...ch of the region of what is ...rong can mean execution by a ...nilitia, government thug or re...gious vigilante.

So, Middle Easterners are left ...ith the old frustration of want...ng the good life of Western so...

...discussion ...get monotonous scapegoating. Blaming America or Israel — "those sneaky Jews did it" — has become a regional pastime.

And after the multifarious failures of Yasser Arafat, the Assads in Syria, Moammar Gadafi, Gamal Abdel Nasser, Saddam Hussein and other corrupt autocrats, many have, predictably, retreated to fundamentalist extremism. Almost daily, some fundamentalist claims that the killing of Westerners is justified — because of a cartoon, a papal paragraph or, most recently, British knighthood awarded to novelist Salman ... first ... them as ...

Victor Davis Hanson is ... ally syndicated columnist and a classicist and historian at Stanford University's Hoover Institution and author of "A War Like No Other: How the Athenians and Spartans Fought the Peloponnesian War."

precautions. He has requested police protection after an Iranian group put a $150,000 ...ounty on his head. Forouz Ra...a'ee-Far, secretary-general of ...he Headquarters for Honoring ...he Martyrs of Islam World Movement, offered the prize ...because, after all, "it is an obligation for all Muslims to kill Salman Rushdie even if he re...ents from the bottom of his ...eart and becomes the pious ...an of the time."

What does the Council on ...merican-Islamic Relations ...ave to say? Their Web site has ... special "incitement watch" ...nd "action alerts" section for ...s (dwindling number of) mem...ers — but as of Tuesday afternoon, not a peep about the in...tement of hatred and violence ...ainst Mr. Rushdie. They'll ...ntually pay lip service to The ...ligion of Peace, but do not for... Rule No. 5 in the jihadi's ...de to etiquette: "You can lie ...u do this for jihad."

...akistani government offi...s are bleating about the need ... "interfaith understanding" ... sensitivity. In Washington ...meetings with the Bush ad...istration, Pakistan's foreign ...nister Khurshid Kasuri ...ed: "When we talk of a glob...ed world, we have to be sen...ve to each other's concerns." ...s anyone with their eyes ...n through Mr. Rushdie's or..., the deadly Muhammad ...oon riots, the calls for be...ding the pope, Oriana Fal... Ayaan Hirsi Ali and defiant, ...Muslim apostates around the ...d knows: "Sensitivity" in ...jihadi world is a one-way, ...-end street.

...lle Malkin is a nationally ...ated columnist and au... "Unhinged: Exposing ... Gone Wild."

Net neutrality overreach

By Randolph May

The battle over "net neutrality" and "open access" — two catchy labels that, in reality, both mean traditional public utility regulation — is moving from the ground to the air. Until recently, net neutrality and open access advocates have focused on getting Congress and the Federal Communications Commission (FCC) to adopt new government regulations that would prohibit wireline broadband Internet service providers, such as Verizon, Comcast or AT&T, from "discriminating" against unaffiliated content providers.

Having largely, but not completely, failed in their effort to straight-jacket the wireline companies, open access advocates now have targeted wireless broadband providers. This might seem illogical because competition in the wireless world generally is more intense than in the wireline marketplace, although in both environments, competition is now the rule.

But logic does not drive net neutrality advocates. Targets of regulatory opportunity do. And the current juicy target of opportunity is the FCC's fast-track proceeding to devise rules for the agency's upcoming 700 MHz spectrum auction. This is prime spectrum that will be freed up when television broadcasters transition to digital-only broadcasts in February 2009. Suitable for high-speed broadband wireless operations, the spectrum could bring the government between $10-20 billion in revenues if the auction rules are not jerry-rigged to favor particular business plans.

Enter a company called Frontline Wireless, newly-created for the purpose of participating in the 700 MHz auction. Anytime the FCC writes rules with big financial stakes, it naturally invites regulatory gaming from all sides. Frontline's auction proposal, though, is loaded with more than the usual number of special requests tailored to its own interests, such as a proposal for bidding credits for "small business entities" like it claims to be.

But the aspect of Frontline's proposal that stands out as especially problematic is its request that the agency set aside a sizeable chunk of the spectrum for those — again, like itself — who agree to abide by an "open access" nondiscrimination mandate. To render this mandate enforceable, it says the FCC needs to impose a strict wholesale-retail unbundling regime, "decoupling the connectivity and retail layers. Frontline claims decoupling of wholesale and retail operations of wireless providers will provide "greater certainty for capital investment, innovative services, and risk taking."

If recent telecom history has taught anything at all, we know Frontline's proposal will have the opposite effect. And Frontline should know this, too, because one of its up-front lead investors is Reed Hundt, the Clinton administration's FCC chairman. Under Mr. Hundt's leadership, the FCC imposed a wholesale-retail unbundling regime on wireline telephone companies that three times was thrown out by the courts

before it was finally jettisoned. Each time the courts held the unbundling regime, which was akin to Frontline's wholesale-retail proposal, unlawful because it was excessively regulatory.

Recall the speculative telecom bubble of the late 1990s. Hundreds of newly created companies, without any network facilities of their own, rushed to take advantage of Mr. Hundt's unbundling rules that granted access to the wireline incumbents' networks at below-market, FCC-controlled prices. Now recall the spectacular bursting of the telecom bubble in 2001 when it became clear, in the court's words, that the "completely synthetic competition" created by the rules could not be sustained. As the court explained, "if parties who have not shared the risks are able to come in as equal partners on the successes, and to avoid payment for the losers, the incentive to invest plainly declines." Mandatory unbundling always "imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities."

Frontline's proposal is not materially different in effect from the ill-fated wireline unbundling rules implemented by Reed Hundt's FCC. Were the FCC to accept his new proposal to import open access and unbundling requirements into the wireless world, the result likely would be the same: the creation of synthetic competition leading to foregone investment and innovation. A network operator relegated to wholesale open access operations lacks entrepreneurial incentives to invest because any rewards reaped from the investment must be shared with those — including competitors — who are granted government-regulated access to its facilities. In short, network operators lack incentives to risk their capital to find new, less costly ways to better serve consumers through efficiencies of integration.

What's more, open access advocates always ignore the ongoing tangible and intangible costs associated with enforcing open access mandates. There are endless disputes concerning whether a particular practice or offering of the network operator is discriminatory in one way or another. These disputes inevitably require the FCC to get involved in pricing the operator's service because discrimination claims generally turn on whether price differentials for allegedly different services are justified. The courts then have their say in seemingly endless litigation to decide whether the FCC's judgments were reasonable. All the while, the business environment for planning and operating networks requiring billions of dollars in investment remains unstable.

The FCC should put the 700 MHz spectrum to auction unencumbered by net neutrality and open access rules that will only diminish its utility to those who otherwise would value it most highly. If the commission allows the net neutrality advocates to prevail in the air when they largely have failed to prevail on the ground, in the short term America's taxpayers will suffer a hit from the reduction in revenues realized from a jerry-rigged auction. As importantly, in the longer term, America's consumers will suffer from the reduced innovation and investment that result from a counterproductive, government-mandated open access regime.

Randolph J. May is president of the Free State Foundation, a free market policy institute in Potomac, Md.

...1 89.3 percent, mak-
...son "the liberal senator
...unteer state." Moreover, dur-
...Thompson's last two years in the Senate (2001-02), his ACU ratings (84 and 89) were well below Mr. Frist's (100 and 100). Just as Mr. Thompson was departing, Mr. Frist became Senate majority leader, where he maintained his ACU lifetime (87.8 percent) edge over his former colleague.

Another conservative gauge is the annual Senate vote rating compiled by the U.S. Chamber of Commerce. For the 1995-2002 period, Mr. Frist compiled an average Chamber rating of 97.5 percent, more than 10 points higher than Mr. Thompson's 86.9 lifetime Chamber rating. There was much speculation that Mr. Frist would seek the presidential nomination after leaving the Senate last year. Interestingly, the same conservative cohorts that are now encouraging Mr. Thompson showed zero enthusiasm for a Frist candidacy.

The National Journal provides another informative ideological gauge of a senator's voting record. NJ's annual scorecard selects scores of Senate votes and divides them among social, economic and foreign-policy themes. The publication ranks the entire Senate in each area, determining that each senator is "more liberal" or "more conservative" than X-percentage of the entire Senate. Then the NJ compiles composite liberal and conservative scores encompassing all three areas and ranks the Senate accordingly.

During his eight-year Senate career, Mr. Thompson displayed a relatively more conservative record on foreign-policy issues than on economic and social issues. Specifically, in the foreign-policy area for four of those years, Mr. Thompson voted identi- and most r... conservative c... embrace of the va... McCain-Feingold campaign... form" legislation, which he not infrequently characterized as "McCain-Feingold-Thompson." In fact, although the Politico reported June 13 that Mr. Thompson's spokesman claimed the former senator had a 100 percent voting record from the National Right to Life (NRTL) organization, NRTL's Web site reports that Mr. Thompson received scores of 87 percent (1997-1998), 78 percent (1999-2000) and 33 percent (2001-2002). Every wrong vote involved McCain-Feingold-Thompson. NRTL convincingly argues that McCain-Feingold-Thompson places a muzzle on the group's free-speech rights at the most critical period of all — election time. Indeed, in his June 18 Newsweek column, "Of Tulips and Fred Thompson," George Will described Mr. Thompson's fascination with campaign-finance "reform" as follows: "Although Thompson presents himself as a strict constitutionalist and an advocate of limited government, he voted for, and still supports, the McCain-Feingold law, which empowers the government to regulate the quantity, content and timing of speech about government." Interestingly, Mr. Frist compiled 100 percent ratings from NRTL for each of those three periods.

Finally, compared to Mr. Thompson's lifetime ACU rating of 86.1 and Mr. Frist's 87.8, worth noting is Arizona Sen. John McCain's 82.3. Also worth noting are the lifetime ACU ratings of so-called "second-tier" Republican presidential candidates: Kansas Sen. Sam Brownback, 94.0; California Rep. Duncan Hunter, 92.0; Colorado Rep. Tom Tancredo, 97.8; and Texas Rep. Ron Paul, 82.3.

Nobles and Knaves

Noble: F. Keith Miller, the Virginia high-school food-services manager who uses his bonuses to give a yearly scholarship to a graduating senior.

Every year, Mr. Miller stashes away his loose change and work bonuses. Instead of treating himself, he uses the money to give a student at Mills E. Godwin High School a $1,000 scholarship to help out with college costs. Students submit an essay about their high-school experience and how it has helped prepare them for college and one is chosen by Mr. Miller, with some help from teachers and school counselors.

Mr. Miller first began giving his scholarship in the late 1980s. He was working at a fast-food restaurant and gave out the prize to local high-school students in Henrico County. He took a job at Godwin in 1993 and now gives the award to kids at his school, where he is on a first-name basis with most teachers and students. Several years ago, he added another scholarship to his repertoire: the $500 Wind Beneath My Wings award, given to a school employee nominated by students. Hopefully the students will nominate Mr. Miller one year.

"Fifteen, 20 years ago, $1,000 went a lot further . . . I don't know what bit of help it is now that tuitions are sky-high but hopefully it makes it easier on the student," Mr. Miller says. As any recipient of this scholarship can certainly attest to, every little bit helps.

For helping students more that just a little bit, F. Keith Miller is the Noble of the week.

Knave: Pat and Sheena Wheaton, the New Zealand couple petitioning to name their baby "4real."

No, we're not making this up. Mr. and Mrs. Wheaton decided on this unusual moniker after seeing their child in an ultrasound, and, presumably, they were struck by the reality of the pregnancy. They went to register the baby's name with New Zealand's Registry of Births, Deaths and Marriages and were told that names with numerals are prohibited. The Kiwis like to prevent parents from using offensive names, Saddam Hussein or Adolf Hitler being two no-nos.

Unfortunately, the rule doesn't apply to stupid names. As of Thursday, the registrar's office explained that the name had not yet been rejected, but that the case is being reviewed with the family. If the situation has not been clarified by July 9, the baby gets registered as "real." Ideally, Mr. and Mrs. Wheaton will decide to choose a name that won't get Junior beaten up regularly.

For a whim which promises their child a lifetime of hassle, Pat and Sheena Wheaton are the Knaves of the week.

Property rights ...

Kudos to The Washington Times for printing an article on the decline of jungle elephants in Central Africa ("Elephant meat prized as jungle delicacy," World, Thursday). The missing piece, however, is the critical role of private-property rights in wildlife conservation. Granting ownership of elephant herds to local

Shutting conservative

It infuriates the left that conservatives have found an outlet for their ideology on talk radio ("Conservatives rule talk radio," Page 1, yesterday). Frustrated conservatives have turned to the talk-radio venue to get their news, untainted by the liberal media, and to talk about the issues that affect them. For decades the liberals have "owned" the major outlets o... the media: print, network new... and the film industry, not t... mention unions and the publi...

The uniform and d...

As American citizens, we ... have the right to dissent. Ho... ever, it is not over a technicali... that the Marine Corps is a... pealing to Adam Kokesh ("D... senting veterans have right... Editorial, Thursday). It is call... the Uniform Code of Milita... Justice (UCMJ), which M... Kokesh took an oath to follo... when he joined the military. ... an honorably discharged me... ber of the military (Air For... 1988-92), I am allowed to w... the uniform that I wore w... honor and distinction to ... public function to which any... tive-duty member would b...

CAIR's phony vi...

The claim by the Co... American-Islamic R... legal director, Arsala... that Arabs and people... nations suffer "dis... pact" in the nat... process ("CAIR r... rise," Nation, June ... other sampling of ... ance theater. I know... travails of legal imm... non-Muslim nati... years for their gre... September will ma... year since I applie... my Chinese wife. ... show after years of ... swered letters is ... and a letter telli... waiting. That bei... lieve it is a disgrac... migration service...

We welcome your c... originals and exclus... articles that are 75(... 350 words. Letters ... your name, addres...

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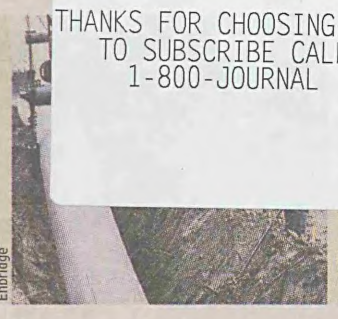
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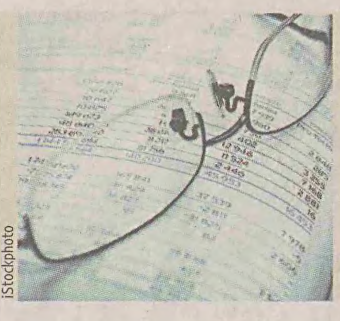
...versal
...Oil
CORPORATE FOCUS | A9

Real Estate's Rare Hot Spot: Martha Stewart
MARKETPLACE | B1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Why a New Law Is Shaking Up Your CPA
THE TAX REPORT | D1

THE WALL STREET JOURNAL.

DOWJONES

WEDNESDAY, JULY 11, 2007 ~ VOL. CCL NO. 8

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DJIA 13501.70 ▼148.27 -1.1% NASDAQ 2639.16 ▼1.2% NIKKEI 18252.67 ▼0.1% DJ STOXX 50 3943.86 ▼1.2% 10-YR TREAS ▲29/32, yield 5.040% OIL $72.81 ▲$0.62 GOLD $662.50 ▲$2.00 EURO $1.3730 YEN 121.97

What's News—

Business and Finance

S&P and Moody's announced a wave of downgrades on bonds backed by subprime mortgages, a tacit admission that they had misjudged the risk of the securities. The Dow industrials dropped 148.27 points on the news to close at 13501.70. Treasury prices rose. Home Depot, D.R. Horton and Sears issued profit warnings, blaming their woes on the slumping housing sector. **A1, A13, C1**

* * *

■ **The FCC has drafted** rules for its radio-spectrum auction that would loosen the grip held by telecom operators on wireless and broadband markets and benefit Google and other tech firms. **A2**

* * *

■ **The Fed is facing** growing criticism for focusing on core inflation as the basis for its interest-rate decisions, as food and energy prices climb nationwide. **A2**

* * *

■ **Liz Claiborne is seeking** to divest itself of 16 of its 36 apparel brands, representing $800 million of its $5 billion in annual sales. **B1**

* * *

■ **Nymex seized** on a Senate investigation to warn of the dangers of rival electronic markets that are largely unregulated. **C1**

* * *

■ **Private-equity firms** and hedge funds are off to a bumpy start in enlisting other industries as they lobby against steep new taxes. **A4**

* * *

■ **Many Chinese companies** are investing heavily in local stocks, creating the potential for a nasty fallout if the market slumps. **C1**

* * *

■ **Three European telecom firms** are selling parts of their radio-tower businesses as wireless carriers look to cut costs. **B4**

* * *

■ **Capital One's CEO sold** about 505,000 shares beginning in May amid poor results, job cuts and subprime-mortgage woes. **C3**

* * *

■ **A Dow Jones board panel** heard proposals from Internet entrepreneur Brad Greenspan and supermarket mogul Ron Burkle. **B4**

* * *

■ **Dutch regulators launched** a probe of possible insider trading in Numico ahead of the announcement of Danone's deal to buy it. **C3**

* * *

■ **The SEC is circulating** a draft proposal of a plan to give shareholders an easier route to nominating corporate-board candidates. **D2**

* * *

■ **Fortis is expected** to take the first step in a fund-raising effort that the bank and its partners will require to buy ABN. **C2**

* * *

■ **First Data picked** Michael Capellas to be its CEO after KKR completes its acquisition of the credit-card and payments processor. **B10**

* * *

■ **Wal-Mart tightened** its rules on prosecuting young shoplifters, as rising thefts bleed profits at the world's largest retailer. **B4**

* * *

■ **China's trade surplus** for June reached a record $26.91 billion. Exports rose 27% from a year ago while imports increased 14%. **A2**

* * *

■ **Lala acknowledged** a delay in launching most new features of its digital-music service. **B4**

World-Wide

■ **Bush vowed to veto legislation setting a date for an Iraq pullout.** Redrawing the now-familiar battle line with Congress as a new push for withdrawal gathers momentum, the president argued his "surge" has not been given a chance. But aides dispatched to take Congress's temperature before key votes this week show nervousness over Republican senators' defections. And thickening the unease in Washington, a barrage of mortars killed three, including an American, and wounded 18 others in Baghdad's Green Zone. **A6**

Sunni insurgents reportedly seized control of a village of 7,500 north of Baqubah despite officials' calls for assistance to Iraqi soldiers and police.

* * *

■ **Pakistan put** a bloody end to the mosque siege in an assault that left at least 50 militants and 12 soldiers dead. It showed the limits of Musharraf's patience, but also boosts the fundamentalist threat he faces. **A8**

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■ **McCain's political star flickered** as a group of his presidential campaign's top advisers and aides quit amid a drop-off in fund-raising. **A3**

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■ **Ex-Surgeon General Carmona** told Congress he was kept in an ideological straitjacket on issues such as stem cells and birth control. **A3**

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■ **Democrats called** for an investigation after a report that Gonzales was told of FBI Patriot Act abuses before testifying he knew of none.

* * *

■ **An Afghan suicide bomber killed** 13 schoolchildren and injured dozens when he detonated near a NATO patrol, wounding eight Dutch troops.

* * *

■ **The U.S. and allies are pushing** to toughen Iran sanctions amid concern the effort may jeopardize what nuclear inspections there are. **A6**

■ **North Korea nuclear talks are** expected to resume in Beijing next week, the U.S. said as it continued to await Pyongyang's reactor closure.

* * *

■ **Palestinian leader Abbas told** Italy's premier that Hamas is allowing al Qaeda to infiltrate Gaza. Hamas denied any ties to the terror group.

■ **Israel's Netanyahu is** likely to become Likud chief in an Aug. 14 vote.

* * *

■ **Al Qaeda's No. 2 threatened** Britain with more attacks because it protects Salman Rushdie from the Islamic world's fury over his novels.

■ **Scottish doctors said** one of the failed airport bombers is near death.

* * *

■ **Mexico reacted** with alarm after a leftist guerrilla group claimed responsibility for a series of small explosions on Pemex oil and gas lines.

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■ **China executed** the head of its equivalent of the FDA 1997-06 for approving fake pharmaceuticals in exchange for approximately $850,000.

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■ **Libya reached** an unspecified settlement in the case of five Bulgarian nurses and a Palestinian doctor accused of infecting children with HIV.

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■ **The March of Dimes said** 90% of U.S. babies are now being screened for signs of genetic proclivity to develop life-threatening disorders. **D5**

* * *

■ **France's Sarkozy won** EU backing for his choice for IMF chief. **A8**

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■ **Congress is** set to boost scrutiny of sensitive foreign investments. **A4**

* * *

■ **Died: Doug Marlette,** 57, cartoonist, in Mississippi, in a car accident.

TODAY'S AGENDA: *A preview of newsworthy events*

House Panel Will Grill Agencies on Hedge Funds


Bloomberg News/Landov

The House Financial Services Committee holds a hearing on how regulators monitor hedge funds. Representatives from the SEC, the CFTC, Treasury and the Fed (Kevin Warsh, *shown*), are testifying. Separately, a Senate panel will examine taxes on hedge funds. **Both sessions at 10 a.m. EDT.**

Media Chieftains Hobnob At Sun Valley Conference


Bloomberg News/Landov

Rainmakers from Hollywood, TV and the Internet are gathering for the annual Allen & Co. media conference in Sun Valley, Idaho, where the hobnobbing has a tradition of leading to new ventures and corporate match-ups. The invitation-only meeting is closed to the press.

Follow the news all day at **WSJ.com**

NEW TREATMENT

Electronics Giant Seeks A Cure in Health Care

Fleeing Chips and TVs, Philips Makes Big Bet On Aging Consumers

By Leila Abboud

EINDHOVEN, Netherlands—When Gerard Kleisterlee took over as chief executive of Royal Philips Electronics NV, Europe's storied consumer-electronics giant was facing one of the most difficult moments in its 116-year history.

It was 2001, and the televisions and compact-disc players that made Philips a household name were under assault from cheaper Asian clones. The computer chip unit, strained as the Internet bubble burst, was hemorrhaging cash. In a single year, Philips racked up losses of €2.5 billion, or roughly $2.2 billion at the time.


Gerard Kleisterlee

Six years later, Mr. Kleisterlee thinks he has found a small part of the solution: people like Mary Prendergast, an 89-year-old, silver-haired former nurse who lives alone in a one-bedroom apartment in Beverly, Mass.

Ms. Prendergast, whose eyesight is waning, is a new customer of Philips's Lifeline service. The medical-alert system allows her to press a button on a bracelet and connect to a call center where operators, armed with her health profile, are on hand. The service, which costs about $40 a month, assists her and other clients with home safety issues, such as falls and questions about their medications. It was designed to help elderly customers live on their own for as long as possible.

Philips paid $750 million last year to buy Massachusetts-based Lifeline, an acquisition that represented a turning point for the company.

For decades, its medical-systems di-
Please turn to page A11

Nursed Back

Royal Philips Electronics consumer products suffered from low-cost competition in Asia. Now the company wants to branch out into health care.

Philips daily share price

Note: €60 = $82.38 at current rate

Sources: Thomson Datastream (weekly share price history); the company; WSJ research (chronology)

Ratings Cuts By S&P, Moody's Rattle Investors

Critics Say Companies Are Reacting Too Late To Subprime Debt Woes

By Serena Ng And Ruth Simon

The widening meltdown in the subprime-mortgage market caught up with the nation's two big debt-rating companies yesterday, with Standard & Poor's and Moody's Investors Service announcing plans to downgrade hundreds of bonds backed by the risky home loans.

The moves jolted jittery financial markets as investors adjusted to the idea that the downturn in the nation's housing market is worsening and that a rebound might be months away, at best. The Dow Jones Industrial Average tumbled 148.27 points, or 1.1%, yesterday to close at 13501.70 as investors fled stocks and low-quality bonds.

In a tacit admission that it severely misjudged the risk of bonds tied to subprime mortgages, Standard & Poor's Ratings Service said it is looking to slash credit ratings on as many as 612 such bonds, with a value of $12 billion, because of mounting delinquencies on the underlying mortgages. Subprime mortgages are made to borrowers with shaky credit histories.

Hours later, Moody's Investors Ser-
Please turn to page A13

No Shelter

Beyond Pokémon: Nintendo DS Goes To School in Japan

Game Machine Gets a Lift From Programs That Turn It Into a Reference Book

By Yukari Iwatani Kane

KYOTO, Japan—Every morning at 8:50, eighth-grade teachers at Otokoyama Higashi Junior High School bring out plastic baskets stacked with electronic devices. For 10 minutes, 122 students use styluses to scrawl English words like "woman" and "tree" on touch screens. Electronic voices beep responses like "Cool!" if the children spell the word correctly, and a mocking "Come on!" if they get it wrong.

The students are tapping away on Nintendo Co.'s DS videogame machine, a portable device customarily reserved for games like Pokémon and Super Mario Bros.

"Work sheets were such a pain," says Minori Yamanaka, a 13-year-old student, during a short break between classes. "These exercises feel like a game."

Behind the fastest-selling portable videogame player in Japan is an unusual shift in the culture of gadgets: People are clamoring for it not just for games, but also to keep a household budget, play the guitar, and study the Buddhist scripture Heart Sutra. Since its introduction in 2004, the DS, which responds to writing and speech, has spurred software makers to fill the Japanese market with an eclectic array of reference guides, digital books and study tools.

Of the 500-odd DS software titles released or in the works so far, only about 200 are traditional videogames. Nintendo is quick to license uses of its DS device, which is also sold in the U.S., so long as they aren't violent or otherwise objectionable. Most of the software isn't available overseas,
Please turn to page A10

On the Go

Cumulative sales for the Nintendo DS (below), in millions of units:

Note: Fiscal years end March 31

Source: the company

PARCHED OUTBACK

In Australia, a Drought Spurs a Radical Remedy

Government Proposal Could Shut Farms; Wee Waa Feels the Pain

By Patrick Barta

WEE WAA, Australia—This tiny town thrived for the past few decades as a center of Australia's burgeoning cotton industry, while the country became one of world's largest exporters. With government encouragement, farmers moved in across the country's biggest river system to grow the thirsty crop.

Now Australia is staggering through one of its worst-ever droughts, and cotton production has plummeted. In Wee Waa, the Cotton Fields Motel that once was busy with seasonal workers now struggles to fill rooms. Elsewhere in the flat basin, kangaroos hop along dry levees, and the ends of giant water-transport pipes poke out over empty reservoirs.

The drought's severity and impact are spurring Australia, the world's driest inhabited continent, to tackle a problem that also is starting to afflict more populous countries: How to survive with less water.

Australian leaders spent decades building reservoir systems to try to turn vast expanses of marginal cropland in its harsh interior into an agricultural mecca. But recent years have brought record drought—and predictions that climate changes from global warming could make Australia's interior even drier. That has the government looking to change course, as farmers protest that the droughts haven't gotten worse—only the politics surrounding them.

In the U.S., farmers and policy makers squabble over how to keep dwindling water resources like the Ogallala Aquifer from disappearing. In China, Beijing is struggling to keep the Yellow River—known as the cradle of Chinese civilization—from drying out. The Australian government's proposal to preserve its Murray-Darling river basin is one of the most far-reaching anywhere. It calls for taking over management of water rights from the local jurisdictions that share the basin, something akin to Washington taking over the Mississippi River.

The government proposes buying
Please turn to page A12

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Spectrum Sale May Open Market

FCC Rules Could Be Boon For Technology Companies; Loosening Telecom's Grip

By Amol Sharma and Corey Boles

A coming government auction of valuable radio spectrum could hand **Google** Inc. and other technology companies their first significant victory in a battle to loosen the grip held by telecom operators on the wireless and broadband markets.

The Federal Communications Commission's draft rules would set aside part of the available spectrum for creation of an "open" network free of the constraints that large telecom operators like **AT&T** Inc. and **Verizon Communications** Inc. normally impose. The spectrum being auctioned is estimated to bring in $15 billion to the Treasury. The new open-access rules would apply to a slice that is big enough to create a nationwide network.

The draft rules also raise the possibility that Google, a satellite-TV provider, or another new entrant could now be enticed to bid in the auction and enter the wireless market as a competitor to the large carriers. However, it remains unclear whether Google is prepared to spend billions to build and operate a new wireless network.

Google, **eBay** Inc.'s Skype and others in the high-tech industry say large telecom firms stifle innovation by controlling which mobile devices, software and services subscribers can use and "locking" phones to a particular carrier. For example, AT&T has exclusive carriage of **Apple** Inc.'s iPhone.

Slicing the Spectrum

- **The News:** The FCC's draft rules for a coming auction of radio spectrum would set aside part of it for creation of an "open" network big enough to be nationwide.
- **The Background:** Big telecom operators have maintained a grip on wireless and broadband markets, controlling mobile devices, software and services subscribers can use and "locking" phones to carriers.
- **What's Next:** The initial rules will be debated in coming weeks ahead of a vote

Those Internet companies have had difficulty bringing services such as free Web calling to the mobile-phone market, while handset makers like **Nokia** Corp. have had trouble bringing popular European phones to the U.S. It's hard for handset makers to offer handsets directly to consumers in the U.S., where the operators control what phones are used on their networks. The telecom carriers say the proposed rules for the auction are unnecessary and have been engineered to fit Google's business model and to scare off Verizon and AT&T from bidding for that slice of spectrum.

Kevin Martin

FCC Chairman Kevin Martin said in an interview that the draft rules would spur innovation by handset makers and other technology companies bringing out mobile phone products and services. He cited as an example Wi-Fi capable cellphones, which have been slow to roll out in the U.S. "I think consumers would dramatically benefit from that kind of capability," he said.

The initial FCC rules will be debated at the agency in coming weeks ahead of a vote, for which a date hasn't been set—but they will likely form the basis of the final auction rules. Some mobile phone entrepreneurs and consumer advocacy groups said the draft rules didn't go far enough.

Google and other tech companies will still face significant pushback from telecom giants. Verizon has fiercely opposed any restrictions on how it operates its wireless and landline networks. Telecom companies have a huge lobbying army in Washington and have only grown in size and clout through a recent round of mergers.

Just last year, Verizon and AT&T lobbied successfully to quash legislative proposals to regulate their Internet services and prevent them from speeding up their own Internet traffic—or that of preferred business partners—while letting Web services from rivals travel at slower speeds. Backers of so-called "net neutrality" want to ban such preferential treatment.

The large carriers won another victory two weeks ago when the Federal Trade Commission said in a closely watched 170-page report that such "net neutrality" regulations were unnecessary.

The coming auction has moved the debate over net neutrality to the wireless industry. U.S. wireless carriers exert multiple layers of control. "You can build a totally terrific product, but getting it distributed is a big issue," said Doug Garland, a mobile industry veteran who once headed up **Yahoo** Inc.'s mobile division and has worked for telecom carriers.

Wireless service providers must lease access to the public airwaves, or radio spectrum, through periodic FCC auctions so they can build networks to carry their voice and data traffic to customers. The spectrum on the block in the coming auction are those that are being vacated by television broadcasters, which are mandated by law to switch to new digital signals by February 2009. The auction is attracting heightened interest, because the frequencies at stake are especially suited for broadband communications.

Technology companies such as **Intel** Corp., Yahoo and eBay would like to see a new entrant get a chunk of that spectrum. Google and some others have gone a step further, arguing that the FCC should explicitly designate that the new entrant open up its network to a wider array of applications and mobile devices than existing carriers do. The draft FCC rules, which the agency hasn't released publicly, would apply those requirements to about one-third of the spectrum being auctioned. While AT&T, Verizon and other telecom providers would not be barred from bidding for the spectrum, the strings attached to it will likely make it much less palatable to them.

"This is probably the best opening for this network neutrality issue for the next couple of years," says Paul Gallant, an analyst at Stanford Group who advises institutional investors on policy developments in the telecom industry.

Google has considered the idea of buying spectrum and outsourcing the building and operation of the network to a third party, one person familiar with the company's thinking said. Another person familiar with the matter said that a direct bid by Google for spectrum is very unlikely at this point because the Internet company views such a move as outside its core activities.

"All we can try to do to allow for someone who is a new entrant to come in and participate," the FCC's Mr. Martin said. "But we can't guarantee it."

—Kevin J. Delaney contributed to this article.

Fed's Focus on 'Core' Inflation Raises Concerns

By Sudeep Reddy And Greg Ip

WASHINGTON—As food and energy prices climb across the nation, the Federal Reserve is facing growing criticism for focusing on "core" inflation, which excludes both those items, as the basis for its interest-rate decisions.

Many consumers question whether Fed officials eat or drive, and some economists worry that the Fed is underestimating inflation risks. Even some Fed officials share these concerns.

The debate has intensified in the past month after new data showed core inflation measured by the Fed's preferred gauge—the core index of personal-consumption expenditures—dropped to 1.9% in May, below the 2% ceiling of some Fed officials' comfort zone. But including food and energy, inflation was still 2.3%.

In the near term, Fed officials are unlikely to switch from emphasizing the role of core inflation in the Fed's strategy or communications with the public. But they say they may try harder to explain why their focus on core inflation doesn't mean they are ignoring the inflationary impact of energy and food. Fed Chairman Ben Bernanke may do so when he appears before Congress next week. And the officials will have to decide whether to target headline or core inflation if they settle on an explicit numerical inflation target, a subject they are now debating.

Mr. Bernanke touched on the subject yesterday in a speech at a conference of academic economists in Cambridge, Mass.

"Increases in energy prices affect overall inflation in the short run because energy products such as gasoline are part of the consumer's basket, and because energy costs loom large in the production of some goods and services," he said. "However, a one-off change in energy prices can translate into persistent inflation only if it leads to higher expected inflation and a consequent 'wage-price spiral.' "

The speech seemed to imply Mr. Bernanke doesn't see that risk at present: "Notably, the sharp increases in energy prices over the past few years have not led either to persistent inflation or to a recession, in contrast [for example] to the U.S. experience of the 1970s."

Differing Pictures

Change from a year earlier in price indexes of personal-consumption expenditures

Source: Commerce Department via Moody's Economy.com

Inflation expectations, he said, have become much better anchored—that is, they are pushed around less by swings in energy prices—since the 1980s, but aren't "perfectly anchored."

The Fed believes that because it has little influence over short-run energy prices, shifting monetary policy when those prices push headline inflation up or down could be harmful—for example, raising rates when gasoline prices rise during the summer driving season, then reversing course in the fall. The Fed's interest-rate decisions are designed to influence the overall economy over a horizon of one or two years.

"The Fed is pretty powerless to do something about the price of energy or the price of food," said Alan Blinder, a Princeton University economist and former Fed vice chairman. "I don't want to charge the Fed with responsibility for something it can't do."

If the Fed thought energy prices were going to rise continuously, it might incorporate that into its inflation forecast and policy decisions, Mr. Blinder said. But in practice, it doesn't second-guess the futures market, which at present foresees flat energy prices over the next 12 months.

Critics note the futures market has been repeatedly wrong and energy prices have risen steadily since 2002. More recently, food prices have also risen. As a result, headline inflation since 2002 has been persistently higher than core inflation—at 2.5% versus 2% as measured by the Fed's preferred gauge, the price index of personal consumption expenditures. That has also led to a divide between the public and the Fed on the perceived threat of inflation.

"Our monthly maintenance on our co-op [apartment] has risen faster than the rate of inflation due to the rise in fuel costs, [and] our monthly grocery bills have risen even faster," said Frederic Wile, a retiree in New York City. "I cannot figure out how or why the Fed excludes these two most basic items from their inflation calculations."

When oil price spikes were temporary, overall inflation rapidly returned to the underlying core trend. But unlike previous spikes in oil and food prices, the latest ones are driven by rising global demand, not interruptions of supply. As a result, unlike in the past, said Paul Ashworth, senior U.S. economist at Capital Economics, "it could be more likely that the gap would be closed by core inflation moving toward headline inflation."

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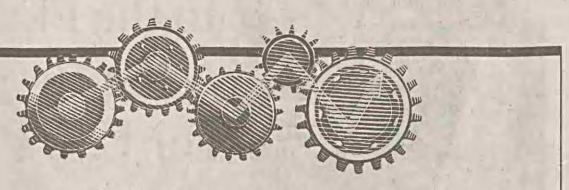
QUESTION OF THE DAY: In which area has inflation hurt your finances the most? Visit **WSJ.com/Question** to vote. Plus, get economic insight and analysis in the Real Time Economics blog, at **WSJ.com/Economics**.



BUSINESS | *By Kevin Helliker*

Smokeless Tobacco's Bet Lights Fire Under Foes

A vast and fast-growing sum is riding on hopes of a healthy future for nonsmoked tobacco. This multibillion-dollar gamble—reflected in a recent flurry of smokeless-tobacco start-ups, acquisitions and expansions—may need the support of three constituencies to pay off: science, consumers and public-health authorities.

So far, two are obliging: Science is showing that smokeless tobacco is safer than cigarettes. And consumers are displaying a growing taste for tobacco served cold—ranging from snuff and chewing tobacco to tobacco lozenges and nicotine gel.

But the public-health community still disapproves. It is on the verge of dealing a possibly lethal blow to the growth of smokeless tobacco, via a bill expected to clear a key Senate committee next week.

Dusan Petricic

The bill reflects the reluctance of many public-health officials to let the industry that lied about the health effects of cigarettes tell the truth about smokeless tobacco. That smokeless tobacco is much less dangerous than cigarettes is clear from reams of research, including some out of Sweden, where a sharp decline in male smoking amid a rise in smokeless-tobacco use has corresponded with a big drop in tobacco-related deaths among men.

Smokeless tobacco, which is just as addictive as cigarettes, is linked with mouth and pancreatic cancer, though those afflictions are more common in smokers. Still, the American Cancer Society's Michael Thun, a foe of smokeless tobacco, concedes, "There's no question that switching to spit tobacco and quitting tobacco altogether are both far less lethal than continuing to smoke."

But surveys show that most smokers believe smokeless tobacco is just as dangerous as cigarettes, and the proposed bill would make it all but impossible for a purveyor of smokeless tobacco in the U.S. to set the record straight.

Among other hurdles, a company would have to prove to the Food and Drug Administration that touting the lower risks of smokeless tobacco would make the product an appealing alternative to smokers without attracting new users from the population at large.

Without FDA approval, a company couldn't mention in news releases, on its Web site or in conversations with journalists scientific research showing smokeless tobacco carries lower risks than smoking.

Even in wooing smokers, makers of smokeless products would face a new challenge: The law would ban free samples to smokers in adult-only venues such as bars. "It is difficult to imagine a company gaining FDA approval to market a modified-risk tobacco product based on a reduced-risk claim, at least in the near term," concluded a recent report on the proposed legislation by the Congressional Research Service, an arm of the Library of Congress.

The FDA already regulates nicotine gums and patches designed to help people stop smoking. It requires those products to bear such elaborate warnings that many smokers, according to surveys, wrongly perceive them as no less dangerous than cigarettes. In fact, gums and patches are the safest available source of nicotine, free of any association with cancer. "We are proud of the role we have played in approving several products over the past few years to aid Americans in smoking prevention and cessation," an FDA spokeswoman says.

Yet maybe American smokers suffering coughs and chest pains already are figuring out what many public-health officials don't want them to know: It's the smoke.

As volume sales of cigarettes in the U.S. continue their long decline, volume sales of smokeless tobacco are rising about 4% a year. In Sweden, the percentage of men who smoke has fallen to about 14%—the lowest in the industrialized world—as the percentage using smokeless tobacco has risen to about 23%, without any government encouragement.

For a long-deceitful industry whose cigarettes have killed legions, a new host of legal impediments could be viewed as just desserts. But among smokeless purveyors, surviving regulation would likely prove hardest for tiny start-ups that never lied about the dangers of tobacco, that have created smokeless products with reduced risks, and that—unlike the cigarette giants now invading the smokeless market—have no incentive to keep smokers smoking.

In an industry whose giants employ battalions of scientists, tiny start-ups such as **Star Scientific** Inc. have introduced the most innovative and arguably lowest-risk tobacco products—a dissolves-in-the-mouth tobacco lozenge, for instance, or a nicotine gel that is rubbed on the skin. Such products can deliver a fix of nicotine, the addictive and relatively benign agent in tobacco, at a tiny fraction of the risk of cigarettes. But the new legislation would impose costs that tiny companies likely couldn't afford.

Of course, winning FDA approval has always been easier for big, deep-pocketed companies. But while it may be unfair for a system to favor pharmaceutical giants over biotech start-ups, it's somehow more unsettling for the advantage to go to a Big Tobacco player like **Altria Group** Inc.'s Philip Morris USA. Although Philip Morris is experimenting with smokeless products, it has yet to launch any nationally, it remains the nation's largest seller of cigarettes, and it supports the proposed legislation. Philip Morris declines to comment.

China Trade Surplus Reached Record at $26.91 Billion in June

By Andrew Batson

HONG KONG—China's export juggernaut reached new milestones in June, government figures issued yesterday showed, with the nation exporting more than $100 billion of goods in a single month and marking another record monthly trade surplus.

Merchandise exports for the month, at $103.27 billion, were 27% higher than a year earlier, while imports of goods increased 14% to $76.36 billion, China's Customs agency said. That left a trade surplus for June of $26.91 billion, beating the previous monthly record of $23.83 billion set in October.

The figures showed no reduction in foreign demand for China's products, despite its manufacturers facing higher costs and greater consumer concerns about quality, after a spate of recalls of tainted products, from pet food to toys and toothpaste.

China's accumulated trade surplus for the first half of the year, at $112.53 billion, is now running 83% above last year's level.

Although export-growth rates could ease in the second half, total order volumes are typically larger then, because of the Christmas shopping season. As a result, many economists are penciling in an annual trade surplus of some $250 billion to $300 billion for 2007, compared with the record $177.47 billion recorded in 2006.

The surplus has brought immense political and economic pressure to bear on China, much of it focused on the nation's exchange-rate controls, which some critics allege are designed to keep China's currency cheap in order to give exporters a price advantage.

There is little reason to expect that the latest figures will result in China yielding to U.S. lawmakers' demands for the yuan to rise sharply against the dollar.

"The pressure has been building for a long time, but that hasn't changed Chinese policy makers' basic stance of allowing a gradual 4% to 5% annualized pace of appreciation," said Daniel Hui, a foreign-exchange strategist with HSBC. The yuan has risen about 3% against the dollar so far in 2007, with most of that gain coming in the past few months.

The stronger currency, which tends to make Chinese goods more expensive abroad, could start to slow export gains later in the year. China's government also recently changed tax policies to impose higher burdens on producers of goods not favored by policy makers. That led many exporters to rush orders into the early part of the year, before the changes took effect, a practice that could mean slower growth ahead.

Still, even slower export growth may not lead to much of a decline in the surplus if China's demand for imports doesn't pick up. Import growth has slowed so far this year, from the 20% pace set in 2006. Because China imports mainly raw materials and capital equipment, as well as parts for exported goods, the slowdown may reflect weaker spending on big projects such as factories and highways.

Corrections & Amplifications

The data under the Biggest 1,500 Stocks, New Highs and Lows, Market Movers and Mutual Funds listings in yesterday's edition reflected trading from Monday, July 9. The headings incorrectly gave the date as Friday, July 6.

Readers can alert The Wall Street Journal to any errors in news articles by emailing wsjcontact@wsj.com or by calling 888-410-2667.

OPINION

Moving Forward in Iraq

By Kimberly Kagan

In Washington perception is often mistaken for reality. And as Congress prepares for a fresh debate on Iraq, the perception many members have is that the new strategy has already failed.

This isn't an accurate reflection of what is happening on the ground, as I saw during my visit to Iraq in May. Reports from the field show that remarkable progress is being made. Violence in Baghdad and Anbar Province is down dramatically, grassroots political movements have begun in the Sunni Arab community, and American and Iraqi forces are clearing al Qaeda fighters and Shiite militias out of long-established bases around the country.

This is remarkable because the military operation that is making these changes possible only began in full strength on June 15. To say that the surge is failing is absurd. Instead Congress should be asking this question: Can the current progress continue?

> The question isn't whether the 'surge' is working. It's whether Washington will allow the current progress to continue.

From 2004 to 2006, al Qaeda established safe havens, transport routes, vehicle-bomb factories and training camps in the rural areas surrounding Baghdad, where U.S. forces had little or no footprint. Al Qaeda used these bases to conduct bombings in Baghdad, to displace Shia and Sunni from local towns by sparking sectarian killings, and to force Iraqis to comply with the group's interpretation of Islamic law. Shiite death squads roamed freely around Baghdad and the countryside. The number of execution-style killings rose monthly after the Samarra mosque bombing of February 2006, reaching a high in December 2006. Iranian special operations groups moved weapons across the borders and into Iraq along major highways and rivers. U.S. forces, engaged primarily in training Iraqis, did little to disrupt this movement.

Today, Iraq is a different place from what it was six months ago. U.S. and Iraqi forces began their counterinsurgency campaign in Baghdad in February. They moved into the neighborhoods and worked side-by-side with Baghdadis. As a result, sectarian violence is down. The counterinsurgency strategy has dramatically decreased Shiite death squad activity in the capital. Furthermore, U.S. and Iraqi special forces have removed many rogue militia leaders and Iranian advisers from Sadr City and other locations, reducing the power of militias.

As a consequence, execution-style killings, the hallmark of Shiite militias, have fallen to the lowest level in a year; some Iranian- and militia-backed mortar teams firing on the Green Zone have been destroyed. Equally important, U.S. and Iraqi forces have restricted al Qaeda's bases to ever smaller areas of the city, so that reinforcements cannot flow easily from one neighborhood to another.

Many in Washington say the Baghdad Security Plan has just pushed the enemy to other locations in Iraq. Though some of the enemy certainly left Baghdad when the security plan began, this metaphor is inaccurate. The enemy has long been located outside of Baghdad and was causing violence from suburban bases. What has changed is the disposition of U.S. forces, which are now actively working to expel the enemy from its safe havens rather than ignoring them.

To accomplish this, Gens. David Petraeus and Raymond Odierno have encircled Baghdad with a double cordon of U.S. and Iraqi forces. They have been preparing the cordons patiently since February, as the new "surge" units arrived. The surge was completed only in mid-June, and the first phase of the large-scale operations it was intended to support began only on June 15. Since then, U.S. forces have begun blocking major road, river, and transportation route around Baghdad. They are also deployed in critical neighborhoods around outskirts and the interior of the city.

AP Photo

U.S. and Iraqi soldiers on patrol in Baquba.

On June 15, Gens. Petraeus and Odierno launched a major offensive against al Qaeda strongholds all around Baghdad. "Phantom Thunder" is the largest operation in Iraq since 2003, and a milestone in the counterinsurgency strategy. For the first time, U.S. forces are working systematically throughout central Iraq to secure Baghdad by clearing its rural "belts" and its interior, so that the enemy cannot move from one safe haven to another. Together, the operations in Baghdad and the "belts" are increasing security in and around the capital.

U.S. and Iraqi forces are thereby attacking enemy strongholds and cutting supply routes all around the city, along which fighters and weapons moved freely in 2006. Coordinated operations south and east of Baghdad are at last interdicting the supply of weapons moving along the Tigris River to the capital. U.S. and Iraqi forces are operating east of Baghdad for the first time in years, disrupting al Qaeda's movement between bases on the Tigris and in Sadr City, a frequent target of its car bombs. North of Baghdad, U.S. forces recently cleared al Qaeda from the city of Baqubah, from which terrorists flowed into Baghdad. They are clearing al Qaeda's car bomb factories from Karmah, northwest of Baghdad, and its sanctuaries toward Lake Tharthar. These operations are supported by counterinsurgency operations west of the capital, from Fallujah to Abu Ghraib. U.S. forces are now, for the first time, fighting the enemy in the entire ring of cities and villages around Baghdad.

This is the Baghdad Security Plan, and its mission is to secure the people of Baghdad. Even so, commanders are not ignoring the outlying areas of Iraq. U.S. forces have killed or captured many important al Qaeda leaders in Mosul recently, and destroyed safe havens throughout northern Iraq. Troops are conducting counterinsurgency operations in Bayji, north of Tikrit. And Iraqi forces have "stepped up" to secure some southern cities. The Eighth Iraqi Army Division has been fighting Shiite militias in Diwaniyah, an important city halfway between Basrah and Baghdad. As commanders stabilize central Iraq, they will undoubtedly conduct successive operations in outlying regions to follow up on their successes and make them lasting.

The larger aim of the new strategy is creating an opportunity for Iraq's leaders to negotiate a political settlement. These negotiations are underway. Iraqi Prime Minister Nouri al-Maliki is attempting to form a political coalition with Amar al-Hakim and Kurdish political leaders, but excluding Moqtada al-Sadr, and has invited Sunnis to participate. He has confronted Moqtada al-Sadr for promoting illegal militia activity, and has apparently prompted this so-called Iraqi nationalist to leave for Iran for the second time since January.

Provincial and local government is growing stronger. Local and tribal leaders in Anbar, Diyala, Salah ad-Din, North Babil and even Baghdad have agreed to fight insurgents and terrorists as U.S. forces have moved in to secure the population alongside their Iraqi partners. As a result, the number of Iraqis recruited for the police forces, in particular, has risen exponentially since 2006.

This is war, and the enemy is reacting. The enemy uses suicide bombs, car bombs and brutal executions to break our will and that of our Iraqi allies. American casualties often increase as troops move into areas that the enemy has fortified; these casualties will start to fall again once the enemy positions are destroyed. Al Qaeda will manage to get some car and truck bombs through, particularly in areas well-removed from the capital and its belts.

But we should not allow individual atrocities to obscure the larger picture. A new campaign has just begun, it is already yielding important results, and its effects are increasing daily. Demands for withdrawal are no longer demands to pull out of a deteriorating situation with little hope; they are now demands to end a new approach to this conflict that shows every sign of succeeding.

Ms. Kagan, an affiliate of Harvard's John M. Olin Institute of Strategic Studies, is executive director of the Institute for the Study of War in Washington.

Net neutrality

Telecom Time Warp

By Robert W. Crandall And Hal J. Singer

Calls for non-discrimination rules in telecom arise periodically from disadvantaged groups of rivals. In the late 1960s, the call for regulation came from equipment providers; in the early 1980s, it came from long-distance providers. In the mid-1990s, it was local exchange carriers and Internet service providers. Today Internet telephone, or "VoIP," providers want help, but to obfuscate their role, they couch it in a deceptive, overused phrase: "network neutrality."

Unfortunately, some lawmakers and regulators are seriously entertaining these pleas for greater regulation. The FCC is considering service rules for the upcoming 700 MHz-auction sponsored by Frontline, a firm headed by former FCC chairman Reed Hundt, which would impose, among other onerous requirements, a net neutrality requirement on the winning bidder. And today Rep. Edward Markey (D., Mass.), chairman of the House Subcommittee on Telecommunications and the Internet, will hold a hearing on the subject of "wireless net neutrality."

When the government decided to impose nondiscrimination rules on (the old) AT&T in the late 1960s, AT&T and its local operating companies controlled virtually the entire telecommunications sector. There were no local competitors, no cable companies offering phone service, not even any wireless companies. AT&T was also vertically integrated into the manufacture of telephone equipment through its ownership of Western Electric. Before its breakup, AT&T had both the incentive (due to its vertical integration) and the ability (due to its market power in voice service) to engage in anticompetitive conduct in complementary markets (equipment).

The telecom environment could not be more different today. There are three survivors of the breakup of AT&T's fixed-wire business, each of which offers phone and high-speed Internet service and is spending billions of dollars upgrading its network to offer video services. Cable television companies have also upgraded their networks so they can offer these services. And the five largest wireless carriers—AT&T, Verizon, Sprint, T-Mobile and Alltel—are also spending heavily so that they can offer high-speed Internet connectivity.

Meanwhile, a cable industry consortium last year spent more than $2 billion in a national wireless auction just to acquire the spectrum real estate that would allow it to become the nation's sixth carrier offering nationwide wireless phone service. Not to be left out, Craig McCaw and Intel are building a national fixed wireless network, and Wild Blue is offering a competitive service from an innovative satellite launched last year.

> Today's information superhighway is so competitive that there's no need for schemes like 'net neutrality.'

What is the likely impetus for all of this new investment? In 2004, the federal courts required the FCC to relax its strict regulation of the Bell companies in part because of its depressing effect on the Bells' investment spending. And, unlike their European counterparts, U.S. wireless operators have been essentially unregulated since 1993. As a result, U.S. telecom capital spending is surging as various competitors are now moving aggressively to provide high-speed Internet services to consumers who want to receive more than email over a variety of different devices.

To some in Washington, the explosion of investment and entry is interpreted with skepticism and hand-wringing. These worrywarts are pressing for a new regulatory regime of "network neutrality." This would prevent fixed-wire broadband networks from charging content suppliers, such as Google or YouTube, for priority delivery of their services to consumers, much as FedEx routinely does for packages. It would also prevent these operators from building intelligence into their networks, and instead would require them to meet the coming demand for bandwidth-intensive applications solely with fatter, dumber pipes. Such a policy would surely increase the cost of building next-generation, high-speed networks, which in turn would delay investment and increase the price of Internet service.

More recently, the cry for network neutrality has spread to the wireless sector. Proponents of "wireless net neutrality" seek to prevent wireless operators from imposing limitations on certain bandwidth-intensive applications available over their networks. In particular, the Internet telephony (VoIP) companies, such as Skype and Vonage, want regulators to force the wireless companies to allow their subscribers to access these VoIP services through unlimited data plans, thereby allowing subscribers to completely bypass the wireless network owners' voice services. This proposal has been developed by Columbia law professor Timothy Wu.

Mr. Wu and his confreres ignore the fact that no U.S. wireless carrier has market power. In fact, competition in this sector is so intense that according to FCC data, the price of a wireless call has declined from $0.43 per minute in 1995 to $0.07 in 2005—roughly 84% in one decade.

This price decline is a function of the number of options facing wireless customers. The lack of market power for any individual carrier makes price reductions irresistible and any anti-competitive practices unsustainable. If consumers were to find that access to VoIP or any other application would increase the value of their wireless experience, surely one or more of the wireless carriers would find it profitable to offer such a service on their own, but not at a loss. If they were forced to allow the VoIP companies such as Skype or Vonage to bid away their own traditional voice revenues, the wireless carriers would simply raise the price of the data services over which Skype or Vonage would be delivered. The obvious losers from such a policy would be the subscribers who rely upon these high-speed data services for other purposes, such as email or Web browsing.

Like wireline operators, wireless operators generally perceive content innovation to be a good thing: The demand for killer applications will drive the demand for faster (and more expensive) broadband connections. Nevertheless, even competitive wireless operators may at first resist offering a service, such as Internet telephony, because it reduces the revenues that they earn from traditional voice services.

But even if all wireless carriers were to decide to block VoIP services on their networks for the foreseeable future, regulators should take a hands-off approach for a number of reasons.

First, the provision of VoIP over other (wireline) platforms provides an outlet for VoIP providers to achieve the requisite economies of scale. Second, the dramatic decline in wireless prices continues with or without VoIP, and the coming entry of the cable companies into wireless services will only accelerate this decline. Third, regulators cannot require wireless networks to allow new Internet voice services to cannibalize the wireless carriers' principal source of revenues without inducing the wireless companies to recover their network costs from other charges to their subscribers. There is no free lunch here—networks cost money to build and operate.

Thus, even in the single application in which wireless network owners could be said to compete with unaffiliated upstream suppliers, there is no need for regulation. When viewed in this light, network neutrality regulation should be more aptly named: "Life Support for stand-alone VoIP Providers" who are struggling to compete in a world of declining prices and bundled service packages.

With respect to every other conceivable application, regulation would be completely unnecessary, as wireless network owners lack both the incentive and the ability to engage in discriminatory practices because they have no market power.

The lesson for future content providers—particularly those now seeking network neutrality regulation—is that they should develop content that network owners will perceive as being *complementary* to their offerings and therefore will add value for their broadband customers. Ignoring this advice will work only as long as the regulators are under the content providers' thumb.

This is the strategy that Apple's and Microsoft's rivals are using in Europe, with little apparent success. It is even less likely to work on this side of the Atlantic, where the regulatory winds that blow in and out of Washington are constantly changing. Eventually, either the FCC or the courts will realize that regulating competitive networks for the benefit of select content providers is not in the interest of American consumers.

Mr. Crandall is senior fellow in economic studies at the Brookings Institution. Mr. Singer, the president of Criterion Economics, has advised CTIA, a trade association that represents the wireless industry on spectrum issues.

Min Wage, Max Politics

By Bradley Schiller

The federal minimum wage went up on July 1 and hardly anyone noticed. And why should they have? The federal minimum had been stuck at $5.15 since 1997, while average hourly wages had risen nearly 40%. Even entry wages at McDonald's had crept above $7 in the decade of legislative inaction. So the bump from $5.15 to $5.85 was largely a nonevent.

The insignificance of the latest wage hike is surprising in view of the intensity of the political debates that preceded it. Liberal Democrats had proclaimed that two million workers would benefit directly from a federal wage hike and millions more would benefit from bumping up the entire wage scale. Republicans warned that a legislated wage hike would cause a labor-market apocalypse, destroying the very entry-level jobs that low-income workers so desperately need to get a toehold on economic security.

The debate was always more about political posturing than economic reality. An "effective" wage hike must actually raise someone's wages. With labor-market wages already significantly above $5.85, this "hike" was largely ineffective.

But what about those two million workers the Democrats said would get a pay boost from the legislated wage increase? It turns out that the U.S. Labor Department found only 479,000 workers earning $5.15 an hour in 2005. Those minimum wage workers represented only 0.35% of the 140 million-worker labor force. And that was two years ago. Today the labor force is larger and the number of minimum wage workers smaller.

The other 1.4 million workers cited by the Democrats were actually earning *less* than $5.15 in 2005. Neither they nor their employers were breaking the law, however. That's because, contrary to a popular impression, the federal minimum doesn't apply to everyone.

The Fair Labor Standards Act contains a long list of exemptions, including tipped employees, seasonal recreation workers, charitable organizations, mom-and-pop businesses, farm workers and Samoan laborers. And as the U.S. Supreme Court recently affirmed, homecare workers are also exempt. None of these workers got a pay raise thanks to the new minimum wage law.

This huge "uncovered" (exempt) segment of the labor force not only restrains the wage impacts that Democrats promise but also obscures the disemployment effects that Republicans project. A worker displaced by a legislated wage hike at McDonald's can take a waiter or busboy job in a sit-down restaurant. In the process, uncovered employment becomes a substitute for increased unemployment. The "beneficiary" of the legislated wage hike may actually experience a wage decline in the process.

As a result, the true displacement effects of an effective minimum wage hike are not easily observed, much less measured. This phenomenon will become increasingly important as the second (July 1, 2008) and third (July 1, 2009) steps of legislated wage hikes creep into the "effective" range. Even then (July 1, 2009), however, a federal minimum of $7.25 will still not be very effective.

It's no wonder, then, that few workers noticed, much less celebrated this week's hike in the minimum wage. The only people celebrating are the politicians who are already proclaiming how they helped the poor, low-income worker.

Mr. Schiller is professor of economics at American University and the author of "The Economics of Poverty and Discrimination" (Prentice-Hall, 10th edition, 2007).

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DOWJONES

FAIRNESS DOCTRINE

Susan Burgess

From: Susan Burgess
Sent: Monday, July 09, 2007 12:24 PM
To: 'tom@cwx.com'
Subject: OTP & Fairness Doctrine

Tom,

On your desk I'm leaving you a stack of all the papers I could find concerning OTP's position on the Fairness Doctrine, which I have listed below. This includes the documents that I sent you by email Friday. I have highlighted the documents I believe are most important:

(1) Aug. 5-6, 1971 – a Scalia memo to CTW explaining what OTP's position on the BEM-DNC decision should be, describing the decision as "a leap towards more pervasive bureaucratic content control . . . more pernicious than the Fairness Doctrine."

(2) Jan. 18, 1972 - a CTW Memo to Flanigan saying that CTW's upcoming testimony before the Senate Subcommittee on Constitutional Rights would be a good time for him to present OTP's position on Fairness Doctrine

(3) Jan. 22, 1972 – a Scalia memo to James Loken concerning the FTC Fairness Doctrine criticizing the FTC's proposal for the FCC to require compulsory counter-advertising.

(4) Feb. 2, 1972 – CTW's Fairness Doctrine testimony before the Ervin Subcommittee

(5) March 5, 1972 - a Washington Post article -- Nixon's Top Radio-TV Adviser Would Drop Fairness Doctrine -- which appears to be based on interview CTW gave the Post, not a speech

(6) May 3, 1972 - a CTW Memo to Flanigan explaining what OTP's position on Fairness Doctrine should be

(7) an undated news summary w/ a handwritten note from Pete Flannigan asking CTW to explain why he was speaking out on Fairness Doctrine

(8) Oct. 11, 1972 – a Chuck Colson memo to CTW attaching an article showing why Colson likes the Fairness Doctrine

(9) July 1974 - a CTW Yale Law Journal review titled "Media Chic" proposing that legislation requiring broadcasters to accept all paid announcements during commerical time w/o discriminatintion as to speaker or subject matter

(10) July 2, 1974 – a CTW letter to Warren Magnuson explaining that OTP agrees with proposed legislation allowing broadcasters to offer time to major party candidates without requiring equal time, but believing the bill should apply to all candidates for federal office.

(11) an undated summary chronology describing important FCC and court decisions and OTP statements on the Fairness Doctrine

Susan

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

OFFICE OF THE DIRECTOR

June 18, 1969

MEMORANDUM FOR MR. WHITEHEAD

SUBJECT: Recent Decision of the Supreme Court

Last week the Supreme Court handed down its decision in the RED LION Broadcasting Company case upholding the constitutionality of the "fairness doctrine". Mr. Justice White in delivering the opinion of the Court made frequent reference to the need and importance of radio frequency spectrum management. The decision upholding the "fairness doctrine" is based on the scarcity of frequencies and the government's role in allocating them.

The case is significant to broadcasters because of the "fairness doctrine" and to telecommunications interests in general because of the endorsement given to the need for radio frequency management by the government. The OTM, as you know, devotes much of its resources to the spectrum management task and will be guided by the Court decision where appropriate.

Attached are: (a) a copy of my memo to the Director, OEP on this subject (b) a brief of the RED LION case, and (c) a copy of the complete text of the Opinion.

J. D. O'Connell

June 16, 1969

Memorandum for the Director, OEP

Subject: Recent Decision of Supreme Court

1. On June 9th the Supreme Court handed down a decision in the RED LION Broadcasting case that upheld the constitutionality of the "fairness doctrine". This "doctrine" requires that broadcast stations provide "equal time" for controversial public issues, assuming, of course, that one aspect of the controversy has already been presented by the station licensee. It also requires that "equal time" be allotted to all qualified candidates for public office. This is a landmark decision as regards broadcasting in particular and telecommunications in general.

2. The case is most significant as regards radio frequency spectrum management -- a primary responsibility of this office, so far as government operations are concerned. Mr. Justice White, in delivering the opinion of the Court, stated that "In view of the prevalence of scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views, we hold the regulations and rulings at issue here are both authorized by statute and constitutional."

3. In the course of reviewing the background, and in the presentation of the reasoning used by the Court in arriving at its opinion, Mr. Justice White made frequent reference to the complexities and importance of frequency management. Practices and principles for frequency management have been developed over many years and are the ones utilized by the FCC and the OTM in assigning out their regular spectrum management tasks. This is the first time that the Supreme Court has made such extensive and knowledgeable reference to spectrum management, thereby adding an endorsement to the work we have been doing and are continuing to do -- with inadequate personnel and budgeting support.

4. Attachment A hereto is a brief of the case referenced above and Attachment B is the complete text of the opinion.

J. D. O'Connell

Attachments A and B

cc: Mr. C. Kendall
General Counsel

cc: Subj. File
Rd. File
OTM (2)
FM

LRRAISH:bks

RED LION BROADCASTING CO., INC. ET AL, Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

(On writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit)

FACTS

In November 1964, radio station WGCB - AM-FM, in Red Lion, Pennsylvania carried a program by Rev. Billy James Hargis attacking Fred Cook for Cook's book criticizing Barry Goldwater's candidacy for Presidency. Cook asked the radio station for an opportunity to reply to Hargis. The station took the position that the "fairness doctrine" did not require them to make free time for reply to subjects of personal attack if paid sponsorship for the reply was possible. A correspondence then ensued between the FCC and the station after a complaint by Cook. The station insisted that before a free reply could be made available, Cook should state he could not obtain sponsorship of the program. The FCC responded that the burden was on the station to find sponsorship and that Cook did not have to show that he was financially unable to pay for or sponsor time to reply to be entitled to it.

The station requested the FCC to reconsider its ruling and also to rule on the constitutionality of the "fairness doctrine!" The FCC reaffirmed its ruling and said the public interest required that the public be given an opportunity to hear the other side, even if this means that the reply must be at the station's own expense. A formal order to that effect was entered by the Federal Communications Commission.

Attachment A

The FCC has for many years imposed on radio and television broadcasters the requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues be given fair coverage. This is known as the "fairness doctrine". It is an obligation defined in a long series of FCC rulings and is distinct from the statutory requirement of Section 315 of the Communications Act that equal time be allotted all qualified candidates for public affairs.

ISSUES

Does the "fairness doctrine" violate the First Amendment and is it unconstitutionally vague?

OPINION

The history of the emergence of the "fairness doctrine" shows that the FCC did not exceed its authority, and that in adopting the new regulations the FCC was implementing Congressional policy.

Before 1927, the allocation of frequencies was left entirely to the private sector and the result was chaos. The Federal Radio Commission was established to allocate frequencies among competing applicants in a manner responsive to the public -- "convenience, interest, or necessity". Very shortly thereafter the Commission expressed the view that the "public interest requires ample play for the free and fair competition of opposing views". This evolved into the "fairness doctrine" that was later strengthened by statutory action amending the Communications Act of 1934 that equal time be accorded each political candidate except certain appearances in views programs.

The legislative history reveals a Senate report that noted "broadcast frequencies are limited and, therefore, they have been necessarily considered a public trust. Every licensee --- is mandated to operate in the public interest ---".

The broadcasters challenge the fairness doctrine on First Amendment grounds, alleging that it abridges their freedom of speech and press, and that they may use their frequencies in whatever way they choose. However, general problems raised by the technology of broadcasting (as compared to the printed media) justify differences in the application of First Amendment standards. The reach of radio signals is incomparably greater than the human voice and the problem of interferences is massive. The reality of this interference necessitated the division of the radio spectrum into portions reserved for public broadcasting and for other important uses of radio, (such as amateur, aircraft, police, defense, and navigation). It would be "strange" if the Government was prevented from making communications possible by

managing the spectrum to prevent overcrowding because of the First Amendment. "No one has a First Amendment right to a license or to monopolize a radio frequency".

"Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licenses ----". But the FCC does not have the right to interfere with free speech - the people as a whole retain their interest in this and it is their right, "not the right of the broadcasters, which is pursuant". Those fortunate enough to have access to the limited spectrum have no monopoly right or "unfettered" power to communicate only their own views on public issues.

The argument that there is no longer need for control of frequency usage is not justified. "Scarcity is not entirely a thing of the past. Advances in technology, such as microwave transmissions, have led to more efficient utilization of the spectrum, but uses for that spectrum have also grown apace. Portions of the spectrum must be reserved for vital uses unconnected with human communication ----- "Land Mobile Services" such as police, ambulance ---- have been occupying an increasingly crowed portion of the frequency spectrum. ------- there are easily enough claimants to permit use of the whole with an even smaller allocation to broadcast radio and television uses than now exists."

"The rapidity with which technological advances succeed over another to create more efficient use of the spectrum on the one hand, and to create new uses for the space by ever growing numbers of people on the other, make it unwise to speculate on the future allocation of that space. It is enough to say that the resource is one of considerable and growing importance whose scarcity impelled its regulation by an agency authorized by Congress. Nothing in this record, or in our own researches, convinces us that the resource is no longer one for which there are more immeidate and potential uses than can be accommodated, and for which wise planning is essential."

DECISION

"In view of the prevalence of scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views," the regulations and rulings at issue are both authorized by statute and constitutional.

The "Red Lion" case is reversed.

SUPREME COURT OF THE UNITED STATES

Nos. 2 and 717.—October Term, 1968.

Red Lion Broadcasting Co., Inc., etc., et al., Petitioners, v. Federal Communications Commission et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.
2	
United States et al., Petitioners, v. Radio Television News Directors Association, et al.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.
717	

[June 9, 1969.]

Mr. Justice White delivered the opinion of the Court.

The Federal Communications Commission has for many years imposed on radio and television broadcasters the requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage. This is known as the fairness doctrine, which originated very early in the history of broadcasting and has maintained its present outlines for some time. It is an obligation whose content has been defined in a long series of FCC rulings in particular cases, and which is distinct from the statutory requirement of § 315 of the Communications Act[1]

[1] Communications Act of 1934, Tit. III, c. 652, 48 Stat. 1081, as amended, 47 U. S. C. § 301 *et seq.* Section 315 now reads:

"315. Candidates for public office; facilities; rules.

"(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

that equal time be allotted all qualified candidates for public office. Two aspects of the fairness doctrine, relating to personal attacks in the context of controversial public issues and to political editorializing, were codified more precisely in the form of FCC regulations in 1967. The two cases before us now, which were decided separately below, challenge the constitutional and statutory bases of the doctrine and component rules. *Red Lion* involves the application of the fairness doctrine to a particular broadcast, and *RTNDA* arises as an action to review the FCC's 1967 promulgation of the personal attack and political editorializing regulations, which were laid down after the *Red Lion* litigation had begun.

---

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 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 newcast, .

"(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. 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.

"(b) The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.

"(c) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section."

I.

A.

The Red Lion Broadcasting Company is licensed to operate a Pennsylvania radio station, WGCB. On November 27, 1964, WGCB carried a 15-minute broadcast by Reverend Billy James Hargis as part of a "Christian Crusade" series. A book by Fred J. Cook entitled "Goldwater—Extremist on the Right" was discussed by Hargis, who said that Cook had been fired by a newspaper for fabricating false charges against city officials; that Cook had then worked for a Communist-affiliated publication; that he had defended Alger Hiss and attacked J. Edgar Hoover and the Central Intelligence Agency; and that he had now written a "book to smear and destroy Barry Goldwater."[2] When Cook heard of the broadcast he

[2] According to the record, Hargis asserted that his broadcast included the following statement:

"Now, this paperback book by Fred J. Cook is entitled, 'GOLDWATER—EXTREMIST 'ON THE RIGHT.' Who is Cook? Cook was fired from the New York World Telegram after he made a false charge publicly on television against an un-named official of the New York City government. New York publishers and NEWSWEEK Magazine for December 7, 1959, showed that Fred Cook and his pal, Eugene Gleason, had made up the whole story and this confession was made to New York District Attorney, Frank Hogan. After losing his job, Cook went to work for the left-wing publication, THE NATION, one of the most scurrilous publications of the left which has championed many communist causes over many years. Its editor, Carry McWilliams, has been affiliated with many communist enterprises, scores of which have been cited as subversive by the Attorney General of the U. S. or by other government agencies . . . . Now, among other things Fred Cook wrote for THE NATION, was an article absolving Alger Hiss of any wrong doing . . . there was a 208 page attack on the FBI and J. Edgar Hoover; another attack by Mr. Cook was on the Central Intelligence Agency . . . now this is the man who wrote the book to smear and destroy Barry Goldwater called 'Barry Goldwater—Extremist Of The Right!'"

concluded that he had been personally attacked and demanded free reply time, which the station refused. After an exchange of letters among Cook, Red Lion, and the FCC, the FCC declared that the Hargis broadcast constituted a personal attack on Cook; that Red Lion had failed to meet its obligation under the fairness doctrine as expressed in *Times-Mirror Broadcasting Co.*, 24 P & F Radio Reg. 404 (1962), to send a tape, transcript, or summary of the broadcast to Cook and offer him reply time; and that the station must provide reply time whether or not Cook would pay for it. On review in the Court of Appeals for the District of Columbia,[3] the FCC's position was upheld as constitutional and otherwise proper. 381 F. 2d 908 (1967).

[3] The Court of Appeals initially dismissed the petition for want of a reviewable order, later reversing itself en banc upon argument by the Government that the FCC rule used here, which permits it to issue "a declaratory ruling terminating a controversy or removing uncertainty," 47 CFR § 1.2, was in fact justified by the Administrative Procedure Act. That Act permits an adjudicating agency, "in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty." § 5, 60 Stat. 239, 5 U. S. C. § 1004 (d). In this case, the FCC could have determined the question of Red Lion's liability to a cease-and-desist order or license revocation, 47 U. S. C. § 312, for failure to comply with the license's condition that the station be operated "in the public interest," or for failure to obey a requirement of operation in the public interest implicit in the ability of the FCC to revoke licenses for conditions justifying the denial of an initial license, 47 U. S. C. § 312 (a) (2), and the statutory requirement that the public interest be served in granting and renewing licenses, 47 U. S. C. §§ 307 (a), (d). Since the FCC could have adjudicated these questions it could, under the Administrative Procedure Act, have issued a declaratory order in the course of its adjudication which would have been subject to judicial review. Although the FCC did not comply with all of the formalities for an adjudicative proceeding in this case, the petitioner itself adopted as its own the Government's position that this was a reviewable order, waiving any objection it might have had to the procedure of the adjudication.

B.

Not long after the *Red Lion* litigation was begun, the FCC issued a Notice of Proposed Rule Making, 31 Fed. Reg. 5710, with an eye to making the personal attack aspect of the fairness doctrine more precise and more readily enforceable, and also to specify its rules relating to political editorials. After considering written comments supporting and opposing the rules, the FCC adopted them substantially as proposed, 32 Fed. Reg. 10303. Twice amended, 32 Fed. Reg. 11531, 33 Fed. Reg. 5362, the rules were held unconstitutional in the *RTNDA* litigation by the Court of Appeals for the Seventh Circuit on review of the rule-making proceeding as abridging the freedoms of speech and press. 400 F. 2d 1002 (1968).

As they now stand amended, the regulations read as follows:

"Personal attacks; political editorials.

"(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than 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 not be applicable (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, on other such candidates, their authorized spokesmen, or persons

associated with the candidates 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.

"(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." 47 CFR §§ 73.123, 73.300, 73.598, 73.679 (all identical).

C.

Believing that the specific application of the fairness doctrine in *Red Lion*, and the promulgation of the regulations in *RTNDA*, are both authorized by Congress and enhance rather than abridge the freedoms of speech and press protected by the First Amendment, we hold them valid and constitutional, reversing the judgment below in *RTNDA* and affirming the judgment below in *Red Lion*.

II.

The history of the emergence of the fairness doctrine and of the related legislation shows that the Commission's action in the *Red Lion* case did not exceed its authority, and that in adopting the new regulations the Commission was implementing congressional policy rather than embarking on a frolic of its own.

A.

Before 1927, the allocation of frequencies was left entirely to the private sector, and the result was chaos.[4]

[4] Because of this chaos, a series of National Radio Conferences was held between 1922 and 1925, at which it was resolved that regulation of the radio spectrum by the Federal Government was essential and that regulatory power should be utilized to ensure that allocation of this limited resource would be made only to those who would serve the public interest. The 1923 Conference expressed the opinion that the Radio Act of 1912, c. 287, 37 Stat. 302, conferred upon the Secretary of Commerce the power to regulate frequencies and hours of operation, but when Secretary Hoover sought to implement this claimed power by penalizing the Zenith Radio Corporation for operating on an unauthorized frequency, the 1912 Act was held not to permit enforcement. *United States* v. *Zenith Radio Corporation*, 12 F. 2d 614 (D. C. N. D. Ill. 1926). Compare *Hoover* v. *Intercity Radio Co.*, 286 F. 1003 (C. A. D. C. Cir. 1923) (Secretary had no power to deny licenses, but was empowered to assign frequencies). An opinion issued by the Attorney General at Hoover's request con-

It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard.[5] Consequently, the Federal Radio Commission was established to allocate frequencies among competing applicants in a manner responsive to the public "convenience, interest, or necessity."[6]

Very shortly thereafter the Commission expressed its view that the "public interest requires ample play for the free and fair competition of opposing views, and the Commission believes that the principle applies . . . to all

---

firmed the impotence of the Secretary under the 1912 Act. 35 Op. Atty. Gen. 126 (1926). Hoover thereafter appealed to the radio industry to regulate itself, but his appeal went largely unheeded. See generally L. Schmeckebier, The Federal Radio Commission 1–14 (1932).

[5] Congressman White, a sponsor of the bill enacted as the Radio Act of 1927, commented upon the need for new legislation:

"We have reached the definite conclusion that the right of all our people to enjoy this means of communication can be preserved only by the repudiation of the idea underlying the 1912 law that anyone who will may transmit and by the assertion in its stead of the doctrine that the right of the public to service is superior to the right of any individual. . . . The recent radio conference met this issue squarely. It recognized that in the present state of scientific development there must be a limitation upon the number of broadcasting stations and it recommended that licenses should be issued only to those stations whose operation would render a benefit to the public, are necessary in the public interest, or would contribute to the development of the art. This principle was approved by every witness before your committee. We have written it into the bill. If enacted into law, the broadcasting privilege will not be a right of selfishness. It will rest upon an assurance of public interest to be served." 67 Cong. Rec. 5479.

[6] Radio Act of 1927, c. 169, § 4, 44 Stat. 1162, 1163. See generally, Davis, The Radio Act of 1927, 13 Va. L. Rev. 611 (1927).

discussions of issues of importance to the public." *Great Lakes Broadcasting Co.*, 3 F. R. C. Ann. Rep. 32, 33 (1929), rev'd on other grounds, 37 F. 2d 993, cert. dismissed, 281 U. S. 706 (1930). This doctrine was applied through denial of license renewals or construction permits, both by the FRC, *Trinity Methodist Church, South* v. *FRC*, 62 F. 2d 850 (C. A. D. C. Cir. 1932), cert. denied, 288 U. S. 599 (1933), and its successor FCC, *Young People's Association for the Propagation of the Gospel*, 6 F. C. C. 178 (1938). After an extended period during which the licensee was obliged not only to cover and to cover fairly the views of others, but also to refrain from expressing his own personal views, *Mayflower Broadcasting Corp.*, 8 F. C. C. 333 (1941), the latter limitation on the licensee was abandoned and the doctrine developed into its present form.

There is a twofold duty laid down by the FCC's decisions and described by the 1949 Report on Editorializing by Broadcast Licensees, 13 F. C. C. 1246 (1949). The broadcaster must give adequate coverage to public issues, *United Broadcasting Co.*, 10 F. C. C. 515 (1945), and coverage must be fair in that it accurately reflects the opposing views. *New Broadcasting Co.*, 6 P & F Radio Reg. 258 (1950). This must be done at the broadcaster's own expense if sponsorship is unavailable. *Cullman Broadcasting Co.*, 25 P & F Radio Reg. 895 (1963). Moreover, the duty must be met by programming obtained at the licensee's own initiative if available from no other source. *John J. Dempsey*, 6 P & F Radio Reg. 615 (1950); see *Metropolitan Broadcasting Corp.*, 19 P & F Radio Reg. 602 (1959); *The Evening News Assn.*, 6 P & F Radio Reg. 283 (1950). The Federal Radio Commission had imposed these two basic duties on broadcasters since the outset, *Great Lakes Broadcasting Co.*, 3 F. R. C. Ann. Rep. 32 (1929), rev'd on other grounds, 37 F. 2d 993, cert. denied, 281 U. S. 706 (1930); *Chicago Federation of Labor* v. *FRC*, 3 F. R. C. Ann. Rep. 36

(1929), aff'd 41 F. 2d 422 (C. A. D. C. Cir. 1930); *KFKB Broadcasting Assn.* v. *FRC*, 47 F. 2d 670 (C. A. D. C. Cir. 1931), and in particular respects the personal attack rules and regulations at issue here have spelled them out in greater detail.

When a personal attack has been made on a figure involved in a public issue, both the doctrine of cases such as *Red Lion* and *Times-Mirror Broadcasting Co.*, 24 P & F Radio Reg. 404 (1962), and also the 1967 regulations at issue in *RTNDA* require that the individual attacked himself be offered an opportunity to respond. Likewise, where one candidate is endorsed in a political editorial, the other candidates must themselves be offered reply time to use personally or through a spokesman. These obligations differ from the general fairness requirement that issues be presented, and presented with coverage of competing views, in that the broadcaster does not have the option of presenting the attacked party's side himself or choosing a third party to represent that side. But insofar as there is an obligation of the broadcaster to see that both sides are presented, and insofar as that is an affirmative obligation, the personal attack doctrine and regulations do not differ from preceding fairness doctrine. The simple fact that the attacked men or unendorsed candidates may respond themselves or through agents is not a critical distinction, and indeed, it is not unreasonable for the FCC to conclude that the objective of adequate presentation of all sides may best be served by allowing those most closely affected to make the response, rather than leaving the response in the hands of the station which has attacked their candidacies, endorsed their opponents, or carried a personal attack upon them.

B.

The statutory authority of the FCC to promulgate these regulations derives from the mandate to the "Commission from time to time, as public convenience, in-

terest, or necessity requires" to promulgate "such rules and regulations and prescribe such restrictions and conditions . . . as may be necessary to carry out the provisions of this chapter . . . ." 47 U. S. C. § 303 and § 303 (r).[7] The Commission is specifically directed to consider the demands of the public interest in the course of granting licenses, 47 U. S. C. §§ 307 (a), 309 (a); renewing them, 47 U. S. C. § 307; and modifying them. *Ibid.* Moreover, the FCC has included among the conditions of the Red Lion license itself the requirement that operation of the station be carried out in the public interest, 47 U. S. C. § 309 (h). This mandate to the FCC to assure that broadcasters operate in the public interest is a broad one, a power "not niggardly but expansive," *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 219 (1943), whose validity we have long upheld. *FCC* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138 (1940); *FCC* v. *RCA Communications, Inc.*, 346 U. S. 86, 90 (1953); *FRC* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 285 (1933). It is broad enough to encompass these regulations.

[7] As early as 1930, Senator Dill expressed the view that the Federal Radio Commission had the power to make regulations requiring a licensee to afford an opportunity for presentation of the other side on "public questions." Hearings before the Senate Committee on Interstate Commerce on S. 6, 71st Cong., 2d Sess., at 1616 (1930):

"Senator DILL. Then you are suggesting that the provision of the statute that now requires a station to give equal opportunity to candidates for office shall be applied to all public questions?

"Commissioner ROBINSON. Of course, I think in the legal concept the law requires it now. I do not see that there is any need to legislate about it. It will evolve one of these days. Somebody will go into court and say, 'I am entitled to this opportunity,' and he will get it.

"Senator DILL. Has the Commission considered the question of making regulations requiring the stations to do that?

"Commissioner ROBINSON. Oh, no.

"Senator DILL. It would be within the power of the commission, I think, to make regulations on that subject."

The fairness doctrine finds specific recognition in statutory form, is in part modeled on explicit statutory provisions relating to political candidates, and is approvingly reflected in legislative history.

In 1959 the Congress amended the statutory requirement of § 315 that equal time be accorded each political candidate to except certain appearances on news programs, but added that this constituted no exception *"from the obligation imposed upon them 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."* Act of September 14, 1959, § 1, 73 Stat. 557, amending 47 U. S. C. § 315 (a) (emphasis added). This language makes it very plain that Congress, in 1959, announced that the phrase "public interest," which had been in the Act since 1927, imposed a duty on broadcasters to discuss both sides of controversial public issues. In other words, the amendment vindicated the FCC's general view that the fairness doctrine inhered in the public interest standard. Subsequent legislation enacted into law and declaring the intent of an earlier statute is entitled to great weight in statutory construction.[8] And here this principle is given special force by the equally venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong,[9] especially when Congress has

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[8] *Federal Housing Administration* v. *Darlington, Inc.*, 358 U. S. 84, 90 (1958); *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 541 (1962) (separate opinion of MR. JUSTICE HARLAN, joined by MR. JUSTICE BRENNAN and MR. JUSTICE STEWART). This principle is a venerable one. *Alexander* v. *Alexandria*, 5 Cranch 1 (1809); *United States* v. *Freeman*, 3 How. 556 (1845); *Stockdale* v. *The Insurance Companies*, 20 Wall. 323 (1873).

[9] *Zemel* v. *Rusk*, 381 U. S. 1, 11–12 (1965); *Udall* v. *Tallman*, 380 U. S. 1, 16–18 (1965); *Commissioner* v. *Sternberger's Estate*, 348 U. S. 187, 199 (1955); *Hastings & D. R. Co.* v. *Whitney*, 132

refused to alter the administrative construction.[10] Here, the Congress has not just kept its silence by refusing to overturn the administrative construction,[11] but has ratified it with positive legislation. Thirty years of consistent administrative construction left undisturbed by Congress until 1959, when that construction was expressly accepted, reinforce the natural conclusion that the public interest language of the Act authorized the Commission

U. S. 357, 366 (1889); *United States* v. *Burlington & M. River R. Co.*, 98 U. S. 334, 341 (1878); *United States* v. *Alexander*, 12 Wall. 177, 179–181 (1871); *Surgett* v. *Lapice*, 8 How. 48, 68 (1850).

[10] *Zemel* v. *Rusk*, 381 U. S. 1, 11–12 (1965); *United States* v. *Bergh*, 352 U. S. 40, 46–47 (1956); *Alstate Construction Co.* v. *Durkin*, 345 U. S. 13, 16–17 (1953); *Costanzo* v. *Tillinghast*, 287 U. S. 341, 345 (1932).

[11] An attempt to limit sharply the FCC's power to interfere with programming practices failed to emerge from Committee in 1943. S. 814, 87th Cong., 1st Sess., 4 (1943). See Hearings on S. 814 before the Senate Committee on Interstate Commerce, 78th Cong., 1st Sess. (1943). Also, attempts specifically to enact the doctrine failed in the Radio Act of 1927, 67 Cong. Rec. 12505 (1926) (agreeing to amendment proposed by Senator Dill eliminating coverage of "question affecting the public"), and a similar proposal in the Communications Act of 1934 was accepted by the Senate, 78 Cong. Rec. 8854 (1939); see S. Rep. No. 781, 73d Cong., 2d Sess., 8 (1934), but was not included in the bill reported by the House Committee, see H. R. Rep. No. 1850, 73d Cong., 2d Sess. (1934). The attempt which came nearest success was a bill, H. R. 7716, 72d Cong., 1st Sess. (1932), passed by Congress but pocket vetoed by the President in 1933, which would have extended "equal opportunities" whenever a public question was to be voted on at an election or by a government agency. H. R. Rep. No. 2106, 72d Cong., 2d Sess., 6 (1933). In any event, unsuccessful attempts at legislation are not the best of guides to legislative intent. *Fogarty* v. *United States*, 340 U. S. 8, 13–14 (1950); *United States* v. *United Mine Workers*, 330 U. S. 258, 281–282 (1947). A review of some of the legislative history over the years, drawing a somewhat different conclusion, is found in Staff of the House Committee on Interstate and Foreign Commerce, Legislative History of the Fairness Doctrine, 90th Cong., 2d Sess. (Comm. Print. 1968). This inconclusive history was, of course, superseded by the specific statutory language added in 1959.

to require licensees to use their stations for discussion of public issues, and that the FCC is free to implement this requirement by reasonable rules and regulations which fall short of abridgment of the freedom of speech and press, and of the censorship proscribed by § 326 of the Act.[12]

The objectives of § 315 themselves could readily be circumvented but for the complementary fairness doctrine ratified by § 315. The section applies only to campaign appearances by candidates, and not by family, friends, campaign managers, or other supporters. Without the fairness doctrine, then, a licensee could ban all campaign appearances by candidates themselves from the air [13] and proceed to deliver over his station entirely to the supporters of one slate of candidates, to the exclusion of all others. In this way the broadcaster could have a far greater impact on the favored candidacy than he could by simply allowing a spot appearance by the candidate himself. It is the fairness doctrine as an aspect of the obligation to operate in the public interest, rather than § 315, which prohibits the broadcaster from taking such a step.

The legislative history reinforces this view of the effect of the 1959 amendment. Even before the language relevant here was added, the Senate report on amending § 315 noted that "broadcast frequencies are limited and, therefore, they have been necessarily considered a public trust. Every licensee who is fortunate in obtaining a license is mandated to operate in the public

[12] "§ 326. Censorship.

"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."

[13] John P. Crommelin, 19 P & F Radio Reg. 1392 (1960).

interest and has assumed the obligation of presenting important public questions fairly and without bias." S. Rep. No. 562, 86th Cong., 1st Sess., 8–9 (1959). See also, specifically adverting to Federal Communications Commission doctrine, *id.*, at 13.

Rather than leave this approval solely in the legislative history, Senator Proxmire suggested an amendment to make it part of the Act. 105 Cong. Rec. 14457. This amendment, which Senator Pastore, a manager of the bill and Chairman of the Senate Committee considered "rather surplusage," 105 Cong. Rec. 14462, constituted a positive statement of doctrine[14] and was altered to the present merely approving language in the conference committee. In explaining the language to the Senate after the committee changes, Senator Pastore said: "We insisted that the provision remain in the bill, to be a continuing reminder and admonition to the Federal Communications Commission and to the broadcasters alike, that we were not abandoning the philosophy that gave birth to section 315, in giving the people the right to have a full and complete disclosure of conflicting views on news of interest to the people of the country." 105 Cong. Rec. 17830. Senator Scott, another Senate manager, added that "It is intended to encompass all legitimate areas of public importance which are controversial," not just politics. 105 Cong. Rec. 17831.

It is true that the personal attack aspect of the fairness doctrine was not actually adjudicated until after 1959,

[14] The Proxmire amendment read: "[B]ut nothing in this sentence shall be construed as changing the basic intent of Congress with respect to the provisions of this act, which recognizes that television and radio frequencies are in the public domain, that the license to operate in such frequencies requires operation in the public interest, and that in newscasts, news interviews, news documentaries, on-the-spot coverage of news events, and panel discussions, all sides of public controversies shall be given as equal an opportunity to be heard as is practically possible." 105 Cong. Rec. 14457.

so that Congress then did not have those rules specifically before it. However, the obligation to offer time to reply to a personal attack was presaged by the FCC's 1949 Report on Editorializing, which the FCC views as the principal summary of its *ratio decidendi* in cases in this area:

> "In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as . . . 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." 13 F. C. C., at 1251–1252.

When the Congress ratified the FCC's implication of a fairness doctrine in 1959 it did not, of course, approve every past decision or pronouncement by the Commission on this subject, or give it a completely free hand for the future. The statutory authority does not go so far. But we cannot say that when a station publishes a personal attack or endorses a political candidate, it is a misconstruction of the public interest standard to require the station to offer time for a response rather than to leave the response entirely within the control of the station which has attacked either the candidacies or the men who wish to reply in their own defense. When a broadcaster grants time to a political candidate, Congress itself requires that equal time be offered to his opponents. It would exceed our competence to hold that the Commission is unauthorized by the statute to employ a similar

device where personal attacks or political editorials are broadcast by a radio or television station.

In light of the fact that the "public interest" in broadcasting clearly encompasses the presentation of vigorous debate of controversial issues of importance and concern to the public; the fact that the FCC has rested upon that language from its very inception a doctrine that these issues must be discussed, and fairly; and the fact that Congress has acknowledged that the analogous provisions of § 315 are not preclusive in this area, and knowingly preserved the FCC's complementary efforts, we think the fairness doctrine and its component personal attack and political editorializing regulations are a legitimate exercise of congressionally delegated authority. The Communications Act is not notable for the precision of its substantive standards and in this respect the explicit provisions of § 315, and the doctrine and rules at issue here which are closely modeled upon that section, are far more explicit than the generalized "public interest" standard in which the Commission ordinarily finds its sole guidance, and which we have held a broad but adequate standard before. *FCC* v. *RCA Communications, Inc.*, 346 U. S. 86, 90 (1953); *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 216–217 (1943); *FCC* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138 (1940); *FRC* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 285 (1933). We cannot say that the FCC's declaratory ruling in *Red Lion*, or the regulations at issue in *RTNDA*, are beyond the scope of the congressionally conferred power to assure that stations are operated by those whose possession of a license serves "the public interest."

III.

The broadcasters challenge the fairness doctrine and its specific manifestations in the personal attack and political editorial rules on conventional First Amendment

grounds, alleging that the rules abridge their freedom of speech and press. Their contention is that the First Amendment protects their desire to use their allotted frequencies continuously to broadcast whatever they choose, and to exclude whomever they choose from ever using that frequency. No man may be prevented from saying or publishing what he thinks, or from refusing in his speech or other utterances to give equal weight to the views of his opponents. This right, they say, applies equally to broadcasters.

A.

Although broadcasting is clearly a medium affected by a First Amendment interest, *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 166 (1948), differences in the characteristics of new media justify differences in the First Amendment standards applied to them.[16] *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 503 (1952). For example, the ability of new technology to produce sounds more raucous than those of the human voice justifies restrictions on the sound level, and on the hours and places of use, of sound trucks so long as the restrictions

[16] The general problems raised by a technology which supplants atomized, relatively informal communication with mass media as a prime source of national cohesion and news were discussed at considerable length by Zechariah Chafee in Government and Mass Communications (1947). Debate on the particular implications of this view for the broadcasting industry has continued unabated. A compendium of views appears in Freedom and Responsibility in Broadcasting (Coons ed.) (1961). See also Kalven, Broadcasting, Public Policy, and the First Amendment, 10 J. of Law and Econ. 15 (1967); Ernst, The First Freedom 125–180 (1946); Robinson, Radio Networks and the Federal Government, especially at 75–87 (1943). The considerations which the newest technology brings to bear on the particular problem of this litigation are concisely explored by Louis Jaffe in The Fairness Doctrine, Equal Time, Reply to Personal Attacks, and the Local Service Obligation; Implications of Technological Change (U. S. Government Printing Office 1968).

are reasonable and applied without discrimination. *Kovacs* v. *Cooper*, 336 U. S. 77 (1949).

Just as the Government may limit the use of sound amplifying equipment potentially so noisy that it drowns out civilized private speech, so may the Government limit the use of broadcast equipment. The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others. *Associated Press* v. *United States*, 326 U. S. 1, 20 (1945).

When two people converse face to face, both should not speak at once if either is to be clearly understood. But the range of the human voice is so limited that there could be meaningful communications if half the people in the United States were talking and the other half listening. Just as clearly, half the people might publish and the other half read. But the reach of radio signals is incomparably greater than the range of the human voice and the problem of interference is a massive reality. The lack of know-how and equipment may keep many from the air, but only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had, even if the entire radio spectrum is utilized in the present state of commercially acceptable technology.

It was this fact, and the chaos which ensued from permitting anyone to use any frequency at whatever power level he wished, which made necessary the enactment of the Radio Act of 1927 and the Communications Act of 1934,[16] as the Court has noted at length before. *National Broadcasting Co.* v. *United States*, 319 U. S.

[16] The range of controls which have in fact been imposed over the last 40 years, without giving rise to successful constitutional challenge in this Court, is discussed in Emery, Broadcasting and Government: Responsibilities and Regulations (1961); Note, Regulation of Program Content by the FCC, 77 Harv. L. Rev. 701 (1964).

190, 210–214 (1943). It was this reality which at the very least necessitated first the division of the radio spectrum into portions reserved respectively for public broadcasting and for other important radio uses such as amateur operation, aircraft, police, defense, and navigation; and then the subdivision of each portion, and assignment of specific frequencies to individual users or groups of users. Beyond this, however, because the frequencies reserved for public broadcasting were limited in number, it was essential for the Goverment to tell some applicants that they could not broadcast at all because there was room for only a few.

Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. If 100 persons want broadcast licenses but there are only 10 frequencies to allocate, all of them may have the same "right" to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airways. It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum.

This has been the consistent view of the Court. Congress unquestionably has the power to grant and deny licenses and to delete existing stations. *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266 (1933). No one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because "the public interest" requires it "is not a denial of free speech." *National Broadcasting Co.* v. *U. S.*, 319 U. S. 190, 227 (1943).

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

This is not to say that the First Amendment is irrelevant to public broadcasting. On the contrary, it has a major role to play as the Congress itself recognized in § 326, which forbids FCC interference with "the right of free speech by means of radio communications." Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. See *FCC* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 475 (1940); *FCC* v. *Allentown Broadcasting Corp.*, 349 U. S. 358, 361–362 (1955); Z. Chafee, Government and Mass Communications 546 (1947). It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. *Associated Press* v. *United States*, 326

U. S. 1, 20 (1945); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964); *Abrams* v. *United States*, 250 U. S. 616, 630 (1919) (Holmes, J., dissenting). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana*, 379 U. S. 64, 74–75 (1964). See Brennan, The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 Harv. L. Rev. 1 (1965). It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.

B.

Rather than confer frequency monopolies on a relatively small number of licensees, in a Nation of 200,000,000, the Government could surely have decreed that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week. The ruling and regulations at issue here do not go quite so far. They assert that under specified circumstances, a licensee must offer to make available a reasonable amount of broadcast time to those who have a view different from that which has already been expressed on his station. The expression of a political endorsement, or of a personal attack while dealing with a controversial public issue, simply triggers this time-sharing. As we have said, the First Amendment confers no right on licensees to prevent others from broadcasting on "their" frequencies and no right to an unconditional monopoly of a scarce resource which the Government has denied others the right to use.

In terms of constitutional principle, and as enforced sharing of a scarce resource, the personal attack and political editorial rules are indistinguishable from the equal-time provision of § 315, a specific enactment of

Congress requiring stations to set aside reply time under specified circumstances and to which the fairness doctrine and these constituent regulations are important complements. That provision, which has been part of the law since 1927, Radio Act of 1927, c. 169, § 18, 44 Stat. 1162, 1170, has been held valid by this Court as an obligation of the licensee relieving him of any power in any way to prevent or censor the broadcast, and thus insulating him from liability for defamation. The constitutionality of the statute under the First Amendment was unquestioned.[17] *Farmers Educ. & Coop. Union* v. *WDAY*, 360 U. S. 525 (1959).

Nor can we say that it is inconsistent with the First Amendment goal of producing an informed public capable of conducting its own affairs to require a broadcaster to permit answers to personal attacks occurring in the course of discussing controversial issues, or to require that the political opponents of those endorsed by the station be given a chance to communicate with the public.[18] Otherwise, station owners and a few net-

[17] This has not prevented vigorous argument from developing on the constitutionality of the ancillary FCC doctrines. Compare Barrow, The Equal Opportunities and Fairness Doctrine in Broadcasting: Pillars in the Forum of Democracy, 37 U. Cin. L. Rev. 447 (1968), with Robinson, The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation, 52 Minn. L. Rev. 67 (1967), and Sullivan, Editorials and Controversy: The Broadcaster's Dilemma, 32 Geo. Wash. L. Rev. 719 (1964).

[18] The expression of views opposing those which broadcasters permit to be aired in the first place need not be confided solely to the broadcasters themselves as proxies. "Nor is it enough that he should hear the arguments of his adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. That is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost for them." J. S. Mill, On Liberty 32 (R. McCallum ed. 1947).

works would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed. There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all. "Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." *Associated Press* v. *U. S.*, 326 U. S. 1, 20 (1944).

C.

It is strenuously argued, however, that if political editorials or personal attacks will trigger an obligation in broadcasters to afford the opportunity for expression to speakers who need not pay for time and whose views are unpalatable to the licensees, then broadcasters will be irresistibly forced to self-censorship and their coverage of controversial public issues will be eliminated or at least rendered wholly ineffective. Such a result would indeed be a serious matter, for should licensees actually eliminate their coverage of controversial issues, the purposes of the doctrine would be stifled.

At this point, however, as the Federal Communications Commission has indicated, that possibility is at best speculative. The communications industry, and in particular the networks, have taken pains to present controversial issues in the past, and even now they do not assert that they intend to abandon their efforts in this regard.[19] It would be better if the FCC's encouragement

[19] The President of the Columbia Broadcasting System has recently declared that despite the Government, "we are determined to continue covering controversial issues as a public service, and exercising our own independent news judgment and enterprise. I, for one, refuse to allow that judgment and enterprise to be affected by official intimidation." Stanton, Keynote Address, Sigma Delta Chi National

were never necessary to induce the broadcasters to meet their responsibility. And if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications. The fairness doctrine in the past has had no such overall effect.

That this will occur now seems unlikely, however, since if present licensees should suddenly prove timorous, the Commission is not powerless to insist that they give adequate and fair attention to public issues. It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press. Congress need not stand idly by and permit those with licenses to ignore the problems which beset the people or to exclude from the airways anything but their own views of fundamental questions. The statute, long administrative practice, and cases are to this effect.

Licenses to broadcast do not confer ownership of designated frequencies, but only the temporary privilege of using them. 47 U. S. C. § 301. Unless renewed, they expire within three years. 47 U. S. C. § 307 (d). The statute mandates the issuance of licenses if the "public convenience, interest or necessity will be served thereby." 47 U. S. C. § 307 (a). In applying this

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Convention, Atlanta, Georgia, November 21, 1968. Problems of news coverage from the broadcaster's viewpoint are surveyed in Wood, Electronic Journalism (1967).

standard the Commission for 40 years has been choosing licensees based in part on their program proposals. In *F. R. C. v. Nelson Bros. Bond and Mortgage Co.*, 289 U. S. 266, 279 (1933), the Court noted that in "view of the limited number of available broadcasting frequencies, the Congress has authorized allocation and licenses." In determining how best to allocate frequencies, the Federal Radio Commission considered the needs of competing communities and the programs offered by competing stations to meet those needs; moreover, if needs or programs shifted, the Commission could alter its allocations to reflect those shifts. *Id.*, at 285. In the same vein, in *F. C. C. v. Pottsville Broadcasting Co.*, 309 U. S. 134, 137–138 (1940), the Court noted that the statutory standard was a supple instrument to effect congressional desires "to maintain . . . a grip on the dynamic aspects of radio transmission" and to allay fears that "in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field." Three years later the Court considered the validity of the Commission's chain broadcasting regulations, which among other things forbade stations from devoting too much time to network programs in order that there be suitable opportunity for local programs serving local needs. The Court upheld the regulations, unequivocally recognizing that the Commission was more than a traffic policeman concerned with the technical aspects of broadcasting and that it neither exceeded its powers under the statute nor transgressed the First Amendment in interesting itself in general program format and the kinds of programs broadcast by licensees. *National Broadcasting Co. v. United States*, 319 U. S. 190 (1943).

D.

The litigants embellish their first amendment arguments with the contention that the regulations are so

vague that their duties are impossible to discern. Of this point it is enough to say that, judging the validity of the regulations on their face as they are presented here, we cannot conclude that the FCC has been left a free hand to vindicate its own idiosyncratic conception of the public interest or of the requirements of free speech. Past adjudications by the FCC give added precision to the regulations; there was nothing vague about the FCC's specific ruling in *Red Lion* that Fred Cook should be provided an opportunity to reply. The regulations at issue in *RTNDA* could be employed in precisely the same way as the fairness doctrine was in *Red Lion*. Moreover, the FCC itself has recognized that the applicability of its regulations to situations beyond the scope of past cases may be questionable, 32 Fed. Reg. 10303, 10304 and n. 6, and will not impose sanctions in such cases without warning. We need not approve every aspect of the fairness doctrine to decide these cases, and we will not now pass upon the constitutionality of these regulations by envisioning the most extreme applications conceivable, *United States* v. *Sullivan*, 332 U. S. 689, 694 (1948), but will deal with those problems if and when they arise.

We need not and do not now ratify every past and future decision by the FCC with regard to programming. There is no question here of the Commission's refusal to permit the broadcaster to carry a particular program or to publish his own views; of a discriminatory refusal to require the licensee to broadcast certain views which have been denied access to the airways; of government censorship of a particular program contrary to § 326; or of the official government view dominating public broadcasting. Such questions would raise more serious first amendment issues. But we do hold that the Congress and the Commission do not violate the First Amendment

when they require a radio or television station to give reply time to answer personal attacks and political editorials.

E.

It is argued that even if at one time the lack of available frequencies for all who wished to use them justified the Government's choice of those who would best serve the public interest by acting as proxy for those who would present differing views, or by giving the latter access directly to broadcast facilities, this condition no longer prevails so that continuing control is not justified. To this there are several answers.

Scarcity is not entirely a thing of the past. Advances in technology, such as microwave transmission, have led to more efficient utilization of the frequency spectrum, but uses for that spectrum have also grown apace.[20] Portions of the spectrum must be reserved for vital uses unconnected with human communication, such as radio-navigational aids used by aircraft and vessels. Conflicts have even emerged between such vital functions as defense preparedness and experimentation in methods of averting midair collisions through radio warning devices.[21] "Land mobile services" such as police, ambulance, fire department, public utility, and other communications systems have been occupying an increasingly crowded

[20] Current discussions of the frequency allocation problem appear in Telecommunication Science Panel, Commerce Technical Advisory Board, U. S. Department of Commerce, Electromagnetic Spectrum Utilization—The Silent Crisis (1966); Joint Technical Advisory Comm., Institute of Electrical and Electronics Engineers & Electronic Industries Assn., Radio Spectrum Utilization (1964); Note, The Crisis in Electromagnetic Frequency Spectrum Allocation, 53 Iowa L. Rev. 437 (1967). A recently released study is the Final Report of the President's Task Force on Communications Policy (1968).

[21] *Bendix Aviation Corp.* v. *FCC*, 272 F. 2d 533 (C. A. D. C. Cir. 1959), cert. denied, 361 U. S. 965 (1960).

portion of the frequency spectrum [22] and there are, apart from licensed amateur radio operators' equipment, 5,000,000 transmitters operated on the "citizens' band" which is also increasingly congested.[23] Among the various uses for radio frequency space, including marine, aviation, amateur, military, and common carrier users, there are easily enough claimants to permit use of the whole with an even smaller allocation to broadcast radio and television uses than now exists.

Comparative hearings between competing applicants for broadcast spectrum space are by no means a thing of the past. The radio spectrum has become so congested that at times it has been necessary to suspend new applications.[24] The very high frequency television spectrum is, in the country's major markets, almost entirely occupied, although space reserved for ultra high frequency television transmission, which is a relatively recent development as a commercially viable alternative, has not yet been completely filled.[25]

The rapidity with which technological advances succeed one another to create more efficient use of spectrum space on the one hand, and to create new uses for that space by ever growing numbers of people on the other, make it unwise to speculate on the future allocation of that space. It is enough to say that the resource is one of considerable and growing importance whose scarcity

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[22] 1968 FCC Annual Report 65–69.

[23] New limitations on these users, who can also lay claim to First Amendment protection, were sustained against First Amendment attack with the comment, "Here is truly a situation where if everybody could say anything, many could saying nothing." *Lafayette Radio Electronic Corp.* v. *United States*, 345 F. 2d 278, 281 (1965). Accord, *California Citizens Band Assn.* v. *United States*, 375 F. 2d 43 (C. A. 9th Cir. 1967), cert. denied, 389 U. S. 844 (1967).

[24] *Kessler* v. *FCC*, 326 F. 2d 673 (C. A. D. C. Cir. 1963).

[25] In a table prepared by the FCC on the basis of statistics current as of August 31, 1968, VHF and UHF channels allocated to

impelled its regulation by an agency authorized by Congress. Nothing in this record, or in our own researches, convinces us that the resource is no longer one for which there are more immediate and potential uses than can be accommodated, and for which wise planning is essential.[26] This does not mean, of course, that every possible

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and those available in the top 100 market areas for television are set forth:

COMMERCIAL

Market Areas	*Channels Allocated*		*Channels On the Air, Authorized, or Applied for*		*Available Channels*	
	VHF	UHF	VHF	UHF	VHF	UHF
Top 10.....	40	45	40	44	0	1
Top 50.....	157	163	157	136	0	27
Top 100.....	264	207	264	213	0	84

NONCOMMERCIAL

Market Areas	*Channels Reserved*		*Channels On the Air, Authorized, or Applied for*		*Available Channels*	
	VHF	UHF	VHF	UHF	VHF	UHF
Top 10.....	7	17	7	16	0	1
Top 50.....	21	79	20	47	1	32
Top 100.....	35	138	34	69	1	69

1968 FCC Annual Report 132–135.

[26] RTNDA argues that these regulations should be held invalid for failure of the FCC to make specific findings in the rule-making proceeding relating to these factual questions. Presumably the fairness doctrine and the personal attack decisions themselves, such as *Red Lion*, should fall for the same reason. But this argument ignores the fact that these regulations are no more than the detailed specification of certain consequences of long-standing rules, the need for which was recognized by the Congress on the factual predicate of scarcity made plain in 1927, recognized by this Court in the 1943 *National Broadcasting Co.* case, and reaffirmed by the Congress as recently as 1959. "If the number of radio and television stations were not limited by available frequencies, the committee would have no hesitation in removing completely the present provision

wavelength must be occupied at every hour by some vital use in order to sustain the congressional judgment. The substantial capital investment required for many uses, in addition to the potentiality for confusion and interference inherent in any scheme for continuous kaleidoscopic reallocation of all available space may make this unfeasible. The allocation need not be made at such a breakneck pace that the objectives of the allocation are themselves imperiled.[27]

Even where there are gaps in spectrum utilization, the fact remains that existing broadcasters have often attained their present position because of their initial government selection in competition with others before new technological advances opened new opportunities for further uses. Long experience in broadcasting, confirmed habits of listeners and viewers, network affiliation, and other advantages in program procurement give existing broadcasters a substantial advantage over new entrants, even where new entry is technologically possible. These advantages are the fruit of a preferred position conferred by the Government. Some present possibility for new entry by competing stations is not enough, in itself, to

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regarding equal time and urge the right of each broadcaster to follow his own conscience . . . . However, broadcast frequencies are limited and, therefore, they have been necessarily considered a public trust." S. Rep. No. 562, 86th Cong., 1st Sess., 8–9 (1959). In light of this history, the opportunity which the broadcasters have had to address the FCC and show that somehow the situation had radically changed, undercutting the validity of the congressional judgment, and their failure to adduce any convincing evidence of that in the record here, we cannot consider the absence of more detailed findings below to be determinative.

[27] The "airwaves [need not] be filled at the earliest possible moment in all circumstances, without due regard for these important factors." *Community Broadcasting Co.* v. *FCC*, 274 F. 2d 753, 763 (C. A. D. C. Cir. 1960). Accord, enforcing the fairness doctrine, *Office of Communication of the United Church of Christ* v. *FCC*, 359 F. 2d 994, 1009 (C. A. D. C. Cir. 1966).

render unconstitutional the Government's effort to assure that a broadcaster's programming ranges widely enough to serve the public interest.

In view of the prevalence of scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views, we hold the regulations and ruling at issue here are both authorized by statute and constitutional.[28] The judgment of the Court of Appeals in *Red Lion* is reversed and that in *RTNDA* affirmed and the causes remanded for proceedings consistent with this opinion.

It is so ordered.

Not having heard oral argument in these cases, MR. JUSTICE DOUGLAS took no part in the Court's decision.

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[28] We need not deal with the argument that even if there is no longer a technological scarcity of frequencies limiting the number of broadcasters, there nevertheless is an economic scarcity in the sense that the Commission could or does limit entry to the broadcasting market on economic grounds and license no more stations than the market will support. Hence, it is said, the fairness doctrine or its equivalent is essential to satisfy the claims of those excluded and of the public generally. A related argument, which we also put aside, is that quite apart from scarcity of frequencies, technological or economic, Congress does not abridge freedom of speech or press by legislation directly or indirectly multiplying the voices and views presented to the public through time sharing, fairness doctrines, or other devices which limit or dissipate the power of those who sit astride the channels of communication with the general public. Cf. *Citizens Publishing Co. v. United States*, 393 U. S. — (1969).

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

August 6, 1971

CTW POSITION ON BEM-DNC DECISION

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

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

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

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

August 5, 1971

MEMORANDUM FOR MR. WHITEHEAD

FROM: Antonin Scalia

SUBJECT: BEM & DNC Court of Appeals Decision

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

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

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

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

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

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

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

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

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

Recommended Action:

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

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

January 22, 1972

MEMORANDUM FOR JAMES B. LOKEN

FROM: Antonin Scalia

SUBJECT: FTC Fairness Doctrine Filing

As part of its broad inquiry into the Fairness Doctrine, the Federal Communications Commission (FCC) requested views on the applicability of the Doctrine to product advertisements. The Federal Trade Commission (FTC) took the unusual step of filing in another agency's proceeding to propose a concept of "counter-advertising," which would provide a right of broadcast access for the presentation of views contrary to those raised explicitly and implicitly by product ads.

As stated fully in the attached FTC comments, the right of access would apply against all commercials--somewhat artificially categorized as follows for purposes of the FTC's suggested rules:

(1) Ad claims that explicitly raise controversial issues (e.g., an oil company ad asserting the Alaska pipeline will not harm the environment);

(2) Ads stressing broad, recurring themes in a manner that implicitly raise such issues (e.g., "food ads which may be viewed as encouraging poor nutritional habits");

(3) Ad claims that are supported by scientific premises that are subject to controversy within the "scientific community" (e.g., "a detergent or household cleanser may be advertised as capable of handling different kinds of cleaning problems"); and

(4) Ads that are silent about the negative aspects of the products (e.g., "in response to advertising for some foods, emphasizing various nutritional values and benefits, the public might be informed of the views of some people that consumption of some other food may be a superior source of the same nutritional values and benefits").

The FTC suggests that this right of access be implemented by FCC rules placing an affirmative obligation on broadcast licensees to promote effective use of counter-ads, to provide a right to purchase time for any advertising or counter-ad purpose, and to require "a substantial amount" of free time "for persons and groups that wish to respond" to ads.

By way of background, since 1961 the FTC and the FCC have had a formal liaison agreement dividing agency responsibility for guarding against deceptive broadcast advertising. The FCC requires that, as part of a licensee's responsibility for the content of all material aired over his station, the broadcaster exercise reasonable diligence in preventing the broadcast of deceptive ads. If the ad in question is of local origin, the FCC will take action against the licensee without invoking FTC processes. If the ad is of national origin, the FCC will defer to the FTC's jurisdiction, and in most cases the FTC's sanctions will be imposed on the advertiser and the advertising agency, but not on the broadcaster.

These procedures have not been used to deal with either institutional or product ads that explicitly or implicitly raise controversial issues. Under the Fairness Doctrine, as it has been developed by the FCC and the courts since the early cigarette advertising rulings, broadcasters must provide reasonable opportunity for the presentation of contrasting views when one side of a "controversial issue of public importance" is treated in an ad. In this respect, the FTC's proposal would not change existing practices--although it gives them additional respectability at a time when Dean Burch may be trying to withdraw from them. (Moreover, it may be going further than the present practice in implying that the broadcaster cannot himself meet his fairness obligations in his programming, but must affirmatively seek out advocates for contrasting viewpoints and provide them with air time.)

It is with respect to the two remaining categories of ads (i.e., those involving controversies within the scientific community and those that are silent as to negative aspects) that the FTC goes over the edge. Although acknowledging that any advertiser who falsely implies that a scientific claim is well-established would probably be guilty of deceptive advertising and hence reachable by ordinary FTC procedures, the FTC asserts that counter-ads are a "more effective" means of dealing with the problem. Likewise with respect to the advertiser's failure to disclose "negative aspects" of his product: It is "more efficient and more effective" to have the FCC deal with these deceptions through compulsory counter-advertising. In effect, the FTC is saying that the FCC, through

its oversight of broadcast content, is better able to achieve the regulatory goals that the FTC was established to serve. No doubt. The FCC holds the very existence of the broadcaster in its hands, and can achieve compliance with its wishes by the mere raising of an eyebrow. The FTC, on the other hand, is constrained by all sorts of inconvenient procedural "safeguards" when it seeks to take action against the deceptive practices declared unlawful. (The Justice Department has the same problem--and seeks the same solution: Do it through the FCC.)

What is most upsetting about the FTC filing, however, is not its understandable abdication of the difficult responsibility to make factual determinations concerning deception. Rather, it is what I would describe as the dilettantish nature and irresponsible flavor of its specific proposals, in the best Ralph Nader-Tracy Westen tradition. To appreciate this, you must read the Statement itself. Although acknowledging that the FCC "does not possess the expertise to speak definitively on this point," the Statement concludes, in less than three pages and with no hard substantiation of the point, that the proposals "are workable"--as though this were a minor detail. But the true spirit of utter obliviousness to practicality can best be derived from page 18, where, after listing five examples of situations in which counter-ads could be required to point up "negative aspects" of advertised products--examples related to products which alone account for about 40% of all TV advertising--the Statement confidently asserts that "the list of examples could go on indefinitely." It apparently did not occur to the FTC that that is precisely the problem. The same devil-may-care attitude was displayed by Mr. Pitofsky (FTC Director of Consumer Protection) in his response to press inquiry concerning who would establish the validity of the counter-ads, which might of course be produced by irresponsible and uninformed groups (Quis custodiet custodes?): As though this were a novel problem not completely thought through, he replied that the FTC "might" have to monitor them to be sure they did not involve false or deceptive statements--although this could become "ticklish," since there might be a First Amendment problem involved. Indeed.

It is possible that the FTC's proposals would devastate the broadcasting and advertising industries--without even having the welcome effect of reducing the number of TV ads, but on the contrary increasing them by some indeterminate factor. In my view, however, the real damage that has been done by the filing consists not in the creation of any substantial possibility that the proposals will be adopted--for they have been put forward before by various groups, and the FCC is

not receptive to them. The damage rather consists of the association of this Administration ("the Republican FTC") with a scheme that is viewed as not merely harmful, but downright irresponsible, by broadcasters and major advertisers. Even if there is virtually no possibility that the proposals will be adopted, it is embarrassing to the President to be indirectly associated with them, and we should make as much of an effort as possible to disclaim any connection.

As to the most appropriate means of achieving this: Neither an OTP filing in the Fairness Doctrine docket, nor a formal letter from Tom to Dean Burch seems appropriate. Both of these devices serve to give added stature to the FTC proposals. Moreover, using such procedures for a matter of this substantive triviality will diminish their effectiveness on future occasions. Unless we are willing to tell the FCC what it should do, I do not think we should debase the filing or formal-letter procedures by using them merely to criticize one possible alternative.

One feasible approach might be a letter from Tom to Miles Kirkpatrick, expressing the Administration's concern about the effects of the FTC proposal, and asking the Commission to reconsider its position. It is unlikely that this would achieve any reconsideration, but it would certainly separate us from the FTC in the clearest possible fashion. Another approach might be a planted question at Tom's appearance before the Ervin Committee on February 2. That would certainly achieve visibility, but the subject matter is really not of the same cloth as the broad First Amendment problems the Committee is considering. Finally, there is the possibility of Tom's making a detailed criticism of the FTC proposal in a major speech. He has a speech scheduled for the middle of next month which would be an appropriate occasion.

As soon as you have had a chance to digest this memorandum, I would like to discuss the various alternatives with you. Please give me a call when you are ready.

Attachment

January 18, 1972

MEMORANDUM FOR MR. PETER FLANIGAN

Senator Sam J. Ervin, Jr., Chairman of the Senate Subcommittee on Constitutional Rights has invited me to testify before his Subcommittee on Wednesday morning, February 2, 1972. Senator Ervin has asked me for my views on "the Administration's policy toward the public broadcasting system" and the potential of cable television and its possible impact on first amendment considerations

As I am sure you will remember, Senator Ervin began his hearings on the broadcast and printed press and their relationship to the first amendment last October. During the first set of hearings, which received considerable public attention, the following testified: Dean Burch and Nicholas Johnson, Frank Stanton and Walter Cronkite, Julian Goodman and David Brinkley, Fred Friendly, Congressman Ogden Reid, a representative of the New York Times, two working journalists from Nebraska, broadcasting representatives from North Carolina, and various professors who discussed both the history of the first amendment and the Fairness Doctrine as it now relates to the broadcasting industry. Senator Ervin has asked several members of the White House staff to testify including Herb Klein, Fred Malek, and Chuck Colson. All have declined invoking executive privilege. RNC Chairman, Dole, was asked and declined. Attorney General, John Mitchell, declined but suggested the Committee hear from Assistant Attorney General, William Rehnquist. Ervin turned him down as not being sufficiently authoritative.

I have discussed this request with Clark MacGregor's office. They find no objection and feel it would be difficult to turn them down because it's not possible for me to invoke executive privilege. I have been assured by Senator Hruska's staff that both Senator Ervin and Senator Hruska do not expect, and will not ask, me to answer questions concerning the several instances regarding this Administration and freedom of the press. If we accept Senator Ervin's invitation, it will be necessary for us to sort out within the White House our position on the Fairness Doctrine, but I think that this is important and now would be a good time.

Clay T. Whitehead

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Tom's prepared statement before the 2/2/72 Ervin Committee does NOT address the Fairness Doctrine

STATEMENT BY

CLAY T. WHITEHEAD, DIRECTOR

OFFICE OF TELECOMMUNICATIONS POLICY

before the

Subcommittee on Constitutional Rights
The Honorable Sam J. Ervin, Chairman
Committee on the Judiciary
United States Senate

February 2, 1972

I am pleased to have this opportunity to appear before you today, to discuss some aspects of the First Amendment which it is an important concern of my Office to protect. I wish to address my remarks specifically to the First Amendment implications of the two most significant innovations in our mass communications system during the past decade.

The first of these is cable television. Coaxial cable and related technologies enable large numbers of electronic signals--television signals included--to be carried directly into the home by wire rather than being broadcast over the air. There is no particular limitation on the number of signals which can be provided; systems now being constructed typically have the capacity to carry about 20 television channels, and can be readily expanded to 40.

The original use for this technology was "CATV," or Community Antenna Television. As its name implies, that involved no more than the use of cable to carry broadcast signals picked up by a high master antenna into homes in areas where reception was difficult. In recent years, however, use of the technology has progressed far beyond that. Many cable systems now use microwave relay systems to import television signals from far distant cities. Some originate programming of their own, and make unused channels available to private individuals, organizations, schools, and municipal agencies. Looking into the future, cable technology has the potential to bring into the home communications services other than television--for example, accounting and library services,

remote medical diagnoses, access to computers, and perhaps even instantaneous facsimile reproduction of news and other printed material. But I wish to focus upon the immediate consequences of cable, and in particular its impact upon mass communications.

I do not have to belabor the point that the provision of 20 to 40 television channels where once there were only four or five drastically alters the character of the medium. It converts a medium of scarcity into a medium of abundance. As this Subcommittee is aware from earlier testimony, one of the most severe problems which must be faced by broadcasters today is the allocation of limited broadcasting time--allocation among various types of programming, and allocation among the many groups and individuals who demand time for their point of view. Cable, if it becomes widespread, may well change that by making the capacity of television, like that of the print media, indefinitely expandable, subject only to the economics of supply and demand.

Of course the new medium also brings its own problems, several of which are immediately related to First Amendment concerns. Economic realities make it very unlikely that any particular community will have more than a single cable system. Unless some structural safeguard or regulatory prohibition is established, we may find a single individual or corporation sitting astride the major means of mass communication in many areas.

The second aspect of this new technology which bears on the First Amendment is, to my mind, the more profound and fundamental, because it forces us to question not only where we are going in the future, but also where we have been in the past. That aspect consists of this: the basic premises which we have used to reconcile broadcasting regulation with the First Amendment do not apply to cable.

In earlier sessions of these hearings, this Subcommittee has heard three principal justifications for Government intrusion into the programming of broadcast communications: The first is the fact of Government licensing, justified by the need to prevent interference between broadcast signals. But with cable, there is nothing broadcast over the air, no possibility of interference, and hence no unavoidable need for Federal licensing. The second is "the public's ownership of the air waves" which the broadcaster uses. But cable does not use the air waves. The third is the physical limitation upon the number of channels which can be broadcast in any area--meaning that there is oligopoly control over the electronic mass media, in effect conferred by Federal license. But the number of feasible cable channels far exceeds the anticipated demand for use, and there are various ways of dispersing any monopoly control over what is programmed on cable channels.

In other words, cable television is now confronting our society with the embarrassing question: Are the reasons we have given in the past forty-odd years for denying to the

broadcast media the same First Amendment freedom enjoyed by the print media really reasons--or only rationalizations. Why is it that we now require (as we in effect do) that each radio and television station present certain types of programming--news, religion, minority interest, agriculture, public affairs? Why is it that our courts repeatedly intervene to decide, or require the FCC to decide, what issues are controversial, how many sides of those controversies exist, and what "balance" should be required in their presentation? Is it really because the detailed governmental imposition of such requirements is made unavoidable by oligopoly control of media content or by the need to decide who is a responsible licensee? Or is it rather that we have, as a society, made the determination that such requirements are good and therefore should be imposed by the Government whenever it has a pretext to do so? And if it is the latter, is this remotely in accord with the principle of the First Amendment, which (within the limitation of laws against obscenity, libel, deception, and criminal incitement) forbids the Government from determining what it is "good" and "not good" to say?

This stark question is inescapably posed by cable technology. The manner in which we choose to regulate cable systems and the content of cable programming will place us squarely on one or the other side of this issue. Perhaps the First Amendment was ill conceived. Or perhaps it was designed for a simpler society in which the power of mass media was not as immense as it is today. Or perhaps the

First Amendment remains sound and means the same thing now as it did then. The answer to how we as a nation feel on these points will be framed as we establish the structure within which cable television will grow.

Because the President realizes that such fundamental issues are involved, he has determined that the desirable regulatory structure for the new technology deserves the closest and most conscientious consideration of the public and the executive and legislative branches of Government. For this reason, he established last June a Cabinet-level committee to examine the entire question and to develop various options for his consideration. Not surprisingly, in view of the magnitude and importance of the subject, the work of the committee is not yet completed. I assure you, however, that First Amendment concerns such as those I have been discussing are prominent in our deliberations--as I hope they will be prominent in yours when the Congress ultimately considers this issue.

I now wish to turn to what I consider the second major innovation in our mass communications system during the past decade--the establishment of a Corporation for Public Broadcasting, supported by Federal funds. The ideals sought by this enterprise are best expressed in the following excerpt from the Report of the Carnegie Commission on Educational Television.

> "If we were to sum up our proposal with all the brevity at our command, we would say that what we recommend is freedom. We seek freedom from the constraints, however necessary in their context, of commercial television. We seek for educational television freedom from the pressures of inadequate funds. We seek for the artist, the technician, the journalist, the scholar, and the public servant freedom to create, freedom to innovate, freedom to be heard in this most far-reaching medium. We seek for the citizen freedom to view, to see programs that the present system, by its incompleteness, denies him."

In addition to this promise, public television also holds some dangers, as was well recognized when it was established. I think most Americans would agree that it would be dangerous for the Government itself to get into the business of running a broadcasting network. One might almost say that the free-speech clause of the First Amendment has an implicit "non-establishment" provision similar to the express "nonestablishment" restriction in the free-exercise-of-religion clause. Just as free exercise of religion is rendered more difficult when there is a state church, so also the full fruits of free speech cannot be harvested when the Government establishes its own mass communications network. Obvious considerations such as these caused Federal support of public broadcasting to be fashioned in such a way as to insulate the system as far as possible from Government interference.

The concern went, however, even further than this. Not only was there an intent to prevent the establishment of a Federal broadcasting system, but there was also a desire to avoid the creation of a large, centralized broadcasting system financed by Federal funds--that is, the Federal "establishment"

of a particular network. The Public Broadcasting Act of 1967, like the Carnegie Commission Report which gave it birth, envisioned a system founded upon the "bedrock of localism," the purpose of the national organization being to serve the needs of the individual local units. Thus it was that the national instrumentality created by the Act--the Corporation for Public Broadcasting--was specifically excluded from producing any programs or owning any interconnection (or network) facilities.

Noncommercial radio has been with us for over 50 years and noncommercial television for 20. They have made an important contribution to the broader use of communications technology for the benefit of all. The new Corporation for Public Broadcasting has, for the most part, made a good start in expanding the quantity and quality of programming available to local noncommercial broadcasting stations. There remain important questions about the most desirable allocation of the Corporation's funds among educational, instructional, artistic, entertainment, and public affairs programming. But most importantly, from the First Amendment standpoint, there remains a question as to how successful the Corporation has been in avoiding the pitfalls of centralization and thereby of Government "establishment." Now that we have a few years' experience under this new system, we see a strong tendency--understandable but nonetheless regrettable--towards a centralization of practical power and authority over all the programming developed and distributed with

Federal funds. Although the Corporation for Public Broadcasting owns no interconnection facilities, which the Act forbids, it funds entirely another organization which does so. Although it produces no programs itself, which the Act forbids, the vast majority of the funds it receives are disbursed in grants to a relatively few "production centers" for such programs as the Corporation itself deems desirable--which are then distributed over the Corporation's wholly funded network. We have in fact witnessed the development of precisely that which the Congress sought to avoid--a "Fourth Network" patterned after the BBC.

There is, moreover, an increasing tendency on the part of the Corporation to concentrate on precisely those areas of programming in which the objection to "establishment" is strongest, and in which the danger of provoking control through the political process is most clear. No citizen who feels strongly about one or another side of a matter of current public controversy enjoys watching the other side presented; but he enjoys it a good deal less when it is presented at his expense. His outrage--quite properly--is expressed to, and then through, his elected representatives who have voted his money for that purpose. And the result is an unfortunate, but nonetheless inevitable, politicization and distortion of an enterprise which should be above faction and controversy.

Many argue that centralization is necessary to achieve efficiency, but I think it is demonstrable that it does not make for efficiency in the attainment of the objectives for

which public broadcasting was established. For those objectives are variety and diversity--almost inherently antithetical to unified control. To choose for public broadcasting the goal of becoming the "Fourth Network" is to choose for it the means which have brought success to the first three--notably, showmanship and appeal to mass tastes. This is not to say that there should be no nationally produced programming for public television. Some types of programming not offered on commercial television require special talent, unique facilities, or extensive funds that can only be provided at the national level; it is the proper role of the Corporation to coordinate and help fund such programming. But both for reasons of efficiency and for the policy reasons I have discussed above, the focus of the system must remain upon the local stations, and its object must be to meet their needs and desires.

The First Amendment is not an isolated phenomenon within our social framework, but rather one facet of a more general concern which runs throughout. For want of a more descriptive term we might describe it as an openness to diversity. Another manifestation of the same fundamental principle within the Constitution itself is the very structure of the Nation which it established--not a monolithic whole, but a federation of separate states, each with the ability to adopt divergent laws governing the vast majority of its citizens' daily activities. This same ideal of variety and diversity has been apparent in some of the most enduring legislation enacted under the Federal

Constitution. Among the most notable was the Communications Act of 1934. Unlike the centralized broadcasting systems of other nations, such as France and England, the heart of the American system was to be the local station, serving the needs and interests of its local community--and managed, not according to the uniform dictates of a central bureaucracy, but according to the diverse judgments of separate individuals and companies.

In 1967, when Congress enacted the Public Broadcasting Act, it did not abandon the ideal and discard the noble experiment of a broadcasting system based upon the local stations and ordinated towards diversity. That would indeed have been a contradictory course, for the whole purpose of public broadcasting was to increase, rather than diminish, variety. It is the hope and objective of this Administration to recall us to the original purposes of the Act. I think it no exaggeration to say that in doing so we are following the spirit of the Constitution itself.

THE WHITE HOUSE
WASHINGTON

Date: 10/11/72

TO: Tom Whitehead

FROM: CHARLES W. COLSON

For your information xx

Tom Whitehead – this is why I like the fairness doctrine – MK

UPI-09

(FAIRNESS DOCTRINE)

LOS ANGELES--JULIAN GOODMAN, PRESIDENT OF THE NATIONAL BROADCASTING CO., TODAY CALLED FOR ELIMINATION OF THE FAIRNESS DOCTRINE, SAYING IT COULD CONTAMINATE FUTURE SYSTEMS OF ELECTRONIC COMMUNICATIONS.

"THE WALL THAT SHOULD ALWAY STAND BETWEEN GOVERNMENT AND JOURNALISM HAS BEEN BREACHED," GOODMAN TOLD A UNIVERSITY OF SOUTHERN CALIFORNIA FORUM. "AS A RESULT WE HAVE REGULATED BROADCAST NEWS, GOVERNMENT-CONTROLLED BROADCAST INFORMATION."

GOODMAN SAID THE FAIRNESS DOCTRINE -- THE PRESENTATION OF SIGNIFICANT CONTRASTING VIEWS ON CONTROVERSIAL ISSUES -- WAS A PROPER JOURNALISTIC STANDARD, FOLLOWED BY RESPONSIBLE JOURNALISTS IN BROADCASTING AND PRINT.

"BUT WHEN IT BECOMES A GOVERNMENT STANDARD, IT MOVES GOVERNMENT OFFICIALS INTO NEWSROOMS AND SEATS THEM AS JUDGES OF HOW BROADCAST NEWS AND INFORMATION SHOULD BE PRESENTED," GOODMAN SAID.

GOODMAN, NOTING THE FEDERAL COMMUNICATIONS COMMISSION WAS CONSIDERING DE-REGULATION OF RADIO, SAID, "IF THE FAIRNESS DOCTRINE AND ITS RELATED RESTRICTIONS WERE ELIMINATED AS PART OF THIS UPDATING OF REGULATION, WE MIGHT MOVE ON TO TELEVISION.

10/11--GE130P

Media Chic

Presidential Television. By Newton N. Minow, John Bartlow Martin & Lee M. Mitchell. *New York: Basic Books, Inc.,* 1973. Pp. xv, 232. $8.95.

Reviewed by Clay T. Whitehead†

Within a relatively short time television has grown from insignificance to nearly total pervasiveness. Since the early 1950's we have become accustomed to this new medium, using it more hours each day[1] and increasingly relying upon it for advertising, entertainment, news, and political debate. Not surprisingly, the new medium and Presidents have found over the years a mutual attraction. Presidents need television to reach the electorate, and the TV medium finds presidential words and actions great "copy" (to stretch only slightly the newspaper term).

Presidential Television[2] documents the steadily expanding use of television by incumbent American Presidents. Following an analysis of the political implications and potential dangers of this phenomenon, the authors reach what seems to be the main point of the book: a series of proposals aimed at mandating an approximate equality of simultaneous television network time among the President, the Congress, and the party in opposition to the President.

The authors point out that the concern of the Framers of the Constitution was not that the President would become too powerful, but that he would not be noticed at all among the numerous members of Congress, whose personal constituencies would make them more powerful as a group.[3] Today, the authors maintain, the President has confounded the Framers' predictions by becoming the most visible, and therefore most powerful, politician in the country. They set out

† Director, Office of Telecommunications Policy, The Executive Office of the President, Washington, D.C. The author wishes to acknowledge the assistance of William Adams.

1. Total television viewing per home has been estimated to have reached 6 hours, 20 minutes per day in the over 60 million homes in the United States having television receivers. BROADCASTING MAG., BROADCASTING YEARBOOK 12 (1974).

2. N. MINOW, J. MARTIN & L. MITCHELL, PRESIDENTIAL TELEVISION (1973) [hereinafter cited to page number only].

3. Pp. 102-03, *citing* THE FEDERALIST No. 73 (Hamilton sees a natural tendency of legislative authority to "intrude upon the rights and absorb the powers of the other departments").

to show that it is largely because of the visibility resulting from his frequent use and masterful manipulation of television that he outshines the Congress and the courts and leaves his opposition far behind.

The proposals advanced by the authors aim at correcting this situation, as they perceive it, by "balancing" presidential use of television in four ways: (1) simultaneously broadcasting live on all television networks during prime time at least four evening congressional sessions each year; (2) granting to the national committee of the largest political party opposing the President an automatic legal right of reply to presidential addresses during an election year and near the time of off-year congressional elections, under the same conditions of coverage that the President enjoyed; (3) televising voluntary debates between spokesmen of the two major parties two to four times annually; and (4) providing free time simultaneously on the three networks to all presidential candidates according to a formula giving equal time to the major party candidates and lesser amounts of time to minor candidates.[4] The authors recommend that the equal time provision[5] and the Fairness Doctrine not be applied to these broadcasts, in order to avoid legal challenges and to prevent the President from demanding more time to reply to them.[6]

I

Unfortunately, the authors confuse the causes and the effects of the phenomenon they call "presidential television." Because they deal almost exclusively with effects, their recommendations, and especially their proposed changes in communications law, smack of tinkering and manipulation rather than the redress of constitutional imbalances. The authors blame the President's frequent television appearances for what they consider his undue power over public opinion in comparison with that of Congress and the opposition party. This conclusion is inaccurate in two respects. First, the present authority and prominence of the presidency result not from television but from the historical growth of the involvement of the federal government, and thus of the

4. This last proposal was earlier developed in THE TWENTIETH CENTURY FUND COMM'N ON CAMPAIGN COSTS IN THE ELECTRONIC ERA, VOTERS' TIME (1969). This review will not discuss the proposals developed originally in that study. The authors also recommend that to preserve its judicial integrity, the Supreme Court should continue to avoid television coverage, while taking some steps to improve general press coverage of its functioning. Pp. 92-102.

5. 47 U.S.C. § 315 (1970).

6. For a summary of the authors' proposals, see pp. 161-63.

Executive, in national and international affairs.[7] Second, the President does not have control over the total amount and nature of his coverage on television, and there is no assurance that he will benefit from the exposure he does receive.

As the nation and the federal government both grew, so also did the power of the presidency. For the first 160 years of our constitutional history, this growth was unaided by television. By the dawn of the era of presidential television in 1947, when President Truman made an address from the White House to launch the Food Conservation Program,[8] the fears of the Framers that the President would be an obscure and unnoticed figure had long been put to rest.

Because of the inherent nature of the office, a Chief Executive is able to supervise or control detailed administrative matters and to act quickly and decisively in circumstances where the pace of national and international events is too rapid for the more contemplative Congress. In both situations, the pragmatic approach of Congress has been to delegate increasing authority to the President in order to allow effective action. Congress has also deliberately accepted certain methods of conducting business which allow the President to set much of its agenda; a large portion of the congressional year is devoted to consideration of the President's budget and legislative proposals. Congress has an even lesser role in international relations, where the President has a constitutional primacy.[9] Not surprisingly, much of the coverage of the President on national television has focused on foreign affairs.[10]

The coverage of the President in all the mass media, including television, reflects his importance, prestige, and newsworthiness in national and foreign affairs. The President's central role is evidenced by the fact that he regularly gets headline coverage in the more than 60 million newspaper copies printed daily in the United States,[11] as

7. The authors almost entirely ignore these factors in their concern with television. There are only occasional, brief admissions that other factors even exist. "Because he can act while his adversaries can only talk, because he can make news and draw attention to himself, and because he is the only leader elected by all the people, an incumbent president always has had an edge over his opposition in persuading public opinion. Presidential television, however, has enormously increased that edge." Pp. 10-11. "Presidential power has expanded because of the growth in national involvement in foreign affairs, because of the increasing role of the federal government in national life, especially in social services, and because television has given the president more access than Congress to the public." P. 103. Even in these statements, however, television is still portrayed as the most significant factor.

8. P. 33.

9. *See, e.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

10. For one illustration that coverage is predominantly on foreign affairs, *see* note 14 *infra*. In addition, there has been extensive coverage of presidential actions in areas where Congress has delegated authority to the President, for example, wage and price regulation during the Nixon Administration.

11. U.S. DEP'T OF COMMERCE, POCKET DATA BOOK 296 (1973).

well as extensive coverage in the national news and opinion magazines. The authors recognize the fact that "[a]lmost anything the President does is news."[12] If "the modern trend in American government is towards an increasingly powerful president and an increasingly weak Congress,"[13] then television, like the other mass media, has only reflected that trend.

Furthermore, there is no evidence that the President's use of television confers any kind of political omnipotence. The political and social forces in this country are sufficiently diffuse to prevent presidential control of public opinion, and therefore, despite his use of television, the President may be defeated on unpopular policies and programs. For example, most of President Nixon's first term television addresses dealt with his Vietnam policies, which nevertheless remained less popular than most of his other domestic and foreign policies.[14] More powerful countervailing forces were acting concurrently to diminish any television advantage that the President might have enjoyed.

Despite the significant amount of attention he gets, the President does not control television coverage. He is covered by the networks and local stations at the discretion of their own independent news departments, and has no right to demand television time.[15] Furthermore, congressmen and other public figures frequently appear on television, and the views and activities of the President's opponents are regularly reported. In fact, if all programming is considered, senators and representatives appear on television much more frequently than the President.[16]

12. By virtue of his office, the President of the United States—its constitutional leader, supreme military commander, chief diplomat and administrator, and preeminent social host—obviously ranks higher in the scale of newsworthiness than anyone else—defeated opposition candidate, national party chairman, governor, congressman, senator.

. . . .

A presidential press conference is clearly news. So is his television address; a report of it will be on page 1 in tomorrow's newspapers. A presidential speech broadcast only on radio will be reported in the television news.

P. 21.

13. P. 103.

14. As of April 30, 1972, President Nixon had preempted network programming a total of 19 times to make addresses to the nation. Ten of these addresses, more than half, dealt with Vietnam or Southeast Asia policy. This subject, to which he devoted by far the most attention, never received as much public support as the authors' notion of the power of presidential television might predict.

15. At times, the President has had to bargain with the networks for a desired television time spot. The authors relate that an Eisenhower speech on the Quemoy-Matsu crisis was delayed until after prime time, while President Kennedy had to postpone a speech designed to prevent racial violence at the University of Mississippi from 8:00 p.m. to 10:00 p.m. (by which time rioting had already started). P. 35.

16. In 1973 alone:

[W]ell over 150 different Congressional spokesmen appeared on the NBC Television Network in more than 1,000 separate appearances of varying lengths. By contrast,

Even if the television news departments of the three national networks failed to provide such extensive coverage of Congress, and the local TV stations on their own news shows did not cover their local senators and representatives, the Federal Communications Commission's (FCC's) Fairness Doctrine would provide a regulatory check on presidential television.[17] In 1970, the FCC recognized that the large number of presidential addresses presented an unusual situation triggering television fairness obligations even when all other programming was nearly balanced.[18]

The impression left by the authors overstates the President's television advantage over Congress and the opposition party. If television under proper circumstances can be an electronic throne for the President, it can also be an electronic booby trap awaiting a chance slip or slur in an offhand remark, thereby causing an explosion of indignation or outrage and a consequent drop in the public opinion polls.

No President has been uniformly effective in his television appearances.[19] It is perhaps the unique intimacy conveyed by television that is responsible for its capacity to betray both the serious and the super-

the President appeared approximately 148 times (of which about 20% were ceremonial occasions).

J. Goodman, President of NBC, Statement Before the Jt. Comm. on Cong. Operations, Mar. 7, 1974, at 4 (hearings to be published).

The *CBS Evening News* broadcast six nights a week to 18 million people a night included 222 interviews with or appearances by members of Congress from June 1, 1973, to last week [the week prior to Feb. 21, 1974] . . . . In addition there were hundreds of other reports of Congressional activity on the *CBS Evening News* during that period.

. . . .

In 1973, for example, there were 31 appearances by members of Congress on *Face the Nation* alone.

A. Taylor, President of CBS, Statement Before the Jt. Comm. on Cong. Operations, Feb. 21, 1974, at 2 (hearings to be published). Since June 1973, CBS has also implemented a more expansive reply policy for leading opposition figures to reply to presidential messages. *Id.* at 5.

17. The statutory basis for the Fairness Doctrine is the Communications Act, 47 U.S.C. § 315 (1970), but in reality the doctrine is an administrative concept grounded in the "public interest" standard governing broadcast regulation. 47 U.S.C. § 309 (1970). The doctrine requires that if a broadcaster gives time to present one side of a "controversial issue of public importance," he must provide a reasonable opportunity for the presentation of conflicting viewpoints. He must provide free time if paid sponsors are not available. There is no "equal time" requirement, and the broadcaster determines what time will be provided for the reply, the format to be used, and who the spokesmen for the other side will be. No individual or group has a right to time under the Fairness Doctrine, which is concerned only with the presentation of issues. *See, e.g.*, Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10415 (1964); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (Fairness Doctrine held constitutional).

It should be noted that this reviewer recommends abolition of the Fairness Doctrine because of the opportunities it creates for bureaucratic and political second-guessing of editorial judgments.

18. Committee for the Fair Broadcasting of Controversial Issues, 19 P & F RADIO REG. 2D 1103 (1970).

19. *See, e.g.*, pp. 37, 40, 47, 48, 50-54, 58.

ficial weaknesses of a politician. The authors attribute the fall of Senator Joseph McCarthy in the mid-1950's to this effect.[20] On a more subtle level the authors suggest that President Johnson's continued inability to use television to bridge what became known as his credibility gap marked his failure to win support for his Vietnam policies and caused his political power to wane.[21] Perhaps this was also due to extensive television coverage of the application and effects of those policies.

Finally, having more to lose than to gain, an incumbent President nearing election time may choose to avoid the risks of television appearances in the hope that his opponent will be discredited and undermined by using television.[22] Such a practice is wholly inconsistent with the authors' notion of television's invariably favorable influence on public opinion and political forces.

II

The authors' first proposal for ending the imbalance in television exposure is that Congress should permit television "on the floor of the House and Senate for the broadcast of specially scheduled prime-time evening sessions . . . ."[23] At least four times per year, these are to be carried live by the three major networks simultaneously. "These broadcasts should be exempt from the 'equal time' law and the fairness and political party doctrines."[24] Staging special evening sessions for television coverage appears well within the power of Congress and, at least at the outset, sufficiently interesting to warrant the three-network, simultaneous, prime-time coverage the authors seek to achieve.[25] But the wisdom and propriety of such a congressional maneuver simply to counteract the President's use of television is doubtful.

20. P. 107.
21. *See* p. 47.
22. *See, e.g.*, p. 58.
23. Pp. 122, 161.
24. Pp. 124, 161. The Fairness Doctrine is discussed in note 17 *supra*. The "equal opportunities" provision, 47 U.S.C. § 315 (1970), applies only to actual candidates during an election campaign. The political party doctrine, a creation of FCC case law, provides that if one major party is given or sold time to discuss candidates or election issues, the other party must be given, or allowed to buy, time (but not necessarily equal time). Pp. 87-89.
25. Prime time is defined as the peak television viewing hours for evening entertainment, generally 7:00-11:00 p.m. It is interesting to note that the only hour which is prime time for the entire nation is 10:00-11:00 p.m., eastern time. The suggested live sessions would have to begin late in the evening in Washington, D.C., to reach west coast viewers during prime time.

While discussing ways to give Congress access to the media, the authors never really address the question of *how* congressional television will counteract presidential television, and their conclusion that "Congress needs television"[26] is therefore without force. Since Congress is by nature pluralistic, many of the recent attempts of its members to present unified fronts have necessarily expressed only the least common denominator of their views and thus those efforts have lacked the impact of a singly-spoken presidential statement.[27] It is hard to see how the prime-time congressional specials could be much better, unless carefully staged by the majority party leaders; yet if the specials were actually staged, both viewers and news commentators might see them as contrived performances. These special congressional sessions are therefore unlikely to improve significantly the image of Congress or provide an effective means of expressing opposition to the President.

In practice, it is doubtful that this proposal would result in the long-run balance to presidential television the authors seek. More often than not, Congress and the White House have been held by the same party, a situation that could give even greater exposure to the President's position and put the opposition party at a more serious television disadvantage when it is perhaps most dangerous to do so.

The authors also suggest that the congressional coverage under their proposal be exempt from the Fairness Doctrine. If the President and the congressional majority were of the same party, the President's opponents would not be represented by the televised congressional sessions, and they would lose the opportunity under the Fairness Doctrine to have these programs balanced by presentation of conflicting views.[28] Moreover, if a broadcaster in this situation voluntarily attemped to balance the exempt congressional coverage by giving time to opponents of the President, there would be a danger that supporters of the President's policies might try to apply the Fairness Doctrine to this nonexempt coverage, forcing the broadcaster to give still more time to the presidential position.

Furthermore, this proposal seems to require the networks to broad-

26. P. 121.

27. Pp. 125, 130. In describing the attempts of Democratic party leaders to present opposition to President Nixon's Vietnam policy, the authors observe that the "quest for a consensus resulted in a watered-down response that George Reedy, President Johnson's former press secretary, said 'sounds like yapping' to most television viewers." P. 130. The authors also observe that the diversity within Congress creates severe limitations on its ability to rebut presidential television. P. 121.

28. *See* p. 1755 *supra*.

cast these congressional sessions. This raises the specter of government compelling its own coverage, a dangerous precedent. Currently, one of the checks on the political use of television is that the President and Congress can only request time, and the networks can therefore negotiate over the time of day and amount of time given.[29] This protection would be removed if either the President or Congress were permitted to demand television time.

The authors have not given sufficient weight to First Amendment interests in their proposal to broadcast congressional sessions. A better solution, if Congress wishes to be more accessible to all of the media,[30] would be to permit journalists to cover whatever congressional activities they consider newsworthy by means of print, radio, or television. Adequate television coverage of Congress could best be encouraged through improvement of congressional procedures. One proposal is to institute several reforms, including restructuring committees to remove overlapping jurisdictions, developing a more efficient method for reviewing the President's budget proposals, and coordinating the actions of the House and Senate, in the hope that such reforms would increase the visibility of Congress and make it easier for the press to cover congressional activities.[31] Constructive proposals of this nature might profitably be undertaken before Congress schedules its debut on live, prime-time television.

When Congress does something newsworthy, it invariably receives broad coverage. All that Congress needs to do is open its doors, if it decides that the public needs "congressional television." Journalists should be left to take care of the rest. Congress has no need to demand or legislatively require television coverage.

29. *See, e.g.*, note 15 *supra*.

30. C. Edward Little, President of the Mutual Broadcasting System, points out that in 1972 congressional committees conducted 40 percent of hearings and other meetings behind closed doors. He notes encouragingly, however, that the trend towards closed meetings is being partially reversed in recent months. C. Little, Statement Before the Jt. Comm. on Cong. Operations, Feb. 21, 1974 (hearings to be published), *citing* 28 CONG. Q. ALMANAC 93 (1972).

31. Rep. J. Cleveland, Statement Before the Jt. Comm. on Cong. Operations, Feb. 20, 1974, at 5 (hearings to be published).

> But the final passage of a bill or a successful investigation are only parts of the legislative drama. The rest of the performance must also be comprehensible—both to achieve quality and to communicate effectively.
>
> . . . .
>
> Reform can achieve this objective. The restructuring of committees, for example, can reduce overlapping jurisdictions, clarify responsibility, improve oversight, and encourage more rational planning—all of which would heighten the visibility of committee work and make it more accessible to the media, as well as produce a higher quality legislative product.

III

The next major proposal the authors develop is that:

> [T]he national committee of the opposition party should be given by law an automatic right of response to any presidential radio or television address made during the ten months preceding a presidential election or within 90 days preceding a Congressional election in nonpresidential years.[32]

Suggesting amendment of § 315 of the Communications Act of 1934,[33] the authors propose that every broadcaster or cablecaster who carries a presidential appearance within the expanded response period provide "equal opportunities to the national committee of the political party whose nominee for President received the second highest number of . . . votes"[34] in the most recent presidential election. The equal opportunities and fairness provisions are to be suspended for this reply by the opposition.[35] The purpose of this proposal is "to insure equality in the electoral use of television."[36]

If such a proposal were implemented, the result would be the replacement of editorial judgment in campaign coverage by a mechanical rule. It is no doubt true that fairness and objectivity are often lacking in network coverage of political parties and candidates. It seems more likely, however, that even with the limited diversity of only three networks, day-to-day news selection based on a reasoned, professional judgment is superior to the mechanical application of a law which forces broadcasters automatically to present spokesmen selected by the opposition party.

One need not peer far into the past to find examples of the potential mischievousness of such a law. When President Johnson was pursuing his Vietnam policies, most of the effective opposition was in his own party, while Republicans were generally less critical of the war. Since the proposed law would not limit the other party to the issues discussed by the President, the Republicans could have eschewed any discussion of the war and instead attacked the President on some unrelated and perhaps less important issue. Ultimately, the war would have been opposed less effectively by the President's real opposition in the time remaining to the networks for coverage of other news topics.

32. P. 161.
33. 47 U.S.C. § 315 (1970).
34. P. 161.
35. P. 162.
36. P. 153.

On the whole, granting the party out of power a right of free reply will make political debate in America more partisan and institutional rather than philosophical and issue-oriented.[37] Such a provision may lock the current political scene into law by narrowing the range of expression to established partisans. Similarly, this proposal could hurt insurgent candidates running independently of the backing of party regulars by giving each national committee the power to select party spokesmen. Television debate of political issues is not likely to be strengthened by giving so much television control to the party regulars on the national committees.

The "opposition" to the President's policies can come from many sources. Whether that opposition is the other party, a local official, or the heir apparent within the President's own party, the wiser choice is to seek conditions under which each such group can receive news coverage to the extent that it is newsworthy and can also have a right to buy television time for itself. This latter issue of access rights, which would in many ways help achieve the authors' objectives, is explored in more detail below.

IV

The authors propose also that "National Debates" among spokesmen of the national political parties be established on a voluntary basis for all concerned, with the stipulation that they be shown live during prime time with simultaneous major network coverage.[38] Designed to facilitate the development of party positions, a dubious goal in itself, the debates would more than likely lead to many of the same results as the proposals for "opposition television" that were criticized above.

Political debates have always been voluntary for both participants and broadcasters. There has seldom been any hesitancy on the part of broadcasters to stage debates. The problem is that the incumbent, usually much better known, is often understandably reluctant to help provide an equal forum for his opponents. The National Debates would frequently meet the same obstacle. It is likely that they would never take place except when the strategies of all candidates coincide. Such debates therefore could never play a major role in balancing presidential television appearances.

37. The present Fairness Doctrine, in contrast, requires a balance of issues, not personalities or parties.
38. Pp. 155, 162.

The authors would vest in the national committees of each party the power to choose the spokesmen who will participate in these debates. They suppose that the "most arresting personalities and best debaters will be chosen."[39] More likely, the division within the national committees will often lead to compromise spokesmen noted only for their lack of further political ambition.[40] Without the charismatic figures that television seems to require, the debates would probably languish very low in viewer popularity—except for those few occasions when they would have been interesting enough to command coverage anyway.

V

In developing their recommendations for giving television reply time to Congress and the opposition party, the authors almost completely ignore the question of allowing a private right of access.[41] Giving access to groups other than Congress and the opposition party would make it possible to provide exposure for a wider range of political opinions. Had the authors considered the access issue in light of theories of broadcasting regulation and the requirements of the First Amendment, their recommendations might have been far different.

Despite the demand for some form of access by private groups, the Supreme Court ruled in *Columbia Broadcasting System v. Democratic National Committee*[42] that broadcaster refusal to allow paid access to the airwaves in the form of "editorial advertisements" did not violate the First Amendment or the broadcasters' statutory duty[43] to act "in the public interest." The Court, in considering the possibility of creating such a private right of access, said that it was necessary to weigh the interests in free expression of the public, the broadcaster, and the individual seeking access. It then held that the Congress was not unjustified in concluding that the interests of the public would be best served by giving full journalistic discretion to broadcasters, with the only check on the exercise of that discretion being

39. P. 155.
40. Conversely, if each party chose several spokesmen to represent various wings of the party, the debates could become little more than intraparty quarrels.
41. "Private right of access" refers to the practice of allowing individuals and groups to purchase television time to broadcast their views on politics or other subjects.
42. 412 U.S. 94 (1973). The Court overturned a ruling by the court of appeals that a flat ban on paid editorial announcements violates the First Amendment, at least when other sorts of paid announcements are accepted. Business Executives Move for Vietnam Peace v. FCC, 450 F.2d 642 (D.C. Cir. 1971).
43. 47 U.S.C. § 309 (1970).

the FCC's public interest regulation of broadcasters. The majority opinion pointed out that choosing a method of providing access to individuals and private groups that relied on detailed oversight by a regulatory agency would simply increase government interference in program content, in view of the need to create regulations governing which persons or groups would have a limited right of access.[44] The Court stated, however, that the access question might be resolved differently in the future: "Conceivably at some future date Congress or the Commission—or the broadcasters—may devise some kind of limited right of access that is both practicable and desirable."[45]

The appearance of *Presidential Television* revives the concerns that took *Democratic National Committee* to the Supreme Court. The growing role of broadcasting in American politics, together with the increasing clamor for some form of access, may justify legislative reexamination of whether the broadcaster should be required in selling his commercial time[46] to accept all paid announcements without discrimination as to the speaker or the subject matter.[47] In this way, paid editorial announcements would stand on an equal footing with paid commercials and paid campaign advertisements. The broadcaster would sell advertising time exclusively on the basis of availability, the same way that newspapers and magazines sell advertising space. All

44. 412 U.S. at 126-27. The Supreme Court distinguished this type of "right of access" from enforcement of the Fairness Doctrine, which the Court described as involving only a review of the broadcaster's overall performance and "sustained good faith effort" to inform the public fully and fairly. However, the Court apparently was unaware of the gradual shift away from general enforcement of the Fairness Doctrine towards specific, case-by-case and issue-by-issue implementation. *See* Blake, *Red Lion Broadcasting Co. v. FCC: Fairness and the Emperor's New Clothes*, 23 FED. COM. B.J. 75 (1969); Goldberg, *A Proposal to Deregulate Broadcast Programming*, 42 GEO. WASH. L. REV. 73, 88 (1973); Robinson, *The FCC and the First Amendment: Observations on Forty Years of Radio and Television Regulation*, 52 MINN. L. REV. 67 (1967); Scalia, *Don't Go Near the Water*, 25 FED. COM. B.J. 111, 113 (1972), *quoting* Paul Porter from *Hearings on the Fairness Doctrine Before the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce*, 90th Cong., 2d Sess., at 153 (1968). In effect, this shift in the method of enforcement has made the Fairness Doctrine similar to the type of "right of access" mechanism that the Court in *Democratic National Committee* said would regiment broadcasters to the detriment of the First Amendment. 412 U.S. at 127.

45. 412 U.S. at 131.

46. This proposal is limited to time reserved for paid commercials, not program time. A broadcaster would not be compelled to preempt regular programming. Commercial time on television falls generally in the range of 9 to 16 minutes per hour. The voluntary code of the National Association of Broadcasters allows nine minutes per hour during prime time, BROADCASTING MAG., *supra* note 1; the amount of commercial time is greater during other times of the day.

47. Under present government regulation, the broadcaster is legally responsible for his commercial time as well as his program material. In a system of paid access, it may be sufficient that individuals and groups are civilly liable for slander, obscenity, false or deceptive advertising, incitement to riot, or other offenses, and therefore the broadcaster should perhaps be relieved of liability for any infractions of law by users of the station's facilities.

persons able and willing to pay would have an equal opportunity to present their views on television.[48]

This kind of access right would be compatible with the policy concerns of the Supreme Court in *Democratic National Committee*.[49] This proposal would require no additional government administration or interference. Exempting access announcements from the Fairness Doctrine would cause a minimum of dislocation to the broadcaster's regular programming.[50] Moreover, broadcasters would not give up any significant control over substantive programming if the right of access were limited to commercial time. Both the journalistic freedom of the broadcaster and the interest of members of the public in obtaining television time are therefore protected by the creation of this limited right of access.[51]

By meeting some of the public demand for an electronic forum, developments in communications technology such as cable television will in the future almost surely reduce the hazards, real or imagined, from

48. This should not cause an unfair discrimination against groups which lack funds. Considering the amount of contributions which television appeals can attract, it is likely that any group with something important to say could raise money for the announcements by an on-the-air appeal. *See, e.g.*, p. 118 (an antiwar group paid $60,000 for time, but received $400,000 in contributions). Small, unpopular, or extremist groups might have trouble raising funds, but regrettably some of these groups probably would also be denied time under the present Fairness Doctrine. Poor groups whose views were not represented on programming time would be able to compel at least some coverage of their views through enforcement of the broadcaster's statutory responsibilities.

49. In fact, this would conflict less with *Democratic National Committee* than would the authors' proposals, which show little regard for the public interest or the journalistic freedom of the broadcaster. The authors would take from the broadcaster control over large blocks of time now devoted to program material, and give it to groups which the FCC could not hold accountable under the public interest standard. This was one reason the Court accepted the FCC's refusal to require public access in *Democratic National Committee*. 412 U.S. at 125.

50. If the Fairness Doctrine were applied to paid political advertisements, the broadcaster might be forced to provide free time for replies during regular programming time. 412 U.S. at 123-24 (the Court apparently did not decide whether the FCC would be permitted or required to extend the Fairness Doctrine to paid political advertisements). This possibility would be avoided by explicitly exempting these announcements from the Fairness Doctrine as part of the proposal. Such an exemption, of course, need not affect application of the Fairness Doctrine to product advertisements. Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969). In addition, this proposal would leave the license renewal process available as a recourse in cases of extreme program imbalance.

The Fairness Doctrine, moreover, is not the source of this right of access. To use the Fairness Doctrine to justify a private right of access is to give it a function for which it was never intended.

51. In contrast, giving an unlimited right of access during regular programming time could remove a large amount of time from the control of the broadcaster and give it to individuals or groups. Since even proponents of access agree that this would be undesirable, they recommend more "limited" rights of individual access. But then it would be necessary to have detailed FCC-enforced regulations and standards to determine who would be entitled to time and which time slots would be made available. A right of access so constrained would result in the same type of governmental control over program content that was condemned in *Democratic National Committee*, 412 U.S. at 126.

presidential television.[52] In the meantime, the more limited medium of broadcast television must be made more responsive to individuals and groups seeking to express their points of view. The method by which this is done is crucial. Access can either be given on an ad hoc basis to those groups powerful enough to command it legally (such as Congress and the opposition party), as the authors suggest, or it can be sold on a nondiscriminatory basis. Only the latter proposal would be an improvement over the present system.

VI

The thrust of all of the authors' proposals is toward dictating to television viewers what they are to see, with paternalistic disregard for their actual desires. In doing so, the authors have lost sight of the substantial journalistic function that broadcasters share with publishers. Newspapers devote their space to those issues and events that the editors feel the readers will find most important. The more important the event, the more prominent is its position in more newspapers. No one tells a newspaper how many column-inches to devote to a certain topic, and certainly there is no law requiring the periodic coverage of specified events regardless of their newsworthiness.

To be sure, the "broadcasters' First Amendment" has come to be viewed[53] as an abridged version of the original one.[54] It is crucial, however, that intrusions on journalistic expression be severely limited. Most of the authors' proposals would impinge on free journalistic expression at a time when ways should be found to help preserve that expression. Indeed, the inevitable arbitrariness and complexity of such proposals provide the best arguments against legal controls over the use of television. The proposals go well beyond what is necessary to achieve many of the authors' goals and, unfortunately, fail to concentrate on the development of a general system of access that would be better designed to achieve those goals.

The major criticism of the authors' proposals, though, is that they

52. While the authors include cable systems in their suggestions, it is doubtful that anyone, including the President, should appear simultaneously on all of the potentially numerous networks in a medium of channel abundance like cable. It is also doubtful that all cable network organizations should be required to give free time to Congress or opposition parties, since there should be sufficient time for sale to accommodate everyone. Cable television, therefore, should be exempt from the programming requirements proposed by the authors.

53. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388 (1969) (the right of the viewers and listeners is paramount to that of the broadcaster).

54. The First Amendment commands that "Congress shall make no law . . . abridging freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

would impair rather than expand the ability of television to evolve into a medium reflecting a wide range of perspectives on the American social and political scene. With the extreme economic concentration of control over television programming by the three national networks[55] and the growing scope of FCC programming regulations,[56] we are already moving toward control of national television programming by a familiar coalition of big business and big government. Proposals such as those in this book serve only to entrench such a system and to constrain the diversity and free choice that should characterize American television.

Presidential Television provides an interesting and valuable addition to the literature on national politics by documenting the successes and failures of the evolving strategies that Presidents have devised in their efforts to adapt to the new television medium. But in the end, the authors fail to demonstrate the validity of their assertion that television has significantly and permanently altered the ebb and flow of America's political forces. We are left with presidential television as a still-evolving form, mastered neither by news departments nor Presidents, clearly something different from presidential radio and presidential headlines, very much a part of our political process, but hardly a fundamental threat to our constitutional system. The authors have discovered the dangers inherent in excessive concentration of presidential power. But, in seeking to check this power, they have chosen a course at variance with our most fundamental First Amendment principles, undermining the ultimate check on political power—an electorate that informs itself through a press unrestrained by government prescription.

55. The three networks originate about 64 percent of all programming for affiliated stations. BROADCASTING MAG., *supra* note 1, at 70. The percentage is higher during evening prime-time hours. Of the 700 commercial stations operating as of April 30, 1974, BROADCASTING MAG., June 3, 1974, at 40, only about 80 are not affiliated with the networks. Station ownership is also highly concentrated:

> Each of the networks owns the legal maximum of 5 VHF stations. Since these are in the largest cities, networks reach 25 to 35 percent of all TV homes with their own stations.

R. NOLL, M. PECK & J. MCGOWAN, ECONOMIC ASPECTS OF TELEVISION REGULATION 16 (1973).

56. *See, e.g.*, Notice of Inquiry in Docket No. 19154, 27 FCC 2d 580 (1971) (recommended percentages of certain types of programming); Further Notice of Inquiry in Docket No. 19154, 31 FCC 2d 443 (1971) (same); Report and Order Docket No. 19622, 29 P & F RADIO REG. 2D 643 (1974) (prime-time access restrictions on network programming).

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

July 2, 1974

DIRECTOR

Honorable Warren G. Magnuson
Chairman
Committee on Commerce
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your request of May 20, 1974, for the views of the Office of Telecommunications Policy on S. 3463, proposed legislation to repeal the "equal opportunities" requirement of section 315(a) of the Communications Act of 1934, as amended (47 U.S.C. §315(a)) with respect to candidates for President and Vice President. Presently section 315(a) provides that if a broadcast licensee permits any legally qualified candidate for public office to use his station, he must afford equal opportunities to all other candidates for the same office in the use of his station.

We are not in disagreement with the purposes of this proposed legislation -- to allow broadcasters to offer free time and coverage to major party candidates without being legally compelled to offer "equal opportunities" to minor party candidates. We take exception, however, to limitation of this bill to Presidential and Vice Presidential candidates. The adverse effects of section 315(a) may be much more pronounced with respect to candidates for other Federal offices. We see no reason why the reform prescribed by this bill should be so severely limited.

Accordingly, we recommend that your Committee report unfavorably on S. 3463.

Sincerely,

Clay T. Whitehead

Question Presented: Why and how did the fairness doctrine evolve in broadcast? How did it die?

Short Answers:

- Three early ideas became the pillars of the fairness doctrine:
  - Early radio experience demonstrated that broadcast wavelengths were scarce. Everyone could not have access and government controls were enacted to license and oversee the broadcast stations.
  - The airwaves could not be owned. They were seen as public property.
  - This meant that licensed broadcasters were trustees of a public resource. Thus they were required to act in the public interest. The public had a right to objective information, and the public interest was not served by allowing the broadcasters a monopoly on the ideas which they disseminated into the airwaves.

- The fairness doctrine evolved as a response to the above ideas:
  - The Radio Act of 1927 required stations to act in the public interest, and the Federal Radio Commission pushed the idea early that this meant fair coverage of public issues.
  - The FCC, established by the Communications Act of 1934, adopted the FRC's approach and by 1949 had fully outlined the fairness doctrine's requirements in its report. The doctrine was justified on the basis of the scarcity of the airwaves and the right of the public to be objectively informed.
  - In *Red Lion*, the Supreme Court essentially adopted the justifications previously laid out by the FCC and upheld the fairness doctrine. The constitutionality of the doctrine was established by the court, and was based upon the idea that the doctrine encouraged coverage of public issues and upheld the public's right to access of information.

- The fairness doctrine had two elements:
  - First, radio stations were required to devote time to issues of public interest. The public's right to be informed was undermined if issues were avoided altogether.
  - Second, when issues were covered, broadcasters were required to provide adequate coverage of both sides of the issue. This was to be determined in the stations overall program, and the implementation of the doctrine was generally at the discretion of the station.

- The doctrine died in the mid-1980s because:
  - Deregulation was the fashion of the day under the Reagan administration. Many regulators were determined to see the doctrine repealed.
  - The justifications of the doctrine lost their foundation. Technological changes meant that access was greater to broadcast media. The scarcity rationale no longer stood strong.
  - Other forms of media became seen, as the previously had not been, as adequate forums to oppose ideas disseminated through broadcast. Thus, the listener's first amendment rights were no longer violated because of the availability of opposing views in other mediums.

- Most importantly, the FCC determined that the doctrine chilled free speech in its 1985 Report. This meant that it was no longer serving its constitutional purposes and therefore was denounced by the FCC in *Syracuse Peace Council*, and affirmed by the D.C. Court of Appeals.

Fairness Doctrine

I. The Ideas Behind the Fairness Doctrine Developed in the Early Days of Radio.

Radio has been regulated since its early days. Once broadcast radio became a reality, it exploded in popularity and use. In 1920, three regular broadcasting stations existed. By 1925, 578 stations were broadcasting regularly. The Radio Act of 1912 required all radio stations to receive a license from the Secretary of Commerce and Labor. Each broadcaster was assigned a wavelength on the spectrum. However, it was held early on that the Secretary did not have the authority to enforce what the broadcasting stations actually did. The result was much unfriendly competition amongst broadcasters. Stations would essentially broadcast in spite of each other, causing mixed signals and a hearing nightmare for the listeners. Many felt that the government needed to take control, and they had their wish.

In the mid-1920s, Hoover, then Secretary of Commerce and Labor, held a series of radio conferences. Their goal was to solve the situation of the jammed airwaves. In these conferences, two key ideas which would later uphold the fairness doctrine took root. The first is that the airwaves are public property. They cannot be owned by the stations, but belong to the American people. Stations were then public trustees of their assigned wavelength, and thus required to act in the public interest. The second idea is that the listener and the broadcaster share the right to freedom of speech. If the radio station was allowed free reign over its broadcasting, then the first amendment rights of the listener, in effect, would be violated. The listener was to be free of the editorial monopoly of the station owner. At the heart of the

problem was the scarcity of broadcasting wavelengths. Only so many could have access. This scarcity problem was a main pillar of the need for the fairness doctrine.

The Radio Act of 1927 was the ultimate result of the clamoring for government control. The Act created a five person Federal Radio Commission with the powers to grant and revoke licenses, assign frequencies, and determine station power and location. The beginnings of the fairness doctrine can be traced back to this act. The Act provided that the FRC should exercise its powers "as public convenience, interest, or necessity requires," and that licenses were to be granted if the "public convenience, interest, or necessity" would be served.1 The second part of the fairness doctrine, which requires both sides of an issue to be covered, is revealed in the legislative history of the 1927 Act. Many members of Congress attempted to amend the act to include a fairness requirement, and the "legislative history does reflect a congressional sensitivity to the problems of airwave scarcity, the need to present balanced public affairs information to the American people, and the danger of private partisan interests propagandizing their own views through the ether." While the fairness doctrine was not included in the act, the seeds were sown.2 The Communications Act of 1934 created the Federal Communications Commission. Its legislative history is similar to the 1927 Act in that it included discussion and attempts for a fairness requirement which was ultimately excluded from the passed law. It is reasonable to say, however, that despite the doctrines exclusion, the authority of the commission to institute policies like the fairness doctrine was not questioned. In fact, the commission's authority was deferred to.3

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1 Steven J. Simmons. *Fairness Doctrine: The Early History*. 29 Fed. Comm. B.J. (1976).

2 *Id.* at 233.

3 *Id.* at 241.

When the fairness doctrine was born is in some debate, but the FRC outlined what an essential element of the fairness doctrine as early as 1929 in the case of *Great Lakes Broadcasting*. The FRC discussed the key considerations when reviewing a license application and stated: "In so far as a program consists of discussion of public questions, public interest requires ample play for the free and fair competition of opposing views, and the commission believes that the principle applies not only to addresses by political candidates but to all discussion of issues of importance to the public..."4 This is a clear statement of what became known as part two of the fairness doctrine. The scarcity problem was cited as the general reason that equal access should be provided, and that the public interest can only be served through it.

II. The FCC Explicitly Establishes the Fairness Doctrine in Case Law and the 1949 Report.

The FRC demonstrated early that it was willing to deny licenses based upon public interest, and the FCC followed along the same path. In *Young People's Association*, the FCC denied a license application to a group which wanted to use the station for religious-only broadcasts.5 The Commission decided that if a station intends to serve only one purpose, then it cannot be said to be serving the general public. Airwave scarcity was again cited to explain why a one-sided presentation was unacceptable. *Mayflower Broadcasting* solidified the second part of the fairness doctrine.6 Mayflower applied for the wavelength already allocated to WAAB, which was up for renewal. WAAB had in previous years aired editorial segments without any pretense of fairness. The Commission renewed their license because the activity had ceased.

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4 *Id.* at 245.

5 *Young People's Association for the Propagation of the Gospel*, 6 F.C.C. 178 (1938).

6 *Mayflower Broadcasting Corp.*, 8 F.C.C. 333 (1941).

However, the decision was important because it reaffirmed the importance of part two of the fairness doctrine. The decision stated:

> Radio can serve as and instrument of democracy only when devoted to communication of information and the exchange of ideas fairly and objectively presented...Freedom of speech on the radio must be broad enough to provide full and equal opportunity for the presentation to the public of all sides of public issues. Indeed, as one license to operate in a public domain, the licensee had assumed the obligation of presenting all sides of important public questions, fairly, objectively, and without bias. The public interest – not the private – is paramount. These requirements are inherent in the conception of public interest set up by the Communications Act as the criterion of regulation. While the day to day decisions applying these requirements are the licensee's responsibility, the ultimate duty to review generally the course of conduct of the station over a period of time and to take appropriate action thereon is vested in the Commission.7

Thus, by 1941, the importance of objective coverage of public issues was established.

The fairness doctrine, as can be seen above, formed in the assumption that objective radio was important to the public interest. The idea that democracy required those in control of the broadcast channels take objective stances on issues, or at least present both sides thereof, was essential to the doctrine's development. Its origins are deep, and by the 1940s, the fairness of broadcasting was cemented. The development of the fairness doctrine was axiomatic. The airwaves are not private property. They are scarce and cannot be owned. However, it is in the best interest of the public to allow broadcasters to make use of the various wavelengths. Because these broadcasters are essentially trustees of public property, they must use it in ways which benefit the public. Not all voices can be allowed access to the airwaves, and therefore it would be against the public interest to allow those who do have access to dominate their broadcasting with their biases. The broadcasters must somehow then be regulated. It would be against the public interest (and against the constitution) to have government control program content. Therefore, broadcasters may choose their programming. But, when they discuss matters of

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7 *Id.* at 339.

public importance, they must allow contrasting sides of important public issues access, so that the public interest may be served through objective or multifaceted presentations. Indeed, "an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day" is vital to democracy.8 Such was the logic of the doctrine.

The affirmative duty of broadcasters to cover issues of public concern, which became known as the first part of the fairness doctrine, developed later than the first. The FCC realized that the public interest is also not served when broadcasters avoid the public issues entirely. Therefore, in its 1946 report entitled *Public Service Responsibility of Broadcast Licensees*, the Commission stated that, when granting or reviewing licenses, one consideration would be the quantity of time devoted to discussion of public issues.9 The FCC made it clear that stations would not be performing their public duty by trying to avoid the problem altogether. The commission enforced this provision only once in its history.

The 1949 Editorializing Report brought the pieces of the puzzle together in an FCC declaration. It set forth the basis for the doctrine (outlined above), parts one and two, made clear that editorializing was permissible, and suggested ways in which the doctrine was to be implemented. The first part of the doctrine was that broadcast stations had an affirmative duty because of their unique situation to devote time to the discussion of important public issues, and the second was to cover those issues on a "basis of overall fairness."10 The station was still to have much discretion in the presentation of public issues, and fairness was looked at in overall programming. The decision also laid out the personal attack rule, that an attack on a specific

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8 *Early History* at 269.

9 *Id.* at 263.

10 *Id.* at 272.

individual or group required notice and response time by that party if they so chose. Public issues were defined as "controversial," "public," and "of interest and importance to the community."11 The report did not set out specific rules, as if any could be formulated, and the implementation of the fairness doctrine was up to the broadcaster. The FCC responded to complaints and decided cases on an *ad hoc* basis.

In 1959, the Communications Act was amended to recognize the broadcaster's obligation to abide by the fairness doctrine. The amendment exempted certain bona fide newscasts from fairness requirements. The amendment went on to remind the broadcasters about their "obligation imposed upon them under this Act to operate in the public interest…"12 Thus, the language suggests that the fairness doctrine was already included in the Act, and that this section was a legislative re-affirmance of the policy.

The Supreme Court upheld the doctrine in *Red Lion*.13 The court based its decision on the scarcity problem. It announced that the doctrine was constitutional and did not violate the first amendment rights of broadcasters. The public had a right "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences…The right may not constitutionally be abridged by Congress or by the FCC."14 The court essentially accepted the previous justifications for the fairness doctrine.

III. Changes in Technology and the "Chilling" Effect of the Doctrine Lead to Its Downfall.

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11 *Id.* at 275.

12 *Id.* at 288.

13 *Red Lion Broadcasting v. F.C.C.*, 395 U.S. 367 (1969).

14 Thomas Houser. *Fairness Doctrine - Historical Perspective*. 47 Notre Dame L. 550, 563 (1971-1972).

The fairness doctrine ran strong through the 1970s, but technology and the deregulation surge of the Regan administration began to change the landscape of the broadcast world and question the applicability of the fairness doctrine. By the mid 1980s the doctrine was seriously challenged. The Supreme Court noted in *F.C.C. v. League of Women Voters*15 that the scarcity rationale was becoming obsolete in the face of cable and satellite television. The court was not prepared to strike down the doctrine, but noting the criticism, all but welcomed some showing by the FCC or Congress that it was no longer needed.16

The Commission followed suit in 1985 with its Fairness Report. The Commission summed three reasons for the repeal of the doctrine.

> First, in recent years there has been a significant increase in the number and types of information sources. As a consequence, we believe that the public has access to a multitude of viewpoints without the need or danger of regulatory intervention...Second, the evidence in this proceeding demonstrates that the fairness doctrine in operation thwarts the laudatory purpose it is designed to promote. Instead of furthering the discussion of public issues, the fairness doctrine inhibits broadcasters from presenting controversial issues of public importance. As a consequence, broadcasters are burdened with counterproductive regulatory restraints and the public is deprived of a marketplace of ideas unencumbered by the hand of government...Third, the restrictions on the journalistic freedoms of broadcasters resulting from enforcement of the fairness doctrine contravene fundamental constitutional principles, accord a dangerous opportunity for governmental abuse and impose unnecessary economic costs on both the broadcasters and the Commission. Finally, we believe the record in this proceeding raises significant issues regarding the constitutionality of the fairness doctrine in light of First Amendment concerns.17

The Commission interestingly decided that it was not free to discontinue the practice of the doctrine. The amount of Congressional interest in the doctrine compelled the Commission to continue enforcing the doctrine. The Commission however was more likely trying to instigate a

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15 468 U.S. 364, 376 (1984).

16 *Id.*

17 *1985 Fairness Report*, 2 F.C.C. Rcd. 5043 (1985).

judicial ruling to give affirmance to their decision that the doctrine was no longer necessary. An important judicial precursor to the elimination of the doctrine came from *TRAC v. F.C.C.*18 The court declared that the fairness doctrine was not codified. This determination was important because it meant that the FCC could stop enforcing the doctrine without an act of Congress.

The Commission denounced the fairness doctrine in *Syracuse Peace Council.*19 It held that the doctrine no longer served the public interest and violated the First Amendment. The doctrine prohibited free speech because it did not allow the public free access to the marketplace of ideas. The FCC stated "the right of viewers and listeners to receive diverse viewpoints is achieved by guaranteeing them the right to receive speech unencumbered by government intervention."20 The D.C. Circuit Court of Appeals upheld the decision of the FCC. Thus, the fairness doctrine was effectively eliminated.

The original justifications for the fairness doctrine could not withstand assault by the time the deregulation attitude of the Reagan era came to bear. Technological advances in telecommunications changed the scarcity argument. The plethora of cable and satellite television outlets meant that more people had access to the radio and television medium. In the early days of radio and television, the medium was considered special because of its direct intrusion into the homes of listeners. Thus, print media was not considered an acceptable alternative to present alternative views because it did not have the pervasiveness of broadcast media. This view was changed, perhaps as broadcast media became more and more integrated into daily life, and by the Commission's 1985 report, other forms of media were considered an adequate safeguard to the

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18 801 F.2d 501 (D.C. Cir. 1986).

19 2 F.C.C. Rcd. 5043

20 *Id.* at 5057.

public's right to be informed. The idea that the doctrine was in the public interest then could not be supported. The finding that the doctrine actually prevented freedom of speech meant that it was not serving its constitutional purpose of protecting the first amendment right of the listener to be informed through objective coverage of important public issues.

Ultimately, the fairness doctrine was not the right tool for the job. In the six years after the FCC renounced the doctrine, the number of radio talk shows jumped from 400 to more than 900.21 The Commission finally realized the costs which the doctrine was imposing upon the broadcast marketplace. These costs became unjustifiable after the FCC determined that the doctrine chilled speech instead of encouraging it. Many Congressional attempts were made to enact a fairness doctrine statute, but they failed to get past a Presidential veto. The doctrine remains controversial, but the costs it imposed and the alternatives available (i.e. the free market approach) keep it as an ineffective instrument.

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21 Adrian Cronauer. *The Fairness Doctrine: A Solution in Search of a Problem*. 47 Fed. Comm. L.J. 51, 62 (1994-1995).

serving the public interest."[247] The Report's "principles" harkened back to the pre-1980s public interest requirements. They include broadcasters' responsibility "to air programming responsive to the issues of concern to their communities,"[248] their interest in "air[ing] local public affairs programming daily in addition to news coverage,"[249] cognizant of the distinction between public affairs programming and news programming,[250] and the importance of "us[ing] good journalistic practices in covering local issues of public concern so as to present conflicting viewpoints and give persons attacked a reasonable right of reply."[251]

II. WHY THE BROADCAST PUBLIC TRUSTEE DOCTRINE FAILED

A. FIRST AMENDMENT CONTRADICTIONS

Reflecting on the FCC's tortuous history of interpreting and enforcing the 1934 Communications Act's "public interest" standard, former FCC Commissioner Ervin Duggan remarked that "successive regimes at the FCC have oscillated wildly between enthusiasm for the public interest standard and distaste for it."[252] Critics of the standard have called it "vague to the point of vacuousness, providing neither guidance nor constraint on the regulatory agency's action."[253]

Although the FCC's seven decades-old struggle to define the public interest standard can be attributed in part to the shifts in political winds and regulatory philosophies, as well as

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.* (implicitly citing 47 C.F.R. § 73.1810(d)(1)(iii) (repealed 1984) (defining "news programming" as "dealing with current local, national and international events, including weather and stock reports, and commentary, analysis, or sports news when they are an integral part of a news program.")).

251. *Id.*

252. Ervin S. Duggan, *Congressman Tauzin's interesting idea*, BROADCASTING & CABLE, Oct. 20, 1997, at S18; *see also* Erwin G. Krasnow & Jack N. Goodman, *The "Public Interest" Standard: The Search for the Holy Grail*, 50 FED. COMM. L.J. 605, 607 (1998) ("If the history of this elusive regulatory standard makes anything clear, it is the fact that just what constitutes service in the 'public interest' has encompassed different things at different times.").

253. GLEN O. ROBINSON, *"Title I, The Federal Communications Act: An Essay on Origins and Regulatory Purpose,"* in A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934 at 3, 14 (Max D. Paglin ed., 1989).

the vagueness of its legislative origins, the fundamental cause of the FCC's difficulty and the doctrine's failure is its inherent tension with the First Amendment and the anti-censorship provision of the Communications Act of 1934. Although the Communications Act delegates to the FCC the authority to issue licenses for use of public spectrum "consistent with the public interest,"[254] it also has a strongly worded censorship prohibition:

> Nothing in this [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.[255]

In 1973, the Supreme Court acknowledged that Congress essentially required the FCC to "walk a 'tightrope' to preserve the First Amendment values written into the Radio Act and its successor, the Communications Act," while ensuring that broadcasters operate in the "public interest."[256]

At its essence then, this tension is one between two conflicting interpretations of the First Amendment. On the one hand, there is the perspective that the First Amendment is the notion of the "free marketplace of ideas" that must be protected from all government restriction and influence. In his dissent in the 1919 *Abrams v. United States* case,[257] Justice Oliver Wendell Holmes wrote that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[258] In other words, the unencumbered exchange of conflicting ideas comes closest to yielding truth and the common good.

A related but somewhat conflicting free speech theory is associated with James Madison, one of the Constitution's principal authors and a champion of the Bill of Rights. The Madisonian view of the First Amendment values free speech as a means to civil enfranchisement, political and economic equality, and democratic empowerment.[259] To Madison, the First Amendment was at the core of American democracy. It

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254. 47 U.S.C. § 302a(a) (2000).

255. § 326 (2000).

256. *See* Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 117 (1973).

257. 250 U.S. 616 (1919).

258. *Id.* at 630 (Holmes, J., dissenting).

259. *See* THE FEDERALIST Nos. 10, 46 (James Madison).

NEW AMERICA FOUNDATION

PUBLIC ASSETS PROGRAM

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WORKING PAPER

The Five Percent Solution

A SPECTRUM FEE TO REPLACE THE 'PUBLIC INTEREST OBLIGATIONS' OF BROADCASTERS

By Henry Geller and Tim Watts*

In the emerging information economy, there is no more valuable public asset than the airwaves, also known as the electromagnetic spectrum. Auctions conducted in Europe and the United States in the past two years indicate that the market value of the spectrum currently allocated to U.S. commercial licensees is well in excess of $300 billion. This is driven, in part, by the exploding demand for spectrum for wireless communication services, as companies providing cell phones and wireless Internet access hope to soon offer always-on, high-speed connections. The potential boon to the economy has made the shortage of spectrum for emerging technologies a matter of urgent public concern.

Unfortunately, the prevailing regulatory model for allocating spectrum is grossly inefficient and inequitable to both the business sector and the public who own this valuable resource. Under current spectrum policy, cell phone companies have paid billions of dollars for licenses at auctions while other commercial users occupy the airwaves without paying the public anything. While a market mechanism is being employed to promote efficient allocation of frequencies assigned to the wireless industry, an outdated industrial policy allows other incumbent licensees to hoard spectrum that in many cases they no longer use efficiently.

Commercial broadcasters are the biggest beneficiaries of this policy failure. Broadcasters originally were granted free spectrum on the condition that they act as "public trustees" of the airwaves and deliver educational, civic, and other informational programming. However, for decades the industry has shirked its public interest obligations. Although the frequencies controlled by broadcasters are worth more and more each year—both as an asset and in terms of the opportunity cost because it is unavailable for other more valuable uses—taxpayers are not receiving a sufficient return for use of this scarce natural resource. Adding insult to injury, broadcasters are demanding that they be allowed to sell for a profit the extra spectrum space that Congress temporarily allocated to them in 1996 for the purpose of converting to digital television.

Reform of spectrum policy must ensure that the public airwaves are used with optimal efficiency and that all commercial users of spectrum pay a fair return to the public. This paper proposes charging commercial broadcasters a spectrum fee equal to five percent of gross advertising revenues is an important first step to achieving these goals.

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Why Broadcasters Don't Pay for Spectrum: A History

The regulatory framework that governs broadcast spectrum today is the product of a deal struck between a group of large commercial broadcasters and Congress over 70 years ago. Radio broadcasting began in the United States in 1920 at a Pittsburgh station. Religious, musical and news broadcasting soon flourished across the country—an outpouring of expression similar to the proliferation of websites after the Internet caught on. By 1922, 500 stations were on the air. Retailers promoted a "Radio Christmas" in 1924 that prompted millions of consumers to buy radio receiver sets.[1] Political, religious and community leaders recognized the potential of radio broadcasts to become an integral part of the cultural and civic life of the nation and actively embraced it. Business people also saw great commercial value in broadcasting's mass audiences and began to invest in radio stations across the country.

Under the 1912 Radio Act, it was illegal to transmit without a license from the Department of Commerce, which actively policed broadcast stations to minimize interference. However, by 1926 burgeoning demand for spectrum space led to clashes between stations over signal interference and culminated in a successful federal court challenge by Zenith Radio Corporation to the Department of Commerce's approach to licensing and policing the airwaves.[2] After this case was lost, the Commerce Secretary Herbert Hoover stopped enforcing airwave assignments altogether, and interference problems escalated everywhere.

This left broadcasters and Congress in a quandary. Here was a new medium of great cultural and democratic importance, and an infant industry that promised to be very lucrative. But a breakdown in regulation was stunting the development of both the medium and the broadcasting market. A new allocation method for the limited number of broadcast frequencies had to be found.

Free speech advocates from religious, education and labor groups proposed (among other policy remedies) a common carrier system.[3] Just as the railroads carry freight for any product—or today's local phone lines carry content for any Internet service provider—they argued that a common carrier approach to managing the airwaves would serve the public interest best by requiring broadcasters to allow anyone to buy airtime. The largest commercial broadcasters, represented by the National Association of Broadcasters (NAB), opposed common carriage and claimed the broadcast market was too splintered and hyper-competitive. They sought to retain editorial control over programming and to merge individual stations into national broadcast networks.

After much lobbying and debate, Congress forged a compromise between the demands of industry and free speech advocates, establishing two core principles with the Radio Act of 1927 and the Communications Act of 1934 (which remains the charter for broadcast television today). First, Congress prohibited common carriage and mandated a government-controlled licensing regime that assigned broadcasters to designated channels in the spectrum. Second, in order to justify this exclusionary zoning policy,

Congress also required that broadcast licensees act as trustees of spectrum on behalf of all of the others who are kept off the airwaves by the government.

As guardians of a scarce, publicly owned resource, broadcasters were ordered to operate in the "public interest, convenience and necessity." This phrase was given no particular definition, but over time Congress and the Federal Communications Commission (FCC) have imposed several public interest obligations (PIOs) on broadcasters, including requirements that they serve local needs and interests, be a balanced source of news about political affairs, and offer educational children's programming.

This deal—giving broadcasters free spectrum in exchange for delivering PIOs—remains the law's framework today. Although generally ineffective in promoting the public interest, the deal became entrenched because it served both the interests of the NAB's members and the interests of lawmakers well. Major commercial stations received preferential frequency assignments and benefited when federal regulators imposed costly technical requirements that put many noncommercial stations out of business.[4] This protective industrial policy allowed broadcasters to create national networks that generated lucrative advertising revenue streams. For their part, Congress and the FCC gained leverage as the adjudicator of broadcasters' public interest obligations to regulate the very politically influential content of broadcasts. Although the First Amendment generally bans Congress from regulating speech, the broadcasters' "public trustee" role as licensees of scarce spectrum, combined with the imprecision of the public interest standard, provided Congress with some authority over broadcasters' speech. As Thomas Hazlett, resident scholar at the American Enterprise Institute, argues:

> The [PIO] regulatory standard was not casually chosen, but carefully crafted to facilitate the cartelization of the broadcasting market. Legislators implemented the regime pushed by the major commercial radio interests, thereby gaining an entrée to regulate an emerging medium of great social influence.[5]

Fulfilling their side of the bargain, broadcasters have historically paid very close attention to the demands of powerful members of Congress.[6]

In recent times, commercial broadcasters have made strategic use of their deal with lawmakers to maintain and expand their lucrative rent-free control of public airwaves. Since 1994, the wireless phone industry has paid taxpayers roughly $36 billion at auction for the privilege of using public spectrum. By contrast, the broadcast television industry not only pays nothing for a far larger allocation, it also successfully lobbied Congress for a free, temporary doubling of its allocation of spectrum under the 1996 Telecommunications Act. Now, the industry is in a position to receive a multi-billion-dollar windfall in exchange for the early clearance of frequencies they were expected to return to the government.[7] Broadcasters have justified their special treatment by promoting the value of the public service their stations provide, but, as the following section explains, their case is a thin one.

Why the Public Interest Obligations Are Inadequate Compensation

The broadcast television industry earned $44 billion in ad revenue in 2000 from its free use of publicly owned spectrum.[8] The only payment it offers to U.S. taxpayers for use of this asset is fulfillment of public interest obligations (PIOs).

In the 1927 Radio Act and 1934 Communications Act, Congress established a clear principle that broadcasters must serve the public interest. The Federal Radio Commission, the predecessor to the FCC, interpreted the principle this way in 1930:

> [Despite the fact that] the conscience and judgment of a station's management are necessarily personal…the station itself must be operated as if owned by the public…It is as if people of a community should own a station and turn it over to the best man in sight with this injunction: 'Manage this station in our interest.'[9]

Unfortunately, the regulatory framework that defines and enforces these obligations has been recognized for decades by political commentators as an almost total farce. Broadcasters are simply not meeting their obligations to the public and therefore taxpayers are being denied a fair return on their asset. Congress never designated a regulatory structure to enforce broadcasters' obligations nor even established guidelines for implementing the public interest standard.

In practice, the FCC was granted broad discretion in setting and revising specific PIOs over time, with Congress occasionally stepping in to impose requirements on broadcasters as circumstances dictated. Because the regulation of broadcast content is governed by a unique First Amendment jurisprudence, several Supreme Court rulings—most notably the *Red Lion* case—have also been important in refining the substance of public interest regulation of broadcasts.[10] In theory, regulators of broadcasters have employed the public interest standard in the name of cultivating a more informed citizenry, greater democratic dialogue, diversity of expression, a more educated population, and more robust, culturally inclusive communities.[11]

These general regulatory objectives have been targeted through rules pertaining to the content of broadcasts in several specific areas, most notably: (1) educational programming for children; (2) local culture and community affairs; and (3) electoral campaign coverage and civic information.

1. Educational Programming for Children

The first mention of programming for children as part of broadcasters' public interest obligations came in an FCC policy statement in 1960, when it was listed as one of 14 components usually necessary for a station to meet the needs of a community.[12] A formal FCC rulemaking on this point occurred in 1971 and the NAB voluntarily changed its code of practice in 1973, committing its member stations to several targets that recognized their special obligation to serve young people.[13] The NAB agreed to separate

advertising from children's programming, to ban selling of products by shows' hosts, to run no drug and vitamin ads during children's shows, and to reduce the number of ads per hour from 16 minutes per hour to 12 on weekdays and 9 on weekends. However, the FCC's *1979 Children's Television Report* found major shortcomings in this self-regulation regime and by 1984 the FCC and NAB had abandoned formal guidelines governing children's programming.

Disturbed by the failure of the deregulated broadcast marketplace to serve children, Congress enacted the Children's Television Act (CTA) in 1990, overriding President Bush's veto. The CTA set limits on the number of ads that could be broadcast per hour and banned commercial tie-ins during children's programming. Under the Act, postcard renewal of station's licenses would not be available. At renewal, the FCC would have to determine whether the overall programming of each broadcast licensee had served the educational needs of children and whether the broadcaster had aired so-called "core programming" that was specifically designed to meet children's information needs. The Act went into effect in October 1991.

In March, 1993, the FCC found that there had been no increase in the hours of educational and informational programming. The maneuvers broadcasters used to evade the spirit of the CTA included relying on PSAs (public service announcements) and vignettes to meet the CTA obligation and counting animated programs like "The Flintstones," "The Jetsons," and "GI Joe" as educational, on the grounds that such programs offer a variety of generalized pro-social themes. In addition, licensees evaded the spirit of the Act by scheduling educational programming before 7 a.m., when the child audience is minimal.[14] For example, The Walt Disney Co., the licensee of a Los Angeles VHF station, presented its core children's programming (i.e., programs specifically designed to educate children) as one half-hour show at 5:30 a.m. (later augmented by another half-hour show at 6 a.m.).[15] This picture certainly demonstrates the weakness of relying upon voluntary public service efforts. Moreover, in 1991 and 1992, the CTA was administered by an FCC Chairman hostile to the notion of requiring broadcasters to render public service in specific categories like children's educational fare, and was poorly enforced.

In 1996, after stations' evasions of the CTA requirements were publicized, the FCC under its then-new Chairman Reed Hundt set a guideline that stations, in return for expedited license renewal, should air three hours a week of "core" programming (specifically designed to meet children's needs); that such programs must be at least 30 minutes in length; and that they must be regularly scheduled. [16] The guidelines had some impact, as many licensees increased the amount of children's programming they aired from one hour to three hours per week, in order to win expedited license renewal.

2. Local Culture and Community Affairs

Broadcasters' service to the local community has been cited since 1946 as a key criterion to be considered in license renewal. In the FCC's *1960 Program Policy Statement* the first two of 14 priorities for broadcasters in meeting public interest obligations were

providing "opportunity for local self-expression" and "the development and use of local talent."[17] After 1971, the FCC also formally requested evidence that broadcasters had conducted "ascertainments," consultative sessions where they sought out needs of local community, when assessing license renewals.[18] This specific requirement was eliminated in 1984 as part of a move toward deregulation, and replaced with the more general standard that broadcasters supply "community issue-oriented programming."

In the 1990s policymakers continued to emphasize the importance of coverage of local and community affairs in broadcasting. Under the Cable Television Consumer Protection and Competitive Act of 1992, Congress forced cable operators to carry the signals of local broadcasters, and justified these "must-carry" provisions by saying that they served the public interest by providing citizens with access to the local, community-oriented content that broadcasters were required to air as public trustees.[19] A closely divided Supreme Court, while relying greatly on cable's "bottleneck gatekeeper" role, further reinforced the centrality of broadcasters' obligation to serve local culture and community affairs in its ruling dismissing cable companies' challenge to "must-carry" provisions in *Turner Broadcasting v. FCC.*[20]

3. Electoral Campaign Coverage and Civic Information

Another public interest obligation established by the Communications Act of 1934 is that broadcasters must air civic discourse and provide candidates for public office with access to the airwaves. One component of this is news coverage of candidates. However, in recent decades, academic observers and watchdog groups have chronicled a dramatic decline in substantive campaign coverage by television broadcasters. The 2000 presidential contest was a prime example; despite being the closest election in history, there was a clear drop-off in debate coverage, convention coverage and overall campaign coverage on broadcast television compared to previous campaigns. The nightly network newscasts, for example, devoted 28 percent less time to the 2000 campaign than to the last open seat contest, in 1988. Broadcasters whittled the presidential candidate sound-bite down to a mere 7.3 seconds; by comparison, in 1968, it was 43 seconds. And in October 2000, with polls showing the contenders neck and neck, two of the four major networks opted to carry sports and entertainment programming instead of presidential debates.[21]

The Act also contained a provision that granted candidates for public office the legal right to the same amount of airtime treatment that their opponent receives. Over time the FCC introduced a series of rules that refined how this "equal opportunities" regulation operates.[22] In 1972, Congress passed a law requiring broadcasters to offer candidates in the weeks preceding elections the same discounted rate for air time (known as the "lowest unit charge") given to year-round, bulk advertisers.[23] However, during the 2000 election cycle, local television and radio stations were able to exploit loopholes in this law and sell political ads to candidates, parties, and issue groups at extremely inflated prices, totaling $1 billion.[24]

The public interest standard has also been applied to promote citizens' access to the airwaves and to ensure the airing of a diverse range of viewpoints on controversial public issues. A 1929 set of guidelines issued by the Federal Radio Commission, the predecessor of the FCC, established what became known as the "Fairness Doctrine."[25] Under the Fairness Doctrine, broadcasts had to display fair-mindedness and balance viewpoints. In a 1941 rulemaking, the FCC went so far as to completely ban broadcast editorials. However, by 1949 it toned down its regulation by instituting new rules that required broadcasters to devote a reasonable amount of airtime to coverage of public issues of wide concern and for the presentation of contrasting viewpoints. Compliance with these guidelines was established as a priority in decisions on broadcast license renewal.

During the 1960s the FCC tightened its enforcement procedures for the Fairness Doctrine and formally ruled that a broadcaster cannot meet its public interest obligations by presenting only one side of an issue of public debate—a station must balance its coverage with competing viewpoints.[26] In 1969, this stance was ruled constitutional by the Supreme Court in *Red Lion Broadcasting v. FCC*. The Court found that: "It is the right of viewers and listeners, not the right of broadcasters, which is paramount."[27] Throughout the 1970s broadcasters actively campaigned against the Fairness Doctrine, claiming it had "a chilling effect" on free speech.[28] In 1987, the FCC agreed and revoked the Fairness Doctrine.[29]

The Failure of the PIO Regulatory Scheme

Although there are clear statutory principles underlying its operation, the regulatory scheme governing broadcasters' public service obligations has been a failure for decades. Indeed, the FCC has effectively deregulated broadcasting.[30] The FCC receives no programming information from which it might assess the public service efforts of its licensees, apart from the limited requirements of the Children's Television Act of 1990. Nor does it monitor the industry generally or conduct random inspections to evaluate public service efforts. Although the FCC requires broadcasters to maintain files indicating significant treatment of community issues, along with illustrative programs, broadcasters do not have to submit this material to the FCC. Instead, they send the Commission a postcard stating that the relevant material may be found by the public at the station.[31] As a result, the FCC relies *solely* upon the public to bring to its attention stations that are not fulfilling their public service obligations.

This reliance is wholly misplaced, as the 20-year experience with postcard-based license renewal shows. Even though people may send letters complaining about the disappearance of a favorite program or some content feature, they can hardly be expected to examine station files, analyze the data, and then file a petition to deny. Postcard renewal simply permits the FCC to avoid consideration of public service issues.

Moreover, without clearly defined and quantitative guidelines, the PIOs are a vague concept and essentially unenforceable. Commercial broadcasting is a business of fierce and ever-increasing competition with subscription cable and satellite services that already

provide the primary TV signal to 87 percent of American homes. In these circumstances, it is understandable that the commercial broadcaster very largely focuses on the bottom line—on maximizing profits.

The situation is similar to the issue of pollution: Some businesses will be good citizens and not pollute the water, land, or air, but many others, driven by strong competition, will take the profit-maximizing route and do great damage to the environment. The government therefore adopts specific regulations applicable to an entire industry.

Yet, with the qualified exception of the Children's Television Act, the FCC has never adopted effective, objective guidelines for local or informational programming—that is, quantitative guidelines for these categories during prescribed times (e.g., 6 a.m. to midnight, or during prime time). Because the FCC proceeded under a vague standard, there has been no effective enforcement of the public interest obligation. In 1976 FCC Commissioner Glen Robinson called regulation of broadcasting a charade—a wrestling match full of fake grunts and groans signifying nothing.[32] Today, with postcard license renewal, the charade continues and is even more starkly apparent.[33]

This is not to say that commercial broadcasters render no public service, but whatever public service is rendered by the commercial broadcasters has very little to do with the regulatory regime. Broadcasters commonly cite news programs like "Sixty Minutes," "48 Hours," and "Primetime" as examples of their public service. But these programs do not represent a commitment to public service; they are all presented because they serve the bottom line. The recent move by ABC to cancel "Nightline" because it wasn't generating enough profit illustrates the industry's ethos. If the FCC did not exist, the same programs would be broadcast. As veteran journalist Daniel Schorr, a one-time member of Edward R. Murrow's legendary news team, has said: "There was a time that television…to hold on to licenses for its stations would really say we have got to perform a public service…. Today it doesn't matter anymore. You just make your money where you make your money and to hell with public service."[34]

The same thing is true of public service announcements (PSAs), so heavily relied upon by commercial broadcasters to show public service. There is no FCC requirement for any amount or placement of such PSAs; they can be carried by the broadcaster without interfering with the commercial operation. They do constitute public service if they displace valuable commercial time, but recent surveys have found that they are rarely carried in prime time when both demand and price is high—and when they are, they are typically paid for, not free.[35]

Unavoidable Constitutional Limitations on PIO Regulation

Public interest groups, while acknowledging the failure of the present scheme, often argue that if the FCC adopted clearly defined guidelines as to public service in the local and informational programming, the public trustee regime would work and would bestow substantial benefits on viewers and listeners. However, an examination of the experience

under the Children's Television Act described above suggests that constitutional limits on the regulation of speech make the PIO system unsustainable.

Within the context of the PIO regime, it is clearly much better to have clearly defined guidelines, both from the point of efficacy and the First Amendment.[36] However a number of crucial flaws in the regulatory approach under CTA show why it is not an appropriate model to extend to other PIOs. The object of PIOs is not just quantity but high-*quality* educational programming. The non-commercial broadcast system is motivated to present such programming, in spite of its extra costs, and has a long track record of doing so. By contrast, the commercial system has no such incentive or history. The commercial system, with its profit incentive, cannot be expected to develop and revise a "Sesame Street," or to present separate programs for pre-schoolers and school-aged children, or to resent literacy or training programs for adults.[37]

There is great difference in quality between "Sesame Street" and a commercial children's program that is geared largely toward entertainment centered on a toy. Annual studies by the Annenberg Public Policy Center have questioned the educational value of a substantial amount of the core children's programming being offered by commercial broadcasters (e.g., one such review found that a quarter of programs have no educational value).[38]

The CTA approach cannot avoid straining against the First Amendment because it brings regulators in direct confrontation with difficult questions of judgment. To attract the young child, the program must have an entertainment component, and the FCC has wisely determined that there is no way to draw a line as to the amount of such entertainment fare. When this consideration is combined with a program that purportedly seeks to teach children a lesson as to some social goal, the FCC would be reviewing content in a most sensitive area.[39] The government is generally precluded by the First Amendment from considering such differences through PIO content regulation. However, since the provision of high-quality educational and civic programming is of great importance, the government should adopt policies that allow it to subsidize quality content, rather than a regime of PIOs through which it can at best influence quantity.

A final defect in the CTA model is that it is exposed to the shifting partisan environment at the FCC. Because FCC commissioners are appointed by the White House (subject to Senate confirmation) when a new President is elected, the approach to implementing public interest content requirements often changes—as described above in the case of the CTA. The current Republican Chairman, Michael Powell, has often stated his aversion to government intrusion into the programming decisions of broadcasters, so the FCC's enforcement of CTA goals is likely to loosen again.

Why Broadcasters Should Pay For Spectrum

Continuing the policy that allows the television broadcasting industry to occupy increasingly scarce and valuable airwaves at zero cost is unacceptable for two reasons. First, granting free spectrum to broadcasters contributes to a substantial distortion in the market for wireless and television services. Other businesses are denied access to spectrum, while consumers lose the benefits of new and lower-cost services. Second, it means taxpayers are denied a fair return on an extremely valuable public asset—rental fees that could be reinvested in new digital assets that benefit all Americans.

A Distorted Marketplace

Although the FCC's approach to broadcast spectrum began as a protective "infant industry" policy, five decades later it is clear that subsidizing an over-the-air cartel is harmful to consumers and competing services. Cable and broadcast TV are in direct competition, yet cable operators, unlike broadcasters, pay rent for their use of publicly owned assets. Under the Cable Communications Policy Act of 1984, cities and towns can and generally do charge cable operators up to five percent of gross cable service revenues as a payment for terrestrial "right-of-way" in streets, sewers and other conduits to run cable. An additional fee can be levied to pay for the capital costs of public, educational and government access (PEG channels). Most municipalities charge the full five percent and nationwide cable operators contribute more than $1 billion annually in right-of-way fees to local governments. Federal courts have recognized that the fee is not a tax, but a cost of doing business that is essentially a "form of rent" levied by the public for use of common assets.[40]

Broadcasters' other major television competitor, direct broadcast satellite providers (DBS) such as DirecTV and Echostar, transmit over a different part of the spectrum than broadcasting. Under the Telecommunications Act of 1996, DBS providers must reserve 4 percent to 7 percent of their channel capacity for noncommercial programming of an educational or informational nature, with prices not to exceed 50 percent of the total direct costs of making such a channel available.[41] Although DBS should similarly pay an "airwaves right-of-way" fee, this capacity allocation at least represents a concrete "in-kind" payment to the public that broadcasters are not levied.

Broadcasters get preferential treatment from U.S. taxpayers in other ways as well. For example, in 1992 Congress enacted laws that gave broadcasters the right to demand carriage on cable operators' systems.[42] The so-called "must-carry" provisions deliver broadcasters guaranteed, cost-free access to the more than 60 million households that subscribe to cable television services, a distinct competitive advantage.

Historically, policymakers have justified subsidizing broadcasters because this approach helped foster the development of "free" television accessible by any American with a TV set and antenna. However, today only 13 percent of U.S. households rely on free television delivered over the airwaves, with a large majority choosing to pay for a wider

choice of channels and better reception through cable or satellite operators. There are also a vast array of alternative media outlets and sources of information available to households including the Internet and video rentals. Clearly broadcasters no longer hold their paramount position as the nation's universal free source of information. Subsidizing their businesses with free spectrum and "must-carry" privileges serves only to undermine competition in the television industry and thwart the allocation of other spectrum services.

A Fair Return on a Public Asset

By not charging broadcasters for the spectrum they occupy, policymakers are also denying taxpayers a fair return on their asset. Based on prices paid by telecommunications companies at the most recent auctions for spectrum in both the United States and Europe, one Wall Street analyst told the NAB last year that the theoretical market value of spectrum assigned to commercial broadcasters is as high as $367 billion.[43] Other public assets with substantial commercial value—such as mineral deposits, oil reserves, timber, and grazing on federal lands—are sensibly managed to ensure that the public receives a fair share of the revenues generated from them by business. But under current policy, spectrum is effectively given away as corporate welfare to the broadcast television industry and most other commercial licensees.

The public cost of this giveaway is even greater when one considers the spectrum squeeze confronting the nation's emerging wireless communication industries. The wireless industry estimates that it will need at least double its allocation of spectrum in order to make wireless Internet services widely available and affordable over the next five to 10 years.[44] Cell phone use is exploding and wireless Internet service providers are springing up in dozens of central city and campus locations. More than 110 million Americans now own cell phones that providers soon hope to enhance with always-on connections to the Internet, known as "3G," offering a bundle of services including email, video-conferencing and integrated credit-card-like payment tools. In areas around the nation's largest cities, the available spectrum is already becoming congested with voice traffic. Without new spectrum for wireless, the development of a host of new high-speed mobile Internet applications may be delayed or severely rationed by premium pricing. The "consumer surplus" generated by current wireless services ("1G" and "2G") was estimated at between $50 billion and $100 billion per year in 1999, according to studies cited in a report by the President's Council of Economic Advisors.[45] Widespread adoption of 3G applications could be far more valuable, the CEA report concluded.

In recent years, several European countries have auctioned large blocks of spectrum to 3G mobile wireless interests, raising over $100 billion during auctions in 2000 alone. The U.S. government, meanwhile, is still struggling with the politics of which incumbent users should lose a portion of their spectrum allocation to free them up for wireless Internet and other new services.

From the wireless industry's perspective, broadcasters occupy some of the most attractive frequencies in the spectrum. All spectrum is not alike: The propagation characteristics of some frequencies allow signals to penetrate buildings, trees, and inclement weather.

Broadcasters' spectrum has these useful qualities, so it is ideal for 3G mobile wireless services. But the current policy in no way reflects the value of broadcasters' prime position in the airwaves. New digital broadcast technology is available that allows a television station to deliver its programming in *one-sixth* of the spectrum used currently. However broadcasters get their spectrum for free, so they have no incentive to convert quickly to this more efficient way of using spectrum. They pay nothing to occupy spectrum for which wireless companies would pay billions and which would likely deliver valuable new services to U.S. consumers.

Charging Broadcasters For Their Use of Spectrum: The Five Percent Solution

Rather than continue on with the charade of "public interest obligations," Congress should impose ***a spectrum usage fee of five percent of gross advertising revenues*** on commercial broadcast television licensees. Since the advertising revenues of commercial television broadcasters (national and local) totaled $44 billion in 2000, this would represent an annual return to taxpayers of at least $2.2 billion.[46]

Five percent is the same levy Congress allows cities and towns to impose on cable companies' gross revenues for terrestrial rights-of-way along city streets. This fee scheme has been imposed on cable service for decades and has worked well, with only a very few disputes as to what constitutes a cable service within the definition. Five percent of gross revenues is also the rate that Congress chose to levy broadcasters who operated "ancillary services" (services other than free public video broadcasts) with the extra spectrum they were granted for high-definition television under the 1996 Communications Act.

Potential Uses for the Proceeds of the Five Percent Spectrum Fee

In the same legislation imposing a fee, we believe Congress should earmark the revenue structured to more effectively fulfill the purposes of the PIOs through direct subsidies. The examples listed below are illustrative of the great public service benefits that might be obtained through use of the spectrum usage fee.

Of the many public service requirements not being met by broadcasters currently, the funding shortfall is greatest for children's educational programming. The Public Broadcasting System requires approximately $280 million—or 20 percent of the annual revenue likely to be generated—to fully implement its expansive and much-needed educational plans for the digital era. In the multi-channel digital era, it would be feasible and desirable to have simultaneous program streams providing high-quality content for pre-schoolers (ready-to-learn), school-aged children (6-17), and adults (e.g. literacy programs or teacher training programs). John Lawson, President of the Association of Public Television Stations, has emphasized that the ability of local PBS stations to broadcast as many as six digital signals opens up rich opportunities for partnerships with

local educational and civic institutions. This is just one example of how a Trust Fund could finally fulfill the voluntary policy of Section 303b(b)(2) of the 1990 CTA.[47]

The Trust could also be used to fund adequately the other missions of public television (e.g., culture, arts, the humanities, drama, in-depth informational programming), thus solving its perennial funding problems.[48]

Another worthy use of the money would be to finance the purchase of substantial free time for political broadcasts in connection with campaign finance reform. Various plans have been advanced and are likely to be introduced soon in Congress now that the initial McCain-Feingold campaign finance reform, focused on restricting "soft money" contributions by special interests, has been signed into law. One proposal, put forth by Paul Taylor of the Alliance for Better Campaigns, recommends creating a system of free air time on broadcast television and radio by mandating such stations to (1) dedicate two hours a week to substantive content including political debates and town hall meetings in the period before an election and (2) provide free ad vouchers to candidates and parties prior to an election. This proposal would greatly reduce the dollar cost of campaign advertising and candidates' reliance on private contributions from special interests, while strengthening political communication by increasing the public's access to substantive election-related information.

Another possibility might be to use spectrum usage fees to fund the proposed "Digital Opportunity Investment Trust." In the tradition of the Land Grant Colleges Act signed by President Lincoln during the Civil War, former FCC Chairman Newton Minow and former PBS President Lawrence Grossman have proposed the creation of a trust that would support innovative uses of digital technologies for education, lifelong learning, and the transformation of our civic and cultural institutions.[49] Their proposal would capitalize that Trust Fund with the proceeds of spectrum auctions and fees to yield a permanent revenue stream of at least $1 billion a year, which could be supplemented with the proceeds of the five percent spectrum usage fee. Rep. Ed Markey [D-MA] recently introduced legislation in the House that incorporates this concept, proposing that spectrum revenue be earmarked for a Digital Dividends Trust Fund. Senators Dodd [D-CT] and Jeffords [I-VT] have announced plans to introduce similar legislation in the Senate.

Addressing the Spectrum Shortage

A spectrum usage fee could also serve as part of a mechanism to get broadcasters to vacate their high-quality spectrum in order to free it up for the needs of the wireless industry and public safety. Broadcasters currently occupy twice the amount of space in the airwaves they need to deliver a conventional analog TV signal—and nearly 12 times the spectrum they need to broadcast a standard definition digital picture. They have 6 MHz channel for basic analog transmission and were each granted another 6 MHz for digital advanced television in 1996 by Congress. Under the terms Congress set, broadcasters were supposed to move to exclusively digital TV transmission programming and to return their analog channels to the government for public auctions by 2006, or

when 85 percent of households can view local channels in a digital format, whichever came later. But many broadcasters found little economic benefit in converting to digital. Crisper digital pictures do not attract new viewers—or ad dollars—especially when 87 percent of homes already receive their primary signal from a paid cable or satellite subscription. Today, fewer than three percent of U.S. households own a digital television set and broadcasters are still holding on to their extra spectrum.

In an October 2000 speech addressing this issue, the previous FCC Chairman, William Kennard, proposed that Congress introduce a "spectrum squatters' fee that would escalate yearly until broadcasters complete their transition to digital and return the analog spectrum to the American people."[50] President Bush has proposed a similar fee in his budget plan for fiscal year 2003. It is a basic microeconomic principle that when any input to production is freely available, business has no incentive to use it cost-effectively. If broadcasters were levied a spectrum usage fee of five percent and that was ratcheted up by, say, one percentage point every year after 2006 that they refused to vacate their analog channel, then their current strategy of hoarding spectrum would quickly become very costly.

There is an alternative, sound public interest solution to the broadcaster spectrum issue—namely, set out a date certain for relocation (e.g., Jan. 1, 2006); with this certainty, require that the auction be held late in 2004; and use the time for the government to insure the availability of a digital set-top tuner box to all those who would otherwise be unable to receive the TV signals on Jan. 1, 2006. With mass production, such a box would cost $100 or less, and could readily be funded from auction proceeds.

Fees on Other Commercial Users of Spectrum

Ideally, all commercial users of spectrum, not just television broadcasters, would pay some form of rent for their occupation of scarce space on the public's airwaves. These include radio broadcasters, cell phone companies (after their current licenses expires, for those who purchased those licenses at auctions after 1994), satellite services, the fixed wireless industry (sometimes called "wireless cable"), and private land mobile services, which are two-way radio services shared by firms in a variety of industries, including petroleum, taxicabs, forest products and utilities. The fee structure would have to take account of the different amounts of spectrum allocated to each category of user and whether the spectrum license had previously been purchased at public auctions, like certain types of cell phone licenses.

The case for applying usage fees to commercial radio broadcasting is especially compelling. There are almost 12,000 radio broadcast stations nationwide, and they all face the same public interest obligations as television broadcasters. These obligations are mostly ignored, even while radio stations profit from the use of the public's airwaves. In 2000, radio broadcasters took in $20 billion in ad revenue. Stations just send the FCC a postcard for renewal of their licenses. It is public radio that delivers in-depth informational programming, cultural fare, programming for the blind and so on. Alternatives to broadcast radio are growing rapidly. Satellite digital radio is coming on

stream. There are thousands of radio stations on the Internet, with hundreds of new stations added each month.[51]

In these circumstances, it is clearly time for Congress to confront the issue why there is a continuing behavioral content requirement as if radio were back in the early or mid-20th century. It would make better policy sense to eliminate the public trustee obligation and to substitute a spectrum fee, revenue that could be directed into the Digital Opportunity Trust described earlier, or even earmarked specifically for grants to no-commercial radio (especially non-commercial networks like National Public Radio, which are so inadequately funded). Commercial radio occupies much less spectrum than television broadcasters, but their national and local spot ad revenues come to roughly $20 billion per year.[52]

Addressing Potential Criticisms

Some free market economists have proposed that granting permanent private ownership rights in the airwaves ("propertization") is the most efficient way to cope with the scarcity and interference problems that justify licensing.[53] They argue that granting broadcasters transferable private property rights—including the ability to sell or lease their channels to wireless phone companies or other industries—would ensure that the invisible hand of the marketplace distributes this scarce public resource to the users who value it most. In this view, the economic efficiency of using a price mechanism should prevail over the historic conception that the airwaves are inherently a commonly owned asset.

The first problem with this approach is that it presumes that the FCC's current 50-year-old spectrum subdivision scheme with its discrete channels and guard bands will always be the optimal way of organizing access to the airwaves. This approach was certainly sensible in the past given the interference problems of existing transmitter and receiver technology. However newly developed ultra-wideband and software-defined radio technologies promise to allow multiple users to dynamically share the same frequency bands without causing interference. In light of the capabilities of these devices, several scholars and engineers have suggested that the most efficient model for managing the airwaves in the near future may be a "spectrum commons," with an open-access architecture similar to the Internet.[54] Turning today's antiquated allocation scheme into private property would lock in the current rigid channel-based zoning regime and create serious barriers to development of these innovative new technologies.

Another problem with privatizing spectrum permanently with auctions is that it deprives the public of long term returns on its asset, both monetary and with respect to First Amendment values. Wireless technologies are developing so rapidly that we simply do not know how scarce and how valuable spectrum will be in the future. In ten years, the airwaves could be so central to the nation's communications and economy that its market value could be in the trillions, not billions of dollars. If the federal government granted permanent ownership of spectrum to businesses with a once-off fire sale today, it would

in effect give up the taxpayers' capacity to derive fiscal returns from airwaves in the future. No private asset manager would choose to do this. In sum, "propertization" of the spectrum would result in both substantial inefficiencies and gross inequities.

It may be argued that with this spectrum fee reform, viewers—especially the 13 percent of household that do not rely on cable or DBS—might lose substantial public service programming in the absence of the public trustee content regulation of the FCC. But as discussed earlier, the impact on news, public affairs, quality children's programming and prime-time PSAs is likely to be minimal. Not only is such programming a shrinking shard of network offerings, but because 87 percent of households receive broadcast content via cable or DBS subscription—and have dozens of paid channels from which to choose—broadcasters have already largely transformed into competitive "content providers," offering primarily what they believe viewers (and advertisers) most want to watch. There could be a small loss in the children's educational programming area, but it could be greatly outweighed by earmarking spectrum revenue to finance high-quality educational fare over PBS and the Internet. The Internet will be increasingly making its contribution in this respect, particularly if a Digital Opportunity Trust is available to subsidize quality educational, cultural, and civic content.

It has been pointed out that a majority of today's broadcasters paid large sums to purchase stations (and the underlying valuable spectrum permit) from a licensee who originally obtained the free permit. But, in acquiring the station, this latter-day purchaser assumed the same obligation to render public service and not to maximize profits at the expense of such service (just as cable operators assume the obligation to pay the franchise fee when they purchase cable systems). It is this obligation for which the spectrum usage fee is to be substituted. As shown above, the sums so obtained could be used too much more effectively obtain public service.

Conclusion

By strategically leveraging a 70-year-old deal with Congress, the commercial broadcasting industry has managed to take control of a large allocation of the nation's airwaves while shirking the public interest obligations it is legally required to deliver as payment for its use of this public asset. The industry's actions are contributing to an alarming shortage of spectrum for higher value-added wireless services and are also denying the American public a fair return on its very valuable asset.

Charging broadcasters a spectrum usage fee of five percent of gross advertising revenues is a necessary first step to dealing with these problems. The proceeds from this "rental charge" on spectrum would be an ideal means of funding non-commercial education innovation and more high-quality children's, local, civic, and cultural programming for the digital era. It would also promote more efficient use of the spectrum by broadcasters who would finally be forced to internalize the costs of occupying this crucial public asset.

ENDNOTES

[1] Thomas W. Hazlett, "The Wireless Craze, The Unlimited Bandwidth Myth, The Spectrum Auction Faux Pas, and the Punchline to Ronald Coase's Big Joke: An Essay on Airwave Allocation Policy," 93 *Harvard Law and Technology Journal*, Spring 2001.
[2] U.S. v. Zenith Radio Corp., 12 Fed. (2) 614 (1926)
[3] Benton Foundation, *Charting the Digital Broadcasting Future: Final Report of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters*, 1998, 18.
[4] See Hazlett (2001), 97.
[5] Ibid., 91.
[6] For a thorough historical summary, see Thomas W. Hazlett and Matthew L. Spitzer, "Digital Television and the Quid Pro Quo," *Business and Politics*, Vol.2, No.2, 2000, 119-120. See also, Erwin G. Krasnow, & Lawrence, D. Longley, *The Politics of Broadcast Regulation (Second Edition)*, (New York: St Martins Press, 1978, 69-93).
[7] See Michael Calabrese, "The Great Airwaves Robbery," Issue Brief, New America Foundation, November 2001. Broadcasters were granted an extra channel for advanced digital television (including high-definition) under the Telecommunications Act of 1996 and were ordered to vacate their old analog channels to make space for wireless services by 2006, with the qualification that this give-back could be delayed until 85% in the viewing area of households could receive advanced TV. They have thus continued to occupy both channels, and will do so for a lengthy period after 2006 because of the 85% requirement. After intensive lobbying from broadcasters, the FCC, in its "Order on Reconsideration of the Third Report and Order", September 17, 2001, gave 21 broadcasting companies with 138 stations on channels 60 - 69 the right to conduct private auctions with wireless phone companies to clear their analog channels, with a public auction to follow. Under this approach, which has aroused considerable controversy on the Hill, broadcasters, not taxpayers, would retain the lion's share of the auction proceeds.
[8] Commercial television advertising revenue figures can be found in Universal-McCann, U.S. Advertising Revenues, 2001 and 2002. See also "State of the Television Industry: Television Revenues 2000 & Beyond," BIA Financial Network, Inc. 2000 as quoted in Alliance for Better Campaigns, *The Case for Free Airtime*, March 2002.
[9] *Schaeffer Radio Co.* (FRC 1930), quoted in John W. Willis, *The Federal Radio Commission and the Public Service Responsibility of Broadcast Licensees*, 11 Fed. Com. B.J. 5, 14 (1950).
[10] *Red Lion Broad. Co. v. FCCI,* 395 U.S. 367, 380 (1969).
[11] Benton Foundation, *Charting the Digital Broadcasting Future: Final Report of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters*, 1998, 21.
[12] Ibid., 28.
[13] Ibid., 29.
[14] FCC Notice of Inquiry, 8 FCC Rcd 1841, 1842 (par.6).
[15] See Petition of CME to Deny Applications for Consent to Transfer of Control of Broadcast Licenses Held by Capital Cities/ABC to Walt Disney Co., at 29-30.
[16] FCC Report on Children's Television Act, FCC 96-335 (1996).
[17] Benton Foundation, *Charting the Digital Broadcasting Future: Final Report of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters*, 1998, 27.
[18] Ibid., 28.
[19] See sections 4-6 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat.1460, 1461 (1992).
[20] *Turner Broad. Sys. Inc. v. FCC,* 512 U.S. (1990), *Supra* note 8.
[21] Paul Taylor and Norman Ornstein, "The Case for Free Air Time: A Broadcast Spectrum Fee for Campaign Finance Reform," Working Paper, New America Foundation, June 2002.
[22] For a good summary of FCC rulemaking in this area see Benton Foundation, *Charting the Digital Broadcasting Future: Final Report of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters*, 1998, 25.
[23] The lowest unit rate requirement was codified as 47 U.S.C. 315 (b) in 1972.

[24] Alliance for Better Campaigns, *Gouging Democracy: How the Television Industry Profiteered on Campaign 2000*, 2001.
[25] The guidelines are contained in *Great Lakes Broadcasting Co.*, 3 F.R.C. Ann. Rep. 32 (1929).
[26] This became known as the *Cullman Doctrine* and was set forth in a letter decision in 1963. *Cullman Broad. Co., Inc.*, 40 FCC 576 (1963)
[27] *Red Lion*, at 390.
[28] Benton Foundation, *Charting the Digital Broadcasting Future: Final Report of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters*, 1998, 27.
[29] Syracuse Peace Council, 2 FCC Rcd 5043 (1987), aff'd, 867 F.2d 654 (DC Cir. 1989) cert. Denied, 110 S. CT. 717 (1989).
[30] Deregulation of Radio, 84 FCC2d 968 (1981); Commercial TV Stations, 96 FCC2d 1076 (1984).
[31] The FCC does have an outstanding proposal to have the material placed on a website; this proposal is vigorously opposed by the NAB as onerous and wasteful, and is still pending.
[32] *Cowles Florida Broadcasting, Inc. v. FCC*, 60 FCC 2d 371, 439 (1976).
[33] For a fuller discussion of this long pattern of failure, see Henry Geller, Regulatory Reform for the Principal Electronic Media, Annenberg Wash. Program, Nov. 1994, at 12-17; Henry Geller, Public Interest Regulation in the Digital Era, 341 *Cardozo Arts & Entertainment Law Journal* 344 (1998).
[34] CNN, "Larry King Live," April 7, 1988.
[35] *Broadcasting & Cable*, March 6, 2000, 98.
[36] Adminis trative discretion to deny renewal must be "reasonably confined by ground rules and standards." *Greater Boston Television Corp. v. FCC*, 444 F 2d 841, 854 (D.C. Cir. 1970), cert. denied, 402 U.S.1007 (1970). The reform urged here would obviate the need for proceedings seeking to determine what the rules or guidelines should be in the digital era. See the Benton Foundation, *Charting the Digital Broadcasting Future: Final Report of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters*, 1998. This is a most difficult undertaking because the nature of that operation is so uncertain today (i.e., the mix of HDTV, SDTV, multichannel operation, ancillary activities); that mix will be determined by market forces, and once establis hed, the broadcasters will resist any change proposed to meet new public interest obligations in the changed digital environment on the ground that it would now be too disruptive. The reform here obviates these issues.
[37] See James Steyer, *The Other Parent*, (New York: Simon & Schuster, 2002). Steyer, the CEO of an independent children's television production company, offers an insider's view of why children's programming is seldom educational and little more than a "giant marketing machine."
[38] The Annenberg Public Policy Center's surveys are available at: http://www.appcpenn.org. As a New York Times article ("Networks Comply, but Barely on Children's Shows," Dec. 11, 1997) reports, the "first batch of new shows to comply with the [FCC] rule is a mixed bag of reruns from PBS or cable, a few innovative shows, and some entertainment shows with an overlay of educational material slapped on like shellac." For example, NBC "continues to say that 'NBC Inside Stuff' is designed to teach 'life lessons,' not just promote basketball."
[39] See above note. As a further example, some broadcasters claimed that "The Little Mermaid," was educational in that it taught young girls how to be leaders; while this might seem ludicrous, it is not easy under the First Amendment for the FCC to rule on whether programs, which can have large entertainment quotients and still serve social purposes, constitute core educational fare (i.e., specifically designed to educate children). However, this problem does not arise with public broadcasting. Thus, Chairman Hundt, in commenting on an Annenberg study, observed: "The studies show that virtually all the programs aired for children on PBS were judged to be of high quality and educational; only a third of those aired on the 'Big Three' networks fell into the same category. This statistic about PBS is not surprising." *Television Digest*, June 16, 1997, 7. It is not surprising because PBS has no commercial motivation and wants solely to deliver high quality educational programming.
[40] *City of Dallas v. FCC*, 118 F.3d 393, 397-398 (1997).
[41] *Telecommunications Act of 1996,* [47 U.C.S 335] 169.
[42] *Cable Television Consumer Protection and Competition Act of 1992*, Pub. L. 102-385, 106 Stat. 1460, 1461 (1992).
[43] Tom Wolzien, "Whose Bandwidth is it Anyway?" Speech, National Association of Broadcasters Futures Summit, April 2001.

[44] At the 2000 World Radio Conference (WRC-2000), the International Telecommunications Union adopted Resolution 223, which states that approximately 160 MHz of additional spectrum will be needed to meet projected 3G system requirements in high traffic areas by 2010.

[45] Council of Economic Advisors, "The Economic Impact of Third-Generation Wireless Technology," October 2000, citing estimates by Brookings Institution economist Jerry Hausman.

[46] Universal-McCann U.S. Advertising Revenues, 2000 and 2001; see also, BIA Financial Network, Inc., "State of the Television Industry: Television Revenues 2000 & Beyond" (2000) as quoted in Alliance for Better Campaigns, "The Case for Free Airtime," March 2002. Overall, the broadcast industry took in $64 billion in advertising revenue in 2000—$44 billion from television ads and $20 billion on radio.

[47] This subsection provides that broadcasters who enable another broadcasters to present educational programming are to be given credit for this action at the time of filing their renewal applications. The provision has been little used. Unlike cable, which has fully supported the C-SPAN channels, commercial broadcasters have made no similar move to fully or very substantially support the PBS educational effort as a ready-to-learn channel or some other multichannel educational activity.

[48] Twentieth Century Fund Task Force on Public Television, "Quality Time?" 1993, 152 (showing the amounts spent per capita on public broadcasting in 1991: U.S., $1.06; Japan, $17.71; Canada, $32.15; U.K., $38.56).

[49] Newton Minow and Lawrence Grossman, *Digital Promise* (New York: Century Foundation Press, 2001).

[50] William Kennard, "What Does $70 Billion Buy You Anyway," Museum of Television and Radio, October 10, 2000. http://www.fcc.gov/Speeches/Kennard/2000/spwek023.html.

[51] "The Web Catches and Reshapes Radio," *The New York Times*, Jan. 16, 2000.

[52] Commercial radio advertising revenue figures can be found in "State of the Television Industry: Television Revenues 2000 & Beyond," BIA Financial Network, Inc. 2000 as quoted in Alliance for Better Campaigns, "The Case for Free Airtime," March 2002.

[53] See R.H. Coase, "The Federal Communications Commission," 2 *Journal of Law and Economics* 577 (1959) and Thomas Hazlett *supra* note 1.

[54] David P. Reed, "Why Spectrum Isn't Like Property," Presentation, Open Spectrum Working Group, May 18, 2001. Reed, a former professor of computer science and engineering at MIT, argues that spectral capacity can scale with demand by using "cooperative" wireless architecture interconnected with wired/fiber networks. See also Yochai Benkler, "Overcoming Agoraphobia: Building the Commons of the Digitally Networked Environment," 11 *Harvard Journal of Law and Technology* 287 (Winter, 1998).

A Modest Proposal for Restructuring the Federal Communications Commission

Harry M. Shooshan III*

I. Introduction

In recent months, a number of commentators have called for the abolition—or very substantial retrenchment—of the Federal Communications Commission (FCC or Commission).[1] Last October, four new FCC Commissioners, including a new Chairman, completed an extraordinary confirmation process which saw them grilled on issues ranging from universal service to spectrum auctions; hauled into senators' private offices for meetings to discuss pending administrative proceedings and litigation strategy; and subjected to all manner of "holds" before finally being approved by voice votes or, in the case of the Chairman, a recorded vote of 99 to 1. Heightened scrutiny, if not downright bludgeoning, of would-be commissioners by Congress was directed against what was, arguably, by U.S. standards, the most qualified slate of FCC nominees ever proposed by an administration—consisting of the FCC's general counsel, a congressional staff economist with real expertise in the subject matter, a former state regulator, and a former Justice Department antitrust lawyer.

There is more than a little irony in all of this furor over one of the oldest of the so-called "alphabet agencies." Calls for eliminating the FCC come at a time when the agency is in the process of implementing the massive Telecommunications Act of 1996 (Act or 1996 Act).[2]

The old adage that "where one stands depends on where one sits" certainly holds true with respect to reform of the FCC. In essence, the debate is between those who hold what might be termed the traditional liberal view and those who are conservatives, or "second-look" liberals. The former are skeptical of marketplace forces and confident of the abilities of regulators to out-perform markets. They favor an expansive, interventionist regulatory agency with broad legislative authority. The latter believe the industry should be governed by consumer-citizen preferences reflected through markets and therefore favor a more limited, less intrusive agency which essentially administers and implements policy established by Congress.[3] What constitutes "undue" process, overlapping jurisdiction, redundant regulation, and unnecessary expenditures for the latter are seen as important safeguards and processes by the former.

Notwithstanding these philosophical differences, there are, especially in this period of budget constraints, legitimate questions about how the modern FCC should be structured, and how much process and regulation we can afford. In large part, it is a question of establishing administrative priorities; that is, doing the things that have to be done—and have to be done by the *federal* regulator. The 1996 Act has established new priorities for the FCC which, along with spectrum allocation, should be where the Commission directs its "scarce" resources.

Like it or not—and one's views on whether we need an FCC are difficult to disentangle from what one thinks about the agency's personalities and policies—the FCC is not going away any time soon. There are legitimate needs for a federal telecommunications regulator, at least for the foreseeable future. Focusing on elimination of the FCC is doubly dangerous. First, it needlessly polarizes the debate about FCC reform—a debate which certainly is important and long overdue. Second, it tends to minimize other approaches to major structural reform of the agency which are more relevant and at least relatively more realistic.

On the other hand, upon careful consideration, the spectacle of qualified nominees running the gauntlet of conflicting political agendas under the guise of advice and consent reveals serious flaws in the traditional structure of the agency. Much of the Congressional concern about the FCC goes to the agency's accountability. Every legislator wants the FCC to be mindful of his or her views and constituent interests. Yet, under the traditional model, accountability tends to be achieved at the expense of effectiveness. Accountability often means making it difficult for the agency to do the "wrong thing" and, as a result, making it virtually impossible for it to do the "right thing." This might be termed "negative accountability," or accountability by stalemate and paralysis. In the discourse about FCC reform, little has been said about changes that might result in "positive accountability," that is, accountability without the adverse effects of the current system.

Agreeing that there is a need for an FCC does not imply that the FCC we need is one structured as the agency is today.[4] Indeed, this article proposes a fairly radical reform—replacing the multimember FCC with a single administrator.[5] The objective of this reform is to reduce costs (both direct and indirect), improve the quality of decisions, and promote positive accountability. While this Article acknowledges the pros and cons, it does, in the end, strongly advocate change.

II. A Selective History of the FCC

After a brief attempt at informal regulation of the radio spectrum by the Commerce Department,[6] Congress, in 1927, established the Federal Radio Commission (FRC) and gave it authority to regulate the use of the spectrum. The FRC could issue a license in any case where it determined "the public interest, necessity or convenience would be served." [7] While the 1927 Radio Act barred the new FRC from engaging in censorship, it did restrict licensees' use of the airwaves, including a requirement of "equal opportunities" for political candidates. The FRC was created with five members, in part to avoid the "political interference or arbitrary control" that might result from a single administrator.[8]

In 1934, the Roosevelt administration sought legislation to transfer the FRC's powers to a new seven-member Federal Communications Commission that was also to be given jurisdiction over the telephone and telegraph industries, which was being exercised at the time largely by the Interstate Commerce Commission. The new statute, enacted within several months after it was submitted, was largely a recodification of the 1927 Radio Act and the Interstate Commerce Act.

In the sixty-four years since the FCC was established, it seems to have been taken for granted that the traditional multimember structure is the most efficient and effective.[9] The major reviews of the independent regulatory commissions (including the FCC) did not directly address this issue, although they did identify a number of structural and procedural problems with these agencies.[10]

One such review was completed in 1949 by a commission headed by former President (and Commerce Secretary) Herbert Hoover.[11] In 1960, retired Federal Judge James Landis compiled a report on the regulatory agencies for President-elect John F. Kennedy.[12] Finally, in 1971, the President's Advisory Council on Executive Organization—popularly referred to as the Ash Council—examined the independent regulatory agencies.[13]

The Hoover Commission Report focused on organizational issues related to the independent agencies. The Report did not directly address the issue of a single administrator versus a multimember commission, but did find that administration of an agency was "distinctly superior" when vested in the chairman and urged the appointment of an executive director to support the chairman.[14] In addition to improving the efficiency of the agency, this approach would also "center responsibility for the functioning of the commission" (i.e., improve accountability).[15] In that same vein, the Hoover Commission Report viewed the chairman as the agency's "principal spokesman before the Congress as well as before the executive branch."[16]

The key reforms proposed by Landis were (1) to increase the authority of the chairman of each agency; and (2) to increase the accountability of each chairman to the President.[17] In these respects, Landis, like the Hoover Commission, clearly favored the "strong chairman" (or *primus inter pares*) model. Interestingly, Landis was unwilling to take the next step along the continuum—a single administrator.

The Landis Report skirted some other tough issues. For example, in a section entitled "Administrative Organization," Landis acknowledged proposals to separate "policy" functions from adjudicatory functions. However, he ultimately believed that the regulatory process was too complex to make such simple distinctions.[18] Moreover, Landis concluded that it was "unsafe to speculate broadly upon the appropriate organization of the regulatory agencies"[19] because the industries they regulate are so different. This conclusion begs the question of how each agency might be better structured to deal with its particular mandate. This question is even more pertinent when, as arguably with the FCC today, the mandate changes over time.

While Landis focused primarily on internal organizational issues, he did touch on matters which bear directly on the structural reform recommended in this Article. Landis noted that the sheer volume and complexity of decisions agencies are called upon to make mean that commission members must delegate much of the decision-making process to staff. With a bluntness that typifies his report, Landis wrote that, unlike federal judges, commissioners "do not do their own work. The fact is that they simply cannot do it."[20] He noted that "delegation on a wide scale, not patently recognized by the law, characterizes the work of substantially all the regulatory agencies . . . . Absent such delegation, the work of these agencies would grind to a stop."[21] Landis suggested that "[t]he real issue . . . is whether to recognize openly this fact of delegation or continue with the present facade of

non-delegation . . . ." [22]

If the effective operation of the FCC entails delegation of decision making and opinion writing to staff and means that commissioners are often left to "rubber stamp" deals worked out at the staff level, there appears to be less need for a multimember structure. A proficient, expert staff directed by a highly competent administrator might be expected to produce decisions that are at least no worse than those produced by a multimember agency. The real questions, then, are what benefits, if any, result from the participation of other commissioners (or, more accurately, their staff) in formulating agency decisions, whether those benefits are more apparent than real, and what costs are associated with the multimember structure.[23]

In a section dealing with the FCC, Landis was especially harsh. While praising the "technical excellence" of its staff, he criticized the Commission for inaction, susceptibility to influence by ex parte contacts (i.e., "capture" by the regulated industry, especially the broadcast networks), and subservience to Congress.[24] After such a strong indictment, Landis offered only a modest remedy—providing the FCC with "strong and competent leadership."[25]

In 1971, the Ash Council completed its review of the independent agencies. Like its predecessors, the Ash Council report focused on issues such as the quality of appointments and concerns about "industry capture." However, the report recommended no changes in the bipartisan, multimember structure of the FCC.[26]

Given the time that has passed since the last thorough review of the independent regulatory agencies generally, and in light of the passage of the 1996 Act, it is timely to reconsider the structure of the FCC.

III. The Case for a Single Administrator

The case for reform of the FCC must start with an assessment of the appropriate role for federal regulation in the modern telecommunications and mass media environment. In other words, structure should be derived from mandate, rather than the other way around.

The structure of the FCC should be that which is most relevant to carrying out its responsibilities effectively and efficiently.[27] Since the FCC's authority has changed significantly, especially within the last decade, it is timely to review the agency's structure. In particular, the FCC's chief tasks today include implementation and enforcement of the clear procompetitive policy set out in the 1996 Act. The FCC is also responsible for administering spectrum auctions, including auctions for new broadcast spectrum, and enforcing the terms of spectrum licenses. While Congress has still left a great deal to the agency's discretion,[28] it has clearly established the major tasks the FCC must perform.[29] The question is whether a single administrator or a multimember Commission is better suited to carry out these responsibilities.

The answer requires analysis along three relative dimensions: cost, effective decision making, and accountability.

A. Costs

The relative costs of a single administrator and a multimember Commission are important

considerations.[30] Any proper cost-benefit analysis identifies beneficial and adverse consequences of a particular approach to determine the existence and magnitude of any *net* benefits, and then compares net benefits with added costs.

Any multimember commission starts out in a hole, so to speak, since it clearly entails additional costs and, thus, must produce sufficient net benefits to cover those added costs. The costs involved are both direct and
indirect. Examples of direct costs are each additional commissioner's salary and benefits (health, retirement, etc.), office space, personal staff compensation, and travel expenses. Estimates of these costs in the case of the FCC amount to about one million dollars annually for each commissioner's office.

There are also greater indirect costs with the multimember structure. The costs of simply reaching a decision, let alone achieving consensus or unanimity, clearly increase as the number of decision makers increases. Collective decision making entails interoffice coordination, negotiations, and multiple consultations with agency staff, as well as the costs of holding official meetings (e.g., meeting room, sound system, provision for telecast, and overflow seating). Another considerable indirect cost is the delay associated with gaining support for a particular outcome.

In addition, costs of private parties and other governmental authorities with stakes in the regulatory decisions are also greater. Interested parties will typically lobby multiple offices and incur the costs of "tailoring" their messages rather than simply filing generic comments with the agency.

Costs incurred in identifying, screening (FBI background checks, etc.), and confirming suitable candidates to fill added commissioner slots are also multiplied. This process often involves trading political favors with key legislators who will be called upon to confirm the nominations and, as a result, can produce delays until acceptable combinations of nominees are proposed.[31]

In the latter regard, while it is a point that bears on the substantive consequences of having a multimember commission, there are likely to be considerable differences in the selection and confirmation process under a multi- versus single administrator regime. In either case, the process is, by nature, a political exercise. Candidates tend to be people with political connections, often having worked directly in political campaigns or in professional staff positions for politically prominent individuals.[32] This is not to say, however, that the political dynamics of the two processes are comparable.

Consider the following example. In 1969, President Nixon nominated Dean Burch, the former Chairman of the Republican National Committee and a protégé of the ultra-conservative Senator Barry Goldwater, to be FCC Chairman. In 1993, President Clinton selected Reed Hundt, a Washington lawyer with very close political and fundraising ties to Vice President Al Gore, to head the agency. While both Burch and Hundt were successfully confirmed (and proved to be distinguished, if controversial, Chairmen), it is far less likely that they would have survived the process (or have been nominated in the first place) had there not been other members of the Commission to counterbalance them.

While having a single administrator will not necessarily ensure a less political selection process, it can be expected that, at least over time, the criteria used for selection of a single administrator would comport more closely with position-relevant characteristics. For example, it has been generally true that the Assistant Attorney General for Antitrust has been an antitrust or industrial organization

expert.[33] On the other hand, it has been rare that an FCC commissioner, let alone a chairman, had significant experience in telecommunications or even in the direct management of a large organization.

As noted, with multimember commissions, "strategic" selections are much more likely; that is, selections which satisfy particular political interests or offset (neutralize) other commission members. When there is more than one opening, the tendency is to put together a slate of candidates who collectively can pass political muster and can be expected to cancel each other out.[34] With expectations such as these, it is hardly surprising to see sometimes bitter and often intensely personal, rivalries surface, which do little to improve the quality of life or of substantive decisions at the FCC.[35] The result is the politicization of otherwise nonpolitical ("technical") issues and decisions.

B. Decision Making

The analysis of the impact of the two approaches on decision making is more complex and tends to be more subjective. There are two ways in which a multimember structure can affect the quality of decisions made by the agency. First, individual commissioners may contribute to better decisions by force of intellect, professional training, and experience. Multiple members bring a diversity of viewpoints. Second, having multiple commissioners may reduce the likelihood of "bad" decisions by exercising a check on any single administrator, especially the chairman.[36]

Does a multimember structure result in more "good" decisions? In the case of the modern FCC, it is not at
all clear that it does. As noted, most decisions are prepared by the staff, usually in consultation with the chairman's office. Typically, other commissioners have little input until a draft "item" is circulated prior to adoption. Even at that point, individual commissioners (including the chairman) have little actual input into the document.

Commissioners obviously have leverage. The fact that the chairman needs a majority and/or may want to appease a particular interest group or key politician with "ties" to a commissioner produces some compromises. It is less obvious, however, whether the compromises produce better decisions. In fact, largely as a result of the need to accommodate disparate views, FCC decisions have become formulaic, typically reveal very little of the Commission's "thinking," and offer little by way of insight into underlying philosophy. They consist of a lengthy section summarizing the positions taken by the parties followed by a typically shorter statement establishing the Commission's position. They serve primarily as announcements of the action taken, rather than well-reasoned statements of principle.[37] Precisely because the outcome is often the product of a last-minute consensus, the decisions are often a patchwork of pieces, each intended to satisfy some (internal or external) interest. Granting the staff "editorial privileges" following adoption of an item has become a euphemism for stitching together the necessary pieces after the fact.

The deterioration of decision making at the FCC is also apparent in the declining quality of dissenting opinions. At one time, dissents were logical, well-written, scholarly opinions which reflected clear philosophical differences with the majority (usually chairman-driven) position.[38] Today, dissents are largely statements of disagreement with the majority and are often simply scripts of comments made at the FCC's open meetings (which are, themselves, neatly choreographed events

rather than occasions for genuine give-and-take).[39]

By contrast, decisions rendered by a single administrator are likely to reflect a clear philosophy, be internally consistent, and present a more logical policy roadmap. A single administrator has nowhere to hide. There is no internal consensus to build or deal to cut.[40]

But, if multimember commissions tend to water down good policies, can they not water down bad policies as well?; that is, serve as a check on a single administrator who may be inclined to "do the wrong thing?" The answer is: "Of course." The analysis, however, cannot stop there.

In the first place, checks and balances are worthwhile, if they truly check abuses and offset the power of vested interests. They may be worth little, if they serve largely to prevent needed reforms and become a means of extracting some unwarranted governmental favor.[41] Moreover, the incremental value of any particular set of checks and balances depends on what others exist.

In the case of the FCC, it can be argued that there is a surfeit of due process—in fact, an infinitely elastic supply of legal process, or what one FCC commissioner termed "undue process."[42] The seeming preoccupation with process over progress is difficult to defend. The result is that a number of genuinely efficiency-enhancing reforms have been all but impossible to achieve. Indeed, a multimember commission is often faced with the "prisoners' dilemma." Regulators might all be inclined to agree that a politically difficult step is worth taking in the same way that prisoners might agree that it would be best not to confess. The problem is that if one nevertheless confesses/opposes taking the controversial step, there are powerful incentives compelling the others to go along. United they stand; divided they fall. A single administrator cannot be *divided* in this sense and may thus be more likely to make wise but politically unpopular decisions.[43]

The putative benefit of multimember commissions is precisely that they thwart effectiveness—they compel compromise and sacrifice of principle. Rule makings become exercises in mollifying competing internal factions or "cutting a deal."[44] From the standpoint of trying to effect change, this putative benefit is a disability precisely because it thwarts effectiveness. A well-conceived governance structure should certainly embody safeguards to ensure that good decisions are made and bad decisions are avoided. There appear to be ample safeguards already in place in the form of judicial review, legislative oversight, executive branch budget authority, and press scrutiny to constrain a single administrator without having to incur the costs of a multimember commission.[45] By way of analogy, if a car is already equipped with a variety of safety features, does it make sense to throw sand in the gears to prevent it from going too fast or operating too efficiently?

C. Independence and Accountability

The goals of independence and accountability are, of course, somewhat in conflict. As an "independent" agency, the FCC is expected to make decisions based on its expert judgment, without undue influence by the
White House, Congress, or the regulated industries. At the same time, the FCC should be accountable for its decisions. Congress must be able to ascertain whether a particular FCC decision is consistent with the statute and with public policy. The courts must be able to discern the reasoned basis for Commission decisions, if those decisions are to be sustained.[46]

From either perspective, the single-regulator model prevails over the multimember commission. Precisely because the decisions made by multimember commissions are compromises, responsibility is diffused and accountability undermined. When called to account by Congress, the President, or the public, the chairman is inclined to defend an outcome as "the best we could do under the circumstances" rather than "this is what, in my judgment, was called for."

As noted previously, FCC decisions themselves are often opaque. It is often difficult to discern a rationale or underlying philosophy other than an effort to give everybody something (a result exacerbated by the multimember decision making). Oversight of the agency tends to be entirely political, that is, a response to interest groups, which perceive they have not gotten enough.[47] A single administrator will still seek compromises among contending factions, but will be more likely to impose his or her own views as to certain core principles.[48]

From the standpoint of independence, a multimember commission may be more favorable, although its independence is achieved in a rather perverse way and at considerable cost. Because, as noted earlier, individual FCC commissioners often owe their appointments to a particular politician or interest group, their votes tend to be heavily influenced accordingly. In fact, with a multimember commission, this is the *expected* result. This result is tolerable because the expectation is that, at least at the margin, these competing influences will cancel each other out. The question remains whether the risks avoided are worth the costs incurred (larger budget, less efficient decision making, diminished accountability, etc.). The answer also depends on how serious the potential liabilities of a single administrator are on this score.

There is a potentially greater risk that the FCC would not be as independent, if it were headed by a single administrator.[49] In theory, a single administrator could be more easily corrupted; that is, unduly influenced by political pressures or industry favors. For example, in the renewal of licenses[50] or enforcement of the political broadcasting rules,[51] a single administrator at the FCC might be inclined to advance the political agenda of the President to whom he owes his appointment. He might be more inclined to curry favor with a powerful legislator by acting to stifle controversial speech (e.g., obscenity and indecency).

These are serious concerns that deserve consideration. Ultimately, the question is whether these concerns warrant a multimember Commission (with all of its associated short-comings) or suggest other necessary reforms. This assessment, moreover, must be made in the context of the modern FCC.

In the first place, the likelihood of abuse in the licensing process has been greatly reduced by the introduction of auctions as a means for awarding licenses, including (for the first time) new broadcast licenses.[52] Elimination of the public interest standard for license renewals (or eliminating the license renewal process altogether) would reduce the opportunity for subjective interpretation and potential abuse. In the absence of such reforms, the best internal check against future abuses in the licensing process is the same as it has been in the past—the existence of a cadre of career professionals who can be expected to resist inappropriate intervention by a commissioner.

Similarly, to the extent that political broadcasting laws and rules are retained, they should be administered by career professionals under delegated authority (much as they are today). If this degree of insulation is considered inadequate, review of such matters by the agency head could be formally limited in some manner. Alternatively, enforcement of political broadcasting rules could be

transferred to the Federal Elections Commission.

Regulation of other aspects of speech by licensees of broadcast stations (e.g., obscenity and indecency) should be left to the courts.[53] From a public policy perspective, it is hard to justify regulating the speech of those entities that are subject to the FCC's jurisdiction differently from the speech of those which are not.[54]

In sum, while there is increased risk of "corruption" with a single administrator, there are corresponding precautions that can be taken to reduce that risk,[55] many of which are also consistent with scaling back and redeploying FCC resources to carry out its new mandate.

IV. The U.K. Model

The single-administrator model was adopted in the United Kingdom in connection with the privatization of a number of state-owned monopolies, including British Telecom (BT).[56] By most accounts, it has worked well.

Under the 1984 Telecommunications Act, primary regulatory responsibility was given to the Director General of Telecommunications (DGT), supported by the Office of Telecommunications (OFTEL) which essentially performs the same functions as the career professional staff (as opposed to political appointees) at the FCC. Other important functions are lodged with the Secretary of State for Trade and Industry (which is roughly comparable to the U.S. Department of Commerce) and the Office of Fair Trading. For example, the Secretary of State issues the licenses which the DGT is charged with enforcing. The DGT is appointed by the Secretary of State for a specified term and is directly accountable to Parliament. The DGT has extensive advisory support, including six independent advisory committees (e.g., Small Business, Disabled, and Elderly) and several expert panels consisting of leading academics, consumers, and business representatives.

Government policy in the U.K. is established differently than in the U.S. model in that "the Government" has more direct control. For example, much of the current telecom policy framework in the U.K. was set out in a 1991 White Paper issued by the Government.[57] Another significant difference in the two regimes is that much of the DGT's authority derives not from a general statute, but rather from enforcement of the various "licences" which are, in effect, agreements between the government and the private parties (e.g., BT), embodying certain obligations and commitments. Disputes over the DGT's interpretation and enforcement of a particular license or over proposed license amendments may be referred to the Monopolies and Mergers Commission. Until now, there has been very little judicial review of government decisions, since the U.K. lacks a tradition of parties appealing regulatory decisions to the courts.[58]

While the overall structure of government in the U.K. differs from that of the U.S., the single-administrator model has produced admirable results.[59] The DGT described the benefits of this framework in a submission to the government as part of its current review of utility regulation. These benefits include:

> · An ability to balance the conflicting interests of consumers and shareholders, and of competitors and incumbents in a manner which transcends the short-term political pressures faced by the "Government of the day;"

· The ability to establish consistent policy and create a stable and predictable regulatory climate so that investment commitments can be made; and

· The ability to promote competition and protect consumers in markets where competition does not exist.[60]

Guided by the DGT, OFTEL has established a much clearer, consistent policy for the introduction of competition. For example, OFTEL has consistently sought to encourage facilities-based competition, rather than relying on resale and on using piece-parts of the networks of the incumbent (i.e., BT). OFTEL sees such "infrastructure competition" as essential to its ability ultimately to withdraw from regulation of the telecommunications industry. OFTEL has also been much more explicit about the need for achieving an efficient rate structure and, not surprisingly, has been much more successful in achieving one than has the FCC.[61] By comparison to the opaque, formulaic FCC decisions, an OFTEL document is a lucid policy roadmap. One might disagree with the destination arrived at by OFTEL, but it is much easier to understand how they got there.

The U.K. model has not been without its recent critics. One respected commentator was led to support the multimember "American-style" commission out of concern that, with a single administrator, "[p]olicy becomes obscured by personality; *mano-a-mano* confrontations replace reasoned decisions."[62] While decisions may be more easily perceived (or cast by the press and affected industries) in such terms (in the U.K. there is, admittedly, only the DGT to blame), close observers of the American scene must find it remarkable how often the priorities of multimember commissions are viewed as the results of "the personal agenda" of the chairman.[63] In either case, press perception and "spin" by the parties seem like weak arguments for one model or the other.[64]

It must also be noted that the DGT has himself recommended replacing individual regulators with multimember commissions.[65] While acknowledging the potential disadvantages of a commission, the DGT suggests that a multimember commission would be "more accountable, provide more stability, and improve the quality of decision making."[66] He also sees benefits from having decisions made in open meetings.[67]

The DGT's recommendation must be considered in the proper context. In the first place, the current occupant of that position has announced that he will not seek reappointment from the new government when his seven-year contract expires in 1998. It is widely acknowledged that he will be "a hard act to follow." Second, his call for a commission is accompanied by a call for greatly expanded authority for the telecommunications regulator in the U.K., including new authority to set competition policy and expanded authority over broadcasting. The latter recommendation may be more politically palatable where it is not seen as further aggrandizing the DGT. A commission, moreover, would have room for others, who might be adversely affected by the transfer of authority to the proposed new agency. Finally, the DGT's recommendation may square with the role regulation will play in the U.K. but is clearly not transferable to the U.S., which already has two competition agencies in place and which has defined a very clear role for the FCC as the primary implementor and administrator of the 1996 Act.[68]

In sum, then, the merits of the DGT's recommendation should be considered within the unique circumstances that exist in the U.K. at the present time. His recommendation in no way diminishes

the successes of the single-administrator model in the U.K. to date or undermines the arguments for reforms of the multimember commission model in the current environment in the U.S.

V. Conclusion

The passage of the Telecommunications Act of 1996 and the debate about the future of the FCC suggest that the time is right to reconsider the Commission's structure. Reviews of the independent regulatory agencies conducted since the FCC was created in 1934 have not seriously considered the alternative model proposed in this Article—a single administrator.

The advantages of a single administrator over a multimember commission are substantial. Costs could be reduced. Decision making could be improved. Positive accountability could be enhanced. The potential disadvantages of a single administrator should also be addressed by appropriate changes in the FCC's jurisdiction, especially as it relates to broadcast license renewals and the political broadcasting rules. In general, if Congress is concerned about limiting the discretion of the single administrator, it can replace the Commission's "public interest" mandate with a more defined set of responsibilities much as it has done with enactment of the 1996 Act.

The success of the single-administrator model in the U.K. should be studied carefully. Under the direction of the DGT, OFTEL has, for example, established a much clearer, more consistent policy for the introduction of telecommunications competition. It has produced a much more stable and predictable regulatory environment.

The restructuring advocated in this Article is a constructive alternative to the calls for elimination of the FCC and a return to the common law. The FCC has been given an important job to do by the Congress in implementing the 1996 Act. Congress should now seriously consider how best to structure the FCC so that its job can be done as rapidly, efficiently, and effectively as possible.

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1. *See* Peter Huber, Law and Disorder in Cyberspace: Abolish the FCC and Let Common Law Rule the Telecosm (1997); Thomas G. Krattenmaker, *The Telecommunications Act of 1996*, 49 Fed. Comm. L.J. 1 (1996); Heritage Foundation, Rolling Back Government (1995); Progress and Freedom Foundation, The Telecom Revolution: An American Opportunity (1995).

2. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.A. (West Supp. 1997)).

3. Of course, few people fall neatly into one category or the other. For example, one may believe marketplace forces are adequate to ensure the presentation of diverse viewpoints in mass media markets but favor government intervention to ensure (subsidize) universal telephone service. This has resulted in collective support, at least among politicians, for the traditional liberal view of regulation (and government generally) and explains why basic reforms have been rarely recommended and difficult to achieve.

4. While this Article focuses on the governance structure for the agency (i.e., whether it can be more effective and efficient headed by a single administrator than a multimember commission), there are obviously other "structural" issues that should be considered.

One area which should be carefully examined is the FCC's jurisdiction over mergers, at least those that do not involve the transfer of broadcast licenses. In the general economy, mergers are reviewed by one or more antitrust authorities (e.g., the Department of Justice, the Federal Trade Commission, and various state attorneys general). The focus of these authorities is on whether a proposed merger or acquisition would lessen competition in the relevant market. However, when a merger is proposed involving firms which hold spectrum licenses, the FCC must give its approval as well, determining whether the transfer of control of the licenses is "in the public interest." The question is: What does this additional layer of review add, or why do we treat firms that use the spectrum differently from those that use newsprint, memory chips, or steel to produce a product or render a service?

The legal theory is that the use of the spectrum carries with it some special responsibilities and obligations. This theory also holds that the spectrum "belongs to the people" and that licensees use it only as "public trustees." This thinking has its roots in the government's administration of broadcast spectrum, where, early on, the decision was made to award licensees by regulatory process rather than by market mechanisms. The theory that supported broadcast licensing became the theoretical foundation for the licensing of all spectrum (e.g., business radio, private microwave, etc.). The FCC's authority in this respect has never been seriously reviewed by Congress. *See generally* Thomas G. Krattenmaker & Lucas A. Powe, Regulatory Broadcast Programming (1994).

Of course, a number of things have changed since the 1920s which call into question the continued relevance of the underlying theory and certainly its expansion by the FCC over the years to form a basis for agency review of telecom mergers. First, there is the fundamental question of whether use of nonbroadcast spectrum should be governed by the same theory as broadcast spectrum. In reality, applications for the use of most nonbroadcast spectrum are routine. Rules relating to allowable levels of power, coverage area, and so forth are straightforward. Does the use of a business radio license to dispatch trucks on service calls, a microwave license to transport cable programming or telephone calls, or a satellite license to send and receive data require a finding, even in the first instance, that the user is an appropriate public trustee?

The FCC has, nevertheless, used this rather small hook to hang up some very big mergers. For example, in 1997, the FCC refused to approve the merger of Bell Atlantic and NYNEX, which had been approved by the Justice Department and a number of state regulatory commissions, until the companies agreed to certain conditions which the Commission proposed relating to local competition. The FCC Chairman also took the unusual step of opposing a possible merger of AT&T and SBC, before it was even formally announced by the parties.

5. At a 1996 Senate hearing on FCC oversight and reform at which the Author testified, Albert Halprin, former Chief of the FCC's Common Carrier Bureau, also advocated the move from a multimember Commission to a single administrator. While not specifically endorsing a single administrator, Dennis Patrick, a former FCC Chairman, testified to the need to reduce the size of the Commission. *Federal Communications Commission Oversight and Reform: Hearing Before the Senate Comm. on Commerce, Science, and Transportation*, 104th Cong. (1996).

6. *See* United States v. Zenith Radio Corp., 12 F.2d 614 (N.D. Ill., 1926); *see also* R.H. Coase, *The Federal Communications Commission*, 2 J.L. & Econ. 1 (1959).

7. Radio Act of 1927, ch. 169, 44 Stat. 1162, *repealed by* Communications Act of 1934, ch. 652, § 602(a), 48 Stat. 1064, 1102 (codified as amended in scattered sections of 47 U.S.C.A. (West 1991 & Supp. 1997)).

8. *See* Erwin G. Krasnow et al., The Politics of Broadcast Regulation 12 (3d ed. 1982) (quoting S. Rep. No. 69-772, at 2 (1926)). In a 1930 law review article, the Chairman of the American Bar Association's Committee on Communications, a former General Counsel of the FRC, called for a "Radio Czar" rather than a commission, expressing a concern that a multimember commission "would inevitably clash and would neutralize each other." Louis G. Caldwell, *The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927*, 1 Air L. Rev. 295, 296 (1930).

9. This is the case despite the fact that during this period a number of regulatory bodies headed by a single administrator were created (e.g., the Environmental Protection Agency). There does not appear to be a clearly stated or consistent rationale for choosing one structure over the other.

10. The structure of the FCC became a legislative issue, when Congress first began to address the need for revamping the Communications Act in the late 1970s. At that time, legislation proposed in the House of Representatives included provisions that would have renamed the agency and reduced the number of commissioners to five. While complete rewrites of the 1934 Act were not enacted at that time, portions of the proposed bills eventually found their way into law or regulation, including the reduction in the number of commissioners. *See* Omnibus Budget Reconciliation Act of 1982, Pub. L. No. 97-253, 96 Stat. 763. However, to date, Congress has not considered replacing the multimember FCC with a single administrator.

11. *See* Commission on Organization of the Executive Branch of Government, The Independent Regulatory Commissions, A Report to Congress (1949) [hereinafter Hoover Commission Report].

12. Subcommittee on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 86th Cong., Report on Regulatory Agencies to the President-Elect (Comm. Print 1960) (authored by James M. Landis) [hereinafter Landis Report].

13. President's Advisory Council on Executive Organization, A New Regulatory Framework: Report on Selected Independent Regulatory Agencies (1971) [hereinafter Ash Council Report].

14. Hoover Commission Report, *supra* note 11, at 5-6.

15. *Id.* at 6.

16. *Id.* The Commission also recommended that members of all independent agencies be removed only for cause and called for a change
in the statute to extend this protection to the FCC. *Id.*

17. Landis Report, *supra* note 12, at 65.

18. *Id.* at 17-22.

19. *Id.* at 20.

20. *Id.* at 19.

21. *Id.* at 20.

22. *Id.*

23. The Landis Report also found considerable overlapping jurisdiction among regulatory agencies, principally in the area of antitrust. Landis cited the FCC's jurisdiction over issues of "monopoly" as one example. He recommended better coordination or simply eliminating the overlaps. *Id.* at 29, 86; *see also supra* note 4 (discussing FCC review of telecommunications mergers).

24. Landis Report, *supra* note 12, at 53-54.

25. *Id.* at 54. President Kennedy certainly followed this advice by nominating Newton Minow as Chairman. Minow proved himself to be one of the most competent and controversial Chairmen in the agency's history. He was also willing to take on the broadcasters as evidenced by his famous "vast wasteland" speech delivered to the National Association of Broadcasters' convention in 1961.

26. Ash Council Report, *supra* note 13, at 14.

27. It is precisely for this reason that proposals to abolish the FCC are so irrelevant. Congress has given the FCC a large amount of work to implement the 1996 Act, leaving many important details to be worked out by the expert agency.

28. Congress should also consider whether "the public interest" standard for decision making is too vague and leaves too much discretion with the FCC. This is not a new concern, especially as it relates to FCC regulation of broadcast speech. *See* Glen O. Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 Minn. L. Rev. 67, 125 (1967) ("Perhaps more basically troublesome than the encouragement of conformity is the fact that it is impossible to tell whether the Commission is in fact making value judgments about programming while its published opinions deny that it is doing so."); David L. Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 Duke L.J. 213, 215 ("The licensing scheme mandated by the Federal Communications Act permits a wide-ranging and largely uncontrolled administrative discretion in the review of telecommunications programming. That discretion has been used, as we might expect and as traditional First Amendment doctrine presumes, to apply sub silentio pressure against speech . . . ."). As yet another commentator has noted:

> It is hard to reconcile such governmentally imposed requirements with the traditional concept of the freedom of the press. The broadcast model assumes that the government has a positive role to play as licensor and regulator. The optimistic notion that government is to play that role on behalf of citizen freedom rather than against it is not persuasive to those who are skeptical about the power of good will in political processes to guarantee good results.
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> Ithiel de Sola Pool, Technologies of Freedom 135 (1983).

29. For example, the FCC is required to oversee the establishment of prices for "unbundled network elements" and to implement the new universal service mandate of the 1996 Act. Telecommunications Act of 1996, sec. 101(a), § 251, 47 U.S.C.A. § 251 (West Supp. 1997).

30. Costs, in this context, refer to the resources needed to operate the agency rather than any adverse consequences that flow from operating in a particular fashion.

31. Frequently during the last decade, the FCC has operated for substantial periods of time with less than a full complement of commissioners for political reasons.

32. In the 1970s, the Senate Commerce Committee commissioned an analysis of appointments to the FCC and Federal Trade Commission which found that: "Partisan political considerations dominate the selection of regulators to an alarming extent. Alarming in that other factors—such as competence, experience, and even, on occasion, regulatory philosophy—are only secondary considerations." Senate Comm. on Commerce, 94th Cong., 2d Sess., Appointments to the Regulatory Agencies: The Federal Communications Commission and the Federal Trade Commission (1949-1974) 391 (Comm. Print 1976) (prepared by James M. Graham & Victor H. Kramer). There has been considerable criticism over the years (by the American Bar Association, among others) of the quality of regulatory appointments. To the extent the problem is endemic to the U.S. political system, it may be too much to expect nominees who are completely "above politics." However, in view of the likely outcome, it *is* desirable to have an agency structure that enhances accountability and efficient, timely decision making.

33. *See* William E. Kovacic, *The Quality of Appointments and the Capability of the Federal Trade Commission*, 49 Admin. L. Rev. 915, 948 (1997) ("Replacing a multi-member structure with a smaller number of commissioners or a single administrator probably increases the likelihood that more nominees will be highly qualified.").

34. *Id.* at 948-49.

There are several approaches for improving the quality of regulatory agency appointments. One approach is to . . . convert multi-member commission structures to leadership by one administrator. [This] curbs the ability of Congress or the executive branch to endorse candidates with weak qualifications. As the number of commission members declines, it becomes more difficult for the President to justify poor appointments by arguing that at least some commissioners are qualified and can be relied upon to guide the agency on matters of substance.

Id.

35. *See In-Fighting at FCC Grows Hotter with Exchange of Contentious E-Mail*, Wash. Telecom Wk., Sept. 26, 1997, at 1; *Quello Fires Final Blast at Chmn. Hundt on First Amendment Issues*, Comm. Daily, Oct. 27, 1997; Chris McConnell, *Quello Fires at Hundt*, Brdcst. & Cable, June 30, 1997, at 24; *Quello Blasts Hundt on First Amendment Views*, Comm. Daily, June 27, 1997; Harry A. Jessell, *Family Feud at the FCC*, Brdcst. & Cable, Dec. 23, 1991, at 4.

36. For a period of 17 months during 1987 to 1989, as a result of unfilled vacancies, the Commission functioned with only three members. During this period, the Chairman was ostensibly able to exercise more control, since he needed only one additional vote to produce his favored result. However, at the same time, each of the other two commissioners had greater bargaining power as well. While it is difficult to judge whether the resulting decisions were any better, the FCC certainly was able to function effectively with fewer than the full complement of commissioners.

37. Judge Posner observed of the Commission's decision to revise the financial interest and syndication rules:

The Commission's majority opinion . . . is long, but much of it consists of boilerplate, the recitation

of the multitudinous parties' multifarious contentions, and self-congratulatory rhetoric about how careful and thoughtful and measured and balanced the majority has been in evaluating those contentions and carrying out its responsibilities. Stripped of verbiage, the opinion, like a Persian cat with its fur shaved, is alarmingly pale and thin.

Schurz Comm., Inc. v. FCC, 982 F.2d 1043, 1050 (7th Cir. 1992).

38. An example of such a dissent was Commissioner Glen Robinson's scathing indictment of the FCC's comparative license renewal process. *See* Cowles Fla. Brdcst., 60 F.C.C.2d 372, 430-433, 37 Rad. Reg. 2d (P & F) 1487 (1973).

39. The Government in the Sunshine Act, Pub. L. No. 94-409, § 2, 90 Stat. 1241 (codified at 5 U.S.C. § 552b (1994)), was enacted in 1976. In essence, the Act requires federal agencies headed by boards (two or more persons) appointed by the President to open "every portion of every meeting" to the public unless there is a valid reason for closing them. Whatever benefits the Sunshine Act may have produced, it has virtually eliminated Commission meetings as a meaningful part of the decision-making process. Points of contention are no longer debated in public, but are resolved prior to meetings in *closed* sessions of Commission staff or even by notation (or "on circulation" in the parlance of the FCC) in part to avoid the notice and other procedural requirements of open meetings. FCC meetings involve virtually no collegial interaction and have no bearing on the outcome. Replacing the Commission with a single administrator, and thereby removing the agency from the requirements of the Sunshine Act with respect to open meetings, would be a long-overdue acknowledgment that this particular "emperor" has no clothes. Indeed, the deterioration in decision making may well be adequate grounds for repealing the Sunshine Act altogether.

40. This also produces greater accountability, as discussed in Part III.C.

41. One penetrating analysis put it this way:

By definition, government's power to solve problems comes from its ability to reassign resources, whether by taxing, spending, regulating, or simply passing laws. But that very ability energizes countless investors and entrepreneurs and ordinary Americans to go digging for gold by lobbying government. In time, a whole industry—large, sophisticated, professionalized, and to a considerable extent self-serving—emerges and then assumes a life of its own. This industry is a drain on the productive economy, and there appears to be no natural limit to its growth. As it grows, the steady accumulation of subsidies and benefits, each defended in perpetuity by a professional interest group, calcifies government. Government loses its capacity to experiment and so becomes more and more prone to failure.

Jonathan Rauch, Demosclerosis: The Silent Killer of American Government 17 (1994).

42. *See Why Is This Trip Necessary? Regular Americans Should Be Interested*, Telco Competition Rep., Aug. 1, 1996.

43. There is a big difference between expression of policy differences at the *policymaking* level (i.e., the legislature) and at the regulatory level, where established policies are administered. While the FCC has historically viewed its "quasi-legislative role" expansively, the Commission's primary responsibilities currently consist of implementing policy established by Congress in the 1996 Act.

44. Judge Posner, in *Schurz Communications, Inc. v. FCC*, said of the Commission's treatment of the

financial interest and syndication rules:

The impression created is of unprincipled compromises of Rube Goldberg complexity among contending interest groups viewed merely as clamoring suppliants who have somehow to be conciliated. The Commission said that it had been "confronted by alternative views of the television programming world so starkly and fundamentally at odds with each other that they virtually defy *reconciliation*." The possibility of resolving a conflict in favor of the party with the stronger case, as distinct from throwing up one's hands and splitting the difference, was overlooked.

Schurz Comm., 982 F.2d 1043, 1050 (7th Cir. 1992) (quoting Evaluation of the Syndication and Financial Interest Rules, 6 FCC Rcd. 3094, para. 11, 69 Rad. Reg. 2d (P & F) 341 (1991)).

45. This reform proposal would leave the protections of the Administrative Procedures Act in place. 5 U.S.C. § 551 (1994). Although some changes in the APA may be desirable in their own right (note the concern that excessive due process thwarts efficient decision making), the absence of similar formal protections in countries such as the U.K. is not to be emulated, especially in the aftermath of the WTO Agreement on Trade in Telephone Services, which calls for openness, transparency, and accountability in the regulatory process. *See GATS Reference Paper*, 36 I.L.M. 367 (1997) (This document's procompetitive regulatory principles were adopted (in whole or substantial part) by 65 World Trade Organization Member Countries on February 15, 1997.).

46. There are problems with both independence and accountability when the FCC becomes the target of too much pressure from too many contending factions. While 20 years ago congressional oversight of the FCC involved primarily answering to the Commerce and Appropriations Committees, the Commission today is the target of inquiries and demands from a growing number of individual legislators, congressional caucuses, etc. *See* Harry M. Shooshan III et. al., *Legislating Conduct at the FCC: Congress and the FCC Authorization Process*, Brdcst. Fin. J., March-April 1989; Harry M. Shooshan III & Erwin G. Krasnow, *Congress and the Federal Communications Commission: The Continuing Contest for Power*, 9 Comm/Ent 819 (1987); Erwin G. Krasnow & Harry M. Shooshan III, *Congressional Oversight: The Ninety-Second Congress and the Federal Communications Commission*, 10 Harv. J. on Legis. 297 (1973), *reprinted in* 26 Fed. Comm. B. J. 81 (1973).

47. In this environment, the first principle is "I want more," and the second is "More is not enough."

48. As an example, compare the local competition decisions of the FCC with those of the U.K.'s Office of Telecommunications (OFTEL). The FCC's interconnection order sought to be all things to all people; that is, to ensure big discounts for resellers of local service and uneconomically low prices for unbundled network elements. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, 11 FCC Rcd. 15,499, 4 Comm. Reg. (P & F) 1, *clarified by Order on Reconsideration*, 11 FCC Rcd. 13,042, 4 Comm. Reg. (P & F) 1057, *reconsideration denied by Second Order on Reconsideration*, 11 FCC Rcd. 19,738, 5 Comm. Reg. (P & F) 420 (1996), *vacated in small part by Third Order on Reconsideration and Further Notice of Proposed Rulemaking*, 8 Comm. Reg. 1206 (1997) (further reconsideration pending). As a result, the FCC's "policy" may actually have undercut facilities-based competition. Key elements of this order were overturned by the Eighth Circuit Court of Appeals. Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), *cert. granted sub. nom.* AT&T Corp. v. Iowa Utils. Bd., 118 S. Ct. 879 (1998). OFTEL's approach has been consistently to promote facilities-based local competition. Only facilities-based providers are eligible for resale discounts and OFTEL has declined to order BT to unbundle its

loops. Whether or not one agrees with OFTEL's philosophy or thinks it is relevant to local markets in the U.S., it is clearly discernable and consistently applied. *See* Harry M. Shooshan III, *Troubling Ironies and Inconsistencies: The MCI/BT Merger* (Feb. 25, 1997) <http://www.spri.com/reports/publist.htm>.

49. It should be emphasized that the restructuring proposed in this Article envisions the FCC as an independent agency; that is, free from direct control of any other executive branch department.

50. *See New Watergate Tapes Show Nixon Considering Attacks on Post Licenses*, Comm. Daily, Jan. 6, 1998.

51. *See* 47 C.F.R. § 73.1920 (1996) (Personal Attacks), § 73.1930 (1996) (Political Editorials) and § 73.1941 (1996) (Equal Opportunities).

52. *See* Balanced Budget Act of 1997, Pub. L. No. 105-33, § 3003, 111 Stat. 251, 265.

53. In fact, there are several examples of the FCC taking steps on its own to eliminate regulation of speech. In 1983, the FCC cited constitutional concerns for broadcasters in its repeal of several "underbrush" policies affecting programming and various commercial practices, preferring instead to rely on market forces to control broadcast abuse. Elimination of Unnecessary Brdcst. Reg., *Policy Statement and Memorandum Opinion and Order*, 54 Rad. Reg. 2d (P & F) 1043 (1983). More importantly, in 1987, the FCC abolished the Fairness Doctrine, which required broadcasters to both cover "controversial issues of public importance" and to afford a "reasonable opportunity" to air contrasting views. Syracuse Peace Council v. WTVH, 2 FCC Rcd. 5043, 63 Rad. Reg. 2d (P & F) 541 (1987). For a discussion of these actions, see Erwin G. Krasnow & Jack N. Goodman, *The "Public Interest" Standard: The Search for the Holy Grail*, 50 Fed. Comm. L.J. 603, 617-18 (1998).

54. The traditional rationales for the regulation of broadcasters are that (1) spectrum is scarce, and (2) broadcasting has greater impact than other media. *See* Red Lion Brdcst. Co. v. FCC, 395 U.S. 367 (1969); FCC v. Pacifica Found., 438 U.S. 726 (1978). Today, with 1,563 television and 12,227 radio stations, when 66% of households subscribe to cable television, and when viewership of broadcast television is declining, it is difficult to sustain these rationales. *By the Numbers*, Brdcst. & Cable, Jan. 26, 1998, at 85.

55. The best course would be to limit the *agency's* jurisdiction in politically sensitive areas as suggested and give the President the same rights enjoyed with most other nonjudicial appointees. If Congress finds this approach too radical and contrary to its concept of the FCC as an independent agency (after all, the first question with independence is: "independence from whom?"), the agency head could be appointed to a single, four-year term subject to removal only for cause. (It should be noted that the last five FCC chairmen have served for an average of four years in that position and that it is highly unusual for someone to stay on as a commissioner after being replaced as chairman by a new President.)

56. The U.K. opted for sector-specific regulation, creating a single administrator for telecommunications, gas, electric, and water. Another model would have been that employed by states in the U.S. which typically have established one agency to regulate all utilities. Note that the U.K. is comparable in land mass to the state of Oregon, while it has about the same population density as the state of Massachusetts.

57. U.K. Dep't of Trade and Ind., Competition and Choice: Telecommunications Policy for the

1990s (1991).

58. A notable exception was a successful challenge by Mercury Communications to the DGT's interpretation of a clause in BT's license relating to the cost standard to be used in setting interconnection prices. *See* Mercury Comm. Ltd. v. Director Gen. of Telecomm. [1996] 1 W.L.R. 48 (H.L. 1995).

59. One result has been to promote the selection of an extremely well-qualified individual as DGT. Don Cruickshank, who resigned as DGT on March 31, 1998, is an accountant with an MBA who served as a business consultant, a newspaper executive, the Managing Director of Virgin Group PLC (with supervision of the company's entertainment, media, airline, and travel business), and Chief Executive of the National Health Service in Scotland. The newly appointed DGT, David Edmonds, was a Managing Director for NatWest Group. Mr. Edmonds was responsible for an investment portfolio of ,2.8 billion, 20 business units, and a staff of over 2,000. He was previously Chief Executive of the housing Corporation and held several senior civil service posts. *See David Edmonds, Director General of Telecommunications, Biographical Note* (visited April 11, 1998)

<http://www.oftel.gov.uk/dgbio498.htm>. In short, the DGT's credentials are more like those of a top member of the U.S. Cabinet than an FCC commissioner.

60. Director Gen. of Telecomm., Review of Utility Regulation 14-15 (Sept. 1997) [hereinafter DGT Submission].

61. The FCC's job is admittedly complicated by the fact that it must share rate-setting responsibility with state commissions, while
OFTEL has jurisdiction over long distance and local rates. On the other hand, the FCC has been notably reluctant over the years to wade into the turbulent political water of rate rebalancing—in part because of divisions among commissioners. *See generally supra* text accompanying notes 38-40.

62. Irwin Stelzer, *American Lessons for the Utility Regulators*, London Sunday Times, July 20, 1997, at B10.

63. For example, under Reed Hundt, the FCC fought a series of pitched battles with broadcasters over children's television, political advertising, and qualification of the public interest standard. *See The Hundtification of TV*, Brdcst. & Cable, July 8, 1996, at 62; Chris McConnell, *Hundt Pitches Kids Standards*, Brdcst. & Cable, Jan. 29, 1996, at 18.

64. Irwin Stelzer advances a more compelling critique of the U.K. approach to regulation on process grounds. He expressed it well in his Institute of Economic Affairs Lecture on Regulation: "By rejecting America's open procedural model in favor of . . . `the more secretive British framework,' the Government has denied the regulatory process the public credibility on which its success and acceptance crucially depend." Irwin M. Stelzer, Lessons for UK Regulation from Recent US Experience, Lecture on Regulation for the Institute of Economic Affairs (Dec. 7, 1995) (transcript on file with author). As long as the procedural rights established by the APA and rules governing ex parte contacts are maintained, this critique would be largely inapplicable to the single telecommunications regulator proposed in this Article. Moreover, as noted earlier, the "kabuki theater" nature of FCC deliberations in open meetings does little to enhance public credibility in the U.S. model.

65. DGT Submission, *supra* note 60, at 33.

66. *Id.* at 33-34.

67. *Id.* at 34.

68. It is also possible that the DGT has a model in mind other than the FCC per se. It cannot be that he wants to emulate the FCC's open meetings as a means of improving decision making or enhancing transparency and accountability.

Susan,

This is the F. D. stuff we reviewed + a couple of papers - for when we get to OTB.

T

36

*REMARKS OF

Clay T. Whitehead, Director

Office of Telecommunications Policy
Executive Office of the President

at the

International Radio and Television Society
Newsmaker Luncheon

Waldorf-Astoria Hotel
New York, New York

October 6, 1971

*AS DELIVERED

This is a major speech -- I read the advance billing and felt I had to say that. I was also billed as one of the youngest and most controversial figures in government and communications. Before I've even opened my mouth, Nick Johnson hates me.

Before I read that advance billing, we had planned one of my usual speeches. You know -- a state of the universe message. But after a year of stating and restating the problems, I guess I can't get away with that any more. So this won't be that kind of speech, but I've gotten attached to the format, so I'd like to spend a little time on the state of broadcasting. I don't claim to have the expertise that any of you have in broadcasting; but in the first year of OTP's life, we've been exposed to many of the relationships between government, broadcasting, and the public. Today, I want to focus on those relationships.

I'll probably sound a bit naive to you when I say that some of these relationships don't make sense and should be changed. But why can't they be changed? -- especially when they are the cause of many of our problems. The Communications Act isn't sacrosanct. It's a 37-year-old law that was intended to police radio interference -- and it has frozen our thinking about broadcasting ever since. But something more than that is needed in a day when the electronic mass media are becoming the mass media.

There are a number of directions to choose from, and I'm here to propose one -- one that redefines the relationships in the Communications Act's triangle of government, private industry, and the public.

But before I tell you what my proposals are, let me first tell you why I think a change is needed and why you should want one too.

Look at the current state of the broadcasting business. You sell audiences to advertisers. There's nothing immoral about that, but your audience thinks your business is providing them with programs. And the FCC regulates you in much the same way the public sees you. It requires no blinding flash of originality on my part to see that this creates a very basic conflict.

CBS's Programming Vice President says:

> "I've got to answer to a corporation that is in this to make money, and at the same time face up to a public responsibility. . ."

His counterparts at the other networks have the same problem. They all have to program what people <u>will</u> watch -- what gets the lowest cost-per-thousand. Sometimes that's what the people <u>want</u> to watch, but more often than not it's the least offensive program.

But you don't care what I think about your programs -- and you shouldn't have to care what any government official thinks about your programs.

But what does the public think? The signs aren't good.

Look at the new season: Twenty-two new prime-time network law and order shows and situation comedies fill in between movies and sports. It's the same old fare. Life's Harris poll is being interpreted to show that there is wide public dissatisfaction with the entertainment you offer.

Kids and teen-agers are developing an immunity to your commercials. Do you doubt that advertisers are questioning the effectiveness of TV as a sales medium?

How long will you be able to deliver our children to food and toy manufacturers? Parents are calling the Pied Piper to task -- there were 80,000 letters to the FCC concerning the ACT petition alone.

Consider the anomaly of Blacks as your most faithful viewers and your most active license challengers.

I suppose it looks like I'm just another critic taking cheap shots at TV. But there's another side to the broadcasting business. In my part of Washington, it's no insult to call someone a successful businessman. You have created a successful business out of the air -- people do watch television. Sure your success is measured in billions of dollars, but it's also measured in public service and all those sets in use.

But your success is taking its toll. It's giving you viewership, but not viewer satisfaction -- public visibility but not public support.

You've always had criticism from your audience but it never really mattered -- you never had to satisfy them; you only had to deliver them. Then the Rev. Everett Parker read the Communications Act. You all know the outcome of the WLBT-United Church of Christ case. Once the public discovered its opportunity to participate in the Commission's processes, it became inevitable that the rusty tools of program content control -- license renewal and the Fairness Doctrine -- would be taken from the FCC's hands and used by the public and the courts to make you perform to their idea of the public interest.

Surprise! Nick Johnson is right. The '34 Act is simply being used and enforced. But where is that taking us?

Look at where we're going on license renewals. In city after city, in an atmosphere of bewilderment and apprehension, the broadcaster is being pitted against the people he's supposed to serve. The proxy for the public becomes the patsy who is held responsible for the Vietnam War, pollution, and the turmoil of changing life styles. As the East Coast renewals come up again, you're snickering about ascertainment -- sure it was designed for Salina, Kansas, and not New York City -- but I'll wager you'll all wrap yourself in interview sheets when your applications are filed in March. But that won't make you less vulnerable at renewal time because you can have no assurance that your efforts over the years will count for anything if a competing application is filed. "Substantial

performance" becomes "superior performance" at the drop of a semantic hat and means that the government has finally adopted program percentage minimums. That's the current price of renewal protection.

So while we all talk about localism, we establish national program standards. You go through the motions of discovering local needs, knowing that the real game is to satisfy the national standards set by government bureaucrats. But it's not a game. Right now your programs are being monitored and taped and the results will be judged under the FCC's 1960 Program Statement. Can you be safe in all 14 program categories?

The Fairness Doctrine and other access mechanisms are also getting out of hand. It is a quagmire of government program control and once we get into it we can only sink deeper. If you can't see where it's leading, just read the Red Lion and BEM cases. The courts are on the way to making the broadcaster a government agent. They are taking away the licensees' First Amendment rights and they are giving the public an abridgeable right of access. In effect, the First Amendment is whatever the FCC decides it is.

However nice they sound in the abstract, the Fairness Doctrine and the new judicially contrived access rights are simply more government control masquerading as an expansion of the public's right of free expression. Only the literary imagination can reflect such developments adequately -- Kafka

sits on the Court of Appeals and Orwell works in the FCC's Office of Opinions and Review. Has anyone pointed out that the Fiftieth Anniversary of the Communications Act is 1984? "Big Brother" himself could not have conceived a more disarming "newspeak" name for a system of government program control than the Fairness Doctrine.

I'm not seriously suggesting that the FCC or the courts want to be "Big Brother" or that 1984 is here, or that we can't choose a different path from the one we now seem to be on. You are at a crossroads -- now you're probably clutching your "Chicago Teddy Bears" and wondering when Whitehead is going to get to the point. The point is: We need a fundamental revision of the framework of relationships in which you, the government, and the public, interact. The underpinnings of broadcast regulation are being changed -- the old status quo is gone and none of us can restore it. We can continue the chaos and see where we end up. But there has to be a better way.

I have three proposals. They are closely related and I want you to evaluate them as a package that could result in a major revision of the Communications Act. The proposals are: One, eliminate the Fairness Doctrine and replace it with a statutory right of access; two, change the license renewal process to get the government out of programming; and three, recognize commercial radio as a medium that is completely different from TV and begin to de-regulate it.

Here are my proposals for television.

First, I propose that the Fairness Doctrine be abandoned. It should be replaced by an act of Congress that provides for both the rights of individuals to speak, and the need of the public at large to receive adequate coverage of public issues. These are two distinct claims, and they cannot both be served by the same mechanism.

To provide for the individual's right to speak, TV time set aside for sale should be made available on a first-come, first-served basis, at nondiscriminatory rates but there must be no rate regulation. The individual would have a right to speak on any matter, whether it's to sell razor blades or urge an end to the war.

This private right of access should be enforced -- as most private rights are enforced -- through the courts, and not through the FCC. The licensee should not be held responsible for the content of ads, beyond the need to guard against illegal material and deceptive product ads should be controlled at the source, by the Federal Trade Commission.

My second proposal is for license renewals. There should be a longer TV license period, with the license revocable for cause. The FCC would invite or entertain competing applications only when a license is not renewed or is revoked. To assure the right of the public to be informed on public issues, the licensee would be obligated to make the totality of programming that is under his control (including PSA's) responsive to the interests and concerns of the community.

The criterion for renewal would be whether the broadcaster has, over the term of his license, made a good faith effort to ascertain the needs and interests of his community and to meet them in his programming. There would be no place in the renewal process for government-conceived program categories, percentages, formats, or any value judgment on specific program content.

I believe these revisions in the access and renewal processes will add stability to your industry, and avoid the bitter adversary struggle between you and your community groups. They recognize the new concerns of access and fairness in a way that minimizes government content control. But there are just too few TV channels, and there is too much economic concentration in TV, to leave these rights completely to the good intentions of private enterprises.

I'm not say that this will eliminate controversies. But it will defuse and change the nature of the controversies.

My third proposal is for Radio De-Regulation: Most of what I've suggested for TV also should apply to radio. But we can go further with radio. This week I sent a letter to Dean Burch proposing that OTP and the FCC jointly develop an experiment to de-regulate commercial radio operations.

We proposed that one or more large cities be selected as de-regulatory test markets, in which radio assignments and transfers would be pro-forma. Renewals would not be reviewed for programming or commercial practices. And the Fairness Doctrine would be suspended. The experiment should be only a first step. For most purposes, we should ultimately treat radio as we now treat magazines.

These are my proposals. The proposals are just that -- I have no legislation tucked in my back pocket that we are about to introduce. But, I will work for legislation if there is support for these proposals. In short, my message on all these proposals is that we've tried government program control and bureaucratic standards of fairness and found that they don't work. In fact, they can't work. Let's give you and the public a chance to exercise more freedom in a more sensible framework and see what that can do.

There is one further aspect of freedom I would like to discuss. Some people suggest that this Administration is trying to use the great power of government licensing and regulation to intimidate the press. Some even claim to see a malicious conspiracy designed to achieve that end. They must ascribe to us a great deal of maliciousness, indeed -- and a great deal of stupidity -- in the attempt to reconcile their theory to the facts. It is not this Administration that is pushing legal and regulatory

controls on television, in order to gain an active role in determining content. It is not this Administration that is urging an extension of the Fairness Doctrine into the details of television news -- or into the print media.

There is a world of difference between the professional responsibility of a free press and the legal responsibility of a regulated press. This is the same difference between the theme of my proposals today and the current drift of broadcasting regulation. Which will you be -- private business or government agent? -- a responsible free press or a regulated press? You cannot have it both ways -- neither can government nor your critics.

Nixon's Top Radio-TV Adviser Would Drop Fairness Doctrine
The Washington Post, Times Herald (1959-1973); Mar 5, 1972; ProQuest Historical Newspapers The Washington l
pg. A3

Nixon's Top Radio-TV Adviser Would Drop Fairness Doctrine

Associated Press

President Nixon's top adviser on the radio-television industry says the fairness doctrine has caused so much chaos and confusion that it should be abolished.

Clay T. Whitehead, director of the White House Office of Telecommunications Policy, said the requirement that all sides in controversial issues be given equal air time also intimidates broadcasters.

In an interview, Whitehead suggestead that a broader approach linked with license renewal should replace the present enforcement of the fairness doctrine.

Asked for his reasons for proposing an end to the fairness doctrine, Whitehead said:

"Let me say that that proposal was part of a package of proposals. It was made for the purpose of getting the industry and the public and government to start discussing some of the problems we have in radio and television regulation.

"What we felt was needed was some specific proposal for people to focus on as an alternative to the way things are being done now. It's worked out pretty well. We have been getting a lot of discussion.

"The reason we proposed abolishing the fairness doctrine was not that we felt fairness was not important, because, of course, we do, but rather that the fairness doctrine, as it has come to be administered, is so confusing, so chaotic and so highly detailed and complex that it really is not a doctrine at all. Nobody knows what it means, no one knows how it would apply in various cases.

"I think it is safe to say it intimidates the broadcaster, who is constantly worried what Washington is going to do if he opens his mouth about anything or puts anyone on his television station. In short, it's just not producing the intended result of the broad, over-all fairness that we want to get.

"So we proposed that we do away with the fairness obligation of the broadcaster, but rather than enforce it on a case-by-case, day-by-day basis here in Washington, that we enforce it as originally intended—at the time we renew the broadcaster's license.

"In his coverage of controversial affairs, has he been fair in covering all sides of all the important issues in his community?

'So you see it was a proposal to get rid of this very complex doctrine as it has come to be applied and move to a more sensible way of enforcing the fundamental fairness obligation."

It was put to Whitehead that there have been indications that he doesn't think public television should be offering public affairs or national news programs. He replied, "That's not correct at all. Public television stations do have a responsibility to supply news and public affairs. What we have been concerned about is the tendency of the Corporation for Public Broadcasting, the organization that receives the federal dollars, to focus so much of their money and attention on things that the commercial networks already are doing."

similar to but not verbatim to testimony p. 488

not?

May 3, 1972

MEMORANDUM FOR MR. FLANIGAN

Our posture on the Fairness Doctrine should be broken down into three areas:

1. The keeping or scrapping of the Fairness Doctrine itself. You will recall I made a package of proposals relating to broadcast regulation for purposes of discussion, including among them the elimination of the Fairness Doctrine. Colson was upset that this would eliminate the only lever that could be used directly against the networks on coverage of political issues. Based on his reactions and other considerations, I agreed that I would refrain from espousing that aspect of the proposals.

2. The detailed working of the Fairness Doctrine. OTP has no particular expertise, nor does the Administration have any serious policy concern, with the myriad details and complexities of the Doctrine as it has evolved. Dean Burch has enough trouble in the Commission's current Fairness Doctrine inquiry without the Administration second-guessing him. I have, therefore, refrained from any recommendations or criticisms on particular details of the Fairness Doctrine and intend to continue that. My comments on the workings of the Doctrine itself have been confined to what Dean Burch has said and what every serious observer of broadcast regulation realizes--that the Doctrine has gotten out of hand and needs serious attention to limit and clarify it, preferably by the Commission itself if the Courts will allow it.

Robinson ? *

No - Robinson had not joined FCC yet - started in 1974

3. The extension of the Fairness Doctrine into product advertising, the use of the Doctrine to require counter-advertising as proposed by the Federal Trade Commission, the twisting of the Fairness Doctrine into a mechanism for free access by various radical groups to get their viewpoints on the air, etc. In the case of counter-advertising, we agreed to put the Administration in the opposition to the irresponsible FTC proposal that the Fairness Doctrine be extended to product ads. In other areas, we have not taken any firm Administration positions, but have cautioned against unnecessary and undesirable extension of this kind of regulatory control over the broadcast and advertising businesses and its extension into the print media. License renewal policies, channel limitations, ownership restrictions,

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SENSITIVE

access demands, advertising, and the like have been entangled by the FCC and the courts with the Doctrine, all growing basically out of the spectrum limitation. It is one of the key areas for policy resolution in cable. It is impossible to deal with broad or specific policy without touching on the fairness obligation and the Doctrine.

In summary, I have gone out of my way to make clear that this Administration does not endorse removal of the Fairness Doctrine; I have avoided any detailed comment on the Doctrine itself; and have confined public statements to drastic extensions of the Doctrine beyond the areas to which it is traditionally applied, and to the relation of the broader fairness obligation to such important policy questions as license renewal criteria, cross-ownership, cable television, and the like. The comments you saw in the news summary were directed at extensions of the Doctrine into advertising, the increasing tendency of the courts to ignore the spectrum scarcity rationale, and the desire by many activists to extend the Doctrine into the print media; I did not touch on the current workings of the Doctrine and specifically acknowledged that the broadcasters (Colson: read as "networks") have a fairness obligation that cannot be removed as long as we have Federal licensing of the airwaves. You will recall that Chuck Colson and I discussed this in preparation for my testimony before the Ervin Committee and agreed the only area he was upset about was the removal of the Doctrine as it relates to the networks. My public positions in this area have been low key and consistent with my understanding of our agreements.

Clay T. Whitehead

CTWhitehead:sr/jm

cc: Mr. Whitehead
Eva

SENSITIVE

report has been made "virtually invisible." Aspin said "if there were a conscious conspiracy to prevent public scrutiny of the impact statement, it couldn't be accomplished much more effectively than this."

The Senate Labor Comm. approved a $9 billion anti-poverty bill after altering a key provision that would transfer the Legal Services program out of OEO to an independent corporation. Javits sponsored the change that would give RN control, saying he felt it essential to prevent another veto.

Leon Jarworski, Pres. of the American Bar Assoc., said "the legal profession has the responsibility to provide legal services not just for a part -- but for the whole of our nation's society. Jarworski again voiced the ABA's backing of the federally-funded Legal Services program and criticized the VP, without naming him, for the VP's alleged interference with it.

A three-judge Federal panel ruled (2-1) that a New York law under which State funds have been used to aid parochial and other non-public schools violates the Constitution. While the majority cited the First Amendment, the dissenting judge said he refused "to participate" in destroying the act by judicial action, saying "a majority of the legislature and the governor have determined that this...statute is a legitimate area of state concern and action."

Bobby Baker was granted parole effective June 1....A 10-2 approved House Ethics proposal designed to force Dowdy to relinquish his Hill voting rights, but not his seat, may never make it to the Floor. Rules Chmn. Colmer indicated his Comm. may not send it to the Floor. In an interview, Colmer, who helped set up the Ethics Comm., said he didn't see how Congress could pass such a resolution, that it would look "kind of silly" for him to judge a man guilty before the final court order.

Clay Whitehead warned newspaper publishers that the Fairness Doctrine is a "runaway theory" that might someday be applied to them as well as broadcasters....The FCC's implementation of the Fairness Doctrine has a "chilling" effect on broadcast journalism said the exec. officer of the Post-Newsweek stations.

Mr Whitehead
Tom-
I thought that
you had agreed
to stay off the
subject?
Can you please
explain this to
Pete

Media Report/White House static over structure, funds keeps public broadcasting picture fuzzy

by Bruce E. Thorp

734

The folks who gave the nation *The Great American Dream Machine* are in trouble with an important viewer.

The viewer is President Nixon, and what he does not like is the way public broadcasting's own dream machine has developed since passage of the Public Broadcasting Act of 1967 (81 Stat 365).

Mr. Nixon has not spoken personally on the issue; his views are relayed through Clay T. Whitehead, director of the White House Office of Telecommunications Policy. *(For a report on OTP, see Vol. 3, No. 7, p. 338.)*

Whitehead, who is charged with drafting legislation for long-term financing of public programs, has not done so because, he says, public broadcasting is too centralized.

Too much authority for funding and programming is concentrated in the Corporation for Public Broadcasting, a private, nonprofit company set up by the 1967 act, says Whitehead, and too little control has been left to individual stations, which were supposed to be the heart of the system.

Shows offered by the Public Broadcasting Service—the public stations' network—dominate the system, according to Whitehead, and public-affairs shows, in turn, dominate PBS scheduling.

Whitehead said in a recent interview, "They want to be something different from what anyone thought they were going to be."

Industry leaders dispute Whitehead's charges. They say they have followed the intent of the Carnegie Commission on Educational Television, which recommended federal funding of public broadcasting in 1967, and of Congress.

Whatever imbalance there may be in the system, they argue, comes mainly from inadequate federal financing.

With less money than they anticipated, CPB officials have used it to develop their network first, putting the money where it will do the most good. As federal funds increase, they say, so will development of local stations and local programming.

The larger philosophic controversy has been focused on a financial conflict over long-term funding for public broadcasting.

The Carnegie Commission originally proposed that the industry be given federal funds outside the annual appropriations process.

Scene from "Sesame Street," the award-winning children's show on public television

But the 1967 Congress left it to future Congresses and Administrations to devise such a plan, and it has not yet been done.

Whitehead says that unless the industry structure is made to conform to what was envisioned, "permanent financing will always be somewhere off in the distant future."

Stymied in its effort to obtain long-term funding, the industry is putting its energies into support of a two-year authorization initiated by Rep. Torbert H. Macdonald, D-Mass., chairman of the House Interstate and Foreign Commerce Subcommittee on Communications and Power.

The bill, HR 13918, has cleared the full Commerce Committee with only two dissents and it could be approved early in May.

In the meantime, both the industry and the Administration have been moving quietly toward changes that may resolve the controversy.

The industry has taken steps to give local stations a greater voice in system funding and programming, which could go far toward satisfying the Administration's complaints.

The Administration has been preparing a list of five persons to be appointed soon by the President to the 15-member CPB board of directors.

Assuming confirmation by Congress, Mr. Nixon would have his first real majority on the board, which presumably would begin to reflect his views.

Funding and politics

The Carnegie Commission proposed that public broadcasting receive its federal money from a special trust fund.

The fund could be fed by an excise tax on new television sets, the commission said, estimating that a 5-per cent levy would produce $100 million a year at a cost of not more than $2.50 a year per set during the useful life of even the most expensive receiver.

The commission argued for permanent funding to insulate public programming from government involvement.

"The commission cannot favor the ordinary budgeting and appropriations procedure followed by the government in providing support from general funds," it said. "We believe those procedures are not consonant with the degree of independence essential to public television."

However, in creating the corpora-

SUMMARY CHRONOLOGY: FAIRNESS DOCTRINE

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

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

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

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

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

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

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

Major recommendations:

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

(1) Time Allotted:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CTW

ERVIN TESTIMONY, HEARINGS

FEB. 1, 1972

He joined the White House staff in January 1969. As Special Assistant to the President, his responsibilities included the space program, atomic energy, maritime affairs, communications, liaison with regulatory agencies, and several specific economic and organizational matters.

I want to welcome you to the subcommittee and express our deep appreciation for your willingness to come and give us the benefit of your observations on what I consider one of the most important aspects of our national life.

STATEMENT OF CLAY T. WHITEHEAD, DIRECTOR OF THE OFFICE OF TELECOMMUNICATIONS POLICY; ACCOMPANIED BY ANTONIN SCALIA, GENERAL COUNSEL

Mr. WHITEHEAD. Thank you very much, Mr. Chairman. I am very pleased to be here with you today and to have this opportunity to discuss with the subcommittee some of the aspects of the first amendment which I consider to be an important concern of my office to protect.

I would like first of all to introduce to the subcommittee Mr. Antonin Scalia, sitting at my right, general counsel of the Office of Telecommunications Policy.

Senator ERVIN. We are delighted to have him with us also.

Mr. WHITEHEAD. I wish to address my remarks today specifically to the first amendment implications of the two most significant innovations in our mass communications system during the past decade.

The first of these is cable television. Coaxial cable and related technologies enable large numbers of electronic signals—television signals included—to be carried directly into the home by wire rather than being broadcast over the air. There is no particular limitation on the number of signals which can be provided; systems now being constructed typically have the capacity to carry about 20 television channels, and can be readily expanded to 40.

The original use for this technology was "CATV," or community antenna television. As its name implies, that involved no more than the use of cable to carry broadcast signals picked up by a high master antenna into homes in areas where reception was difficult. In recent years, however, use of the technology has progressed far beyond that. Many cable systems now use microwave relay systems to import television signals from far distant cities. Some originate programing of their own, and make unused channels available to private individuals, organizations, schools, and municipal agencies. Looking into the future, cable technology has the potential to bring into the home communications services other than television—for example, accounting and library services, remote medical diagnoses, access to computers, and perhaps even instantaneous facsimile reproduction of news and other printed material. But I wish to focus today upon the immediate consequences of cable, and in particular its impact upon mass communications.

I do not have to belabor the point that the provision of 20 to 40 television channels where once there were only four or five will drastically alter the character of the medium. It converts a medium

of scarcity into a medium of abundance. As this subcommittee is aware from earlier testimony, one of the most severe problems which must be faced by broadcasters today is the allocation of limited broadcasting time—allocation among various types of programing, and allocation among many groups and individuals who demand time for their point of view. Cable, if it becomes widespread, may well change that by making the capacity of television, like that of the print media, indefinitely expandable, subject only to the economics of supply and demand.

Of course the new medium also brings its own problems, several of which are immediately related to first amendment concerns. Economic realities make it very unlikely that any particular community will have more than a single cable system. Unless some structural safeguard or regulatory prohibition is established, we could find a single individual or corporation sitting astride the major means of mass communication in many areas.

The second aspect of this new technology which bears on the first amendment is, to my mind, the more profound and fundamental, because it forces us to question not only where we are going in the future, but also where we have been in the past. That aspect consists of this: The basic premises which we have traditionally used to reconcile broadcasting regulation with the first amendment do not apply to cable.

In earlier sessions of these hearings, this subcommittee has heard three principal justifications for Government intrusion into the programing of broadcast communications: The first is the fact of Government licensing, justified by the need to prevent interference between broadcast signals. But with cable, there is nothing broadcast over the air, no possibility of interference, and hence no unavoidable need for Federal licensing. The second is "the public's ownership of the airwaves" which the broadcaster uses. But cable does not use the airwaves. The third is the physical limitation upon the number of channels which can be broadcast in any given area—meaning that there is oligopoly control over the electronic mass media, in effect conferred by Federal license. But the number of feasible cable channels far exceeds the anticipated demand for use, and there are various ways of dispersing any monopoly control over what is programed on cable channels short of controlling content.

In other words, cable television is now confronting our society with the embarrassing question: Are the reasons we have given in the past 40-odd years for denying to the broadcast media the same first amendment freedom enjoyed by the print media really reasons —or only rationalizations? Why is it that we now require (as we in effect do) that each radio and television station must present certain types of programing—news, religion, minority interest, agriculture, public affairs? Why is it that our courts repeatedly intervene to decide, or require the FCC to decide, what issues are controversial, how many sides of those controversies exist, and what "balance" should be required in their presentation? Is it really because the detailed governmental imposition of such requirements is made unavoidable by oligopoly control of media content or by the need to decide who is a responsible licensee? Or is it rather that we have, as a

society, made the determination that such requirements are good and therefore should be imposed by the Government whenever it has a pretext to do so? And if it is the latter, is this remotely in accord with the principle of the first amendment, which (within the limitation of laws against obscenity, libel, deception, and criminal incitement) forbids the Government from determining what it is "good" and "not good" to say?

This stark question is inescapably posed by cable technology. The manner in which we choose to regulate cable systems and the content of cable programing will place us squarely on one side or the other of this issue. Perhaps the First Amendment was ill conceived. Or perhaps it was designed for a simpler society in which the power of mass media was not as immense as it is today. Or perhaps the First Amendment remains sound and means the same thing now as it did then. The answer to how we as a nation feel on these points will be framed as we establish the structure within which cable television will grow.

Because the President realizes that such fundamental issues are involved, he has determined that the desirable regulatory structure for the new technology deserves the closest and most conscientious consideration of the public and the executive and legislative branches of Government. For this reason, he established last June a Cabinet-level committee to examine the entire question and to develop various options for his consideration. Not surprisingly in view of the magnitude and importance of the subject, the work of the committee is not yet completed. I assure you, however, that the first amendment concerns such as those I have been discussing are prominent in our deliberations in the committee—as I hope they will be prominent in yours when the Congress ultimately considers this issue.

I now wish to turn to what I consider the second major innovation in our mass communications system during the past decade—the establishment of a corporation for public broadcasting, supported by Federal funds. The ideals sought by this enterprise are best expressed in an excerpt from the report of the Carnegie Commission on educational television:

> If we were to sum up our proposal with all the brevity at our command, we would say that what we recommend is freedom. We seek freedom from the constraints, however necessary in their context, of commercial television. We seek for eduational television freedom from the pressures of inadequate funds. We seek for the artist, the technician, the journalist, the scholar, and the public servant freedom to create, freedom to innovate, freedom to be heard in this most far-reaching medium. We seek for the citizen freedom to view, to see programs that the present system, by its incompleteness, denies him.

In addition to this promise, public television also holds some dangers, as was well recognized when it was established. I think most Americans would agree that it would be dangerous for the government itself to get into the business of running a broadcasting network. One might almost say that the free-speech clause of the first amendment has an implicit nonestablishment provision similar to the express nonestablishment restriction in the free-exercise-of-religion clause. Just as free exercise of religion is rendered more difficult when there is a state church, so also the full fruits of free speech

cannot be harvested when the government establishes its own mass communications network. Obvious considerations such as these caused Federal support of public broadcasting to be fashioned in such a way as to insulate the system as far as possible from government interference.

The concern went, however, even further than this. Not only was there an intent to prevent the establishment of a Federal broadcasting system, but there was also a desire to avoid the creation of a large, centralized broadcasting system financed by Federal funds—that is, the Federal establishment of a particular network. The Public Broadcasting Act of 1967, like the Carnegie Commission Report which gave it birth, envisioned a system founded upon the bedrock of localism, the purpose of the national organization being to serve the needs of the individual local units. Thus it was that the national instrumentality created by the act—the Corporation for Public Broadcasting—was specifically excluded from producing any programs or owning any interconnection (or network) facilities.

Noncommercial radio has been with us for over 50 years and noncommercial television for 20. They have made an important contribution to the broader use of communications technology for the benefit of all. The new Corporation for Public Broadcasting has, for the most part, made a good start in expanding the quantity and quality of programming available to local noncommercial broadcasting stations. There remain important questions about the most desirable allocation of the corporation's funds among educational, instructional, artistic, entertainment, and public affairs programing. But most importantly, from the first amendment standpoint, there remains a question as to how successful the corporation has been in avoiding the pitfalls of centralization and thereby of government establishment. Now that we have a few years' experience under this new system, we see a strong tendency—understandable but nonetheless regrettable—towards a centralization of practical power and authority over all the programing developed and distributed with Federal funds. Although the Corporation for Public Broadcasting owns no interconnection facilities, which the act forbids, it funds entirely another organization which does so. Although it produces no programs itself, which the act forbids, the vast majority of the funds it receives are disbursed in grants to a relatively few production centers for such programs as the corporation itself deems desirable—which are then distributed over the corporation's wholly funded network. We have in fact witnessed the development of precisely that which the Congress sought to avoid—a fourth network so-called patterned after the BBC.

There is, moreover, an increasing tendency on the part of the corporation to concentrate on precisely those areas of programing in which the objection to establishment is strongest, and in which the danger of provoking control through the political process is most clear. No citizen who feels strongly about one or another side of a matter of current public controversy enjoys watching the other side presented; but he enjoys it a good deal less when it is presented at his expense. His outrage—quite properly—is expressed to, and then through, his elected representatives who have voted his money for

that purpose. And the result is an unfortunate, but nonetheless inevitable, politicization and distortion of an enterprise which should be above faction and controversy.

Many argue that centralization is necessary to achieve efficiency, but I think it is demonstrable that it does not make for efficiency in the attainment of the objectives for which public broadcasting was established. For those objectives are variety and diversity—almost inherently antithetical to unified control. To choose for public broadcasting the goal of becoming the fourth network is to choose for it the means which have brought success to the first three—notably, showmanship and appeal to mass tastes. This is decidedly not to say that there should be no nationally produced programing for public television. Some types of programing not offered on commercial television require special talent, unique facilities, or extensive funds that can only be provided at the national level; it is indeed the proper role of the corporation to coordinate and help fund such programing. But both for reasons of efficiency and for the policy reasons I have discussed above, the focus of the system must remain upon the local stations, and its object must be to meet their needs and desires.

The First Amendment is not an isolated phenomenon within our social framework, but rather one facet of a more general concern which runs throughout. For want of a more descriptive term we might describe it as an openness to diversity. Another manifestation of the same fundamental principle within the Constitution itself is the very structure of the Nation which it established—not a monolithic whole, but a federation of separate States, each with the ability to adopt divergent laws governing the vast majority of its citizens' daily activities. This same ideal of variety and diversity has been apparent in some of the most enduring legislation enacted under the Federal Constitution. Among the most notable was the Communications Act of 1934. Unlike the centralized broadcasting systems of other nations, such as France and England, the heart of the American system was to be the local station, serving the needs and interests of its local community—and managed, not according to the uniform dictates of a central bureaucracy, but according to the diverse judgments of separate individuals and companies.

In 1967, when Congress enacted the Public Broadcasting Act, it did not abandon the ideal and discard the noble experiment of a broadcasting system based upon the local stations and oriented towards diversity. That would indeed have been a contradictory course, for the whole purpose of public broadcasting was to increase, rather than diminish, variety. It is the hope and objective of this administration to recall us to the original purposes of the act. I think it no exaggeration to say that in doing so we are following the spirit of the Constitution itself.

Mr. Chairman, that concludes my prepared statement. Thank you very much.

Senator ERVIN. I want to commend you on your statement, which raises some of the most serious problems I think we have in understanding the first amendment. You have effectively pointed out that the justifications which we have employed for regulating the broad-

casting medium is founded upon factors which do not apply in the case of cable television. I sometimes think we have only touched the outer fringes of what will be possible through cable television. I happen to live in the foothills of the Blue Ridge Mountains and owing to the configuration of the mountains or some other natural conditions that I don't fully understand, I was unable to get some very close TV stations. But by means of cable television, my capacity to hear and see has been vastly expanded. I get many stations that I couldn't get at all in time past. Certainly since cable television does not use the airwaves and since limited frequencies is not a problem for the cable television, I think you make an excitingly fine case for the propositions that whatever justifications there may be for regulations of the broadcasting media, which uses the airwaves, does not apply to cable television.

I think we all recognize that the main purpose of the First Amendment was to afford rights which would make Americans politically and intellectually and spiritually free. We can't escape the fact that the Federal Government regulation of the broadcasting media which used the airwaves results in two things which are somewhat dangerous to liberty. One is that it keeps the broadcasting media at all times under a Damocletian sword, and the other is that it tends to make the government succumb to the temptations to try to brainwash the American people.

The first amendment was designed to allow people to present both sides of a question. I have one illustration drawn from my own experience representing my State of North Carolina which, as you know, manufactures a great deal of tobacco. First we have a political doctor over in HEW who wants to dictate what the Americans should smoke, and I suspect, eat, drink, and wear, though he hasn't gotten to the last three things, and for some reason the FCC has succumbed to his blandishments. They now have a regulation which says in effect that while people can broadcast derogatory statements about tobacco, people who think that tobacco is pretty good can't say anything in favor of it over the air.

Nevertheless, the policy of the FCC is that it has the complete possession of all the truth on this subject and those who disagree with them have none.

I think if the Federal Government adopts such a policy that generally it destroys freedom of the mind. I think the First Amendment was written to implement the concept expressed by Thomas Jefferson when he said, "I have sworn upon the altar of God eternal hostility to all forms of tyranny over the minds of man."

So I certainly agree with you that we need reconsideration of some of these things and we don't want government domination.

Also I share your views about the centralization and control of the public broadcasting system. I am a sort of a lone voice crying in the very confused governmental wilderness at the present time. I don't believe in centralization of power. I am a disciple of Woodrow Wilson who said that liberty has never come from government. Liberty has always come from the subjects of it. The history of liberty is the history of the limitation of government not the increase of it. When we resist, therefore, the concentration of power we resist the

processes of death because concentration of power always precedes the destruction of human liberties.

I think many of the liberties of American people have been destroyed by centralization of power.

The public broadcasting presents a real problem. We have some public broadcasting stations, I think we have one here in Washington, WETA, which does a marvelous job with the programs it presents. And, of course, public broadcasting also sits under a Damoclean sword if it is going to be dependent upon Federal appropriations. While many of us profess, as did Voltaire, the sentiment, "I don't agree with a thing you say but I will defend to the death your right to say it," as you pointed out so well in your statement, people don't want views that they don't like disseminated at public expense.

I think it is essential that we keep public broadcasting.

It has a real function to perform and we have got to find some way to make it secure in its financing and also to make it secure against Government control of the contents of what it broadcasts.

I will certainly await with interest your report of your study of these subjects because I think you have put your finger squarely on some of the most serious problems that we have in this field, and which are so closely intertwined with the First Amendment. I like your expression that the First Amendment, whatever you may say about it, it is designed to secure diversity of opinion.

Senator HRUSKA. Thank you, Mr. Whitehead, for your very fine statement. You put many questions very clearly, quite pertinently. I am especially interested in the impact of some of the activities of your office in the light of the First Amendment. In a little while I shall ask you some specific questions on that subject.

Before I do, however, I would like to ask you about this statement that you made during the course of your testimony this morning. It is at the bottom of page 2 of the statement. You say, "Unless some structural safeguard or regulatory prohibition is established, we could find a single individual or corporation sitting astride the major means of man's communication in many areas." Considering modern technology as having broadened the range of CATV, do you see any comparability or do you see any similarity between a corporation that would gather—all the programs that are available and have them for sale, or for distribution to local broadcasting systems or telecasting systems? Do you see any similarity between that kind of a mechanism and the structure that has been created through the years by the Associated Press and by the United Press International and other press services?

Mr. WHITEHEAD. I think there is certainly the potential, Senator, for that kind of similarity to arise. Local cable television systems are going to have to obtain their programming from certain sources, their news from certain sources, and I think it is likely that some kind of centralized nationwide organization could spring up similar to what has happened with the Associated Press. This is a distant possibility.

Senator HRUSKA. Well, now, there was a time when the Associated Press and United Press International fell into the displeasure of

those in Government who under our laws didn't like monopoly and the things that go with monopoly. That has been pretty well resolved now, hasn't it?

Mr. WHITEHEAD. I think it has been in that case. I think there will have to be similar kinds of things considered with respect to cable television to avoid just the problem that I think you are referring to.

Senator HRUSKA. So that if there is a gathering, whether it is by one corporation or by two or by three, perhaps they will not be able to say we will give these programs only to certain stations and we will not give them to others. Perhaps they have gone into the public domain to the extent that AP and UPI have gone and they are not able to discriminate, are they, under the present system?

Mr. WHITEHEAD. That is certainly one very effective way of going about it and it avoids the dangers of direct regulation that we would be very sensitive to in that kind of area.

This is what I was referring to when I said certain kind of structural changes should be made or should be adopted. It is to avoid the very detailed regulatory programs and still avoid the dangers that are implicit in the monopoly kind of situations to which you refer.

Senator HRUSKA. In the quotation that you included from the report of Carnegie Commission on Educational Television, they say, "We seek for educational television freedom from the pressures of inadequate funds."

By what means can that be achieved? After all, we have two sources of funds, I presume. One is from private sources, an organization or a corporate entity of some kind that provides the services that television for education would like to have. There is another source and that is from the public funds over which under our Constitution, thank goodness, the committees and Members of the Congress and the two Houses of the Congress have control.

How can we achieve a freedom from pressures of inadequate funds?

Do you know?

Mr. WHITEHEAD. I am afraid I don't know the full answer to that, Senator. The ideal, of course, would be unlimited funds with no restrictions. That is simply incompatible with the traditions of our society. People either have to use their own money or they have to convince other people to give them the money.

Public television today is obtaining funds through donations from corporations, from the listener and the viewer, and from foundations. They are also beginning to receive funds from the Federal Government. However, I think all of those people have a responsibility to ask what that money is being used for. There has to be an answerability, nevertheless. The answerability in the form of private donations is quite simple. If you do not like what you are listening to, you don't contribute any money.

In the case of Federal funds, however, there is a much more ticklish problem which I am referring to. I think we would all have to agree there simply cannot be unlimited funds, that we should provide adequate funds, that Federal Government should be a supple-

mentary source but not the principal source of those funds, and that the Congress does have a responsibility to ask in broad form how those funds are being used and whether those uses serve the purposes the public would like to see served.

In short, I think their desire for unlimited funds has to be just a desire and goal rather than something that can be actually attained.

Senator. HRUSKA. Well, of course, your reference to the ideal situation being one where there would be unlimited funds provided, that wouldn't fit very well, would it? First of all, there isn't that much money. Secondly, in this country we don't like discrimination. The 14th amendment says everybody should be treated equally and a free press and even an educational television system is but one of our national goals. There have many other national goals, and if we are going to treat everybody equally and give them all unlimited funds, the dollars wouldn't be worth very much, would they?

Mr. WHITEHEAD. We have to make the judgment.

Senator HRUSKA. You say the Government would want to know what the funds it provides are being spent for.

Sometimes there are prohibitions and restrictions put upon the expenditure of those funds and you say one of those prohibitions specifically excludes the Corporation for Public Broadcasting from producing any programs or owning any interconnection or network facilities.

How meaningful is that prohibition, Mr. Whitehead?

Mr. WHITEHEAD. I think it is somewhat less meaningful than originally intended. Through the devise of wholly funding these activities, the corporation has discovered, not suprisingly, that it has rather great control over what programs are produced and which ones are distributed over the public broadcasting network.

I don't mean to imply that they use that control, for improper purposes, but I simply do refer to the point that one organization is in effect exercising the power that I believe the Congress did not want it to have, and this raises a problem with respect to how we proceed in providing Federal guidance and funding.

Senator HRUSKA. Do you feel that a system of grants and, of course, the use of the programs from organizations that receive those grants, constitutes an evasion or violation of the statutory prohibition excluding the corporation from producing any programs or owning any interconnection with network facilities?

Mr. WHITEHEAD. No, sir. I don't consider it a violation nor would I consider it a purposeful evasion. I do think, though, that it reflects a rather different spirit than what I understand was intended by the 1967 act.

Senator HRUSKA. Well, what are your views on creating and implementing a national public TV news show anchored by former NBA newscaster Sander Vanocur for the robust salary of $85,000, presumably per year? I noted this item in the *Newsweek* of February 7th. What are your ideas on that in the light of the prohibition to which you alluded in your statement?

Mr. WHITEHEAD. Senator, I would prefer not to comment on any particular individual or employee or even any particular show that is put on by public broadcasting.

Senator HRUSKA. Well, then, for the purposes of my question, I eliminate the name of Sander Vanocur.

Mr. WHITEHEAD. Thank you, sir.

I think that that type of thing is illustrative of the general problem which I was referring to, to wit when public funds are being used, there has to be some concern about the uses to which the funds are being put. As to the level of salaries, for instance, I think the public generally feels that public services has its own rewards and the use of public funds for paying very large salaries is not compatible with that general feeling.

It raises other problems. Public television has traditionally made use of talents of artists, writers, directors, actors, and so forth, who could command rather great salaries in the commercial sector but who donate or make available their time at a very low level to participate in the very worthwhile activities of educational and public broadcasting. Obtaining large salaries through public funds is going to inevitably discourage that kind of thing and in the process it is going to change the spirit of public television.

Furthermore, I think that to the extent public television wants to be involved in the discussion of controversial political affairs, which is inevitably going to be provided, they simply have to take into account the fact that this is going to make public television itself controversial. They have to weigh the benefits of that and the costs of that.

Along with that is the question of whether Federal funds should be used for this kind of purpose and that raises simply the broad question of principle that I raised in my statement.

So I think there are a number of problems.

Senator HRUSKA. This is a direct attempt. When a grant is made to another entity at least it is not that direct, but when a man is hired as a newscaster, without references to personality, without reference to salaries, when there is created a national public TV news show, wouldn't that seem to be specifically within the prohibitions that say the corporation is excluded from producing any programs?

I don't know much about your telecommunications industry but to a layman it seems where there is a prohibition from producing any programs and then there is, according to this news article, the creation of a national public TV news show, I think they are talking about the same thing, don't you?

Mr. WHITEHEAD. Sir, as I said, it is certainly not a violation of the act. It obviously is counter to the spirit of the act.

Senator HRUSKA. It is obviously what?

Mr. WHITEHEAD. Counter to the spirit of the act. Technically they are not producing that program. They have given a grant to another entity that is producing the show.

Senator HRUSKA. Well, it wouldn't be my purpose to go into that further because I understand that other committees of this Congress are inqquiring into the matter. Perhaps they have a more specific oversight of the activities of the corporation. And I will entrust that part of the subject to their tender mercies. I think they will give it a good working over. They should.

Now, directing some questions to your statement proper, recently the Federal Trade Commission recommended that the Federal Com-

munications Commission require "counter-advertising" under the Fairness Doctrine. Do you think there are any First Amendment problems with this proposal?

Mr. WHITEHEAD. Yes, sir. I think there are. There are two important First Amendment considerations. One is the growing tendency to discriminate against the broadcasting media simply because of the fact of a Federal license. That raises broad First Amendment problems.

Perhaps more directly there is the question of who is going to oversee this process? How are we going to decide who gets to counter what and whether the person who is doing the counter-advertising is in fact not being deceptive?

Now, product advertising is not considered, I believe, to come under the free speech provisions of the First Amendment. It is not considered to be protected speech.

On the other hand, counter-advertising presumably would be. So there do arise very sensitive First Amendment problems of who is going to oversee the process, who gets to say what about advertising, who gets to do the counter-advertising? It merely moves the FTC's problem back one step and tries to pass over to the FCC what should really be the responsibility of the Federal Trade Commission.

We find this a very disturbing proposal and disagree with it.

Senator HRUSKA. In the example given by Senator Ervin about the evils of tobacco being considered in a sacrosanct position, no controversy about it at all. It was the FCC who said that, wasn't it?

Mr. WHITEHEAD. That is correct.

Senator HRUSKA. So they have moved in and have answered the question you raised when you ask who will take charge of monitoring this. They have stepped into that void, haven't they?

Mr. WHITEHEAD. They have.

Senator HRUSKA. Do you think that is where it should reside?

Mr. WHITEHEAD. We think the decisions on advertising practices should properly reside with the Federal Trade Commission. If you want to regulate advertising, you should do it through your control of advertising, not through the device of Federal licensing and regulation.

Senator HRUSKA. Where it is a hybrid creature, and the advertising may be a viewpoint and the answer to it an opinion, then we get half and half, don't we?

Mr. WHITEHEAD. That is right.

Senator HRUSKA. And we don't know whether we should be in one area or the other.

Mr. WHITEHEAD. That is right.

Senator HRUSKA. Now, on the subject of CATV, I understand that your office had negotiated with interested parties and received various viewpoints on it, and recently a compromise was achieved which would retard CATV growth subsequently and especially in the top 50 markets. How does this square with what seems to be the bright future that is seen for the technology developed by CATV?

Mr. WHITEHEAD. Well, the bright future of any new technology or any new industry always presents a bit of a chicken and egg problem. How do you get the thing geared up to be big enough so that

the advantages can in fact come about. The way that the Federal Communications Commission wanted to adopt, is to give cable television some favored treatment on its ability to import distant signals.

Now, as soon as they do that, there are profound copyright questions that arise and the Federal Communications Commission approach is to authorize those distant signals to be imported and to allow special copyright provisions—a compulsory license as it is called.

The compromise that was later reached among the parties, the copyright owners, the cable television people, and the broadcasters, placed some restrictions on the terms and conditions under which this special treatment would be afforded in the top 50 markets. So that viewed in its proper perspective, it is not retarding of cable television in the top 50 markets but simply not giving it such favored treatment in the top 50 markets. The reason for that, in the economics of television production, is that the top 50 markets are essential to the continued profitability of the program production organizations. They have to be assured of making an appropriate profit in those markets if they are going to be able to produce programing at all. The agreement was intended to provide much more freedom and much more latitude for cable television in the markets below the top 50 and to keep the necessary copyright exclusivity provisions in the top 50 markets to assure the program suppliers' economic base would not seriously be damaged.

Senator HRUSKA. Of course, when there has been a negotiation with reference to an interpretation of the copyright laws we get into the field of legislation, the statutes, and then normally when there is a difference of opinion upon that, we refer it to the courts. We go into the courtroom and ask the judge, what do you think this really means? So I presume that this arrangement and compromise which was worked out would be subject to court interpretation?

It would also be subject would it not, to express legislation on the subject where a law enacted by Congress would say this is what shall be. Do I state the case fairly?

Mr. WHITEHEAD. Absolutely.

Senator HRUSKA. Now, your office has a responsibility to develop policy for direct to home broadcast satellites. Are there any First Amendment implications of this for the U.S. broadcasters and if so, what are they?

Mr. WHITEHEAD. Yes, there are First Amendment implications. On the one hand, we would generally view the expansion of any new outlet of communication as an expansion or opportunity to extend the workings of the First Amendment. However, in this case there is the possibility, because of the economic realities, that direct broadcasting from satellite to home would result in the establishment of a new centralized national television system. It would involve programing to the entire Nation and the economics of this would drive out local broacasting.

Now, this would work counter to the principle of the First Amendment where we want as many local and diverse voices as possible. You have those two competing kinds of First Amendment considerations that need to be weighed.

There is also the international problem which we have to keep in mind. Use of the radio spectrum in space is inherently an international of activity and the United States I am afraid is in the minority around the world in believing the world should be an open society—open to the freedom of information across national boundaries.

There is some movement abroad in international communications circles to try to limit or to forbid the use of satellites for this kind of purpose. We are very diligent in trying to avoid that taking place.

Fortunately this is a problem that is not going to be with us in the immediate future because the technology and the economics of the technology are such that it simply is too expensive for practical use in the foreseeable future.

Senator HRUSKA. Well, it is gratifying that the substances of your answer indicates that future decisions or considerations will be given within the framework of the first amendment. That is encouraging.

What is the administrative financing plan for the CPR? Is personal financing the goal as far as you know? What policy or what thought has your office on that subject?

Mr. WHITEHEAD. We along with most people feel very strongly that long-range financing is essential to setting up the kind of corporation, and kind of public broadcasting system that we want and need in this country. Unfortunately in setting up that kind of long range financing we have to resolve some of these very vexing questions that I discussed in my statement. We have concluded that it is simply not an appropriate time to try to push through a long range financing plan in this session of Congress. We have therefore submitted a one-year extention of the authority for funding of the Corporation for Public Broadcasting at an increased level of funds, up to $45 million from the previous year of $35 million to assure the corporation can continue to grow and continue the healthy development of public broadcasting.

In our bill, which I believe will be introduced today, we have provided that a certain amount of the funds, namely, $15 million, would go directly to the local stations as a matter of right.

Senator HRUSKA. Mr. Chairman, I have a series of additional questions that are along this line. I don't want to burden the record at this point nor to encroach on the time of other witnesses and staff and the Chairman. May I ask unanimous consent that these questions be propounded to Mr. Whitehead for his answers and insertion into the record?

Senator ERVIN. That will be fine. So ordered.

They will be directed to Mr. Whitehead and he can answer them in writing.

Mr. WHITEHEAD. I will be pleased to do so.

Senator HRUSKA. I would prefer to do it that way and, if there is no objection, I would appreciate it.

(The material referred to follows:)

SENATOR HRUSKA'S QUESTIONS FOR MR. WHITEHEAD

1. The Corporation for Public Broadcasting seems to put a lot of emphasis on British Broadcasting Corporation entertainment shows, cultural uplift and public affairs discussions and documentaries. What does this have to do with

educational TV? Do you think the Corporation for Public Broadcasting is simply programing for an economic or cultural elite? Is it responsive to the needs of "middle Americans" of all races?

2. What do you consider to be the influence of foundations, such as the Ford Foundation, on public broadcasting programs, operations and policy making? Do you see any "free press" dangers in this? Should foundations be precluded from these activities?

3. How much money has the Ford Foundation directed to public broadcasting activities?

4. How could the Congress best keep tabs on the Corporation for Public Broadcasting's use of federal funds, just to see that there's fiscal responsibility and with no intent to exert improper influence?

5. You mentioned today that the Cabinet Committee on cable TV is studying this or the other fundamental issue and will soon make recommendations. What's holding the report up?

6. Do you know what the cable TV Cabinet Committee is considering to assure that cable development will enhance the opportunities for free expression which you described for us today?

7. What is the Office of Telecommunications Policy's role in advising the Federal Communications Commission on the First Amendment implications of its proposed rules regarding cable program content, access channels and the like?

RESPONSES OF CLAY T. WHITEHEAD TO QUESTIONS RAISED BY SENATOR ROMAN L. HRUSKA REGARDING FIRST AMENDMENT IMPLICATIONS OF PUBLIC BROADCASTING AND CABLE TELEVISION

Question No. 1.—The goals to be achieved for public broadcasting were initially derived from early educational radio and television services which developed in response to the educational needs of local communities and the instructional programs of state and local educational entities. The Carnegie Commission on Educational Television built on these educational broadcasting goals and created the concept of public broadcasting, which was intended to include more than classroom instructional services and other strictly educational broadcast services for use outside of the classroom. The intent was to have the Corporation fund programing in a wide variety of fields, including drama, culture, and art. The Congress followed this intent in the Public Broadcasting Act of 1967, although there was some uneasiness expressed about the Corporation's funding of entertainment programing.

In its programing operations, CPB has provided entertainment, "cultural uplift," public affairs and other types of programing. These do tend to appeal to a cultural and economic elite. I think, however, that there is no doubt that the more emphasis CPB gives to instructional services, adult education broadcasts, and programing for the learning needs of children, the more CPB is appealing to a broader, more diverse audience. Both types of programing are desirable; it is a question of emphasis. We believe that CPB should work more closely with the local educational stations to see where the balance should be struck between both types of program services to achieve the greatest benefit to the public.

Questions Nos. 2 and 3.—Foundations, in general, and the Ford Foundation, in particular, have contributed much of the financial support for the development of public broadcasting. No single private or public entity has contributed as much as the Ford Foundation—nearly $200,000,000 in all. Obviously, when any entity—including the Government—spends large sums of money upon an enterprise it looks to see that the enterprise is developing along the lines that it desires. There is nothing wrong about this; indeed, it would be irresponsible for any private or public donor to dispense money willy-nilly, without regard to success in achieving the desired goals.

On the other hand, it is certainly legitimate to question whether it is appropriate for a social institution as important as public broadcasting to be substantially directed along the lines desired by any single entity that is not accountable to the public. The Ford Foundation, for example, is well known to be particularly interested in public affairs programing. Naturally, this interest underlies the Foundation's funding decisions and affects the balance among various types of programs that are made available to the public.

The inappropriateness of dominant influence by a single private source—however benevolent that source may be—is one of the reasons the Administration believes that public financing for public broadcasting should be established on a sound, fiscally responsible and stable basis.

Question No. 4.—In 1967, when the Congress enacted the Public Broadcasting Act, a question was raised as to how the Congress could maintain responsibility for CPB's use of Federal funds. The matter was resolved by including a provision in the Act allowing for an audit of CPB by the General Accounting Office. To my knowledge, Congress has not used that provision.

Question No. 5.—The President's Cabinet committee on broadband cable television was formed in June 1971, and has spent a considerable amount of time analyzng the fundamental and difficult policy matrers which it must resolve in order to make its recommendations to the President. There has been steady progress in the committee's work, and there is nothing "holding up" its recommendations except the complexity of the task.

Question No. 6.—The Cabinet committee has considered a number of different approaches for cable development which will enhance opportunities for free expression. While it would be inappropriate for me to discuss the details of the committee's current deliberations, I can highlight some of the First Amendment objectives that public policy should set for cable television. One of the most important objectives is to facilitate access to cable channels for both program production and program reception. Another objective is to guard against the dangers posed by the fact that, in most instances, provision of cable transmission services will be a natural monopoly. Furthermore, as cable develops over-the-air broadcasting must be allowed to continue to provide essential public services that will contribute to the total diversity of programing and program sources.

There are various ways to achieve these First Amendment objectives for broadband cable development. There could be broadcast-type regulation for cable, with use of the Fairness Doctrine, paid access requirements, program "anti-siphoning" rules, etc. A strict common carrier approach could also be chosen, which would require complete separation of program supply and distribution functions. Another approach may be to require vertical disintegration of the program production and program distribution functions, in order to avoid excessive concentration of control over the access to cable channels. Other approaches and variations on the above are also possible.

Whatever the approach ultimately chosen, the Cabinet committee will be guided by the fundamental goal of fostering the opportunities for free expression which broadband cable promises for the future.

Question No. 7.—OTP has not advised the Federal Communications Commission on the First Amendment implications of the FCC's new rules regarding access channels, cable program content, and other cable services not related to the retransmission of television broadcast signals. The Administration's views on these aspects of cable television will be based on the Cabinet committee report. As I noted earlier, free speech considerations are prominent in the committee's deliberations.

While we take no position at this time regarding those aspects of the FCC's proposed rules not related to retransmission of broadcast signals, we nevertheless support prompt implementation of the entire package, with broad industry support. We think this is essential to enable the development of this promising new technology to proceed.

The framework and national policy for cable regulation is a matter of crucial importance to our society, and it requires the most careful congressional consideration as a matter of mass media structure. The FCC rules will serve to permit cable growth while that deliberation is proceeding and yet not foreclose the opportunity for congressional review and readjustment of the long-run policy. Indeed we would not urge final implementation of the FCC's new cable rules if we thought that this would have the effect of foreclosing any practical evaluation of a broad, long-range policy for broadband cable technology. We believe, however, that implementation of the rules will not have this effect, and that the FCC rules could serve as a transitionary approach to the ultimate public policy treatment of cable technology.

Senator ERVIN. Mr. Whitehead, I will have to admit you have confused me a little by making the distinction between freedom of

speech generally and freedom of advertising. I think you and I would both agree that the First Amendment gives every American the right to make a political speech in which he says my religious views are good for my country. Don't we?

Mr. WHITEHEAD. Yes, sir.

Senator ERVIN. What provision of the Constitution says to an manufacturer, you are to be forbidden by a Federal agency to say that the goods you produce are good for the country?

Mr. WHITEHEAD. I don't think there is any problem with that, sir, and my general counsel, has just flagged the same problem for me. Not being a lawyer I am a little bit at a loss in grasping all the technicalities.

Senator ERVIN. I will have to confess I can't see a valid distinction between a man saying, my political views are good for the country, and a man saying my product is good for the country.

Mr. WHITEHEAD. I certainly have no problem with that in principle.

Senator ERVIN. You don't have a problem with it?

Mr. WHITEHEAD. No, sir.

Senator ERVIN. Nevertheless, you say the Federal Government can determine the truth of the latter but not of the former?

Mr. WHITEHEAD. No, sir, that is not what I am saying. I think the advertiser certainly has the right to say to the public what he wants to say. I just was under the impression that there were certain restrictions that were placed on that right and I may have been wrong.

Senator ERVIN. Well, the FCC has required certain people producing certain gasolines who advertise that their gasoline is good for the motor, to present as a part of their advertisement information indicating that their gasolines pollute the atmosphere.

Now, I don't know what your views are on that but my view is that action is polluting—that is, FCC requirements of that kind are polluting freedom. In my opinion, polluting freedom is worse than polluting the atmosphere, if we have to make a choice between those two very disagreeable things. If you allow the FCC, or any other governmental agency, to say this product is good and that product is bad, and an advertiser cannot speak up for the goodness of his own product in public broadcasts, I think you are very close to getting to the point of allowing the government to say to the American people, it would be good for you to read this book but it would be very bad for you to read that book because that book might give you some thoughts that the government thinks are improper.

Mr. WHITEHEAD. Yes, sir; I agree completely with you in spirit.

Senator ERVIN. Thank you.

Mr. WHITEHEAD. And that was my reason for being so upset and opposing the FTC's proposal which I think carried this use of government regulation and licensing in broadcasting far beyond what was ever intended and far beyond what was sound.

Senator ERVIN. The trouble with governmental power is that those who have it have an insatiable appetite for more power and they abuse power. I think there is less danger in having people abuse freedom of speech than there is in having despotic governmental power because one perceives freedom even though the freedom is exercised and abused, and the other stifles freedom.

Thank you very much.

Do you have any questions?

Mr. BASKIR. I would like to followup on some of those points which Senator Hruska and the chairman mentioned. In a speech in October, you had some very very critical things to say about Fairness Doctrine and other legal mechanisms to open up accesses to broadcasters; stronger, I might add, than any of the other witnesses we have heard. You said it was of government control, that the courts, and I guess the FCC, are making broadcasters government agents that to take away the licensee's First Amendment rights and giving the public an abridgable right of access, in essential is, I guess, the First Amendment then becomes what the FCC and the courts say it is.

You also had three proposals which were designed to change the situation. One was with respect to access. If I recall, you wanted to have a statutory right of access, with whoever paying for the time accommodated on a first come first served basis. I think when you made that speech and made those proposals, they were your personal views. I would like to ask you first, are they still your personal views and only your personal views, or do they represent something more from the administration?

Mr. WHITEHEAD. Those are reflective of the broad concern of those in the administration and elsewhere that there are fundamental problems involved in the direction we are taking to regulate broadcasting. Those specific proposals you refer to were my personal proposals and remain my personal proposals. They were put forward because we felt very strongly that this was needed to stimulate public discussion of these very broad questions of how we are regulating broadcasting. Public discussions I think, had become rather bogged down and we felt a concrete proposal, presenting a rather different alternative, would be useful in stimulating public discussion. We thought they were responsible proposals and we continue to think so. However, we are not yet prepared to take action on them because I don't think we have had sufficient public discussion to justify pushing those specific proposals forward and trying to get them adopted at this time.

But we do think that these proposals and like proposals should receive very serious public consideration.

Mr. BASKIR. On the right of access, your proposed statutory right of access in place of the Fairness Doctrine and various other things, as I recall, was based upon requiring the broadcasters to sell time to whoever asked for it and had the money to pay for it.

Now, the Federal Trade Commission has proposed to the FCC a similar proposal but they added another item, that some of this time should be offered free of charge. I wonder what your views are on that?

Mr. WHITEHEAD. The problem of requiring a broadcaster to provide time free of charge is that the only place that can be done is the government. Therefore you get right back into the problem of government power over the content of speech that I was referring to earlier and the chairman alluded to.

This is just a very serious and very sensitive problem. The spirit of the proposal that you are talking about was to limit the Fairness

Doctrine in its application to program time and not to use the Fairness Doctrine as a way of obtaining the right of access for an individual to have time to express his point of view. The Fairness Doctrine is intended to assure various points of view are expressed. It was never intended to be a mechanism whereby a person could claim the right of access to a television screen. The proposal I made was an attempt to illustrate that and provide a different access mechanism that would avoid the Federal Government getting involved in the very detailed determination of who gets that right of access. The proposal would also avoid undermining the economic structure of broadcasting by requiring all sorts of free time to counterbalance people who have paid for time or simply claimed right of access.

Mr. BASKIR. How would you handle the problem, which I gather the Trade Commission's proposal is aimed at, of getting points of view across from people who do not have enough money to buy time? There are very important points of view, I expect which cannot command funds in the public marketplace because——

Mr. WHITEHEAD. Well, first of all——

Mr. BASKIR. They are not attractive from the commercial points of view, so the people who hold them can't find the money to buy the time.

Mr. WHITEHEAD. I think most points of view if they are sufficiently important do attract funds. But recognizing that that may not always be the case, that is precisely why we have the fairness obligation placed on the broadcaster as license.

As long as we have the current system of broadcasting with the limited number of channels, the FCC is going to have to decide who is the qualified licensee. I think in making that determination, a very important aspect of it is the question "has that licensee been fair?" Has he covered the controversial issues and has he made sure that all sides are fairly presented? We would like to have the licensee cover points of view and assure that they are covered if the money is not forthcoming to buy time for that purpose.

Mr. BASKIR. This is the second part of your proposal? The straight statutory purchase of time would not be the complete test.

Mr. WHITEHEAD. Oh, no, of course not. When I made those proposals I made it very clear that they were interrelated. These are very complex matters and as you start discussing issues and proposals, you find that they begin to overlap and interlink so you can't always ascribe one issue to one particular proposal.

Mr. BASKIR. Your third proposal was that we start deregulation by taking some parts of broadcasting—I think you were suggesting certain major broadcasting markets perhaps certain portions of the FM band—and deregulate those. It seems to me that the logic of your speech and your statement today would suggest that you want to propose deregulating all of the broadcasting rather than just portions of it.

Mr. WHITEHEAD. There is unfortunately rarely a clear line that you can draw between something that has to be regulated and something that does not need to be regulated. In broadcasting it is more a matter of degree. I think that television, for many reasons is unique and probably is going to continue to have to have a significant amount of Federal regulation.

My proposal was on radio broadcasting. I pointed out that it is quite different from television. It is a case of the tail wagging the dog. We are now regulating radio as a kind of secondhand television. We don't think that is appropriate. But most appropriately of interest to this committee, we gave great weight to first amendment considerations in developing the proposals.

In radio we have a multiplicity of outlets. In almost every community there are more radio voices available than there are, say, newspaper voices. We have a strong belief in this country that the viewer, the listener, the consumer has a certain amount of good sense and can decide what he wants to listen to and what he doesn't want to listen to and discriminate between what he is hearing and what doesn't want to hear.

We simply felt from a First Amendment standpoint and from an economic standpoint, in view of the opportunity for competition in radio, that there was much less need to regulate radio in the great amount of detail that there is in television and probably much less need for all that red tape than you might think from having it there.

Unfortunately that is the kind of thing that is impossible to prove. We could study it for 10 years and never develop, I think, a convincing case one way or the other. We therefore propose to try an experiment in several areas of the country to move as far as we thought prudent within the law, of course, to remove as many of the regulations as seemed prudent and to follow the program, to see what happened. Does the service to the public improve? Or, does the Federal Government need to look over the public's shoulder and tell the public what they will have.

We simply think that kind of thing ought to be tried so that we will know which direction we ought to be going in.

Senator ERVIN. Thank you very much for a very illuminating and very penetrating analysis of the many complex problems that arise in this field under the First Amendment.

Mr. WHITEHEAD. Thank you, sir.

Senator ERVIN. You may call the next witness.

Mr. BASKIR. Mr. Chairman, our next witness this morning is Miss Edith Efron.

Senator ERVIN. We are delighted to welcome you to the subcommittee and appreciate your willingness to express views which were very entertainingly set forth in your book, *The News Twisters*, You may proceed in your own way, Miss Efron.

STATEMENT OF MISS EDITH EFRON

Miss EFRON. Just one prefatory comment. I speak here as a private citizen, not as a representative of my publication.

Mr. Chairman, members of the committee: A view has crystallized in this country that the bias controversy is a relatively new phenonmenon, spawned by a repressive Nixon administration, and bred in the dark shadows of right-wing conspiracies.

This view is a symptom of our antihistorical age, where memories are increasingly confined to the parameters of the daily press.

The bias controversy was actually born in the 1930's with the collectivist concept of public ownership of the airwaves. Until that

Gmail talk BETA

Susan Burgess <skburgess@gmail.com>

Dems - fairness doctrine

12 messages

westlaw@westlaw.com <westlaw@westlaw.com> **Mon, Jul 16, 2007 at 12:09 PM**
Reply-To: west.support@thomson.com
To: skburgess@gmail.com

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News accounts re political attitudes re: fairness doctrine

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Section: A

Partisan Battle Looms Over Deficit Bill

SUSAN F. RASKY, Special to The New York Times

WASHINGTON, Oct. 24 The most powerful committee barons in the House and Senate will face off again across the bargaining table on Wednesday to try to shave a modest sum from the Federal deficit for the 1990 fiscal year, without bringing the Government to a halt in the process.

Crafting a compromise deficit reduction bill could take weeks, maybe months. With 10 House committees, nine Senate committees and nearly 200 lawmakers involved, partisan differences between Democrats and Republicans matter far less than institutional pride and turf protection. In this annual ritual, the real battles in House-Senate conferences pit chairman against chairman, Congress against Administration, and, for now, chamber against chamber.

That is especially so in the current conference because the Senate, which usually

saddles money bills with extraneous legislation, passed a deficit reduction plan confined to measures that raise revenue or reduce spending. It wants the House to follow suit and then figure out a way to deal with other spending issues, from child care and capital gains tax reduction to repeal of the surtax that helps finance benefits for the elderly under the Medicare Catastrophic Coverage Act.

No Use for 'Insufferability'

The House is not prepared to put aside these and scores of other measures in its budget bill. Nor is it prepared to accept lectures on good government from the Senate, where lawmakers are already lining up to attach all the leftover measures to a bill raising the national debt limit.

"I have a high degree of tolerance and, after 20 years in Congress, I'm used to hearing almost anything from senators," said Representative Bill Frenzel of Minnesota, the senior Republican on the House Budget Committee. "But when the Senate starts lecturing us on what is extraneous, that comes close to the borders of insufferability."

Indeed, Representative Dan Rostenkowski, the Illinois Democrat who heads the House Ways and Means Committee, has exhorted the Senate to make good on its new-found sense of fiscal responsibility. He also has urged the Senate to keep extraneous measures off the debt limit bill so that the Government will be able to continue to borrow money and stay in operation.

"The shelf life of the Senate's commitment to good government will last exactly until the debt ceiling bill is brought up, and I don't think we should let them get away with it," Mr. Rostenkowski told his House colleagues.

Representative Charles E. Schumer, a Brooklyn Democrat on the Budget Committee, said, "Once you've had powerful committee chairmen fight long and hard for something they want and get it passed as part of a larger bill that must go through, they don't want to give it up."

"The dilemma," he said, "is how to package all that, and you probably have 535 different permutations and combinations based on what each senator and House member wants or doesn't want."

Senator Dave Durenberger, a Minnesota Republican on the Senate Finance Committee, put it less charitably. "Members of the Finance Committee were led to believe that what was stripped from our bill would come back in some other bill," he said. "But the House conferees' egos won't permit them to do that."

Automatic Cuts Activated

Because a deficit plan was not in place by Oct. 16, automatic cuts of $16.1 billion in spending were made across an array of domestic and military programs, as required by the Gramm-Rudman-Hollings budget-balancing law. It forces yearly reductions in the deficit.

The law is replete with loopholes. For example, $1.1 billion in disaster relief money for the victims of Hurricane Hugo was declared "mandatory" so that it would not be counted against deficit reduction targets. Today, however, the House decided that this money as well as $2.9 billion for victims of the California earthquake should be counted against the deficit reduction targets for the 1991 fiscal year. The Senate will consider these bookkeeping problems on Wednesday.

Nobody on Capitol Hill is more sensitive to the problem of committee chairmen's egos than the House Speaker, Thomas S. Foley, Democrat of Washington. Mr. Foley has so far been unwilling to impose a master plan on the likes of such legislative powerhouses as Mr. Rostenkowski or Representative John D. Dingell, the Michigan Democrat who heads the House Energy and Commerce Committee and whose pet provision in the House deficit package is a measure to restore the broadcasting Fairness Doctrine.

In addition to a long history of professional rivalry and personal animosity, Mr. Rostenkowski and Mr. Dingell share jurisdiction over some of the most complex and politically tough issues facing the conferees, including the expanded Medicare benefits, changes in the ways doctors are paid under Medicare and greater coverage for the poor under Medicaid.

These two House barons wage much of their legislative warfare through surrogates, the powerful health subcommittee chairmen on their respective panels. The subcommittee chairmen often disagree with their own bosses as much as they do with each other.

"We have our batting helmets on, and we are going to need them because the pitches will be very close to the head," said Representative Thomas J. Downey, a Long Island Democrat who serves on the Ways and Means Committee. #4-Way Struggle on Child Care But sorting out the differences on health policy, may be easy compared with the four-way struggle over child care. In addition to the measure already approved by the full Senate, the Senate Finance Committee approved a plan to assist parents by expanding existing tax credits.

In the House, the Ways and Means Committee approved a measure combining tax credits for child care with expansion of an existing grant program to help states improve the quality and availabilty of day care services. But the Education and Labor Committee approved its own new grant program for child care and the two proposals were unhappily melded in the House deficit reduction package. President Bush finds all the alternatives too expensive and has policy objections to many of their provisions.

And then there is the issue of cutting the capital gains tax, a top priority with the Bush Administration and an issue that has divided Democrats in both the House and the Senate. The House deficit reduction plan includes a provision that would temporarily reduce the tax rate, and Senate supporters of a cut will try to attach their proposal for a permanent reduction to the debt ceiling legislation.

The debt limit increase, which may come before the Senate later this week, is one of the few fiscal deadlines that really matter. The current limit expires Oct. 31, next Tuesday, and without an increase, the Government faces default on its domestic and international debts as well as the inability to make payments to millions of Social Security beneficiaries Nov. 3.

Already Congressional leaders are talking about a short-term debt limit extension to avoid slamming into the Tuesday deadline with the budget issues still unresolved. That might take the pressure off for now, but it would only postpone a final showdown until lawmakers run up against the only other deadline that matters on Capitol Hill: adjournment for the holidays.

Mr. Downey, echoing the prevailing view, was not optimistic. "I'm afraid there is going to be turkey in the House dining room for Thanksgiving and Christmas," he said.

---- INDEX REFERENCES ----

NEWS SUBJECT: (Judicial (1JU36); Legal (1LE33); Social Issues (1SO05); Legislation (1LE97); Government (1GO80))

INDUSTRY: (Healthcare (1HE06))

REGION: (USA (1US73); Americas (1AM92); Minnesota (1MI53); North America (1NO39))

Language: EN

OTHER INDEXING: (RASKY, SUSAN F) (AUTOMATIC CUTS ACTIVATED; BROOKLYN DEMOCRAT;
BUDGET COMMITTEE; COMMERCE COMMITTEE; COMMITTEE; CONGRESS; DEMOCRAT; DEMOCRATS;
FINANCE COMMITTEE; GRAMM RUDMAN HOLLINGS; HOUSE; HOUSE SENATE; HOUSE BUDGET
COMMITTEE; HOUSE ENERGY; HOUSE SPEAKER; ILLINOIS DEMOCRAT; LABOR COMMITTEE;
MEDICARE CATASTROPHIC COVERAGE; MICHIGAN DEMOCRAT; REPUBLICAN; SENATE; SENATE
FINANCE COMMITTEE; THANKSGIVING AND CHRISTMAS) (Battle Looms; Bush; Charles E.

Schumer; Crafting; Dan Rostenkowski; Dave Durenberger; Dingell; Downey; Fairness Doctrine; Foley; John D. Dingell; Representative; Representative Bill Frenzel; Republicans; Rostenkowski; Thomas J. Downey; Thomas S. Foley) (FINANCES; BUDGETS AND BUDGETING; LAW AND LEGISLATION) (UNITED STATES; UNITED STATES)

EDITION: Late Edition - Final

Word Count: 1477

10/25/89 NYT A20

END OF DOCUMENT

Westlaw Delivery Summary Report for WHITEHEAD,CLAY 5364288

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10/9/89 St. Louis Post-Dispatch 20B

1989 WLNR 384336

St. Louis Post-Dispatch (MO)

October 9, 1989

Section: NEWS

CHILD CARE MAY BE CASUALTY OF SENATE'S BLOATED DEFICIT BILL

The Associated Press

WASHINGTON (AP) Senate Democratic leaders expressed concern Sunday that a proposed expansion of child-care benefits might be lost in the process while they seek passage of a major deficit-reduction bill.

"Child-care legislation is of the highest priority in this Congress - a far higher priority than a capital-gains tax cut," which President George Bush wants, said Senate Majority Leader George J. Mitchell, D-Maine. "We don't want that to fall between the cracks."

The child-care issue apparently was the main one raised in a private meeting of Senate leaders of both parties.

As recently as Saturday, the biggest questions facing similar meetings were how Republicans could win the capital-gains tax cut that Bush wants, and how Democrats could defeat the capital-gains plan and substitute expanded Individual Retirement Accounts.

Whatever the issues, the only agreement was that meetings would resume Tuesday in an effort to see if hundreds of provisions unrelated to deficit reduction can be stripped from a bill whose main purpose is deficit reduction.

Finishing the big deficit bill is the major business facing both the House and Senate in the upcoming holiday-shortened week. But the House also may get to Senate-passed flag legislation by the end of the week.

Unless Congress completes action on the deficit bill by Oct. 16, the Gramm-Rudman law will trigger automatic across-the-board cuts in most spending

programs.

The House already has passed its deficit bill - a package loaded with such extraneous issues as repealing catastrophic-health coverage for retirees; restoring the Fairness Doctrine requiring broadcasters to air all sides of an issue; extension of several expiring tax breaks for a variety of interests; and a broad new initiative to help lower-income working parents. The House bill also includes a capital-gains tax cut.

A similarly bloated bill is awaiting action in the Senate. It contains a different child-care plan but no capital-gains tax cut. Instead, Democrats added to the package an expansion of tax-deductible IRAs for all workers.

Leaders of both parties have decried the tendency to load up the deficit-reduction bills with unrelated amendments. Now, to avoid disruptions that the automatic spending cuts might bring, they are looking for a way to strip away the amendments and leave a relatively "clean" deficit-reduction package.

If the effort is successful, it probably will require that a new bill be originated in the Senate to include the IRA expansion, the child-care initiative, dozens of other tax provisions and - if the Republicans have their way - a capital-gains cut.

"We don't have an agreement yet, but everybody in there today thought we should get one," Senate Republican leader Bob Dole of Kansas told reporters.

There was no explanation of why so much attention was given the child-care issue in Sunday's meeting. Mitchell said only that in a caucus Saturday, several Democrats insisted that the child-care initiative not be lost in efforts to trim the deficit-reduction bill.

Involved in the discussions Sunday in addition to Mitchell and Dole were Finance Committee Chairman Lloyd Bentsen, D-Texas, and senior Republican Bob Packwood of Oregon; Budget Committee Chairman Jim Sasser, D-Tenn., and senior Republican Pete V. Domenici of New Mexico, and Sen. Robert C. Byrd, D-W.Va., who heads the Appropriations Committee.

---- INDEX REFERENCES ----

NEWS SUBJECT: (Social Issues (1SO05); Taxation (1TA10); Government (1GO80))

INDUSTRY: (Accounting, Consulting & Legal Services (1AC73))

REGION: (USA (1US73); Americas (1AM92); North America (1NO39))

Language: EN

OTHER INDEXING: (BUDGET COMMITTEE; CONGRESS; DEMOCRATS; FAIRNESS DOCTRINE; FINANCE COMMITTEE; IRA; SENATE) (BLOATED DEFICIT; Bob Dole; Bush; CHILD CARE; Dole; George Bush; George J. Mitchell; Jim Sasser; Lloyd Bentsen; Mitchell; Pete V. Domenici; Republican Bob Packwood; Robert C. Byrd; Senate; Senate Democratic)

EDITION: THREE STAR

Word Count: 684

10/9/89 STLSPD 20B

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10/4/89 NYT A20 FOR EDUCATIONAL USE ONLYPage 1

10/4/89 N.Y. Times A20

1989 WLNR 2032689

New York Times (NY)

October 4, 1989

Section: A

House Bars Deletion of Broadcast Fairness Rule From Budget Bill

AP

WASHINGTON, Oct. 3 The House today kept alive a move to require broadcasters to air opposing views on controversial issues.

On a 261-to-162 vote, the House defeated an amendment by Representative Michael G. Oxley, Republican of Ohio, which would have stripped a "fairness doctrine" provision from a budget bill.

The Federal Communications Commission repealed its 40-year-old fairness doctrine in 1987, saying it violated the First Amendment and no longer served the public interest in an era of numerous "voices" in broadcasting.

In 1988, Congress wrote the doctrine into law, but Ronald Reagan, then President, vetoed it. President Bush has indicated that he would follow suit if such a bill reached his desk, but he has not said what he would do if the fairness doctrine was contained in the budget bill.

The House Energy and Commerce Committee added the fairness doctrine provision to the bill earlier this year and the committee gave the F.C.C. new authority to impose fines on stations the commission found in violation of the doctrine. The amounts of the fines would be determined by the commission.

Fines Seen as Just a Tactic

Mr. Oxley charged that the civil fines were only added to make the doctrine provision germane to budget reconciliation. He said the commission never administered fines while the fairness doctrine was in effect from 1949 to 1987 and never has sought the authority to do so.

"What this amounts to is simply government intrusion on free speech and government micromanagement of the news," Mr. Oxley said.

He said "it is clearly veto bait" and urged his colleagues to vote on the fairness doctrine separately.

Representative Tom Tauke, Republican of Iowa, said the Government, under guise of free speech, would be dictating what is fair and then would be able to fine stations if they did not agree.

But Representative John D. Dingell, Democrat of Michigan, who as chairman of the Energy and Commerce Committee has been the main backer of the fairness doctrine bill, said, "It is only fair that when broadcasters own that wonderful right to use the money machine which they are given by the F.C.C., that they should use it in the public interest."

Repesentive Edward J. Markey, Democrat of Massachusetts, chairman of the Subcommittee on Telecommunications and Finance of the Energy and Commerce Committee, said the fairness doctrine was not a great burden on broadcasters and only assures that they cover important community issues "in a fair and balanced manner."

A Senate bill that would codify the fairness doctrine was passed in April by the Commerce, Science and Transportation Committee but has not come to the floor for a vote.

If a fairness doctrine is passed by Congress and the President signs it, a Supreme Court test is likely, based on what opponents say is the doctrine's unconstitutional infringement on broadcasters' rights.

A Federal appeals court earlier this year ruled that the F.C.C. had the authority to scrap the doctrine, but the court sidestepped the issue of the doctrine's constitutionality.

The fairness doctrine has been opposed by many broadcasters, particularly smaller station owners who say the threat of lawsuits is enough to make them "just play music" instead of discussing controversial issues.

---- INDEX REFERENCES ----

COMPANY: FEDERAL COMMUNICATIONS COMMISION

NEWS SUBJECT: (Legal (1LE33); Technology Law (1TE30); Government (1GO80))

REGION: (USA (1US73); Americas (1AM92); North America (1NO39))

Language: EN

OTHER INDEXING: (BROADCAST FAIRNESS RULE; COMMERCE; COMMERCE COMMITTEE; CONGRESS;
ENERGY; FEDERAL COMMUNICATIONS COMMISSION; HOUSE ENERGY AND COMMERCE COMMITTEE;
SENATE; SUPREME COURT; TRANSPORTATION COMMITTEE) (Bush; House; House Bars Deletion; John D. Dingell; Michael G. Oxley; Oxley; Repesentive Edward J. Markey; Representative Tom Tauke; Ronald Reagan) (TELEVISION; LAW AND LEGISLATION; FINANCES; BUDGETS AND BUDGETING; FAIRNESS DOCTRINE; REGULATION AND DEREGULATION OF
INDUSTRY) (UNITED STATES)

COMPANY TERMS: FEDERAL COMMUNICATIONS COMMISSION (FCC)

EDITION: Late Edition - Final

Word Count: 649

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9/21/89 AP Online 00:00:00

AP Online

September 21, 1989

Section: Washington News

Automatic Cuts Looming as Congress Snarled in Partisan Fight

STEVEN KOMAROW

WASHINGTON Partisan warfare over cutting the capital gains tax is part of a budget quagmire that has Congress so steeped in dispute that the government is threatened with automatic spending cuts next month.

Republicans are taking pains in advance to set up the majority Democrats for the blame.

At the heart of the political battle is the annual budget bill designed to reduce the deficit to within the parameters of the Gramm-Rudman budget law.

Unless the bill is enacted, the estimated fiscal 1990 deficit will exceed the $110 billion maximum in Gramm-Rudman's guidelines, triggering cuts of nearly $17 billion will be ordered on Oct. 15. Half the cuts would come from the Pentagon and half from civilian programs.

But the budget bill is threatened with defeat in the House next week because most Democrats oppose its cut in the capital gains tax rate, which they call a giveaway to the rich.

Republicans, who expect to win on the capital gains issue, may not vote for the bill either because they want the bill stripped of other provisions, including child care legislation and a revised catastrophic insurance plan for the elderly.

House Budget Committee Chairman Leon Panetta, D-Calif., predicted flatly that the

automatic cuts "will go into effect.

"The question is how long will they stay in effect" before the House, Senate and White House can agree, he said.

House Minority Whip Newt Gingrich, R-Ga., agreed and said popular items such as farm subsidies and the space program would be slashed because Democrats were unable to manage the Congress' agenda.

Gingrich said Democrats were killing the legislation because they loaded child care, Medicaid improvements, the Fairness Doctrine for broadcasters and a host of other issues on the must-pass legislation.

"The more they load this up, the more ... likely it will carry us into" the automatic cuts, he said.

White House press secretary Marlin Fitzwater told reporters prospects for averting the cuts were "somewhat bleak," and it was up to the Democratic- controlled Congress to overcome the problems.

With debate less than a week away, House Democratic leaders decided Wednesday it would fight Bush's capital gains cut with a tax alternative of their own - raising rates for society's wealthiest in order to give new tax breaks for individual retirement accounts.

The plan is similar to one offered earlier this month by Senate Finance Committee Chairman Lloyd Bentsen, D-Texas, including a provision which would allow IRA savings to be used without penalty for education or first-time home purchases.

Most House Democrats adamantly oppose the amendment approved in the House Ways and Means Committee which would cut the maximum capital gains tax rate from 33 percent to 19.6 percent.

Much of their anger is directed at Bush, who Democrats believe has pushed his tax-cut campaign promise ahead of his commitment to work together to reduce the deficit.

"This dispute on capital gains is undercutting the kind of cooperation" needed to tackle the deficit, said Panetta.

The capital gains dispute was also exposing rifts within Democratic ranks. Not only were some conservatives siding with the GOP on capital gains, but liberals were pushing House Speaker Thomas S. Foley for an all-out brawl instead of a

compromise.

"The troops that want to get on their horses and charge are growing impatient," said Rep. David Nagle, D-Iowa.

"This capital gains issue will test the legendary Tom Foley thoughtfulness,' ' said Rep. Pat Williams, D-Mont. "And a lot of people are watching to see if he'll pass the test."

Aside from the deficit-reduction legislation, the House passed all 13 of its annual appropriations bills before the August recess. But only one has been forwarded to the president's desk because action in the Senate has been stalled over the drug controversy. Acknowledging the mess, the House Appropriations Committee has tentatively scheduled a meeting next Tuesday to approve a 31-day interim spending bill which would prevent the government from shutting down Oct. 1.

---- INDEX REFERENCES ----

NEWS SUBJECT: (Judicial (1JU36); Legal (1LE33); Taxation (1TA10); Government (1GO80); Tax Law (1TA64))

INDUSTRY: (Accounting, Consulting & Legal Services (1AC73))

REGION: (District Of Columbia (1DI60); USA (1US73); Americas (1AM92); North America (1NO39))

Language: EN

OTHER INDEXING: (AUTOMATIC CUTS LOOMING; CONGRESS; CONGRESS SNARLED; DEMOCRATS;
FAIRNESS DOCTRINE; GINGRICH; GOP; GRAMM RUDMAN; HOUSE; HOUSE APPROPRIATIONS COMMITTEE; HOUSE BUDGET COMMITTEE; HOUSE DEMOCRATS; HOUSE MINORITY WHIP NEWT
GINGRICH; IRA; PENTAGON; SENATE; SENATE FINANCE COMMITTEE; WHITE HOUSE) (Bush; David Nagle; Foley; Leon Panetta; Lloyd Bentsen; Marlin Fitzwater; Panetta; Pat Williams; Republicans; Senate; Thomas S. Foley)

Word Count: 806

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4/6/89 Rec. N. N.J. a11

1989 WLNR 975438

New Jersey Record (NJ)

April 6, 1989

Section: NEWS

FCC CHIEF ANNOUNCES RESIGNATION

George Lobsenz, United Press International

WASHINGTON Dennis Patrick, the controversial architect of major deregulatory moves

affecting the broadcasting and telephone industries, said Wednesday that he was resigning as chairman of the Federal Communications Commission.

Patrick - head of the panel since April 20, 1987, and an FCC commissioner since 1983 - led the Reagan administration's efforts to reduce federal regulation of American Telephone & Telegraph Co. following the court-ordered breakup of the telecommunications giant.

In addition, Patrick fought an extended, high-profile, and victorious battle with congressional Democrats over abolishing the Fairness Doctrine, a long-standing FCC policy that required broadcasters to air opposing viewpoints on controversial issues.

By coincidence, Patrick announced his resignation at the same time a House subcommittee approved legislation resurrecting the Fairness Doctrine.

Patrick, 37, told reporters he was resigning because he felt he had achieved most of his key policy goals and it was time for him to return to the private sector.

"We have accomplished most of the agenda we set for ourselves," Patrick said. "The regulatory process should not stand in the way of benefits flowing from the radical restructuring of the market now going on."

---- INDEX REFERENCES ----

COMPANY: FEDERAL COMMUNICATIONS COMMISION; AMERICAN TELEPHONE AND TELEGRAPH CO

NEWS SUBJECT: (HR & Labor Management (1HR87); Business Management (1BU42); Economics & Trade (1EC26))

INDUSTRY: (Internet Regulatory (1IN49); Internet (1IN27); Internet Infrastructure (1IN95); Internet Infrastructure Policy (1IN62))

REGION: (USA (1US73); Americas (1AM92); North America (1NO39))

Language: EN

OTHER INDEXING: (AMERICAN TELEPHONE TELEGRAPH CO; FAIRNESS DOCTRINE; FEDERAL
COMMUNICATIONS COMMISSION) (Dennis Patrick; FCC; FCC CHIEF ANNOUNCES; Patrick;

Reagan) (USA; GOVERNMENT; OFFICIAL; MEDIA; RESIGNATION)

EDITION: All Editions

Word Count: 255

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6/24/87 San Jose Mercury News 6A

1987 WLNR 319358

San Jose Mercury News (CA)

June 24, 1987

Section: Front

FAIRNESS DOCTRINE

Mercury News Wire Services

The Senate on Tuesday effectively sustained President Reagan's veto of the fairness doctrine , but Democrats promised to bring the issue back to the floor in another form. The Senate voted 53-45 -- roughly along party lines -- to put off action on the president's veto of the bill, which would write into law a policy requiring broadcasters to present divergent views on controversial issues.

Washington News in Brief

---- INDEX REFERENCES ----

Language: EN

OTHER INDEXING: (SENATE) (Democrats; FAIRNESS DOCTRINE; Reagan)

EDITION: Morning Final

Word Count: 83

6/24/87 SJMERCN 6A

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6/24/87 SFLSUN-SENT 4A FOR EDUCATIONAL USE ONLYPage 1

6/24/87 South Florida Sun-Sentinel 4A

1987 WLNR 1616860

South Florida Sun-Sentinel

June 24, 1987

Section: NATIONAL

FAIRNESS DOCTRINE BACKERS VOW MEASURE NOT DEAD YET

The Associated Press

WASHINGTON -- The Senate on Tuesday effectively sustained President Reagan`s veto of the fairness doctrine , but Democrats promised to bring the issue back to the floor in another form.

The Senate voted 53-45 -- roughly along party lines -- to send the bill, which would codify a policy requiring broadcasters to present divergent views on controversial issues, back to the Commerce, Science and Transportation Committee.

Sen. Robert Packwood, R-Ore., said he had more than enough votes to sustain Reagan`s veto but lacked a majority to prevent doctrine supporters from shuffling the measure back to committee. At least 34 votes would be needed to sustain a veto, but Packwood declined to say how many he had.

Emilio Pardo, a spokesman for the committee led by Sen. Ernest Hollings, D-S.C., a chief supporter of the bill, said plans were to bring the issue back to the floor, either as a bill to be voted through the process again or as an amendment on another measure.

Pardo acknowledged that doctrine supporters lacked the votes to override the veto. The bill was passed by the House 302-102 and by the Senate 59-31.

In delivering the veto on Saturday, Reagan said the doctrine was ``antagonistic to the freedom of expression guaranteed`` by the Constitution.

The doctrine, a Federal Communications Commission policy since 1949, requires radio and television broadcasters to cover issues of public importance and present opposing views.

A federal appeals court ruled last fall that the policy was not law and could be repealed by the FCC, which opposes the doctrine.

The White House and the FCC say the policy is constitutionally suspect because it gives the government editorial control over the broadcast media. They also say the policy inhibits coverage of controversial issues because broadcasters fear lawsuits and license challenges.

Hollings repeated the scarcity argument of doctrine supporters, saying the policy of fairness is an appropriate burden for broadcasters because they are using a limited public resource -- the electromagnetic spectrum. Newspapers, on the other hand, are not regulated by such a policy.

---- INDEX REFERENCES ----

COMPANY: FEDERAL COMMUNICATIONS COMMISSION

NEWS SUBJECT: (Legal (1LE33))

REGION: (USA (1US73); Americas (1AM92); North America (1NO39))

Language: EN

OTHER INDEXING: (FCC; FEDERAL COMMUNICATIONS COMMISSION; SENATE; HOUSE (THE); TRANSPORTATION COMMITTEE; WHITE HOUSE) (Democrats; Emilio Pardo; Ernest Hollings; FAIRNESS DOCTRINE BACKERS VOW MEASURE; Hollings; Packwood; Pardo; Reagan; Robert Packwood)

KEYWORDS: FREEDOM OF THE PRESS; MEDIA

EDITION: SUN-SENTINEL

Word Count: 430

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9/15/85 NYT 223 FOR EDUCATIONAL USE ONLYPage 1

9/15/85 N.Y. Times 223

1985 WLNR 556556

New York Times (NY)

September 15, 1985

Section: 2

TV VIEW; WHY THE FAIRNESS DOCTRINE IS STILL IMPORTANT

John Corry

Clearly, the Fairness Doctrine still rouses passion. It is either a threat to free speech or the last, best hope for the voiceless; it is a yoke on broadcasters' necks or a necessary restraint to keep them in line. Old arguments over broadcasting rules and regulations usually smell musty; this argument stays fresh and new. In part, this is because political postures change and opponents and proponents, loosely speaking, change positions. In the 1970's, liberal Democrats seemed ready to discard the Fairness Doctrine ; political vagaries now make them its defenders. Over the years, meanwhile, the doctrine has been used, and abused, by all sides. At the moment, the Federal Comunications Commission, whose child the doctrine is, wants to disown it. Radio and television broadcasters may applaud, but it is not a good idea.

The Fairness Doctrine is a code of broadcast behavior, distilled from 50 years of legislation, court decisions and F.C.C. practice, and defined not so much by what it is as by what it does. When the F.C.C. said last month that it wanted to abandon the doctrine, it called it the "two-pronged obligation" that requires broadcasters "to provide coverage of vitally important controversial issues in the community...and provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues." An obligation like this, the F.C.C. now says, is no longer appropriate; it has been superseded by changing times.

Purely as a personal matter, meanwhile, this critic prefers the way the F.C.C. defined the Fairness Doctrine in 1974: It is a "two-fold duty: (1) The broadcaster must devote a reasonable percentage of broadcast time to public issues; and (2) his coverage of these issues must be fair in the sense that it provides an opportunity for...contrasting points of view."

Either way, the general meaning is the same, and a specific wording is probably unimportant. The Fairness Doctrine always has been more symbolic than real, more a standard to be strived for than an absolute command. The F.C.C. has not been punitive or capricious in enforcing it, and although broadcasters say the Fairness Doctrine exerts a "chilling effect," preventing them from examining controversial issues, the chill seems to be mostly in their minds. The F.C.C. seldom penalizes anyone.

Nonetheless, in its closely reasoned, even passionate, report, the F.C.C. concluded that the Fairness Doctrine "restricts the journalistic freedom of broadcasters." It said it would still enforce the Fairness Doctrine, but that it hoped Congress would relieve it of the duty by abolishing the doctrine.

In fact, several bills have been introduced to do this, although no one expects Congress to act soon. For one thing, political considerations are involved. Special-interest groups are on both sides of the issue, sometimes confusingly so. For example, both the Democratic National Committee and Accuracy in Media, the

conservative group that admonishes the press for liberalism, want to retain the doctrine; both the National Association of Broadcasters and First Amendment absolutists want it to go. There is a wonderful role reversal in some of this: Conservatives are taking the high road of free speech; liberals, several of their oxen gored, oppose them. This critic thinks almost all the arguments are a little askew.

The F.C.C.'s 111-page report, buttressed with 415 footnotes, argues along two main lines: The Fairness Doctrine inhibits broadcast journalism, while the proliferation of electronic voices no longer makes it necessary for anyone to worry about whether enough points of view are being presented. In 1949, the F.C.C. notes, there were 2,564 radio stations; now there are 9,766. In 1949, there were 51 television stations; now there are 1,208. Moreover, 6,600 cable television systems are now in operation, and other forms of electronic communication - low-power television, multipoint distribution service, satellite master antenna systems, for instance - are coming up fast.

Therefore, the F.C.C. concludes, the question of "viewpoint diversity" is now moot. Obviously, there is truth in this. The blossoming of electronic outlets means that left, right and center now find it easier to be heard. Moreover, in the bright electronic future all opinions, doctrines and theologies will find it easier to be heard. The fact is, they will demand to be heard. Microphones and cameras are beguiling. They confer identity and status on the people who use them. Those who believe themselves to be disenfranchised can find a home.

In a way, that's what the dispute over the television coverage of terrorism is all about. Causes, no matter how odious, may be legitimatized by media exposure. Under the Fairness Doctrine, a radio or television station that advocates an odious cause may be held accountable if it does not present a countervailing view. In the absence of the Fairness Doctrine, there is no necessity for it to do so. Indeed, in the absence of any restriction, an odious cause may not only be heard; it may control the radio or television station itself.

Think about it. How about a station devoted solely to anti-Semitic gospel hours, say, or the glories of Weathermen extremists? Neither prospect is that far-fetched. Cruise the airwaves of America. In different parts of the country, at odd hours of the day or night, you may hear programs very much like that now. There is no compelling reason why they should be encouraged. The Fairness Doctrine may be only a standard, and it may not often be enforced. But it does recognize that while speech may be free, it may not always be unbridled. Enlightened public discourse demands a sense of boundaries. Mere possession of a radio or television station does not mean the owner has a sense of boundaries; it means only that he has sufficient money to buy the station.

Broadcasters, meanwhile, say the Fairnesss Doctrine imposes an unfair burden. They complain that it allows them to be harassed by nuisance suits and plagued by partisans who claim they do not present both sides of an issue. In 1974, the F.C.C. responded to similar complaints from broadcasters by saying that "these burdens simply run with the territory." Last month's F.C.C. report reversed this

position. It said the burdens were onerous, and that the fear of attracting them imposed a "chilling effect" on broadcast journalism. It apparently causes the broadcasters to stay away from controversial issues.

The broadcasters who feel the chill, however, do not seem to be responding to much that is real, and it is almost as if the F.C.C. wants to suspend the Fairness Doctrine to help them overcome their own timidity. The F.C.C. report is insistent on the broadcasters' fearfulness, but nowhere are we persuaded that the broadcasters have much to be fearful about. Fairness Doctrine requirements are easily met. Broadcasters, when challenged, must show only that they acted in good faith. This does not require them to grant "equal time" - that applies only to political candidates - but merely a "reasonable opportunity" for an opposing viewpoint on an issue. Traditionally, the F.C.C. has interpreted this loosely; a reasonable opportunity is determined largely by the broadcaster.

Moreover, broadcasters are not required to extend the "reasonable opportunity" for inconsequential issues; they are required to extend it only for "controversial" issues. It's hard to understand how this impedes broadcast journalism. In fact, the Fairness Doctrine is predicated on what seem to be the most elementary rules of journalism.

Still, it is likely that one day the doctrine will be modified, or even done away with entirely. Time is not on its side, and its critics now seem to outnumber its friends. There is also a Constitutional argument that may be made against it; the First Amendment declares that Government shall make no law "abridging the freedom of speech, or of the press," and a Supreme Court may someday rule that this invalidates the doctrine. We may extend the scope of the precious First Amendment that way, but certainly we will lose something, too. The Fairness Doctrine, imperfect as it may be, sets a standard.

---- INDEX REFERENCES ----

INDUSTRY: (Entertainment (1EN08); Radio (1RA81))

Language: EN

OTHER INDEXING: (CONGRESS; CONSTITUTIONAL; DEMOCRATIC NATIONAL COMMITTEE; FAIRNESS; FAIRNESS DOCTRINE; FAIRNESSS DOCTRINE; FEDERAL COMUNICATIONS COMMISSION;
NATIONAL ASSOCIATION OF BROADCASTERS; SUPREME COURT; TV; WEATHERMEN) (Cruise;
Microphones; Purely; Semitic; Special; Traditionally) (Terms not available)
(review)

EDITION: Late City Final Edition

Word Count: 1634

9/15/85 NYT 223

END OF DOCUMENT

Westlaw Delivery Summary Report for WHITEHEAD,CLAY 5364288

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2/7/85 N.Y. Times C25

1985 WLNR 578947

New York Times (NY)

February 7, 1985

Section: C

ISSUE AND DEBATE; FAIRNESS DOCTRINE IN BROADCASTING

PETER W. KAPLAN

Today the Federal Communications Commission will begin two days of hearings that could determine the fate of the fairness doctrine - the Government regulation requiring stations to broadcast opposing views on important public issues.

In the annals of broadcasting, no rule so seldom used has been so passionately debated: many broadcasters want it dispensed with, many civil libertarians want it retained as a safeguard, and other civil libertarians see it as a threat to the First Amendment. The Supreme Court has upheld it, yet nearly every year some interest attacks it. The F.C.C. estimated it received 15,189 fairness complaints in three recent years but it counted only 13 reprimands. The penalties levied are more nudges than cudgels: stations are asked to give representatives of opposing views a chance to respond, in circumstances decided by the broadcaster. Few complaints get even that far. Yet the regulation continues to infuriate many broadcasters.

The current chairman of the F.C.C., Mark S. Fowler, has organized this two-day inquiry to examine the doctrine, which he feels to be unnecessary and philosophically distasteful, and to explore whether the commission has the power to alter it.

The Background

Laws starting with the Radio Act of 1927 and the Communications Act of 1934 established that the airwaves belonged to the people and that broadcasters were licensed to use them but must keep in mind the rights of the owners, the public. In 1959, after years of debate, Congress added Section 315, the "equal time" amendment, to the Communications Act of 1934: broadcasters, it said, had an obligation "to afford reasonable opportunity for conflicting views on issues of public importance." The fairness doctrine was written in response to that amendment.

In 1969, the Supreme Court upheld it in the landmark "Red Lion" case, finding that a Pennsylvania radio station that had broadcast a personal attack on a journalist, Fred Cook, had to provide free time for a response.

Since the beginning of broadcasting, a distinction has been made between the broadcast and print media that has been used to justify the fairness doctrine. While many have or could have access to printing presses, the argument goes, there are only a limited number of stations set by the F.C.C.

In the last few years, the scarcity argument has been challenged from both the

political left and the right. This year, when the Central Intelligence Agency sought to apply the fairness doctrine to an ABC News report, many liberals felt the regulation could be used as a means of silencing or intimidating reporters.

For the Doctrine

It has been said that the fairness doctrine alone holds radio and television station owners accountable for what they put on the airwaves. Representative Timothy Wirth, Democrat of Colorado, chairman of the House subcommittee on telecommunications and a strong supporter of the fairness doctrine, challenged those who call it a threat to the First Amendment. "That's not what 'Red Lion' said," he said, "that's not what the Supreme Court said. Broadcasters do not have to pay for their airwaves; in return for that they are expected to act in the public interest. And the public interest is defined in the language used in Section 315 and the fairness doctrine."

Charles Ferris, former F.C.C. chairman in the Carter Administration, said, "The only remedy the F.C.C. has is to tell the broadcaster to go out and cover a controversial interest again, that there was an imbalance in the listener's rights that has to be corrected." Mr. Ferris said that the F.C.C. was showing "arrogance in attempting to change a statute that came from great sense in Congress, that is trying to insure fairness and equal opportunity."

Against the Doctrine

Floyd Abrams, a lawyer who specializes in First Amendment matters, has opposed the fairness doctrine for some time. "I'm in favor of its recision," he said. "It allows the Government to make all sorts of decisions that are contrary to all kinds of elemental freedoms of expression."

Although Mr. Abrams acknowledged the doctrine can command air time for unheard voices, he said Government "should be denied that role."

Most important, however, the fairness doctrine is regulation that Mr. Fowler and many conservatives find philosophically repugnant. "A veritable slew of content-oriented regulations has tumbled out of the F.C.C. in the last 50 years," he said recently. "The fairness doctrine is perhaps the most offensive of these content regulations."

"You have to ask yourself," said Daniel Brenner, senior adviser to Mr. Fowler, "where the scarcity in getting access to radio and television air exists. In New York, there are dozens of radio and television outlets and only three newspapers. Why are we regulating them?"

The OutlookThere are a great many supporters for change, both in the Reagan

Administration and among broadcasters, but if the F.C.C. chose to go ahead and change the rule without consulting Congress, it might be picking a fight in an area where passions run high. "If the F.C.C. tries to do anything" to the doctrine, Representative Wirth said, "the Congress is going to rise up in incredible revolt, and the F.C.C. is going to wish there was a fairness doctrine to protect it from the wrath of Congress."

Mr. Fowler's office said that he would reserve comment until after the two-day inquiry.

---- INDEX REFERENCES ----

COMPANY: FEDERAL COMMUNICATIONS COMMISION

NEWS SUBJECT: (Judicial (1JU36); Legal (1LE33); Technology Law (1TE30); Government (1GO80); Economics & Trade (1EC26))

INDUSTRY: (TV (1TV19); TV Stations (1TV23); Entertainment (1EN08); Traditional Media (1TR30); TV Regulatory (1TV84))

REGION: (USA (1US73); Americas (1AM92); North America (1NO39))

Language: EN

OTHER INDEXING: (KAPLAN, PETER W; FOWLER, MARK S) (ABC NEWS; BROADCASTING; CARTER ADMINISTRATION; CENTRAL INTELLIGENCE AGENCY; CONGRESS; DOCTRINE; FEDERAL
COMMUNICATIONS COMMISSION; OUTLOOKTHERE; REAGAN ADMINISTRATION; SUPREME COURT)
(Abrams; Against; Charles Ferris; Congress; Daniel Brenner; F.C.C.; Ferris; Floyd Abrams; Fowler; Fred Cook; Laws; Mark S. Fowler; Representative Wirth; Timothy Wirth) (TELEVISION; RADIO; FAIRNESS DOCTRINE)

COMPANY TERMS: FEDERAL COMMUNICATIONS COMMISSION (FCC)

EDITION: Late City Final Edition

Word Count: 1073

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5/29/82 NYT 18 FOR EDUCATIONAL USE ONLYPage 1

5/29/82 N.Y. Times 18

1982 WLNR 319662

New York Times (NY)

May 29, 1982

Section: 1

G.O.P. COMMERCIALS UPHELD BY AGENCY

AP

WASHINGTON, May 28 The Federal Communications Commission has rejected a complaint challenging the airing last fall of Republican television commercials supporting

President Reagan's economic program.

Democrats had charged that the commercials violated the " fairness doctrine ," which requires broadcasters to address "controversial issues of public importance" and then provide time to present opposing views.

The commission, voting 6 to 1, ruled Thursday that the Democratic National Committee had failed to prove that overall coverage of economic issues on the CBS and NBC television networks was "unreasonably out of balance."

Unlike the equal time law, which requires that an essentially equal opportunity for air time be provided political candidates, the fairness doctrine does not require an exact balance of competing viewpoints, the commission explained.

Argument Is Rejected

"The public's right to be informed is the cornerstone of the fairness doctrine," the commission said. "We do not believe that the public has been left uninformed."

The Democratic committee's complaint focused on NBC and CBS because the third major network, ABC, did not broadcast any of the disputed commercials. The doctrine does not require that individual programs or advertisements be strictly balanced; only that broadcasters maintain balance in their "overall programming."

The Democratic National Committee, along with the Democratic Senate and House campaign committees, asserted in a complaint filed in December that the Republican National Committee's purchase of more than $2 million worth of commercial time last fall "simply tipped the scales of just debate too much to be tolerated."

The Democratic committee had submitted research findings showing that the Reagan Administration's viewpoints were presented on the evening news programs on the two networks at least twice as much as those of the Democrats. The Democrats wanted the networks to provide free time to balance the paid Republican commercials.

"We cannot find the amount of time and frequency afforded each side so disparate as to warrant commission intervention," the commission said.

Frank W. Lloyd, an attorney who assisted the Democratic National Committee in filing its complaint, said he thought an appeal was likely.

---- INDEX REFERENCES ----

COMPANY: FEDERAL COMMUNICATIONS COMMISION

REGION: (USA (1US73); Americas (1AM92); North America (1NO39))

Language: EN

OTHER INDEXING: (CBS; DEMOCRATIC COMMITTEE; DEMOCRATIC NATIONAL COMMITTEE; DEMOCRATIC SENATE; FEDERAL COMMUNICATIONS COMMISSION; NBC; REPUBLICAN NATIONAL
COMMITTEE) (Democrats; Frank W. Lloyd; G.O.P. COMMERCIALS; Reagan) (ADVERTISING; TELEVISION; UNITED STATES POLITICS AND GOVERNMENT)

EDITION: Late City Final Edition

Word Count: 454

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9/13/87 NWSDAY 15 FOR EDUCATIONAL USE ONLYPage 1

9/13/87 Newsday 15

1987 WLNR 206595

Newsday (USA)

September 13, 1987

Section: NEWS

CUOMO: EQUAL TIME MAKES BAD LAW

Rex Smith. Newsday Albany Bureau Chief

Anaheim, Calif. Gov. Mario Cuomo, in a speech warmly received by a group of radio executives from across the country, said Friday night that Democrats in Congress were wrong for attempting to enact a law requiring broadcasters to air both sides of controversial issues.

And while praising President Ronald Reagan's veto of the so-called Fairness Doctrine , Democrat Cuomo warned that a Democratic president might be less likely to block the legislation.

Cuomo's remarks, including a 90-minute question-and-answer period, drew a standing ovation from the roughly 150 guests at a private dinner sponsored by United Stations Radio Networks, an entertainment and news programing service. The governor was introduced by broadcasting personality Dick Clark, an owner of the net- works, as "a major leaguer" in the American political arena.

The speech, part of Cuomo's stepped up schedule of appearances around the country, brought the governor to the home town of Disneyland for an invitation-only affair that one organizer said was attended by "probably 80 percent Republicans," primarily radio station owners and their guests.

In response to a question, Cuomo reiterated his February statement that he would not seek the Democratic presidential nomination but still expected to have an effect on national policy.

He recently said that because people now are convinced that he will not run, he feels free to make more appearances outside New York state.

Cuomo devoted most of his prepared remarks to an attack on the Fairness Doctrine, which requires broadcast outlets to present opposing views on controversial topics. The doctrine was imposed on radio stations for almost four decades as a Federal Communications Commission regulation. When the Reagan-appointed FCC dropped the rule this year, Congress passed a bill resurrecting the doctrine with the force of law. That bill was vetoed by Reagan - a veto that Cuomo said would be unlikely to be repeated if a Democrat wins the White House in 1988. "I think you're going to have to face the issue all over again," he said.

Cuomo said the doctrine "chilled as much debate as it encouraged" by prompting broadcasters not to schedule any controversial programing to avoid the possibility of government intrusion. And he characterized it as an invasion of First Amendment rights.

"Of course there are limits to liberty and lines to be drawn," Cuomo said. "But curtailing First Amendment rights should be allowed only when the need is so clear and convincing as to overwhelm with reasonableness the arguments in opposition. And the case for government intrusion, for the Fairness Doctrine, is certainly less than compelling at its very best."

But Cuomo warned that "palpable unfairness" by broadcasters "can invite the type of laws that our founding fathers would have abhored" and urged radio and television stations to exercise "self-imposed individual restraint and good judgment."

Nick Verbitsky, who formed the 500-station network with Clark two years ago and is its president, said that Cuomo was invited because of his oratorical skill and candor. "You can get a lot of politicians who look good and feel good and seem good, but then they get up there and don't say anything when they answer questions," Verbitsky said. "And Cuomo may be governor of New York, but he's a very national governor."

---- INDEX REFERENCES ----

COMPANY: FEDERAL COMMUNICATIONS COMMISION

NEWS SUBJECT: (Government (1GO80); Economics & Trade (1EC26); Public Affairs (1PU31))

REGION: (USA (1US73); Americas (1AM92); North America (1NO39); New York (1NE72); California (1CA98))

Language: EN

OTHER INDEXING: (DEMOCRATIC; FAIRNESS DOCTRINE; FCC; FEDERAL COMMUNICATIONS COMMISSION; UNITED STATIONS RADIO NETWORKS; WHITE HOUSE) (Clark; Cuomo; CUOMO: EQUAL TIME MAKES BAD LAW; Democrat; Democrat Cuomo; Dick Clark; Gov; Mario Cuomo; Nick Verbitsky; Reagan; Ronald Reagan; Verbitsky) (MARIO CUOMO; LAW; SPEECH; RADIO; TELEVISION; VETO; FREEDOM OF SPEECH)

EDITION: NASSAU AND SUFFOLK

Word Count: 674

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8/11/87 LATIMES 5 FOR EDUCATIONAL USE ONLYPage 1

8/11/87 L.A. Times 5

1987 WLNR 1484628

Los Angeles Times

August 11, 1987

Section: Metro

FCC Steps Out of Order With Fairness Ruling

DANIEL BRENNER

Daniel Brenner, the director of the Communications Law Program at UCLA Law School, was the legal adviser to the chairman of the FCC from 1979 to 1986.

Is the FCC fairness doctrine constitutional? Who should decide? The Federal Communications Commission has answered no to the first question, and has nominated itself for the second. Two years ago it thought that it didn't have that power.

The decision to dump the doctrine touches off a new round of debate about the rule, which for 38 years required radio and television stations to provide opposing viewpoints in covering controversial issues. The debate isn't about whether covering controversy and doing it with balance are good ideas. It's about whether the government should oversee the judgment calls when broadcasters make them.

I think that broadcasting should be treated as the print media are. A Federal Newspaper Commission administering a fairness doctrine would be unthinkable. The reason given for taking a different First Amendment turn when it's KNBC or KFI is the "scarcity of the air waves." But that's not convincing in Los Angeles, where there are scores of electronic news outlets but only a few print.

It's not true in Humboldt County, either. There may be only a couple of local radio outlets there. But the cause of this scarcity is a lack of advertising dollars to support more stations, not a shortage on the electromagnetic spectrum. Permit regulation of this sort of scarcity, and you justify government review of films that a small-town movie house can play or of the slogans permitted to be sold by a village T-shirt shop.

Also, the fairness doctrine doesn't work that well. It assumes that the same viewers will somehow hear the differing viewpoints even if they're broadcast days or weeks apart. And, when the FCC has to enforce it, the remedial broadcast may appear years later, long after a controversy has died down.

Worse, the FCC can err about whether the rule has been violated. In 1972 NBC aired a documentary about people who were fired just before their pensions would have become vested. The FCC said that it was too one-sided. NBC thought that it had been fair.

The U.S. Court of Appeals for the District of Columbia found that the FCC had misapplied the fairness doctrine, and reversed the order. But the challenge had cost NBC $100,000 in legal fees. Broadcasters don't need headaches like this. The doctrine can chill editorial enthusiasm, not foster it.

But who should decide whether the fairness doctrine violates the guarantee of free speech? The oddity of last Tuesday's decision is that an administrative agency has done so. It shouldn't be the FCC; it should be the Supreme Court of the United States.

The FCC didn't start out trying to make constitutional law. In 1985, thinking that Congress might have codified the doctrine in 1959, the FCC said that it would enforce the rule until a court or Congress said to stop. But in 1986 the District of Columbia Court of Appeals suggested that Congress never enacted the doctrine.

Yet "stop enforcing" is about the last instruction that Congress would give this FCC. Congress tried to codify the doctrine last spring, but President Reagan vetoed the measure in June.

There is irony here. The FCC is not supposed to be an adversary of Congress, but its agent. An act of Congress created the agency in 1934; an act of Congress could eliminate it tomorrow. But the FCC is an independent agency as well, part of the "fourth branch" of government created in this century to oversee industries like securities, transportation and communications.

Some of the friction is political. A Democratic Congress oversees an FCC that is run by people who were all appointed or reappointed by Reagan. The chairman, who sets the FCC's agenda, is picked by the President. But "Republican vs. Democrat" doesn't fully explain sides on the fairness doctrine. At stake is a difference in philosophy about how free the electronic press should be. Those in favor of the rule include the chairmen of the House committees that oversee the FCC, John D. Dingell (D-Mich.) and Edward J. Markey (D-Mass.), as well as Ralph Nader. But add Phyllis Schlafly and Patrick Buchanan. They also believe that broadcast journalists, especially on networks, should be regulated.

Opponents of such regulation include as diverse a group as Sen. William Proxmire (D-Wis.), Walter Cronkite and the Rev. Jerry Falwell. They believe that government shouldn't have a role to play in deciding what's fair.

The Supreme Court likes to defer to the FCC or Congress when it comes to broadcasting. It is hesitant to rewrite regulations that involve political, social and engineering issues. As the court sees it, deference to the FCC is good; deference to Congress, better.

Our nation's first chief justice, John Marshall, declared that the Supreme Court

ultimately decides what's constitutional--not the FCC, not even Congress. If Congress reimposes the doctrine, the experiment in electronic press freedom begun last Tuesday will be halted. Yet the arguments that led the FCC to its decision remain. The FCC has the right message, but the right medium is the Supreme Court.

---- INDEX REFERENCES ----

COMPANY: FEDERAL COMMUNICATIONS COMMISSION

NEWS SUBJECT: (Legal (1LE33); Judicial (1JU36); Government (1GO80); Economics & Trade (1EC26))

REGION: (District of Columbia (1DI60); USA (1US73); Americas (1AM92); North America (1NO39))

Language: EN

OTHER INDEXING: (APPEALS; CONGRESS; DEMOCRATIC CONGRESS; FEDERAL COMMUNICATIONS
COMMISSION; FEDERAL NEWSPAPER COMMISSION; KFI; NBC; RALPH NADER; REV; SUPREME
COURT; TRANSPORTATION; US COURT OF APPEALS) (Democrat; Edward J. Markey; FCC; Jerry Falwell; John D. Dingell; John Marshall; Patrick Buchanan; Phyllis Schlafly; Reagan; Republican; Walter Cronkite; William Proxmire; Worse)

EDITION: Home Edition

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76.251(a)(10)(ii) applying to live cablecasts longer than five minutes, etc. on a major market cable system's designated public access (channels).

4 We note that a great many system operators make no charge for live studio presentations often greatly in excess of five minutes in length, or for other use of cablecast equipment and facilities.

Robinson
FCC decisions

34 Rad. Reg. 2d (P & F) 383, 53 F.C.C.2d 1104, 1975 WL 31060 (F.C.C.)

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36 Rad. Reg. 2d (P & F) 1021, 58 F.C.C.2d 691, 1976 WLPage 1
32074 (F.C.C.)

(Cite as: 36 Rad. Reg. 2d (P & F) 1021, 58 F.C.C.2d 691, 1976 WL 32074 (F.C.C.))

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36 Rad. Reg. 2d (P & F) 1021, 58 F.C.C.2d 691, 1976 WL 32074 (F.C.C.)

F.C.C. 76-265

*1 In the Matter of

THE HANDLING OF PUBLIC ISSUES UNDER THE FAIRNESS DOCTRINE AND THE PUBLIC INTEREST
STANDARDS OF THE COMMUNICATIONS ACT.

Docket No. 19260

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION OF THE FAIRNESS REPORT

(Adopted: March 19, 1976; Released: March 24, 1976)

BY THE COMMISSION: CHAIRMAN WILEY ISSUING A SEPARATE STATEMENT; COMMISSIONER
HOOKS CONCURRING AND ISSUING A STATEMENT; COMMISSIONER ROBINSON DISSENTING AND
ISSUING A STATEMENT

I. Introduction

1. During the past four years, the Commission has engaged in a comprehensive inquiry into the purposes and the application of the fairness doctrine. The extent of public input in this proceeding is documented in the Fairness Report, 48 FCC 2d 1 (1974). We now have before us various petitions for reconsideration of that Report. We here turn our attention to the questions raised by those petitions, and other questions which have come to our attention requiring further clarification of our fairness doctrine policy.

2. The petitions for reconsideration present a vigorous disagreement with the Report's position on applying the doctrine to standard product commercial advertising, and present a proposed alternative to the doctrine. They further suggest that the doctrine be invoked only in license renewal proceedings, and suggest applications of the doctrine for slanted or staged news, personal attacks, and editorial advertising.

3. Petitioner Henry Geller argues that the Commission is prohibited from applying the doctrine except as part of a license renewal proceeding. Mr. Geller's conclusion is based on his reading of two recent Supreme Court decisions FN[FN1] and on the early history of the Fairness Doctrine. He proposes that licensees adopt a 'ten issue' approach to meeting fairness obligations and that all complaints be referred to the licensee when they are received. He further advocates a 'hands-off' policy for the Commission concerning news distortion or slanting. FN[FN2]

4. Mr. Geller further urges the Commission to modify its 'crazy quilt' personal attack rules. He suggests instead that if such an attack is made as part of the

discussion of a controversial issue of public importance and the licensee has not achieved fairness nor made timely plans to do so, then the licensee must notify the attacked party within a 'reasonable time' and offer an opportunity for response. Geller urges us to require broadcasters to examine and consider editorial advertising without requiring them to accept any. Finally, he opposes the decision not to apply the doctrine to product efficacy advertising. In this last position, he is joined by the Media Access Project (MAP) petitions. FN[FN3] MAP contends that the Commission has failed to articulate its reasons for allegedly exempting product advertising from the doctrine and that hearings should have been held to determine that decision's economic impact. Moreover, MAP argues that prior Court decisions require that the Commission include product advertising within the ambit of the fairness doctrine, and that it is improper to conclude that advertisements for particular product line or brand cannot advocate a controversial issue of public importance.

*2 5. MAP's position is opposed by Metromedia and McKenna, Wilkinson and Kittner (on behalf of broadcast clients). Metromedia cites the depth of the Commission's inquiry in this docket and argues that MAP's interpretation of certain Court decisions is over broad. The McKenna response faults MAP for merely offering its own counter-assumptions supplemented with a few random and inconclusive statistics. It suggests that, under MAP's proposal, the Commission would have to make subjective evaluations of the informational impact of commercial messages.

6. MAP proposes that before a complaint may be filed with the Commission, the station must answer the complaint stating whether the issue is a controversial issue of public importance and what contrasting programming has been aired. Metromedia and McKenna argue that the proposal would be a significant departure from present standards by imposing the initial burden, that properly should remain with the complainant, on the individual station.

7. The final petition, by the Committee for Open Media (COM), proposes an optional plan which, if adopted by the licensee, would satisfy his general fairness obligations. COM proposes a scheme of access through 'Free Speech Messages' (FSM), publicly available spot announcements aired at different times during the week. One half of the spots would be allocated on a first-come, first-served basis, and the remainder would be rotated among 'representative spokespersons' from groups which have demonstrated significant community support. COM would not apply this system to partisan political access and recommends amending the personal attack rules to exempt such attacks made in an FSM.

II. Discussion

A. Purpose of the Fairness Doctrine

8. The purpose of the fairness doctrine was discussed in some depth in the Fairness Report, supra at 2-8, but events subsequent to the adoption of the Report indicate that a recapitulation of our views is called for here.

9. There is no principle of greater importance to understanding the fairness doctrine and the First Amendment than that '[i]t is the right of the viewers and listeners, not the broadcasters, which is paramount.' Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969). The fundamental concept which underscores this right is that the continued vitality of a democratic society and its freedoms requires the 'widest possible dissemination of information from diverse and antagonistic sources. . . .' Associated Press v. United States, 326 U.S. 1, 20 (1945). We must always keep in mind that 'speech concerning public affairs is more than self-expression; it is the essence of self-government.' Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964). FN[FN4] The relationship of this principle to broadcasting was articulated in Green v. FCC, 447 F.2d 323 (1973). There it was held that 'the essential basis of any fairness doctrine, no matter with what specificity the standards are defined, is that the American public must not be left uninformed.' Id. at 329.

*3 10. It is difficult to believe that the Court in Green, supra, intended the American public to be only half-informed, particularly in light of the language in Associated Press, supra, calling for the 'widest possible dissemination of information from diverse and antagonistic sources. . . .' Id. at 20 (emphasis added). Full information is the theoretical underpinning of the broadcaster's two duties; to cover controversial issues of public importance fairly by providing an opportunity for the presentation of contrasting points of view; and to devote a reasonable amount of broadcast time to the coverage of public issues.

11. We do not subscribe to the theory that recent Supreme Court decisions have established boundaries concerning the fairness doctrine. In Miami Herald v. Tornillo, supra, the Court's opinion was limited only to print media and cited language in CBS v. DNC, supra, which set apart broadcasting and newspapers. 418 U.S. 241, 255 (1974), quoting from 412 U.S. 94, 117 (1973). The language relied upon by Mr. Geller in his petition clearly places the Court's emphasis on 'newspapers' in the context of the historical evolution of free 'press' guarantees.

12. It is suggested that the Court's language in CBS, supra, that '[f]or better or worse, editing is what editors are for . . .,' is a pronouncement that the Commission must abandon its current views on the fairness doctrine. Yet the lines preceding that quotation reveal that language as presenting a choice between the view 'that every potential speaker is 'the best judge' of what the listening public ought to hear' and the view that such choices are better left to editors. 412 U.S. at 124. The Supreme Court did not address in CBS the question of licensee discretion vis-a-vis the Commission's role as the ultimate arbiter of the fairness doctrine. The Court did not generalize that overzealous invocation of the fairness doctrine might cause an 'erosion of the journalistic discretion of broadcasters in the coverage of public issues.' 412 U.S. at 124. The Court was instead specifically concerned with the question of licensee discretion vis-a-vis individuals demanding a right of access. The Court said that if the Fairness Doctrine were expanded to include mandatory access there would be a

. . . substantial danger that the effective operation of that doctrine would be jeopardized. The result would be a further erosion of the journalistic discretion of broadcasters in the coverage of public issues, and a transfer of control over the treatment of public issues from the licensees who are accountable for broadcast performance to private individuals who are not. Id.

13. The CBS decision's denial of the right of access was predicated on the continued existence and enforcement of the fairness doctrine as it has developed over the years. In the language quoted above, the Court implied that it preferred control over the treatment of public issues to remain with licensees because they are 'accountable for broadcast performance.' Id. The Court further stated that it feared that a transfer of such control would jeopardize the effective operation of the fairness doctrine. In CBS, therefore, the Supreme Court reaffirmed its continued belief in and support for the fairness doctrine and Red Lion.

*4 B. The Statutory Scheme-Balancing Rights and Burdens

14. The legislative framework regulating broadcasters is grounded in the 'public interest' and the courts have consistently recognized that '[t]his mandate to the FCC to assure that broadcasters operate in the public interest is a broad one, a power 'not niggardly but expansive." National Broadcasting Co. v. United States, 319 U.S. 190, 219 (1943), cited with approval 395 U.S. at 380. The Supreme Court has made it clear that '[t]here is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all.' 395 U.S. at 392. The Court also recognized that while the 'initial and primary responsibility for fairness, balance and objectivity' rests upon the licensee, the Commission is the 'overseer and ultimate arbiter and guardian of the public interest.' CBS v. DNC, 412 U.S. 94, 117 (1973).

15. The statutory scheme calls for balancing the people's First Amendment rights and the rights of the media. Over the past half century, 'Congress and its chosen regulatory agency have established a delicately balanced system of regulation intended to serve the interests of all concerned.' CBS v. DNC, 412 U.S. 94, 102. This system is outlined with specific procedural requirements and with substantive guidelines upon which both viewer and licensee may rely. The Commission has tailored its actions so as not to become, in effect, the broadcast journalist or programmer. We do not believe that it would be in the public interest to upset this delicate balance.

16. In the Fairness Report, supra at 17-18, we rejected the notion that all fairness complaints should be reviewed only as part of license renewal proceedings. There, we said that we believed it would be impossible to evaluate overall licensee performance at renewal time without considering the specifics of individual complaints. The public's right to be informed is best safeguarded by an ongoing review of all fairness complaints. For example, the incentive for citizens to file complaints would be removed if their complaints would not result in the opposing viewpoint being aired before the issue has become stale with the passage of time. Continuing enforcement helps the broadcaster by helping to remedy violations which would place his license in jeopardy before a flagrant pattern of

abuse develops. Id. at 18. We do not believe that a departure from that position would be in the public interest. We conclude, therefore, that in view of the considerations enunciated above, it would be most appropriate to utilize this case by case approach to ensure that broadcasters fulfill their affirmative responsibilities under the fairness doctrine to adequately cover controversial issues of public importance and to present differing viewpoints on those issues. See Public Communications Inc., 50 FCC 2d 395 (1974).

17. As part of the ongoing review procedure of fairness complaints, the Commission will continue to make its determinations of licensee reasonableness in the context of overall programming on an issue rather than on a particular program. FN[FN5] We recognize that there are difficulties inherent in selecting a finite period of time (i.e., a 'cut-off' date) in which to view the 'overall' programming on an issue. We see no advantage to the arbitrary selection of the license term as the period over some other time period. FN[FN6] Indeed, since the fairness doctrine is oriented toward issues and varying viewpoints, it is preferable to retain the present flexibility in reviewing a time period during which the issue is a matter of public controversy and public importance.

*5 18. We are urged to reconsider our procedure for handling fairness complaints. The Commission's complaint procedures and substantive rulings attempt to strike and maintain a delicate balance between licensees and complainants to ensure that neither side is unduly disadvantaged. We noted in the Fairness Report, supra, at 18, that there seems to be a lack of understanding of Commission complaint procedures. In an effort to alleviate that problem, the procedures were discussed in some detail. Id. The instant petitions indicate that further explanation would be useful. FN[FN7]

19. The Commission does not ordinarily invoke the fairness doctrine on its own motion. Action by the Commission must await a dispute between the complainant and the licensee which is not resolved by those parties. Thus, where the licensee agrees to present opposing views on an issue the Commission need not become involved. However, no specific action is required of the licensee until prima facie evidence of a violation is presented to the Commission by a complainant. Allen C. Phelps, 21 FCC 2d 12 (1969). This policy is part of the delicate balance allocating burdens between licensees and complainants. This policy prevents broadcasters from being burdened with the task of answering idle or capricious complaints. Report, supra, at 8.

20. As part of the allocation of burdens and responsibility among complainants, licensees and the Commission, the initial burden has been placed on the complaining party. As stated in the Fairness Doctrine Primer, 40 FCC 598 (1964):

> Where complaint is made to the Commission, the Commission expects a complainant to submit specific information indicating (1) the particular station involved; (2) the particular issue of a controversial nature discussed over the air; (3) the date and time when the program was carried; (4) the basis for the claim that the station has presented only one side of the question; and (5) whether the station had afforded, or has plans to afford, an opportunity

for the presentation of contrasting viewpoints.Id. at 600.

21. In the Fairness Report, supra, at 19-21, we discussed the fourth and fifth items mentioned above. The suggestion there that licensees respond to the complainant stating whether there was a controversial issue of public importance leads to the burden placed on the complainant in the second item-specifying the particular issue of a controversial nature discussed over the air.

22. The requirement of specificity was reemphasized in David C. Green, 24 FCC 2d 171 (1970), affirmed Green v. FCC, 447 F.2d 323 (D.C. Cir. 1971), where the court recognized that in order to allege that an issue is a controversial issue of public importance the complainant must first define the issue. Id. at 329. This requirement is needed so that complainants, licensees and the Commission will have a clearer understanding of the positions of the parties. This is particularly true because once the burden of specificity has been placed upon the complainant, our attention and that of the licensee is then directed to the issue as framed by the complainant. We do not intend to be placed in the position of specifying the alleged controversial issue of public importance in a complaint. It is not the proper function of the administering agency to frame the complaints coming before it and it is incumbent upon the complaining party to bring before us a prima facie complaint.

*6 23. After the complainant has presented prima facie evidence of a fairness violation, the licensee is called upon to answer an inquiry by the Commission staff which recites the issue specified by the complaint. The licensee is asked whether that issue is a controversial issue of public importance, whether the program in question addressed that issue, and whether other programming has been or will be presented on that issue. The Commission must then decide whether the licensee's response to these questions are reasonable. FN[FN8]

24. Within the parameters of law, the determination of reasonableness in each particular instance is a question of fact. This is true because reasonableness is not an absolute standard, but is situational in nature-rooted in the facts which gave rise to the controversy. Wilderness Society, 31 FCC 2d 729, 732 (1971). Reasonableness is also inherently a comparative determination, the actions of a person being measured against a standard by the finder of fact, that standard being the 'reasonable man.' Therefore, before the reasonableness of one party may be decided, an independent (i.e. comparative) judgment on the question must be made by the finder of fact.

25. This does not mean that the Commission or its staff may substitute their judgment for that of the licensee. A hard look at all the facts and competing arguments is required before the determination on licensee reasonableness. WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969). This examination is only one step toward that final determination. Having once made its initial examination, the staff then has the responsibility of determining the reasonableness of the licensee's judgment. Rather than substituting its views for those of the licensee, the staff at this stage decides the licensee's reasonableness based on the contentions of all parties and on its own evaluation of the evidence. FN[FN9]

C. Standard Product Commercials

26. In the Fairness Report, supra at 24-8, we declared after much deliberation that the public interest would be served best by not applying the doctrine to standard product commercials. FN[FN10] At least two petitioners disagree strongly with this decision and suggest that the Commission was without power to effect such a change, and that it failed to articulate sufficient grounds for the policy. We disagree.

27. The Report, supra, articulates the rationale for adopting the policy and its substantive standards, and both the rationale and the standards are well within the Commission's discretion. The Commission clearly stated that the standard was being changed and not ignored, and it set forth a reasoned opinion explaining the change. Indeed, the U.S. Court of Appeals for the First Circuit, in sustaining the Commission, recently determined that the Commission had acted within its statutory authority when it 'with appropriate notice and . . . sufficient clarity' concluded that it was in the public interest to 'abandon [its] earlier precedents and frame new policies.' Public Interest Research Group v. FCC, 522 F.2d 1060, 1065 (1975), cert. denied, March 22, 1976. The Court went on to say

> *7 Given the necessity of product advertisement in American broadcasting, and the administrative difficulties and costs of determining when a product is so controversial as to trigger fairness obligations, we cannot, merely from the generalized congressional endorsements described in Red Lion, say that the Commission acted contrary to statute when it struck the current balance between product advertising and the fairness doctrine.Id. at 1067.

28. In the Report, we concluded that the application of the doctrine to cigarette commercials had been a mistake because it departed from the doctrine's central purpose of developing an informed public opinion. 48 FCC 2d at 24. The extension of the cigarette ruling to other commercials, as in Friends of the Earth v. FCC, 449 F.2d 1164, compounded the problem, and forced broadcasters and the Commission to balance two sets of commercials 'which contribute nothing to public understanding' of the underlying issues. Therefore we concluded:

> In the absence of some meaningful or substantive discussion . . ., we do not believe that the usual product commercial can realistically be said to inform the public on any side of a controversial issue of public importance.48 FCC 2d at 76.

Furthermore, we said that the diversion of broadcasters' attention to the fairness implications of ads would hinder their fulfillment of responsibilities to develop informed public opinion in more meaningful ways.

29. Neither have court decisions constrained the Commission from changing its policy after due deliberation consistent with required administrative procedures. See Public Interest Research Group v. FCC, supra. The D.C. Circuit was careful in Banzhaf and Friends of the Earth to avoid implying that the fairness doctrine or the public interest standard mandated the Commission to make such a finding. In Friends of the Earth, the Court expressly noted the pending fairness inquiry, and pointedly suggested that its holding was based only on then-existing Commission policy concerning the fairness doctrine:

> Pending, however, a reformulation of its position, we are unable to see how the Commission can plausibly differentiate the case presently before us from Banzhaf insofar as the applicability of the fairness doctrine is concerned.449 F.2d at 1170.

30. The Commission was given inconclusive statistics and told that it should have held a hearing on the economics of broadcasting before concluding that extension of the doctrine to product advertising would be detrimental to commercial broadcasting. The extensive proceedings in this docket provided more than ample opportunity for that question to be raised. Clearly, however, the economic impact on the broadcasting industry was only one of many factors contributing to our choice of policy, and that factor alone is not of such critical importance as to cause a change of policy. See, 48 FCC 2d at 24-27.

*8 D. Free Speech Messages

31. In the Fairness Report, supra, suggestions for a system of mandatory access were rejected as neither practical nor desirable. In CBS v. DNC, 412 U.S. 94 (1973), the Supreme Court held that mandatory access is not a matter of either constitutional or statutory right. We are now presented instead with a proposal for an optional access system to be administered by the licensee, and supplemented by the fairness doctrine.

32. The essential requirements for any such system would be that licensee discretion be preserved and no right of access accrue to particular persons or groups. Further the access system would not be permitted to allow important issues to escape timely public discussion. Most importantly, the system must not draw the government into the role of deciding who should be allowed on the air and when.

33. The proposal of the Committee for an Open Media (COM) is the first serious attempt to meet these requirements. It is neither perfected nor ready for adoption as rule or policy. We do not envision that system as a substitute for fairness obligations, but it has the potential to offer a format which acts consistently and complementarily with the purposes of the doctrine. We view Free Speech Messages as a supplement to a licensee's fairness obligations, but we reiterate our view that the licensee is responsible for seeing that important controversial issues are discussed and that opposing viewpoints are provided an

opportunity for presentation.

III. Conclusion

34. It is hoped that this reconsideration Report and Order will help to clarify the responsibilities and procedures incumbent upon licensees, complainants and the Commission under the fairness doctrine, and the reasons for our policies. We are attempting to balance conflicting constitutional rights by choosing paths which minimize the interference with the rights of either party, and which minimize the role of government in evaluating media performance, consistent with the public interest.

35. Accordingly, IT IS ORDERED, That the petitions for reconsideration ARE DENIED in all respects other than as incorporated in this Report and Order. IT IS FURTHER ORDERED, That the proceedings in Docket 19260, ARE TERMINATED. FN[FN11]

FEDERAL COMMUNICATIONS COMMISSION,

VINCENT J. MULLINS, Secretary.

SEPARATE STATEMENT OF CHAIRMAN RICHARD E. WILEY

In Re: Reconsideration of Fairness Report (Docket 19260)

In an address to the International Radio and Television Society on September 16, 1975, I proposed an experiment in which the Commission would discontinue enforcement of the fairness doctrine in the larger radio markets. I believe that this proposal has considerable merit and that it is unfortunate that a majority of the Commission has chosen not to pursue the idea at this time.

There is little reason to believe that fairness enforcement is necessary in the major radio markets. The doctrine, as we all know, is predicated upon the assumption that there is a scarcity of broadcast frequencies and that licensees should not be permitted to monopolize these channels so as to deny the public access to contrasting viewpoints on public issues. In the larger markets, it seems clear that the problem of scarcity is not so significant as to make it likely that radio debate could be monopolized by a single philosophy or point of view. In the Chicago market, for example, there are some 65 commercial radio stations; in Los Angeles the figure is 59; and in New York there are 43 stations. Even in the absence of governmental control and supervision, it seems to me that a wide variety of opinion would be presented in these markets.

*9 The question of the Commission's legal authority to adopt a fairness

experiment is somewhat more difficult and complex. Prior to 1959, there would have been no doubt that we had the discretion to conduct such an experiment. In that year, however, the Communications Act was amended so as to refer approvingly to the standard of fairness in broadcasting. The literal wording of the statute indicates only that the Commission's fairness policies were left undisturbed, but the provision has, nevertheless, been widely interpreted to stand as a 'codification' or legislative enactment of the doctrine. See e.g., Straus Communications Inc. v. FCC, D.C. Cir. No. 75-1083, January 16, 1976, Slip op. at n. 11 (referring to the provision as amounting to an 'explicit statutory enactment').

The Supreme Court, in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1967), stated at one point that the 1959 amendment 'ratified' the doctrine (p. 381) and at another point that the language was 'merely approving' (p. 384). The question was discussed more recently in the so-called 'snowmobile' case. Public Interest Research Group v. FCC, 522 F.2d 1060 (1st Cir. 1975). In this case, the First Circuit stated that the statutory language is not sufficiently specific to be construed as more than a general endorsement of fairness standards or an approval of the 'general tenets' of the fairness doctrine (p. 1066). The Court indicated that questions of 'application and accommodation' and of 'how and when' the fairness doctrine should be applied should be left to agency discretion (p. 1067). It suggests, further, that these decisions should be arrived at under the general public interest standard and that the Commission's decisions should be upheld unless they are 'so plainly inimical to the public interest as to be illegal' (p. 1067).

As indicated, I believe there is ample justification for concluding that a large market fairness experiment would be consistent with the public interest and, indeed, that it would be in keeping with the 'general tenets' of the fairness doctrine itself. We stated in the Fairness Report, 48 FCC 2d 1 (1974), that the basic goal of the fairness doctrine, like that of the First Amendment, was 'to foster 'uninhibited, robust, wide-open' debate on public issues,' quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). The whole legal and constitutional tradition of this country teaches us that (except in cases of serious technological scarcity) this goal cannot be advanced by government control of the media. It seems clear to me, therefore, that a radio experiment (in markets where scarcity is not a serious practical problem) would serve the purposes of both the First Amendment and the Commission's fairness doctrine.

While I recognize the fact that there is room for debate concerning the meaning of the 1959 amendments to the Act, I nevertheless believe that it would be desirable for the Commission to initiate a public inquiry which would afford interested parties an opportunity to comment on the question of our legal authority, and also examine the appropriate size and scope of an experiment. I am hopeful that, in the not too distant future, the Commission or the Congress will look more favorably on the idea of reforming the fairness doctrine so as to apply it only in circumstances where there is a realistic need for government regulation.

*10 It has been suggested that, while the Commission may not be moved to cut

back on the fairness doctrine (as suggested by my experiment), it might nevertheless explore certain alternatives to the traditional fairness principles and procedures. In this regard, the proposal of the Committee for Open Media that we allow 'access' as an option in lieu of fairness has attracted some attention and support. Under the proposed system, any station which would agree to carry a reasonable number of 'Free Speech Messages,' and which would set up a mechanical formula for the selection of spokesmen, would be relieved of its fairness obligation to assure that contrasting views on particular issues are reasonably represented.

I do not believe that stations should be encouraged to abdicate editorial control in the fashion suggested by this proposal. The plan calls for heavy emphasis on a single programming technique: the access announcement. In my opinion, a more varied, interesting and informative coverage would be possible if professional journalists played a conscious and positive role in the process. It seems inescapable that editorial supervision would result in a presentation which is more coherent and enlightening than we could expect from a series of random and unstructured individual appearances. Despite its problems, the present fairness system is, in my opinion, preferable to the alternative which has been suggested.

CONCURRING STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS

In Re: Reconsideration of Fairness Doctrine Report (Docket No. 19260)

I have carefully considered the comments filed in this proceeding, and my bottom line, if you will, continues to be a whole-hearted endorsement of the Fairness Doctrine. FN[FN12] While comparisons with the print media are academically interesting, numerical comparisons showing a greater number of broadcast media than newspapers for purposes of negating the 'scarcity' arguments-assumed by some to the the raison d'etre for the Doctrine-are unimpressive to me. The fact remains, as pointed out in Red Lion Broadcasting v. U.S., 395 U.S. 367, 388 (1967) that '. . . there are substantially more individuals who want to broadcast than there are frequencies to allocate.' This fundamental condition more than neutralizes any 'relative scarcity' contrasts with newspapers; there is an 'absolute scarcity' of broadcast media outlets, which phenomenon is inapposite to the printed press.

And, in light of court decision holding that the Doctrine has been 'statutized' by the recodification of Section 315 (47 U.S. s 315) FN[FN13] and may even amount to a Constitutional imperative, see Red Lion, supra, the debate over its very existence should probably trail off into discussions about appropriate application.

In that connection, I join my majority colleagues in their decision to invoke the Doctrine in timely fashion. Delay of such invocation would unfortunately render moot most issues within the Doctrine's purview and effectively castrate the purpose for which it stands; that is, the public's right to be informed on an issue. Paramount is not our right to take recriminatory measures against an

offender.

*11 Where I depart from my colleagues, as I did previously, is the decision to continue to apply the Doctrine to product commercials. FN[FN14] As I see it, continued application will again create a series of inconsistent rulings, on the question of what constitutes an 'obvious and meaningful discussion of a public issue' and such judgments, by their nature, are predominantly subjective. Instead, I would have established an access requirement of a fixed percentage of overall commercial time and permitted 'counter-commercial' spokesmen to present responsible rebuttals to explicitly or implicitly controversial ads. FN[FN15] We, then, would be out of the day-to-day commercial operations of our licensees which is, I believe, the better place to be on these matters.

With respect to the access principle generally, and notwithstanding my support-in the main-for the Doctrine's present form, I would have little difficulty in experimenting with the alternative suggested by the Committee for Open Media and would not mind testing the 'access is fairness' postulate. FN[FN16] With respect to the mechanics, I would associate myself with the considered views of my erudite colleague, Commissioner Glen Robinson, and believe, as he does, that the problems presented by this alternative would be no more 'difficult' to administer than those presently posed.

DISSENTING STATEMENT OF COMMISSIONER GLEN O. ROBINSON

I. The Vulnerability of Venerability

Now over a quarter century old, the fairness doctrine has become one of the venerable institutions of FCC jurisprudence. Unlike some venerable institutions, however, old age has hardly secured the fairness doctrine from the tarnish of corrosive controversy. On the contrary, age seems to have increased, not diminished, critical doubts about the doctrine-its purpose, its effects, is value. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), which put the Supreme Court's inprimatur on the legality of the fairness concept, has not set these doubts to rest. Indeed, the Court's subsequent decision in Miami Herald Pub. Co. v. Tornillo, 418 U.S. 251 (1974), has raised new doubts and fresh concern.

I agree with the Commission's conclusion that Red Lion is still good law, although Tornillo clearly does undermine the foundations on which Red Lion appeared to rest. The original Red Lion decision assumed (1) that the imposition of an obligation of fairness (including a private right to reply in certain instances) did not restrain ('chill') free speech, but actually served to promote it by ensuring greater diversity; and (2) that because the broadcast media operated under conditions of physical scarcity, the marketplace could not be relied upon to produce adequate diversity of speech and, therefore, some forms of regulation, such as the fairness obligation, were appropriate, and necessary. Clearly, Tornillo repudiates the first assumption of Red Lion. Logically at least, this conclusion is necessary; otherwise there is no basis for the Court's invalidating the right of reply statute in that case. Can Red Lion stand on the

second assumption independent of the first? I have some doubts whether it can as a matter of pure logic, for I do not think the condition of scarcity is a compelling basis for distinguishing between electronic and print media FN[FN17]-particularly on the finding made in Tornillo that a compulsory right of reply tends to reduce public debate, contrary to the purpose of the fairness doctrine. FN[FN18] Nevertheless, however the logic of the matter may appear to me, I am forced also to admit that it appears to appear differently to the Supreme Court; as recently as two months ago, the Supreme Court indicated (albeit in dicta) that it still regards Red Lion as good law. See Buckley v. Valeo, -- U.S. --, 96 S. Ct. 649, n. 55 (1976).

*12 The question remains whether, constitutional issues aside, the doctrine could nevertheless be repudiated by the Commission. I once thought so, FN[FN19] but the Supreme Court appears to have disagreed. In Red Lion the Court said:

'that Congress in 1969 [intended] that the phrase 'public interest,' which had been in the Act since 1927, imposed a duty on broadcasters to discuss both sides of controversial public issues. In other words, the amendment vindicated the FCC's general view that the fairness doctrine inhered in the public interest standard.'395 U.S. at 380. See also Straus Communications, Inc. v. FCC, -- F.2d --; No. 75-1083, Slip Opinion, p. 10, n. 11 (D.C. Cir., Jan. 16, 1976). It thus seems to be beyond our power to eliminate altogether the general requirement that licensees give a reasonably balanced presentation sentation of controversial public issues. However, I do not interpret Red Lion (or Straus) as depriving the FCC of all power to reshape the rule according to changing perceptions of the public interest. FN[FN20] While our discretion is circumscribed, I think we still have freedom to redefine how the basic fairness obligation may be satisfied by licensees. Given the Commission's action in narrowing the scope of the doctrine to exclude routine commercial product advertising from its coverage-an action with which I wholeheartedly agree FN[FN21] -my colleagues evidently agree that some reshaping of the doctrine is still within our power.

The majority and I part company on whether that power should be exercised to seek alternatives to the present formulation of the fairness doctrine. In contrast to the Commission's evident satisfaction with the present fairness doctrine, I believe it has proved to be unworkable and, at least potentially, dangerous-raising public expectations that cannot be fulfilled within the limits which the First Amendment places on our oversight of electronic journalism. Accordingly, within the limits of our discretion under Section 315, I think we should explore alternative possibilities for achieving the underlying goals of the fairness doctrine.

II. The Right to Speak versus the Right to Hear

Before turning to a critique of the fairness doctrine, a brief note on First Amendment philosophy is appropriate, for it is my belief that much of the debate over the fairness doctrine is needlessly clouded and misdirected by superficial and sophistical reasoning about the free speech ideal. The Commission begins its

defense of the fairness doctrine on a high constitutional plane, quoting from Red Lion:

> 'There is no principle of greater importance to understanding the fairness doctrine and the First Amendment than that '[i]t is the right of the viewers and listeners, not the broadcasters, which is paramount."Insofar as this dictum is intended merely to express the traditional utilitarian notion that free speech is protected not only in the interest of the individual speaker but also that of the broader social interest of the public as listeners, the 'listener's right' theory is unexceptionable. Similarly, as a simple (if rather elliptical) statement that 'free speech' is subject to some restrictions 'in the public interest,' it can pass without protest, at least pending the review of the specific restrictions imposed. But inasmuch as the above formulation suggests some general principle that the First Amendment gives positive rights to listeners/viewers to dictate what speakers shall tell them, I believe it is pregnant with mischief.

*13 I concede that freedom of speech is conducive to social welfare (a small concession), and it is generally that social interest which underlies the constitutional protection. But I reject the notion that only speech which promotes government or social welfare policies in a narrow sense is worthy of constitutional protection, FN[FN22] and, in the same vein, I disagree with the implication that the First Amendment is a tool of social policy, to be used and interpreted in an activist, affirmative way which promotes the 'spirit' and 'purpose' of free speech-the view put forward, for example, in Business Executives Move for Vietnam Peace v. FCC, 540 F.2d 642 (D.C. Cir. 1971), reversed sub nom., Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973). Such an instrumentalist view of the First Amendment effectively reduces the constitutional guarantee of free speech to the same standing and dignity as that of any conventional governmental policy. See Columbia Broadcasting System, Inc., supra, at 132, 133 (concurring opinion of Justice Stewart). Therein lies the vice of the listeners' rights theory. If the speaker truly has the right to hear, it follows (from Hohfeld FN[FN23] and from common sense) that the speaker has a correlative duty to speak. If a listener has a legal right to hear certain things for certain purposes, then a speaker-some speaker-must have correlative duty to speak to those things. On this theory the people have the right to determine what the speaker shall say-in order to serve the 'spirit' of the First Amendment to advance the social welfare of 'the people.'

Once it is explained in this way, it becomes apparent why the listeners' rights theory has not taken hold as a general theory of the First Amendment and, indeed, appears to have now been at least impliedly repudiated even for the electronic media. FN[FN24] As a general conception, the listeners' rights theory makes nonsense of the First Amendment; in fact, it stands it on its head. The First Amendment may indeed belong to everybody-as the listeners' rights theory suggests-but it cannot truly belong to everybody unless it first belongs to each and every particular somebody. To deny the individual right in the name of the collective right transforms the First Amendment from a guarantee of individual freedom into its very opposite, rule by public clamor. To be sure, this interference is intended to further the 'spirit' and 'larger purposes' of the First Amendment. For my part, however, I prefer to entrust my political freedoms

to the Constitution rather than to the ardent schemes of well-meaning persons.

In summary, we err when we stray beyond the simple proposition that the First Amendment is a restraint on government-nothing less, but also nothing more. Of course, it does not follow from this that the First Amendment restrains every act of government touching free speech (whether that action) is intended to further free speech, to restrain it, or is neutral with respect to it). Thus, rejection of the listeners' rights idea expressed in Red Lion would not necessarily alter the decision, but it would, at least, have the clear virtue of removing from the debate over fairness the misleading and mischievous notion that the First Amendment is an expression of the right of the public, through their government, to regulate speech in the interest of listeners.

*14 III. The Concept of Fairness

I assume no one has any serious difficulties either with the concept of fairness or its applicability to the communications media. It is the administration of that idea, as legally obligatory conduct, which creates the hard problems. As Lewis Carroll reminds us, the linguistic barriers on the way to resolving a problem may be the most difficult to pass. In Through the Looking-Glass, Alice and Humpty Dumpty are debating how words mean what they mean:

'I don't know what you mean by 'glory," Alice said. Humpty Dumpty smiled contemptuously. 'Of course you don't-till I tell you. I meant 'there's a nice knock-down argument for you!"

'But 'glory' doesn't mean 'a nice knock-down argument," Alice objected.

'When I use a word,' Humpty Dumpty said, in a rather scornful tone, 'it means just what I choose it to mean-neither more nor less.'

'The question is,' said Alice, 'whether you can make words mean so many different things.'

'The question is,' said Humpty Dumpty, 'which is to be master-that's all.'Through the Looking-Glass 94 (Random House ed., 1946). As with 'glory' so with fairness: the important question is not how the word is to be defined but who is to be master. The idea of obligatory fairness includes the idea of a standard of conduct external to the speaker, against which his conduct is to be measured. In short, unlike Humpty Dumpty, a speaker who is obligated to be 'fair,' according to the definition of another, is not completely master of his own will. That is the problem. It is not simply that the need for enforced fairness is difficult to determine, but the fact that someone other than the speaker has the task of determining it. Particularly is this the case where that 'someone' is a government agency with far-reaching enforcement powers, including sanctions like fines or license revocation, at its disposal. We must consider a second question-

We must therefore consider the question of the cost of mandating 'fairness'.

That cost, of course, is the risk that government-mandated fairness impedes ('chills') speech. Clearly we are in the land of shadows here, for it is hard to prove that an enforceable fairness obligation has an adverse impact on a robust free press. The Supreme Court has been of two minds on whether such an impact is reasonably to be feared. In Red Lion, the Court found no reason to think that the fairness doctrine would discourage free speech by broadcasters; FN[FN25] but in Tornillo, it found the opposite would hold for the print media. FN[FN26] Those cases are difficult to reconcile. In neither was there any specific evidence of effects. Thus, as in other First Amendment cases, FN[FN27] reliance had to be placed on certain general assumptions. What justified the different assumptions about the respective impact on the different media? The technological differences between the two seem clearly insufficient to explain the different assumptions about the impact of enforced fairness. FN[FN28] However, whatever the differences between the media of mass communications, the central point in either case is whether such obligations can have a tendency to impede free speech. Without suggesting that the answer is undebatable, it seems clear enough that reasonable people can, and plainly do, believe there is a significant risk of such a tendency. FN[FN29] It may be that this possible inhibition is an acceptable cost when compared with the promised benefits to be derived from fairness. That evidently is what Red Lion decided for purposes of sustaining the constitutionality of the fairness doctrine. However, within our discretion to shape and modify the doctrine, we ought to continue to consider whether the possible benefits of fairness outweigh the possible costs.

*15 Measuring the benefits of fairness is as difficult as assessing the costs. The expected benefits are simply described: increased diversity of viewpoints and greater balance in airing controversial public issues. If we can really obtain these desiderata, fine; but the question is whether they can be obtained through the use of the fairness doctrine. This consideration is the crucial one-and it has been somewhat slighted in the debate over fairness. Even if the risks of inhibiting free speech are slight, whether they are worth incurring turns not merely on the importance of the benefit sought, but also on the likelihood of achieving it. Cf., United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947). A clock that cannot keep time is no bargain even at garagesale prices, unless it is esteemed as an ornament.

Can the Commission's fairness clock keep time, or is it merely an ornament? I am skeptical-and I become more skeptical with time-that this aging timepiece is anything more than an object d'art, and at that, more objet than art. I do not think this Commission can in practice define 'fairness' with sufficient clarity to enforce this norm as law. To be sure, there are some steps we 'could' take, in theory, if we were willing. But we can in theory do many things that, in practice, we will not do, and should not do. One of these things is to second-guess licensee judgments on fairness, except in the most extraordinary cases. In a two year period, 1973 and 1974, the Commission received 4,280 formal fairness complaints. Of these only nineteen-4/10 of one percent-resulted in findings adverse to the licensee. FN[FN30]

Adverse findings, few and far between in the past, are likely to be even more exceptional in the future as a consequence of Straus Communications, Inc. v. FCC, -- F.2d --, No. 75-1083 (D.C. Cir. Jan. 16, 1976) and National Broadcasting Co. v.

FCC, 516 F.2d 1101, 1117-1122 (D.C. Cir. 1974) ('Pensions') (opinion of Leventhal, J.), vacated, etc., at id.; cert. denied, 44 U.S.L.W. 3464 (2/24/76), which explicitly caution that the First Amendment requires the agency to defer to the licensee' judgment unless it is found to be unreasonable or in bad faith. The court, in Straus, underlines this point by noting that the 'unreasonable/bad faith' standard 'applies to all components of the doctrine; it is the licensee, in the first instance, who decides, for example, exactly what issue is involved and whether that issue is controversial and of public importance.' (Slip Opinion at p. 14). FN[FN31]

Data on the small number of adverse findings are frequently cited to show how small is the risk to licensees of government interference. FN[FN32] What they show even more persuasively, however, is how small are the benefits. That there were only nineteen adverse findings in two years FN[FN33] bears witness to one (or more) of three things: (1) incredible fairness by the media; (2) remarkably ineffective enforcement by the FCC; or (3) a standard of licensee discretion so broad as to permit almost any judgment to stand. On the first assumption, the fairness doctrine seems to me unnecessary; on the second and third, it is ineffectual. FN[FN34]

*16 Innate suspicion tells me the first assumption is unlikely: I just cannot believe that with several thousands of licensees and millions of broadcast hours yearly, the fairness doctrine does not suffer many more violations than those few found. The second and third assumptions are interrelated. The FCC's enforcement of the fairness doctrine has always been less than rigorous. In the face of increasing demands to redress fairness grievances the Commission has involved procedural barriers, such as the 'Phelps Doctrine,' see Alan C. Phelps, 21 FCC 2d 12 (1969), in order to forestall becoming too easily involved in licensee programming judgments. And, where we have become involved, we have, with few exceptions accorded the licensee broad discretion to define what constitutes a controversial issue of public importance, and almost equal latitude in satisfying the obligation of fairness with respect to such issues. While some critics have accused the FCC of lassitude or worse in its enforcement, I do not see how the Commission could be more rigorous in its demands upon licensees without undertaking a course of program surveillance that would almost certainly run afoul of the First Amendment. It is not so much that it is impossible to define and enforce fairness obligations (though at best it is a difficult task), but rather that it is not possible to do so in a meaningful way without interfering in programming outside the intended focus of our enforcement. Judicial confirmation of this is suggested by the recent reversals of Commission decisions in the Straus and Pensions cases for failure to give sufficient discretion to licensee judgment. FN[FN35] I do not quarrel with those court decisions, but it should be emphasized that the agency actions which prompted them were exceptional. FN[FN36] This underscores my point about the futility of enforcement. The implication which I draw from these cases is that even the current level of enforcement-which results in adverse findings in less than one half of one percent of the cases-may be too high! At this point it surely must occur even to supporters of the fairness doctrine to ask whether the game is worth the candle.

The situation is untenable. The very existence of the fairness doctrine has given rise to public expectations that are quite unrealistic. The volume and the

character of fairness doctrine mail which the Commission receives bears witness to such expectations. The Commission cannot come close to meeting those exaggerated expectations without infringing the Constitution; indeed, it apparently cannot even continue its own very limited enforcement course if I correctly gauge the direction of the prevailing judicial winds.

IV. Alternatives

Given the infirmities of the fairness doctrine, it is time to start looking for alternatives. My preferred course-retiring the fairness doctrine altogether-is presumably beyond our power unless and until the Supreme Court reverses or reinterprets Red Lion. A second possibility is simply to forget about enforcement. But as I have argued above, this is about what we have done in effect, with an occasional exception; I regard this course as totally unsatisfactory. It breeds disrespect for the law. Worse, it is an unstable state, which produces not desuetude, but erratic (and hence discriminatory) enforcement. Just as nonenforcement is not a practicable option, so too is the similar proposal of Mr. Henry Geller to relegate enforcement of the fairness doctrine to the end of the license period. Under the Geller proposal the Commission would revert to its earlier (pre-1962) practice FN[FN37] of examining the licensee's overall fairness as part of its three year performance record rather than, as now, evaluating individual complaints. I concur in the Commission's rejection of this proposal. I am sympathetic to what I discern to be the purpose of this proposal, to eliminate detailed scrutiny of, and interference with, licensee news judgments. However, I do not think Mr. Geller's proposal would necessarily work as he supposes. In fact, I think the Commission would still ultimately be led to responding to particular complaints as it does now, except that its response would be to an accumulation of complaints-most of them on a stale record. If this were the outcome of such a proposal, it could increase the problem of discriminatory enforcement, and also aggravate the risk of adverse impact on licensee news judgments. The accumulation of complaints, the uncertainty of how they would be regarded, the increased scope of Commission scrutiny and finally the greater ultimate sanction to the licensee with a license renewal at stake (as opposed merely to an adverse finding of the kind now typically made in cases of violation), could increase the chilling effect of the fairness doctrine. FN[FN38] In return for these new risks the Geller proposal offers no significant additional benefits in terms of surer enforcement, or more probable achievement of fairness. As has been explained, this last aspect is a crucial flaw in the present fairness doctrine: against the risk (however slight it may be) of adverse effects, the actual benefits are, as a practical matter, negligible. FN[FN39]

*17 In my view a more attractive alternative to either the present process or the Geller option is the optional access-in-lieu-of-fairness proposal of the Committee for Open Media (COM). FN[FN40]

COM suggests a system of optional access in lieu of the fairness doctrine. Instead of being required to program discussions of controversial matters of public importance in a reasonably balanced manner, licensees might instead be allowed to choose to set aside time to allow members of the public to appear on the air.

As an alternative to what we have now, the access idea is appealing; by automating the process for permitting different views to be expressed, the subjective determinations that are now the core concern would be largely eliminated. FN[FN41] I am not an admirer of access in and for itself, and for this reason have never supported the idea of mandatory access, per se. But mandatory access is not the issue here. The question is not whether a public access period is good, but whether it is better than what we now have. In fact, even the latter formulation is somewhat beside the point for the proposal is not to compel access in lieu of fairness, but to permit the licensee to opt for it. FN[FN42] There is reason to doubt that many licensees would select access over their present fairness obligations. But that is no concern of ours. To permit the substitution would at least give those licensees who are troubled by the fairness doctrine (or who may feel 'chilled' by it) an opportunity to opt out in favor of an alternative that at least minimizes the risk of vexing the FCC. FN[FN43]

At the outset it would be necessary to prescribe clear guidelines of how such an access alternative would work. COM proposes so-called 'free speech messages'-short radio or television spots made available to any number of the public. Under this approach people could then get air time to criticize the fairness of the station's news or public affairs programming, or to talk about anything else that deserved public notice. Some administrative problems come to mind immediately. How much time must be allocated, and in what time periods, in order to exempt the licensee from its traditional fairness obligation? How are speakers to be chosen, assuming that more will want to speak than time can reasonably be provided for? Should stations have at least a minimal role in selecting the speakers?

These questions are not so difficult; but to a degree, their answers proceed on faith. If the Commission were to allow access as an alternative to fairness, it would be simple to frame rules requiring that access messages be aired at times throughout the day when significant segments of the viewing public were watching. FN[FN44] Likewise, the FCC could provide by rule that speakers be chosen, either by lot or by queue, so as to minimize broadcaster bias and ensure that each chosen speaker was allowed to go before the public within a reasonable period-say a week-after requesting access time. FN[FN45] The third point is related to the second. Whatever means of allocation were chosen would have to prevent monopolization by any one group. COM resolves the problem by providing that half the spots would be allocated by the licensee to representative speakers. But no allocation system to which our attention has been directed can completely automate the selection function or remove the practical need for a supervisory intelligence of some sort-at the very least to monitor what goes over the air to ensure that it is not defamatory nor obscene. FN[FN46] Obviously, the pressure of this supervisory intelligence re-interoduces the problem of licensee bias. But it would be a lesser problem than the one we have now. Certainly, it seems intuitively obvious that, if a licensee threw himself open to all comers (or a random selection of all comers) who fell somewhere in the zone of reasonableness, a greater diversity of viewpoints would more probably be represented than where the licensee himself generates the entire broadcast agenda. To be sure, the access message system could be perverted by licensee bad faith-this system has

that vulnerability in common with all the institutions of democracy-but I do not fear this possibility. Broadcast journalism is becoming increasingly professional: it is attracting increasingly capable and well-prepared people at all levels, and the performance of licensees-especially television licensees-in the public affairs sector of their activities is beginning to show it. Under these circumstances, it seems to me that we twentieth century bureaucrats ought to be willing to take a gamble on the broadcast media similar to that the Founding Fathers took on pamphlets and newspapers two hundred years ago.

1 Maimi Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); CBS v. DNC, 412 U.S. 94 (1973).

2 Under his proposal, Commission action would be taken only upon extrinsic evidence showing that the owner or 'top management' gave instructions for deliberate slanting. Deliberate slanting by other station personnel would be a matter to be resolved by the licensee without any Commission follow-up.

3 For the United Farm Workers (UFW), the Council on Economic Priorities (CEP), and the Project on Corporate Responsibility (PCR).

4 This conceptual approach to the right of free speech is supported by related holdings in cases dealing with fundamental rights and the continued vitality of the democratic process. The Supreme Court has stated that 'no right is more precious in a free country than that of having a voice in the election of those who make the laws. . . . Other rights, even the most basic, are illusory if the right to vote is undermined.' Wesberry v. Sanders, 376 U.S. 1, 17 (1964), cited with approval in Williams v. Rhodes, 393 U.S. 23, 31 (1968). In Williams, the Courts went on to say that the individual's right to vote is 'heavily burdened' where the number of parties allowed on the ballot is restricted without a showing of a compelling state interest for such a restriction, Id. This view was applied to candidates as well as parties in Lubin v. Panish, 415 U.S. 709 (1974). The essential thread of reasoning in these cases, like Red Lion, is that it is the citizen who has the right to listen to and to vote for a diverse selection of views and candidates, rather than the rights of candidates to a ballot position, or of broadcasters to be heard, that is paramount.

5 The only instance in which the Commission's determination might rest on a single program would involve a complaint where the licensee declares it has not presented prior programming on that issue and announces its intention not to present any future programming on that issue. Hence, that single program would be the overall programming on the issue.

6 For the same reasons, we see little advantage in making arbitrary changes in the personal attack rules. No system is perfect, and there may be disadvantages to the present rules. However, proposals made to the Commission to change those rules have their own drawbacks which render them no more acceptable than our present rules. Indeed, Mr. Geller's proposal noted in para. 4, supra, merely would add another patch to the 'crazy quilt.' It ignores reality in accepting the premise that a licensee which 'has not achieved fairness or made timely plans to do so' would see the need to do anything at all. The proposal adds delay to the application of the rule, replaces a precise deadline with an undefined 'reasonable time,' and removes Commission consideration to renewal time. Its net effect would be to prevent the victim of an attack from having an opportunity to respond in a

timely fashion. Nor do we see any reason for departing from our present method for dealing with news slanting or distortion. See note 2 and accompanying text, supra, and Columbia Broadcasting System (Hunger in America), 20 FCC 2d 143 (1969).

7 For example, MAP proposed that adverse fairness doctrine rulings against a network be applicable to its affiliates. The Commission traditionally has approached networks where a complaint is based on a network program, notwithstanding the fact that fairness obligations 'attach to the individual station licensee.' Cf. Letter to Blair Clark, Campaign Manager, McCarthy for President, 11 FCC 2d 511 (1968). It is settled that even though the TV networks are themselves licensees they respond as networks only and are not responsible for the overall programming of an affiliate on a controversial issue of public importance.

8 Where a licensee poses an alternative issue to that specified in the complaint, such alternative will be considered an implicit denial that the basic thrust of the program addressed the issue specified by the complaint. In such a case the Commission will continue to review the reasonableness of the licensee's denial, considering the alternative issue as evidence concerning the licensee's good faith and reasonableness. Any departure from this policy would render useless the requirement for specificity by the complainant and permit licensees to avoid presenting opposing viewpoints by sophistic distinctions entirely lost on the average viewer. We adhere, however, to our policy in National Broadcasting Co. (AOPA), 25 FCC 2d 735 (1970), where we found reasonable NBC's denial that its program addressed the issue specified by the complainant. There we looked to the basic thrust of the program and declined to apply the doctrine to sub-issues because if every statement could be made the subject of a separate fairness requirement, the doctrine would be unworkable and the Commission would become involved too deeply in broadcast journalism. Id. at 736-7. See also Gary Lane, 38 FCC 2d 45 (1972), Application for Review denied, 39 FCC 2d 938 (1973).

9 The Commission's standard of review allows great discretion to the licensee and does not vary depending upon the particular case being reviewed. It has been suggested in the past that we abandon our established standards where the licensee has a financial interest concerning a controversial issue of public importance. That we cannot do. The Commission has adequate means to deal with licensees who use their facilities to gain commercial advantage in other enterprises, and who in other ways abuse their public trust. The fairness doctrine is not the proper vehicle for such enforcement nor is it the most effective. Such over broad use of the doctrine would undermine its effective use where it is most needed. We adhere to the policy set forth in Public Communication, Inc., 50 FCC 2d 395 (1974). To the extent that WSOC Broadcasting Co., 40 FCC 468 (1958), Springfield Television Broadcasting Corporation, 45 FCC 2083 (1965) and 28 FCC 2d 339 (1971), and Pennsylvania Community Antenna Association, Inc., 6 R.R. 2d 112 (1965), conflict with this policy they are overruled.

10 Commercials which simply sell a product and do not deal meaningfully with a controversial issue of public importance.

11 The Commission has decided not to proceed at this time with a proposal by the Chairman for an experimental suspension of the fairness doctrine in larger radio markets.

12 For a fuller explanation of my views, see my separate statement upon our

previous disposition of the matter, 48 FCC 2d at 52 (1974).

13 E.g. Straus Communications, Inc. v. FCC, D.C. Cir. No. 75-1083 January 16, 1976, Slip Op. at n. 11.

14 Exemption of product commercials from the Fairness Doctrine was recently applauded in Simmons, Commercial Advertising and The Fairness Doctrine: The New FCC Policy in Perspective, 75 COLUM. L. REV. 1083 (1975) where the author called prior applications of the Doctrine to ads a 'crazy quilt' (id. at 1089) and concludes:

> During the late 1960's and early 1970's the FCC began to apply the fairness doctrine to broadcasting advertising. The Commission and the courts set down a string of inconsistent and confused precedent as they attempted to grapple with a growing number of fairness complaints directed at commercial advertising.
>
> In 1974, the Commission completed a reevaluation of the fairness doctrine and issued its Fairness Report. The Report states that institutional advertising may raise fairness doctrine issues only if the issues are explicitly and meaningfully addressed. The Report's language can be interpreted to mean that it will be more difficult to file successful fairness complaints based on institutional advertising, and it has been suggested in these pages that it should be so narrowly construed. The difficulty of interpreting these advertisements, the lack of clear guidance, and the first amendment rights of broadcasters all call for such a conclusion.
>
> The 1974 Report also signalled a major change in F.C.C. policy by exempting ordinary product and service advertisements from fairness doctrine obligations. This policy change should be applauded by even the severest critics of product advertisements. At its best, the fairness doctrine-product advertising marriage only attempted to replicate other more effective means to police product commercials and give the American people vital consumer and environmental information. At its worst, it created a quagmire of precedents which potentially undermined the economic foundation of the broadcasting industry and threatened the first amendment interests of broadcasters and the public alike.Id. at 1120. While this conclusion may be over broad since we did not fully 'exempt' product commercials (only those that do not 'obviously and meaningfully address a controversial issue of public importance'), it does lend support to my argument.

15 See n. 1, above.

16 For those who are happier in seeking parallelism between the print and broadcast media, the access alternative should be seen as a sort of electronic 'op-ed' page carried by virtually every newspaper worthy of the title. While such is not obligatory on newspapers as a matter of law, cf. Miami Herald Pub. Co. v. Tornillo, 418 U.S. 251 (1974), as a matter of custom and unwritten law most newspapers would be hard pressed to eliminate its 'Letters to the Editor' column. Hence, the access substitute should be embraced by those who argue for no First Amendment distinction between the press and FCC licensees. If anybody does argue against Fairness and access, he is arguing essentially for undiluted unfairness and propaganda. As for me, 'that dog won't hunt.'

17 See, e.g., Robinson, The FCC and the First Amendment: Observations on Forty

Years of Radio and Television Regulations, 52 Minn. L. Rev. 67, 88 (1967). See also Barron, Access to the Press-A New First Amendment Right, 80 Harv. L. Rev. 1641 (1967), who argues similarly but draws inferences the opposite of mine, concluding that the print media should be subject to some kind of fairness doctrine. Tornillo, of course, chilled that idea.

18 In Tornillo the Court found the Florida right of reply statute to have such an effect, reasoning as follows:

'The Florida statute exacts a penalty on the basis of the content of a newspaper. The first phase of the penalty resulting from the compelled printing of a reply is exacted in terms of the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print. It is correct, as appellee contends, that a newspaper is not subject to the finite technological limitations of time that confront a broadcaster but it is not correct to say that, as an economic reality, a newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or a statute commands the readers should have available.

'Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government-enforced right of access inescapably 'damapens the vigor and limits the variety of public debate.' New York Times Co. v. Sullivan, supra, 376 U.S. at 279, 84 S. Ct. at 725.'418 U.S. at 256, 257. It should be noted that this reasoning applies with even greater force to broadcasters inasmuch as there are (by the Court's acknowledgment) greater 'technological limitations' on the time which they can devote to meeting the obligation (therefore, by the Court's reasoning, higher cost and correspondingly greater incentive to 'play it safe'). On the reasoning of Tornillo it is thus difficult to see that scarcity supports the fairness doctrine since the presumed necessity to compensate for inherent limitations on diversity which such scarcity creates aggravates the chilling effect.

19 The question turns on the interpretation of the following language of the 1959 amendments to Section 315 of the Communications Act:

'Nothing in the foregoing sentence [setting forth certain exemptions from the equal time provisions] shall be construed as relieving broadcasters . . . from the obligation imposed upon them 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.'I argued in my 1967 article (supra, footnote 1 at 134) that this language need not be read to codify the fairness doctrine, and that it is better understood simply as a clarification that Congress did not intend, by creating exemptions from the equal time obligation, to disturb the status quo as far as the fairness doctrine was concerned. Under this reading, the clause 'and to afford reasonable opportunity . . .' would be read disjunctively rather than conjunctively with the preceding clause. This reading of the statute, which conforms with the legislative history, see Manelli, Legislative History of the Fairness Doctrine, Staff Study for the Committee on Interstate and Foreign Commerce, 90th Cong. 1st. Sess. 21-21 (1968), would preserve our discretion to abandon or alter the administration of

the doctrine.

20 See Public Interest Research Group v. FCC, 522 F.2d 1060, 1066-67 (1st Cir., 1975) (affirming Commission change in the fairness doctrine as applied to commercial advertising). See also Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 131, 132 (1973), where the Court concludes its discussion on the FCC's continuing investigation of the best feasible use of the broadcast band for the discussion of important matters by cautioning that 'courts should not freeze this necessarily dynamic process into a constitutional holding.'

21 I will not elaborate in detail on the commercial advertising aspect. For a recent, detailed critique in Simmons, Commercial Advertising and the Fairness Doctrine: The New FCC Policy in Perspective, 75 Colum. L. Rev. 1083 (1975). Suffice it to say that I long ago thought the Commission's extension of the fairness doctrine to cigarette ads (see Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969)) was a feckless venture that the Commission would come to rue, for it would not be, and could not be, contained. See Hearings on the Fairness Doctrine Before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 90th Cong., 2d Sess., ser. 90-33, p. 53, 56 (1968). The Commission's futile effort to limit the application of Banzhaf (see Friends of the Earth v. FCC, 449 F.2d 1164 (D.C. Cir. 1971)) has confirmed this conclusion.The problem here is generally similar to that which has beset administration of the fairness doctrine elsewhere: if fairness requirements are to be meaningful, they must be enforced with a vigor and a regularity that would require a degree of government supervision that would be unwise. Indeed, such a level of control might also be unconstitutional for, as recent decisions make clear, commercial advertising does enjoy some degree of First Amendment protection. See Bigelow v. Virginia, 421 U.S. 809 (1975); Virginia Citizens Consumer Council, Inc. v. State Board of Pharmacy, 373 F. Supp. 683 (E.D. Va. 1974), prob. juris noted, 95 S. Ct. 1389 (1975); California State Board of Pharmacy v. Terry, 395 F. Supp. 94 (N.D. Cal. 1975), Appeal filed 9/2/75, 44 U.S.L.W. 3155 (9/23/75). Confronted, on the one hand, with the necessity of extensive control in order to effect even-handed enforcement or, on the other hand, with the equally unattractive alternative of pursuing selective and arbitrary enforcement, the Commission has wisely chosen to make a clean break (more or less; product advertising my still be within the doctrine in exceptional cases where viewpoints on controversial public issues are explicitly discussed) with past folly. Would that it were possible to do this with the entire fairness doctrine.

22 Alexander Meiklejohn, one of the most admired modern theorists, insisted that the First Amendment protects only 'public' speech of a kind useful to self government. A. Meiklejohn, Free Speech and Its Relation to Self Government, 61-63 (1948). As a corollary of this general proposition Meiklejohn excluded commercial broadcasting from his narrow sphere of relevant speech, on the apparent ground that profit-making was incompatible with free speech. A. Meiklejohn, Political Freedom, XV (M. Sharp, ed. 1960) (foreward by Malcolm Sharp). Given Meiklejohn's very narrow conception of the value of free speech and the role of the First Amendment, I find it extraordinarily curious that he should enjoy such a high reputation as a libertarian. His views, if adopted, would sweep away the better part of all the positive First Amendment jurisprudence which has developed in the past score years, not only in the field of mass communications, but elsewhere.

23 Hohfeld, Some Fundamental Legal Conceptions As Applied to Judicial Reasoning, 23 Yale L.J. 16, 31-32 (1913).

24 Tornillo must be considered an implied repudiation of the theory so far as the print media are concerned; and with respect to the electronic media, Columbia Broadcasting System, Inc. v. Democratic National Committee seems basically hostile to the theory. Thus, the listeners' rights theory seems to have no real vitality except as a rhetorical bow to the unexceptional notion that free speech does not totally supplant the rights of the people at large to exercise their sovereign powers.

25 On the contrary, the Court found that the Commission's fairness rules would 'enhance rather than abridge the freedoms of speech and press protected by the First Amendment. . . .' 395 U.S. at 375.

26 See footnote 2, supra.

27 '[W]e have never . . . demanded that First Amendment rights rest on elaborate empirical studies demonstrating beyond any conceivable doubt that deterrent effects exist . . . [nor] required proof of the exact number of people potentially affected by government action, who would actually be dissuaded from engaging in government activity.'Rather, on the basis of common sense and available information, we have asked, often implicitly, (1) whether there was a rational connection between the cause (the governmental action) and the effect (the deterrence or impairment of the First Amendment activity), and (2) whether the effect would occur with some regularity, i.e., would not be de minimis. * * * And in making this determination, we have shown a special solicitude towards 'indispensable liberties' protected by the First Amendment. . . .'Branzburg v.

Hayes, 408 U.S. 665, 734-35 (1972) (Stewart, J., dissenting). See also New York Times Co. v. Sullivan, 376 U.S. 255 (1964); Time, Inc. v. Hill, 385 U.S. 374 (1967); Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971). The last two cases are particularly noteworthy in this regard insofar as they rest on the premise that even relatively slight burdens on journalism may have sufficient impact to justify a finding of unconstitutional impediment to free speech. This also appears to be the premise of Tornillo but not, as noted above, of Red Lion.

28 Indeed, as pointed out in footnote 2, supra, on the reasoning of Tornillo, the chilling effect of enforced fairness in broadcasting is greater than in the print media since the scarcer the resource, the greater the cost of requiring portions of that resource to be devoted to meeting fairness (or public access) obligations-hence the greater the 'chilling effect.'

29 The risk, of course, is not simply or even primarily that the government will itself directly control speech (though that possibility cannot be totally discounted). It is rather that the media themselves will find it expedient to avoid controversial matters which might give rise to difficulties with the government. Therein lies the chilling effect of government interference. See footnote 2, supra.

30 This is the latest period for which complete data were readily available. Violations in this period included: seven violations of the political editorializing rules, seven personal attack rule violations and five general fairness doctrine rulings.

31 Both in Straus and in Pensions, the court's language indicates that the standard by which the FCC reviews licensee discretion is similar to the standard by which the courts review the work of the agency. It is not enough, in order to disturb the licensee's conclusion, to find that the preponderance of evidence favors a different result from that reached by the licensee. Nor is it enough to find that the complainant's identification of the issue (and whether it was controversial and of public importance) is more sensible than the licensee's version of the story. The licensee's conduct must actually be unreasonable before its discretion may be rejected by the Commission. See Straus, Slip Opinion at 14-15; Pensions, 516 F.2d at 1120, 1122-23.

32 I am not at all certain that the data will support that conclusion since the degree of the 'chill' on free speech that may flow from government intrusion is not simply a function of the number of adverse findings or even the number of inquires made of licensees. The chill stems from the licensee's perception of the costs of presenting certain programs, and those perceptions may be based more on anxiety than on any objective, actuarially sound, assessment of risk. In any case, the more immediate concern of the licensee will be whether the marginal benefit of broadcasting matter bearing on a controversial public issue outweighs the possible battling with citizen groups, disgruntled viewers/listeners, and last, but not least, the FCC.

33 An adverse finding is not necessarily followed by a separate punishment; indeed, usually it is not. Most adverse findings result either in a ruling that certain programming requires presentation of another viewpoint or a letter admonishing the licensee to comply with the fairness doctrine. Of the nineteen adverse findings in 1973 and 1974, only eight (seven political editorial cases and one personal attack) resulted in any tangible punitive action-forfeiture in each case. Of course, the forfeiture penalty is available to the Commission only in the case of personal attack-political editorializing violations inasmuch as these alone have been crystallized into specific rules. As for the ultimate sanction, non-renewal of license, the Commission will not consider this except in the most egregious case of licensee irresponsibility towards its fairness obligation, and it has found this but once, in Brandywine-Main Line Radio, Inc., 24 FCC 2d 18 (1970), aff'd. 473 F.2d 16 (D.C. Cir. 1972), cert. denied, 412 U.S. 922 (1973). (Parenthetically I might note that licensee misconduct such as that found in Brandywine might make one a believer in the fairness doctrine were it found more often. As it is, however, I think it hard to justify this, or any other rule, by the most extreme, and most rarely encountered, case.)

34 Of course, the deterrent effect on all licensees of making an example of a few of them cannot be overlooked. But the proper limits to the practice of 'making an example' of someone are rapidly reached. See Andenaes, The Morality of Deterrence, 37 U. Chi, L. Rev. 649 (1970). As a rule of elementary justice, a person can be so used only if he is first guilty of some misconduct. The idea of guilt, in this sense, includes the idea that A has done something which he should not have done, and which others similarly situated have refrained from doing. I doubt, as I have mentioned, that the average licensee who is found to have violated the fairness doctrine has done something which other licensees have refrained from doing. The old maxim, 'Beat your boy ever day-if you don't know what for, he will,' may serve a purpose as a primitive rule of childrearing, but it is no way to run a government.

35 National Broadcasting Co., Inc. v. FCC, 516 F.2d 1101 (D.C. Cir. 1974); Straus Communications, Inc. v. FCC, -- F.2d --, No. 75-1083 (D.C. Cir. Jan. 16, 1976).

36 The exceptional character of the findings may, in fact, be additional reason to challenge the actions insofar as it evinces erratic (and hence discriminatory) enforcement. See my dissent in Straus Communications, Inc., 51 FCC 2d 385, 389 (1975).

37 The change in practice, the Commission's rationale for it, and Geller's critique, are discussed in Pensions, supra, 516 F.2d at 1115-16.

38 It must again be emphasized that the adverse impact on speech derives not so much from what the Commission actually does than from the licensee's apprehension of what the Commission might do.

39 It is not decisive counter to the above objections that the Commission once 'enforced' the fairness doctrine as Geller now proposes. That was over a decade ago-almost in the paleolithic era of the fairness doctrine-when there was far less consciousness of this doctrine by the public or licensees. I doubt very much that the Commission could restore those relatively halcyon days simply by adopting the old process.

40 The notion of mandated access has received much attention on both sides. For a bibliography and critique, see Lange, The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment, 52 N. Car. L. Rev. 1 (1973). However, I am not familiar with any discussion in the general legal literature of this particular scheme of access.

41 The access option would be more or less self-enforcing though there would possibly be some occasions for subjective determinations by the licensee and this, in turn, would require some supervision by the Commission, hopefully minimal.

42 Because under this proposal access would be optional with the licensee, it would be entirely consistent with Columbia Broadcasting System, Inc. v. Democratic National Committee which involved the question whether access was required by the First Amendment or the Communications Act. It is also, I believe, consistent with the Red Lion holding that Congress incorporated the basic fairness obligation into Section 315. As discussed earlier, I do not think that was intended to freeze the fairness obligation precisely in its present form. See CBS v. DNC, 412 U.S. at 131-132; Public Interest Research Group v. FCC, 522 F.2d 1060, 1064.

43 Under the COM proposal, access would not be a surrogate for the presnet fairness doctrine in cases of 'editorial advertisements' on controversial public issues. The rationale of the exception is to 'prevent powerful private interests from disserving the public interest by propagandizing their ideas in a blitz paid spot campaign without comparable response capable of being afforded through the access system.' Committee for Open Media, Petition for Reconsideration, p. 18. This fear is probably exaggerated, but there should be no objection to this exceptional retention of the traditional fairness doctrine.

44 COM proposes 35 minutes per week or five minutes a day, scheduled at different times (including prime time).

45 COM proposes that one half the access spots would be allocated on first-come, first-served basis, and the other half would be allocated on a 'representative spokesperson' system.

46 I assume that a licensee would continue to be legally responsible unless and until public access were a matter of statutory right. In Farmers Educ. and Coop. Union v. WDAY, 360 U.S. 525 (1959), the Supreme Court held that a licensee could not be held liable for defamatory language uttered during a time period which was required to be supplied under Section 315 of the Communications Act. If the fairness obligation arises under Section 315, the same immunity arguably applies. It might be contended that this immunity ought to extend to the fairness surrogate, access, as well. It seems much more probable, however, that if the licensee had any significant discretion as to who was permitted access and what was to be said, it probably would be held responsible. That, in turn, would require the licensee to monitor. Of course, the obscenity or defamation laws could be changed by statute to insulate a broadcaster from liability for anything said on access messages, but such change seems unlikely. It also seems undesirable if one attaches, as I do, importance to the interests which the obscenity and defamation laws were meant to protect. In any event, nothing as radical as amending the Communications Act or Title 18 of the U.S. Code needs to be contemplated until time and experience clarified whether and to what extent such changes were necessary.

36 Rad. Reg. 2d (P & F) 1021, 58 F.C.C.2d 691, 1976 WL 32074 (F.C.C.)

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Gmail talk BETA

Susan Burgess <skburgess@gmail.com>

Robinson - fairness doctrine dissent

3 messages

westlaw@westlaw.com <westlaw@westlaw.com> **Mon, Jul 16, 2007 at 11:13 AM**
Reply-To: west.support@thomson.com
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37 Rad. Reg. 2d (P & F) 744, 59 F.C.C.2d 987, 1976 WL Page 1
31869 (F.C.C.)

(Cite as: 37 Rad. Reg. 2d (P & F) 744, 59 F.C.C.2d 987, 1976 WL 31869 (F.C.C.))

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37 Rad. Reg. 2d (P & F) 744, 59 F.C.C.2d 987, 1976 WL 31869 (F.C.C.)

F.C.C. 76-529

*1 In Re Complaint of

REPRESENTATIVE PATSY MINK, THE ENVIRONMENTAL POLICY CENTER AND O. D. HAGEDORN
AGAINST RADIO STATION WHAR, CLARKSBURG, WEST VIRGINIA

MEMORANDUM OPINION AND ORDER

(Adopted: June 8, 1976; Released: June 16, 1976)

BY THE COMMISSION: COMMISSIONERS WILEY, CHAIRMAN; AND QUELLO CONCURRING IN THE
RESULT; COMMISSIONER ROBINSON CONCURRING AND ISSUING A STATEMENT

1. The Commission received a fairness doctrine complaint dated September 25, 1974 against radio station WHAR, Clarksburg, West Virginia, filed by the Media Access Project on behalf of Representative Patsy Mink, the Environmental Policy Center and O.D. Hagedorn, a citizen of Clarksburg. The thrust of the complaint is that WHAR is in 'violation of its affirmative obligations under the fairness doctrine to 'devote a reasonable percentage of [its] broadcast time to the coverage' of the national, state and local controversial issue of public importance of strip mining.'

2. On July 8, 1974 Representative Mink, a sponsor of anti-strip mining legislation then before Congress, wrote to WHAR and numerous other broadcast stations requesting that they broadcast an 11-minute tape regarding her proposal which she claimed would contrast viewpoints presented during a U.S. Chamber of Commerce program entitled 'What's the Issue (No. 684),' representing a pro-strip mining position that had previously been broadcast by 'hundreds of stations . . . including WHAR.'

3. On July 10, 1974, WHAR responded to Representative Mink's request by returning the tape and stating that it was 'not going to broadcast it,' and that 'furthermore . . . [the station is] well aware of . . . [its] responsibility to inform the public of all sides of a controversial issue.' Complainants wrote the station on July 22 seeking a clarification of its action in order to 'determine whether [the licensee] violated the fairness doctrine.' On July 23 the licensee responded by stating:

'1. WHAR did not air What's the Issue program number 684.

2. WHAR has presented no programming on the Strip Mining controversy.

3. WHAR has aired no contrasting viewpoints on the Strip Mining Issue.'Thereafter complainants filed their complaint with the Commission alleging that 'the licensee has failed for at least a four-month period when Congress was considering strip mining legislation to air any programming on the strip-mining controversy,' (emphasis in original), and that this issue has continued to be 'of extreme importance to the economy and environment of the area served by WHAR and, consequently, is of extraordinary controversiality and public importance to WHAR's listeners.'

4. In support of its contention that the strip mining issue was at that time extremely controversial, complainants cited the 'battle over strip mining . . . being waged in the halls of Congress,' referring specifically to House Report No. 93-1072, at page 60, which lists the various organizations reacting in some fashion to such legislation. Complainants cited similar legislation introduced by West Virginia Congressman Ken Hechler, who they stated has 'vociferously challenged' strip mining in that state. Moreover, the complainants argued that the 'failure to impose stringent controls on strip mining . . . is bound to hurt the deepmining industry, still the backbone of the Appalachian economy,' and referred to the coverage the issue has received in area newspapers such as the Herald-Dispatch in Huntington, and the Gazette-Mail in Charleston, national periodicals such as Business Week, May 11, 1974, as well as in the local Clarksburg Telegram which they claimed devoted nine front page stories from July 10 to July 21, 1974 to 'the local and national debate about strip mining.' Additionally, they stated that on September 9, 1971 a group of citizens from Clarksburg called 'The Concerned Citizens' filed comments with the Commission in which they referred to the controversiality of this issue. Those comments are included in In Re Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standard of the Communications Act, Docket No. 19260. Furthermore, complainants enclosed a report dated February 6, 1971 compiled by the Appalachian Research and Development Fund, Inc., of Charleston, West Virginia,

entitled 'Legal Duty of Broadcasters to Present Strip Mining Abolition Issue Adequately and Fairly-Strip Mining Abolition: A Controversial Issue of Public Importance,' which the complainants claimed put all broadcasters in the area on notice of the importance of this issue. In that report, it was noted:

> *2 'That the abolition of strip mining of coal in West Virginia is a controversial issue of public importance, there can be no doubt . . . Numerous public officials, high and low, have issued pronouncements on both sides of the subject. Private citizens throughout the state have aired their views in unprecedented fashion. Newspaper articles daily declare the urgency of that issue. Economic and biological reports have [been] issued and are in process of issuance from government, both state and federal, which document the environmental and economic havoc caused by strip mining. Most recently, the West Virginia Surface Mine Association has found this topic so menacing to its self-interest, as to justify purchase of broadcast time throughout the state.'

5. The complainants argued that 'by neglecting the strip mining controversy . . . WHAR has totally failed to afford its listeners any programming on perhaps the most important controversial issue in the Clarksburg area, an issue which intimately affects the day-to-day economic and physical well-being of those listeners.' They stated that 'perhaps the most stinging indictment of the station's self-professed failure to cover the current strip mining controversy' is its statements in its 1972 license renewal application that '[t]he economy of [its] area is basically industrial. The major industry is glass, followed closely by Surface and Deep Mining.' In addition, they asserted that WHAR, in its renewal application, cited 'Development of new industry' and 'Air and Water Pollution' as issues of great concern to its listeners.

6. The complainants requested that the Commission direct the station to 'schedule substantial programming immediately on strip mining,' claiming that the failure to require such programming would 'make a mockery of not only the fairness doctrine, but of the Commission's Primer on Ascertainment of Community Problems by Broadcast Applicants, 20 FCC 2d 650 (1971)' which they asserted requires that community problems 'receive suitable attention' during the licensee's programming as well as in its application for license.

7. Inasmuch as the Commission had no independent information regarding this complaint other than the licensee's statement that it had presented no programming on strip mining, we sent the licensee a letter of inquiry dated December 11, 1974 requesting that it comment on the complaint. In its response dated January 13, 1975, WHAR referred to this matter as 'a misunderstanding of the facts,' stating that '[w]here, in answer to [complainants'] letter, the licensee replied that it had 'presented no programming on the strip mining controversy' and 'aired no contrasting viewpoints on that issue,' it meant only that it had originated no local programming that dealt with, or presented contrasting views on the controversy. The licensee stated that it did not mean that it had refused to carry or failed to carry any information at all on this controversy, for that was not at all the case.' The licensee claimed that to the contrary it broadcast 'a significant amount of information concerning the [strip mining] controversy.' To substantiate this claim, it cited its broadcast of the Associated Press news service which it asserted 'carried continuous bombardment of stories [referred to

as news summaries] relating to the strip mining issue, most of which were carried over WHAR.' It declared that, in addition, it subscribes to ABC Contemporary Network's news and public affairs programs including the Issues and Answers program. It advised the Commission that it would submit further information concerning the extent of the coverage that the strip mining issue had received during these programs upon receipt of such data from ABC.

*3 8. WHAR also argued that even if the Commission were to determine that the licensee had failed to 'adequately cover' the strip mining controversy, it doubted 'whether the licensee is answerable to the Commission for selection of those issues' to be broadcast and therefore whether it would be proper for the Commission to take any action in view of such apparent failure. It stated that Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), which it characterized as the basis for the Commission's language in its Fairness Report, 48 FCC 2d 1 (1974), that the licensee has an obligation to present coverage of controversial issues, 'does not say that each licensee must treat . . . [each critical issue], and it does not, in any way, imply that a broadcaster has no discretion to decide to handle some of those issues and leave others to be treated by other licensees.' WHAR contends that there is presently no established precedent or rule requiring a particular licensee to cover any particular issue, and cited our ruling in Gary Soucie, 24 FCC 2d 743 (1969), which also was referred to in our Fairness Report, supra, as prescribing a general obligation for 'broadcasting' as an industry rather than individual licensees to cover controversial issues. It argued that any attempt by the government to designate the issues which must be discussed by a licensee 'enfleshes [the] . . . spector of censorship,' and would interfere with the licensee's discretion under the fairness doctrine to determine the nature and amount of coverage to be given to particular subject matter.

9. In attacking the assertion that strip mining was a critical issue in Clarksburg, WHAR claimed that it found no problems relating to strip mining mentioned among principal needs and interests in its community as determined in two ascertainment surveys accompanying its 1970 renewal application and its 1974 application for a new FM license in Clarksburg. As to the assertion that wide coverage of the issue in the print media should require similar coverage by licensees, WHAR argues that this would deprive broadcasters of their own editorial discretion. In addition, it asserted that the complainants neither attempted to negotiate with the licensee nor filed a complaint with the station but rather went immediately to the Commission after receiving WHAR's July 10, 1974 response to their correspondence, and therefore cut off the possibility of additional programming devoted to the strip mining issue.

10. WHAR requested that the Commission retract the language in its Fairness Report which the licensee argues gives the Commission the power to determine 'which are the 'critical' issues or whether and to what extent those issues have been covered.' Furthermore, it stated that if the Commission 'should affirm such a policy,' WHAR should not be subject to sanction because the Commission would be establishing a 'new guideline for all stations to follow.'

11. The licensee attached the affidavit of James Fawcett, President and majority shareholder of WHAR who reiterated therein that WHAR never carried any of

the United States Chamber of Commerce programs, and that '[a]lthough strip mining is, admittedly, a matter of importance to many of the inhabitants of the Clarksburg area, WHAR has never had any request whatsoever to produce or broadcast any programming on that issue other than the request from Representative Mink.' Fawcett stated that WHAR had not ignored this issue, although he acknowledged that its programming thereon had been limited to what it had received from the ABC Network and syndicated wire services. Fawcett asserted that the Charleston Bureau of the Associated Press advised him that it had compiled 128 items on strip mining from March to June 1974 and 102 items from October to December 1974 and stated that 'WHAR would probably have carried over 75% of these stories.' He declared that WHAR broadcast other programs which dealt with environmental concerns, such as a weekly 15-minute program produced by the West Virginia Extension Service which discussed various ecological problems: 'Outdoors Angles,' a program on hunting and fishing which indirectly touches upon ecological concerns, and 'Focus on the Issues,' a call-in discussion program during which listeners may discuss any issue they so desire.

*4 12. Thereafter, the complainants, in a January 28, 1975 letter, informed the Commission that they intended to submit further comments upon receipt of information concerning the extent of network programming on strip mining broadcast by WHAR. As promised in its January 13, 1975 reply, WHAR, on February 4, 1975, submitted additional material to substantiate its claim that it presented numerous news items on strip mining, enclosing Associated Press tear sheet items broadcast between June 1 and July 30, 1974. The licensee also referred to seven Issues and Answers programs which it believed could possibly have involved strip mining. Additionally, on March 19, 1975, WHAR informed the Commission that on February 22 it had carried a five-minute tape on strip mining provided by Representative Ken Hechler of the 4th Congressional District of West Virginia.

13. In its April 7, 1975 response to the licensee's comments, the complainants asserted that 'in view of the tremendous and permanent consequences which the congressionally-debated strip mining legislation would have on all aspects of the life styles of West Virginia and Harrison County citizens, it was probably the single most important issue to arise in several decades . . . [and] in Clarksburg and Harrison county . . . the most important issue during the time period within which the complaint is concerned.' In support of this claim the complainants enclosed numerous news articles from various communities in West Virginia concerning the debate over strip mining. While most of the articles submitted by complainants were from outside of WHAR's service area, complainants maintained that taken as a whole they illustrated the concern over the strip mining controversy in communities similarly affected by the proposed legislation. In one such article in Vantage Point, a publication of the Commission on Religion in Appalachia, 1973 edition, it was stated:

> Because of strip mining, mountain people are turned against one another. The mountaineers in the hollows facing a crumbling mountain are dead-set against other mountaineers who are manning the strippers' earth moving equipment. There is nothing more demeaning that a mountaineer being told by a strip mine operator that he must strip his neighbor's land if he wants to put bread on his family's table. . . .Articles from the local press indicate the impact that strip mining has already had on residents of Clarksburg. In the June 15, 1974

Clarksburg Telegram it was stated that:

'[R]esidents of Suan Terrace [in Clarksburg] are organized and ready to mobilize if the 'excavation' near their homes yields any coal.'The Charleston Gazette, October 22, 1974, reported:

James Hawkins, a resident of Suan Terrace where the stripping was done, said a prospecting permit was granted to keep opponents from their right to protest. He said a petition with about 200 names was submitted to reclamation division A.*5 The complainants submitted a copy of statements given before Congress supporting the claim that the strip mining controversy is both economic and ecological, some of which are set forth below:

The human suffering of those who live near strip mining sites is pitiful. The blasting and bulldozers have frequently set boulders onto the property and even into the homes of those on the fringes of strip mining . . . Statement of Honorable Ken Hechler, Representative from West Virginia.

To me the most critical aspect of strip mining is what is happening to people in Appalachia, and to the quality of their lives . . . The coming of strip mining has caused the most ruthless attack yet to be put on the people and their land. Central Appalachia, where strip mining prevails, has become a land that resembles the battlefields of war. Where the people are the victims and the land becomes a waste . . . In 1971 the Legislature of West Virginia employed the Standford Research Institute to do a study of the effects of strip mining in that State. One of their findings was that in the mountain region of Appalachia, for every acre of land stripped 3 to 5 adjoining acres were directly and adversely affected. Statement of Rev. Baldwin Lloyd, Appalachia People's Service Organization.

Surface mining in West Virginia has virtually outgrown its earlier status as an emotional issue because of proven reclamation success, increased energy fuel requirements, and rigid enforcement of stringent state regulations . . . By any yardstick of reason, those who advocate elimination of surface mining for environmental protection could only be interpreted as ill-advised and unrealistic. It is unsound because it ignores the serious and damaging consequences to the economy of both West Virginia and the nation. At best it is an extremist solution of what is essentially an aesthetic problem. Statement of James L. Wilkinson, President, West Virginia Surface Mining and Reclamation Association.The complainants enclosed the above referred to Stanford Research Institute study on the effects of strip mining in West Virginia. Included in this report was the determination that surface mining produces severe land erosion, that it will ultimately have an adverse effect on West Virginia's economy; that Harrison County (which includes Clarksburg) leads all other counties in West Virginia with the most land disturbed; and that these disadvantageous effects will continue and become more pronounced in the future.

14. Complainants submit that such local environmental concerns uncovered in WHAR's ascertainment survey, such as air and water pollution and the lack of

recreational facilities, arise to a large part as a result of the strip mining in and around Clarksburg; that, in contrast, the licensee's broadcast of Associated Press wire service items 'reveals absolutely no substantive information on the environmental, economic, physical or other aspect of strip mining in Clarksburg or Harrison county, or even in West Virginia'; that there was no local perspective, genuine partisan voices or varying point of view; and that, therefore, WHAR failed to tailor its programming to the needs of the community.

*6 15. The complainants assert that in regard to the Issues and Answers programs cited by WHAR, the transcripts of those programs disclose that at no time was strip mining discussed during any of the seven broadcasts; that WHAR read the Associated Press news items verbatim 'letting AP decide what was best suited to meet the needs of WHAR's listeners,' and that in so doing, it exercised no editorial judgment and thus represents 'an impermissible delegation of licensee programming responsibility'; and that WHAR's failure to know precisely what was broadcast during the network programs over its facilities 'further evidences total failure of WHAR to make a 'conscientious and positive effort' to meet its affirmative fairness doctrine obligations.' In regard to WHAR's claim that complainants had not negotiated with it or notified it that a complaint was being filed, complainants state that they informed WHAR that if they had not received its response to complainants' inquiry to the station within seven days they were going to 'file a formal complaint with the FCC.' Complainants also state that the 'licensee's request to [the FCC to] reconsider a portion of the Commission's fairness doctrine regulation is appropriate only in a rulemaking situation.

16. In additional correspondence dated May 28, 1975 complainants ask us not to consider the February 22 broadcast of the Hechler tape. They allege that this statement was devoted not to a discussion of strip mining but rather to mine safety in general. It was also maintained that the tape 'was aired almost a year after the time period within which it is contended that WHAR failed to comply with the fairness doctrine in regard to the coverage of the 'burning issue' of strip mining as it affects the life and well being of persons in the Clarksburg area and in West Virginia generally-a time during which Congress was considering a strip mining bill which would have enormous effect on Clarksburg and West Virginia citizens.'

17. On June 13, 1975 WHAR submitted a copy of the Hechler tape with transcript to support its contention that the Congressman's comments did touch upon strip mining. The transcript indicates that during the first part of his commentary Hechler attempted to rebut the argument that strip mining was safer than deep mining.

18. The complainants replied on June 18 to WHAR's response by arguing that the emphasis of the tape commentary was on mine safety and not on strip mining reclamation-the issue referred to in their complaint. They emphasize that Hechler 'mentions strip mining tangentially in the context of the national problem of mine safety about which there is no controversy.'

Discussion

19. The Commission has previously notified broadcasters that it regards strict adherence to the fairness doctrine-including the affirmative obligation to provide coverage of issues of public importance-as the single most important requirement of operation in the public interest. Committee for the Fair Broadcasting of Controversial Issues, 25 FCC 2d 283, 292 (1970). This obligation includes informing listeners of issues of particular concern to the communities which they are licensed to serve. As far back as our Report on Editorializing by Broadcast Licensees, 13 FCC 1246 (1949), we stated that:

> *7 It is axiomatic that one of the most vital questions of mass communication in a democracy is the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day . . . The Commission has consequently recognized the necessity for licensees to devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community served by the particular station. Id. at 1249.

20. The above-stated principles reflected the Supreme Court's observation in Associated Press v. U.S., 326 U.S. 1, 20 (1945), that the purpose of the First Amendment was to provide 'the widest possible dissemination of information from diverse and antagonistic sources.' With this in mind, the fairness doctrine 'imposes two affirmative responsibilities on the broadcaster: coverage of issues of public importance must be adequate and must fairly reflect differing viewpoints.' Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94, 111 (1973). Without licensee compliance with the responsibility to cover adequately vital public issues, the obligation to present contrasting views would have little success as a means to inform the listening public. If the fairness doctrine is to have any meaningful impact, broadcasters must cover, at the very least, those topics which are of vital concern to their listeners. It was the view of the Court of Appeals for the District of Columbia that 'the essential basis of any fairness doctrine, no matter with what specificity the standards are defined, is that the American public must not be left uninformed.' Green v. FCC, 447 F2d 323, 329 (1973).

21. The Commission, however, has no intention of intruding on licensees' day-to-day editorial decision-making. Rather, it has been our policy, in light of the prohibition against government censorship set forth in Section 326 of the Communications Act, to afford to licensees great leeway in their selection of program matter. As we stated in our Report on Editorializing, supra:

> 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 program to be devoted to each subject, the different shades of opinion to be presented, and the spokesman for each point of view. Id. at 1251.

22. Consistent with this view, we have in the past stated that 'the public's need to be informed can best be served through a system in which the individual

broadcaster exercises wide journalistic discretion, and in which the government's role is limited to a determination of whether the licensee has acted reasonably and in good faith. Fairness Doctrine Primer, 40 FCC 598, 599 (1964). See Citizens Communication Center, 25 FCC 2d 701 (1970). While it is our policy to defer to licensees' journalistic discretion, we must emphasize that that discretion is not absolute, Committee for the Fair Broadcasting of Controversial Issues, supra, at 292, and we have previously advised licensees that 'some issues are so critical or of such great public importance that it would be unreasonable for a licensee to ignore them completely.' Fairness Report, supra at 10. While it would be an exceptional situation and would not counter our intention to stay out of decisions concerning the selection of specific programming matter, we believe that the unreasonable exercise of this licensee discretion, i.e., failure to adequately cover a 'critical issue' in a particular community, would require appropriate remedial action on the part of the Commission. Such action in those are instances was contemplated by the Supreme Court in Red Lion when it declared:

*8 . . . if the present licensees should suddenly prove timorous, the Commission is not powerless to insist that they give adequate and fair attention to public issues . . . Congress need not stand idly by and permit those with licenses to ignore the problems which beset the people. Red Lion at 393.These are rare instances, however, and licensees are not obligated to address each and every important issue which may be considered a controversial issue of public importance. Public Communications Inc., 50 FCC 2d 395 (1974); Fairness Report, supra at 10.

23. The question of whether a licensee has presented significant coverage of vital issues of public importance, which has been found to be necessary to fully inform the public, has been the subject of previous Commission action: Committee for the Fair Broadcasting of Controversial Issues, supra (responsibility of adequate coverage of the Vietnam war); WSNT, Inc., 27 FCC 2d 992 (1971) (failure to cover various events organized by local civil rights organizations in the community raised the question of whether the licensee had met the obligation to 'serve the public by presenting important local news.') Particularly, in Gary Soucie, 24 FCC 2d 743 (1969), we emphasized that commercial broadcast facilities 'must be used to inform,' and in spite of the licensee's editorial discretion regarding the nature of its coverage of vital environmental issues, specifically the automobile gasoline/air pollution issue, 'broadcasters must discharge their public trust by contributing fairly and effectively to an informed electorate on these vital issues.' 24 FCC 2d at 750. FN[FN1] We now turn to the facts before us.

24. In the present case the extensive amount of supporting material furnished by complainants sufficiently illustrates the fact that strip mining is of extreme importance to the people of Clarksburg. There is evidence from Congressional testimony, newspaper and magazine articles and research studies which illustrates the enormous impact strip mining has already had on the air and water quality and the immediate economic stability of the region. For example, Harrison County (Clarksburg and vicinity) has the highest percentage of strip mined land of any county in the State. This information also reveals that the long term environmental picture and countless future employment opportunities in deep and surface mining and other related industries would be altered significantly by the

mandatory reclamation of strip mined land provisions included in the legislation debated in Congress. The licensee has itself stated that strip mining is 'a matter of importance to many of the inhabitants of the Clarksburg area,' Fawcett affidavit, page 1 (attached to WHAR response of January 13, 1975). Moreover, there is evidence of the highly controversial nature of the issue of strip mining, illustrated by citizen protests concerning strip mining in Clarksburg (see paragraph 13, supra), the nine 'front page' stories in the Clarksburg Telegram

over an eleven day period in July 1974, and the lengthy debate in Congress concerning the strip mining bill followed on May 20, 1975 by the President's veto of the measure. We believe it would be unreasonable for WHAR to deny that the issue of strip mining is a critical controversial issue of public importance in Clarksburg. It would therefore appear that a total failure to cover an issue of such extreme importance to the particular community would raise serious questions concerning whether the licensee has acted reasonably in fulfilling its obligations under the fairness doctrine.

*9 25. To support its claim that it had not ignored strip mining but rather had provided continuous news coverage, the licensee submitted copies of news items compiled for broadcast between June 1 and June 30, 1974 by the Associated Press, 25 of which were related to some degree to strip mining. Included among these 25 items are references to two Congressmen's characterization of the Nixon Administration's opposition to strip mining legislation as 'unfair and unjustified' (June 7); a statement by a local strip mining abolitionist that in view of his opposition to the legislation Interior Secretary Morton is a traitor to Appalachia (June 9); estimates of money spent by surface mining industry to support candidates for public office in West Virginia (June 14); statistics indicating that 68% of the land used for coal mining between 1930 and 1971 has been reclaimed (June 23); and a statement by FEA Administrator John Sawhill that the legislation at issue will undermine efforts to revitalize the coal industry (June 30). Many related to statements by state officials outside West Virginia about matters which had no bearing on either the Clarksburg community or the federal legislation. Since the licensee stated only that it carried 'well over' 75% of the items it submitted, it cannot be determined which of these items were actually broadcast.

26. As set forth above, WHAR subsequently indicated that it had carried a five-minute tape furnished by Representative Ken Hechler which, according to the station's logs, concerned 'strip mining/mine safety.' However, while it is noted that Representative Hechler was a well-known proponent of the then pending strip mining legislation, neither that legislation nor the ecological or environmental impact of strip mining was mentioned during his statement. FN[FN2] Furthermore, we note that the licensee was unable to document its assertion that it presented other related programming furnished by the ABC Contemporary Network.

27. In WHEC Inc., 52 FCC 2d 1079 (1975), we concluded that, concerning the issue of adequacy of programming on local issues, '[t]he key is the responsiveness to [community] needs and not necessarily the original source of broadcast matter.' Id at 1085. We have on many occasions emphasized that licensees should be able to show that its programming is to some significant extent tailored to specific community needs. In re City of Camden, 13 FCC 2d 412 (1969). Although we believe

that the nature of the coverage is for the station management to decide, we have stated that the licensee 'should be alert to the opportunity to complement network offerings with local programming . . . or with syndicated programming,' to fully inform the community on issues of public importance. WHAR cannot rely on the fact that prior to this complaint it had not received any request for strip mining related programming, since it is the station's obligation to make an affirmative effort to program on issues of concern to its community. Fairness Report at 10. We do not believe that WHAR has shown what programming, if any, it broadcast which was devoted to a discussion of the local ramifications of strip mining and/or the proposed legislation. It neither originated such programming nor provided syndicated material aimed at informing its listeners in any depth of the nature of the issue cited in the instant complaint-that issue being the effects of strip mining in and around Clarksburg.

*10 28. However, even more significant than the absence of locally originated programming on the issue of strip mining is the fact that WHAR cannot, with a reasonable degree of certainty, state what specific programming it has broadcast relating to this issue. We cannot accept the list of news items provided by the Associated Press and submitted by the licensee as evidence of compliance with the fairness doctrine when it is not all certain that they were aired by WHAR. Moreover, we cannot accept WHAR's statement to the effect that it may have presented ABC Contemporary program matter related to the strip mining controversy without references to specific programming broadcast over their facilities. We note that none of the Issues and Answers broadcasts cited by the licensee as having appeared on the station included a discussion of strip mining. FN[FN3] As we stated in the Fairness Report, supra, 'we expect that licensees will be cognizant of the programming which has been presented on their stations, for it is difficult to see how a broadcaster who is ignorant of such matters could possibly be making a conscious and positive effort to meet his fairness obligations.' Id at 20. Since the determination as to what programming will best meet the needs of a particular community served by the licensee cannot reasonably be delegated to others, En Banc Programming Policy, 44 FCC 2303, 2313-14 (1960), we are unable to sustain a licensee's judgment to defer to a non-broadcast entity editorial decision-making on whether to cover an issue of such extreme importance and impact on the station's listening audience. In this case, the licensee's total reliance on outside programming related to strip mining and its failure to know which of the material was presented clearly indicates that WHAR did delegate its programming responsibility and has not made a sufficiently diligent effort to inform its listeners. Under these circumstances, we are unable to conclude that WHAR has adequately covered the issue of strip mining.

29. It is our belief, as stated in the Fairness Report, supra, that the licensee could not reasonably fail to cover an issue which has tremendous impact within the local service area-that such failure would violate the fairness doctrine. We now reaffirm that principle. Where, as in the present case, an issue has significant and possibly unique impact on the licensee's service area, it will not be sufficient for the licensee as an indication of compliance with the fairness doctrine to show that it may have broadcast an unknown amount of news touching on a general topic related to the issue cited in a complaint. Rather it must be shown that there has been some attempt to inform the public of the nature of the controversy, not only that such a controversy exists. We must conclude, therefore, that WHAR has acted unreasonably in failing to cover the issue of strip

mining, an issue which clearly may determine the quality of life in Clarksburg for decades to come.

*11 30. Given these findings, we are of the opinion that the licensee of radio station WHAR is in violation of the fairness doctrine. Considering the continuing controversial nature of the issue of strip mining, the licensee is requested to inform the Commission within 20 days of the release date of this Order on how it intends to meet its fairness obligations with respect to adequate coverage of the aforementioned issue.

FEDERAL COMMUNICATIONS COMMISSION,

VINCENT J. MULLINS, Secretary.

CONCURRING STATEMENT OF COMMISSIONER GLEN O. ROBINSON

This is the first time the Commission has ever found that a particular issue of public controversy was so important that a licensee was compelled, under the first part of the fairness doctrine, to offer at least some programming addressing it. I, for one, derive no satisfaction from participating in this procedent-setting case; it goes against my grain to so intrude in the programming discretion of a licensee. As I have made clear elsewhere, I am not a supporter of the fairness doctrine; measuring the uncertain benefits of this law against its probable adverse effects on free speech, I believe we would be better off without it, or with some substitute access rule. See my dissenting statement in Fairness Doctrine Reconsideration, -- FCC 2d --, FCC 76-265 (1976).

However, this general complaint is not pertinent here. As long as the fairness doctrine is established law, the Commission has the responsibility to enforce it in a fair and reasonable manner. We are here confronted with a case which fairly calls for enforcement and I see no basis for withholding my assent to the Commission's decision to take action. Indeed, if the first part of the fairness doctrine does not apply to this case, it would have to be concluded that it does not apply anywhere, and that a rule which purports to be binding is, in fact, merely precatory. I do not see how we could treat the first part of the fairness doctrine differently from the second in this respect-both purport to be integral parts of a legally binding rule. FN[FN4]

I cannot predict where this ruling will lead in the future. The Commission correctly emphasizes that the occasions for directing a station to air a particular issue to meet the first part of the fairness obligation are exceptional. Thus, not every issue of public importance or controversy whose presentation might trigger an obligation under part two of the fairness doctrine is sufficient to create an affirmative obligation for coverage by the station under part one. The Commission uses the term 'critical issues' to describe the occasion for the latter obligation; in Gary Soucie, 24 FCC 2d 743, 750 (1970), the Commission spoke of 'burning issues.' I suppose one question-begging adjective is

as good as another in this foggy business of defining such ephemeral responsibilities. I would only add that it is not merely an issue which is 'critical' or 'burning,' but one which all reasonable men must acknowledge to be such, that triggers this obligation. Strip mining in West Virginia is such an issue FN[FN5] and, on the facts presented here, the obligation has not been met. FN[FN6]

*12 Nevertheless, much as we may stress the exceptional character of our enforcement of this requirement, we should not fool ourselves that the Commission will escape demands to enforce this requirement with greater zeal than has heretofore been demonstrated (or expected). I think we can say with certainty that many of such demands will prove unjustified. With equal certainty, however, we can predict that some-perhaps many-of the demands will be indistinguishable from this case, and any attempt to artificially limit this case-as the Commission attempted to do with its famous cigarette ruling-most ultimately fail. Friends of the Earth v. FCC, 449 F.2d 1164 (D.C. Cir. 1971). In any event, I shall not be surprised if, as a consequence of our action today, the Commission soon finds itself involved more deeply in program judgments than it presently desires or even foresees. FN[FN7] If and when that happens, present distress about the fairness doctrine will almost certainly become more intense and more widespread-perhaps even to the point where the courts, if not Congress, direct the abolition of this mischievous doctrine. It is to be hoped; the best think to be said of today's decision, other than that it conforms to the current law, is that it may bring us closer to the day when that law is changed.

1 In Soucie we pointed out that:

> Of course, the broadcast licensee retains the discretion as to issues, format, appropriate spokesmen, etc. Thus, a broadcaster located in an area with no air pollution issue but a severe water pollution one would clearly focus on the latter . . . there remains wide access for judgment by the licensee based upon the facts of its particular area. 24 FCC 2d at 751.

2 We do not agree with the complainants' contention that the Hechler tape should not be considered in determining whether WHAR presented programming related to the issue of strip mining because the program, aired on February 22, 1975, did not fall within the March-June 1974 time frame set out in their complaint. It appears that the issue of reclamation of strip mined land has continued to be controversial up to the present date. Legislation providing reclamation standards was passed by Congress, subsequently vetoed by the President on May 20, 1975 and the veto was sustained on June 10. Presently new legislation similar in nature to the previous legislation was introduced by Representative John Melcher of Montana (HR 9725, introduced on September 19, 1975). We therefore believe that the Hechler tape is relevant to our present considerations.

3 Also it has not been shown by WHAR that the other programming it cites as having concerned environmental matters such as its Outdoor Augles, did in fact include a discussion of topics even tangentially related to strip-mining.

4 Concededly, enforcement of the first obligation constitutes a somewhat greater degree of government interference than enforcement of the second inasmuch as it is not triggered by the licensee's program choice. For this reason I agree

with the Commission's caution that the first obligation of the fairness doctrine is limited to 'exceptional' circumstances. However, the first and second obligations differ more in degree than in kind. Enforcement of either obligation requires us to scrutinize licensee judgment, overturn it where it is unreasonable, compelling a licensee to carry some program which it has chosen not to air. Even though in the former instance we can say it has 'opened the door' by presenting one side of a controversial issue of public importance, the fact remains that it is our determination, not the licensee's, which ultimately decides whether this door has been opened. Thus, as a practical matter, there is relatively little difference between our telling a radio station in Eureka, California, that nuclear power generation is an issue of controversial public importance in Eureka for purposes of enforcing the second obligation of the fairness doctrine in Public Media Center, -- FCC 2d --, FCC 76-453 (May 18, 1976), and our telling WHAR that strip mining is a 'burning issue' in Clarksburg for purposes of the first part of the fairness doctrine.I am not suggesting that it is not possible to have the second part of the fairness doctrine without the first. I am suggesting merely that once we have made all the necessary assumptions required to justify the second obligation-to provide balanced coverage of an important issue-we have made the requisite assumptions to justify that first obligation-to cover important issues.

5 The fact that it was not revealed as such in WHAR's 1974 ascertainment (see letter of January 17, 1975, from WHAR's president to the Commission) reveals more about the ascertainment process than it does about the issue.

6 In this regard, I do not think coverage necessarily requires locally originated programming. Nor do I understand the Commission's opinion to hold otherwise. While the Commission talks about licensees not being permitted to delegate to others their responsibility to cover critical issues, I understand this to mean merely that the obligation cannot be avoided by relying on coverage by other local media. This is inherent in the requirement since one crucial indication that an issue is of 'critical importance' is that it is so treated by other media. However, while I accept this (insofar as I feel bound to accept the requirement itself), I do not interpret it to mean that the broadcaster cannot rely on nonlocal programming in carrying out its obligation. The problem here is that the licensee has not been able to show meaningful coverage by local or other programming.

7 I do not take much comfort in the well-rehearsed rubric that the licensee has large discretion in selecting the issues to be programmed. See Soucie, supra; Public Communications, Inc., 50 FCC 2d 395 (1974). Cf. Straus Communications, Inc. v. FCC, 530 F.2d 1001 (D.C. Cir. 1976). As the Commission here recognizes, it is implicit in the existence of an enforceable obligation that the discretion is not unlimited. Moreover, if the vaguely defined 'critical issues' concept leaves large room for licensee discretion it also leaves some room for Commission discretion as well, and it is that discretion which should be the cause for anxiety.

37 Rad. Reg. 2d (P & F) 744, 59 F.C.C.2d 987, 1976 WL 31869 (F.C.C.)

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34 Rad. Reg. 2d (P & F) 383, 53 F.C.C.2d 1104, 1975 WLPage 1
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34 Rad. Reg. 2d (P & F) 383, 53 F.C.C.2d 1104, 1975 WL 31060 (F.C.C.)

FCC 75-755

*1 In the Matter of AMENDMENT OF PART 76, SUBPART G, OF THE COMMISSION'S RULES AND REGULATIONS RELATIVE TO PROGRAM ORIGINATION BY CABLE TELEVISION SYSTEMS; AND

INQUIRY INTO THE DEVELOPMENT OF CABLECASTING SERVICES TO FORMULATE REGULATORY
POLICY AND RULE MAKING

Docket No. 19988

MEMORANDUM OPINION AND ORDER

Proceeding Terminated.

(Adopted June 24, 1975; Released July 2, 1975)

BY THE COMMISSION: COMMISSIONERS HOOKS AND QUELLO ABSENT; COMMISSIONER ROBINSON
ISSUING A SEPARATE STATEMENT.

1. On December 9, 1974, the Commission released its Report and Order in Docket 19988, FCC 74-1279, 49 FCC 2d 1090 (1974), which, inter alia, deleted our mandatory origination rule (see former Section 76.201 of the Commission's Rules) and adopted new Section 76.253 which imposes a cablecasting equipment availability obligation on cable television systems and system conglomerates serving 3,500 or more subscribers.Mr. Henry Geller FN[FN1] has sought reconsideration of certain 'peripheral matters' which were part of that decision. He has expressed agreement with the main thrust of the Report and Order. No oppositions to his petition have been received.n2

Fairness and Equal Opportunities

2. The Geller petition suggests that our action in Docket 19988 be modified to delete the 'equal time' and 'fairness' obligations placed on operator-originated cablecasting. His arguments in support of this proposal are essentially a reiteration of those previously submitted in this proceeding and summarized in paragraph 27 of the Report and Order. We have concluded, upon further consideration of this question, that it should be dealt with in a separate proceeding where both interested parties and the Commission can focus upon it. It is an important issue requiring careful consideration after the widest possible comment. We believe that the context in which it has been presented in this proceeding has not afforded us the benefit of the wide range of views we might otherwise expect. The Notice of Proposed Rule Making and Notice of Inquiry in Docket 19988, supra, was directed solely to the question of whether we should continue the requirement of mandatory origination, and the applicability of the fairness doctrine was mentioned in passing, along with lotteries, advertising, etc., when we noted that these parts of the Rules would remain in effect during the pendency of the proceeding. As a probable consequence, there was not extensive comment and we dealt with the question summarily in our first opinion. We think it unwise to decide such a significant issue upon so sparse a record, particularly since other interested parties may have quite reasonably assumed it was not germane and may have failed to address it for that reason. It is peripheral to the

questions raised in the Notice and we have decided, for the reasons given above, not to attempt to resolve it at this time.

Publicity of Local Cablecast Opportunities

3. Petitioner also seeks reconsideration of the Commission's decision in the subject Report and Order not to adopt a specific requirement that operators publicize the availability of cablecasting equipment and channel space. He maintains that it is not sufficient for the Commission to merely '... encourage operators to make their communities aware of existing opportunities,' and indicate that it will adopt appropriate regulations if operators seek to evade their responsibilities by 'suppressing information of these opportunities.' (See paragraph 44 of the Report and Order in Docket 19988, supra.) It is asserted by petitioner that an operator has a 'duty' reasonably to inform his community of access opportunities and that the language of the Commission's Report should clearly stress the existence of such a duty and not be couched in terms of 'encouragement' or 'suppression.' Petitioner suggests that the exercise of that duty be left to the operator's discretion at this time (the operator could use on-screen placards, cablecast announcements, calls to officials or community leaders, etc.) but that the Commission issue specific regulations if this obligation is not discharged effectively.

*2 4. We find no great difference between petitioner's suggestions on this matter and our own position as enunciated in the Report and Order. Each seeks active public employment of the equipment required by our Rules and believes that a Commission mandate that operators specifically publicize the availability of such equipment in a particular manner would be premature and, hopefully, unnecessary. We fully expect that a cable operator will put to active and appropriate use that equipment which he has been required to obtain and required to offer to the public. He has duty to make this equipment and a reasonable amount of time available. We presume that fulfillment of this responsibility and the operator's obligation to serve the local community by themselves imply an affirmative duty to make known the existence of video opportunities. However, at this time we shall leave to the operator's discretion the procedures under which his equipment and available non-broadcast bandwidth will be put to their most beneficial use.

Channel Space Availability and Minimal Equipment

5. Petitioner recognizes our Report's statements that, under the new rule changes, system operators '... must make a reasonable effort to provide channel time wherever it is available,' and that the equipment required by January 1, 1976 can be 'minimal' in nature but suggests that the terms of these requirements be more specifically included in the rules. We agree and have amended the rules accordingly as indicated in the attached Appendix.

Cablecast Program Identification

6. We are also asked to include in our Rules an identification requirement for non-broadcast programming. As we stated in our Report, we do believe that local cablecast programming should be identified as such (see paragraph 43, Report and Order in Docket 19988, supra) and have advised system operators to identify the type of cablecasting service being presented (see footnote 13, Report and Order in Docket 19988, supra). However, the adoption of any formal identification rule should more appropriately be confined to our action on Docket 19334. (See Further Notice of Proposed Rule Making in Docket 19334, FCC 74-667, 47 FCC 2d 670 (1974).) That docket precisely addresses the identification issue and the Report and Order in that rule making proceeding will be the proper vehicle for any formal identification requirement.

Equipment Charges

7. Petitioner questions why our newly adopted Section 76.253, applicable to larger cable systems, differs in the area of 'assessment of costs' from our major market access regulations codified in Section 76.251 of the Commission's Rules. Specifically, petitioner asks why the major market stipulation that production costs may not be assessed for live studio presentations not exceeding five minutes (see Section 76.251(a) (10) (ii)) is not incorporated in Section 76.253 applying to systems having 3,500 or more subscribers and regardless of the system's geographical location. The answer is that our major market access rules require an operator to provide, inter alia, a studio. Because the operator was required to furnish such a studio facility it was our determination that these systems could easily, and at very little cost, accommodate those short, live, 'walkon' presentations requested by individual members of the public. Therefore, we prescribed that no charges could be made for such brief live uses of an operator's access facilities. Systems required to provide cablecasting equipment pursuant to Section 76.253 are not additionally required to provide a studio. Therefore, we have not set forth a five minute 'live free studio use' provision for systems subject only to Section 76.253. Should these systems voluntarily provide a studio we presume that the appropriate charge (which, as required, need be '... consistent with the goal of affording the public a low cost means of television access,' FN[FN3)]) for a brief live presentation will be quite minimal if, indeed, a charge is made at all. FN[FN4]

*3 Other Matters

8. We also wish to take this opportunity to address certain housekeeping matters which we believe should be treated in this proceeding. The attached Appendix specifies four additional rule modifications which will cure certain apparent defects or clarify our Report and Order in Docket 19988, supra. First, we shall delete the reference in Section 76.251(a)(4) to former Section 76.201. Second, we restore the subheading '[Leased] access channels' to Section 76.251(a)(7) which was amended by our action in Docket 19988. Third, we wish to denote that systems providing public access service pursuant to Section 76.251(c) need not comply with the cablecasting equipment requirements of Section 76.253. Therefore, we shall amend Section 76.253(d) which already exempts those systems providing public access service pursuant to either Section 76.251(a) or Section 76.251 (b).

Finally, we have amended Section 76.253(a) to make it clear that the facility requirement applies to systems with 3,500 or more subscribers and to technically-integrated conglomerates having a total of 3,500 or more subscribers but does not apply independently to 3,500 or more subscriber systems that are part of larger conglomerates. That is, such larger conglomerates need have only one set of equipment available even though individual communities that are part of the conglomerate themselves have more than 3,500 subscribers.

Authority for the rules adopted in the Appendix attached hereto is contained in Sections 2, 3, 4(i) and (j), 301, 303, 307, 308, 309, 315, and 317 of the Communications Act of 1934, as amended.

Accordingly, IT IS ORDERED, That the petition for reconsideration filed by Mr. Henry Geller IS GRANTED to the extent indicated herein and otherwise IS DENIED.

IT IS FURTHER ORDERED, That Part 76 of the Commission's Rules and Regulations, IS AMENDED, effective August 8, 1975, as set forth in the Appendix attached. IT IS FURTHER ORDERED, That this proceeding is terminated.

FEDERAL COMMUNICATIONS COMMISSION, VINCENT J. MULLINS, Secretary.

SEPARATE STATEMENT OF GLEN O. ROBINSON

I concur in the Commission's disposition of the Geller petition's proposals regarding equal time and fairness insofar as these seem extraneous to this proceeding. I think, however, we should revisit our rules extending the equal time and fairness requirements to cable for I think both the legality and the wisdom of the imposition of such requirements on cable to be questionable.

On the matter of program origination equipment, I adhere to the views which I expressed in my separate statement to the original report and order.

APPENDIX

Part 76 of Chapter I of Title 47 of the Code of Federal Regulations is amended, as follows:

s 76.251 [AMENDED]

1. In s 76.251, paragraph (a)(4) is amended to delete reference to former s 76.201, and paragraph (a)(7) is amended to incorporate the subheading 'Leased access channels.'

2. In s 76.253, paragraphs (a), (b), and (d) are amended, as follows:

*4 s 76.253 Cablecasting equipment requirements for larger cable systems./

(a) Any conglomerate of commonly-owned and technically-integrated cable television systems having a total of 3500 or more subscribers, or any system having 3500 or more subscribers which is not part of such a system conglomerate, shall have available at least the minimum equipment necessary for local production and presentation of cablecast programs other than automated services and permit local non-operator production and presentation of such programs. Operators of such systems or system conglomerates shall make a reasonable effort to provide channel time for presentation of such programs.

(b) Any cable system having made available the equipment described in paragraph (a), either voluntarily or pursuant to paragraph (a), shall comply with the following requirements:

*

(d) This section shall become effective on January 1, 1976: Provided, however, That if a cable system makes available the equipment described in paragraph (a) at an earlier date, such system shall comply with paragraphs (b) and (c) of this section at that time: And provided, further, That if a cable system is providing any public access services pursuant to s 76.251(a), (b), or (c), this section shall not be applicable to such system.

1 His filing is on behalf of himself as an individual and not for any sponsoring organization.

2 A further pleading relating to this Docket was filed, out of time, by Citizens for Cable Awareness in Pennsylvania and the Philadelphia Community Cable Coalition. In view of the statutory requirement of Section 405 of the Communications Act that rehearing petitions 'must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of,' and the requirements of Section 1.106 of the rules, the views of PCCC are not formally considered herein, although that pleading has been reviewed informally. We find nothing in PCCC's disagreement with our deletion of the mandatory origination requirement that was not considered in our Report and Order in this proceeding or that would cause us to reevaluate that decision now. Nor do we agree with PCCC that the Administrative Procedure Act has been violated because the precise terms of the rules finally adopted were not specifically set forth in the Notice of Proposed Rule Making and Notice of Inquiry in Docket 19988, FCC 74 315, 46 FCC 2d 139 (1974). We believe adequate notice of the nature of the proposals under consideration was given.

3 See Section 76.253(c) and the similar language found in Section

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Was the Fairness Doctrine a "Chilling Effect"?
Evidence from the Postderegulation Radio Market

THOMAS W. HAZLETT AND DAVID W. SOSA

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WAS THE FAIRNESS DOCTRINE A "CHILLING EFFECT"? EVIDENCE FROM THE POSTDEREGULATION RADIO MARKET

*THOMAS W. HAZLETT AND DAVID W. SOSA**

ABSTRACT

The stated rationale for the Fairness Doctrine was to encourage more information to be aired by radio and TV stations, on the theory that private broadcasters would tend to underprovide a public good—news about important social issues. Yet, the danger has been seen, at the U.S. Supreme Court, the Federal Communications Commission, and elsewhere, that there exists a potentially unconstitutional "chilling effect": the prospect of having to award equal (unpaid) time to dissenting points of view constitutes a tax on controversial speech. In that the Doctrine was abolished in 1987, the radio market now allows us to observe licensees' unregulated choices in selecting the profit-maximizing quantity of informational programming. Industry data show a clear break in the trend around 1987, when informational formats began rising relative to others—evidence suggesting just the "chilling effect" feared by the Supreme Court.

I. INTRODUCTION

THE Fairness Doctrine (FD) is perhaps the most controversial content regulation that has ever been applied to broadcasters in the United States. Formally imposed by the Federal Communications Commission (FCC) in 1949,[1] it was abolished by the agency in August 1987[2] after a decades-long debate in the courts, law reviews, the Commission, and Congress. The Doctrine consisted of a two-pronged mandate which both radio and television

* Hazlett is Professor of Agricultural and Resource Economics and Director, Program on Telecommunications Policy, University of California, Davis; Sosa is Doctoral Student, Department of Agricultural & Resource Economics, University of California, Davis. A previous version of this paper was delivered at the Southern Economic Association meetings in New Orleans, November 1995. The authors thank session participants for their thoughtful suggestions. An anonymous referee provided helpful comments.

[1] Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949).

[2] Syracuse Peace Council: Memorandum Opinion and Order, 2 F.C.C. Rcd 5043 (1987). See also Robert D. Hershey, Jr., F.C.C. Votes Down Fairness Doctrine in a 4–0 Decision, N.Y. Times, August 5, 1987, at A1.

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stations would have to meet in order to gain a license or license renewal.[3] First, licensees had an *affirmative obligation* to provide coverage of "vitally important controversial issues of interest in the community served by the broadcaster." Second, an *equal access* mandate required licensees to "provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues."[4] Justification for the FD stemmed from a widespread belief that informational programming (especially controversial material) might be undersupplied in an unregulated market. The Commission regularly asserted until the early 1980s that the two prongs of the FD, taken together, would increase both the coverage of controversial public issues and the presentation of diverse viewpoints on such issues, thereby remedying a market failure.[5]

The FD, however, involves the government in regulating broadcast content, a function that appears to come dangerously close to compromising the First Amendment. In the 1964 *Fairness Doctrine Primer,* which was intended to "advise broadcast licensees and members of the public of the rights, obligations, and responsibilities of [broadcasters] under the Commission's 'fairness doctrine,' "[6] the FCC stated: "In passing on any [Fairness Doctrine] complaint . . . the Commission's role is not to substitute its judgment for that of the licensee as to any . . . programming decisions, but rather to determine whether the licensee can be said to have acted reasonably and in good faith."[7] As ultimate arbiter over the "fair and balanced presentation of all public issues,"[8] the FCC assumed tremendous power over licensees' programming choices. Opponents of the FD argued that this power lent itself to abuse by regulators pressured by political factions. Self-censorship would result in a "chilling effect" on the flow of controversial speech.

Nevertheless, the Supreme Court accepted the FCC's assertion that the

[3] The Commission assigns radio and television licenses by an administrative review process. Originally licenses had to be renewed every 3 years. In 1981 the license period was extended to 5 years for television, 7 for radio. The Telecommunications Act of 1996 extends the license period to 8 years for both radio and television.

[4] The General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C. 2d 145, 146 (1985). The original *equal access* directive did not specify under what conditions the licensee was to grant respondents airtime. In 1963, the FCC expanded the FD by instituting what became known as the Cullman doctrine (Cullman Broadcasting, 40 F.C.C. 576 (1963)), which required that if one side of a controversial issue was presented, the other side must also be presented, even if no one would pay for airtime.

[5] Tim Brennan, The Fairness Doctrine and Public Policy, 33 J. Broadcasting & Electronic Media 419 (1989).

[6] Fairness Doctrine Primer, 40 F.C.C. 598 (1964).

[7] *Id.* at 599.

[8] 13 F.C.C. 1251.

FD was beneficial to broadcast audiences by increasing the supply of informational programming. In the landmark 1969 decision, *Red Lion,*[9] the Supreme Court ruled that the FD was constitutional, contingent on the validity of the Commission's assertion that the net effect of the rule on the flow of controversial speech was positive.

Because the Doctrine was abolished in 1987, we now have data with which to gauge whether a "chilling effect" was in evidence under the FD.[10] The popular press, in fact, has repeatedly provided commentary that the elimination of the FD has instrumentally affected the sort of programming offered by radio and television stations. This is the first study to rigorously test for a "chilling effect." Following a brief history of the FD, we develop a partial equilibrium model that illustrates the effects of the Doctrine's incentives on broadcasters' programming decisions. Finally, we examine the effects of changes in broadcast regulation on informational programming on AM radio between 1975 and 1995. Specifically, we consider the impact of the elimination of certain content regulation in 1981, the dropping of the FD in August 1987, and the issuance of a large quantity of new licenses (particularly for FM stations) by the Commission over the period in question.

II. A Brief History of the Fairness Doctrine

The Federal Communications Commission was created in 1934 to manage access to the airwaves according to "public interest, convenience and necessity."[11] In addition to developing a federal licensing system for broadcasters, the FCC identified certain types of speech as essential to upholding the public interest standard. In particular, news and public affairs program-

[9] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

[10] Despite the repeal of the FD, the existence of a "chilling effect" is not simply of historical interest. Rather, it is of front-burner significance in ongoing public policy analysis. First, the prevailing regulatory structure, complete with FCC licensing in the public interest and continuing content controls including requirements for children's educational programming, depends on the empirical absence of a "chilling effect." Second, the FD could be reinstituted by Congress or the FCC at any time; indeed, several efforts to codify the Doctrine arose in Congress between 1987 and 1993. Finally, the regulatory structure for new electronic media, particularly private computer networks connected via the Internet, is being crafted by Congress, the FCC, and the courts. The legality of content controls, and more generally the existence of a "chilling effect" from forced access rules such as the FD (rules promoting nonprovider speakers "free" time or mandated network participation), is likely a determinative issue.

[11] The FCC took over the task of licensing users of the electromagnetic spectrum, a function originally assigned the Department of Commerce and Labor in the Radio Act of 1912 and then the Federal Radio Commission in the Radio Act of 1927. See Ronald Coase, The Federal Communications Commission, 2 J. Law & Econ. 1 (1959); and Thomas W. Hazlett, The Rationality of U.S. Regulation of the Broadcast Spectrum, 33 J. Law & Econ. 133 (1990).

ming were considered especially important in the interest of maintaining an informed electorate. As the Commission stated in 1949:

> It is axiomatic that one of the most vital questions of mass communication in a democracy is the development of an informed public opinion through the public dissemination of news and ideas concerning the vital issues of the day. . . . The Commission has consequently recognized the necessity for licensees to devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community served by the particular station. And we have recognized, with respect to such programs, the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning these vital and often controversial issues which are held by the various groups which make up the community.[12]

Furthermore, the Commission long asserted that the broadcast market was imperfect, with grave consequences for informational and public affairs programming.[13] Because creating a knowledgeable citizenry is very nearly a pure public good, the FCC argued that licensees would be unable to internalize the benefits associated with certain format types. In its analysis of radio programming, the Commission formulated a fundamental dichotomy between entertainment and nonentertainment formats. While the Commission believed that broadcasters could internalize benefits from the provision of entertainment formats (principally music), this was not the case for nonentertainment formats, principally news, information, and public affairs programming.[14]

This perception of market failure found support in academic circles from traditional models of program choice first introduced by Peter Steiner in 1952.[15] Extending Hotelling's[16] work on locational competition, Steiner (and later authors) concluded that in a market characterized by monopolistic

[12] 13 F.C.C. 1249.

[13] The perception of this source of market failure was widely held. For example, Judge David L. Bazelon, who was among the most vocal critics of the FD, argued, ironically, that news and public affairs programming "is a perennial loss leader and arguably without FCC intervention to insist upon it, a requirement found in the Fairness Doctrine, licensees might just do away with it" (David L. Bazelon, FCC Regulation of the Telecommunications Press, 1975 Duke L. J. 213 (1975)).

[14] The FCC used the terms "informational programming" and "nonentertainment programming" interchangeably when regulating program content. See Deregulation of Radio: Notice of Proposed Rulemaking, 73 F.C.C. 2d 457 (1979); and Deregulation of Radio: Report and Order, 84 F.C.C. 2d 968 (1981). This illustrates the regulatory view that news and public affairs shows were not "entertaining" and would, hence, be undersupplied.

[15] Peter O. Steiner, Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting, 66 Q. J. Econ. 194 (1952).

[16] Harold Hotelling, Stability in Competition, 34 Econ. J. 41 (1929).

competition, broadcasters will choose formats of "excessive sameness." This conclusion corresponded with the common recognition that the three major broadcast TV networks routinely aimed for the "lowest common denominator," exhibiting widespread conformity in programming production choices. As Owen and Wildman note: "Steiner-type models have been enormously successful in academic and policy circles because of . . . the consistency of their results with the perceived failure of the advertiser-supported broadcast industry to satisfy consumers' diverse tastes."[17] This "overconformity" view of broadcast programming, combined with the perception that informational programming was less profitable than entertainment programming, reinforced the belief that news and public affairs shows would be undersupplied by unconstrained, profit-maximizing stations and that regulatory intervention was necessary to correct the problem.

To affect broadcasters' programming choices, the Commission developed two principal policy tools. Rules designed to directly change programming decisions, such as the FD, are commonly referred to as *content* regulation.[18] This is distinct from *structural* regulation, which, while formally content neutral, is designed to indirectly influence programming decisions through changes in market structure.[19]

Content regulation, especially the FD, has always walked a constitutional fine line. While the Commission repeatedly asserted that it was not in the business of telling licensees what speech to broadcast, it never clarified the vague mandates of the Doctrine.[20] This raised critical legal implications, as political discretion in enforcing undefined content standards can easily lead

[17] Bruce M. Owen & Steven S. Wildman, Video Economics 65 (1992).

[18] While many, including Judge Bazelon, viewed the FD as "the most overt form of program regulation in which the FCC engages" (Bazelon, *supra* note 13, at 219), there were several other rules governing broadcast content developed at different times. Nonentertainment guidelines were established to ensure that stations broadcast a minimum amount of news, talk, and public affairs programming. Commercial guidelines limited the amount of time broadcasters could devote to advertising. Stations were required to survey community leaders (ascertainment) and respond to community concerns with specific programming. *Equal time* rules still in effect ensure all major candidates for public office the same amount of airtime or news coverage as given their opponents. Note that content controls are also referenced as "behavioral regulation."

[19] Structural rules include limits on ownership concentration, incentives for minority ownership, and prohibitions on certain cross-ownership positions. For a discussion of minority preferences, see Matthew L. Spitzer, Justifying Minority Preferences in Broadcasting, 64 S. Cal. L. Rev. 293 (1991); and Jeff Dubin & Matthew L. Spitzer, Testing Minority Preferences in Broadcasting, 68 S. Cal. L. Rev. 841 (1995).

[20] For example, in 1979 the Commission admitted that "[a]lthough the Fairness Doctrine requires stations to provide coverage of controversial issues of interest to the community, we have never defined the term 'community' as it applies to fairness issues" (73 F.C.C. 2d 517).

to censorship, violating the First Amendment.[21] The prevailing precedent is the 1969 Supreme Court ruling in *Red Lion*. In this case, radio station WGCB appealed to the Court to overturn a Commission ruling ordering the station to grant free airtime to a journalist who had filed an FD complaint.[22] The Court upheld the FCC's position that a broadcaster could legally be forced, under the threat of license nonrenewal or revocation, to provide *free* airtime to a speaker demanding the right to respond to a controversial broadcast. This was deemed permissible, despite the First Amendment's prohibition on laws regulating speech and the press, based on the so-called physical scarcity doctrine[23] and faith in the FCC's assertion that the Doctrine increased the overall flow of informational and, most particularly, controversial speech. However, the Court specifically noted a potential "chilling effect" from FD enforcement:

> It is strenuously argued that . . . if political editorials or personal attacks will trigger an obligation in broadcasters to afford the opportunity for expression to speakers who need not pay for time and whose views are unpalatable to the licensees, then broadcasters will be irresistibly forced to self-censorship and their coverage of controversial public issues will be eliminated or at least rendered wholly ineffective. Such a result would indeed be a serious matter, for should licensees actually eliminate their coverage of controversial issues, the purposes of the doctrine would be stifled. . . . And if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications.[24]

Given a trial record which excluded any evidence of such an impact, the Court concluded that the possibility of a "chilling effect" was "at best speculative." The FD, and behavioral regulation generally, was upheld. Since the abolition of the FD in August 1987, however, the Supreme Court's conclusion has become a testable proposition. How has the marketplace responded to removal of the potential "chilling effect"? Has informational programming increased or decreased in aggregate? A quarter century after *Red Lion* we have the opportunity to empirically examine the effects of the FD on electronic speech.

[21] The legal history of the FD is beyond the scope of this paper. See Fred W. Friendly, The Good Guys, the Bad Guys, and the First Amendment (1975); Bazelon, *supra* note 13; and Lucas A. Powe, American Broadcasting and the First Amendment (1987).

[22] The actual regulations at issue were the so-called personal attack rules, considered sister regulations to the FD, with precisely the same constitutional issues at stake. A journalist who had written a book on Barry Goldwater had been sharply criticized on the radio station, and the dispute was over how a reply should be handled. WGCB had offered the journalist the chance to respond on the air under the same terms and conditions which had been offered the original (offending) speaker. (The personal attack came in a 15-minute broadcast which had been purchased from the station for $7.50; the complainant was offered the same deal.)

[23] That this rationale for regulation was uncompelling to economists has been clear since Coase (*supra* note 11).

[24] 395 U.S. 393.

III. An Economic Model of the Fairness Doctrine

Enforcement of the FD was triggered by a complaint filed by a private party alleging an FD violation. The Commission would then request that the licensee in question respond to the complaint. The process would occasionally lead to a formal hearing by the Commission, during which the licensee's programming choices would be scrutinized in great detail. Most typically, FD complaints were filed either at the time of license renewal or license transfer.[25] The costs (to the licensee) associated with an FD complaint ranged from the legal and lobbying expense involved in responding to the initial accusation, to the award of free airtime to complainants. The most potent weapon the FCC wielded, the capacity to revoke a license or refuse renewal (or transfer) for an uncooperative licensee, was rarely used. Nonetheless, the threat of loss of license was a powerful motivation for dispute settlement as well as behavior modification (as an "electronic publisher") to avoid programming likely to provoke complaints in the first place.

That broadcasters were overwhelmingly successful in protecting licenses from confiscation does not mean that rent-defending expenditures were trivial.[26] One dimension of such "expenditures" is what is, in fact, being tested empirically in observing how removal of the FD changed programming decisions. It should also be noted that some radio stations did lose their licenses pursuant to FD challenges.[27] At bottom, the licensee "failure rate" is a function not only of the credibility of the threat made by regulators to delicense those stations which violate the FD but also of the efforts expended by licensees to resist such appropriation.

A key aspect of the FD regime was that the complaint process was triggered by individuals disgruntled with a station's coverage of public issues

[25] When stations are sold, the FCC must approve transfer of the federal broadcast license as part of the transaction.

[26] One particularly sensational case illustrates this point. In 1970, two Florida television stations owned by the Washington Post were subjected to license challenges by Nixon allies after the Jacksonville station uncovered unfavorable evidence about G. Harold Carswell, the president's embattled Supreme Court nominee. Both challenges were unsuccessful, although the attack against the Miami station lasted 7½ months and was only withdrawn after the Post agreed to pay the challengers' legal fees (Powe, *supra* note 21, at 131).

[27] WLBT (Jackson, Mississippi) in 1969, and WXUR (Philadelphia) in 1973. See Powe, *supra* note 21.

who could "fine" broadcasters by simply filing a fairness complaint.[28] Because defending a license against a formal FD challenge would consume real resources, broadcasters had an incentive to avoid either sort of filing (under the first prong—insufficient coverage of public issues—or the second—unbalanced coverage of public issues). It is apparent that these incentives worked in opposite directions, insofar as the supply of informational programming was concerned. It is ambiguous, therefore, as to whether the FD "chilled" or "warmed" coverage of news and public affairs.

A. *An Affirmative Obligation: The "Warming Effect"*

The first part of the FD, requiring broadcasters to address issues of importance in their communities, can be characterized as an incentive to increase the output of informational programming. If a broadcaster fails to comply with the rule, the FCC can ultimately take away the license. In the limit (as the probability of license revocation or nonrenewal goes to one), the broadcaster will invest the present value of the license (L) to ensure compliance. However, as the output of informational programming increases, the likelihood that the station will lose its license in an FD challenge falls.[29] There are still real costs incurred by licensees associated with defending against unsuccessful, even frivolous, fairness complaints, but we assume that these costs are highly correlated with the expected loss of rents. Thus the penalty function for the broadcaster under the first prong of the FD,

$$R_1(I) = Lp_1(I),$$

is equal to the expected loss in rents from an FD challenge, for a given supply of informational programming, where

$R_1(\ )$ = expected lost rents;[30]
I = the quantity of informational programming supplied;
$p_1(\ )$ = the probability of license revocation or nonrenewal pursuant to an FD complaint under the first prong; and $\partial p_1(I)/\partial I < 0$, because the probability of a successful FD challenge under the first prong falls as the supply of informational programming increases.

[28] For example, the 1985 FCC proceedings investigating the FD recount a battle that ensued over a California referendum on a glass recycling program. The beverage industry prepared an advertising campaign in opposition to the bottle bill. When the pro-bottle lobby learned of the advertisements, they wired 500 stations demanding twice the amount of airtime free from any station accepting the commercials. Two-thirds of the stations subsequently refused the bottle industry's ads (102 F.C.C. 2d 176).

[29] Probably very rapidly. That is, once some threshold level of news programming is provided, the chances that the station will lose its license falls close to zero. Indeed, the FCC routinely identifies "safe harbors" which inform licensees as to what minimum standards will protect them against license challenges for insufficient quantities of nonentertainment programming.

[30] Or rent-defending expenditures.

We can characterize the first-prong incentive as a penalty incurred by the licensee attempting to protect license rents, L, against a petitioner claiming that the licensee did not offer the sufficient quantity of informational programming. We assume that FCC enforcement of the FD is sufficiently predictable that if the licensee does not supply any informational programming, he is sure to lose his license ($p_1(0) = 1$).

B. *Informational Programming as a Liability: The "Chilling Effect"*

The second FD prong, requiring broadcasters to present balanced perspectives on the coverage of public affairs encouraged in the first prong, has the effect of making each unit of informational programming more costly by raising the probability that an FD challenge will be filed.[31] As broadcasters increase the amount of controversial programming, they increase the likelihood that they will incur a demand for free airtime under the FD.

The lost rents associated with violating the second prong of the Doctrine would encompass the legal fees incurred responding to an FCC inquiry, providing free airtime to the plaintiff, and incurring loss of a license. Because rent-defending expenditures are highly correlated with the expected loss, the penalty function would be of the form

$$R_2(I) = Lp_2(I),$$

where

$p_2(\ )$ = the probability of license revocation or nonrenewal under the second prong of the FD; $\partial p_2(I)/\partial I > 0$, since an increase in the supply of informational programming will raise the probability of a successful FD challenge under the second prong; and
$p_2(0)$ = 0, as we assume that in the extreme case of zero supply of informational programming, no FD challenge under the second prong would be possible.

[31] This, of course, does not imply that stations have no commercial interest in "fairness," only that the possibility of FD penalties impact the licensee's program choices at the margin.

C. *Net Effects: Global Warming or Planetary Cooling?*

Assuming profit-maximizing behavior and using the FCC's entertainment/nonentertainment format dichotomy, the objective function for a broadcaster in the absence of the FD would be

$$\max_{I,E} \left\{ \Pi = [P_I, P_E] \cdot \left[\frac{I}{E} \right] - TC(I, E) \right\},$$

where

P_I and P_E = price vectors of advertising time for informational and entertainment programming, respectively;
I and E = the output quantities of informational and entertainment programming;
$I + E$ = 24 hours;

and we assume that informational programming can be controversial whereas entertainment is not controversial, and that broadcasters exhibit price-taking behavior.

In an unregulated (no FD) market, the equilibrium solution is $P_I = \mathrm{MC}_I$, yielding a quantity of informational programming I^*. This represents the traditional determination of the quantity of informational programming supplied and demanded.

Now we consider the effects of the FD on format choice. Adding penalty functions for the two FD prongs, the broadcaster's new objective function would be

$$\max_{I,E} \left\{ \Pi = [P_I, P_E] \cdot \left[\frac{I}{E} \right] - TC(I, E) - Lp_1(I) - Lp_2(I) \right\}.$$

Solving the objective function yields

$$P_I = \mathrm{MC}_I + L[\partial p_1(I)/\partial I + \partial p_2(I)/\partial I].$$

Thus, the supply function for informational programming is shifted by the penalty functions. Whether supply shifts out in response to the FD, increasing the equilibrium output, or shifts in, reducing output, depends on the sign of the term in brackets (that is, which FD effect dominates). The equilibrium quantity of informational programming increases if

$$[\partial p_1(I)/\partial I + \partial p_2(I)/\partial I] < 0$$

and falls if

$$[\partial p_1(I)/\partial I + \partial p_2(I)/\partial I] > 0.$$

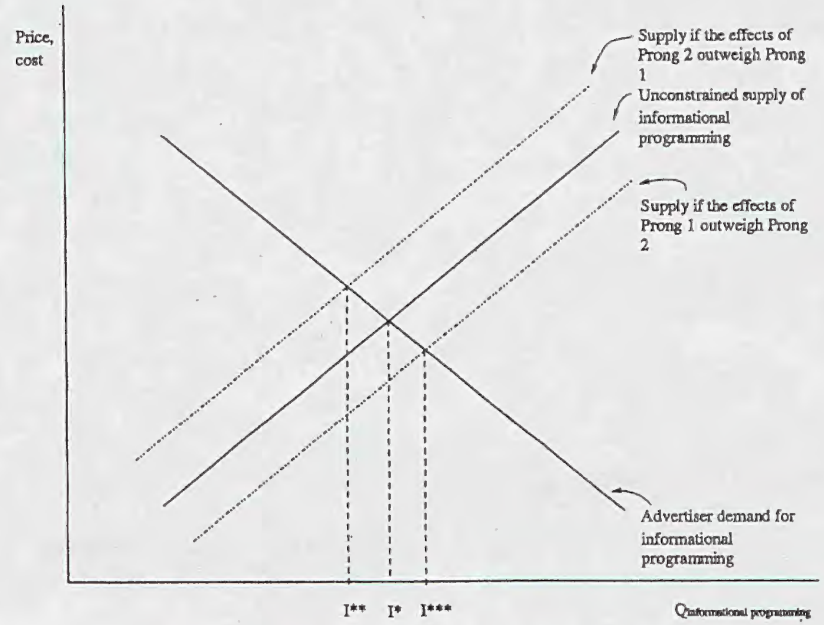

FIGURE 1.—Equilibrium effects of the Fairness Doctrine

Hence, the net effect of the FD on the supply of informational programming is ambiguous. (See Figure 1.)

For decades, the FCC promulgated and enforced the Doctrine with the argument that it stimulated the supply of informational programming. The Supreme Court, when it formulated the constitutional test for the FD in *Red Lion,* accepted the Commission's assertion that neither of the Doctrine's prongs had a negative effect on informational programming. However, by 1985 the Commission embraced a different view, stating:

> Because a decision by this Commission to deny the renewal of a broadcast license is "a sanction of tremendous potency" which can be triggered by a finding by this Commission that the licensee failed to comply with the Fairness Doctrine, a licensee has the incentive to avoid even the potential for such a determination. Therefore, in order to attenuate the possibility that opponents, in a renewal proceeding, will challenge the manner in which a licensee provides balance with respect to the controversial issues it chooses to cover, a broadcaster may be inhibited from pre-

senting controversial issue programming in excess of the minimum required to satisfy the first prong of the fairness doctrine.[32]

This finding of a "chilling effect" was then taken by the Commission to be of sufficient magnitude to dominate any potential benefits (the "warming effect") of the FD, which the agency abolished on the rationale that it lessened the quantity of informational programming.

Did the FD warm or chill? After the 1987 elimination of the FD, we are poised to test for its effects. On the one hand, if it had, on net, a warming effect, we could expect the equilibrium quantity of informational programming in Figure 1 to fall from I^{***} to I^{*}, as supply shifts in, in the wake of the FD repeal. On the other hand, if the FD had a net "chilling effect," we would expect informational programming to increase from I^{**} to I^{*}, as supply shifts out following repeal of the rule in 1987. It is this issue we seek to resolve by observing format choices made by FCC licensees in the radio broadcasting market before and after the FD.

IV. Applying the Supreme Court's Test

A. *The U.S. Radio Market, 1975–95*

In examining the 1975–95 period in the U.S. radio market there are three important "events" to consider. First, there is rapid growth in the overall number of radio stations, with the growth coming primarily in the FM band (see Figure 2). FM, which had been long suppressed by FCC policy,[33] finally came of its own in the 1960s (following the FCC's authorization of stereo broadcasting on FM [only] in 1961) and passed AM in listening share in 1979.[34] The increasing number of stations was a function of two interactive forces: public policy (more licenses were supplied by the Commission) and market demand (more stations were economically viable).

Second, there was the "Deregulation of Radio," as the FCC called its proceeding that began in 1978 and concluded in January 1981. This rulemaking ended a number of licensing requirements for commercial AM and FM licensees, including the following rules:

Nonentertainment Program Regulation. The FCC eliminated "guidelines" indicating how much informational programming each station

[32] 102 F.C.C. 2d 162. While this statement marked a major departure in FCC policy by admitting that $\partial p_2(I)/\partial I > 0$, it did not reach the conclusion that the net effect of the FD overall was to reduce the flow of controversial speech.

[33] Lawrence Lessing, Edwin Howard Armstrong: Man of High Fidelity (1969).

[34] Vincent M. Ditingo, The Remaking of Radio 18, 60 (1995).

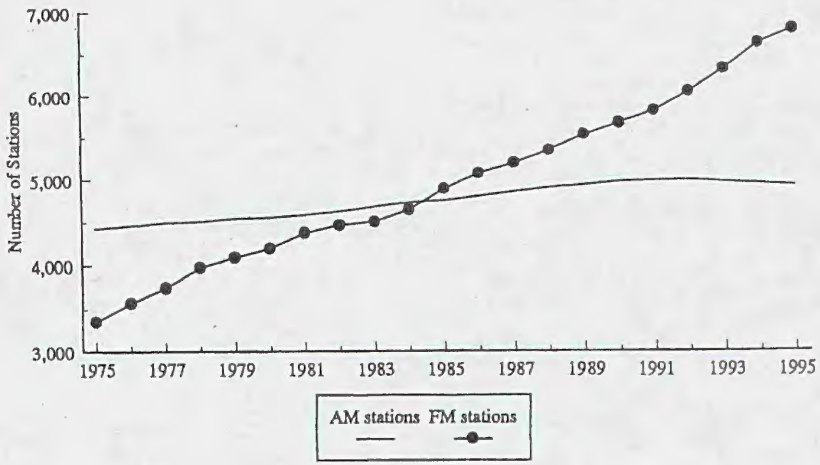

Figure 2.—AM and FM stations (nationwide)

should render to have its license renewed, replacing it with "a generalized obligation for commercial radio stations to offer programming responsive to public issues."

Ascertainment. Elimination of formal documentation of "community needs."

Commercials. Abolition of FCC guidelines on maximum commercial time allowed on radio stations.

Program Logs. Elimination of program logs, to be replaced by "an annual listing of five to ten issues that the licensee covered together with examples of programming offered in response thereto."

The nonentertainment guidelines required AM stations to offer 8 percent nonentertainment programming and FM stations to offer 6 percent. In simple terms, informational programs were considered to be news, talk, and public affairs, while entertainment programming consisted of music. The ascertainment process required stations to survey "community leaders" to determine issues of importance to their listeners and then document the station's response to these concerns through programming. The commercial guidelines set an upper limit on commercial time of 18 minutes per hour. The program-logging rule required stations to record all programs broadcast.

The FCC's stated rationales for deregulation were that market competition could discipline stations more effectively than behavioral rules en-

forced by the government and that the rules themselves led to numerous inefficiencies.[35]

Third, there followed the abolition of the FD in August 1987. This has been described above.

B. *Radio Formats*

To analyze the effects of the FD on broadcasters' format choices, we obtained data on radio programming[36] for both AM and FM broadcasters nationwide over the period 1975–95.[37] These data are summarized for AM radio in Table 1.

Throughout the interval, music is the dominant broad category.[38] Yet, there is a pronounced upward trend in the number of formats reported over this period. In 1975 the music category was dominated by only a few formats such as *country-western* and *adult contemporary.* By 1995 the music category consisted of more than 20 specific formats, including *urban contemporary, new age,* and *bluegrass.* If the number of identifiable formats is considered a broad (if crude) measure of the diversity in programming available to the consumer, the overall trend is toward an increase in program listening choices.

Starting with raw data from the 29–45 categories reported by the *Broadcasting and Cable Yearbook,* we aggregate formats into five broad categories: music, information, religious, foreign language/ethnic, and mixed.[39]

[35] As noted by Commissioner James Quello, the Commission recognized that "the process of license renewal appears to be a very expensive, time-consuming method of ferreting out those few licensees who have failed to meet a subjective 'public interest' standard of performance." The principal objective of the 1981 deregulation was to streamline this renewal process, with the conviction that "the enormous savings in time and money could be used for more constructive purposes in programming and news" (73 F.C.C. 2d 594).

[36] The other market regulated by the FD, broadcast television, also merits study. Measurement of program content is made problematic there, however, by the lack of distinct station formats; each show must be characterized as information or entertainment programming. We await further research in this arena.

[37] The source was the Broadcasting and Cable Yearbook (1975–95), which publishes detailed information on broadcasters, including a list of stations by principal format. A principal format (as defined by the Yearbook) is one that the station broadcasts for more than 20 hours per week. Under this definition, it is possible for a station to have more than one principal format. Our data series begins in 1975 because this was the first year the Yearbook compiled comprehensive data on radio stations by format.

[38] Music accounts for 90.8 percent of AM programming in 1975, falling to 51.7 percent in 1995. In FM the share of music formats falls from 89.8 percent to 79.6 percent over the period.

[39] The "mixed" category consists of formats such as *agriculture* and *drama/literature,* which neither fit well into one of the other categories nor have any clear relationship between one another.

TABLE 1

AM RADIO STATION FORMAT SUMMARY: 1975 AND 1995

MUSIC			INFORMATIONAL			RELIGIOUS			FOREIGN/ETHNIC			MIXED		
	Year			Year			Year			Year			Year	
	1975	1995		1975	1995		1975	1995		1975	1995		1975	1995
Adult contemporary	944	583	News	75	295	Gospel	0	315	Native American	5	3	Agriculture	13	66
Beautiful music	52	94	News/talk	0	854	Religious	142	597	Filipino	0	1	Children	0	16
Big band	1	129	Public Affairs	10	18				Foreign/ethnic	9	55	Comedy	1	1
Black	165	108	Talk	130	396				French	3	3	Drama/literature	1	0
Bluegrass	0	16							Greek	2	5	Educational	0	19
Blues	0	21							Italian	3	1	Other	0	34
Classical	21	17							Japanese	2	2	Sports	0	325
Classic rock	0	48							Polish	2	4			
Country	1,199	1,221							Portuguese	0	6			
Disco	0	1							Spanish	62	286			
Folk	0	1												
Jazz	5	22												
Middle of the road	1,404	333												
New age	0	7												
Nostalgia	0	85												
Oldies	67	486												
Polka	4	4												
Progressive	47	15												
Rock/AOR	168	53												
Top 40	254	70												
Urban contemporary	0	102												
Variety	216	122												

SOURCE.—Broadcasting and Cable Yearbook (1975, 1995).

FIGURE 3.—Selected AM format categories (nationwide: 1975–95)

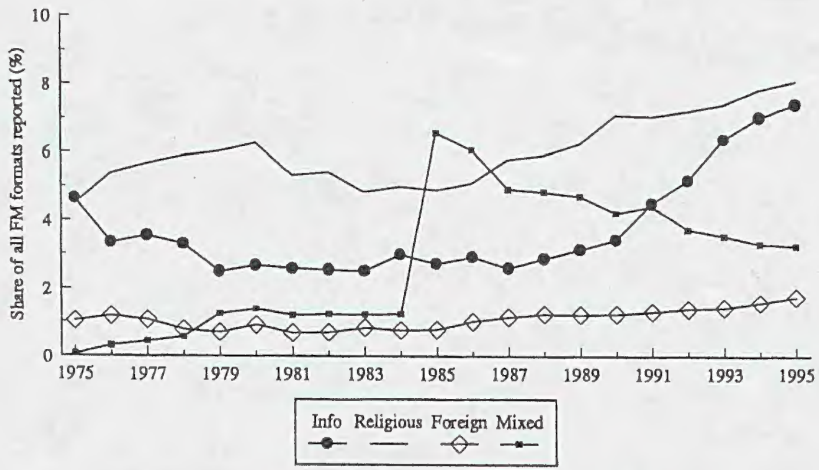

FIGURE 4.—Selected FM format categories (nationwide: 1975–95)

Grouping the *Yearbook* formats into five broad groups minimizes sampling error associated with categorizing programming.

In Figures 3 and 4 we have omitted the shares accounted for by music formats, which form the residual category. While there appears to be an upward trend in each of the nonmusic categories over the entire 1975–95

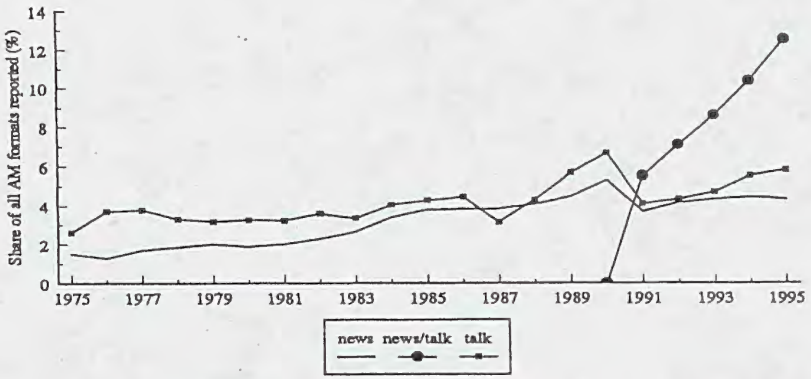

FIGURE 5.—AM information formats (nationwide: 1975–95). The share of public affairs programming is negligible.

range, the trend in informational programming is most dramatic. The share of informational programming on FM increases from 4.64 percent in 1975 to 7.39 percent in 1995. The more dramatic increase is in the AM band, where the share of informational programming goes from 4.29 percent to 27.60 percent. Particularly impressive is the increase in AM informational share from 7.11 percent in 1987 to 27.60 percent in 1995.

Figures 5 and 6 show the breakdown of the informational category into news, news/talk, public affairs, and talk.[40] We see that in AM the news/talk format drives the later increases in informational programming. Interestingly, in the FM band it is a surge in news formats that drives the rise in informational formats.

C. *Testing Regime Changes*

In this section we examine the effects of the 1987 elimination of the FD on the observed quantity of informational programming on AM radio.[41] In

[40] News/talk was a new category in 1990. It, obviously, is a combination of the two formats.

[41] We do not analyze the FM format data because of a change in reporting beginning in 1985, when the category *educational* was introduced. While this change affected both AM and FM, the effects on FM were much more dramatic. The broad category *mixed,* which includes the *educational* format, jumps from a 1.55 percent share in 1984 to a 6.56 percent share in 1985, as a result of this change in reporting.

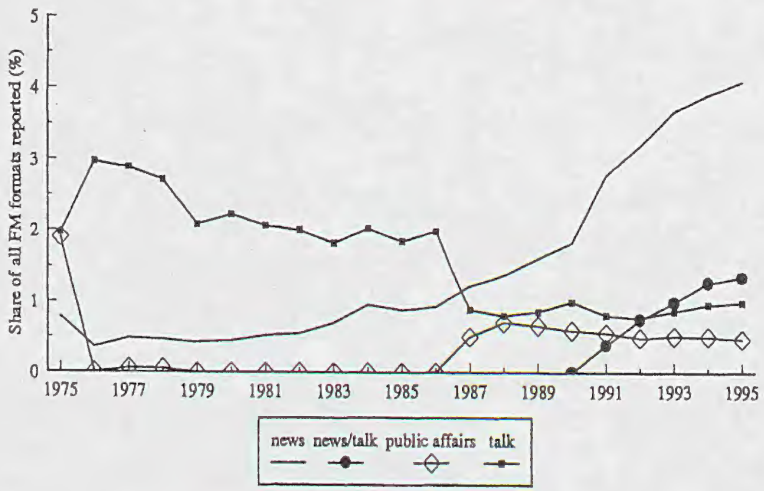

FIGURE 6.—FM information formats (nationwide: 1975–95)

keeping with the basic framework of the Steiner model, given a small number of stations in any market, we expect to see most stations concentrating on entertainment formats. However, with new entry, stations should attempt to diversify into nonentertainment formats such as informational programming. The years 1975–95 correspond to a period of high licensing activity by the FCC.

We model INFO, the share of informational program formats as a percentage of all types of formats on AM radio, as a function of the number of competing stations on AM (AMS) and FM (FMS). Thus for informational programming:

$$\text{INFO}_t = \beta_0 + \beta_1\text{AMS}_t + \beta_2\text{FMS}_t + \epsilon_t. \quad (1)$$

Within this framework, we attempt to determine the effects of the deregulatory events on informational programming in AM radio. We use a single-date switching regression framework based on (1) to find the most likely date for a regime switch date over the period. The model is as follows:

$$\text{INFO}_t = \beta_{01} + \beta_{11}\text{AMS}_t + \beta_{21}\text{FMS}_t + \epsilon_{1t}, \quad t = 1, \cdots, t_{k-1};$$

and

$$\text{INFO}_t = \beta_{02} + \beta_{12}\text{AMS}_t + \beta_{22}\text{FMS}_t + \epsilon_{2t}, \quad t = t_k, \cdots, T;$$

where t_k is the switch date (the first year of the new regime). Our goal is

TABLE 2

SWITCH DATES FOR AM INFORMATIONAL FORMATS

Date	Posterior Odds Ratio	ln $\mathcal{L}$
No switch		−38.832
1979	.000	−17.830
1980	.000	−20.137
1981	.000	−19.550
1982	.000	−17.611
1983	.001	−15.994
1984	.003	−14.955
1985	.048	−12.104
1986	.034	−12.453
1987	1.000	−9.063
1988	.032	−12.492
1989	.027	−12.673
1990	.070	−11.723
max (ln $\mathcal{L}$)		−9.063

NOTE.—The posterior odds ratio (POR) is the ratio of the probability of the switch occurring at a particular date to the probability of the switch occurring at the maximum likelihood estimate date.

to estimate t_k using a maximum likelihood (ML) procedure suggested by Goldfeld & Quandt[42] and applied by Mankiw et al.[43]

Assuming normally distributed errors, the log-likelihood function for the model is

$$\ln\mathcal{L} = -(T/2)\ln(2\pi) - (t_{k-1})\ln(\sigma_1^2) - (T - t_{k-1})\ln(\sigma_2^2) - \left(\frac{1}{2\sigma_1^2}\right)\epsilon_1'\epsilon_1 - \left(\frac{1}{2\sigma_2^2}\right)\epsilon_2'\epsilon_2,$$

where σ_1^2 and σ_2^2 are the error variances under the pre- and postderegulation regimes, respectively. We can determine the ML estimate of t_k by computing the ML estimates of the parameters for all possible t_k and then choosing the value that maximizes the log-likelihood function above.

The MLE values for various switch dates are reported in Table 2. According to these results, the most likely date for a structural change in the

[42] Stephen M. Goldfeld & Richard E. Quandt, The Estimation of Structural Shifts by Switching Regressions, 2 Annals Econ. & Soc. Measurement 475 (1973).

[43] N. Gregory Mankiw, Jeffrey A. Minon, & David N. Weil, The Adjustment of Expectations to a Change in Regime: A Study of the Founding of the Federal Reserve, 77 Am. Econ. Rev. 358 (1987).

provision of informational programming on AM radio was 1987, coincident with the formal elimination of the FD.

To judge the degree of confidence in these point estimates of the date the new regime began, we calculate the posterior odds ratio for alternative switch dates. Under a diffuse prior (all possible switch dates are equally likely), the ratio of the likelihood values for different switch dates produces the posterior odds ratio

$$\text{POR}(t_k) = \exp\{\ln \mathcal{L}(t = t_k) - \ln \mathcal{L}(t = t_{\text{MLE}})\}.$$

Table 2 reports, for a range of possible switch dates, the posterior odds ratio of that date as a switch date compared to the ML date (for INFO, $t_{\text{MLE}} = 1987$). The calculated PORs give strong evidence that any other date would be unlikely as a switch date in a single switch model. As the estimated switch dates are coincident with the 1987 event, it would appear that the repeal of the FD was an influential regulatory event.

Table 3 reports the regression results under the ML estimated switch date. The results are consistent with the anticipated effects of entry on product differentiation in the Hotelling/Steiner model. Prior to the elimination of the FD, the number of AM stations had a positive effect on the choice to broadcast an information format, as evidenced by the positive coefficient on AMS. However, the effect of FM stations is not statistically different from zero. After the regime change we see that the number of FM stations has a positive effect on the provision of AM information formats, suggesting that the elimination of the FD facilitated greater format substitution between AM and FM. This would follow from the elimination of a regulatory regime that imposed a tax on controversy, thereby improving the competitive position of AM radio (which enjoys a comparative advantage in talk formats).[44] Freed from a constraint on controversial formats, AM licensees' programming would be influenced by new entry in FM, which is dominated by entertainment formats. The negative coefficient on AMS in the post-FD period may seem contradictory; however, the number of AM stations falls slightly from 1993 through 1995. This would be one explanation for the unexpected sign on β_{12}.[45] The fact that INFO rises even as AMS falls during part of the post-FD period is itself compelling evidence of the importance of regulation (vs. competition) in affecting the observed quantity of informational programs.

TABLE 3

REGRESSION RESULTS

	PERIOD	
	1975–86	1987–95
Constant	−64.719***	25.531
	(19.15)	(17.19)
AMS	.017**	−.018***
	(.0053)	(.0038)
FMS	.002	.013***
	(.0012)	(.0003)
ln $\mathcal{L}$	−6.174	−2.889
SSE	1.966	1.001
σ_n	.467	.409

NOTE.—SSE = sum of squared errors.
** Significant at $\alpha = 5$ percent.
*** Significant at $\alpha = 1$ percent.

V. CONCLUSION

> [W]ere it to be shown by the Commission that the fairness doctrine [has] the net effect of reducing rather than enhancing speech, we would then be forced to reconsider the constitutional basis of our decision in [*Red Lion*]. (U.S. Supreme Court in, *FCC v. League of Women Voters of California,* 468 U.S. 364 (1984))

The evidence suggests that the 1987 elimination of the FD had a pronounced effect on radio station formats—in favor of informational programming. Correlation is not causality, but the correlation is very strong. This evidence would seemingly be crucial to the analysis of the FD in both the judicial system and the legislative branch of government. While the Supreme Court is on record as identifying a "chilling effect" as the aspect of the FD which could trigger a successful First Amendment challenge to the FCC's regulatory regime (see passage quoted at the beginning of this section), it has noted that such evidence is not in the record. Within the legislative policy debate, the FCC has been criticized by Congress for its 1985 finding that the FD "chilled" free speech, precisely on the grounds that it reached such a conclusion lacking any factual or "statistical" basis.[46]

[44] Signal clarity in the AM band is inferior to FM, input dollar for input dollar. Therefore FM has a comparative advantage in music formats; AM in nonmusic formats.

[45] Estimation of (1), over the period 1987–92, yields a positive coefficient on both independent variables, further suggesting that the sign of β_{12} in the 1987–95 period is a result of a falling number of AM stations over the last 3 years of the period. Estimating over just 1987–92, we find (standard errors in parentheses):

$$\text{INFO} = \underset{(20.710)}{-57.757} + \underset{(0.0051)}{0.003}\text{AMS} + \underset{(0.0009)}{0.010}\text{FMS}.$$

[46] This criticism intensified sharply after the Commission abolished the Doctrine in August 1987. See Edward Markey, The Fairness Doctrine, Congress, and the FCC, 6 Comm. Lawyer 1 (1988).

To wit, the following interchange between Representative John Dingell (D-Mich.), then chairman of the House Commerce Committee, and Commissioner Mark Fowler, then chairman of the FCC, in House hearings held in April 1987:

> MR. DINGELL: Did you have anything other than anecdotal information about the desperate state of mind in which broadcasters found themselves or did you have some statistical information about the number of programs they would have put on or the number of programs that they did not put on because of the presence of the Fairness Doctrine?
>
> MR. FOWLER: We did not have statistical information per se but that anecdotal evidence as I just said, it seems to me, is highly relevant and probative on the question as to whether or not broadcasters are chilled by the operation of the Fairness Doctrine and we so found.[47]

The debate produced something of a standoff, as previous Commissions had—using similar methods—concluded that the FD did not have a net "chilling effect." Note the statement, at the same House hearings, of former FCC Chairman Charles Ferris, commenting on the FCC's 1985 Fairness Doctrine report:

> The FCC focused only on the supposed chilling effect of the Fairness Doctrine. In my tenure as Chairman of the FCC, I saw no credible evidence of a chilling effect. In fact, during 1979, during my watch, the Commission explicitly found that the Fairness Doctrine enhanced, not reduced, speech. The FCC under my predecessor also conducted [a] broad inquiry into the effects of the Fairness Doctrine in 1974 and found no evidence of a chilling effect. This FCC, in finding a chilling effect in its recent Fairness Doctrine report, relied solely on the self-serving anecdotes of the broadcaster. The FCC made no attempt to reconcile its findings with those of equally expert Commissions in 1974 and 1979. It cited no changed circumstances.[48]

Hence the political demand for market evidence as to the net effect of the economic incentives meted out by the FD.

The statistical results of examination of the pre- and post-FD radio market are buttressed, interestingly enough, by some further "anecdotal" evidence, however. In the wake of the Doctrine's abolition, the marked increase in informational programming was associated with a drive to reinstate the FD. The momentum for this legislative effort was provided, according to those leading the initiative, by the gaining importance of talk radio as a medium of expression. A sponsor of H.R. 1985, a bill entitled

[47] Hearing on H.R. 1934 before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce, House of Representatives, 100th Cong., 1st Sess. 79 (April 7, 1987).

[48] *Id.*

The Fairness in Broadcasting Act of 1993, was Representative Bill Hefner (D-N.C.). A flyer issued by his office openly argued that his measure aimed to control "TV and Radio talk shows that often . . . make inflammatory and derogatory remarks about our public officials. THE FAIRNESS DOCTRINE IS URGENTLY NEEDED."[49] This sort of legislative rationale was commonly characterized in news reports as an attempt to apply pressure on radio broadcasters viewed as antagonistic to Congress and the administration.

Given the evidence presented above, it is not irrational for members of Congress to believe that the FD could indeed alter the quantity of public debate. (Whether changes in quantities affect the terms of debate awaits further study.) The data suggest that even in the absence of free entry, informational programming increased with the lifting of regulatory burdens. This is evidence that the old rules indeed provided a disincentive to broadcasting informational programs. The Supreme Court, if it is still looking for a "chilling effect," might carefully examine this experience in the radio broadcasting market.

[49] Charles Oliver, Can the FCC Muzzle Rush Limbaugh? Inv. Bus. Daily 1 (August 16, 1993).

DENNIS PATRICK
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July 18, 2007

Part 1: INTRODUCTION

On August 4 of this year, we celebrate the 20th anniversary of the date on which American broadcasters were reunited with their constitutional birthright: full First Amendment freedom.

In 1987 I was privileged to the chair the FCC commission that restored those rights by abolishing the so-called Fairness Doctrine and all that it implied.

As twenty years have passed, we thought it an appropriate time to describe how the Commission reached its decision and to offer some observations about the subsequent history.

Surprisingly, since agreeing to speak, some members of congress have resurrected this issue by proposing to codify the doctrine. I suspect they are not motivated solely by the desire to make these remarks more timely and better attended.

For whatever reason, the role of the government in the regulation of our press has been raised again.

And thus, it is out of a sense of both historical interest and current topicality that we look back.

Part 2: Background
The origins of the Fairness Doctrine lie in the FCC's 1949 "report on editorializing by broadcast licensees," 13 FCC 1246. Over time it evolved to encompass two discreet elements:

(1) An affirmative obligation to cover controversial issues of public importance to the community; and

(2) A related "access" element requiring the broadcaster to provide a reasonable opportunity for the presentation of contrasting viewpoints on those issues, even if air time had to be granted for free.

Most would agree that the doctrine encompassed journalistic principles to which most broadcasters would subscribe anyway.

The problem arose from federal enforcement.

The rule empowered the commission---indeed, upon the filing of a complaint, required the commission---
to involve itself in certain key question of content and editorial discretion.

At risk of losing their licenses, broadcasters could be, and were, called upon to defend not only the degree to which they had devoted airtime to covering important public issues but, most problematically, their reasonableness in offering air time to contrasting perspectives on those issues.

This brought a federal agency in to second-guess a broadcaster's judgments as to what issues were sufficiently important to a community to warrant coverage.

Worse, it involved the federal government in deciding which of the potentially many contrasting views warranted airtime -- for how long, by whom, and in what context.

Those subtle judgments, at the heart of the editorial function, were to be assessed by federal officials thousands of miles removed from those communities.

Before its abolition in 1987, "fairness" complaints had been filed in thousands of FCC proceedings, generally at the time of a station's application for renewal. The stakes were high for the broadcaster.

Losing the license to broadcast---silencing the speaker entirely and inflicting a financial penalty measured in millions of dollars---was a real threat.

To avoid even the possibility of such dire consequences, stations expended hundreds of thousands of dollars in attorneys' fees and lost staff time.

But these direct costs grossly understate the true costs of the Fairness Doctrine.

Radio and TV station owners quickly learned that license challenges thrived on controversial news coverage. When a broadcaster simply presented a modicum of bland, uncontroversial "top of the hour" news, and some opinion on very safe issues, the requirements of the Doctrine were cheaply satisfied. Requests for presentation of the opposing views were nil as no hornets' nests were riled. There just weren't many contrasting views to be aired when it came to naming that new park.

License renewals were assured.

It was a much safer and much cheaper strategy--- for broadcasters.

But it was an extremely expensive strategy for the public. Because the cost to society included the issues not covered, the controversies not engaged, the information not conveyed.

To avoid the tax, controversy was avoided and free speech was chilled. Stations imposed internal constraints and avoided airing news or informational programming for fear of entanglement in the regulatory web of Washington.

These indirect costs were borne by the American public and by the electronic press as an institution, whose status as a second class citizen was enshrined by the enforcement of a doctrine which would be unconstitutional without question if applied to the print press.

Inevitably, the constitutionality of the doctrine was challenged .

In Red Lion co. vs. FCC, 395 U.S. 367 (1969), a broadcaster challenged application of the Fairness Doctrine on First Amendment grounds.

While acknowledging that similar federal involvement in the editorial discretion of print journalists would not be tolerated under our constitution, the court accepted an argument that the scarcity of radio frequencies, licensed exclusively to a given broadcaster in the "public interest" allowed for a exception, shielding the doctrine from the First Amendment's blanket prohibition on federal abridgement of a free press.

In reaching its decision, the court relied heavily on the FCC's assurance that the net effect of the doctrine was to increase the coverage of controversial issues.

As if inviting reconsideration based on new or better data, the court added:

"....if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications."

By the early 1980s, the commission believed it had sufficient experience in enforcing the doctrine to proffer the evidence the Red Lion court had solicited.

In its 1985 fairness doctrine report, 102 fcc 2d 145, the FCC concluded:

"the Fairness Doctrine---in stark contravention of its purpose---operates as a pervasive and significant impediment to the broadcasting of controversial issues of public importance."

The commission's conclusion was based on the testimony of countless broadcasters who had declined to cover issues for fear of federal entanglements.

The commission concluded that the net effect of the doctrine was not to expand the coverage of controversial issues by broadcasters, but to reduce it – creating a "chilling effect" on speech protected by the First Amendment.

The commission went on to document a host of additional problems with the doctrine's enforcement, including

- Use of fairness complaints as a weapon to discourage a broadcaster from airing a disfavored opinion; and

- The effect of the doctrine in favoring only orthodox perspectives. This resulted from the fact that a broadcaster could not be expected to air every contrasting view—hence the obligation attached only to "significant" or "major" opposing perspectives. And, of course, commission officials in Washington, as opposed to editors in the communities, were the final arbiters of what was major and what was minor....

The commission's '85 report also documented explosive media growth and questioned the scarcity rationale.

The commission concluded: "we believe that the same factors which demonstrate that the Fairness Doctrine is no longer appropriate as a matter of policy also suggest that the doctrine may no longer be permissible as a matter of constitutional law."

Interestingly, despite these findings on the merits, the commission opined that its authority to eliminate the doctrine was an issue "not easily resolved" and, citing congress' intense interest in the subject, concluded: " it would be inappropriate at this time for us to either eliminate or significantly restrict the scope of the doctrine."

In substance, we concluded it was bad policy and probably unconstitutional, but bowed to congress, and resolved to keep enforcing it.

And we did.

In 1984, the commission had found a tv station in New York in violation of the fairness doctrine for running a paid ad advocating construction of a nuclear power plant while declining to run a piece opposing the construction.

(It may help to elucidate the complexity of "fairness enforcement" to note that this case turned on defining the issue: if the issue was the soundness of nuclear as an investment, the station would lose; if the issue was the need to eliminate reliance on foreign oil, it won.....the station lost, presumably because the FCC knew just what real "issues of local importance" were in Syracuse during the summer of '82.)

Between our finding of a fairness violation and the station's request for reconsideration, the commission released its '85 fairness report concluding, as noted, that the doctrine was terrible public policy and probably unconstitutional.

Understandably, this irritated the broadcaster, Meredith, which amended its petition for reconsideration to raise the constitutional question.....

As in, "well, gee guys, why are you enforcing a doctrine you believe disserves the public interest and is probably unconstitutional??"

The commission denied reconsideration, affirmed its finding of a violation, and refused to rule on Meredith's constitutional claim, contending that congress and the courts were the better venue to resolve the constitutional question.

The United States Circuit Court for the District of Columbia disagreed.

In January of 1987, the DC Circuit remanded the Meredith case to the FCC and directed us to address the constitutional challenge.

The court noted the Fairness Doctrine was FCC policy, not statutory law (Telecommunications Research and Action Center v. FCC, 801 f.2d 501) and that the commission itself had "largely undermined the legitimacy of its own rule....[by a] report that eviscerates the rationale for its existing regulations." Meredith Corporation v. FCC, 809 f.2d 863.

In a stinging rebuke to the FCC, the court reprimanded the commission for ducking the issue:
"...we are aware of no precedent that permits a federal agency to ignore a constitutional challenge to the application of its own policy merely because the resolution would be politically awkward."

When I was sworn in as chairman, this remand order was literally on my desk.....and I was soon to learn just how "politically awkward" it would become.

Part 3: THE DECISION

Upon becoming chairman, I had my own scarcity problem.

The commission faced a host of important issues from overseeing the transition to competitive telephony to ongoing broadcast and cable deregulation.

And every new chairman has a finite amount of political capital, and time, to expend on his or her highest priorities. They are the scarce, but precious, coin of the realm.

And it was clear that, should we address the fairness issue on the merits, not deferring to congress as we had done in 1985, we were in for a bruising battle---one likely to use most--if not all--of my political capital on the Hill and earn me, in some powerful quarters, permanent political enemies.

Why?

Both houses of Congress had voted to codify the Fairness Doctrine in June 1987. A veto by President Reagan put the issue back on our plate, but the congressional vote made it clear that a majority in congress---with broad support in both parties---wanted the Fairness Doctrine to remain the law.

Members were not shy about making their opinions known. Both formally in oversight proceedings and informally in discussion, many members had made their views very clear.

The commission found no safe harbor in the broader body of interested parties. The comments in the '85 inquiry had been roughly evenly divided. And nothing much changed in '87.

While the broadcast industry generally supported repeal, some expressed the view informally that accepting a fairness obligation to avoid spectrum fees "wasn't a bad trade."

Not from their perspective, but then again, the First Amendment wasn't theirs to trade.

Strange bed fellows---left and right--- found themselves in unholy alliances to preserve federal control over the press. Each constituency hoped to use the Doctrine to very different effect.

But the most distressing discussions I had were with those who stated quite clearly that they supported the Fairness Doctrine because it gave them a federal club with which to discourage broadcasters from airing perspectives they found politically offensive.

In this context, I had conservatives complain what the liberal networks might do, and liberals recoil at the thought of unconstrained media conglomerates.

Those discussions were not about diversity, or access, or robust debate.
It was about using the federal government to control speech.....just what, as I recall, the founding fathers feared.

And so it was clear, going in, that our reconsideration of Meredith v FCC was frought with political peril.

And yet, as the court of appeals had made clear, it was an issue that had to be engaged without further delay.

And while I claim no particular prescience, I think we all understood that this was an important issue, with great potential for the good. I can't say that, for me, it was a difficult decision. It wasn't.

The combination of constitutional gravity and political sensitivity guided our approach:

- we addressed all claims, including the constitutional challenge;
- we gathered another round of public comments;
- we directed the staff to evaluate all evidence in the record and to make recommendations on the merits, straight up, without regard for politics that swirled about us;
    - As to timing, the issue would be neither rushed nor delayed relative to any other matter but presented when it was ready.

A unanimous commission adopted its decision Aug. 4, 1987.

I won't take the time to review the final Order in any detail here.

Suffice it to say that the commission first accepted for purposes of its analysis, that Red Lion and its scarcity rationale were still controlling precedent. But Red Lion was expressly conditioned upon there being no evidence the doctrine "chills" speech. We found, based on the '85 study and comments in the '87 proceeding, overwhelming evidence that the net effect of the doctrine was to discourage the coverage of controversial issues.

Thus, the commission found the Fairness Doctrine unconsitutional even by the tolerant standard of Red Lion.

But the commission did not stop there. The order challenged the underlying scarcity premise of Red Lion.

We argued that explosive growth in media rendered federal fairness regulation of broadcasters unnecessary and therefore not, in constitutional terms, "narrowly tailored to achieve the objective" of viewpoint diversity.

For these reasons, and a host of others, the commission found the Doctrine unconstitutional and inconsistent with the public interest.

I found, upon rereading the decision after all these years, that it is very well reasoned and, to me, quite persuasive.

As I said, we reached our decision on August 4. On August 5 all hell broke loose. House Commerce Chairman John Dingell held a press conference to call us all "lickspittles." Senate Commerce Chairman Ernest Hollings called us "wrongheaded, misguided and illogical."

And then it got nasty.

Oversight hearings were held. Investigations were conducted. Motives and processes were questioned.

But in the end, what the congress found was that four bureaucrats had complied with a court order to resolve a constitutional challenge to one of their own regulations, and that, in doing so, they had voted their consciences.

Part 4: LOOKING BACK

Twenty years of history since the abolition of this rule provide both the means to evaluate our deregulatory policy with empirical data.

The evidence upon which the commission acted was essentially "negative" in nature. We had direct and abundant testimony about what broadcasters did not air, and did not cover, as a result of the doctrine and the fear of federal entanglement.

That evidence was attacked by critics as "anecdotal." In some sense, that was correct. While the doctrine remained in effect, fundamentally, we could only search for evidence of its effect one story at a time.

With the Doctrine in place, it was not possible to do a controlled experiment. Because all radio and TV stations were governed by the same policy, we did not have comparative data that would highlight the effect of the doctrine.

Of course, the decision to abolish the Fairness Doctrine generated that data. It tee-ed up the question that students of the Fairness Doctrine – including, perhaps, the nine justices of the U.S. Supreme Court – would logically ask: would abolition of the Doctrine result in more coverage of controversial issues, more debate, more opinion and exchange?

If so, this broad industry data would confirm what the anecdotal evidence had suggested: the Fairness Doctrine chills speech.

The answer was "Yes."

> When you drop the requirement for free response time,
>
> when you remove the obligation to present significant contrasting views,
>
> when you remove the regulatory and financial risk associated with controversial editorials,
>
> when you stop taxing speech, you get more of it.

In an exhaustive study published in the Journal of Legal Studies in 1997, Drs. Tom Hazlett and David Sosa documented a dramatic increase in informational programming on radio after the elimination of the Fairness Doctrine.

Most impressively, the percentage of AM stations programming news, talk and public affairs jumped from just over 7% in 1987 to over 27% in 1995. To put that in perspective, in 1975 there were no AM stations in America with a news/talk format. In 1995 there were 854.

Of course, the fact that the elimination of the Fairness Doctrine spurred an abundance of programming aimed squarely at our most important and controversial issues is no longer seriously debated.

Indeed, the new proponents of content controls cite the elimination of the doctrine as a primary cause of a talk radio's phenomenal growth....and they are right. When discussion is tax free, it abounds.

And more news/talk, more discussion of controversial issues was what we all said we wanted.

But some see a problem-----some don't like the content. It is too conservative, or too helpful to political opponents.

So now they want to bring back the Fairness Doctrine. Maybe no talk was better than all this talk we don't agree with.

PART 5: LOOKING FORWARD

Which raises the question: We have looked at the decision and the past twenty years---what about the future?

When I look at this issue from my current perspective, far removed in time and space from the those controversial days at the FCC, the issues and the answers seem much simpler and clearer.

I will lay them out in three broad conclusions:

First: the Fairness Doctrine was unconstitutional on its face.

The First Amendment provides that congress shall make no law abridging freedom of speech or of the press. Period.

The FCC derives its authority from congress. Its regulations have the force of federal law unless reversed by congress.

So the constitutional issues presented are analytically—if not politically—straightforward:

Is discussion of controversial public issues "speech" within the meaning of the First Amendment? Clearly, indeed, it is speech which lies at the very heart of the democratic process.

Are broadcasters part of the press?

To suggest otherwise is to suggest the framers of our constitution intended to protect from federal coercion only those who used the technology of the day---a proposition absurd on it face;

For surely what they intended to protect from federal influence was a process, a process of debate and discussion and disagreement, good analysis and bad, reassuring and offensive.

Most of all, they sought to protect the right of a free people, through their press in whatever form it took, to question and challenge and confront their government, including their then elected representatives in that government.

Pretty much exactly what's going on today, much to the chagrin of some members of Congress.

The final constitutional question is whether the Fairness Doctrine "abridges" the freedom of that press.

It is on this piece of the puzzle that we spend the bulk of our time debating. We have now demonstrated that the doctrine abridged speech because it discouraged coverage of issues, and the creation of informational formats broadcasters would otherwise have provided.

But it's much easier than that.

The Fairness Doctrine abridged press freedom on its face by directing broadcasters who chose to cover an issue, to cover both sides. Maybe they did not desire to cover both sides. Maybe they felt strongly their broadcast communities would benefit greatly from hearing only one side, the one they felt was right?

Maybe the other side was the conventional wisdom and needed no promotion, maybe that other side was well represented, even dominant in the communities' print media (you know, the one not burdened by the Fairness Doctrine).

After all, Alexander Hamilton in penning the federalist papers was not required to summarize the case for decentralized power…

Our founding fathers had an abiding belief that it was through the conflict of ideas, strongly held and boldly presented, that truth would emerge.

They believed, as Judge Bazelon wrote, that "Truth and fairness have a too uncertain quality to permit the government to define them…." Bazelon, "FCC Regulation of the Telecommunications Press," 75 Duke L.J. 213, 236 (1975).

It follows for me that the Fairness Doctrine was unconstitutional on its face.

Because broadcasters -- as citizens and as members of the press -- should be able to say what they think without regulatory sanction. If they choose to represent one perspective, so be it. There are plenty of additional perspectives out there.

But this conclusion requires the second proposition:

Red Lion is bad law, both factually and conceptually. It should no longer cloud our thinking about First Amendment issues and the electronic media.

In order to conclude, as we did in 1987, that the Fairness Doctrine was unconstitutional, we had to deal with the Red Lion decision which came out the other way.

We did so by accepting Red Lion's assumption that broadcasters were entitled to a lesser degree of First Amendment protection, a different standard of review, while attacking the factual assumptions of scarcity and "no chilling effect." See the Commissions 1987 decision at pg 21.

As we have seen, both factual assumptions were in error in 1987 and are even more so in error today.

Numerically, there simply is no longer any meaningful scarcity. Red lion was based upon the scarcity of broadcast frequencies "in the present state of commercially acceptable technology as of 1969." Red lion broadcasting co. V. FCC, 395 U.S. 367 at 389.

Well, technology has changed. In 1969 there were 6,595 radio stations in the U.S. Now there are 13, 837. In 1969, there were 837 television stations. Now there are 1,756. And these are just full power stations.

Of course since this is all about insuring the audience has access to diverse sources of news, information and perspective, we cannot limit ourselves to broadcast technologies.

There is a high degree of substitutability among media by consumers seeking access to information. [See FCC media working group's consumer substitution among media, September 2002.]

Besides radio and tv, the average American has access to over 100 channels of cable or direct broadcast satellite and, of course, to the internet---delivering literally millions of sources news, information and perspective at click of a mouse.

The simple fact is, there is no scarcity of diverse news, information, and opinion within the electronic media marketplace. And the number of these sources continues to expand as technology improves.

The second factual assumption of Red Lion was that the doctrine would increase, not decrease, the supply of controversial issue programming. As we have discussed, this factual assumption was also in error.

But let me address for a moment the more fundamental conceptual issue: the standard of review postulated by the Red Lion.

That court held that broadcasters are not entitled to the full measure of First Amendment protection enjoyed by their print colleagues ---that an "access" requirement for broadcasters, clearly unconstitutional in the print context, might be acceptable for the electronic press.

The commission was required to accept Red Lion's lesser standard of review for broadcasters in reaching its 1987 decision.

I am not so constrained in my remarks today.

And I think it is important to address this issue directly. Because if we accept j compromised press freedoms for one member of the media, it threatens every member of the media.

As more and more Americans receive their news and information electronically, as the technology of delivery morphs and mixes from analog to digital; from print to broadcast to cable retransmission; from over the air to internet re dissemination, who can say what "standard of review" applies?

Is it the simple and clear words of the First Amendment---"no law"—or is it some lesser standard which looks to shifting factual circumstances or the impact on the audience as distinguished from the freedom of the speaker?

Red Lion was wrong not just factually, but conceptually and, I believe, legally in articulating a lesser standard of review for the broadcast media.

The notion of scarcity as an excuse to dilute free speech press rights was never compelling.

Key resources are generally economically scarce---including the inputs necessary to build a broadcast entity: bricks, mortar, human talent and money.

The truth is the vast majority of broadcast properties in the market today were purchased from the previous owners, not licensed by the FCC directly.

So the real barrier to entry here is like any other business: money.

When pressed, the proponents of "scarcity" fall back on licensing---the FCC licenses one user among many would be users. Demand exceeds supply; everyone can't have one so you have to share---even your free speech rights.

This argument fails for two reasons: first, it is the ultimate bootstrap argument---demand exceeds supply in the licensing process only because of the way we choose (among many viable alternatives) to license.

Because we give licenses away, at least initially, demand exceeds supply. That always happens when you artificially hold the price of a valuable resource to zero. Once the license trades in the market, demand equals supply, exactly.

So if there is any licensing scarcity, we create it. Not a strong reason to compromise the First Amendment.

Maybe more fundamentally, our constitution does not allow the government to condition access to public resources on giving up the Bill of Rights.

In summary, both the factual and the conceptual model articulated by Red lion were flawed. I believe it highly likely that the current court would reject Red Lion and its implied assumption that there is more than one First Amendment.

My third and final point stands, hopefully, above the rest. Over and above constitutional precedent, technologies and numbers and all the rest

My third point is about policy, it's about what is right for the country, for the press, and for the citizens who rely on that press.

Twenty years of perspective, for me at least, have made this issue even clearer.

Federal regulation of the press, or the content of speech, is bad public policy. There are narrow exceptions to be sure---for obscenity, for crime.

But that is not what we have been talking about this morning.

What we have been talking about is the federal government's role in how the press, in all of its forms today and tomorrow, reports news, analyzes issues, and critiques its elected leaders.

My view is that the government has no role there. None.

And the reasons for that conclusion go beyond the inevitable "chilling" effect of any such federal involvement.

All regulations have unintended consequences---the Fairness Doctrine was no different.

While it was intended to encourage the broadcast of more perspectives, it was used by Democratic and Republican administrations alike as a tool to discourage the broadcast of objectionable perspectives. [See Fred Friendly, the good guys, the bad buys, and the first amendment (New York: Random House, 1976).]

An assistant cabinet secretary in the Kennedy administration was quoted on this point: "our …strategy was to use the fairness doctrine to challenge and harass right wing broadcasters in the hope that the challenges would be so costly to them that they would be inhibited and decide it was too expensive to continue." (Quoted in ibid, p. 39.)

The Nixon administration used the Fairness Doctrine to discourage broadcasters who had criticized his Vietnam strategies. Columbia broadcasting system inc. V. FCC 454 f 2d 1018

This is, of course, is exactly the sort of conduct our constitution's framers sought to avoid with our First Amendment.

The most surprising and, to me, discouraging aspect of the current debate regarding the Fairness Doctrine concerns the motives: it appears that altering the perceived right-wing bias of AM radio is the inspiration for at least some of those who seek to re-establish federal oversight of content.

My response to those who fear the conservative bent of AM radio is the same one I gave my conservative friends in '87 when they urged retention of the fairness doctrine to help restrain the "liberal" broadcast networks:

The only thing worse than a media dominated by your philosophical opponents is a media regulated by the federal government.

As Justice Douglas said, in noting that he would not have voted to uphold the Fairness Doctrine,

> "The prospect of putting government in a position of control over publishers is to me an appalling one, even to the extent of the fairness doctrine. The struggle for liberty has been a struggle against government." Columbia broadcasting system, inc. v. democratic national committee, 412 U.S. at 154.

It is worth noting that the cry to re-impose the Fairness Doctrine comes from inside the Washington beltway: from incumbents and professional policy wonks.

Outside Washington, there is no fear. Because the citizens of this country are smart; they see through the bias, and the bluster, where they exist.

And they are going to be just fine as long as they have a rich, diverse and free press. They do today. Lets hope we keep it that way.
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BOOK REVIEW

Media Chic
Minow, Martin & Mitchell: Presidential Television

by

Clay T. Whitehead

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Media Chic

Presidential Television. By Newton N. Minow, John Bartlow Martin & Lee M. Mitchell. *New York: Basic Books, Inc.,* 1973. Pp. xv, 232. $8.95.

Reviewed by Clay T. Whitehead†

Within a relatively short time television has grown from insignificance to nearly total pervasiveness. Since the early 1950's we have become accustomed to this new medium, using it more hours each day[1] and increasingly relying upon it for advertising, entertainment, news, and political debate. Not surprisingly, the new medium and Presidents have found over the years a mutual attraction. Presidents need television to reach the electorate, and the TV medium finds presidential words and actions great "copy" (to stretch only slightly the newspaper term).

Presidential Television[2] documents the steadily expanding use of television by incumbent American Presidents. Following an analysis of the political implications and potential dangers of this phenomenon, the authors reach what seems to be the main point of the book: a series of proposals aimed at mandating an approximate equality of simultaneous television network time among the President, the Congress, and the party in opposition to the President.

The authors point out that the concern of the Framers of the Constitution was not that the President would become too powerful, but that he would not be noticed at all among the numerous members of Congress, whose personal constituencies would make them more powerful as a group.[3] Today, the authors maintain, the President has confounded the Framers' predictions by becoming the most visible, and therefore most powerful, politician in the country. They set out

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1. Total television viewing per home has been estimated to have reached 6 hours, 20 minutes per day in the over 60 million homes in the United States having television receivers. BROADCASTING MAG., BROADCASTING YEARBOOK 12 (1974).

2. N. MINOW, J. MARTIN & L. MITCHELL, PRESIDENTIAL TELEVISION (1973) [hereinafter cited to page number only].

3. Pp. 102-03, *citing* THE FEDERALIST No. 73 (Hamilton sees a natural tendency of legislative authority to "intrude upon the rights and absorb the powers of the other departments").

to show that it is largely because of the visibility resulting from his frequent use and masterful manipulation of television that he outshines the Congress and the courts and leaves his opposition far behind.

The proposals advanced by the authors aim at correcting this situation, as they perceive it, by "balancing" presidential use of television in four ways: (1) simultaneously broadcasting live on all television networks during prime time at least four evening congressional sessions each year; (2) granting to the national committee of the largest political party opposing the President an automatic legal right of reply to presidential addresses during an election year and near the time of off-year congressional elections, under the same conditions of coverage that the President enjoyed; (3) televising voluntary debates between spokesmen of the two major parties two to four times annually; and (4) providing free time simultaneously on the three networks to all presidential candidates according to a formula giving equal time to the major party candidates and lesser amounts of time to minor candidates.[4] The authors recommend that the equal time provision[5] and the Fairness Doctrine not be applied to these broadcasts, in order to avoid legal challenges and to prevent the President from demanding more time to reply to them.[6]

I

Unfortunately, the authors confuse the causes and the effects of the phenomenon they call "presidential television." Because they deal almost exclusively with effects, their recommendations, and especially their proposed changes in communications law, smack of tinkering and manipulation rather than the redress of constitutional imbalances. The authors blame the President's frequent television appearances for what they consider his undue power over public opinion in comparison with that of Congress and the opposition party. This conclusion is inaccurate in two respects. First, the present authority and prominence of the presidency result not from television but from the historical growth of the involvement of the federal government, and thus of the

4. This last proposal was earlier developed in THE TWENTIETH CENTURY FUND COMM'N ON CAMPAIGN COSTS IN THE ELECTRONIC ERA, VOTERS' TIME (1969). This review will not discuss the proposals developed originally in that study. The authors also recommend that to preserve its judicial integrity, the Supreme Court should continue to avoid television coverage, while taking some steps to improve general press coverage of its functioning. Pp. 92-102.

5. 47 U.S.C. § 315 (1970).

6. For a summary of the authors' proposals, see pp. 161-63.

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Executive, in national and international affairs.[7] Second, the President does not have control over the total amount and nature of his coverage on television, and there is no assurance that he will benefit from the exposure he does receive.

As the nation and the federal government both grew, so also did the power of the presidency. For the first 160 years of our constitutional history, this growth was unaided by television. By the dawn of the era of presidential television in 1947, when President Truman made an address from the White House to launch the Food Conservation Program,[8] the fears of the Framers that the President would be an obscure and unnoticed figure had long been put to rest.

Because of the inherent nature of the office, a Chief Executive is able to supervise or control detailed administrative matters and to act quickly and decisively in circumstances where the pace of national and international events is too rapid for the more contemplative Congress. In both situations, the pragmatic approach of Congress has been to delegate increasing authority to the President in order to allow effective action. Congress has also deliberately accepted certain methods of conducting business which allow the President to set much of its agenda; a large portion of the congressional year is devoted to consideration of the President's budget and legislative proposals. Congress has an even lesser role in international relations, where the President has a constitutional primacy.[9] Not surprisingly, much of the coverage of the President on national television has focused on foreign affairs.[10]

The coverage of the President in all the mass media, including television, reflects his importance, prestige, and newsworthiness in national and foreign affairs. The President's central role is evidenced by the fact that he regularly gets headline coverage in the more than 60 million newspaper copies printed daily in the United States,[11] as

7. The authors almost entirely ignore these factors in their concern with television. There are only occasional, brief admissions that other factors even exist. "Because he can act while his adversaries can only talk, because he can make news and draw attention to himself, and because he is the only leader elected by all the people, an incumbent president always has had an edge over his opposition in persuading public opinion. Presidential television, however, has enormously increased that edge." Pp. 10-11. "Presidential power has expanded because of the growth in national involvement in foreign affairs, because of the increasing role of the federal government in national life, especially in social services, and because television has given the president more access than Congress to the public." P. 103. Even in these statements, however, television is still portrayed as the most significant factor.

8. P. 33.

9. *See, e.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

10. For one illustration that coverage is predominantly on foreign affairs, *see* note 14 *infra*. In addition, there has been extensive coverage of presidential actions in areas where Congress has delegated authority to the President, for example, wage and price regulation during the Nixon Administration.

11. U.S. DEP'T OF COMMERCE, POCKET DATA BOOK 296 (1973).

well as extensive coverage in the national news and opinion magazines. The authors recognize the fact that "[a]lmost anything the President does is news."[12] If "the modern trend in American government is towards an increasingly powerful president and an increasingly weak Congress,"[13] then television, like the other mass media, has only reflected that trend.

Furthermore, there is no evidence that the President's use of television confers any kind of political omnipotence. The political and social forces in this country are sufficiently diffuse to prevent presidential control of public opinion, and therefore, despite his use of television, the President may be defeated on unpopular policies and programs. For example, most of President Nixon's first term television addresses dealt with his Vietnam policies, which nevertheless remained less popular than most of his other domestic and foreign policies.[14] More powerful countervailing forces were acting concurrently to diminish any television advantage that the President might have enjoyed.

Despite the significant amount of attention he gets, the President does not control television coverage. He is covered by the networks and local stations at the discretion of their own independent news departments, and has no right to demand television time.[15] Furthermore, congressmen and other public figures frequently appear on television, and the views and activities of the President's opponents are regularly reported. In fact, if all programming is considered, senators and representatives appear on television much more frequently than the President.[16]

12. By virtue of his office, the President of the United States—its constitutional leader, supreme military commander, chief diplomat and administrator, and preeminent social host—obviously ranks higher in the scale of newsworthiness than anyone else—defeated opposition candidate, national party chairman, governor, congressman, senator.

. . . .

A presidential press conference is clearly news. So is his television address; a report of it will be on page 1 in tomorrow's newspapers. A presidential speech broadcast only on radio will be reported in the television news.

P. 21.

13. P. 103.

14. As of April 30, 1972, President Nixon had preempted network programming a total of 19 times to make addresses to the nation. Ten of these addresses, more than half, dealt with Vietnam or Southeast Asia policy. This subject, to which he devoted by far the most attention, never received as much public support as the authors' notion of the power of presidential television might predict.

15. At times, the President has had to bargain with the networks for a desired television time spot. The authors relate that an Eisenhower speech on the Quemoy-Matsu crisis was delayed until after prime time, while President Kennedy had to postpone a speech designed to prevent racial violence at the University of Mississippi from 8:00 p.m. to 10:00 p.m. (by which time rioting had already started). P. 35.

16. In 1973 alone:

[W]ell over 150 different Congressional spokesmen appeared on the NBC Television Network in more than 1,000 separate appearances of varying lengths. By contrast,

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18. Committee for the
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19. *See, e.g.*, pp. 37, 40, 4

Even if the television news departments of the three national networks failed to provide such extensive coverage of Congress, and the local TV stations on their own news shows did not cover their local senators and representatives, the Federal Communications Commission's (FCC's) Fairness Doctrine would provide a regulatory check on presidential television.[17] In 1970, the FCC recognized that the large number of presidential addresses presented an unusual situation triggering television fairness obligations even when all other programming was nearly balanced.[18]

The impression left by the authors overstates the President's television advantage over Congress and the opposition party. If television under proper circumstances can be an electronic throne for the President, it can also be an electronic booby trap awaiting a chance slip or slur in an offhand remark, thereby causing an explosion of indignation or outrage and a consequent drop in the public opinion polls.

No President has been uniformly effective in his television appearances.[19] It is perhaps the unique intimacy conveyed by television that is responsible for its capacity to betray both the serious and the super-

the President appeared approximately 148 times (of which about 20% were ceremonial occasions).

J. Goodman, President of NBC, Statement Before the Jt. Comm. on Cong. Operations, Mar. 7, 1974, at 4 (hearings to be published).

The *CBS Evening News* broadcast six nights a week to 18 million people a night included 222 interviews with or appearances by members of Congress from June 1, 1973, to last week [the week prior to Feb. 21, 1974] . . . . In addition there were hundreds of other reports of Congressional activity on the *CBS Evening News* during that period.

. . . .

In 1973, for example, there were 31 appearances by members of Congress on *Face the Nation* alone.

A. Taylor, President of CBS, Statement Before the Jt. Comm. on Cong. Operations, Feb. 21, 1974, at 2 (hearings to be published). Since June 1973, CBS has also implemented a more expansive reply policy for leading opposition figures to reply to presidential messages. *Id.* at 5.

17. The statutory basis for the Fairness Doctrine is the Communications Act, 47 U.S.C. § 315 (1970), but in reality the doctrine is an administrative concept grounded in the "public interest" standard governing broadcast regulation. 47 U.S.C. § 309 (1970). The doctrine requires that if a broadcaster gives time to present one side of a "controversial issue of public importance," he must provide a reasonable opportunity for the presentation of conflicting viewpoints. He must provide free time if paid sponsors are not available. There is no "equal time" requirement, and the broadcaster determines what time will be provided for the reply, the format to be used, and who the spokesmen for the other side will be. No individual or group has a right to time under the Fairness Doctrine, which is concerned only with the presentation of issues. *See, e.g.*, Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10415 (1964); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (Fairness Doctrine held constitutional).

It should be noted that this reviewer recommends abolition of the Fairness Doctrine because of the opportunities it creates for bureaucratic and political second-guessing of editorial judgments.

18. Committee for the Fair Broadcasting of Controversial Issues, 19 P & F RADIO REG. 2D 1103 (1970).

19. *See, e.g.*, pp. 37, 40, 47, 48, 50-54, 58.

ficial weaknesses of a politician. The authors attribute the fall of Senator Joseph McCarthy in the mid-1950's to this effect.[20] On a more subtle level the authors suggest that President Johnson's continued inability to use television to bridge what became known as his credibility gap marked his failure to win support for his Vietnam policies and caused his political power to wane.[21] Perhaps this was also due to extensive television coverage of the application and effects of those policies.

Finally, having more to lose than to gain, an incumbent President nearing election time may choose to avoid the risks of television appearances in the hope that his opponent will be discredited and undermined by using television.[22] Such a practice is wholly inconsistent with the authors' notion of television's invariably favorable influence on public opinion and political forces.

II

The authors' first proposal for ending the imbalance in television exposure is that Congress should permit television "on the floor of the House and Senate for the broadcast of specially scheduled prime-time evening sessions . . . ."[23] At least four times per year, these are to be carried live by the three major networks simultaneously. "These broadcasts should be exempt from the 'equal time' law and the fairness and political party doctrines."[24] Staging special evening sessions for television coverage appears well within the power of Congress and, at least at the outset, sufficiently interesting to warrant the three-network, simultaneous, prime-time coverage the authors seek to achieve.[25] But the wisdom and propriety of such a congressional maneuver simply to counteract the President's use of television is doubtful.

20. P. 107.
21. *See* p. 47.
22. *See, e.g.*, p. 58.
23. Pp. 122, 161.
24. Pp. 124, 161. The Fairness Doctrine is discussed in note 17 *supra*. The "equal opportunities" provision, 47 U.S.C. § 315 (1970), applies only to actual candidates during an election campaign. The political party doctrine, a creation of FCC case law, provides that if one major party is given or sold time to discuss candidates or election issues, the other party must be given, or allowed to buy, time (but not necessarily equal time). Pp. 87-89.
25. Prime time is defined as the peak television viewing hours for evening entertainment, generally 7:00-11:00 p.m. It is interesting to note that the only hour which is prime time for the entire nation is 10:00-11:00 p.m., eastern time. The suggested live sessions would have to begin late in the evening in Washington, D.C., to reach west coast viewers during prime time.

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While discussing ways to give Congress access to the media, the authors never really address the question of *how* congressional television will counteract presidential television, and their conclusion that "Congress needs television"[26] is therefore without force. Since Congress is by nature pluralistic, many of the recent attempts of its members to present unified fronts have necessarily expressed only the least common denominator of their views and thus those efforts have lacked the impact of a singly-spoken presidential statement.[27] It is hard to see how the prime-time congressional specials could be much better, unless carefully staged by the majority party leaders; yet if the specials were actually staged, both viewers and news commentators might see them as contrived performances. These special congressional sessions are therefore unlikely to improve significantly the image of Congress or provide an effective means of expressing opposition to the President.

In practice, it is doubtful that this proposal would result in the long-run balance to presidential television the authors seek. More often than not, Congress and the White House have been held by the same party, a situation that could give even greater exposure to the President's position and put the opposition party at a more serious television disadvantage when it is perhaps most dangerous to do so.

The authors also suggest that the congressional coverage under their proposal be exempt from the Fairness Doctrine. If the President and the congressional majority were of the same party, the President's opponents would not be represented by the televised congressional sessions, and they would lose the opportunity under the Fairness Doctrine to have these programs balanced by presentation of conflicting views.[28] Moreover, if a broadcaster in this situation voluntarily attemped to balance the exempt congressional coverage by giving time to opponents of the President, there would be a danger that supporters of the President's policies might try to apply the Fairness Doctrine to this nonexempt coverage, forcing the broadcaster to give still more time to the presidential position.

Furthermore, this proposal seems to require the networks to broad-

26. P. 121.

27. Pp. 125, 130. In describing the attempts of Democratic party leaders to present opposition to President Nixon's Vietnam policy, the authors observe that the "quest for a consensus resulted in a watered-down response that George Reedy, President Johnson's former press secretary, said 'sounds like yapping' to most television viewers." P. 130. The authors also observe that the diversity within Congress creates severe limitations on its ability to rebut presidential television. P. 121.

28. *See* p. 1755 *supra*.

cast these congressional sessions. This raises the specter of government compelling its own coverage, a dangerous precedent. Currently, one of the checks on the political use of television is that the President and Congress can only request time, and the networks can therefore negotiate over the time of day and amount of time given.[29] This protection would be removed if either the President or Congress were permitted to demand television time.

The authors have not given sufficient weight to First Amendment interests in their proposal to broadcast congressional sessions. A better solution, if Congress wishes to be more accessible to all of the media,[30] would be to permit journalists to cover whatever congressional activities they consider newsworthy by means of print, radio, or television. Adequate television coverage of Congress could best be encouraged through improvement of congressional procedures. One proposal is to institute several reforms, including restructuring committees to remove overlapping jurisdictions, developing a more efficient method for reviewing the President's budget proposals, and coordinating the actions of the House and Senate, in the hope that such reforms would increase the visibility of Congress and make it easier for the press to cover congressional activities.[31] Constructive proposals of this nature might profitably be undertaken before Congress schedules its debut on live, prime-time television.

When Congress does something newsworthy, it invariably receives broad coverage. All that Congress needs to do is open its doors, if it decides that the public needs "congressional television." Journalists should be left to take care of the rest. Congress has no need to demand or legislatively require television coverage.

29. *See, e.g.*, note 15 *supra*.

30. C. Edward Little, President of the Mutual Broadcasting System, points out that in 1972 congressional committees conducted 40 percent of hearings and other meetings behind closed doors. He notes encouragingly, however, that the trend towards closed meetings is being partially reversed in recent months. C. Little, Statement Before the Jt. Comm. on Cong. Operations, Feb. 21, 1974 (hearings to be published), *citing* 28 CONG. Q. ALMANAC 93 (1972).

31. Rep. J. Cleveland, Statement Before the Jt. Comm. on Cong. Operations, Feb. 20, 1974, at 5 (hearings to be published).

> But the final passage of a bill or a successful investigation are only parts of the legislative drama. The rest of the performance must also be comprehensible—both to achieve quality and to communicate effectively.
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> Reform can achieve this objective. The restructuring of committees, for example, can reduce overlapping jurisdictions, clarify responsibility, improve oversight, and encourage more rational planning—all of which would heighten the visibility of committee work and make it more accessible to the media, as well as produce a higher quality legislative product.

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> [T]he national committee of the opposition party should be given by law an automatic right of response to any presidential radio or television address made during the ten months preceding a presidential election or within 90 days preceding a Congressional election in nonpresidential years.[32]

Suggesting amendment of § 315 of the Communications Act of 1934,[33] the authors propose that every broadcaster or cablecaster who carries a presidential appearance within the expanded response period provide "equal opportunities to the national committee of the political party whose nominee for President received the second highest number of . . . votes"[34] in the most recent presidential election. The equal opportunities and fairness provisions are to be suspended for this reply by the opposition.[35] The purpose of this proposal is "to insure equality in the electoral use of television."[36]

If such a proposal were implemented, the result would be the replacement of editorial judgment in campaign coverage by a mechanical rule. It is no doubt true that fairness and objectivity are often lacking in network coverage of political parties and candidates. It seems more likely, however, that even with the limited diversity of only three networks, day-to-day news selection based on a reasoned, professional judgment is superior to the mechanical application of a law which forces broadcasters automatically to present spokesmen selected by the opposition party.

One need not peer far into the past to find examples of the potential mischievousness of such a law. When President Johnson was pursuing his Vietnam policies, most of the effective opposition was in his own party, while Republicans were generally less critical of the war. Since the proposed law would not limit the other party to the issues discussed by the President, the Republicans could have eschewed any discussion of the war and instead attacked the President on some unrelated and perhaps less important issue. Ultimately, the war would have been opposed less effectively by the President's real opposition in the time remaining to the networks for coverage of other news topics.

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On the whole, granting the party out of power a right of free reply will make political debate in America more partisan and institutional rather than philosophical and issue-oriented.[37] Such a provision may lock the current political scene into law by narrowing the range of expression to established partisans. Similarly, this proposal could hurt insurgent candidates running independently of the backing of party regulars by giving each national committee the power to select party spokesmen. Television debate of political issues is not likely to be strengthened by giving so much television control to the party regulars on the national committees.

The "opposition" to the President's policies can come from many sources. Whether that opposition is the other party, a local official, or the heir apparent within the President's own party, the wiser choice is to seek conditions under which each such group can receive news coverage to the extent that it is newsworthy and can also have a right to buy television time for itself. This latter issue of access rights, which would in many ways help achieve the authors' objectives, is explored in more detail below.

IV

The authors propose also that "National Debates" among spokesmen of the national political parties be established on a voluntary basis for all concerned, with the stipulation that they be shown live during prime time with simultaneous major network coverage.[38] Designed to facilitate the development of party positions, a dubious goal in itself, the debates would more than likely lead to many of the same results as the proposals for "opposition television" that were criticized above.

Political debates have always been voluntary for both participants and broadcasters. There has seldom been any hesitancy on the part of broadcasters to stage debates. The problem is that the incumbent, usually much better known, is often understandably reluctant to help provide an equal forum for his opponents. The National Debates would frequently meet the same obstacle. It is likely that they would never take place except when the strategies of all candidates coincide. Such debates therefore could never play a major role in balancing presidential television appearances.

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The authors would vest in the national committees of each party the power to choose the spokesmen who will participate in these debates. They suppose that the "most arresting personalities and best debaters will be chosen."[39] More likely, the division within the national committees will often lead to compromise spokesmen noted only for their lack of further political ambition.[40] Without the charismatic figures that television seems to require, the debates would probably languish very low in viewer popularity—except for those few occasions when they would have been interesting enough to command coverage anyway.

V

In developing their recommendations for giving television reply time to Congress and the opposition party, the authors almost completely ignore the question of allowing a private right of access.[41] Giving access to groups other than Congress and the opposition party would make it possible to provide exposure for a wider range of political opinions. Had the authors considered the access issue in light of theories of broadcasting regulation and the requirements of the First Amendment, their recommendations might have been far different.

Despite the demand for some form of access by private groups, the Supreme Court ruled in *Columbia Broadcasting System v. Democratic National Committee*[42] that broadcaster refusal to allow paid access to the airwaves in the form of "editorial advertisements" did not violate the First Amendment or the broadcasters' statutory duty[43] to act "in the public interest." The Court, in considering the possibility of creating such a private right of access, said that it was necessary to weigh the interests in free expression of the public, the broadcaster, and the individual seeking access. It then held that the Congress was not unjustified in concluding that the interests of the public would be best served by giving full journalistic discretion to broadcasters, with the only check on the exercise of that discretion being

39. P. 155.

40. Conversely, if each party chose several spokesmen to represent various wings of the party, the debates could become little more than intraparty quarrels.

41. "Private right of access" refers to the practice of allowing individuals and groups to purchase television time to broadcast their views on politics or other subjects.

42. 412 U.S. 94 (1973). The Court overturned a ruling by the court of appeals that a flat ban on paid editorial announcements violates the First Amendment, at least when other sorts of paid announcements are accepted. Business Executives Move for Vietnam Peace v. FCC, 450 F.2d 642 (D.C. Cir. 1971).

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the FCC's public interest regulation of broadcasters. The majority opinion pointed out that choosing a method of providing access to individuals and private groups that relied on detailed oversight by a regulatory agency would simply increase government interference in program content, in view of the need to create regulations governing which persons or groups would have a limited right of access.[44] The Court stated, however, that the access question might be resolved differently in the future: "Conceivably at some future date Congress or the Commission—or the broadcasters—may devise some kind of limited right of access that is both practicable and desirable."[45]

The appearance of *Presidential Television* revives the concerns that took *Democratic National Committee* to the Supreme Court. The growing role of broadcasting in American politics, together with the increasing clamor for some form of access, may justify legislative reexamination of whether the broadcaster should be required in selling his commercial time[46] to accept all paid announcements without discrimination as to the speaker or the subject matter.[47] In this way, paid editorial announcements would stand on an equal footing with paid commercials and paid campaign advertisements. The broadcaster would sell advertising time exclusively on the basis of availability, the same way that newspapers and magazines sell advertising space. All

44. 412 U.S. at 126-27. The Supreme Court distinguished this type of "right of access" from enforcement of the Fairness Doctrine, which the Court described as involving only a review of the broadcaster's overall performance and "sustained good faith effort" to inform the public fully and fairly. However, the Court apparently was unaware of the gradual shift away from general enforcement of the Fairness Doctrine towards specific, case-by-case and issue-by-issue implementation. *See* Blake, *Red Lion Broadcasting Co. v. FCC: Fairness and the Emperor's New Clothes*, 23 FED. COM. B.J. 75 (1969); Goldberg, *A Proposal to Deregulate Broadcast Programming*, 42 GEO. WASH. L. REV. 73, 88 (1973); Robinson, *The FCC and the First Amendment: Observations on Forty Years of Radio and Television Regulation*, 52 MINN. L. REV. 67 (1967); Scalia, *Don't Go Near the Water*, 25 FED. COM. B.J. 111, 113 (1972), *quoting* Paul Porter from *Hearings on the Fairness Doctrine Before the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce*, 90th Cong., 2d Sess., at 153 (1968). In effect, this shift in the method of enforcement has made the Fairness Doctrine similar to the type of "right of access" mechanism that the Court in *Democratic National Committee* said would regiment broadcasters to the detriment of the First Amendment. 412 U.S. at 127.

45. 412 U.S. at 131.

46. This proposal is limited to time reserved for paid commercials, not program time. A broadcaster would not be compelled to preempt regular programming. Commercial time on television falls generally in the range of 9 to 16 minutes per hour. The voluntary code of the National Association of Broadcasters allows nine minutes per hour during prime time, BROADCASTING MAG., *supra* note 1; the amount of commercial time is greater during other times of the day.

47. Under present government regulation, the broadcaster is legally responsible for his commercial time as well as his program material. In a system of paid access, it may be sufficient that individuals and groups are civilly liable for slander, obscenity, false or deceptive advertising, incitement to riot, or other offenses, and therefore the broadcaster should perhaps be relieved of liability for any infractions of law by users of the station's facilities.

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This kind of access right would be compatible with the policy concerns of the Supreme Court in *Democratic National Committee*.[49] This proposal would require no additional government administration or interference. Exempting access announcements from the Fairness Doctrine would cause a minimum of dislocation to the broadcaster's regular programming.[50] Moreover, broadcasters would not give up any significant control over substantive programming if the right of access were limited to commercial time. Both the journalistic freedom of the broadcaster and the interest of members of the public in obtaining television time are therefore protected by the creation of this limited right of access.[51]

By meeting some of the public demand for an electronic forum, developments in communications technology such as cable television will in the future almost surely reduce the hazards, real or imagined, from

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49. In fact, this would conflict less with *Democratic National Committee* than would the authors' proposals, which show little regard for the public interest or the journalistic freedom of the broadcaster. The authors would take from the broadcaster control over large blocks of time now devoted to program material, and give it to groups which the FCC could not hold accountable under the public interest standard. This was one reason the Court accepted the FCC's refusal to require public access in *Democratic National Committee*. 412 U.S. at 125.

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The Fairness Doctrine, moreover, is not the source of this right of access. To use the Fairness Doctrine to justify a private right of access is to give it a function for which it was never intended.

51. In contrast, giving an unlimited right of access during regular programming time could remove a large amount of time from the control of the broadcaster and give it to individuals or groups. Since even proponents of access agree that this would be undesirable, they recommend more "limited" rights of individual access. But then it would be necessary to have detailed FCC-enforced regulations and standards to determine who would be entitled to time and which time slots would be made available. A right of access so constrained would result in the same type of governmental control over program content that was condemned in *Democratic National Committee*, 412 U.S. at 126.

presidential television.[52] In the meantime, the more limited medium of broadcast television must be made more responsive to individuals and groups seeking to express their points of view. The method by which this is done is crucial. Access can either be given on an ad hoc basis to those groups powerful enough to command it legally (such as Congress and the opposition party), as the authors suggest, or it can be sold on a nondiscriminatory basis. Only the latter proposal would be an improvement over the present system.

VI

The thrust of all of the authors' proposals is toward dictating to television viewers what they are to see, with paternalistic disregard for their actual desires. In doing so, the authors have lost sight of the substantial journalistic function that broadcasters share with publishers. Newspapers devote their space to those issues and events that the editors feel the readers will find most important. The more important the event, the more prominent is its position in more newspapers. No one tells a newspaper how many column-inches to devote to a certain topic, and certainly there is no law requiring the periodic coverage of specified events regardless of their newsworthiness.

To be sure, the "broadcasters' First Amendment" has come to be viewed[53] as an abridged version of the original one.[54] It is crucial, however, that intrusions on journalistic expression be severely limited. Most of the authors' proposals would impinge on free journalistic expression at a time when ways should be found to help preserve that expression. Indeed, the inevitable arbitrariness and complexity of such proposals provide the best arguments against legal controls over the use of television. The proposals go well beyond what is necessary to achieve many of the authors' goals and, unfortunately, fail to concentrate on the development of a general system of access that would be better designed to achieve those goals.

The major criticism of the authors' proposals, though, is that they

52. While the authors include cable systems in their suggestions, it is doubtful that anyone, including the President, should appear simultaneously on all of the potentially numerous networks in a medium of channel abundance like cable. It is also doubtful that all cable network organizations should be required to give free time to Congress or opposition parties, since there should be sufficient time for sale to accommodate everyone. Cable television, therefore, should be exempt from the programming requirements proposed by the authors.

53. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388 (1969) (the right of the viewers and listeners is paramount to that of the broadcaster).

54. The First Amendment commands that "Congress shall make no law . . . abridging freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

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would impair rather than expand the ability of television to evolve into a medium reflecting a wide range of perspectives on the American social and political scene. With the extreme economic concentration of control over television programming by the three national networks[55] and the growing scope of FCC programming regulations,[56] we are already moving toward control of national television programming by a familiar coalition of big business and big government. Proposals such as those in this book serve only to entrench such a system and to constrain the diversity and free choice that should characterize American television.

Presidential Television provides an interesting and valuable addition to the literature on national politics by documenting the successes and failures of the evolving strategies that Presidents have devised in their efforts to adapt to the new television medium. But in the end, the authors fail to demonstrate the validity of their assertion that television has significantly and permanently altered the ebb and flow of America's political forces. We are left with presidential television as a still-evolving form, mastered neither by news departments nor Presidents, clearly something different from presidential radio and presidential headlines, very much a part of our political process, but hardly a fundamental threat to our constitutional system. The authors have discovered the dangers inherent in excessive concentration of presidential power. But, in seeking to check this power, they have chosen a course at variance with our most fundamental First Amendment principles, undermining the ultimate check on political power—an electorate that informs itself through a press unrestrained by government prescription.

55. The three networks originate about 64 percent of all programming for affiliated stations. BROADCASTING MAG., *supra* note 1, at 70. The percentage is higher during evening prime-time hours. Of the 700 commercial stations operating as of April 30, 1974, BROADCASTING MAG., June 3, 1974, at 40, only about 80 are not affiliated with the networks. Station ownership is also highly concentrated:

> Each of the networks owns the legal maximum of 5 VHF stations. Since these are in the largest cities, networks reach 25 to 35 percent of all TV homes with their own stations.

R. NOLL, M. PECK & J. MCGOWAN, ECONOMIC ASPECTS OF TELEVISION REGULATION 16 (1973).

56. *See, e.g.*, Notice of Inquiry in Docket No. 19154, 27 FCC 2d 580 (1971) (recommended percentages of certain types of programming); Further Notice of Inquiry in Docket No. 19154, 31 FCC 2d 443 (1971) (same); Report and Order Docket No. 19622, 29 P & F RADIO REG. 2D 643 (1974) (prime-time access restrictions on network programming).

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49. In fact, this would conflict less with *Democratic National Committee* than would the authors' proposals, which show little regard for the public interest or the journalistic freedom of the broadcaster. The authors would take from the broadcaster control over large blocks of time now devoted to program material, and give it to groups which the FCC could not hold accountable under the public interest standard. This was one reason the Court accepted the FCC's refusal to require public access in *Democratic National Committee*. 412 U.S. at 125.

50. If the Fairness Doctrine were applied to paid political advertisements, the broadcaster might be forced to provide free time for replies during regular programming time. 412 U.S. at 123-24 (the Court apparently did not decide whether the FCC would be permitted or required to extend the Fairness Doctrine to paid political advertisements). This possibility would be avoided by explicitly exempting these announcements from the Fairness Doctrine as part of the proposal. Such an exemption, of course, need not affect application of the Fairness Doctrine to product advertisements. Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969). In addition, this proposal would leave the license renewal process available as a recourse in cases of extreme program imbalance.

The Fairness Doctrine, moreover, is not the source of this right of access. To use the Fairness Doctrine to justify a private right of access is to give it a function for which it was never intended.

51. In contrast, giving an unlimited right of access during regular programming time could remove a large amount of time from the control of the broadcaster and give it to individuals or groups. Since even proponents of access agree that this would be undesirable, they recommend more "limited" rights of individual access. But then it would be necessary to have detailed FCC-enforced regulations and standards to determine who would be entitled to time and which time slots would be made available. A right of access so constrained would result in the same type of governmental control over program content that was condemned in *Democratic National Committee*, 412 U.S. at 126.

presidential television.[52] In the meantime, the more limited medium of broadcast television must be made more responsive to individuals and groups seeking to express their points of view. The method by which this is done is crucial. Access can either be given on an ad hoc basis to those groups powerful enough to command it legally (such as Congress and the opposition party), as the authors suggest, or it can be sold on a nondiscriminatory basis. Only the latter proposal would be an improvement over the present system.

VI

The thrust of all of the authors' proposals is toward dictating to television viewers what they are to see, with paternalistic disregard for their actual desires. In doing so, the authors have lost sight of the substantial journalistic function that broadcasters share with publishers. Newspapers devote their space to those issues and events that the editors feel the readers will find most important. The more important the event, the more prominent is its position in more newspapers. No one tells a newspaper how many column-inches to devote to a certain topic, and certainly there is no law requiring the periodic coverage of specified events regardless of their newsworthiness.

To be sure, the "broadcasters' First Amendment" has come to be viewed[53] as an abridged version of the original one.[54] It is crucial, however, that intrusions on journalistic expression be severely limited. Most of the authors' proposals would impinge on free journalistic expression at a time when ways should be found to help preserve that expression. Indeed, the inevitable arbitrariness and complexity of such proposals provide the best arguments against legal controls over the use of television. The proposals go well beyond what is necessary to achieve many of the authors' goals and, unfortunately, fail to concentrate on the development of a general system of access that would be better designed to achieve those goals.

The major criticism of the authors' proposals, though, is that they

52. While the authors include cable systems in their suggestions, it is doubtful that anyone, including the President, should appear simultaneously on all of the potentially numerous networks in a medium of channel abundance like cable. It is also doubtful that all cable network organizations should be required to give free time to Congress or opposition parties, since there should be sufficient time for sale to accommodate everyone. Cable television, therefore, should be exempt from the programming requirements proposed by the authors.

53. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388 (1969) (the right of the viewers and listeners is paramount to that of the broadcaster).

54. The First Amendment commands that "Congress shall make no law . . . abridging freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

would impair rather than expand the ability of television to evolve into a medium reflecting a wide range of perspectives on the American social and political scene. With the extreme economic concentration of control over television programming by the three national networks[55] and the growing scope of FCC programming regulations,[56] we are already moving toward control of national television programming by a familiar coalition of big business and big government. Proposals such as those in this book serve only to entrench such a system and to constrain the diversity and free choice that should characterize American television.

Presidential Television provides an interesting and valuable addition to the literature on national politics by documenting the successes and failures of the evolving strategies that Presidents have devised in their efforts to adapt to the new television medium. But in the end, the authors fail to demonstrate the validity of their assertion that television has significantly and permanently altered the ebb and flow of America's political forces. We are left with presidential television as a still-evolving form, mastered neither by news departments nor Presidents, clearly something different from presidential radio and presidential headlines, very much a part of our political process, but hardly a fundamental threat to our constitutional system. The authors have discovered the dangers inherent in excessive concentration of presidential power. But, in seeking to check this power, they have chosen a course at variance with our most fundamental First Amendment principles, undermining the ultimate check on political power—an electorate that informs itself through a press unrestrained by government prescription.

55. The three networks originate about 64 percent of all programming for affiliated stations. BROADCASTING MAG., *supra* note 1, at 70. The percentage is higher during evening prime-time hours. Of the 700 commercial stations operating as of April 30, 1974, BROADCASTING MAG., June 3, 1974, at 40, only about 80 are not affiliated with the networks. Station ownership is also highly concentrated:

> Each of the networks owns the legal maximum of 5 VHF stations. Since these are in the largest cities, networks reach 25 to 35 percent of all TV homes with their own stations.

R. NOLL, M. PECK & J. MCGOWAN, ECONOMIC ASPECTS OF TELEVISION REGULATION 16 (1973).

56. *See, e.g.*, Notice of Inquiry in Docket No. 19154, 27 FCC 2d 580 (1971) (recommended percentages of certain types of programming); Further Notice of Inquiry in Docket No. 19154, 31 FCC 2d 443 (1971) (same); Report and Order Docket No. 19622, 29 P & F RADIO REG. 2D 643 (1974) (prime-time access restrictions on network programming).

General Counsel at FCC
when Dennis Patrick
Chairman - gave her
credit for research + writing
opinion on abolishing
Fairness Doctrine

Tom wants to give
primary credit goes to
Patrick, there's also
Robinson who got idea for
OTP -

repeal of FD is overwhelmingly
Republican + continuation is
Democratic → PATTERN

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