

From: Susan Burgess
Sent: Monday, January 29, 2007 4:35 PM
To: Susan Burgess; skburgess@gmail.com
Subject: OTP actions re FD

On some date, CTW testified re fairness doctrine before the Ervin Committee and discussed the issue with Chuck Colson beforehand (see 5/3/72 CTW letter to Flanigan)

- (1) 8/5/1971 Scalia memo to CTW recommending that CTW criticize recent BEM and DNC Court of Appeals decision that is worse than the Fairness Doctrine in increasing governmental control of program content
- (2) 8/6/1971 CTW writes (in response to an inquiry, unclear who and whether sent) position on BEM-DNC decision
- (3) Week before 1/17/72 Scalia made a speech to the FCC bar association (about FD?)
- (4) 1/17/72 OTP's general counsels sought law office's comments re Fairness Doctrine Rulemaking
- (5) 1/22/72 Scalia wrote memo re FTC's Fairness Doctrine Filing re FCC's request for views on the applicability of the doctrine to product ads
- (6) 3/3/72 CTW wrote memo to Chuck Colson re article Chuck sent him re political uses of FCC's "fairness doctrine" saying that 3 underlying assumptions of the article that potentially support the idea that the Administration is benefited by FD enforcement are incorrect

Letter says that "OTP is not proposing to eliminate the fairness obligation, just to eliminate case-by-case enforcement of it against licensees. This would give the private licensees more discretion in meeting their fairness obligations and would cut back on second-guessing by the FCC and the courts."

"With a few exceptions [court decisions on FCC fairness doctrine rulings] are contrary to Republican interests. . . . [And] they may get even worse unless the vehicle which brings them forth—the present case-by-case method of enforcing fairness—is eliminated. It is therefore desirable to remove as much of the power as possible from the courts and return it to the discretion of the private broadcast licensees."

- (7) 3/17/1972 FCC confirms that Scalia will participate as Fairness Inquiry Panelist 3/28/72.

Letter says that FCC hopes "that such an open forum for the discussion of contrasting views and opinions will materially assist the Commission in its determination of appropriate policies with respect to the Fairness Doctrine." Letter includes FCC's "Notice of Inquiry in Docket 19260" and "recent Order."

- (8) 5/3/1972 CTW memo to Flanigan outlines his recommendation for OTP's posture on the Fairness Doctrine.

Memo says that CTW's earlier package of proposals included scrapping the fairness doctrine, saying that this upset Colson who believed that the fairness doctrine gave the admin a useful lever against the networks. Based on Colson's reaction, CTW agreed not to espouse that aspect of his proposals.

CTW says that OTP has refrained from making recommendations or criticisms re details of the fairness doctrine b/c OTP has no expertise on the myriad complexities of the issue nor does the Administration have serious policy concerns with them.

CTW says that his comments have been limited to what Dean Burch and others have said, that "the Doctrine has gotten out of hand and needs serious attention to limit and clarify it, preferably by the Commission"

CTW says that OTP staked out a firm administration position on only one issue, which was saying that the Admin was opposed to FTC's proposal to extend the Fairness Doctrine to product ads. In all other areas, OTP cautioned against the unnecessary extension of regulatory control over broadcast and advertising business and its extension to print media.

"In summary, I have gone out of my way to make clear that this Administration does not endorse removal of the Fairness Doctrine"

- (9) 1974 CTW book review in Yale Law Journal. The authors of the reviewed book "recommend that the equal time provision and the Fairness Doctrine not be applied to [presidential] broadcasts in order to avoid legal challenges and to prevent the President from demanding more time to reply to them."

In FN 17, CTW writes “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.”

“Even if the television news departments of the three national networks failed to provide such extensive coverage of Congress . . . the Federal Communications Commission’s Fairness Doctrine would provide a regulatory check on presidential television.” [Statement doesn’t support existence of the FD, just acknowledges that the FD exists and what its effect is]

“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. Moreover, if a broadcaster in this situation voluntarily attempted 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.”

FN 44 says that the shift of Fairness Doctrine enforcement to the “case-by-case and issue-by-issue implementation” “has made the Fairness Doctrine [the type of] mechanism that the Court [said] would regiment broadcasters to the detriment of the First Amendment.”

- (10) 7/2/1974 CTW letter to Senate Commerce Cttee Chair urging the Committee to report unfavorably on a bill that would repeal the “equal opportunities” requirement of the Communications Act of 1934 because it is only limited to Presidential and VP candidates instead of candidates for all federal offices.