FAIRNESS DOCTRINE

HEARINGS

BEFORE THE

SPECIAL SUBCOMMITTEE ON INVESTIGATIONS

OF THE

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE

HOUSE OF REPRESENTATIVES

NINETIETH CONGRESS

SECOND SESSION

PANEL DISCUSSION ON THE FAIRNESS DOCTRINE AND RELATED SUBJECTS

MARCH 5 AND 6, 1968

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FAIRNESS DOCTRINE

TUESDAY, MARCH 5, 1968

HOUSE OF REPRESENTATIVES,
SPECIAL SUBCOMMITTEE ON INVESTIGATIONS,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington D.C.

The special subcommittee met at 9:30 a.m., pursuant to notice, in room 2123, Rayburn House Office Building, Hon. Harley O. Staggers (chairman) presiding.

The CHAIRMAN. The committee will come to order.

I would like to make a brief announcement before we get started.

Mr. Don McGannon of Westinghouse will not be with us because of a death in the family. We are very sorry for him.

Also, I will have to leave soon, as I have to go to the Rules Committee in a few moments. I will return as soon as possible, however.

We welcome each of you here this morning. It is certainly a distinguished panel.

The business of this subcommittee for the next 2 days will be a consideration of some of the most significant issues in broadcast regulation: The fairness doctrine, the equal time requirements of section 315 of the Communications Act, broadcast editorializing, and the question of personal attacks carried over the airwaves.

The House Committee on Interstate and Foreign Commerce has the duty and responsibility under section 136 of the Reorganization Act of 1946 to exercise legislative oversight or continuous watchfulness of the execution by the administrative agencies of any laws, the subject matter of which is within the jurisdiction of the committee. Communications is one of such subject matters. House Resolution 168, 90th Congress, authorizes this special subcommittee to make investigations and studies concerning communications and the Federal Communications Act of 1934, as amended.

We are well aware that some of the panelists represent parties in various matters before the courts. I want to emphasize at the outset that our purpose here is not to focus on individual court actions or FCC decisions, except insofar as they bear on the larger issues before us.

The format of our exploration of these issues will be that of a panel discussion. I would like to say more about both the issues and our format in a few minutes; but, first, it gives me great pleasure to welcome our distinguished moderator, Dean Barrow, and the panel members who are with us today. In a few minutes, I will ask Dean Barrow to introduce each of the participants to the subcommittee.

We have prepared and distributed to the subcommittee a series of biographical briefs of the participants. This will also be inserted into the record of these proceedings. (See pp. 7–14.)

To observe that we have a "blue ribbon" panel present here today is merely to state the obvious. I want the panel to know that we on this subcommittee are deeply grateful for the contribution you are making—in many cases involving considerable personal inconvenience—toward the better understanding of these issues. Your presence here today is further proof, if any were actually needed, of the timeliness and importance of these discussions.

We want to make a special welcome to Chairman Hyde, of the Federal Communications Commission. Mr. Chairman, we look forward to your participation in these proceedings and are grateful for it.

A few minutes ago, in alluding to the issues to be discussed in these proceedings, I mentioned four: "Equal Time," the "Fairness Doctrine," "Broadcast Editorializing," and "Personal Attacks."

It does seem to me, however, that we may actually be referring to only two issues. "Equal Time" is one of these. This is the requirement—which has been in the law since the Radio Act of 1927—that when a station allows a legally qualified candidate for public office to make use of its facilities, it must afford equal opportuities for all other such candidates competing for the same office.

There is certainly no need to point out the great significance this requirement takes on during an election year. It has been urged that the strict "equal time" requirement fails to take proper account of the realities of our national political system. It is stated, for example, that broadcasters are reluctant to extend free time to candidates of the major parties for fear of being required to extend equal amounts of valuable air time to candidates from obscure or splinter parties in whom the public may have little interest.

Against this, however, we must weigh the fact that the so-called splinter party of today may become the majority—or at least a significant—party of tomorrow. The views of the so-called obscure candidates may ultimately prove to be of great value to the electorate.

For these reasons, we want to proceed very carefully in considering modifications in the present equal time requirement. The subject is vital in a free society, and we are looking forward to the panel's consideration of this topic this morning.

As we all recall, the equal time requirements of section 315 were suspended during the 1960 Presidential campaign. The results of that suspension are still being discussed, and I am sure will be discussed further today.

The other principal issue before us, and in many ways the more difficult of the two, is the "Fairness Doctrine."

The fairness doctrine received its definitive statement in the FCC's 1949 report on "Editorializing by Broadcast Licensees." The doctrine provides that when a licensee presents one side of a controversial issue of public importance, reasonable opportunity must be afforded for the presentation of contrasting views.

This goes to the heart of broadcasting, and the fairness doctrine has received much critical comment from the broadcast industry. It is said that the asserting of a legal, as opposed to a moral, obligation of fairness violates the first amendment of the Constitution, and also section 326 of the Communications Act, which expressly prohibits censorship on the part of the FCC.

These, of course, are legal considerations. But practical objections have also been raised that the existence of the doctrine inhibits broadcasters from venturing into controversial subjects.

This issue is not easily resolved. The fairness doctrine represents an attempt—certainly not beyond improvement—to insure that the American public has the opportunity of hearing contrasting viewpoints on the vital issues of the day. Recent studies by respected polling organizations have confirmed what might have been suspected without any polls—that the majority of our citizens consider broadcasting television in particular, to be its primary and most reliable source of news and information.

Broadcasting regulation has—from its inception—been based on the premise that the airwaves belong to the people, licensed to be used in the public interest, convenience, or necessity. The public should hear from the responsible voices that are raised in the discussion of public issues. The marketplace of ideas should not be foreclosed to some and monopolized by others.

I think all of us will agree to these general principles. But that still leaves us with the question of whether the fairness doctrine is the best way to insure that responsible voices will be heard in the discussion of public issues. We are looking forward to the panel's deliberations on this subject, and will be especially interested in suggestions for improvement in the doctrine itself, or in its administration.

The other two issues I mentioned earlier—personal attacks and editorializing—seem to be really subheadings under the general concept of the fairness doctrine. Last year, the FCC promulgated administrative rules specifying the duties of licensees in the cases of personal attacks or political endorsements. These rules required the licensee to provide the victim of the attack, whether it be an individual or a group, with notice of the attack, a transcript or summary of the attack, and an offer of reply time. This was to be performed within a week of the time the attack was broadcast.

These rules were challenged in court by various parties representing the broadcast industry. As if to underline the importance and timeliness of our proceedings here today, we have just learned that the FCC has asked the U.S. Circuit Court of Appeals in Chicago to withhold consideration of the personal attack rules pending further Commission consideration, and perhaps revision, of these rules. I think we should be striving for a bit more certainty and clarity in the law in this area, and your deliberations here will contribute toward the achievement of this goal.

As to editorializing, this issue, too, it seems to me, properly falls under the general heading of the fairness doctrine. To me—and others may disagree with this definition—an editorial is simply an expression of the licensee's views on a particular subject which is clearly labeled as such. The expression of opinion may be on a controversial subject, or it may not. If it is on a controversial subject, the fairness doctrine applies and the licensee must afford reasonable opportunity for the presentation of contrasting views.

But I do not want to anticipate the discussions which are to follow. However, it is necessary to say a few words about the format we will be using here.

This will be a panel discussion. We have asked eight of the panelists to prepare statements in advance of these proceedings. These statements have been reproduced and made available to the subcommittee and the press.

Two of these papers will be presented this morning, and two this afternoon. We have also asked other panelists to review these papers and prepare commentaries on them. Unfortunately, time has not permitted us to duplicate these commentary statements, except for two which we received last week.

We are hoping to obtain many points of view in the next 2 days. The panelists who are visiting us are knowledgeable and concerned. We do not expect them to be in agreement on all of the issues. We are looking forward to an open and uninhibited expression of differing viewpoints.

We are operating on a tight schedule, and many of the panelists have only a brief time to be with us. We know, for example, that Dr. Stanton has only a limited time to spare for his participation and must return to New York City for a board of directors meeting. We know that Mrs. Pilpel must leave shortly after her presentation this afternoon. Mrs. Pilpel's husband is opening a play tonight on Broadway. She has our best wishes.

In view of these time limitations, I would like to ask that the members of the subcommittee hold their questions until tomorrow afternoon when our schedule is a little less crowded. This will give us more of a chance to take advantage of the combined expertise present here in our panel.

In the event that this arrangement results in some member having questions which have not been put to the panelists, additional questions may be filed for direction to the panelists. We would ask that these questions be filed within 3 days of the close of our sessions here.

We also invite the submission of additional information, both from panelists and anyone else who wishes to express a viewpoint. These should be submitted within 2 weeks after the close of the hearings.

At this time, I would like to present to you the distinguished moderator of our hearings, Dean Roscoe L. Barrow.

Dean Barrow, who retired last year as dean at the University of Cincinnati Law School, now is Wald professor of law at the university. He has done intensive research in broadcasting and was director of the broadcast network study for the Federal Communications Commission which culminated in the publication of "Network Broadcasting, 1957," which has come to be known as the Barrow report.

We are particularly pleased to have his aid and assistance today. Dean Barrow will present an introductory statement and introduce the panelists to the subcommittee. He will moderate our discussions during the next 2 days.

I would ask that any participant or member of the subcommittee who wishes to raise a question or offer a comment so signify to Dean Barrow and wait to be recognized by him. This type of orderly procedure is essential if we are to proceed expeditiously and make the best use of the limited time, and the impressive experience and knowledge of the panel.

As I mentioned before, I do ask that the members hold their questions, if at all possible, until tomorrow afternoon. Clarifying ques-

tions, of course, are always in order, and we do not want to completely foreclose the members from offering comments or questions. This will be a matter for our own judgment. We will have to bear in mind that these 2 days will go by very quickly and we have a great deal of ground to cover.

Before turning the discussion over to Dean Barrow and the panelists, I would like to ask our ranking minority member, Mr. Keith of Massachusetts, to say a few words.

Dean Barrow, we are happy to have you with us.

Mr. Keith, have you any statement to make?

Mr. KEITH. Thank you, Mr. Chairman.

I would like to join with you in welcoming the participants in this roundtable discussion.

We are aware that all of you are extremely busy, and we thank you for taking the time to attend these meetings. I would also like to extend my congratulations to the members of the subcommittee staff who have overcome many difficult problems in scheduling these meetings.

Regarding the issues before us, it appears that there are three goals that we should seek to achieve in these sessions. We should seek to determine exactly what the various rules and doctrines are, especially the fairness doctrine; and to what extent their application is called for. We should also seek to determine how these rules and doctrines are enforced by the FCC and how this might be improved. Finally, we should seek to determine what action by the Congress is called for.

The issues involved are very complicated and confusing, and the considerations affecting many of the decisions that have to be made are closely balanced. It appears that we are confronted by a dilemma that may not be possible to solve by broad, general rules. On the one hand, there is the right of free speech which the first amendment is designed to protect. On the other, there is the public ownership of a very limited number of radio and television frequencies which are, in effect, leased to private individuals on the condition that they operate in the public interest.

One of the basic considerations of serving the public interest is that this public be given the opportunity to hear both sides of an issue. How is it possible to insure one right, that of free speech, without seriously damaging the other right to hear both sides of the question?

In any event, I am certain that each of the members of the panel has his own opinions on how best to resolve this problem. I am also certain that all of their opinions do not coincide. I hope that the panel members' discussions will expose the issues that must be resolved and that the confrontation of opinions will also furnish us with some considerations necessary to guide us.

As a Congressman, I regret the loss of an opportunity to present detailed questions to the panel members during the discussions. It is my understanding, however, that many of you will return at a later date when we are considering this matter again. By then, these sessions will have provided excellent material for framing our questions in those later sessions.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Mr. Keith.

Dean Barrow?

Dean BARROW. Thank you, Mr. Chairman and honorable members of the Special Subcommittee on Investigations.

The members of the panel appreciate deeply the opportunity to participate in your inquiry into the operation of the equal opportunities and fairness doctrines. Each member of the panel is sensitive to the high responsibility to the subcommittee and to the public which was assumed in accepting the subcommittee's invitation.

The members of the panel will practice the fairness doctrine and it is hoped that the sessions of the next 2 days may be of value to the subcommittee in its deliberations.

To introduce the members of the panel is as easy as it is pleasant, because they are distinguished and a mention of their names serves to identify their contribution to the broadcasting industry, Government, and other areas of service.

PANEL MEMBERS PRESENT [1]

ROSCOE L. BARROW (MODERATOR), HERBERT E. ALEXANDER, HOWARD H. BELL, JOHN R. CORPORON, JAY CROUSE, REUVEN FRANK, LINCOLN M. FURBER, HYMAN H. GOLDIN, ROSEL H. HYDE, LOUIS L. JAFFE, ELMER W. LOWER, LOUIS M. LYONS, FRANK ORME, MRS. HARRIET PILPEL, GLEN O. ROBINSON, CHARLES A. SIEPMANN, FRANK STANTON, VINCENT T. WASILEWSKI

Dean BARROW. First, I am pleased to introduce one known to all, the Honorable Rosel H. Hyde, Chairman of the FCC. Mr. Hyde has served the FCC and its predecessor since 1928 and his expertise will contribute greatly to these sessions.

The other members of the panel are arranged with those on my right presenting position papers and those on my left presenting comments on the position papers, and in the order in which they will present those papers.

First, Dr. Frank Stanton, who has served as president of the Columbia Broadcasting System since 1946 and is recognized as one of the outstanding network executives in the history of broadcasting.

Mr. Louis Lyons, news commentator for WGBH, Boston, and prior to that curator of the Nieman program of fellowships in journalism at Harvard University under which 300 or more newspapermen received a year of training.

Mr. Elmer W. Lower is president of ABC News and is a veteran of news reporting and news program production with newspapers and the three major networks.

Mr. Herbert E. Alexander is director of Citizens' Research Foundation and writes on financial and political matters. He is well known for his service as Executive Director of the President's Commission on Campaign Costs.

Mr. Glen O. Robinson, professor of law, University of Minnesota, who prior to entering teaching practiced here, is engaged in research and publication in the field of broadcasting.

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[1] See pp. 7–14 for biographical data.

Prof. Charles A. Siepmann until recently was chairman of the Department of Communications, New York University. Prior to 1937, he served the British Broadcasting Corp. He has published extensively on broadcasting.

Mr. Reuven Frank is executive vice president, NBC News. From 1956 to 1962 he produced the "Huntley-Brinkley Report" and has won various awards for excellence in news broadcasting.

Mr. Jay Crouse is president of the Radio-TV News Association and has won awards for distinguished reporting.

Mr. Frank Orme is executive director of the National Association for Better Broadcasting and has, for more than 40 years, served broadcasting as critic and producer.

Mrs. Harriet Pilpel is chairman, Radio-Television Committee, American Civil Liberties Union. She is an author and an attorney.

Dr. Hyman Goldin is professor of communications, Boston University. He was executive secretary to the Carnegie Commission on Educational Television and prior to that served the FCC for 22 years, being Chief of Economics and Research.

Mr. Vincent Wasilewski, president of the National Association of Broadcasters.

Mr. Lincoln M. Furber, director of public affairs, Station WETA–TV in Washington.

And Mr. Howard H. Bell, who is now president of American Advertising Federation and prior to that for 16 years an executive on the staff of NAB and in charge of its code of good practice.

(Biographical sketches of the panelists follow:)

ROSCOE L. BARROW (MODERATOR), DEAN EMERITUS, UNIVERSITY OF CINCINNATI LAW SCHOOL

Dean Roscoe L. Barrow is well known in broadcasting circles as the author of "Network Broadcasting, 1957," prepared during a 2-year assignment as director of broadcast network study for the Federal Communications Commission. The book is also known as "The Barrow Report."

A native of La Grange, N.C., Dean Barrow was graduated from the Illinois Institute of Technology, Chicago, and received his law degree from Northwestern University.

He worked with the National Labor Relations Board in 1939–40; the Department of Agriculture in 1940–42, the Office of Price Administration in 1942, and the Department of Justice, becoming special assistant to the Attorney General of the United States. From 1942 to 1945, he served with the U.S. Navy.

Dean Barrow became acting dean of the University of Cincinnati Law School in 1952 and was named dean in 1953, retiring in 1967 to become Wald professor of Law.

He served as consultant to Federal agencies and has been an FCC consultant since 1961. He served as visiting professor of law at the University of North Carolina in the summer of 1962, and at the University of Virginia in academic year 1965–66.

HERBERT E. ALEXANDER, DIRECTOR, CITIZENS RESEARCH FOUNDATION

Herbert E. Alexander, director of the Citizens' Research Foundation since 1958, has written extensively on matters relating to money in politics. The Foundation, located in Princeton, N.J., specializes in the study of political campaign spending and on means to reduce such expenditures.

Dr. Alexander is the author of "Money, Politics and Public Reporting," "Tax Incentives for Political Contributions?", "Financing the 1960 Election," "Financing the 1964 Election," "Responsibility in Party Finance," and other publications.

He received his B.A. from the University of North Carolina, M.A. from the University of Connecticut, and Ph. D. in political science from Yale University.

In 1954–55, he was with the Institute of Research and Social Science, University of North Carolina. He taught in the Department of Politics, Princeton University, in 1956–58, and subsequently has been a visiting lecturer at Princeton (1965–66) and at the University of Pennsylvania (1967–68).

Dr. Alexander was Executive Director of the President's Commission on Campaign Costs during 1961–62, was a consultant to the President of the United States during 1962–64, and has been consultant to the Department of the Treasury and the House Administration Committee.

HOWARD H. BELL, PRESIDENT, AMERICAN ADVERTISING FEDERATION

A journalism school graduate who majored in advertising at the University of Missouri, Howard H. Bell entered the advertising field via broadcasting.

He was sales promotion manager of WMAL–AM–FM–TV in Washington, D.C., for 4 years and then began a 16-year association with the National Association of Broadcasters before resigning in January 1968, to accept the post as president of the American Advertising Federation.

In his new job, Mr. Bell heads an organization with almost 40,000 individual members in 173 affiliated local advertising clubs, more than 700 company members, and 25 affiliated national organizations.

At the National Association of Broadcasters, Mr. Bell was in charge of the organization's code authority program, being responsible for the administration, interpretation and enforcement of the radio code and the television code. His activities included programs to acquaint the public, industry, and government with the accomplishments and goals of self-regulation within the broadcast industry.

Mr. Bell obtained a law degree from Catholic University Law School and is a member of the bar of the State of Maryland. He is a member of the American Bar Association and its standing committee on public relations, and of the Federal Communications Bar Association.

Other activities include the Washington Advertising Club, Alpha Delta Sigma advertising fraternity, past chairman of the Radio-TV Committee of the President's Committee for Employment of the Handicapped, former executive secretary of the Association for Professional Broadcasting Education, and currently on the Board of the University of Missouri Freedom of Information Center.

JOHN R. CORPORON, VICE PRESIDENT—NEWS, METROMEDIA TV

As vice president in charge of news for Metromedia TV, John R. Corpron oversees the news coverage of Metromedia, Inc., television stations in Washington, New York, Kansas City, and Los Angeles.

Mr. Corporon was given the post in 1968 after a year as news director for Metromedia's New York City station, WNEW–TV.

After graduating from the University of Kansas with degrees in journalism and political science, Mr. Corporon worked briefly as a newspaper reporter before going to Louisiana as a reporter and news bureau manager for United Press International.

In 1958, he became the Washington correspondent for WDSU–TV, New Orleans, returning to the station in 1960 to become political reporter, chief editorialist and news director. Seven years later, he left the New Orleans stations to accept a position with Metromedia, Inc.

JAY CROUSE, PRESIDENT, RADIO TV NEWS DIRECTORS ASSOCIATION

Jay Crouse joined WHAS News, Louisville, Ky., in 1952 and has been news director since 1962.

He is a graduate of the University of Missouri's School of Journalism and worked for 2 years on the Cincinnati Post.

Mr. Crouse twice has been president of the Louisville Professional Chapter, Sigma Delta Chi, and has been president of RTNDA since September 1967.

In 1964, WHAS won the association's national award for reporting of a community problem for "WHAS Reports: The Ravaged Mountains," a three-part

documentary on the soil erosion, floods, etc., caused by poor control of strip and auger mining in eastern Kentucky.

Mr. Crouse twice served in the U.S. Navy, seeing combat duty in World War II and the Korean conflict.

REUVEN FRANK, EXECUTIVE VICE PRESIDENT, NBC NEWS

A native of Montreal, Canada, Reuven Frank moved to the United States at the age of 20, becoming a naturalized citizen.

After obtaining a degree in social sciences from the City College of New York and a master's degree in journalism from Columbia, Mr. Frank worked 3 years with the Newark Evening News, where he was night city editor.

He joined NBC in 1950, worked on the Camel News Caravan program for several years and, in 1956, was a producer of the network's political convention coverage.

Mr. Frank has been the producer or executive producer of the network's convention and election coverage since then.

He produced the Huntley-Brinkley Report from 1956 to 1962 and was executive producer of the newscasts in 1963–65.

In addition, Mr. Frank has produced numerous documentaries for NBC and also has operated in executive administrative capacities with the network.

Among the awards he has won are eight "Emmy" prizes from the National Academy of Television Arts and Sciences.

Mr. Frank is a member of the academy and of the Writers Guild of America, the American Newspaper Guild, and the Radio & Television Correspondents Association.

LINCOLN M. FURBER, PUBLIC AFFAIRS DIRECTOR, WETA–TV, CHANNEL 26, WASHINGTON, D.C.

Lincoln Furber had a 10-year career in commercial broadcasting before becoming director of public affairs for the noncommercial educational WETA–TV in September 1967.

A graduate of Middlebury College, Vermont, and Columbia University Graduate School of Journalism, Mr. Furber's first assignment was with WBZ–TV, Boston, Mass. in 1958, he became a newscaster with WCAX–TV, Burlington, Vt., and in 1962, began a 3-year stint as a newscaster and producer for NBC and CBS stations in Chicago, Ill.

Mr. Furber came to Washington in June 1965 as a correspondent with the Washington News Bureau, CBS owned-and-operated television stations. His reports were designed for audiences on the five TV stations owned by CBS in New York City, Chicago, Los Angeles, St. Louis, and Philadelphia.

He is a member of the National Press Club, the Radio-Television Correspondents Association, the National Academy of Television Arts and Sciences, and the American Federation of Television & Radio Artists.

HYMAN H. GOLDIN, ASSOCIATE PROFESSOR OF COMMUNICATIONS, BOSTON UNIVERSITY

Hyman H. Goldin, associate professor of communications at Boston University, has spent recent months in intensive research on noncommercial educational television.

As executive secretary to the Carnegie Commission on Educational Television, Prof. Goldin was one of the architects of the commission's report, "Public Television: A Program for Action." The report was used extensively in the preparation of legislation which led to the Public Broadcasting Act of 1967.

Prof. Goldin was graduated from Harvard College and received his Ph. D. degree in 1951 from Harvard University.

He was a staff member of the Federal Communications Commission from 1943 to 1965, serving as Chief of the Economics and Research Division and as Assistant Chief of the Broadcast Bureau.

He currently is a consultant to the Carnegie Corp. of New York.

WILLIAM G. HARLEY, PRESIDENT, NATIONAL ASSOCIATION OF EDUCATIONAL BROADCASTERS

William G. Harley has been president of the National Association of Educational Broadcasters since September 1960.

Previously, he was professor of radio-television education at the University of Wisconsin, and program director of the Wisconsin State Broadcasting Service. In 1954, he put the Nation's fourth noncommercial educational television station (WHA–TV) on the air and was in charge of its operation until coming to Washington.

Mr. Harley currently is on the board of directors, Joint Council of Educational Telecommunications. He is on the board of the United States-Japan Television Program Exchange Center and is immediate past president of the National Industry Advisory Committee of the Federal Communications Commission, and the U.S. National Commission for UNESCO.

As an expert in educational broadcasting, he has attended conferences and consulted on special projects throughout the world. In 1961, he was sent by the State Department to investigate educational broadcasting potentialities in Colombia. He was a member of the NAEB team which planned the use of educational television in the American Samoa school system. In addition, he has visited Uganda, Kenya, and other developing nations to provide consultation for the establishment of radio and television systems for education.

Mr. Harley is a graduate of the University of Wisconsin, with degrees in journalism and speech.

ROSEL H. HYDE, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION

A career Government service employee, Rosel H. Hyde has been associated with the Federal Communications Commission since 1928.

Mr. Hyde, a native of Idaho, came to Washington after attending Utah Agricultural College and then studied law at George Washington University.

He entered Government service while still a student, working on the staff of the Civil Service Commission in 1924–25 and the staff of the Office of Public Buildings and Parks from 1925–28. After his admission to the bar in 1928, he joined the Federal Radio Commission, which later became the Federal Communications Commission.

Mr. Hyde was an attorney, examiner, and general counsel at the Commission until 1946, when he was appointed a Commissioner. He was Chairman briefly in 1953–54 and then, in 1966, was named Chairman to fill a vacancy caused by his predecessor's resignation. His appointment will expire in 1969.

LOUIS L. JAFFE, BYRNE PROFESSOR OF LAW, HARVARD UNIVERSITY

A native of Seattle, Wash., Louis L. Jaffe was graduated from Johns Hopkins and received his doctor of juristic science degree from Harvard.

In the early 1930's, he served as a law clerk with Justice Brandeis, worked on the legal staff of the Agricultural Adjustment Administration and the National Labor Relations Board.

In 1936, he became a professor law at the University of Buffalo, later being named dean of the law school. He has been Byrne professor of administrative law at Harvard since 1950.

Dr. Jaffe contributes law review articles and is the author of "Cases and Materials on Administrative Law," among other works.

ELMER W. LOWER, PRESIDENT, ABC NEWS

Elmer W. Lower, a veteran of news work in the print media and at all three large commercial networks, has been president of ABC News since 1963.

Before joining ABC News, Mr. Lower had spent 4 years with NBC News, where he rose from chief of the Washington News Bureau to general manager-vice president of NBC News, New York.

From 1953 to 1959, Mr. Lower worked with CBS News, both in Washington and New York.

Previously, Mr. Lower had been associated with Life magazine (1945–51) as a foreign correspondent.

Between news assignments, Mr. Lower served with two U.S. information agencies. From 1942 to 1945, he organized a Europe-Africa radiophoto network for the Office of War Information; from 1951 to 1953 he was Chief of the Information Division, Office of the High Commissioner for Germany.

Mr. Lower is a 1933 graduate from the University of Missouri's School of Journalism, which honored him in 1959 with an award for Distinguished Service to Journalism. After graduation, he worked as a reporter and editor with various newspapers and wire services located in Kentucky, Michigan, Missouri, Ohio, Illinois, New York, and Europe. He holds an M.A. degree in public law and government from Columbia University.

LOUIS M. LYONS, NEWS COMMENTATOR, WGBH, BOSTON, MASS.

Louis M. Lyons, after retiring in 1964 as curator of the Nieman fellowships for journalism at Harvard University, continued his activities as a news analyst and commentator for the Boston noncommercial educational broadcasting station, WGBH.

His nightly news and comments over the radio station have been heard since 1946 through most of New England and in New York and have won for him the Peabody Award and the Du Pont Award for excellent in broadcasting.

Mr. Lyons was born in Boston in 1897 and was educated at the Massachusetts Agricultural College (now the University of Massachusetts).

From 1923 to 1946, he was a reporter for the Boston Globe. It was while he was a reporter that he studied at Harvard in 1938–39 with the first group of Nieman fellows. He then became curator of the Nieman fellowships, continuing part time on the staff of the newspaper.

Under his guidance, more than 300 American newsmen studied at Harvard, each devoting a year to academic subjects useful as background for future journalism career.

Mr. Lyons has been awarded honorary degrees from Harvard, the University of Massachusetts, Colby College, Marlborough College, Rhode Island College of Education, and New England College.

He is a fellow of the American Academy of Arts and Sciences and of the Academy of New England Journalists. He is an honorary member of Phi Beta Kappa.

DONALD H. MCGANNON, CHAIRMAN, WESTINGHOUSE BROADCASTING CO.

After a 3-year term in the private practice of law, Donald H. McGannon entered broadcasting in 1951 as assistant to the director of broadcasting for the DuMont Television Network.

He later became general manager and then, in 1955, was named vice president and general executive of Westinghouse Broadcasting Co. He soon was named president and, since 1963, has been chairman of the board.

Mr. McGannon, a native of New York City, has received degrees from Fordham University and the University of Scranton.

He is a member of the Democratic State Central Committee of Connecticut and is a trustee for Ithaca College, Fordham University and Sacred Heart University. Mr. McGannon is a member of the advisory council for Notre Dame and Georgetown University.

He is a member of the Connecticut Bar Association and the National Association of Broadcasters, which presented him with an achievement award in 1964.

FRANK ORME, EXECUTIVE DIRECTOR, NATIONAL ASSOCIATION FOR BETTER BROADCASTING

Frank Orme, executive director of the National Association for Better Broadcasting since April 1964, has been involved in broadcasting—either as critic or producer—for almost 40 years.

A native of Ontario, Canada, Mr. Orme, a naturalized American citizen, first entered the broadcast field in 1929, when he became radio critic for nine daily southern California newspapers.

After a short term as a writer for a Los Angeles radio station in 1931, he became a freelance writer for the next 17 years, produced half-hour radio plays, produced a 39-episode radio serial for juveniles, and published a number of children's short stories and plays.

From 1949 to 1956, Mr. Orme continued his freelance writing activities and also worked in editorial capacities for such magazines as Television, TV magazine, and Film World.

After a year as staff writer and research director for Parthenon Pictures, which produced industrial and documentary motion pictures, Mr. Orme became educational director for a nonprofit organization specializing in dental postgraduate education but continued his independent interest in radio and television.

After several special research and writing projects for the National Association for Better Broadcasting, he was named executive director.

Mr. Orme is the author of several studies and surveys of crime programs on Los Angeles television and has written annual television program evaluations for Parents' magazine during the last 4 years.

MRS. HARRIET PILPEL, RADIO-TELEVISION COMMITTEE CHAIRMAN, AMERICAN CIVIL LIBERTIES UNION

An author and attorney, Mrs. Harriett Pilpel is a member of the national board of directors for the American Civil Liberties Union as well as being chairman of the Union's radio-television committee.

A native of New York City, she studied at Vassar College and earned degrees in international relations and public law at Columbia University.

Mrs. Pilpel has practiced law in New York City since 1936 and is a member of the Greenbaum, Wolff & Ernst law firm. She is the author of a monthly column in Publishers Weekly, "But Can You Do That?"

Mrs. Pilpel, wife of Robert Cecil Pilpel and the mother of two children, is on the board of directors for the Home Advisory & Service Council of New York City, Sex Information & Education Council of the U.S., and Association for the Study of Abortion.

Her memberships include also the New York Ethical Culture Society, American Association of Marriage Counselors, Copyright Society, Authors League of America, Phi Beta Kappa, and New York City, American, and Federal Bar Associations.

PAUL A. PORTER, ATTORNEY, WASHINGTON, D.C.

Paul A. Porter, a partner in the Washington, D.C., law firm of Arnold & Porter, had a lengthy career in public service before going into private practice.

He is a former Chairman of the Federal Communications Commission, former Administrator of the Office of Price Administration, and was Chief of the American Economic Mission to Greece in 1946, with the rank of Ambassador.

Mr. Porter, a native of Joplin, Mo., worked on newspapers in Kentucky and Georgia after studying at Kentucky Wesleyan College and the University of Kentucky Law College.

He came to Washington, D.C., as special counsel to the Department of Agriculture in 1932.

Mr. Porter was with the Agriculture Department 5 years, was Washington counsel for the Columbia Broadcasting System from 1936 to 1942, and served during the early 1940's with the Office of Price Administration, the War Food Administration, and the Office of Economic Stabilization.

Mr. Porter was campaign publicity director for the Democratic National Committee in 1944. That year he was named to the Federal Communications Commission, as Chairman. In 1946, he was appointed as Administrator of OPA and later that year was named Chief of the Economic Mission to Greece.

Mr. Porter served, with the rank of Ambassador, as U.S. representative on the Palestine Conciliation Commission in 1949 and was a member of the President's Commission on Campaign Costs in 1961–62.

GLEN O. ROBINSON, ASSOCIATE PROFESSOR OF LAW, UNIVERSITY OF MINNESOTA LAW SCHOOL

Professor Robinson was born 1936 in Salt Lake City, Utah, and educated in the public schools of Ogden, Utah.

He received an A.B. degree from Harvard College in 1958, graduating magna cum laude, and an LL.B. degree from Stanford Law School in 1961.

From 1961 to 1967, with the exception of 2 years of active military service in the U.S. Armor Corps, Prof. Robinson was associated with the law firm of Covington & Burling, Washington, D.C.

In 1967, he was appointed associate professor of law, University of Minnesota Law School, and currently teaches courses in regulated industries, administrative law and torts.

He has done extensive research in communications law and is the author of a recent article on the Federal Communications Commission's regulation of communications.

CHARLES A. SIEPMANN, PROFESSOR EMERITUS, NEW YORK UNIVERSITY

Charles A. Siepmann, a graduate of Oxford University, served for 12 years with the British Broadcasting Corp., where he organized its school broadcasting and adult education general talks.

He was Vice President of the British Broadcasting Corporation, successively director of adult education, director of talks, director of program planning (1927–1939).

He was university lecturer and adviser to the President, Harvard University (1939–1942).

From 1942–1946 he served with the Office of War Information and latterly deputy director of its San Francisco Office responsible for broadcast propaganda to Japan, to China and to Japanese occupied territories.

From 1946 to 1967 he was Chairman, Department of Communications In Education, New York University.

He was Consultant at various times to the Federal Communications Commission (part author of its "Bluebook" entitled *Public Service Responsibilities of Broadcast Licensees*); consultant to the U.S. Army; consultant to the West German Broadcasters' Association; author of the study and report on Broadcasting in Canada embodied in the report of the Canadian Royal Commission on National Developments in the Arts, Letters and Sciences; presently consultant to the Ford Foundation.

He is the author of *Radio's Second Chance; Radio, Television and Society; Television and Education in the United States* (a UNESCO publication); *TV and Our School Crisis.*

He was the recipient for this last publication of the first Frank Stanton Award for meritorious research in the Communications field.

FRANK STANTON, PRESIDENT, COLUMBIA BROADCASTING SYSTEM

Frank Stanton was born in Muskegon, Mich., and received his Ph. D. from Ohio State University.

He has been president of CBS since 1946 and is serving his second term as Chairman of the U.S. Advisory Commission on Information, appointed by President Johnson.

Dr. Stanton is a trustee and former chairman of the Center for Advanced Study in the Behavioral Sciences, a member of The New York State Council on The Arts and The Business Council, a trustee of The Rockefeller Foundation, Carnegie Institution of Washington and Washington University, and a director of Lincoln Center for the Performing Arts, New York Life Insurance Company and Pan American World Airways. He is a fellow of the American Academy of Arts and Sciences and The American Psychological Association.

Stanton served as a trustee of the RAND Corporation from 1956–1967; he was chairman from 1961 to the completion of his statutory term as trustee.

In 1961, for his sustained effort to bring about the "Great Debates," he received the George Foster Peabody Award and the commendation of President Kennedy who said, "his role in making it possible for last year's TV debates to take place was a significant advance in American politics . . ."

VINCENT T. WASILEWSKI, PRESIDENT, NATIONAL ASSOCIATION OF BROADCASTERS

Vincent T. Wasilewski's professional career has been spent with the National Association of Broadcasters, which he joined shortly after being graduated from the University of Illinois with degrees in political science and law.

Mr. Wasilewski was employed by NAB in 1949, became vice president for Government affairs in 1960, was named executive vice president in 1961, and was selected as president in 1965.

A veteran of the U.S. Army Air Force (1942–45), he won the Distinguished Flying Cross and the Air Medal.

He was a member of the U.S. National Commission for UNESCO, 1956–60, and currently is a member of the American Bar Association, American Judicature Society, the Federal Communications Bar Association, and the International Radio and TV Society.

STATEMENT OF ROSCOE L. BARROW, WALD PROFESSOR OF LAW, COLLEGE OF LAW, UNIVERSITY OF CINCINNATI

Dean BARROW. The procedure of the panel discussions will be as follows: A position paper will be read. A comment on that paper will be read. Then the panel will discuss the subject matter. This procedure will be repeated throughout the series of eight papers during the ensuing 2 days.

Mr. Chairman and members of the subcommittee, I wish to commend your rather novel use of the panel sessions as a phase of your inquiry into the equal opportunities and fairness doctrines. It is recognized by administrative agencies that their work is facilitated by utilizing written presentations and following this with oral hearings on the controlling issues which are unresolved by the writings.

Also, our courts, through pretrial conference and similar devices, are achieving more efficient administration and saving of time. Your panel sessions should serve a similar purpose of economy of time in laying a substantial part of the factual base for your inquiry. If it is unsuccessful, your moderator must assume the responsibility because your able staff has done all that possibly could be done to make these hearings successful, and I know the panelists have done their homework.

My assignment includes an introductory substantive paper, which is as follows:

The equal opportunities and fairness doctrines, which facilitate the political process and dialog on the issues of our time, are of great importance in a free society. It is fitting that, in this period of great need for dialog on vital issues, the subcommittee should inquire into the effectiveness of the operation of the fairness doctrine.

I appreciate greatly the opportunity to participate in the inquiry and am sensitive to the responsibility to the subcommittee and to the public which I assumed in accepting your invitation.

It is difficult to analyze the equal opportunities and fairness doctrines without taking into account related problems in broadcasting. Change in the present operation of these doctrines may have an impact in other areas of broadcasting. Accordingly, it is appropriate to review briefly the place of the equal opportunities and fairness doctrines in the regulation of broadcasting under the public interest standard.

The physical limitations of the spectrum cannot accommodate all who desire to broadcast. A license is granted to that applicant who is best qualified to serve the public interest. Other applicants who could have served the public interest are denied the privilege.

The broadcaster is granted the use of the publicly owned spectrum without cost and is permitted to broadcast for his own profit. In return for this valuable privilege, the licensee assume a duty to serve the public interest. The Federal Radio Commission, and its successor the Federal Communications Commission, have protected the character of broadcasting stations as local institutions having a grassroots interest in providing the programing needs of the community served.

Thus, early in the history of broadcasting, the Chain broadcasting rules were adopted to free the broadcaster from practices which limited the licensee's freedom to choose programing fulfilling local needs.

Recently, the policy of protecting local broadcasting stations was evidenced by the caution exercised in authorizing pay-TV and the limitations upon cable-TV. It is anticipated that direct satellite-to-home broadcasting may not be authorized in order that the ability of the local broadcaster to serve community needs may be protected.

The primary interest to be served under the Communications Act is the interest of the public in the larger and more effective use of broadcast facilities. Early in the history of broadcasting, the Commission, in the *Great Lakes* case, interpreted the public interest in broadcasting to require balanced programing, stating:

> The tastes, needs, and desires of all substantial groups among the listening public should be met, in some fair proportion, by a well-rounded program, in which entertainment, consisting of music of both classical and lighter grades, religion, education and instruction, important public events, discussion of public questons, weather, market reports, and news, and matters of interest to all members of the family find a place.

In its statement of policy on programing of July 29, 1960, the Commission reiterated the categories of programing which usually are necessary to meet the needs of the community but emphasized the broadcaster's duty to make an effort in good faith to ascertain and fulfill the needs of the community served.

The Commission stated:

> The confines of the licensee's duty are set by the general standard 'the public interest, convenience, or necessity' . . . The principal ingredient of such obligation consists of a diligent, positive and continuing effort by the licensee to discover and fulfill the tastes, needs and desires of his service area. If he has accomplished this, he has met his responsibility.

It should be noted that the Commission's determination that the public interest requires that the broadcaster serve the needs of the community was not foisted upon unwilling broadcasters. From the beginning of the regulation of broadcasting, this policy had the concurrence of the broadcasting industry. Thus, the chairman of the Legislative Committee of the National Association of Broadcasters, Henry A. Bellows, testified before this committee, as it was constituted in 1934:

> It is the manifest duty of the licensing authority . . . to determine whether or not the applicant is rendering or can render an adequate public service. Such service necessarily includes the broadcasting of a considerable proportion of programs devoted to education, religion, labor, agriculture, and similar activities concerned with human betterment.

From the beginning of broadcasting there has been wise concern that centralized control of broadcast matter might endanger the free society. Thus, Herbert Hoover, addressing the Third Annual Radio Conference in 1924, stated:

It would be unfortunate, indeed, if such an important function as the distribution of information should ever fall into the hands of the Government. It would be still more unfortunate if its control should come under the arbitrary power of any person or group of persons. It is inconceivable that such a situation could be allowed to exist.

Much of the regulation of broadcasting in the public interest is intended to prevent undue concentration of control in broadcasting. The diversification doctrine, limiting the number of stations which may be owned by the same interest, serves this purpose. So does the duopoly rule, preventing ownership of two broadcasting stations of the same type in the same community.

The Commission has sought to maximize service and program viewpoints and, thus, to prevent any person or group from exerting disproportionate influence upon public opinon through broadcasting. Commission policies encouraging entry of new program sources, networks, stations, and systems of program service, and competition between all components of the industry have the same purpose. Requiring all-channel receivers was for these purposes.

The concern over undue influence upon public opinion via broadcasting was recognized by the Congress when it provided that the licensed broadcaster could acquire no property interest in the channel and that property in the channels was reserved to the public.

This concern for potential control of public opinion by a few was recognized by the Congress when in section 18 of the Federal Radio Act of 1927, it adopted the policy of equal opportunities in use of broadcast facilities by candidates for public office. The Congress appreciated that radio is a powerful instrument of communication and that misuse of it in political campaigns could cause serious harm in a free society.

Two years later in the *Great Lakes* case, the Commission extended this concept of fairness in political campaigns to broadcasts dealing with controversial issues of public importance. Explaining this extension of the fairness doctrine, the Commission stated:

Again the emphasis is on the listening public, not on the sender of the message. It would not be fair, indeed it would not be good service to the public, to allow a one-sided presentation of the political issues of a campaign. Insofar 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 discussions of issues of importance to the public.

The Commission's extension of the statutory doctrine of fairness in use of broadcasting facilities by candidates for public office to fairness in the presentation of controversial issues of public importance is sound in theory and, I believe, in practice. A poltical campaign worthy of the name revolves about a core of vital issues which have been considered by the people in the available forums, including broadcasting.

The relationship of the political campaign to the consideration of controversial issues of public importance bears analogy to the iceberg. The campaign speeches are to the small portion of the iceberg above water as the consideration of issues of public importance is to the mass of ice beneath the waves. If it is important to accord candidates for public office equal opportunities via broadcasting, a fortiori, it is important to provide the people an adequate forum via

broadcasting to become informed upon controversial issues so that the people and the candidates may learn which issues are worthy of attention in the campaign.

Any inquiry into the equal opportunities and fairness doctrines must take into account the importance in the free society of the opportunity for dialog on the issues of our time. In a free society, sound decision-making depends upon an informed public. If broadcasters are free to present one-sided broadcasts on vital issues, or to avoid broadcasts on vital issues, or to promote the candidacy of one office seeker while denying access to his opponent, the people may well be misinformed—rather than informed—and the purpose of political elections could be frustrated.

The principal distinction between totalitarianism and the free society is that in the free society the person has an opportunity to participate in making the vital decisions of his time. We need more dialog—not less. The lack of timely adequate forums for dialog on the issues of the day was a significant factor in the race riots of the past three summers and in the protest movements on the university campuses.

Broadcasting has had an impact upon newspapers, many of the large newspapers in our great cities having dissolved. Today society is not as fully served by newspapers as a forum for vital issues as it was in the prebroadcasting days. More reliance has been placed on broadcasters to provide this service.

The problems of society grow ever more complex and the time for decision shortens. There is a dire need in our country today for forums which hold quite regular sessions on the issues of public concern and which encourage concerned people to bring significant public problems to the forum for fruitful dialog. The equal opportunities and fairness doctrines have been developed to facilitate dialog and effective political process. For the present, broadcasting is the best forum which we have for dialog on controversial issues of public importance.

Earlier in these comments, it was noted that the equal opportunities and fairness doctrines are related to other major policy decisions in applying the public interest standard to broadcasting, and that a change in these doctrines relating to political campaigns and controversial issues might well impair other important doctrines adopted by the Commission to protect the public interest in broadcasting.

Solely for the purpose of discussion, let us assume that the Supreme Court in the *Red Lion* case and the *Radio Television News Directors Association* case holds that the fairness doctrine is unconstitutional, or that the Congress, in implementation of possible recommendations of this subcommittee, declares the fairness doctrine beyond the scope of the public interest standard. What would be the effect upon other regulations adopted by the Commission to implement the public interest standard?

If the fairness doctrine, a cornerstone of the public interest standard, should be removed, would a substantial part of the public interest structure collapse?

If broadcasters should be relieved of the duty to practice fairness in broadcasts of programing on controversial issues or of the duty to provide equal opportunities to political candidates, would it be reasonable thereafter to require broadcasters to make a good-faith effort to ascertain and fulfill less important programing needs of the community?

Articulate voices contend that to require the broadcaster to provide balanced programing, serving audiences in our pluralistic society, or to review, in the licensing context, the extent to which the broadcaster has ascertained and fulfilled programing needs of the community, is unconstitutional as an infringement of free speech or press.

Some of these spokesmen would reduce the role of the Commission to one of preventing interference between broadcast signals. They would leave a license free to broadcast "the Old Grey Mare" all day long, or to broadcast solely his views, or to propagandize as the broadcaster might choose, not that a responsible broadcaster would do that.

If the fairness doctrine should be abandoned, it may be anticipated that soon thereafter these spokesmen would seek an exception of programing from the public interest standard. If the available broadcasting channels were unlimited, or even bountiful, and if the underprivileged as well as the wealthy were able to own a station or stations, complete freedom of the broadcaster to serve his own interest rather than that of the public might be feasible.

However, even under that imaginary situation, there would be a need to prevent the broadcast of obscenity, fradulent schemes, quack medical remedies, and the like. But that imaginary abundance of channels does not exist and will not exist in the foreseeable future. The needs for spectrum space by mobile carriers, industry, ships at sea, the military, government, education, and the like, grows faster than the technology can develop equipment capable of broadcasting over the electromagnetic waves in the highest frequencies.

If the fairness doctrine were abandoned and this were followed by abandonment of the public interest standard as applied to broadcast of programing in general, would it longer be reasonable to retain the diversification doctrine, limiting concentration of control of broadcasting facilities?

Would it longer be reasonable to limit the control of networks over their affiliates?

Would there longer be good reason for protecting the character of local broadcasting stations as local institutions by preventing cable-TV, pay-TV, direct broadcast from satellite to the home, and other technological developments from impairing the economic position of the local broadcaster?

In deliberating upon the equal opportunities and fairness doctrines, the caution lamp should be lit because these doctrines are close to the heartbeat of the free society.

Following a substantial period of regulation through the equal opportunities and fairness doctrines, it may be anticipated that, even if the doctrines were abandoned, responsible broadcasters would continue to serve for some time at the same high level of service which they are rendering today. However, it may be anticipated that, absent the statutory provision and regulation, some broadcasters would not continue to serve adequately the political and public affairs needs of the community.

Moreover, in time, competition between irresponsible and responsible broadcasters might prompt responsible broadcasters to decrease their service in providing equal political opportunities and in broadcasting contrasting viewpoints on controversial issues of public importance.

The starting point in analyzing most problems in broadcasting—

and certainly the problem of the equal opportunities and fairness doctrines—is the armchair before the broadcasting set in the American home. The overriding consideration must be service to the 200 million Americans.

Of course, it is appropriate to take into account the convenience and profit of broadcasters and all other components of the broadcasting industry. But the line should be drawn at the point where serving the convenience and profit of the industry impairs service in the public interest. As the Commission expressed this thought in General Order No. 32:

> While it is true that broadcasting stations in this country are for the most part supported . . . by advertisers, broadcasting stations are not given these great privileges . . . for the primary benefit of advertisers. Such benefit as is derived by advertisers must be incidental and entirely secondary to the interest of the public.

Thus, even though the equal opportunities and fairness doctrines may occupy time on the broadcasting stations which the several components of broadcasting might prefer to allocate to regularly scheduled entertainment supported by advertising, the time should be allocated to political and civic purposes to the extent that the greater public interest is served thereby.

During the panel session, discussion will be conducted on wheather the equal opportunities doctrine should be abandoned, modified, or retained without change. The equal opportunities doctrine is set forth in section 315, and the Commission's public notice of April 27, 1966 on use of broadcast facilities by candidates for public office, provides guidelines which enable broadcasters to apply the doctrine.

Moreover, if one political party in a community should seek to buy a disproportionate amount of the available time for political broadcast, the broadcaster has a helpful refuge in section 315. As section 315 stands, a broadcaster is not required to sell time on the station to a political candidate. The broadcaster is required merely to grant to opposing political candidates equal time on the same terms that are given to a candidate permitted to broadcast over the station.

Some spokesmen say that many broadcasters do not grant access to political candidates to the extent that they would if they were not required to give equal time to opposing candidates. But a policy of preferring one candidate would be detrimental to the public interest in a sound political process. It is suggested that, during the panel sessions, discussion might well be had on whether a broadcaster, rather than being relieved of the duty to provide equal time to opposing candidates, should be required to allocate a reasonable amount of time for the conduct of election campaigns.

It should be noted that the most popular use of broadcast facilities by candidates for public offce were the Kennedy-Nixon debates, which were conducted while section 315 was suspended as to the presidential and vice presidential candidates. It may be anticipated that in national campaigns, absent section 315, appropriate exposure would be given to the opposing candidates of the two major parties.

However, this does not solve the problem of the presidential and vice-presidential candidates of a potential third party. There is danger in a political process which would deprive any new party of a reasonable opportunity to contest a national election with the two major

political parties. It is doubtful that this problem will be solved unless we retain an equal opportunities doctrine.

Moreover, the State and local political contests pose problems the solution of which is facilitated by the equal opportunities doctrine.

Also, during the panel sessions, discussion will be held on whether the fairness doctrine should be abandoned, modified, or retained unchanged. Unquestionably, practice of the fairness doctrine requires more judgment by the broadcaster than does the equal opportunities doctrine. Nevertheless, responsible broadcasters say that, with experience, one develops a sense of judgment in the application of the doctrine. It appears that more difficulty is experienced by the small broadcaster who lacks sufficient personnel to permit one of the staff to develop expertise in applying the doctrine.

While the Congress recognized the fairness doctrine in the 1959 amendments to section 315, the statute does not define the fairness doctrine with the particularity given to the equal opportunities doctrine. Probably an amendment relating to the fairness doctrine would be helpful in the administration of the doctrine. At least this would clear the air on whether the Congress in the 1959 amendments to section 315, adopted the Commission's application to the fairness doctrine under the public interest standard of the statute.

Of course, the Supreme Court may well decide that issue in the *Red Lion* and *RTNDA* cases.

The Commission's Fairness Primer gives helpful guidance to broadcasters. Understandably, the Commission has been reluctant to regulate under the fairness doctrine more than necessary, because it is the responsibility of the broadcaster to make programing judgments in the public interest. Nevertheless, the panel may wish to consider whether more definite criteria might not be established by the Commission under the fairness doctrine.

In considering the fairness doctrine, the primary concern should be the impact of abandonment of the doctrine upon the process of informing the public concerning the vital issues of the day and so enabling them to participate in decisionmaking in the free society. Obviously, the practice of the fairness doctrine may reduce the revenue of networks and stations. However, financial considerations should not override the public interest in being informed on controversial issues of public importance. The inquiry into the fairness doctrine should concern ways in which broadcasting may serve better the informing of the public on controversial issues of public importance.

In closing, permit me to quote a few words from the Report of the President's Commission on National Goals regarding the communications function of broadcasting:

> Sooner or later we (must) face up to the harsh fact that the democratic dialogue is in real danger of being smothered . . . Plainly the mass media offer us a splendid opportunity, which we will lose at the peril of losing democracy

Mr. Chairman, that concludes my prepared opening statement. I suppose it is more catalyst than moderator in character, but I believe there will be opportunities for those who might differ with anything said to introduce this at an appropriate time during the discussion of the several topics.

Mr. Chairman, the program at this time calls for paper No. 1 by Mr. Elmer Lower. However, due to certain problems of schedule and

time, it has been decided, agreeably to all concerned, that Dr. Frank Stanton will present the first position paper. His subject is "The Equal Time Requirements of Section 315 of the Communications Act of 1934."

Mr. SPRINGER. Mr. Chairman——

The CHAIRMAN. Mr. Springer?

Mr. SPRINGER. I take it you had intended that the questions would start tomorrow afternoon?

The CHAIRMAN. Yes, unless we need some clarification. Then after getting Dean Barrow's attention, you would direct the question for clarification.

Mr. SPRINGER. Mr. Chairman, I think the questioning probably will be rather extensive in some instances. Are all of these panelists going to be present tomorrow afternoon at the time of the questioning? I think that is very important.

The CHAIRMAN. We hope they will be.

Mr. SPRINGER. Will Dr. Stanton be here, may I ask?

Dean BARROW. Dr. Stanton will not be here, and Mr. Lower will not be here.

Mr. SPRINGER. Is there going to be a chance to ask these people questions who will not be here tomorrow? I think that is very important. I think much more will be brought out in questioning than will be brought out in statements.

The CHAIRMAN. I might say that for so many days you can file any question you want to and we will ask any of the members of the panel to give us answers. I will say when there is a specific question to ask Dr. Stanton after he delivers his paper, we might permit that. Otherwise, we just would not get through the panel if we interrupted it with questions. I think we can take down the questions as we go along and get the answers supplied for the record.

PAPER NO. 2—DR. FRANK STANTON: THE EQUAL TIME REQUIREMENTS OF SECTION 315 OF THE COMMUNICATIONS ACT OF 1934

Dr. STANTON. Mr. Chairman, members of the subcommittee, Mr. Moderator, and fellow panel members, we owe a debt to Congressman Staggers, as chairman, and the other members of this subcommittee, for their foresight and concern in initiating and conducting this inquiry.

There has been no scarcity of literature on the general subject of equal time. It has been the thorniest and most persistent problem in broadcasting since World War II. It has been the subject of repeated hearings, and of no less than 66 bills in one or both sessions of 11 successive Congresses. Much of this has generated more heat than light, however, because it was created in an atmosphere of crisis, complaint, or criticism. An exploratory session like this, giving us an opportunity to take a clear look at where we are, where we have been, and where we might go, with a view toward making the broadcast media more effective instruments in the democratic process, can be enormously helpful in the definition and construction of public policy.

No step in self-government is more vital than elections. They are the very core of democracy. Although we are a society governed by laws and not by men, it is necessarily men who enact the laws, who administer them, and who interpret them. And sooner or later, ac-

countability for who they are, and for what they do, is traceable to the voter in the act of making his choice in the voting booth. There is no civil act more central to democracy, more determining of political behavior, and more charged with social responsibility.

In attempting to arrive at a sound public policy on how broadcasting might serve the American people in election campaigns, the approach of the Congress historically has been one calculated not to construct an affirmative policy leading to the wisest use of the broadcast media to equip the voter better to exercise his franchise, but to prevent conceivable abuses that might operate to the advantage of one candidate or party over another.

Although this was not an inappropriate object of legislation—perhaps, in the face of the unknown, it was the only plausible one at the time—it resulted in essentially negative and repressive measures.

Broadcasting first achieved significant dimensions in American political life in 1924 during the interminable but dramatic Democratic Convention in Madison Square Garden that took 103 ballots to determine the nominee but in the process captivated the public attention. In the subsequent campaign, radio was seen as providing candidates, for the first time, with direct and immediate access to the millions and was, therefore, regarded as a means primarily to enlarge audiences for rallies. There consequently sprang into being the hired-hall concept of campaign broadcasting. Section 18 of the Federal Radio Act of 1927, in effect, merely set the ground rules for broadcasters to follow in renting the hall by requiring that equal time be given to all candidates if given to any. It virtually eliminated any more imaginative use of the medium; because, if a broadcaster gave time to the candidates of significant parties, he would have to give it to those of all parties, however numerous and however trivial.

The old section 18 was the prototype of section 315 of the Federal Communications Act of 1934, which, with the amendments of 1959 exempting certain categories of news broadcasts from its reach,[1] remains the single legislative statement on the role of broadcasting in election campaigns. It is essentially negative and repressive. Its equal-time restrictions effectively limit the broadcast media to a time-selling function and to such reporting as is permitted by section 315.

The question recurring over the years—and still persisting—is not whether these restrictions on the use of radio and television to convey information, to stimulate interest and to promote discussion during election campaigns are in the best interests of broadcasters or of the candidates. The question is whether they are in the best interests of the 120 million Americans of voting age and, indeed, of the total population.

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[1] The Communications Act of 1934, as amended:

Sec. 315.

(a) * * * Appearance by a legally qualified candidate on any—

(1) bona fide newscast.

(2) bona fide news interview.

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

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

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

If the impact of the equal-time restrictions of section 315 on the material interests of the broadcasters were the sole criterion, the best answer would be to let the law stand as it is. By the standard of where the public interest lies, however, all the available evidence that we have from the 1960 presidential campaign—the only case history of an election campaign without equal-time restrictions—demonstrates that we ought to strike down those restrictions once and for all and depend upon principles of fairness and the accountability of the broadcaster as a licensee to prevent abuses.

I say this on the general grounds that any useful election campaign ought to be a continuing dialog and not merely a collection of competitive set presentations that avoid more issues than they meet, raise more questions than they answer, and sloganize more policies than they explore. When he buys time or space, of course, any candidate is entitled to put his case in the manner most favorable to his prospects. For this purpose, all the traditional forms of campaigning are available, as are many forms of modern advertising. Nobody wants to eliminate all this. But in the best working democracy, legitimate efforts at persuasion should be conducted in a context of in-depth knowledge, not of superficiality and ignorance, and of awakened interest, not merely of suggestibility.

There seem to me to be three useful criteria by which we can measure the effectiveness of election campaigns. First of all, it is essential to the idea of self-government that the voter be genuinely interested in the process of self-governing. Second, quantitatively, it is obviously important that as many people as possible be directly exposed to the candidates. Third, it is highly desirable, if they are to vote responsibly, that they be exposed to both sides of the issues and to candidates taking opposing views. Applying these criteria to the 1960 presidential election campaign, we must conclude that we were far better off without the equal-time restrictions than we would have been with them.

There is no disagreement that an apathetic electorate is a social and political evil in a democracy and that any apathy ought to be remedied. A variety of factors unquestionably influence the degree of interest in a campaign. One is the tendency of a candidate simply to say what everyone knew he was going to say and to say it very much the same way that he has said it before.

For the most part, only the party faithful listen to it, and they seldom need to be converted. The substance of all history, political as well as military, on the other hand, is conflict: actions or ideas in contention. Popular interest centers in the advancement and ultimate resolution of the conflict, as the issues are sharpened and the contenders are drawn out by confrontations, even on subjects they might avoid in unilateral talks. Yet traditional campaign methods, far from depending upon the presentation of conflicting opinions, rely almost entirely on the one-sided presentation of views already known.

It was this element of conflict, I am quite sure, that accounted for the significant increase in interest during the 1960 campaign after the confrontations of the candidates on television and radio as compared to that during the last campaign preceding it. In 1956 and in 1960, going into September of each year, those "very much interested" in the campaign were about the same—46 percent in 1956 and 45 percent in

1960. According to reliable public opinion polls,[2] in 1956 those "very much interested" rose in October to 47 percent—an increase of 1 percentage point. But in 1960, in October, after the debates, those "very much interested" rose to 57 percent—an impressive improvement of 12 points.

Besides this considerable increase in direct interest, the confrontations of the two candidates on television and radio in 1960 generated an enormous amount of material bearing upon the issues and personalities of the election in other media. They were the occasion for front-page stories in the newspapers. They were topics for featured treatment in the magazines. They were the subject of discusion, conversation and comment on the national and on the regional and local levels. In short, they breathed life into the campaign and interest into the electorate.

In any event, it should be the purpose of all of us to stimulate a sharing in the governmental process by as many of our citizens as possible. Fundamental as they are, elections are only a first step in the continuing civic responsibility of the people in a democracy. If they commit themselves in the election, they are much more likely to have a clearer sense of responsibility for the subsequent policies and actions of their candidates, thereby considerably broadening the base of national discussion and of the national consensus between elections.

Quantitatively, there is convincing evidence that more people are attracted to a meaningful confrontation of candidates than to the traditional paid political broadcast, with an oratorical set price or staged question-and-answer formula with the answer carefully written before the question ostensibly eliciting it is asked.

Statistical data indicate that, as a rule, when a paid political broadcast replaces a regularly scheduled entertainment program, some 30 percent of the audience drops away. But the confrontation broadcasts in the presidential campaign of 1960 drew an audience that not only did not fall off from that of the program replaced, but was actually, on the average, 20 percent larger than that of the entertainment programs they preempted.

Looked at another way, the paid political broadcast in 1960, generally speaking, drew an audience less than a third in size of that drawn by the presidential debates. Moreover, the tuneout that is customary in the course of long and serious programs did not occur in the case of the presidential debates. To a remarkable degree, the audiences stayed with the broadcasts to the conclusion. The holding power of the debates was 88 percent, compared to 77 percent for entertainment programs in similar time periods.

Even more significantly, the people who tuned in to see the candidate they preferred, or toward whom they leaned, were also given occasion to see and hear the opposition. The importance of this cannot be overestimated. People tend to go to the rallies, read the words, and listen to the speeches of the man whom they already favor or who represents the party to which they already belong. Any restrictions on radio and television that help to preserve this political immobility and inbreeding sap the vitality of the election process. They are simply helping to perpetuate a behavioral pattern that atrophies independent thinking and stagnates voting behavior.

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[2] "Election Studies II and III, Concerning Issues and Candidates," October and November 1960, Elmo Roper & Associates, 111 West 50th Street, New York, N.Y.

The equal-time restrictions of section 315 seem to me to offer no safeguards in any way comparable to the advantages to the electorate that their elimination would bring about. Objections to such a course generally revolve around fears that minority parties would not get a fair shake or that broadcasters uninhibited by the equal-time restrictions, would indulge in irresponsible political favoritism.

Both fears seem to me unjustified. The equal-time provisions, so far as third parties are concerned, have become no-time provisions, because for all practical purposes they restrict the granting of time to those who have the funds to pay for it. The reason for this, of course, is that no broadcaster can afford to offer free time to the presidential candidates of 20 or so parties,[3] and no broadcasting schedule could accommodate such demands and still have an audience left for the major candidates.

Far from protecting significant third parties, section 315 penalizes them, by lumping them together indiscriminately with the insignificant. Some parties, such as this year's American Independent Party of George Wallace, can develop into meaningful forces in a campaign. Broadcasters ought to be free to treat them as such. Under section 315, they are not.

As a matter of fact, last week I received a memorandum from my colleague who is in charge of CBS news. In it he said:

> We have been working for some time on a documentary on George Wallace. Obviously, he is newsworthy and can significantly affect the outcome of the 1968 election. We had scheduled it for March or April. Now that he has formally announced his candidacy, the lawyers have informally ruled that such a documentary is not exempt from section 315 since it does not treat Wallace incidentally. Hence, we would be required to provide equal opportunities for the minor party candidates who have already announced and who have no opposition.
>
> Accordingly, we have to abandon the documentary. This is a pretty stunning example of how section 315 cuts across our journalistic obligations to the American people. At the very time when Wallace is in the news and becomes particularly significant, we are hamstrung by section 315.

Third parties generally are of three categories: those with an historic background of thoughtful criticism of the major parties but whose significance varies widely over the years; those concerned with a single current issue on which in a given campaign they part

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[3] Political parties:

1964 presidential campaign:
Democratic.
Republican.
Conservative (C. Benton Coiner for President).
Conservative (J. Bracken Lee for President).
Constitution (Merritt B. Curtis for President).
Constitution (Joseph B. Lightburn for President).
Constitution (Charles L. Sullivan for President).
Freedom Now.
Freedom Socialist.
Independent.
Independent Afro-American Unity.
Industrial Government.
Liberal.
National Civil Rights.
National States Rights.
Prohibition.
Socialist Labor.
Socialist Workers.
Tax Cut.
Universal.

1960 presidential campaign:
Democratic.
Republican.
American Beat Consensus.
American Third.
American Vegetarian.
Church of God.
Conservative (C. Benton Coiner for President.
Conservative (J. Bracken Lee for President).
Constitution (Merritt B. Curtis for President).
Constitution (Charles L. Sullivan for President).
Farmer Labor Party of Iowa.
Greenback.
Independent Afro-American Unity.
Independent American.
Industrial Government.
Liberal.
National States Rights.
Prohibition.
Socialist Labor.
Socialist Workers.
Socialist Workers and Farmers.
Tax Cut.
Theocratic.
Unpledged Democrats for Harry Byrd.

company with the major parties; and those made up of chronic malcontents, panacea peddlers, or personality cultists. By a common treatment of all third parties, without regard to their political or civic significance, the equal-time restrictions impose as the sole determinant of whether they get air time, the cash resources they have to buy it. Broadcasters, unable to give time to all third parties, significant or trivial, generally give it to none. And the useful purposes that responsible and relevant third parties can serve in a largely bipartisan system—reducing lethargy or timidity in the major parties, sharpening really critical issues, and advancing bold and new approaches, for example—fall by the wayside, so far as air time goes. Because, except in the news categories exempt from section 315, and in the absence of third parties normally having financial resources comparable to the major parties, the broadcasters' hands are tied.

As for the possible biases of broadcasters, I have no doubt that, like all citizens, they have their loyalties and preferences as individuals. But to indulge these personal attitudes in the conduct of the public service function of their stations would be a very risky business. A broadcasting franchise is a very precious thing. Nobody knows this better than a broadcaster. That the general devotion of the American people to the principles of fair play apply to the way broadcasters exercise their franchise has been made amply clear. No broadcaster worth his salt would risk amassing a record of biased treatment of candidates or parties.

The American people have had four decades of experience now with broadcasting. During the intervals between election campaigns, when no equal-time requirements are applicable, there is no evidence that broadcasters have favored one political party over another—even though partisan disputes became major public issues. Complaints have been extremely sparse. It has been no accident that the public trusts the fairness of broadcasters. The record shows that they have earned that trust. In the longrun, the judgment of the people can be far better relied upon to insure fairness than any mathematical formula or any rigid regulation.

The equal-time restrictions of section 315 provide nothing more than a mechanical formula that precludes broadcasters both from exercising their judgment and from carrying out their responsibility. It is easy, and it is safe. Carrying out responsibility is hard, on the other hand, and making judgments is risky.

But in this—as in all areas of the democratic experience—efforts and risks make for progress and improvement, while ease and safety make for reversion and stagnation. It is time for broadcasting to be freed of the section 315 restrictions. There is no evidence that this would result in weakening the electoral process. There is commanding evidence that it would strengthen that process.

This committee could make an historic contribution in that direction if, as a result of these proceedings, there could come a joint resolution, modeled after but enlarging upon the provisions of Senate Joint Resolution 207, which was passed by the 86th Congress and signed by President Eisenhower on August 24, 1960, and which made the Kennedy-Nixon debates possible. Senate Joint Resolution 207, you will recall, suspended the equal-time requirements of section 315, with regard to nominees for the offices of President and Vice President for the period of the 1960 campaigns.

The test of experience proved that suspension a success. A joint resolution now calling for a 6-year suspension, including nominees for all offices, would provide a test of further experience that would embrace two general elections, an off-year election, and State and local elections at all levels. Results could be observed and reported back to the Congress not in a single isolated instance, but over a comprehensive series of elections. If any abuses arose, ways of dealing with them could be considered in the light of the facts rather than on the basis of fears and speculations. And a substantial advance will have been made in the resolution of a problem that has haunted and preoccupied us all too long and that has its roots in a legal anachronism that has long since defeated its own purpose.

Dean BARROW. Thank you, Dr. Stanton, for your excellent contribution to the panel.

Since the panel was introduced, Mr. Chairman, we have been joined by Prof. Louis Jaffe, Byrne professor of administrative law at Harvard University.

The comment on Dr. Stanton's paper will be read by Mr. Herbert E. Alexander. It has not been duplicated in advance, so you will not find it among the papers before you.

COMMENT ON PAPER NO. 2, BY HERBERT E. ALEXANDER

Mr. ALEXANDER. Mr. Chairman, I appreciate the opportunity to appear on this panel before this distinguished subcommittee.

Dr. Stanton deserves praise for putting problems of political broadcasting in the context and perspective of democratic theory, and for relating broadcasting to the quality of American politics.

But posing such questions can also lead one to conclusions at variance with his, and not necessarily as optimistic.

Political broadcasting presents perhaps a classic case of conflict between the democratic theory of public dialog in free elections, and the economic freedom of the marketplace. The campaign interests of candidates do not always coincide with the interests of the electorate in full discussion; nor do they often square with the interests of the broadcaster in format design or time availability.

It seems to me that elimination of section 315 will not, by itself, do very much to get very many candidates the time they want in the form they want, on the stations they want. Section 315 may be considered negative, as Dr. Stanton says, but it is so purposely, to protect candidates from discrimination.

Section 315 may be repressive, as he says, but it is so purposely, to deter broadcasters from exercising favoritism and, by the way, 315 protects broadcasters as well as candidates.

In my judgment, for other than presidential elections, the fairness doctrine is not an adequate substitute for the protection that section 315 affords to candidates, for fairness is only a debatable standard admitting of after-the-fact administrative procedures. There can be no equity for a candidate once an election is lost.

The question is whether it is in the best interests of the American people to turn over all decisions of free candidate access to a private industry. No matter how well intentioned some broadcasters may be, some candidates are going to get hurt. Scores of complaints and court

cases are ample testimony to the varying interpretations of both equal opportunity and fairness, and the industry record in providing sustaining time leaves real doubts.

Since section 315 is no hindrance when there are not more than two candidates, as is most often the case in general elections, how much free time does the industry give when there are only two candidates?

In senatorial campaigns in 1962, an FCC survey [4] showed that television broadcasters did not provide significantly more sustaining time when only two candidates were running. There were two senatorial candidates each in 28 State contests and there were more than two in eight States. Proportionately, as many TV stations in the eight States provided sustaining time for senatorial candidates as in the 28 States.

A like analysis for radio and television in 1966 showed that the average time for major party candidates was about the same whether or not there was a third party candidate. In 1966, of 133 television stations reporting charges of more than $50,000 for paid political broadcasts, 35 percent made no free time available.[5]

While broadcast costs increased, the statistics suggest that the ratio of paid to free program time has been declining, and probably for the same reason—it is more costly to give free time just as it is to buy it.

Of course, statistics may mislead in both directions. On the one hand, some free time that is now provided is not donated in prime-time periods. On the other hand, some free time is offered and is refused by candidates who do not like the formats offered or do not want opponents to get equal exposure.

These are reasons why I wonder how much more time would be utilized if 315 were repealed. Understandably, broadcasters are concerned about format, but should they be in a position to dictate campaign strategy by putting offers of free time on a take-it-or-leave-it basis?

Many candidates would like more exposure than is provided through debates and interviews. Many candidates would like opportunities to speak for themselves on their own terms, even if they attract smaller audiences.

Dr. Stanton says they could buy that time, but what if they don't have the money available or, as likely, the stations don't want to sell them program time? Some stations won't sell program time for the same reason they won't give it free—fear of losing audiences. Thus, broadcasters often are, in effect, in a position to substitute their judgment for that of the candidates.

Dr. Stanton idealizes confrontation politics. Well, it can be exciting for the public, and it probably can bring increased public interest, but to put it bluntly, many candidates are simply not willing to confront either an opponent or an issue, even to get free time.

The cost of political broadcasting is high and rising, and the end is not in sight. There are potential CATV costs as both cities and rural areas get wired and candidates can be sure to reach only their constituents. Color TV will bring higher time and production costs. Yet increasingly, the bulk of money spent on political broadcasting,

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[4] Federal Communications Commission, "Survey of Political Broadcasting, Primary and General Election Campaigns of 1962" (Washington, D.C.; USGPO, 1963), pp. v–viii.
[5] Federal Communications Commission, "Survey of Political Broadcasting, Primary and General Election Campaigns of 1966" (Washington, D.C., USGPO, 1967), pp. 4–5.

about two-thirds of it in recent years, goes for spot announcements, not program time. Both stations and candidates may prefer spots as a matter of strategy and convenience, the stations because they fear losing audiences to others running popular entertainment, and candidates because they know the attention span of the average listener is short, and because the viewer hasn't time to change the dial.

If section 315 were eliminated, or alternatively, as some have advocated, if stations were required to give a certain amount of free time as a condition of licensing, I would like to pose several questions:

Would either alternative get around the problem that the time given would presumably be program time, so might not the candidate spend as much as before to buy the spots he wants? Thus, one purpose would not necessarily be carried out, to help reduce campaign costs for candidates. One doubts that a prohibition of spot announcements is either good public policy or constitutional.

On the other hand, is there justification to give free spot announcements which the candidate probably wants but which are hardly likely to be edifying or to contribute to the public dialog? Would either alternative get to the problem of who is to decide who is to get the free time? Would the Congress decide that only Federal candidates should get it, or would the stations decide, as they do now, or the political parties, or would the FCC apportion the time?

We are dealing with limited time availability for unlimited numbers of candidates. There are more than 500,000 public offices filled in elections in this country, and campaigns are even more numerous because of the open nomination systems. Obviously, most candidates for most offices never get near a microphone or television camera with either paid or free time, so the problem immediately is reduced.

But if 315 were simply abolished, wouldn't those stations willing to give time all seek the most popular or visible contests? The most appealing candidates usually attract funds as well, but what about other candidates in less visible contests or in one-sided contests where one candidate has excessive funds available for broadcasts?

Too, the air waves cross political boundaries. There are, for example, 40 or more congressional districts in the New York metropolitan area, some in Connecticut and New Jersey, reached by New York stations. If the several stations in New York agreed to divide up the districts and each take a share, would it be collusion on the part of the broadcasters, subject to antitrust action? What stations would get the colorful candidates in the silk stocking or reform challenged districts and what stations would get the one-party dominant districts in which there is hardly a contest or a modicum of interest?

For another example, there are no VHF commercial television stations in New Jersey. A candidate seeking time on New York or Pennsylvania stations finds his message reaching mostly out-of-staters who do not vote in New Jersey. The few statewide candidates from New Jersey who do buy such time know they are throwing away 75 cents of every dollar before the broadcast begins.

Would these stations be willing to give double time to serve these needs in adjoining States, or could they be required to do so?

Given these kinds of considerations, the need, it seems to me, is to weigh the question of whether for the few candidates who might benefit from abolition of equal-opportunity provisions, it is worth abolishing the protection that section 315 now affords for all candidates.

On the other hand, there is no need to sit still. Traditionally, section 315 has worked least well in presidential elections where invariably there are a dozen or more candidates. The suspension of 315 in 1960 was useful in permitting the so-called great debates, and I think it is useful to treat presidential campaigns differently than others by periodic suspensions of 315, subject to close congressional review.

A possible approach to the minor candidate problem would be to devise a policy of "differential equality of access," a doctrine that would recognize our predominant two-party system while giving all contenders some chance to be heard. "Differential equality of access" need not entail a complex rating system according to the size of the vote, the size of membership or the size of petition. It could simply state that major candidates get equal time, that minor candidates get equal time, but that the two categories do not get time equal to each other.

Broadcasters are correct in saying that the industry already bears a relatively large share of political program costs, and it would not be equitable if the industry were asked to assume the entire financial burden. Therefore, I agree with a proposal of former FCC Chairman E. William Henry, who suggested that the Internal Revenue Code be amended to give incentive to broadcasters to program free political time by permitting them to deduct from their taxable income not only out-of-pocket expenses of free broadcasts as they do now, but also to deduct at least a portion of the revenue lost.[6]

In this way, responsible broadcasters would benefit by serving the public at election time, and some of the burden would be distributed to the taxpayer.

One other proposal I would make would be to broaden the definition of a news program to include any joint or simultaneous appearances of major presidential candidates. This would give broadcasters the wider scope they seek to present such figures on the same program, including program series for the duration of a campaign. Recognition would thus be given to the special news quality of such appearances.

Minor candidates would not have to get equal treatment unless broadcasters decided their appearance was equally newsworthy.

This formula would have to be watched closely and if it worked successfully at the presidential level, it could be tried for other contests, but under controlled circumstances.

Perhaps radio and television have the potential to raise the level of political education and participation, as Dr. Stanton says, but so far the evidence is conflicting. Studies of the Survey Research Center at the University of Michigan [7] show citizen interest in political involvement fluctuating during recent decades, while there was a tremendous increase in television coverage. Turnouts in presidential elections in 1952 to 1960 were higher than in 1944 and 1948, but not proportionately higher than in 1936 and 1940.

The voter turnout in 1956, deep in the television era, was less than 1 percentage point higher than in 1940. Moreover, there has been no significant increase in off-year congressional elections during the television era.

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[6] Address of E. William Henry before the Commonwealth Club of California, San Francisco, Jan. 15, 1965. Press Release, p. 14.

[7] Angus Campbell, "Has Television Reshaped Politics?" Columbia Journalism Review, I (1962), pp. 10–13.

It is time to begin a serious dialog on the problems of political communications. I commend the beginning this subcommittee in making. The continued strength of our democratic institutions may depend on finding the answers.

Dean BARROW. Thank you, Mr. Alexander.

We are now at the point of a discussion of these two papers. I am sure I need not point out to the members of the panel that our reporter will have his problems in identifying statements with each spokesman, so if you will, let me identify you and perhaps that will be helpful to him.

I will follow the procedure of asking the person who gave the position paper to give the first brief reply to the comments upon the paper.

Dr. Stanton?

Dr. STANTON. Having heard of Mr. Alexander's remarks for the first time this morning, I am not able to make this as tight a comment as I would like to make it.

It seems to me, in the first place, that the survey of what has happened in the past in the two-contest situations and the three or more contest situations isn't the real test because it seems to me that if you started giving time under 315 to the two-candidate situations that in time you would encourage third, fourth, and fifth candidates to appear.

This has certainly been the history in the presidential campaigns where we, as you pointed out, have had a great deal of difficulty under section 315. I am not suggesting that what I am proposing this morning is the answer to this problem for all time. I do suggest, however, that an extended test is the best way, it seems to me, to see just how well this might work. We did it in 1960, and I think the evidence is pretty good.

You talked about one of the difficulties with the candidate and the station having to do with the question of a take-it-or-leave-it attitude. I believe that the history of the campaign of 1960 in the presidential debates would deny that we went at that on a take-it-or-leave-it basis. That format wasn't developed in the office and then taken to the candidates with "Here it is. Take it or leave it."

We sat down with the candidates' representatives and worked out what appeared to all sides to be a fair and equitable use of the medium. This has certainly been the case in individual debates that have been held by individual stations in other campaigns.

So I think it is unfair to say that the broadcaster has taken a take-it-or-leave-it attitude. Moreover, I think that it is improper to say that there are stations who will not sell time because they don't want the political broadcast in the schedule because of the effect it might have on ratings. I think we are way beyond that situation in this country. This is talking pre-World War II kinds of talk, it seems to me.

Radio and television in this country have become so important to the fabric of our political life, and news broadcasts have become so important in the schedules of the stations because they are important to the people. So I think even in the quote that was read by Dean Barrow this morning in his opening remarks, and again I wish I had had a copy of it before I made my direct statement, in reading from the testimony in the *Great Lakes* case, if you look at that description of a well-rounded program schedule, the very last thing that is listed is news, and yet news today is the most important single program type in the program schedule.

Back in the early days, news had a much less important position in the schedule. So I think the management of broadcasting stations today do not look upon the political broadcast or the news broadcast as something that they want to avoid. This is the way to be in the mainstream of your community.

You went on to say that perhaps one way to accommodate the situation would be to put these debates in news broadcasts. Unless you are going to suggest that news broadcasts be expanded in time, I don't see how to accommodate them, and I don't think it is proper to deny the public its regular flow of news during the political campaigns, to force the news down to a minimum in order to accommodate the debate. This seems to me to be an unwise approach to follow.

You raised some points about the costs of broadcasting. There is no question about that. That cost is a cost for the user as well as it is for the broadcaster. But I do believe that more time would be given, and there would be more dialog and more confrontation, and the public would be better off, if we tried to lift 315.

You mentioned in your final remarks, as I recall, some statistics having to do with the lack of turnout or the fact that there wasn't a significant increase in turnout in elections since there has been a high use of television by the public and by the politicians. I am not sure that you can make that correlation as clearly as I think you presented it.

It seems to me that there are many other factors that have to do with the turnout problem. These include our antiquated registration techniques, the fact that people are much more mobile today and, therefore, disenfranchised in many places; the voting hours are still very restrictive in terms of taking care of the voter; the whole suburban traffic problem in getting to voting booths and so forth—these are all problems that have a bearing on that.

I am not saying that they are exclusively the problems, but these are things that also bear on that. So I think we have to look at that statistic with a jaundiced eye, if you will, because I don't think that correlation is the final answer.

At any rate, as I said at the outset, I don't think I have all the answers here. All I am suggesting is that I think we can advance the whole cause and have another look if we were to take the approach of a 6-year test.

Dean BARROW. Do you want to respond immediately to this?

Mr. ALEXANDER. I would respond very briefly to two or three points.

With respect to the format of the Great Debates in 1960, I am not denying that the candidates had a good deal to say about the format, but I am saying that the format was one of confrontation, and that the networks would not willingly have given the same time available for set speeches back-to-back if the candidates had preferred that procedure.

That is the point I was making about broadcasters putting the time availability on a take-it-or-leave-it basis.

With respect to news and documentary broadcasts, I think there are many opportunities for the major candidates to appear. Because these broadcasts are newsworthy, I think they should be treated in a different way. Every time a public person goes on "Face the Nation" or "Meet the Press," it becomes an object of newsworthiness. The next morning what he says is in the newspapers. It is, in effect, manu-

factured news, not hard news, growing out of the fact that he was interviewed and he made some statements.

So I think there should be in campaigns these same opportunities and they, in a sense, would give more exposure to the major candidates for public office, because they have bigger audiences than would necessarily straight political broadcasts.

Dean BARROW. Mr. Stanton.

Dr. STANTON. There is no question that you are right that the appearance of candidates in a debate would be picked up in the news broadcasts. Go back to history in 1960 and that was exactly the case. But that is taking a brief mention out of the context of the full broadcast.

That isn't the way to have a confrontation. in my opinion, to use brief takeouts in a news broadcast. This happens every Monday, and every Sunday night, as you say, on "Meet the Press" and "Face the Nation." But that isn't manufactured news. I take exception to that. These men are not manufacturing news. They are making news.

But I would make the distinction that it is not a synthetic manufactured affair.

Back to one other thing.

On November 21, 1963, and if you will remember the date, that was the eve of the terrible tragedy in Dallas, I wrote John Bailey and at that time the Honorable William E. Miller, then chairman of the Republican National Committee, a letter hoping to get ready for the plans for the 1964 campaign with the two major presidential candidates, in which I was offering them the facilities not for fixed debates, but for an opening statement, then 6 weeks of some type of confrontation that could be worked out, and then a closing broadcast which would be completely under the control of the candidate so that he opened the 8 weeks between, let's say, Labor Day and the election with an opening statement as he saw the campaign.

Then we had the confrontations, still to be worked out in format, and then a closing hour on the Sunday night before the election in which they could summarize the campaign in their own fashion.

I only introduce this here to indicate the willingness on the part of the broadcaster to try to be flexible in working out these things, and it is not a take-it-or-leave-it situation.

Dean BARROW. May I point out that we have allocated 45 minutes in this morning's session to Paper No. 1, which we passed over. If we stick to the schedule, there are about 12 minutes left for discussion of this one, even if we do not take the usual break.

Is it the pleasure, Mr. Chairman, to continue straight through without a break in the morning session?

The CHAIRMAN. Might I say this: that we have decided that the subcommittee just doesn't have the time to question Dr. Stanton. We are interested in what you gentleman have to say. We will forgo our questioning. If we have any questions, we will put them in writing to Dr. Stanton or Mr. Alexander.

Would it be possible for you to return tomorrow, Dr. Stanton?

Dr. STANTON. Tomorrow afternoon?

The CHAIRMAN. Yes.

Dr. STANTON. I have a very critical meeting tomorrow.

The CHAIRMAN. Very well. We will try to go ahead until you are finished with the next paper.

Dean BARROW. Then we will continue the discussion with the panel for another 10 minutes or so on this paper.

Mr. LYONS. Both Mr. Lower, whose paper comes next, and mine, which discusses his, go into this question. It would save the time of the panel if we withheld our comments and perhaps it would save some duplication. I can make my statement in this 12-minute discussion or withhold it, as you like.

Dean BARROW. Mr. Lyons has made a valuable suggestion, I believe, so we will go, then, into Paper No. 1 by Mr. Elmer Lower, entitled "The Role and Influence of Radio and Television in the Formation of Public Opinion: Comparison with Newspapers, Magazines, and Specialized Journals of Opinion."

PAPER NO. 1—ELMER W. LOWER: THE ROLE AND INFLUENCE OF RADIO AND TELEVISION IN THE FORMATION OF PUBLIC OPINION: COMPARISON WITH NEWSPAPERS, MAGAZINES, AND SPECIALIZED JOURNALS OF OPINION

Mr. LOWER. Thank you, Mr. Chairman.

My name is Elmer W. Lower, vice president of the American Broadcasting Co., and president of ABC news department.

The topic on which I have been invited to speak is the impact and influence of radio and television in forming public opinion as compared with that of newspapers, magazines, and specialized journals of opinion.

I especially want to make this comparison within the context of our theme for this panel discussion—the fairness doctrine and related subjects.

Let me begin with the obvious. In this complex, interdependent world of today people—now as never before—need to know what is going on. They want to be able to find out easily, and they want to be able to find out fast.

These factors, I think, account for the growing importance of all the information media—and especially of broadcast journalism which presents the news quickly, concisely, and in a manner that is easily understood.

I wish there were some exact measuring rod that could enable us to determine with precision the comparative impact of the media. Since there isn't, what I am going to try to do is to draw on what statistical and survey information is available and draw as well on my 35 years of experience in both broadcasting and print in order to reach what I think are valid conclusions and also raise some useful questions.

First off, let's look at what the polls tell us. They tell us that over the last few years, the broadcast media have replaced print as the public's principal source of news and information. More specifically, the polls reveal that since 1963, television has been the most popular news medium—the one Americans turn to for most of their news. They tell us further that television is the medium that people consider the most reliable, the one they would be most inclined to believe in the face of conflicting reports.

If we take together the combined influence of television and radio, the public's reliance on broadcasting is shown to be even greater—far greater than the reliance on all other media combined.

The polls—a series of five of them—were conducted by Roper Research Associates for the Television Information Office of the National Association of Broadcasters, between 1959 and 1967. Each one used a sample of about 2,000 people—representing a nationwide cross section of the adult population.

In the first poll, in 1959, television ranked second to newspapers as a source of information. In 1963, TV took the lead for the first time, and increased that lead in last year's poll.

On the second point—which medium to believe if there were conflicting reports, television has rated highest in each of the last four polls. Last year it was considered most reliable by almost twice as high a percentage as the runner-up—newspapers.

There is a great deal more evidence, some of which I will take up later, that makes clear beyond question the enormous influence of broadcasting as a news medium. But there is one crucial legal difference between broadcast and print news that I think we ought to keep in mind from the outset.

The newspaper or magazine journalist is influenced in reporting the news primarily by the traditional canons of American journalism: mainly, the stress on truth, accuracy, and objectivity.

Of course, the broadcast journalist also keeps these uppermost in mind. But he must also keep in mind that he is working in a medium that, unlike print, operates under Federal regulation that has an impact upon what is disseminated. The most influential of these Federal regulations, of course, is the fairness doctrine. I want to consider its effects more fully later on—after we have looked at some of the other differences between the impact of the broadcast news media—with special reference to television—and that of newspapers and magazines.

Television's greatest advantage, of course, is that it can give the viewer a closer approximation of concrete reality than any other medium.

It makes direct use of two of the five senses—sight and sound. Our object in the news business is to tell it like it is and television can do this by actually showing things as they are—or at least as they look and sound. Live television can convey these impressions instantaneously—at the very moment they are going on. There is no need to wait for the next edition.

Russell Lynes, the Harper's magazine editor and critic, recently wrote of television:

> It reports ably after the fact, but it is when it is a substitute for one's own eyes, watching action as it happens, that it is more miraculous.
>
> Who will ever forget the sun reflected in the eyes of Robert Frost so he could not read his poem at President Kennedy's inauguration? Who will forget the McCarthy hearings, the moment when Ruby shot Oswald, the smoke billowing from burning Detroit last summer? Television is the most remarkable transmitter of news ever devised because it is the first to be instantaneous.

Lynes might have mentioned radio here, too. It has been providing instantaneous coverage for many more years than television, although only in sound. Television—especially live television—has another important characteristic. Uniquely among the media, it affords people

a sense of participation in great events. The most striking example of this came after President Kennedy's assassination.

Much has been said about the way television reported the events of those four terrible days. It has been called TV's finest hour. I think it was. But not enough, I think, has been said about the way television united the Nation in those dark hours.

For the first time, all Americans, from border to border and coast to coast, were taking part in and sharing the same experience. Television brought all of us closer together as shared experiences always do. And it provided this vital service at a time when national unity was especially essential. No other medium could possibly have done that.

I think that the unmatched outpouring of grief at President Kennedy's death was itself—in some part—a reflection of the influence of television. Through that medium, millions had gotten to know him as no generation of Americans has ever known a President before. Most of us saw and heard him almost every day—and became familiar with his lovely wife and his children. Television made John F. Kennedy, as it had Dwight Eisenhower before him, real to us to an unprecedented extent.

Television has added a whole new dimension to coverage of the Vietnam war. Some, like critic Martin Maloney, have even gone so far as to call it the TV war. Never before has the agony of war been brought with such brutal and unremitting force into our own homes, intruding daily into our lives. No wonder so many people are upset by what they see on television. It is something they have never seen before—raw stuff, to say the least, that burns itself into the mind. It is more reality than many people want. But to give people less than the truth would be the violation of a public trust.

This applies as well to the continuing racial story, of which the broadcast media have also provided unique and sometimes disquieting coverage. As men in politics, I need not give you a detailed evaluation of how television has influenced your profession. Suffice it to say it has created no less than a revolution, vitally affecting everything from campaign styles to the kinds of candidates who enter the races and the color of the shirts they wear.

In 1968, politics is television's biggest story, as it is in every presidential election year—and it is a story TV is uniquely equipped to tell. Through television, the whole Nation has already begun taking part in the campaign—looking over the candidates, examining their records and evaluating them as people—each voter in the privacy of his living room. From the same vantage point, every American will be able to follow developments at the conventions better than many of the delegates. I remember in 1964 seeing many delegates clustering around television sets in the convention halls to get a better idea of what was going on.

And on election night, of course, television serves as the speedy, dependable herald of the Nation's decisions at the polls.

How has the growth of television affected the other news media? How, especially, has it affected the role of the newspaper?

Some of my chauvinistic colleagues in television suggest that our emergence has provided one vital new role for the newspaper—that of providing TV listings. More seriously, I don't know that tele-

vision news has seriously impaired the role of the newspaper. Certainly broadcasting has taken the edge off the impact that newspapers once had as the only daily news medium.

Now both radio and TV give us our news before the newspaper and often present it more graphically. And now the James Restons and Joseph Alsops have to compete as pudits with the Eric Sevareids and Howard K. Smiths.

But I think the newspaper continues to remain indispensable. We can complement it, but never replace it. That is a lesson those of us in broadcasting learned very well during several long newspaper strikes. For example, on many television stories, the kind of coverage we can give is limited by the medium.

Where we don't have film or other visual materials to illustrate a story, we can rarely have our anchorman tell it for more than about 45 seconds—about 100 words. Front page newspaper stories frequently run more than 500 words. So the newspapers often do a more thorough job.

I hasten to add that this is not always the case. The advent of the half-hour television news program has brought with it more complete coverage of daily stories, and what we call extended reports. These are in depth treatments of matters of news importance that can run anywhere from 3 to 10 minutes. Many do as good a job of depth reporting as does any newspaper.

So do television documentaries. How many newspapers provided as much coverage of the Warren report as did CBS news, with its four exhaustively researched hour-long programs? How many have provided coverage of the Vietnam war as penetrating as ABC Scope which, in the course of 107 weekly half-hour documentaries devoted solely to various aspects of the war, examined just about every conceivable aspect of it?

In the main, however, there is no question that newspapers still give more complete coverage of far more stories than we do. There is no question, either, that the papers and wire services, with their much larger reporting staffs, do a far more complete job of gathering the news than we in broadcasting do.

And if television often has a more dramatic impact on its audience, that of the newspaper is usually more permanent. On radio or television, a story once told literally disappears into thin air. A viewer cannot go back and check a fact, ponder something he doesn't understand, or look up what he may have missed. Nor can he cut out an item and file it away for future reference.

Incidentally, I would like to see us do something about this. There is enough good, original reportage on radio and television today that it deserves a permanent record—and the attention of people who just didn't happen to be tuned in to the ABC evening news at 7:18 last Monday night. Perhaps someday we could put out a weekly journal to include at least the verbal record of exclusive stories of importance.

Many of the points about newspapers apply as well to magazines. In addition, magazine editors have more time to prepare their material and more space in which to present it in greater depth. Some of the most distinguished reporting and commentary in the magazine field appears in the smaller, more specialized journals of low circulation.

But television can bring the same kind of material to the attention of the mass audience. The respected quarterly, Foreign Affairs, has a circulation of about 60,000. So an article on Africa appearing in it can attract only a limited audience.

While some in that audience doubtless watched ABC's 4-hour documentary on Africa last September, millions of others who do not read Foreign Affairs had the opportunity for an in-depth exposure on this subject. ABC's "Africa" had an audience of 40 million people.

Having made all these comparisons between broadcasting and the other media, I would now like to look more closely at the crucial one I mentioned earlier—Broadcasting alone operates under the FCC fairness doctrine which requires the presentation in news and documentary programs of varying points of view on controversial public issues.

While ABC has never advocated the entire withdrawal of the fairness doctrine, I do think we ought to recognize that the existence of the doctrine raises a number of interesting questions. I would simply like to pinpoint some of those questions as food for thought without attempting to answer them in this statement. I think this committee will and should go into these questions much more fully in the course of its panel discussions.

The first question—and I think the most important—is whether the doctrine violates the first amendment to the Constitution.

There is no question that it imposes on broadcast journalists a limitation that does not apply to their colleagues in the print media—the requirement that broadcasters present points of view that they might otherwise choose not to on journalistic grounds. Is this an abridgement of freedom of the press? Or, on the other hand, is it a vital, legitimate way of assuring that the broadcaster will not use his control over one of the limited number of public airways to promote private, partisan policies?

Secondly, since broadcast content in this sense is now regulated by the Government, may this not raise in some broadcasters—rightly or wrongly—the fear that if they present material unsympathetic to whatever administration is in power they may face the threat of reprisal from their regulator?

Thirdly, does the requirement for an overall treatment of controversial issues make for a wishy-washy, on-the-fence quality in broadcast journalism that stifles its ability for hard-hitting investigatory reporting?

The fourth question I raise deals with the subject of comment and opinion. Traditionally, the print media provide opportunity for the most forthright expression of all kinds of opinions. Journals such as the New Republic on the left, and National Review on the right are devoted to the development of particular points of view.

Local stations, like magazines and newspapers, can present their opinions. But broadcast editorials, unlike those in print, must by regulation allow for the presentation of responsible opposing viewpoints. And there is the separate consideration that no opinions are expressed by the national networks. Does this situation also detract from broadcast journalism's role in contributing to the discussion of vital issues?

Finally, what about the limitations imposed on broadcasters by section 315 of the Communications Act? Does its existence discourage op-

portunities for discussion by major political candidates because of the requirement that all official candidates—serious or not—must be given equal time?

Here the difference in approach between broadcast and print journalism is most graphically illustrated.

While section 315 was suspended in the 1960 presidential elections, it has been in force ever since. And it is going to cause us many problems in this election year as it has in the past. ABC's position—as previously expressed—is that section 315 should be suspended on a trial basis for all candidates for public office—National, State, and local—until after the coming election.

It is our feeling that this temporary suspension as to all candidates would give everyone concerned a valid basis to judge whether a permanent suspension as to some or all of these offices would be desirable. In the alternative, we favor a proposal which would permanently exempt presidential and vice presidential candidates from the requirements of section 315.

I think my comparison of the broadcast and print media—with respect to the unique qualities of each, and the Federal regulation of one and not the other—makes one thing clear: Each has its own unique kind of impact and influence on the public.

No one of the news media has a better claim on informing the public than any of the others. Each complements the others. Complete news coverage comes from a combination of all of them. Perhaps competition among the media is the greatest protection in that it helps the people to determine for themselves where the truth actually lies.

Taken together, the news media best accomplish what each one strives for individually—a better informed America that more fully understands its problems as the first giant step toward overcoming them.

Thank you.

Dean BARROW. Thank you, Mr. Lower, for an excellent contribution. Mr. Louis Lyons will comment on paper No. 1.

COMMENT ON PAPER NO. 1, BY LOUIS M. LYONS

Mr. LYONS. Thank you.

Elmer Lower's statement is characteristically fair, informed, and covers the waterfront. I find little to dispute.

My own experience for two-thirds of my working life was with the newspaper and the last 17 years in broadcasting news and public affairs over an educational or noncommercial television station.

This is not quite the same thing as the commercial broadcasting that Mr. Lower has discussed—much short of it in resources and in audience reach.

I do not have to train myself in split-second timing to weave the news around the commercials. But I do know the limitations of TV time to do a satisfactory news report in 15 minutes.

You just can't do it. At best you cover the front page news, almost nothing of what's inside the paper. I reach for the New York Times next morning to check whether their front page has anything, other than local to New York, that I missed at 7 o'clock last night. This is because the Times undertakes to put its front page in perspective.

But I find a close reading of such a paper, and of the whole range of periodicals, indispensable to doing an informed news report. Without that, my report, if just from the agency wire, would lack the background to give such meaning, depth, and continuity as justifies an educational station having any news program at all.

One of the contributions of television has been to force the newspaper to go into more depth in background of the news. For TV gets the news first. The newspaper must try to supplement this, to give more dimensions to the news.

The TV report catches the headline reader and probably satisfies him with as much as he wants to know about most things most of the time.

It catches even people who can't read at all or wouldn't bother to.

Thus, it certainly extends the number of people exposed to information that they would not acquire by reading. It unquestionably incites many to turn, at times anyway, to more information from a newspaper. I have no doubt that TV gradually develops newspaper readers and the newspapers in turn develop readers for magazines and books.

But television cannot or does not do much of what makes certain essential reader services of the newspaper. It does not list the votes of Congressmen on civil rights. It does not cover the city council or the school committee or keep tabs on the regulation of utility rates.

It cannot provide the needed text of the riots commission, or the cables on the Tonkin incident, or a Presidential message on housing, or the farm program that needs to be read in detail to have meaning.

It does little or nothing in the whole area of criticism—books, theater, music, art, that affects public taste, although TV certainly has a total effect on public taste greater than all other media.

What TV does do incomparably is live coverage of events that can be scheduled, to get the cameras set up and the commentators mobilized—the national convention, inauguration, election, Presidential press conference. It is magnificent in covering sports events.

It drives home with indelible impact the condition of migrant workers, the race conflict, the Vietnam war, a space launching. It gives us a sense of considerable acquaintance with the public men who seek our votes.

It can, when it chooses, as Edward R. Murrow showed, explore the great issues and give them an immediacy and reality that the printed word cannot match. It stretches the imagination to comprehend the importance of things that had hardly reached our consciousness by reading.

I would not limit the influence of television to what we call news and public affairs. Its influence is pervasive, often subtle. The cracks of the Smothers brothers about politicians and institutions and our mores are not to be discounted.

Or, in another direction, the frequent infiltration of the military into big football games must be more appreciated by Secretary Rusk than by Senator McCarthy. People are probably influenced more when they are caught off balance.

Broadcast music and plays bring them to people who never would have them. And it may well be that such an infrequent event as a 4-hour African program is more instructive to many than day-to-day news reports from Africa.

The intimacy of the broadcast is a dimension beyond the printed word.

Mr. Lower spoke about this, I thought, very effectively.

People feel acquainted with the personality of the broadcaster whose voice and features are familiar night after night.

I know that even on a small educational station, my broadcasts bring me more mail than I or any of my colleagues experienced when I was covering top stories on a newspaper of several times the circulation of our station.

This intimacy is a real factor in the confidence of viewers that Elmer Lower mentioned.

As one who has worked both sides of the street, I do not fully accept these statements of greater confidence in broadcast news.

The newspaper has more time to make its report accurate and adequate. The newspaper reader has a better chance to detect error. I think the broadcaster gets off more easily if he smiles and looks pretty. And many people can't remember what they heard. If they come in at the middle of a broadcast and get a confused notion, they are apt to assume that the part they missed would have cleared it up.

Then I think there is a feeling about newspaper headlines, that they look sensational. The broadcaster escapes that, although some try to pitch their voices up to overcome this deficiency.

Then we have, I think, some hangovers from the days of intensely competitive yellow journalism. That is just newspaper talk.

We haven't yet developed an equivalent cliche about broadcasting.

We have been considering mostly television performance in terms of what the great networks produce.

As Mr. Lower says, though, if you don't happen to be at home at that particular time, you can't turn back and pick up the TV program you missed. Our educational station in Boston repeats on weekends the most important programs of the week. This is a very appreciated service.

But in very many areas, the network programing is not typical TV fare. The local news broadcasts, outside a few metropolitan centers--such as parts of New England—are parochial to trivial, and the rest of the fare in prime time is more to be compared with what the local movie theater dispenses than with the content of a good newspaper.

The local station does not compete at all with the newspaper in adequate reporting staff, nor will it give time for adequate treatment of public affairs. It is primarily an entertainment medium.

The journalistic side of broadcasting, even in the networks, is incidental to entertainment, and even the talent sought in the news broadcaster is more as performer than analyst of news. Eric Sevareid is unique.

The pace of change and the urgency of our public affairs have made information of contemporary events increasingly important. The need of the citizen is to be informed. TV on one side and the magazines on the other, have become increasingly journalistic. They have moved into what used to be the province of the newspaper.

Television has not yet developed this side of its programing to do the full job. The magazines can do it in more depth than the newspaper, with more time for consideration. Look at the March issues of

the *Atlantic Monthly* and *Harper's*. Each is entirely given over to a single report in depth.

This is, to be sure, unusual. The *Atlantic* had Dan Wakefield exploring for 4 months the mood of America in relation to its two wars, in Vietnam and in our cities, for this one article.

Harper's has Mailer's personal report of his participation in the march on the Pentagon. Two very different approaches to what's going on.

Paperback books on a great event can be brought out almost as fast as the Sunday newspaper to join the media of journalism.

I would have little question that the impact and influence of TV is greater than that of the newspaper and all other print media, but that TV does not fully compete in journalistic performance with the printed media.

Of course, with either TV or the newspaper, the quality of service depends on who is running it. But the differences in structure, purpose and tradition are significant.

The newspaper is almost equally dependent on advertising revenue. But it had a couple of hundred years to develop certain minimum standards before the day of mass advertising. It has its own autonomy.

Its articles and departments are not produced for advertisers or tailored to the prescriptions of advertisers. It does not determine whether to have an editorial page or a sports department or a political column by the question of whether it can find a sponsor.

Its sponsors are the whole range of advertisers who accept the total function of a newspaper as a productive channel to reach the public with their ads. But the newspaper separates news from ads and keeps ads off the front page and the editorial page.

The newspaper has a character of its own—I mean a good newspaper. It is not the personality of a broadcaster. It includes many personalities but the whole of it is more than that. It is an institution in its community whose readers expect it to serve a certain role—information, entertainment—and also as a civic force in their public affairs. In this full sense of what journalism is, TV still has to develop its journalistic role, and its primary energies are directed otherwise.

I will not take time for any separate consideration of radio. My own broadcasts are simulcasts because for its first 5 years WGBH was only in FM radio. I know many commuters habitually listen to the news report on their car radios who used to read a newspaper on a train.

I am homesick for the more relaxed time of radio—time for an easy conversation. We put many fine lectures and panel discussions, chamber music, poetry, on radio that wouldn't get a show on the 10 times as expensive television. My programs are repeated at the end of the evening on radio, not on TV.

As to the fairness doctrine, I will settle for Elmer Lower's statement, and I found Dr. Stanton very persuasive.

In 17 years of broadcasting, often stating vigorous views and interviewing on controversial issues, and having complete independence of any news policy or supervision, I have had no real problem.

On the rare occasions when we have had to give equal time, it has been accidental. We didn't know there was any other side to exploring some situation that seemed of general concern.

Or if we have asked a legislative leader to explain some proposed structural change in government, it would turn out, not that there was opposition to the issue, but that he had an opponent for his seat who expected equal exposure. This has wasted a little time.

We have wasted more time and bored more people when I have had to moderate a candidate's night, to which we give all the evening, perhaps in cooperation with the League of Women Voters, and we have had to present the Prohibition candidates and the Socialist-Labor candidates and so on for every State office, so that we couldn't go into the congressional contests in any conceivable timespan.

I do feel strongly that, in presidential years at least, the rules should clear the decks for the great debate, not make it so cluttered or hampered as to be unmanageable.

Let me add that I think the Prohibitionists et al. should be given an inning, at least on an educational station, as part of the total American scene.

But not that we should be obliged to include them at a moment when it is totally irrelevant to 99.9 percent of the public, so as to make it impracticable to perform the essential service to present the alternatives the electorate faces election day.

Dean BARROW. Thank you, Mr. Lyons.

Mr. DINGELL (presiding). Dean Barrow, the staff advises me it would be appropriate to request at this point that the legislative history of the fairness doctrine be inserted into the record of the hearings.

Without objection, that will be done.

(The document referred to appears on p. 183.)

Dean BARROW. May I take this opportunity to commend Mr. Daniel J. Manelli, of the subcommittee's staff, for the excellent work he has done in the compilation of the legislative history.

Mr. DINGELL. Thank you. I am sure those words will be most pleasing to him.

Dean BARROW. Mr. Lower in his paper pointed out the different treatment which is given under the fairness doctrine of broadcasting and to the news media.

As I happen to have before me what I consider to be the best judicial statement of the reason for that, and it is very brief, I think I would like to read it into the record.

This is from Office of Communication of United Church of Christ versus FCC, which appears in 359 Federal 2d 994. This was handed down in 1966.

This brief quotation is from page 1,003.

> A broadcaster has much in common with a newspaper publisher, but he is not in the same category in terms of public obligations imposed by law. A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise, it is burdened by enforceable public obligations. A newspaper can be operated at the whim or caprice of its owners; a broadcast station cannot. After nearly five decades of operation, the broadcasting industry does not seem to have grasped the simple fact that a broadcast license is a public trust subject to termination for breach of duty.

Of course, that last sentence was made in respect of the particular broadcast handling in that case. I thought that might be pertinent to the panel discussion which would follow upon these two papers, and that it was good to place it into the record at this point.

We are now open for panel discussion. In accordance with the procedure adopted, I would turn first to Mr. Lower for such comments as he might have upon the comments.

Mr. LOWER. Thank you, Mr. Chairman.

Louis Lyons and I don't strike too many sparks because we see things fairly much alike. I would make a couple of notes, though, which apply to his evaluation of broadcasting's absence of invading certain fields of interest and also what he had to say about local television stations.

I really feel that as far as the national and the local pictures are concerned, I often look back to when I first went into broadcasting 15 years ago after 20 years in the printing business.

I believe Dr. Stanton referred to this in his statement. We have so much more on the air on a network level today than we had then that I hardly recognize I am in the same business.

There is more programing, the staffs are larger, a more thorough job is done, and certainly all the national organizations and the various groups of stations are spending a lot more money on their news departments than they were at that time.

I think the record is clear on this and I don't think I need to go further into it.

I thought Mr. Lyons slightly deprecated the local stations. I think this criticism may have been true a number of years ago, and it may be true today in certain areas of New England to which he referred, with which I am not familiar. I can only illustrate it by saying that when 10 years ago I searched for personnel, I looked for people coming from newspapers because I didn't think there were enough radio and television stations around the country which were giving them the proper experience.

I think at NBC one time there was a rule that a man had to have 5 years of newspaper experience before they would even let him walk in the door for an interview.

I don't believe that is the case today, and I know it is not at ABC. I think the local stations are becoming much stronger, and we are using them more as a recruiting ground.

I merely cite that as evidence that there are more good shops around the country than Mr. Lyons would indicate in his statement. One of them is represented on our panel today by Jay Crouse, who, aside from his title as head of the Radio and Television News Directors Association, is also the news director of WHAS–TV and radio in Louisville, which happens to be one of those stations which has expanded its news department and which does a very creditable job.

We would like to steal a man from Jay Crouse any day simply because he runs a good, solid news station.

There is another thing about broadcasting and perhaps it applies to the fairness doctrine. I don't want to invade Reuven Frank's field because he is on the program this afternoon. But having been a print journalist for 20 years and a broadcast journalist for 15, one of the personal differences I notice in broadcasting is I feel like I am operating in a goldfish bowl that I never felt like when I was working for newspapers, magazines, or press associations.

You wake up every morning and the newspapers are criticizing what you did the day before. It is pretty hard to make a mistake and not

have the public know of it. That plus the intense competition among three networks, I think is as good a safeguard as the fairness doctrine.

Dean BARROW. Dr. Goldin.

Dr. GOLDIN. I am somewhat of a unique position on this panel because I have neither a paper nor a formal position to discuss. So I will take this opportunity to try to discuss each of the major questions which Mr. Lower has raised in his paper and which seem to me go to the heart of this whole panel discussion.

Obviously, these are only opening comments because these will come back over and over again in the course of our discussion.

The first question that you raised is whether the doctrine violates the first amendment to the Constitution because it imposes on broadcast journalists a limitation that does not apply to their colleagues in the print media.

My own view, and I am not speaking as a lawyer but as someone who has worked in the Commission, it seems to me that the fundamental point which has already been raised by Dean Barrow is the fact that you are dealing with a medium, broadcasting, which has been judged by the Congress as a licensed medium to operate in the public interest. Frequencies may be used for different purposes and a determination as to the amount of frequency space allocated for broadcasting flows from a determination that a broadcast service is important in the public interest. From this flows a requirement as to regulating the type of service provided.

This is a fundamental difference from the print media. I think it is quite as simple as that.

This is a public national policy decision which the Congress made, and which has been confirmed by the courts in their discussion of the differences.

Dean Barrow read from one court decision. There are many other court decisions on the same point. It seems to me that the choice that is faced here as a national policy is do you want to convert, is it practicable at this stage to convert, the broadcast medium into a private medium?

Professor Coase at the University of Chicago has suggested that there are means of doing so in terms of converting public rights into private rights. He suggests that it is perhaps too late in terms of the history of broadcasting, and I quite agree with it. But this is a conscious policy decision that the Congress has made, that broadcasting is endowed with the public interest.

From this fact, it seems to me, there are many consequences which flow, and that there are, therefore, differences in the treatment of broadcasting as compared with the print medium.

This does not suggest that there are no limitations on the degree of control or restraint exercised on the broadcast medium. There are certainly very severe ones.

However, it also means that there may not be identity in terms of the rights exercised by these two media. I think the one that comes obviously to mind, which has been subscribed to by most of the broadcasters, is that broadcasting cannot be used for the private views of the broadcaster exclusively.

This is a fundamental difference from the newspaper, where the newspaper has no legal obligation to use his medium for other than his private purposes, if he so chooses.

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There is no government agency, or any other body, to tell him that he may not do so.

There is a long subject, and I hope we will approach it from many different aspects. But I think this is very fundamental.

The second question that he raised is since broadcast content in this sense is now regulated by the Government, may this not raise in some broadcasters the fear that if they present material unsympathetic to whatever administration is in power they may face the threat of reprisal from their regulator?

I have the contrary view. I have the view that the fairness doctrine is a protection to the broadcaster rather than a threat to the broadcaster; because if there is undue pressure from one agency of the government, as for example the White House or Congress or the city hall, the broadcaster may tell that candidate or politician that there is a doctrine for which he is responsible, the doctrine of fairness in the treatment, and that he cannot, in exercise of his public responsibility, treat only one side of the issue.

I would also urge that in terms of the history of the doctrine of fairness there has never been, in my understanding, any charge by broadcasters or others that this doctrine has been administered in any way which suggests that the broadcaster is required to present a view favorable to the administration.

It seems to me that what is confusing here is to regard the Government as being a monolithic body with monolithic interests. There are many different agencies of the Government which approach problems from many different points of view. Certainly the Commission, in my opinion, has never been the handmaid of a monolithic government designed to oppress or abuse the power which it has.

Third, does the requirement for an overall treatment of controversial issues make for wishy-washy, on-the-fence quality in broadcast journalism?

I would suggest the broadcasters should not demean themselves because I think they have done magnificently in covering of two of the most controversial issues faced, the Vietnam war and the race relations.

Certainly this doctrine has not hampered them in their treatment of these issues.

In terms of the fourth question, on the subject of comment and opinion, the fact that broadcasters have to allow for the presentation of responsible opposing viewpoints and the fact that the networks don't editorialize, I think their decision as to whether they editorialize or not is something obviously that the networks themselves should comment on.

As far as the fact that there is a requirement for the presentation of responsible viewpoints on the other side of editorials, I think this has in no way harmed the function of the broadcaster or limited his freedom in any way.

Broadcasters do editorialize and they do permit conflicting views because the interest which they serve is the interest of the public to hear the other side.

The public may judge the two sides quite differently. When a broadcaster presents an editorial, it is under the auspices of that institution and, if the broadcaster occupies a prominent part in the community,

the editorial obviously has greater weight in the community than perhaps another group which opposes that point of view.

But, nevertheless, I don't see that any harm has come or any limitation on the freedom of the broadcaster.

Finally, the question of 315 which was raised by Mr. Stanton and Mr. Alexander and Mr. Lower. I think my own view is that the case has been made most strongly for the presidential election in the general campaign, and I think I quite agree with Dr. Stanton that this certainly is an area in which section 315 should be waived.

However, I think he has raised two other problems which should be discussed, and one which Mr. Alexander has already raised. It struck me as it did Mr. Alexander that what Mr. Stanton said in effect was that, if you want to use the medium effectively for broadcast purposes in campaigns, it should be done in a way in which there is confrontation, either in terms of back to back, or some method which would be, as I understood Mr. Stanton's point of view, essentially to prevent the broadcaster going directly on the air and making a set speech.

At least, that was the whole tenor of what I heard, that the candidate should be governed by what the broadcaster believes will stimulate the greatest interest in the community.

The second problem, and I think it is a more difficult problem, is the problem of what you do in primaries. I think a real distinction can be made between general elections and primaries, Mr. Stanton suggested that you could have fairness, but I would like to have him address himself to the question of what are the principles of fairness in a race for Congressman, a primary race, where there are eight or 10 candidates, where you don't have the criterion of party.

The only criterion you have would be the established candidate, the candidate who has occupied the office.

I think there are very thorny problems in the area of primaries.

Thank you.

Dean BARROW. I think we should hear some reply from those who might take issue with what Dr. Goldin has just said.

Mr. WASILEWSKI. I find this rather intriguing because I find I don't disagree so much with the panelists who have been on as I do with the moderator's opening statement, and Mr. Goldin's statement.

For example, I think Mr. Goldin said the fairness doctrine is a protector to the broadcaster, and I think that most broadcasters would find this a rather unique benefit that has not been referred to before, and would tend to say, "Don't do me any favors, please."

The point is that as Dr. Stanton pointed out, section 315 is not for the benefit of the broadcaster, nor necessarily for the benefit of the candidate.

The question should be whether it is or is not in the best interests of the public. The point that I would respond to in Dr. Goldin's statement would be this, that the same consideration should apply as far as the fairness doctrine is concerned.

I happen to believe that suspension of section 315 in the presidential race would be highly beneficial to the public at this time.

I really believe that section 315's repeal in the long run would be beneficial. And I also believe the fairness doctrine could be done away with as a practical matter and the public would benefit thereby as well.

Dean BARROW. Mr. Wasilewski, would it be a fair question to ask of you, as president of the National Association of Broadcasters, whether you have made an objective survey of what broadcasting attitudes really are?

That is, have you sent a questionnaire to each of the stations and obtained their views?

Mr. WASILEWSKI. We did conduct a survey on that, I think in 1967. In that survey, as I recall, some 60 percent of those responding indicated that they thought that they would be better able to serve the public without the fairness doctrine.

Dean BARROW. I asked that because I follow the practice, as I happen to meet broadcasters, of asking questions regarding broadcasting. I have found considerable sentiment for the view that broadcasters like 315 because it is a haven from rather strong interests who want them to support one political party or take a position on one side of a controversial issue, and it was rather helpful to be able to say that they, under the law, had to give contrasting views and equal opportunities.

Mr. WASILEWSKI. I would agree with that, that there are a number of broadcasters who are quite pleased with 315 because it does provide an easy way out to their journalistic responsibilities.

But that doesn't necessarily mean that that is either serving the best interests of the public or being in fairness to the public.

Mr. ROBINSON. I would like to address myself to a couple of points, if I may. The statement has been made here that somehow broadcasters are a different animal from the newspapers because, as we all know, they are regulated, they are licensed.

But it seems to me that this notion that they can be regulated simply because they are licensed, and we can tell them how they shall conduct their broadcasting operations because they are licensed, begs the question as to the degree to which the licensing authority may use that as a pretext for interfering with, or restraining, or imposing obligations which the first amendment says shall not be imposed.

We talk about public ownership of the airwaves by way of abstract generalization. I really don't know what this means. Presumably the Government owns Lafayette Park, but I don't think anybody would suppose that the Government, by virtue of its ownership of Lafayette Park, could tell the public or tell any persons what they can, or cannot say in that park.

I would have supposed that if the first amendment said anything, it said just this: that you cannot use the notion of privilege as an excuse or as a pretext for suspending fundamental rights under the Constitution.

Dean BARROW. Are there further comments?

Dr. Goldin?

Dr. GOLDIN. I wanted to make first a comment to what Mr. Wasilewski said. I wanted to make clear when I said that the rights of the broadcasters would be protected, and I regarded that as a virtuous thing, I didn't mean that that was because his private rights were protected, but that there was a public interest in maintaining the integrity of the broadcasting service because of its value to the general community. It is in that context that I felt that the fairness had a very important role.

With respect to what Mr. Robinson has said, I think the record should be clear that every time the court has addressed itself to the question of the rights of the Commission in dealing with the programing of the industry, it has almost uniformily upheld the Commission's right. This has been done in various circuit courts and in the Supreme Court.

It suggests to me that the courts have recognized that without undermining the first amendment right of the broadcasters, that there is a degree, if you will, of restraint that is compatible with the first amendment which inures not in the public ownership of the frequency—and I think you misunderstand that—but is in the fact that the broadcaster is licensed to serve the public interest. This is fundamentally different from the newspaper.

Dean BARROW. The major case on the authority of the FCC relative to regulation of programing to which Dr. Goldin referred, was the *NBC* case. In that case the Supreme Court held that regulations which relate to the program matter of broadcasts do not contravene freedom of speech or press.

Of course, we are getting into an area in which the Supreme Court may give us fresher opinion in the relatively future.

Mr. ROBINSON. I would like to make a comment on the *NBC* case just so that it is not misunderstood. The *NBC* case did not deal with program regulation at all. The Court's remarks, insofar as they were taken to apply a broad regulatory authority, over programing are pure *obiter*. They had no bearing on the regulations which were in issue before the Court at that time. These regulations were, of course, the chain broadcasting regulations, which involved the much different question of the scope of the Commission's authority to regulate the economic dealings of the industry, and which did not at all go to the question of the FCC's authority to enter directly into program regulation via the fairness doctrine or equal-time opportunities doctrine, or any other theory of direct or indirect programing regulation.

Mr. SPRINGER. Are you talking now with reference to the *Red Lion Broadcasting* case?

Dean BARROW. This is the *National Broadcasting Company* case, an early U.S. Supreme Court case which held that the chain broadcasting rules did not violate the first amendment either as to freedom of speech or press.

Mr. SPRINGER. What case was that? I am trying to get it clarified.

Dean BARROW. *National Broadcasting Company* v. *the F.C.C.*

Mr. ROBINSON. I have the citation. It is 319 U.S. 190, 1943.

Dean BARROW. On the point that is under discussion about the case, it is pertinent to note that one of the major chain broadcasting rules involved had to do with the extent to which the networks would preempt the time of stations for exhibition of network programs.

Anyone who is considering the legality of a rule of that kind must look at it, it seems to me, not solely in terms of economics, but in terms of programing.

The point was whether networks could control stations to such an extent that they were not free to select that programing which fulfilled the needs of their community as they saw them, and they were the licensed broadcasters and had the trustee's duty to perform that function.

So while there are people who hold Professor Robinson's view, and I respect his opinion and that of others, I do think we should realize that what we were dealing with was a rule which prevented an outside component of the industry from controlling the licensed broadcaster in the kind of programing which he could select.

This has a very strong effect upon the type of programing which is presented. The Court realized that program regulation was quite heavily involved in the case. Judge Hand stated in his opinion for the lower court that the regulation indirectly controlled programing. 47 Fed. Sup. 940, 946.

Dr. GOLDIN. I think Congressman Springer's remark is very appropriate because the circuit court has spoken very directly and very immediately on the question that Mr. Robinson was addressing himself to and said that the broadcasting service can be treated differently, in effect, from the printed media. So there is a very recent decision on this.

There are other decisions by the court, the circuit court and the Supreme Court, in which the rules of the FCC or policies of the FCC have been upheld, although they have been in the programing area, and they have resulted in restraints on broadcasting, if you will, which are significantly different from those of the printed media.

Dean BARROW. Mr. Alexander.

Mr. ALEXANDER. I am not a lawyer, but I would like to ask Mr. Stanton the basis on which his legal staff decided that CBS could not present a program on Governor Wallace's candidacy for nomination of the American Independent Party.

As I read section 315, it says that if a candidate for one office is given time, other candidates for that same office must be given equal time. I don't know of any others who were vying for the position of nominee of the American Independent Party.

Dr. STANTON. Mr. Alexander, I have learned long ago not to try to make like a lawyer, so I won't try to give you the answer that the law department prepared for the head of our news department on this point. If the moderator or the chairman would care to, we will be glad to submit a memorandum on that particular item.

(The following memorandum was received by the committee:)

CBS MEMORANDUM

From: Richard W. Jencks (LAW).
To: Dr. Stanton.
Date: March 13, 1968.

You have asked for an account of the advice given by the Law Department to CBS News in connection with a proposed documentary concerning the candidacy and campaign of George Wallace. CBS News asked the CBS Law Department at the end of February for an opinion concerning the "equal opportunities" obligations, if any, CBS would face as a result of a proposed half-hour broadcast on former Governor George Wallace for carriage over the CBS Television Network in June of 1968. CBS News sought in this proposed broadcast to utilize the documentary format for a close-up study of former Governor Wallace, including his views on the major political issues of the day. Based on the Law Department's review of Section 315 of the Communications Act and the applicable FCC Rules and interpretive decisions, as well as the information we had regarding the status of Mr. Wallace's candidacy, we advised CBS News that in our opinion it was likely that the broadcast as proposed would give rise to valid "equal time" requests from at least three and perhaps several additional Presidential candidates. In these circumstances, CBS News dropped its plans to produce the broadcast in question.

DISCUSSION

(i) The exempt status of the proposed broadcast under section 315 of the Communications Act

Section 315 provides that an appearance by a legally qualified candidate shall not constitute a "use" if the appearance occurs on a

"(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),".

The Law Department advised CBS News that while the broadcast would clearly constitute a documentary, it did not believe that a documentary whose subject was solely concerned with the political candidacy of a single Presidential candidate—in this case, former Governor Wallace—would qualify as an exempt documentary. It was the Law Department's view that Wallace's appearance on this proposed broadcast was not merely "incidental" to the presentation of the subject of the documentary—it was the subject of the documentary.

(ii) Candidates for the Presidency as of June 1968

In connection with the Law Department's consideration of the proposed Wallace documentary, we learned from the CBS News Election Unit, that based on the information then available to it, the Prohibition Party and the Socialist Workers Party had already nominated their candidates for the Presidency and the Socialist Labor Party would do so prior to June. It also appeared quite likely that by June additional candidates for the Presidency would be selected by other political parties. If at the time of the proposed June broadcast, Mr. Wallace was merely a candidate for the American Independent Party's Presidential nomination, it was clear that a non-exempt broadcast would not give rise to valid "equal time" requests from candidates nominated by other political parties. See FCC Public Notice, *Use of Broadcast Facilities by Candidates for Public Office*, April 27, 1966, Secion V, Questions 3 and 4. Since we were not aware of any other candidates for the Presidential nomination of the American Independent Party, we did not believe the "equal time" risks of such a broadcast to be great.

Based, however, on the information available to it regarding Mr. Wallace's candidacy, the Law Department concluded that at least in some states Mr. Wallace was not merely a candidate for the nomination of a Party, but was currently a candidate for the Presidency. Due to the nature of the campaign being conducted on Mr. Wallace's behalf, as well as the varying state requirements regarding third party candidacies in general, it was quite difficult for the Election Unit to collect information with regard to Mr. Wallace's electoral status. It did appear clear, however, that while in some states Mr. Wallace may well be merely a candidate for the nomination of the American Independent Party, in at least two states—Virginia and Pennsylvania—Mr. Wallace was a candidate for the Presidency, and he is likely to be a candidate for the Presidency in Nebraska by March 15 and South Carolina by March 30. While there may well be a number of other states in which Wallace will be a Presidential candidate by June, our information to date is limited to the above four states

CONCLUSION

In these circumstances, we advised CBS News that in the opinion of the Law Department the proposed half-hour Wallace broadcast in June over the CBS Television Network could well result in valid "equal time" requests from the Presidential candidates of the Socialist Workers, Socialist Labor and Prohibition Parties—and possiby from other Presidential candidates nominated prior to the broadcast.

Dr. STANTON. Let me just say this: that in treating with a candidate who is self-declared and may or may not have to have a convention, it is pretty difficult to know when he is a candidate and when he isn't a candidate. If he says he is a candidate and he doesn't have to go through the same convention procedures that the Republican or Democratic Convention candidates have to go through, then it becomes a little more troublesome.

As I understand the situation further, if this has been a regular program series devoted to and treating with candidates for public

office and had been an established series for that purpose, I suppose we would not have been in trouble on this particular broadcast.

But this was incidental treatment, and I believe incidental is the test word. This was not an incidental treatment of Wallace's candidacy but, rather, an examination of the man and his candidacy and the whole hour was to be devoted to it. This lifted him out of the mainstream where we could treat with him as a candidate.

Mr. WASILEWSKI. On that point, I would like to point out that Mr. Wallace is undoubtedly an avowed candidate announced for the November election, and there are other avowed candidates of minor parties, even though the Democratic Party and Republican Party do not have nominees yet.

But the fact they do not have nominees does not mean, nevertheless, that Mr. Wallace is not a candidate for the November election at the present time.

Dr. STANTON. Mr. Moderator and Mr. Wasilewski, I think there are six or seven candidates already. There is the Peace and Freedom Party, the Prohibition Party, the Socialist Labor Party and the Socialist Workers Party. These are parties who have nominated candidates where we would be in some problem if we were to go ahead with this Wallace broadcast, as I mentioned earlier.

Dr. GOLDIN. One point ought to be clarified on a technical matter: that the broadcaster has absolute freedom in terms of which race he will choose to broadcast. I think there has been some confusion on that point.

He can choose any particular race to put on his station. If he puts on the local city elections, he is not required to go through the whole process of putting on all other political races. Under Louis Lyons' comment, the broadcasters could have started with the congressional races and stopped there, which they chose to do. There is no requirement on the broadcasters to deal with all the races.

Mr. ROBINSON. I would just like to make one point on what Mr. Goldin says. It may be perfectly true that the broadcaster is free to refrain from speaking out on particular candidacies or a particular race. However, the Commission has made it clear that they regard political broadcasting, in the broad sense of the word, as being an element of the public interest. Thus, while there is no specific requirement to broadcast for or against the candidacy of any particular candidate, I would presume that the Commission would look with a jaundiced eye upon a local station that completely turned its back on a local election campaign of some importance.

So I am not so sure that we can simply assume that the broadcaster isn't under some amorphous if you will, duty to speak on these matters.

Dr. GOLDIN. I am glad Mr. Robinson said "amorphous" because when I was with the Commission, one of my responsibilities was to conduct the surveys of political broadcasting, and one of the things that we learned in statistical form, which we knew in other form, was that there are a number of broadcasters who do not participate in any particular election campaign and do not arouse the ire of the Commission or have their renewals in any way threatened.

Mr. ROBINSON. But if I am correct, the Commission did, in its equal time primer, or in one of its policy statements, state something to

the effect that a repeated refusal to deal with these matters might be considered at renewal time.

Dr. GOLDIN. I think if you put in all the ifs, ands, and buts, that is a fair statement; that it is one of the elements to be considered in the public interest obligations of the broadcaster. But there is so much latitude in this area that many broadcasters have the option of opting out of a particular race, and particularly of a particular candidacy in particular race, or even of not being in that particular election campaign at all.

They may, however, often discharge the responsibility by having a forum or some other discussion which doesn't come under section 315.

Dean BARROW. Mr. Chairman, I believe we have about reached the point where we could terminate our scheduled program for the morning if it is your desire.

Mr. VAN DEERLIN (presiding). Thank you, Dean Barrow.

Since one or two of the panelists have referred to submitting written statements, Chairman Staggers has asked that I make it clear that the record of the panel will be open until March 21 for that purpose.

It is anticipated that we will have unanimous consent to resume the hearing at 2 o'clock this afternoon. We will expect to see almost all of you back.

The committee will be in recess until 2 o'clock this afternoon.

(Whereupon, at 12:13 p.m. the special subcommittee recessed, to reconvene at 2 p.m. the same day.)

AFTER RECESS

(The special subcommittee reconvened at 2 p.m., Hon. Lionel Van Deerlin presiding.)

Mr. VAN DEERLIN. The subcommittee will come to order, please.

You may proceed.

Dean BARROW. Mr. Chairman, our afternoon session opens with a paper by Prof. Glen O. Robinson on the subject, "The Fairness Doctrine, the Law and Policy in Its Present Application."

PAPER NO. 3—GLEN O. ROBINSON: THE FAIRNESS DOCTRINE, THE LAW AND POLICY IN ITS PRESENT APPLICATION

Mr. ROBINSON. It is a great privilege and pleasure to participate in these panel discussions on what must be regarded as one of the most controversial and troublesome problems in the field of radio and television, the fairness doctrine.

The history of the fairness doctrine is rather uncertain since it depends on how one defines what now passes for a "doctrine." The Commission maintains that the fairness doctrine has, in essence, been in effect from the first days of regulation by the Federal Radio Commission. This seems to me to be a gloss on its early decisions, but I will not quarrel with this conclusion. In any event the basic expression of the doctrine as it is currently implemented is the Commission's report on "Editorializing by Broadcast Licensees",[8] released in 1949,

[8] P. & F. Radio Regulations 91:201 (1949).

in which the Commission reversed its earlier ban on editorializing and dealt generally with the licensee's overall duty of fairness in treating controversial issues. It set forth a twofold affirmative obligation: first, to speak out on controversial public issues, although not necessarily in the format of station editorials; and, second, to ascertain and seek out all responsible viewpoints on controversial issues and afford the opportunity for such contrasting viewpoints to be heard.

Congress recognized the fairness doctrine in its 1959 amendments to section 315. Amended section 315, after establishing the exemption for bona fide news broadcasts, provides:

> 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.

Although the Commission has read this provision as a ratification of the fairness doctrine, there is no evidence that Congress, in amending section 315, actually intended to give specific statutory sanction to the doctrine. More probably, the intent was neither to approve nor disapprove of it, but merely to insure that section 315 would not interfere with it.

It is important at the outset to distinguish the fairness doctrine from the equal time requirements, with which it is often confused.

Unlike the equal time requirements the fairness doctrine puts an affirmative duty on the broadcaster to encourage and implement the broadcast of all sides of controversial issues. Unlike the equal time requirements the fairness doctrine does not necessarily require a station to grant equal time to all opposing viewpoints. A 10-minute commentary by the station on one side of a controversial school bond issue, for example, does not necessarily require that the station grant 10 minutes to all other sides. This flows from the fact that the obligation is, in theory, to insure fair treatment of the issue, not necessarily precisely equal time to the various sides. Unlike the equal time requirements the fairness doctrine does not in all cases require the station to offer time to outside person, group, or agency. If the scheduled programing is such that fairness is accorded to all sides over a reasonable period of time, then the station's obligations are, at least theoretically, met.[9] However, I might note that where a station editorializes many licensees do not rely on this apparent flexibility but routinely seek out persons or groups having contrasting views and offer them an opportunity to express those views. Even where outside groups are sought out to insure fairness, however, the station has discretion in selecting who the spokesmen must be to give the contrasting views.[10]

An exception to this broad test of overall fairness, however, are the so-called personal attack rules which require that, where a station makes an attack upon the honesty, character, integrity, or like personal qualities of an individual or group, or takes a partisan position with respect to candidates and issues in a political campaign, it must provide the individual or group attacked with a script or tape of the broadcast prior to or at the time of the broadcast with a specific offer of a reasonable opportunity to respond over the station's facilities. The

[9] E.g., Blair Clark, 12 P. & F. Radio Regulation 2d 106 (1968).
[10] E.g., Cullman Broadcasting Co., 25 P. & F. Radio Regulation 895 (1963).

personal attack rules, which are being challenged as unconstitutional in the *Red Lion* case [11] pending in the Supreme Court, have now been codified into specific regulations which require opportunity to reply to personal attacks and also require the station to offer rebuttal time in the case of editorial endorsements of, or opposition to, qualified political candidates. These regulations have also been challenged in the Court of Appeals for the Seventh Circuit.[12]

I might note that the Supreme Court has agreed to defer consideration of the *Red Lion* case pending a decision in the seventh circuit on this appeal from the regulations themselves.

The Commission's enforcement of the fairness doctrine is substantially similar to its enforcement of the equal time requirements. Upon complaint that a licensee has not accorded fair coverage to a controversial public issue, the Commission forwards the complaint to the licensee and demands a reply. If the reply does not satisfy the Commission, it informs the station of the error of its ways, indicating perhaps that the matter may be considered at renewal time. In addition, it may demand from the licensee a statement of how it will comply with the doctrine in the future.

A notification to the applicant that the matter will be considered at renewal time is the kind of "lifted eyebrow"—to use the words of a former FCC Commissioner—technique which the Commission has employed in other aspects of broadcast regulation—usually with notable success. Generally, it is not so much the possible loss of a station's license as the threat of being forced through the ordeal of a hearing which makes the informal procedure effective. To reinforce this informal procedure, the Commission has in one recent case issued a 1-year renewal where a station's presentation of controversial public issues had been of questionable fairness.[13]

I might add it has also set another renewal application down for hearing for inquiry into its compliance with the fairness doctrine.

If the fairness doctrine has been incorporated into section 315, then enforcement methods such as cease and desist orders and fines would presumably be available although the Commission has not resorted to such methods. A major reason for "codifying" its new personal attack rules into regulations, was to make clear the availability of such methods to enforce policies.

The requirements of the fairness doctrine are elusive. The Commission has attempted to furnish guidance in its so-called fairness primer,[14] which is chiefly a collection of various past rulings. Time does not permit a detailed review and analysis of these rulings. They are in any event a very uncertain guide. They tell us, for example, that civil rights,[15] racial integration,[16] the banning of nuclear testing,[17] "krebiozen," [18] and pay TV [19] are controversial issues of public importance,

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[11] *Red Lion Broadcasting Co.* v. *FCC*, 381 F. 2d 908 (D.C. Cir. 1967), cert. granted, 36 U.S. Law Week 3226 (Dec. 4, 1967).
[12] *Radio Television News Director Association* v. *United States*, seventh circuit No. 16369.
[13] Lamar Life Broadcasting Co., 5 P. & F. Radio Regulation, 2d 205 (1965), reviewed on question of standing and whether license should be renewed at all., sub nom., *Office of Communication of the United Church of Christ* v. *FCC*, 359 F. 2d 994 (D.C. Cir. 1966).
[14] Fairness Doctrine, 2 P. & F. Radio Regulation 2d 1901 (1964).
[15] New Broadcasting Co. (WLIB), 6 P. & F. Radio Regulation 258 (1950).
[16] Lamar Life Ins. Co., 18 P. & F. Radio Regulation 683 (1959).
[17] Cullman Broadcasting Co., 25 P. & F. Radio Regulation 895 (1963).
[18] Report on "Living Should Be Fun" inquiry, 23 P. & F. Radio Regulation 1599 (1962).
[19] WSOC Broadcasting Co., 17 P. & F. Radio Regulation 548 (1958).

as to which the expression of views gives rise to the obligation to "fairly" treat contrasting views. This seems to me to be not much enlightenment, either for the broadcaster or the public. But, beyond this, it is hazardous to predict how the doctrine will be applied by the FCC.

Consider, for example, the Commission's rulings on religious programing. It has said that merely carrying religious programing does not constitute the presentation of a controversial viewpoint and thus does not obligate a station to present the viewpoint of the atheist, the agnostic or the "freethinker." [20] At the same time it has intimated that for a religious group to express its religious, social, political views without affording opportunity for contrasting viewpoints may violate the fairness doctrine.[21] The line of distinction seems a thin one, if not an entirely arbitrary one as Commissioner Loevinger has charged.[22] Perhaps the distinction is between implicit and explicit raising of controversial issues, as suggested by the Commission in its recent cigarette ruling.[23] But such a distinction seems to me to be little more than an excuse for weaseling away from the logical implications of its doctrine. In any event if such a distinction is to be drawn would it not be reasonable to expect it to be drawn uniformly, with respect to all controversial issues? But such is not the case. In the cigarette ruling the Commission expressly rejected the distinction as to health issues even though it noted its pertinence in cases involving religious issues. This does indeed demonstrate some very fast footwork in dancing around troublesome problems.

The Commission's cigarette ruling offers an example of the potentially vast sweep of the fairness doctrine and illustrates some of its far-reaching implications. The Commission has ruled that a station which presents cigarette advertising "has the duty of informing its audience of the other side of this controversial issue of public importance—that however enjoyable, such smoking may be a hazard to the smoker's health."

The ruling, which is being challenged in the Court of Appeals for the District of Columbia on a number of grounds, more particularly on the grounds of conflict with the Cigarette Labeling and Advertising Act of 1965,[24] is a surprisingly bold challenge to what we would all regard, I suppose, as very substantially interests.

I will not attempt to consider here the very difficult problem whether the ruling is consistent with the Cigarette Labeling Act, or more appropriately an exercise of the FCC power, to leap into an area where the FCC is already committed.

Far more troublesome to me are the implications which such an application of the doctrine raises outside the context of the cigarette controversy. For example, does the advertising of automobiles give rise to an obligation to permit Ralph Nader to present his views on automotive safety? The Commission rejected such implications of its ruling, emphasizing that here the decisive criteria were the "governmental and private reports and congressional action" stressing the health hazards

[20] Madalyn Murray, 5 P. & F. Radio Regulation 2d 263 (1965).
[21] See Brandywine-Main Line Radio Inc., 4 P. & F. Radio Regulation 2d 697, 700 and 705 (1965) (granting application for transfer of license), 9 P. & F. Radio Regulation 2d 126, 128 (1967) (renewal application designated for hearing).
[22] 5 P. & F. Radio Regulation 2d at 269.
[23] WCBS–TV, 11 P. & F. Radio Regulation 2d 1921, 1925 n. 21 (1967).
[24] 79 Stat. 282 (1965), 15 U.S.C. §§ 1331–39 (1967 Supp.).

of smoking and urging persons to cease. But the distinction seems paper thin, particularly since nothing in the way the fairness doctrine has been applied in other contexts suggests that the presence or absence of governmental action or the element of public health or welfare is of decisive importance. And even if it is, the ruling still has endless ramifications considering the almost limitless range of issues with which the Government is concerned. For example does the advertising of vitamin supplements require a station to give air time to Dr. Goddard to present the FDA's views on the questionable need for such supplements?

I might add another example. Does the advertising of beer in States where the sale of beer is forbidden to minors—and I take it that it is in all States—constitute a controversial public issue as to which fair rebuttal time must be given, on the theory that the broadcast station has not discriminated between those who can and those who cannot legally buy beer in putting its advertising message on the air?

The cigarette ruling also presents the interesting question whether a station which carries antismoking public service announcements, or other antismoking programing of any kind, does not then have to present the prosmoking side. The Commission has indicated that if the station carries cigarette advertising the prosmoking side of the "issue" is sufficiently presented. However, if the station does not carry such advertising, the Commission has stated that this is "governed by the same principles as are applicable generally under the 'fairness doctrine.'" [25] Which, I interpret to mean that the station could not present antismoking health announcements without also presenting the prosmoking side of the "issue." This has the dubious virtue of logical consistency, but it seems to me only to demonstrate the ultimate artificiality of the fairness doctrine, as it is being currently applied.

Unlike the sweeping scope of the general fairness doctrine as applied to controversial issues, the personal attack rules are somewhat more limited in scope, even if more rigid in their requirements.

But even here there are difficulties in knowing when and how far the concept of personal attack extends. There are probably not a few people who considered that President Johnson's characterization of Senator McCarthy's candidacy as a "Kennedy-McCarthy movement" and his query as to "the effect upon the American people of these maneuverings" as an attack upon the "honesty, character, and integrity" of Senator McCarthy. But the Commission thought not.[26]

Evidently something more strongly critical is required.

We are told, for example, that accusing the John Birch Society of resorting to "physical abuse and violence" and "local terror campaigns against opposition figures" among other things, qualifies as a personal attack.[27] But would it be an attack simply to name someone as a member of the John Birch Society? The Commission has ruled that a charge that a group is Communist is.[28]

But where should we look for standards? We could look to the law of defamation. Many if not most of the attacks on which the Commission has ruled thus far would probably qualify as libelous.

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[25] See Tobacco Institute, Inc., 11 P.& F. Radio Regulation 2d 987 (1967).
[26] Blair Clark, 12 P. & F. Radio Regulation 2d 106 (1968).
[27] University of Houston, 12 P. & F. Radio Regulation 2d 179 (1968).
[28] Storer Broadcasting, 12 P. & F. Radio Regulation 2d 179 (1968).

However, I doubt whether resort to the arcane subtleties of libel law would really advance the cause. And I doubt in any event that the Commission itself will look in this direction for guidance. It has, for example, recently ruled that the right to reply to personal attack exists whether or not the personal attack is true.[29] If truth is not a defense, presumably none of the other defenses or privileges of the law of defamation apply here.

I think it would not be fruitful at this point to attempt to explore further the reach of the fairness doctrine. I think that we have not yet begun to see its fullest potential. I would, however, like to turn to some of the legal problems which are raised—most especially the free speech issues which are now being thrashed out in the courts.

Without intending to preempt the discussion of our next panelists who will tell us more about the impact of the fairness doctrine, I would just note preliminarily that it seems difficult to deny that the fairness doctrine does constitute a restraint on broadcaster free speech—a restraint sufficient to raise serious constitutional problems, and one which is no less real by virtue of the fact that it does not directly seek to inhibit free speech but merely place burdens or restrictions upon its exercise.

The restraining effect of the fairness doctrine is compounded for the broadcaster by its vague and indefinite standards. The vagueness and uncertainty is inherent, first in the definition of what constitutes a controversial public issue and second as to what "fairness" requires the licensee to do in the particular circumstances.

Uncertainty as to the elements of the doctrine and what it requires must inevitably cause a greater restraint on broadcaster discretion than would otherwise be the case. It is just such vague and indefinite restraints on conduct, and particularly speech, which the Supreme Court has condemned as unconstitutional,[30] particularly where, as here, the vagueness of the restraint is compounded by unrestricted administrative discretion.[31]

Mr. VAN DEERLIN. In the interest of maintaining a perfect attendance record for the committee members on the House floor, we will have to recess for about 15 minutes.

(Brief recess.)

Mr. VAN DEERLIN. The subcommittee will be in order, please.

Mr. Robinson, do you wish to proceed?

Mr. ROBINSON. Mr. Chairman, I wonder if I might clarify a statement on the basis of some information I have just received.

I mentioned in passing that the *Radio-Television News Directors Association* case was pending in the seventh circuit and the Supreme Court had held the *Red Lion* case in abeyance.

I have a motion which was filed by the FCC in the seventh circuit case, to hold the case in abeyance. In effect, the FCC is asking the seventh circuit not to rule pending further rulemaking proceedings, either to clarify or augment or revise their personal attack regulations.

I would like at this time, if I may, to ask that it be inserted in the record for such clarification as it adds.

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[29] *Ibid.*
[30] E.g., *Herndon* v. *Lowry*, 301 U.S. 242 (1937).
[31] E.g., *Hague* v. *C.I.O.*, 307 U.S. 496, 516 (1939).

Mr. VAN DEERLIN. Would you rather do that at the end of your formal statement?

Mr. ROBINSON. Yes. I will save it until the end of my paper.

(The material referred to appears on p. 66.)

The constitutional implications of the fairness doctrine have come to the forefront in connection with recent court challenges to the "personal attack" rules. While the personal attack rules have called down far more criticism than the general fairness doctrine as applied to editorializing and expression on controversial issues, in some respects, at least, these rules are arguably more defensible than the general fairness doctrine itself.

A case might be made for the right to reply to a personal attack, at least where the attack is defamatory, on the ground stated by Professor Chafee that, in such cases, a legislative requirement imposing a duty to permit a reply to such statements may be preferable to punishing or inhibiting defamation through libel suits.[32]

It must be conceded, however, that things have changed since Chafee wrote. In fact the very kinship between the personal attack rules and the law of libel may be its ultimate undoing considering what appears to be the clear trend of constitutional law as set forth in the *New York Times*,[33] *Butts*,[34] and *Hill*[35] cases. This vulnerability of the personal attack rules to constitutional challenge is made more critical by the fact that, whereas in libel suits truth is a defense, the Commission has ruled that truth or falsity is irrelevant to the duty of a licensee under the personal attack rule. But this entire issue is one which the Supreme Court is being asked to decide in the *Red Lion* case and one can only speculate how it will rule.

I think it should be emphasized, however, that even if the constitutionality of the personal attack rules be sustained, on grounds similar to those advanced, or other grounds, this would not necessarily vindicate the fairness doctrine as it is applied generally to controversial issues.

If one might find that the right to reply to personal attacks is justified by analogy to the long tradition of remedying libel (which within the limits set by New York Times and its progeny, I take to be still a constitutionally permissible tradition), no such tradition affords a right to reply to the expression of opinion on a controversial issue: no such tradition compels one always to give all sides of the story.

In the end analysis it seems clear in fact that, outside the field of broadcasting, neither the courts nor the public would long stand for the kind of interference with free speech that inheres in the fairness doctrine. Attempts to tell newspapers, for example, that they have to treat all controversial issues "fairly"—as judged by a Government agency—and there would be a hue and cry which would fairly rock the foundations of Capitol Hill.

But, it will be asserted that whatever may be, the rules for newspapers, radio, and television are "unique" and such restraints, including but not limited to, the obligation to be "fair," are justified in these unique media. Precisely what is meant by "unique" has never been made very clear. There are various explanations which have had a place

[32] 1 Chafee, Government and Mass Communications Media, 172, 184–90 (1947).
[33] *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).
[34] *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967).
[35] *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967).

in the ideology of program regulation. However, the one to which all ultimately return is that of "spectrum scarcity." As Justice Frankfurter stated in the NBC case,[36] "Unlike other modes of expression, radio inherently is not available to all * * * and that is why, unlike other modes of expression, it is subject to governmental regulation."

The most obvious shortcoming of this logic is that, notwithstanding conceded physical limitations on frequency availability and the corresponding limitation on the number of broadcast facilities which can be operated, the fact remains that radio and television stations are more numerous than any of the other competing mass communications media which exists today. If radio is not "available to all" neither is any other significant mass communications medium. It is impossible, therefore, to distinguish radio and television from newspapers, movie theaters, or magazine and book publishers on this basis. If barriers to entry and limitations on access to the use of mass communications media are to be relied on as a basis for imposing regulation of free speech, such regulation should not discriminate against radio and television but should extend to all communications media.

Indeed one scholar has argued that true fidelity to the spirit of the first amendment requires just that and has proposed that newspapers should also be subject to some kind of general editorial regulation, similar to the fairness doctrine, to insure that a diversity of viewpoints is presented to the public.[37]

But, I suggest that to invoke the aim of diversity to support government control of speech is purest sophistry. It is just such a philosophy of "benevolent" Government interference for the "good of the public" which has fed the most blatant and obnoxious forms of censorship.

It has been suggested that if the Government does not place some direct editorial control on mass communications media, it is allowing them to be censors. In short, we are told to replace the private censor with a Government censor. Frankly, if private censorship is an ill to be cured, I think this cure is worse than the illness.

Some have expressed a distrust of the judgment and responsibility of broadcasters. It seems to me that this distrust stems more from a belief in the "original sin" of broadcasters than any tangible evidence of misconduct. However, even if we are skeptical about broadcaster responsibility, is there any more reason to have an abiding faith in the judgment of the FCC or any other governmental agency in these matters?

I think a reappraisal of the role of the FCC in such matters is clearly called for.

Thank you.

Dean Barrow. A comment will now be made by Prof. Charles A. Siepmann.

COMMENT ON PAPER NO. 3, BY CHARLES A. SIEPMANN

Mr. Siepmann. Given 10 minutes I think all I can do is identify the true thrust of the argument before us. As we do so, it appears clear to me that Mr. Robinson's potshots at the doctrine constitute a mere diversionary ploy.

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[36] *National Broadcasting Co. v. United States*, 319 U.S. 190, 226 (1943).
[37] Barron, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641 (1967).

The real purpose of his paper is more ambitious. What he is saying is that, as we win this round of argument we can anticipate the final knockout blow which floors not just the fairness doctrine but the FCC's entire concern, as a regulatory agency, with programing of any sort. The veil is drawn aside in his concluding paragraph and more particularly in his last sentence. "I think a reappraisal of the role of the FCC in such matters is clearly called for."

Albeit obliquely, a whole philosophy of life is bespoken in this closing paragraph. All men, it suggests, are scoundrels, but some are more scoundrelly than others, notably men in government. This hatchet job (on the FCC) was better (because more frankly) done nearly 20 years ago, and curiously at hearings before the FCC on a matter intimately related to the subject we're discussing now—the revised Mayflower decision hearings.

In his testimony before the Commission, Mr. Theodore Pierson then argued, and brilliantly, for rescinding the Mayflower decision and, with it, all FCC concern with programing as incompatible with the provisions of the first amendment. His was a devastating case, its logic remorseless and irrefutable—given his premise. His premise was that the Founding Fathers were literate men, using the English language to say what they meant, and that consequently "no law" meant, precisely and unequivocally, "no law" without ifs, ands, or buts.

This is a view that I respect and with which, historically, I agree. By historically I mean as having reference to the circumstances of the time and, more specifically, as having reference to the press as it then was. For to publish a paper then was within the means of every members of the electorate.

Thus freedom of the press, as the mere extension of the reach and range of the spoken word, was synonymous with individual freedom of speech and, as such, included in the language of the first amendment.

What I disagree about is that such absolute interpretation of the first amendment applies today—given the radical change in the nature and function of the modern press and the motivation of those at its control. But irrespective of my views on this subject, Mr. Pierson's (like Mr. Robinson's) position would seem to be undermined by the distinctive nature and role of broadcasting as defined in the Communications Act. For, unlike other media, broadcasting is not a form of free enterprise. Broadcasters do not own or have free access to the airwaves. Broadcasters have temporary, conditional and privileged access to a public domain.

The FCC allocates frequencies and prescribes the nature of their use (see section 303 of the Communications Act). Like a building contractor, the prospective licensee bids, and against competitors, for execution of a prespecified design. No one has to bid, but if he does, he is under obligation to meet the specifications of the contract. The first amendment protects him in the way he goes about the job, but not in determination of what the job shall be.

The rationale, moreover, of the Communications Act derives (as becomes clear from reading the congressional debates preceding its passage), not, as Mr. Robinson suggests, from the incidental shortage of frequencies, to which Mr. Justice Frankfurter's often-quoted dictum refers, but from the conception of broadcasting as a service in the

public interest as the paramount consideration, with profitmaking subordinate thereto.

Unspecified in the act is the extent of supervisory regulation of such service by the FCC. It is my judgment that any such regulation has been hampered, if not negated, by the consistent refusal of the Congress, since passage of the act in 1934, to provide (through adequate appropriations) the wherewithal of manpower to the Commission to monitor and scrutinize programs broadcast.

An aggravating factor has been the reluctance, other than on rare occasions of the Commission itself to articulate the broad programing requirements of the licensee and to enforce their observance.

I differ again with Mr. Robinson in his citing of the revised *Mayflower* decision in 1949 as the fons et origo of the principles articulated in the fairness doctrine. They were implicit in the act and its interpretation, as far back as the days of the Federal Radio Commission. They were in large measure made explicit in the FCC's report on Public Service Responsibilities of Broadcast Licensees, in 1946. Whatever, the report said, service in the public interest, convenience or necessity might be held to mean, it included as paramount components, regular provision for the reflection of local life and talent, regular many sided discussion of controversial questions, and regular provision for the varied interests of cultural minorities.

If the FCC had stuck to its guns, and enforced honest observance of the spirit of these broad provisions, I doubt if we should be in conference here today. For to attempt much more than this by way of regulation is, as I believe, both impracticable and improper. I have always believed that, in any realistic sense, the function of the FCC, in an imperfect world is to conduct a rearguard action against flagrant and irresponsible abuse of the public interest.

Both as a former broadcasting executive, knowing the excitement and perplexities attaching to decisionmaking, and as a theorist, I favor maximum scope for the exercise by licensees of imagination, leadership and initiative. Given the lure of the fantastic profits that broadcasters have earned, one can't be sanguine that many of them will subordinate their avarice to the pride and satisfaction of true public service rewarded with modest profits. But no power on earth, and perhaps least of all an agency of Government, can force men to virtue. Flagrant abuse or nonobservance of broad principles of public service is preventable. I regard this, however sadly, as the practicable limit of the FCC's function as guardian of the public interest.

It is the FCC's failure, in this sense, to stick to its guns and honor its obligation to the public that finds us where we are—discussing a problem not soluble by specific regulations. In this whole matter of the fairness doctrine, it would seem to me that the FCC has got itself up to the armpits in waters that it should never have attempted to breast. For to prescribe "fairness" in broadcasting is analogous to the dispute of medieval theologians over how many angels can stand on the head of a pin.

In this matter, as in specific interpretation of the provisions of the Blue Book, I prefer the risk and uncertainty (and no honest broadcaster need, in fact, fear either) of Mr. Robinson's regulation by lifted eyebrow to rigid and specific rules and regulations.

Let the licensee assume the burden of determining what fairness is. Let the FCC act as judge of the propriety of complaints brought against licensees. Their judgment, after all, is subject to review and the redress of grievances by the courts.

As regards certain aspects of the fairness doctrine and related issues touched on by Mr. Robinson, I would suggest that we can avoid much of the contentious trouble we are in if the following principles were observed. (In self-defense let me say that shortage of time precludes elaboration or—though I hope not—clarification of my views.)

1. RELIGIOUS BROADCASTING

The Supreme Court has ruled (*Everson* v. *Board of Education* 1947) that "the establishment of religion clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, *aid all religions* (emphasis supplied), or prefer one religion to another." From this I draw three conclusions:

(*a*) The FCC may not prescribe religion (as this favors all religions) as a required component of program services.

(*b*) Religious groups stand on an equal footing with others as applicants for a license.

(*c*) A religious group which is granted a license may choose to exclude all religious programs, but if it includes any one, like provision must be made for other religious groups in the community on an equitable basis.

2. EDITORIALIZING

I stand by my testimony before the Commission at the revised Mayflower hearings. I think the *Mayflower* decision should have been left standing. I see no reason why the recipient of a license (often at the expense of competing applicants) should enjoy the unique privilege of foisting his personal views and/or prejudicies on listeners over publicly owned frequencies. Entailed in his doing so are all the derivative complications of decision in which we have become involved as related to who and/or how many others (there are rarely just two sides to a question) shall be conceded equal time on request or sought out mandatorily to reply. As related to the public interest the matter of editorials, as such, is immaterial. Imperative, as the Blue Book insists, is regular, many sided discussion of controversial questions. The method of airing such discussion (whether by commentators of varying outlook, by roundtable discussion, interviews or what not) should be at the discretion of the licensee.

3. EQUAL TIME

The right of reply to personal attacks has the superficial air of fair play. It does not bear scrutiny. Certainly "equal" time is not the answer. One sentence of irresponsible abuse may require a hundred sentences to set the record straight.

More basic is the question whether personal abuse contributes in any way to the benefits we derive from the free marketplace of thought. The free circulation of ideas and opinions is paramount to the democratic way of life. Argumentum ad hominem contributes

nothing useful or relevant thereto. Call it censorship if you will. In my view the banning of personal abuse over the public airwaves protects the true purpose of the first amendment, which is enlightenment and the pursuit of truth. We should be through with trouble on this front if we restored to the airwaves the good manners of communication of a civilized society.

Thank you, sir.

Dean BARROW. Thank you, Professor Siepmann, for those excellent comments.

Mr. Chairman, during Professor Robinson's paper, a reference was made to a motion in the seventh circuit by the Federal Comunications Commission.

Chairman Hyde states that if the committee desires, he will be happy to introduce it into the record.

The CHAIRMAN. It is up to your judgment and his.

Dean BARROW. Would you care to comment on that, Mr. Chairman, and any other matters which have been raised in the presentation of these two papers?

STATEMENT OF ROSEL H. HYDE, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION

Mr. HYDE. Chairman Staggers, I think it might be helpful to the study of the subjects under examination, if I would supply for you the motion which the United States has filed in the seventh circuit.

I think I ought to explain why it seemed appropriate to file the motion. I will do so at this time if it meets the pleasure of the committee.

The essential features of the rules, and I am referring to the personal attack rules, are that where a personal attack occurs in the context of a controversial issue of public importance, it is the responsibility of the licensee to notify the person attacked, send him a copy of the script or a summary, and offer him a reasonable opportunity to respond in person.

The basic purpose is to make available to the public the opportunity to hear both sides of important questions, including the personal character of persons advocating a viewpoint when their character is put in issue.

The personal attack rules are thus a part of the general fairness doctrine. The new rules, including editorializing rules adopted at the same time, were challenged by NBC, CBS and, in a third case, by the Radio-Television News Directors Association, and a group of licencees. The United States is a respondent in these cases, together with the Commission.

In discussing the defense of the cases, the Department of Justice, and the Commission, reviewed in detail the question of whether the present form of the rules is the best that could be devised to achieve the Commission's objective.

In connection with this review, the Assistant Attorney General in charge of the Antitrust Division, wrote to the Commission on February 29, 1968, expressing the Department's full suport of the Commission on the constitutional and statutory suport for the fairness doctrine,

and the adoption of a special rule dealing with the personal attack aspect of fairness.

The letter suggested, however, that the rules as drafted raised possible problems that might be minimized by some revision of the rules. After further consideration, the parties have filed a motion in the Seventh Circuit asking that the cases be held in abeyance so that the Commission might hold expeditious rulemaking proceedings, looking toward revision of the personal attack portions of the rules.

Since these cases are still pending and no ruling on the motion has been made by the court, it would not be appropriate to go further into the merits of the litigation.

It is relevant, however, to note that a case called *Red Lion Broadcasing Co.* v. *Federal Communications Commission*, dealing with a specific Commission ruling in a personal attack situation prior to the adoption of the rules, is now pending in the Supreme Court. The Supreme Court has postponed oral argument in the *Red Lion* case pending further proceedings in the Seventh Circuit cases.

The further process of the *Red Lion* case will, of course, have to be determined in the light of the present circumstances. All that can be said now is that the nature of any revision of the rules might affect that question.

Since the Solicitor General will determine our position here, and since this is also a matter pending in court, further speculation on the nature of any pleadings to be filed in the Supreme Court in *Red Lion* would not be appropriate.

The Commission has considered the nature of revision of the personal attack rules to be proposed if the Seventh Circuit holds the cases there in abeyance to permit further proceedings by the Commission.

The essential purpose of revision would be to retain the principle of maximum opportunity for the public to be informed on public issues, with a minimum of any possible effect upon the initial presentation of any form of personal attack.

In short, our purpose, as always, is to maximize debate. I would supply for the record a copy of the letter which we received from Mr. Turner, Assistant Attorney General, and a copy of the motion itself.

(The documents referred to follow:)

DEPARTMENT OF JUSTICE,
Washington, February 29, 1968.

Re Columbia Broadcasting System, Inc. v. U.S. & F.C.C. (7th Circuit, No. 16498); National Broadcasting Co. v. U.S. & F.C.C. (7th Circuit, No. 16499); Radio Television News Directors Assn. v. U.S. & F.C.C. (7th Circuit, No. 16369)

Hon. ROSEL H. HYDE,
Chairman, Federal Communications Commission,
Washington, D.C.

DEAR MR. CHAIRMAN: In our consideration as a party respondent of the issues raised by petitioners in the above-entitled matters, we are fully prepared to support the Commission's position that the "fairness doctrine" is constitutional and within the Commission's statutory powers, and that, as a general proposition, some special rule with regard to personal attack is a valid facet of that doctrine. However, we have some concern that the rule, as drafted, raises possible problems that might be minimized by appropriate revisions in the rule without materially interfering with the public interest objectives that the rule is intended to serve. In discussions with members of your staff some possibilities along this line have been considered.

We therefore respectfully suggest that the Commission might wish to weigh the possibility of considering the revisions of the rule before proceeding further with the cases now before the Seventh Circuit.

Sincerely yours,

DONALD F. TURNER,
Assistant Attorney General, Antitrust Division.

FEDERAL COMMUNICATIONS COMMISSION

LEGAL ACTIVITIES

The United States and the Federal Communications Commission have filed with the United States Court of Appeals for the Seventh Circuit, a motion to hold in abeyance action on *CBS* v. *U.S.* and *F.C.C.*, *NBC* v. *U.S.* and *F.C.C* and *Radio and Television News Directors Association* v. *U.S.* and *F.C.C.* in order to permit the F.C.C. to conduct an expeditious rule making proceeding for revision of the Commission's personal attack rules. The motion advises the Court that the filing was in light of further consideration of the rules by the Commission and consultation with the Department of Justice. Commissioner Bartley abstained, Commissioner Cox concurred and Commissioner Loevinger dissented from the Commission's instruction to seek this relief. Commissioners Cox and Loevinger issued statements.

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Case No. 16,369

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, BEDFORD BROADCASTING CORPORATION, CENTRAL BROADCASTING CORPORATION, THE EVENING NEWS ASSOCIATION, MARION RADIO CORPORATION, RKO GENERAL, INC., ROYAL STREET CORPORATION, ROYWOOD CORPORATION, TIME-LIFE BROADCAST, INC., PETITIONERS,

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNCIATIONS COMMISSION, RESPONDENTS.

Case No. 16,498

COLUMBIA BROADCASTING SYSTEM, INC., PETITIONER,

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS.

Case No. 16,499

NATIONAL BROADCASTING COMPANY, INC., PETITIONER,

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS.

MOTION TO HOLD CASES IN ABEYANCE AND TO AUTHORIZE FURTHER PROCEEDINGS

The United States of America and the Federal Communications Commission, respondents in the above-entitled cases, hereby move that these cases be held in abeyance and that the Federal Communications Commission be authorized to conduct further rule making proceedings. The ground of this motion is that the Commission, upon further consideration and consultation with the Department of Justice, has determined, Commissioner Bartley abstaining and Commissioner Loevinger dissenting, to set aside those parts of the rules at issue dealing with personal attacks (subpart (a) and (b)), and to conduct an expeditiou rule making proceeding looking toward their revision.

It is therefore respectfully requested that the cases be held in abeyance and that the Commission be authorized to conduct further proceedings upon an expedited basis for the purpose of reconsidering subparts (a) and (b) of the rules.

Respectfully submitted.

HENRY GELLER,
General Counsel,
Federal Communications Commission.
DONALD F. TURNER,
Assistant Attorney General,
Department of Justice.
By: DANIEL R. OHLBAMM,
Deputy General Counsel,
Federal Communications Commission.

March 1, 1968.

CERTIFICATE OF SERVICE

I, Robert D. Hadl, hereby certify that the foregoing "Motion To Hold Cases In Abeyance And To Authorize Further Proceedings" was served this 1st day of March, 1968, by mailing true copies thereof, postage prepaid to the following persons at the addresses shown below:

W. Theodore Pierson, Esq.
Vernon C. Kolhaas, Esq.
Harold David Cohen, Esq.
Robert M. Lichtman, Esq.
Pierson, Ball & Dowd
1000 Ring Building
Washington, D.C. 20036
*Maurice Rosenfield, Esq.
Harry Kalven, Jr., Esq.
208 S. LaSalle Street
Chicago, Illinois 60604
Lawrence J. McKay, Esq.
Cahill, Gordon, Sonnett Reindel & Ohl
80 Pine Street
New York, New York 10005

Roger Wollenbrg, Esq.
Wilmer, Cutler & Pickering
900 17th Street N.W.
Washington, D.C. 20006
Thomas D. Barr, Esq.
Cravath, Swaine & Moore
One Chase Manhattan Plaza
New York, New York 10005
Herbert Wechsler, Esq.
435 W. 116th Street
New York, New York 10027
*Newton N. Minow, Esq.
Leibman, Williams, Bennett, Baird & Minow
208 South LaSalle Street
Chicago, Illinois 60604

ROBERT D. HADL.

*Air Mail.

CONCURRING STATEMENT OF COMMISSIONER KENNETH A. COX

As is often the case, I find the opinion of Commissioner Loevinger in this matter a truly remarkable document. He imputes motives to those who disagree with him which simply do not exist.

It is true that the Commission has invited litigation to test the validity of our fairness doctrine, and I have done so personally. It is not accurate to say that we have not been true to our promise to litigate the issue, that we are considering changes in our rules for mere cosmetic effect, that we are serving only our own interest as a litigant and no public purpose at all, or that our action falls short of any standards of diligence, promptness and candor which we demand of our licensees—or which would generally be regarded as reasonable in a situation such as this.

Commissioner Loevinger is perfectly entitled to believe that we should not have taken this step—indeed I was initially of that view, though for entirely different reasons that he advances, but ultimately joined the rest of my colleagues in directing our General Counsel to move the Court of Appeals for the Seventh Circuit to hold the personal attack cases in abeyance and to authorize us to take further proceedings looking toward partial revision of the rules. However, I do not think he should be allowed to distort the record without challenge—particularly since the statements he now makes are not, for the most part, the ones he advanced while we were considering the matter.

The opposition filed by the Solicitor General to the petition of Red Lion Broadcasting Company for Supreme Court review of the decision of the Court of Appeals for the District of Columbia sustaining the Fairness Doctrine and our

application of it to Red Lion was not designed to delay authoritative decision of this question. The Commission and the Solicitor General believed the Court of Appeals decision was sound and urged the Supreme Court that further review was not warranted. However, the Supreme Court decided to hear the case, and we welcome its review. The Solicitor General and the Commission have opposed delay in its resolution of the matter, and are ready to proceed as soon as possible.

Similarly, the Solicitor General's opposition to the petition of the Radio-Television News Directors Association asking the Supreme Court to grant certiorari in its case prior to decision by the Court of Appeals for the Seventh Circuit was not intended to delay resolution of the fundamental issues in this area. The Red Lion case was already before the Supreme Court and constituted an appropriate vehicle for deciding many of the basic questions concerning the Fairness Doctrine. The proposal of RTNDA to by-pass the Court of Appeals was unusual in the extreme and did not seem to us at all necessary, since the collateral question of the validity of the personal attack rules we have adopted to implement this portion of the Fairness Doctrine could be decided in ordinary course, quite apart from the Red Lion case. The Supreme Court apparently concluded that it would prefer to consider both aspects of the matter at one time, but wanted lower court decisions in each case. It therefore ordered argument in the Red Lion case postponed until the RTNDA case is before it in due course. If Commissioner Loevinger must assess blame for delay in concluding the pending litigation, I would suggest that he look in this direction—though I wish to make it clear that I have no objection to the course followed by RTNDA and think the Court's disposition of the matter is entirely appropriate and may conduce, in the long run, to the earliest practicable final decision of this important litigation. But, again, we and the Solicitor General were not seeking delay. Indeed, the course we urged would have produced a Supreme Court ruling on the basic constitutional challenge to the Fairness Doctrine and the personal attack principle more quickly than any other method proposed. I think Commissioner Loevinger's charges of intentional delay cast an unwarranted aspersion not only on the Commission but also the Solicitor General of the United States, who controls our litigation in the Supreme Court and filed the pleadings in question.

It is true that the step we are not taking—if the Court concurs—will involve delay in resolving the question of our authority to adopt rules dealing with the personal attack problem, though the issue of our basic policy in this area, out of which the rules evolved, is still before the Supreme Court in the Red Lion case. The latter case can either be adjudicated in the near future, or can be deferred until we have revised the rules and they can be challenged again if their new form is still regarded as objectionable by the parties to the present case, or anyone else.

Certainly nothing we do by way of amendment of a portion of the rules will prevent any interested party from challenging our authority to act in this area, nor will the Supreme Court be asked "to concede the power and invite the probability of adoption of rules at least as onerous as the ones now in effect." It may hold the Red Lion case until a new challenge to our revised rules is before it, in which case it will know precisely what rules we would propose to apply in this area before it makes any ruling on the basic issues of the Fairness Doctrine and the personal attack principles—as distinguished from the rules—which we have developed in a series of decided cases. But even if it decides the Red Lion case in the near future, it will be ruling, as did the Court of Appeals, on the application of our policies to a specific factual situation fully disclosed on the record in that proceeding. If it were to affirm our action in Red Lion, that would not in any way commit it to affirmance of the rules we would be in the process of revising. Those could be challenged in advance of their application to anyone, just as was done with respect to the rules we are now asking permission to reconsider in part. There is no need for us to give the Courts any "assurance" as to the revised form of the rules we may adopt because the exact form of the revised rules will be before the Courts if and when they are asked to pass on our authority to make and enforce rules in this field.

We are not proposing to change our rules "to make a better showing in pending litigation" or "to present a better face to court." We are trying to adopt a

better rule[1] for the regulation of this important aspect of broadcasting. If we are successful in formulating a rule which will promote what we conceive to be the public interest in the presentation of both sides of controversial issues—and which at the same time will avoid results which the parties fear would result from the present language of the rule and which they contend are legally or constitutionally invalid—that will certainly serve a *public* purpose, and not simply constitute a ploy in the maneuvering of counsel concerned only with victory or loss in court. If we have the authority and responsibility to act in this field, as we believe we do, then we should act as wisely and fairly as we can. If by revision of the language of the role we can achieve what we consider to be valid goals without causing alleged impairment of the interests of the parties and the public in free broadcast journalism, then certainly we should be permitted to try to do so without being accused of lack of diligence and candor. This charge is all the more incomprehensible since we are acting, in part, at the urging of Assistant Attorney General Donald F. Turner, who formally represents the United States in these cases. (See his letter to Chairman Hyde dated February 29, 1968).

We are not suggesting that the Courts will be "influenced" by this action. Instead, they will be asked to pass on our authority to adopt a revised rule which we have reason to believe will be more in the public interest than the one now on appeal. Certainly the Courts, the parties, and the public may scrutinize our entire course in this matter—indeed, they are asked to do so. If there are inferences to be drawn from what we have done I believe they should be far different from those Commissioner Loevinger suggests.

DISSENTING STATEMENT OF COMMISSIONER LEE LOEVINGER

(Re motion to remand personal attack rules)

The issue of the existence and extent of Commission authority to supervise or regulate the content of broadcast programming has been disputed and debated for years, particularly with respect to the expression of opinions and the reporting of news. The issue has not been tested or decided in the courts, until current litigation, because licensees have generally deemed it more prudent not to hazard their licenses or antagonize the bureaucracy which had such great discretionary power over their business. However, the Commission and Commissioners have often stated that they invited litigation to test the legality of Commission action in this area. Ostensibly the Commission has sought and seeks the enlightenmen and guidance of court decisions.

On July 5, 1967, the Commission promulgated certain rules relating to "personal attacks" and "political editorials". FCC 67–795. The stated purpose of these rules was to "clarify and make more precise the obligations of broadcast licensees" under the general "Fairness Doctrine" with respect to these matters, and to authorize the Commission to "impose appropriate forfeitures" in cases of violations of such obligations. Commissioner Bartley dissented. I concurred on the ground that "the right of reply" was a sound principle, but stated that the rules were not well drafted.

On August 2, 1967, the Commission sua sponte amended the personal attack rules, with Commissioners Bartley, Loevinger and Wadsworth absent, and Commissioner Cox concurring in the result. FCC 67–923. The stated ground of the amendment was the neecssity of further "clarification".

In the meantime, Red Lion Broadcasting Co. appealed a ruling of the Commission under the general "Fairness Doctrine" to the Court of Appeals for the District of Columbia. The decision of that court, sustaining the constitutionality of the doctrine and the ruling of the Commission was entered June 13, 1967, Red Lion Broadcasting Co. v. F. C. C., —— F2d —— (1967), Red Lion applied to the U.S. Supreme Court for certiorari and the Commission opposed. The Supreme Court granted the petition on December 4, 1967, and the case is now pending in that Court.

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[1] Commissioner Loevinger is quite right in saying that we have not decided what revision of the rules we will make. He suggests, based on our preliminary discussions, "that the proposed revisions will involve no improvement in the rules but merely another step away from clarity and precision." Since we haven't adopted a new rule, I would simply invite him to bend his efforts toward avoiding the result he fears. He is free to make any suggestions he likes as to the language of the rule, although I don't recall any specific suggestions he made for revision of the present rule. He simply expressed the opinion that the rule "would better achieve its purpose [which he approved in principle] if it were drafted with a clearer delineation of scope and practical operation."

While the Red Lion case was on its way to the Supreme Court the Radio Television News Directors Association appealed the validity of the "personal attack" rules to the Court of Appeals for the Seventh Circuit. RTNDA petitioned the Supreme Court to grant certiorari before judgment in the Court of Appeals in order to consolidate both cases in the Supreme Court and bring several aspects of the legal issue before the Supreme Court for decision at one time. The Commission opposed this motion. On January 29, 1968, the Supreme Court denied the RTNDA petition to bring up the Seventh Circuit case immediately, but ordered the arugment of the Red Lion case postponed until the RTNDA case had been decided by the Seventh Circuit and was ripe for Supreme Court review.

Now the Commission decides that it will petition the Seventh Circuit Court of Appeals to return the "personal attack" rules to the Commission for further revision and clarification. While the Commission has not decided what revision in the rules it will make, the general nature of the proposed revisions have been proposed to the Commission by its counsel. Though it is possible to express only tentative views on tentative proposals, it seeems to me that the proposed revisions will involve no improvement in the rules but merely another step away from clarity and precision. In any event, this endless tinkering with the language of the rules cannot affect the governing legal principles and can amount to no more than an attempt to buttress legal arguments on the Commission's behalf. The inferences which the courts, the parties and the public are entitled to draw from the Commission's wavering course are obvious and justified.

But there is a more important consideration for me. At long last the Commission is in court with competent opposing counsel testing the existence and extent of Commission authority to supervise and regulate speech by broadcast licensees and those using broadcasting facilities. The Commission is not true to its promise to litigate or to its avowed desire to secure authoritative decision of the issues when it opposes every attempt to bring these issues before the Supreme Court and then employs such tactics as the present ones, involving inevitable and indefinite delay and confusion of the issues.

The important issues here are not the cleverness, or unskillfulness, of Commission lawyers in drafting rules. Since these rules were issued, serious doubt has been cast on their constitutional validity by authoritative publications. See Harry Kalvan, Jr., Broadcasting, Public Policy and the First Amendment, 10 J. Law & Econ. 15 (1967); Glen O. Robinson, The FCC and the First Amendment, 52 Minn. Law Rev. 67 (1967); Legislative History of the Fairness Doctrine, Staff Study for House Committee on Interstate and Foreign Commerce. 90th Cong. 2nd sess. (Feb. 1968). Regardless of any changes the Commission may now make in its rules, it will be apparent to the courts that sustaining the constitutional power of the Commission to act in this area will be to concede the power and invite the probability of adoption of rules at least as onerous as the ones now in effect. The Commission may now change its rules in an effort to make a better showing in pending litigation, but it cannot expunge the record of having adopted the rules now under attack. Neither Commission counsel nor the entire Commission can give the courts any assurance that the Commission will not adopt rules just like its present rules, or more burdensome, as soon as litigation is concluded if the courts find that the Commission has the power to act at all in this area. For the Commission to rewrite its rules now is obviously merely a cosmetic effort to present a better face in court. It is not complimentary to the courts to suggest that they will be influenced by this.

Certainly the basic legal issues raised in this litigation deserve the most prompt consideration and determination that adequate judicial process will permit. The action of the Commission will simply postpone indefinitely the determination matter serves only its own interest as a litigant, has no public purpose, and falls considerably short of the diligence, promptness and candor which the Commission demands of its own licensees. Consequently I am forced to dissent.

Mr. HYDE. I was asked if I have any other comment on matters under discussion.

I would like to state that I believe the Commission's position on all the matters that have been discussed here, particularly in the document of Professor Robinson, are adequately and fully dealt with in the Commission's rulings in promulgating the Fairness Doctrine, in the Commission's rulemaking in promulgating the regulations appli-

cable to personal attack situations, and in the Commission's decision applying the fairness doctrine to the cigarette advertising.

You will find in those documents a legal analysis of the constitutional question, the legal authority of the Commission. And you will also find the Commission's study of the legislative history of the 1959 amendments, and, in fact, the legislative history of the statutes under consideration. I would recommend those documents for the attention of the committee.

The CHAIRMAN. They will be printed in the record at the proper place.

(The material referred to appears on p. 219.)

Dean BARROW. Mr. Robinson, would you have comments at this time on the comments made by Professor Siepmann?

Mr. ROBINSON. Yes, I would like to comment, if I may, on Professor Siepmann's analysis.

Let me state first of all that since Mr. Siepmann does not believe that I have been candid about my ultimate motivation here, I will say in all candor that I don't think the Commission has any business in programing, and if there was anything surreptitious in my paper, it was not intended to be surreptitious, it was only intended to be directed at this particular application of program regulation with which I understood the committee was primarily concerned.

But I would not draw back from applying these principles across the board. I would not be adverse to saying to the Commission "You may not dictate the content of programs or you may not dictate specifically the conditions under which they will be broadcast."

I am not suggesting that the Commission is to be shorn of all its powers to regulate broadcasting. I would certainly suppose that there are no grave first amendment implications with respect to most of what the FCC does.

I would think that most of its general regulatory oversight on economic matters or technical supervision, and generally the public responsibility of the broadcaster, can still be accomplished consistent with the first amendment.

But let me suggest that in this particular application of the FCC's regulatory powers, I think there is grist for any critic's mill. More specifically, on Mr. Siepmann's main points:

He says that he does not believe that the NBC rationale controls here, but that the true rationale for the Fairness Doctrine, as for other incidents of general program oversight by the FCC, is the fact that broadcasters have temporary conditional and privileged access to the public domain.

That is a statement that is replete with a great many concepts, but let me repeat what I said this morning, that I don't see how it resolves the problem simply by talking about public domain. The issue remains, what can the FCC do, assuming that stations licensed to use "public property" in any sense of the word. The fact of licensing, or the fact of an obligation of public service, is not questioned here. But this does not end the problem; it merely poses it.

We still have to inquire, it seems to me, what follows from these facts. I think Prof. Harry Kalven put it very succinctly when he said in a recent article:

The traditions of the First Amendment do not evaporate because there is licensing. We have been beginning, so-to-speak, in the wrong corner. The question is not what does the need for licensing permit the Commission to do in the public interest. Rather, it is what does the mandate of the First Amendment inhibit the Commission from doing even though it is to license.

It seems to me that in that succinct statement, Professor Kalven has pointed the way to a more fruitful discussion than engaging in abstract inquiries as to the nature of the "public domain," or the "ownership of the airwaves," whatever those terms may mean, or the nature of broadcasting as a "public service." (And, by the way, I don't understand any broadcaster to claim that it is not a public service. But by the same token, I think you would find precious few newspaper editors who would confess to having only the profit motive: That is not the most profit-making business to be in these days. Most newspapermen are just as dedicated to the public interest as any of the broadcasters.)

Mr. Siepmann goes on to outline a series of points as to how this issue can be more profitably discussed, and I think he has put the issues very well indeed.

He states, first of all, on religious broadcasting, a principle or conclusion which to me is quite interesting. He says that a religious group which is granted a license may choose to exclude all religious programs, but if it includes any one, like provision must be made for other religious groups in the community on an equitable basis. That may be Mr. Siepmann's reading of the Fairness Doctrine, but it apparently is not that of the Commission. How else could we explain its decision in the *Madalyn Murray* case? I may be misinterpreting that decision, but it seems to me it squarely holds that the mere programing of religious broadcasting does *not* invoke the Fairness Doctrine.

Second, Mr. Siepmann argues provocatively for a return to the *Mayflower* decision, which was a complete ban on all editorializing. By this I suppose he does not mean—I think he makes clear that he does not mean—that broadcasters should not discuss controversial public issues, only that they should not editorialize.

But just what is an editorial? If a broadcaster inserts a statement of opinion in course of a public discussion, is that an editorial? What difference is it whether it is labeled "editorial" or not? The critical question is, Can you really adequately, meaningfully, discuss controversial issues in the vacuum of having or expressing no opinion?

I think that a return to the *Mayflower* concept of fairness would return us 28 years, to an age which, God help us, I hope has passed. It was an age in which blandness was the rule (many would say it still prevails—encouraged by the Fairness Doctrine) and which I frankly would hate to see broadcasting return to.

Mr. Siepmann closes with a remark that we ought to restore to the airwaves the good manners of communications of a civilized society. This would seem difficult to take issue with, except for the fact that it seems to be holding up broadcasters to something more than mortal standards of conduct. It seems to me Mr. Siepmann's remark harks back to some golden era when all argument was genteel and courtly but also never really came frankly to grips with the critical issues of the times.

If there ever was such an age when all criticism was so refined and genteel I think we are well rid of it. In this vein, I would like to close

by quoting from an opinion of Justice Brennan in the *New York Times* v. *Sullivan* case, where he said,

> This Country has a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open and that it may well include relevant caustic and sometimes unpleasant sharp attack.

Dean BARROW. Is there further discussion on this series of papers?

Mr. JAFFE. I agree almost entirely with Mr. Robinson. I find Mr. Siepmann's position very strange and almost inexplicable. He seems to set aside—because of the mechanics involved in getting into the industry, the fact that there are problems, technical problems, of making broadcasting effective—he seems to set aside the whole area of broadcasting as a communications device as something highly special, highly distinct, a sort of virgin in the lists of public communication, which is to have a very special rules, which rules he is prepared to provide. That is, no editorials, no religion but if you have religion then you have to have something else, and so on, a whole series of special rules which argue for broadcasting as a completely distinct medium, apart from all the other mediums of communication.

The position I am going to take tomorrow is not necessarily the position that the broadcasters take. I am going to take the position that it has never been demonstrated that broadcasting is that different, that distinct, and that autonomous. On the contrary, it is part of the whole complex of communicating devices.

The position of broadcasting as a distinct medium has been, if not exaggerated, at least never proven. It has never been proved by the FCC which always starts out with how distinct it is, and how glorious it is. The broadcasters think it is that distinct and that it is entirely different from everything else. And so, you need very special rules about what goes on in order to protect the public from getting one-sided positions.

I think there are certain fields where broadcasting is distinctive, particularly in the field of political candidates and speeches. But I think in the field of the right to reply and the fairness doctrine, they are just part of the whole totality of communications devices.

What I am going to try to do tomorrow is simply raise the question whether these doctrines serve any particular function. They may not be so bad as made out, they may not be so inhibiting.

It seems to me the first question, quite apart from the constitutional question, is whether they really serve any appropriate function and whether you need them, and just where we stand on this complex of doctrines, of which I identify four; namely, the political doctrine, the right of reply doctrine, the fairness doctrine, and the local service doctrine, whether each of these doctrines serve any particular, special need.

I have more or less come out with the conclusion that the political candidate doctrine and the local service doctrine have a greater validity than the other two.

But my whole quarrel with the kind of argument that Mr. Siepmann makes, and with the assumptions on which other arguments are based, is that broadcasting is a world all unto itself, and the people who communicate and listen in this world are really isolated from the rest of the world; that it is the only thing they ever hear, that is

the only thing they listen to, and that you have to have special rules to protect these people living in this isolated world.

Dean BARROW. Are there additional comments?

Dr. GOLDIN. I was interested, Mr. Jaffe, in your comment that you thought that political broadcasting was different, and that it probably was constitutional. Did I understand that correctly?

Mr. JAFFE. Yes.

Dr. Goldin, I wasn't attempting very much, either here or tomorrow, to deal with constitutional issues. I think they have been very, very thoroughly dealt with in many different places. I think they are going to be dealt with by the Supreme Court shortly in a very authoritative way. I don't mean that keeps us from talking about them. But I would prefer in the thinking I have done about the matter to examine the initial premise that you are in a field here that is rather special, where you need a special set of rules for communicating that you don't have in the other fields of communication.

I think if you need a doctrine of this sort, the greatest need is in the field of political discussion. I don't know that you even need a rule there, because it may be that self-interest would keep the broadcasters in line. I don't know.

Assuming that you might need it there, whether that would demonstrate whether it is constitutional or not, I don't know. I would be prepared to make an argument for its constitutionality.

In a sense, one might say the Supreme Court has never, I think, faced very squarely the constitutionality of controls of this sort. They have, however, as we know in the case coming from Minnesota dealing with the libel law, proceeded as if section 315 were constitutional and have gone on to make decisions as to what consequences of 315 were on the law of defamation. I suppose it never occurred to anyone at the time to question the constitutionality of 315.

Dr. GOLDIN. In that connection, may I read one sentence from that decision?

"The thrust of section 315 is to facilitate public debate over radio and television," said Justice Black, and they went on to uphold the section.

Mr. JAFFE. I am sure they assumed it was constitutional, and I wouldn't be at all surprised if they hold all the other things constitutional.

Dr. GOLDIN. If they held it to be constitutional on raido and television, what about the print media? Is it constitutional in print media?

Mr. JAFFE. My feeling as to section 315 functions is based on the tremendous importance of the impact of the personality of the candidate as a distinctive characteristic of the medium, a characteristic which I don't think is at all so significant with respect to the personal attack or the so-called Fairness Doctrine in discussion of ideas.

Dr. GOLDIN. Are you bringing back, then, the unique characteristic of radio and television?

Mr. JAFFE. I think that with respect to political campaigns it is unique as a medium. Whether the uniqueness of the medium allows you to get by the problems of the first amendment, I don't know.

Dr. GOLDIN. I think for the record also, this might be helpful. There was a question raised by Professor Robinson about congressional intent in respect to fairness. I think the record ought to be complete by having

inserted in the record a section of the Communications Act which was passed in October 1967, which is section 396(g)(1)(A), which refers in that context to educational broadcasting, but where the Congress imposed an obligation on the corporation for public television to insure that the programs which it distributed to the stations should be with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature.

Dean BARROW. Mr. Robinson.

Mr. ROBINSON. In my paper I hadn't really focused on that particular amendment, but it does seem to me to be anomaly to talk about congressional ratification of a doctrine as far reaching as this one is (and as troublesome apparently to this committee—witness these hearings) by attempting to grab hold of bits and pieces of amendments passed without any reflection on the Fairness Doctrine as it is applied generally—with all its implications. To construct out of these bits and pieces some kind of statutory ratification of the doctrine seems to me to be a very bad way to make statutory law.

If, however, Congress did ratify the doctrine in this way, I would urge strongly that it ought to be reconsidered, notwithstanding that it has been incorporated into the Communications Act.

Dean BARROW. Mrs. Pilpel.

Mrs. PILPEL. Mr. Jaffe said he did not think there was such a great distinction between the print media and the broadcast media, and he seems to deduce from that that you should not be able to regulate the broadcast media because you can't regulate the print media.

I would venture to suggest one could make exactly the opposite argument, namely that the kind of doctrine which has evolved in the Fairness Doctrine is the kind of doctrine which may now be urgently needed in one form or another in connection with the print media, and that a right of access, for example, or a right of many-sided presentation would not only not violate the first amendment when involved in broadcasting, but would also not violate the first amendment when involved in the print media.

Notwithstanding the various ways the first amendment has been referred to, it does not prohibit Congress from making laws regulating freedom of speech and of the press. It prohibits Congress from making laws abridging freedom of speech and of the press.

Actually, we have U.S. Supreme Court decisions in many cases to substantiate the fact that Congress may indeed make laws in aid of freedom of the press. I don't want to take the time of the committee at this time to refer to more than one, the *Associated Press* case, where the court said "It would be strange indeed, however, if the grave concern for freedom of the press" [and this had to do with the press not with the broadcast media] "which prompted the adoption of the first amendment should be read as a command that the Government is without power to protect that freedom. That amendment rests upon the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society."

I would submit that the Federal Communications Commission has done a great public service in promulgating the Fairness Doctrine and that this committee might at some point wish to consider whether

some such doctrine might not well be applied in those situations where there is no realistic access to print media in the community.

Mr. JAFFE. I just want to correct the statement that I was making an argument about something. I tried to refrain from making any arguments about the constitutionality. I was not distinguishing between the press and broadcasting with respect to constitutionality. I was raising the question whether the broadcasting is so apart from all other organs of communication that some kind of special rules are necessary in communicating in that medium.

I would be prepared to make arguments, but I wasn't making any. I wasn't saying that there is no distinction upon which you could justify a regulation of one and not the regulation of another.

Dean BARROW. We are going to take these questions, but in doing so may I point out that we were to have started with paper No. 4 at 3:10, and we are running a little behind.

Mr. Alexander.

Mr. ALEXANDER. It seems to me there may be an internal inconsistency in what Professor Jaffe says, if he tries to divorce discussion of issues from political discussions, or in effect divorce fairness from equal time. It seems to me if you admit the necessity of regulating political broadcasts, it flows from that that you have to be concerned about fairness in the voicing of the issues, which politics is all about.

Mr. JAFFE. I haven't read my paper yet. I am going to try to demonstrate that I think there is a distinction.

Dean BARROW. I trust we will get more comment on this subject when Professor Jaffe presents his paper.

Mr. WASILEWSKI. I would hesitate to get into a discussion between and among Professor Jaffe and the other professors at the table, but it occurred to me the big distinction between Professors Siepmann and Robinson is that, although they both would accord constitutional principles to broadcasting, Professor Siepmann takes the position that once you apply for a license you make a contract with the Government and, therefore, waive certain constitutional protections you otherwise would have. That seems to me the logical sequence he takes in the religious situation. The Government does not require religion, but if you put on religion, then the Government could require religion. Therefore, you do waive constitutional rights.

To pursue Mrs. Pilpel's logic, I think her logic is unassailable, though I think it should be applied in reverse, namely, that the constitutional principles, she says, that are applied to broadcasting and the Fairness Doctrine as applied to broadcasting could legally be applied to newspapers.

I would say if they can be legally applied to broadcasting, they could probably be legally applied to newspapers. However, I don't think it can legally be applied to newspapers and, therefore, it should not be legally applied to broadcasting.

Mr. SIEPMANN. In support of Mrs. Pilpel's view, we might remember a report from the Luce Commission, respecting the whole issue of the freedom of the press.

One sentence takes us to the heart of this whole matter of responsibility and answerability to the public at large. It said, referring to the press in the broad sense but specifically in terms of the newspapers,

that without the assumption of moral responsibilities there are no moral rights.

I think that is a pregnant sentence which focuses on the point of difference between some of us in our present discussion.

Mr. WASILEWSKI. I would quote Justice Brandeis to the effect that it is more necessary to be on our guard to protect liberty where the purposes of Government are beneficient.

Dean BARROW. There were two matters in Professor Robinson's paper which have not been commented on, and perhaps others should, if they are worthy of taking issue with. He has considerable to say about the vagueness of the doctrine, and I think we might recognize that actually most of the regulations under the Communications Act have been under the standard public interest, convenience or necessity which I think certainly is no less vague, and perhaps it shouldn't have been as vague as it was.

But somehow we have developed a broadcasting industry and a regulatory policy largely around that standard. The adequacy of it has been tested in a number of decisions, and, of course, has always been upheld or we would not be operating under it today.

Also, he shows considerable concern about the danger to individual broadcasters in attempting to apply the Fairness Doctrine. I know of no instance—perhaps the others would—in which anyone has lost a station or has been under the real threat of losing a station with regard to the application of the Fairness Doctrine.

If I am wrong about that, I would like to be corrected on it. I would even wonder if in the cases now before the court involving the Fairness Doctrine if the broadcasters should lose their case if it would raise any problem of that kind.

Mr. Hyde, would you have any comment to make on that, or is it inappropriate for you to comment on that?

Mr. HYDE. I would not comment on any pending case or any case in court. Up to the moment, no license has been revoked, no renewal has been refused, no fines have been assessed, on the basis of fairness rulings by the Commission.

Dean BARROW. Mr. Chairman, we have a coffee break scheduled at some point this afternoon. I would raise with you whether this would seem to be the appropriate time to do it or whether we should go ahead with the next paper, which is the final paper of the day. What is your pleasure, please?

Mr. VAN DEERLIN (presiding). The consensus of the committee seems to be that coffee is an anytime thing, and we just might be called back to the House floor. We have such a great collection of talents here we would like to stay with it.

Dean BARROW. Our next paper is to be submitted by Mr. Reuven Frank, with the title "Effect of the Fairness Doctrine on Broadcast News Operations."

PAPER NO. 4—REUVEN FRANK: THE EFFECT OF THE FAIRNESS DOCTRINE ON BROADCAST NEWS OPERATIONS

Mr. FRANK. Thank you.

My name is Reuven Frank. I am the executive vice president of the NBC News Division, and am in charge of its day-to-day operations.

The NBC News Division develops, supervises, and presents all of NBC's news programs—regularly scheduled hard news reports and analysis, special event and political coverage, news interview programs, and documentaries.

This totals a massive amount of varied programing, on the air many times a day on NBC-owned stations, and on our radio and television networks. It represents almost 25 percent of the NBC Television Network's total schedule and calls for a staff of more than 900 people.

I myself have worked in the news business for over 20 years as a reporter, writer, editor, producer, and administrator. I started with a newspaper and since 1950 I have been with NBC News.

I have been asked to discuss the theory and application of the Fairness Doctrine from the point of view of a working newsman. It is one of the limitations of language that anyone questioning the Fairness Doctrine or how it is administered sounds as though he is against fairness. No doubt a different impression would be created if we called it the "Government Interference Doctrine" or the "News Regulation Doctrine," and perhaps this discussion would move better if we used a term like "Doctrine X," that did not prejudge the matter by its name.

We could then consider whether "Doctrine X" was a good idea to start with, whether it is being productively followed, and what are its prospects. It was first enunciated to insure fairness in a public medium of great reach and influence. Has it?

That's a hard question. Even before we reach the details we get hung up on the wisdom or desirability of taking judgment of journalistic standards in the treatment of controversial issues away from trained journalists, and giving the supervision of such judgment to a Federal agency. Government is a community. Journalism is a community.

The community of American journalism—and this may be its most important function—is charged with keeping an eye on government. There is a logical flaw in having a part of government judging how it performs this function.

In my view, increasing Federal enforcement of a Fairness Doctrine in broadcasting will create more serious problems than leaving these judgments to the broadcast news organizations and to the reactions of the public they seek to serve.

I reach this conclusion on several considerations.

First is the fact that the judgments involved are intricate and complex, calling more for the skills and sensitivities of the professional journalist than those of the Federal regulator, who must regulate in terms of rules, definitions, and precedents.

This consideration is fortified by the tendency for regulation to start out on a broad and generalized basis and then to get more and more detailed, rigid and restrictive. This has been true of the administration of the Fairness Doctrine.

Second is the diversity of the broadcasting medium. There are far more separate voices in radio and television than in the newspaper or wire service fields, nationally and in individual communities. Broadcasters do not speak with one voice, and the competition and variety in ideas and presentations in broadcasting are certainly no less than in any other news medium.

Furthermore, every broadcaster must satisfy a diverse audience. He is wholly dependent on great numbers of voluntary choices made hour by hour by viewers and listeners, who have a strong personal identification with the medium, and who will be alienated by obvious bias and distortion. Few Americans would admit they themselves need the protection of a Federal agency calling the shots on journalistic fairness.

Finally—and this is wholly a judgment factor—it seems to me that the public is endangered less by the possibility of a few irresponsible broadcasters in a responsible industry than by an increasing Government penetration into the operation and content of a news medium. Such Government intervention has the most serious implications, and can contribute to an irreversible trend.

I am not a lawyer and cannot speak as an expert on the legal development of the Fairness Doctrine. I understand that the doctrine started as a statement of general principle applicable primarily to broadcast editorials. Now, only a few years later, it is already at the point of a set of detailed and restrictive rules of uncertain interpretation.

The matter started in 1949, when the Federal Communications Commission reversed its earlier decision holding that broadcasters might not editorialize. In reversing this ruling, the Commission declared that if a station presented views on one side of a controversial public issue, it should make time available for the opposing side, emphasizing that the particulars were for decision by the broadcaster, exercising "his best judgment and good sense."

By 1964—that is 15 years later—the Commission had applied this doctrine to a variety of presentations, not confined to broadcast editorials, but the standard it outlined was still a broad and general one, stated in these terms:

> The licensee, in applying the Fairness Doctrine, is called upon to make reasonable judgments in good faith on the facts of each situation * * * In passing on any complaint in this area, the Commission's role is not to substitute its judgment for that of the licensee * * * but rather to determine whether the licensee can be said to have acted reasonably and in good faith.

Only 3 years later, this general statement of principle had been expanded to an ever-growing code of practice, specifying procedures to govern various aspects of the Fairness Doctrine. To illustrate how rigid and difficult these restrictions have rapidly become, I'd like to mention a recent application of the so-called personal attack rule, one of several byproducts of the Fairness Doctrine.

A few months ago, a radio station broadcast a brief announcement containing a quotation from J. Edgar Hoover and a statement referring to the DuBois Clubs of America as a "new Marxist youth organization—founded at a special meeting in California dominated and controlled by American Communists." When challenged to give the DuBois Clubs broadcast time to respond, the station objected, citing a variety of findings by the Attorney General, the FBI, and two congressional committees confirming the accuracy of the statement.

The Commission overruled the objection, declaring that the truth of a "personal attack" was not a defense to the obligation to provide time to answer.

To reach this ruling, the Commission had to find that the comment was in fact a "personal attack," which it had previously defined as "an attack—upon the honesty, character, integrity, or like personal qualities of an identified person or group." It had to disregard the truth of the statement. It had to find that the licensee was acting unreasonably and in bad faith when the station judged that the statement did not involve a genuinely "controversial issue of public importance." And if there was really a controversial issue, it had to disregard the possibility that the station may have previously presented the opposing sides of that issue.

Having done all this, the Commission required the station to present a broadcast by the DuBois Clubs.

I do not mention these factors to dwell on the merits of a particular regulatory decision. But I offer it as a striking and current example of how deeply Federal intervention into news programing can go, once it starts down the road of regulation, no matter how benevolent its purpose seems.

If we consider how this ruling embraced a series of involved interpretations—on any one of which reasonable men could certainly differ—we can recognize the increasing strain the Fairness Doctrine can place on a vigorous news operation.

And if we multiply this instance by the hundreds of occasions in which a direct or implied criticism of a person or organization can develop, in an interview program or an investigative report or a documentary, we can see the enormous difficulties which could arise from a strict application of the "personal attack" rules.

It seems to me that this kind of regulatory constraint must inevitably have a progressive flattening effect on news presentation, particularly in their most vital and sensitive and socially useful areas—the treatment of controversy.

The worst thing that can happen in news is for some editor, some producer, or some reporter to shy away from any subject because it isn't worth the trouble. Not the trouble his professional activity will put him to, but the trouble which might result.

Such trouble could range in magnitude from a flood of angry letters which need answering to appearing in court to respond to a nuisance suit. There are enough inhibiting factors now without adding to the list the spector of detailed day-to-day second guessing by the FCC. Such prospects cause self-censorship, and if the situation gets bad enough it can restrict broadcast journalism to a mixture of the dull and the frivolous.

In fairness, I do not have a catalog of horrible examples showing how the Fairness Doctrine has prevented NBC News from exercising its responsibilities.

For one thing, many of the Commission's earlier rulings on fairness related to broadcast editorials; and we do not editorilize, believing that we can do a more enlightening job through news reporting, analysis, and interpretation than through brief statements of advocacy. Furthermore, until recently, the Fairness Doctrine was also a statement of general principle with latitude to the broadcaster in its application, rather than a detailed code of behavior.

I should add that under this general principle, complaints have been field against NBC News, but in no case has the Commission found that we violated the principle.

On this basis you may feel that we are protesting before we have been hurt. I believe, however, that we have a cause for concern. Television journalism is only about 20 years old, and is still changing its techniques and revising its forms.

NBC News is seeking more and more to go beyond the television picture of an event to explain its background and implications. We are readying an ambitious new project—a 2-hour prime-time news program to be called "First Tuesday"—which will aim at bringing a greater awareness of issues and events to the audience.

So, we are concerned that just as television news programing seeks more and more to come to grips with vital issues, the Fairness Doctrine will continue its recent trend toward greater and greater restriction and regimentation.

Our concern is, therefore, more with the future than the past. If there is to be a Fairness Doctrine at all,[38] we believe that it should not go beyond the broad and flexible standards set forth in the FCC's 1964 statement.

This statement, as I said earlier, left the initiative to the broadcaster "to make reasonable judgments in good faith on the facts of each situation." It declared that "the Commission's role is not to substitute its judgment for that of the licensee—but rather to determine whether the licensee can be said to have acted reasonably and in good faith."

But that is quite a different standard from the one now being followed by the Commission.

I suggest we would all agree that it would be unthinkable to impose anything like a Fairness Doctrine on newspapers or magazines, or would have agreed to that up to about a half hour ago.

We would consider it unconstitutional for a Federal agency to analyze newspaper interviews, reports, and editorials, and, on complaint, to require the publication of additional material to treat further aspects of controversial issues.

It is usually argued that broadcasting is different because it is licensed, but this is arguing in a circle. A Federal license to use frequencies in the public interest does not suspend the freedom of the press of which broadcasting is a part.

It is also argued that broadcasting facilities are so scarce, and new entry into the field is so limited, that special limitations on broadcast expression are justified, while the diversity of newspapers makes such limitation unnecessary in that field. But any basis for that argument disappeared long ago.

When the Constitution and the first amendment were adopted, there were very severe technological limits on the production of newspapers in this country. It has been estimated that at the end of the Revolutionary War, there were only 43 newspapers in all the States.[39]

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[38] NBC opposes in principle the concept that a Federal agency should establish and enforce rules directly applicable to the content of news and discussion programs. It is participating in two cases now in the courts seeking to having the fairness doctrine declared invalid because of a conflict with the first amendment.

[39] Chenery, "Freedom of the Press," p. 142 (1955).

Yet despite this scarcity, an absolute constitutional prohibition was adopted against abridging the freedom of the press.

In the early stages of broadcasting, facilities were indeed limited. Since that time, however, the number of stations has multiplied enormously. By 1965, there were over 5,000 radio stations and more than 500 television stations, while the number of daily newspapers had declined to 1,751.[40]

Moreover, within any given locality, there are generally fewer daily newspapers than broadcasting stations. So far as new entry is concerned, economic realities greatly restrict new entries into the newspaper business, and newspaper terminations and mergers have progressively shrunk the total.

Some of the statistics on these points are assembled in an appendix to my statement and I will not detail them here. They show a large and increasing number of competing "voices" in broadcasting, and a smaller and declining number in the newspaper field.

If an argument can be made from these trends, it is not that scarcity of facilities justifies singling out broadcast news for regulation.

Rather it suggests the importance of free expression in broadcasting as an offset to the decline in the diversity of print journalism. The Supreme Court has said:

> A free press stands as one of the great interpreters between the Government and the people. To allow it to be fettered is to fetter ourselves.[41]

I cannot accept that this applies less to news as broadcast than to news as printed.

Nor is there any reason to assume that Federal regulation is needed to prevent broadcasters from misleading the public through bias and distortion in dealing with controversial issues.

That danger is precluded by the very diversity of outlets and the intense competition in the field. It is precluded even more by the control a vocal, responsive, and reacting audience exerts on broadcast expression, especially when it deals with controversial issues.

By definition, a controversial issue involves strongly opposing public views, and these opposing views are reflected in each station's audience.

Viewers and listeners who have strong convictions on one side of a controversial issue will resent a biased treatment favoring the other side. If a broadcaster keeps up such biased treatment, the resentment will mount, and the offended viewers or listeners will turn away to another station.

This is only one example of the interaction between broadcasting and its audience—which goes on all the time—and which is a more effective, more democratic, and less hazardous influence on responsibility in dealing with controversial issues than the processes of Federal regulation which are necessarily so clumsy.

Before closing, I should like to spend a few moments on section 315. This section, designed to provide equality between the candidates, actually works to prevent broadcasters from providing the public

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[40] U.S. Bureau of the Census, Statistical Abstract of the United States, 1966; pp. 519, 523 (87th edition).

[41] *Grosjean* v. *American Press Co.*, 297 U.S. 233, at 250 (1936).

with maximum information on election campaigns, as was pointed out so well this morning.

The so-called Lar Daly amendments did give us some welcome freedom. But section 315 continues to prevent us from giving the broad coverage which was possible in 1960 when Congress suspended the equal time requirement for presidential and vice-presidential candidates.

Everyone remembers the debates between Senator John F. Kennedy and Vice President Nixon, but many other informative programs were also given life by the suspension.

One good example was the NBC News special series, "The Campaign and the Candidates," a weekly 1-hour program in evening time, which presented the principal presidential and vice-presidential candidates discussing the issues.

In 1964, when the "equal time" rule was reinstated, "The Campaign and the Candidates" lost a good deal of its value because it could not present the candidates themselves; and through no fault of ours it became less of a service to the public.

There is a public need for such programs in addition to the coverage of the campaign on news and news interview programs. Broadcasters should also be permitted to cover along with all other news media, the legitimate news conferences of the candidates.

But the FCC has ruled that such coverage requires equal time to be given to all that candidate's opponents.

NBC favors repeal, or suspension for the 1968 campaign, of section 315, or, at the very least, the enlargement of the present exemptions to include all debates, bona fide news conferences, and all bona fide news documentary programs.

(The attached appendix follows:)

APPENDIX

1. COMMERCIAL BROADCAST STATIONS ON THE AIR, AND DAILY AND SUNDAY NEWSPAPERS, IN THE UNITED STATES, BY STATES, AS OF 1965

State	Total	Commercial broadcast stations on the air			Daily and Sunday newspapers	
		AM	FM	TV	Daily	Sunday
United States	5,681	3,930	1,189	562	1,751	562
Alabama	162	122	27	13	23	15
Alaska	25	15	2	8	6	2
Arizona	77	57	12	8	14	4
Arkansas	98	77	15	6	34	11
California	373	223	116	34	128	32
Colorado	87	64	13	10	26	9
Connecticut	56	37	14	5	25	6
Delaware	13	10	3		3	
District of Columbia	17	6	6	5	3	2
Florida	239	181	41	17	47	30
Georgia	189	156	23	10	31	12
Hawaii	35	23	2	10	6	2
Idaho	48	39	3	6	14	5
Illinois	197	118	59	20	83	19
Indiana	138	76	45	17	88	17
Iowa	94	68	14	12	43	9
Kansas	82	58	12	12	52	14
Kentucky	120	93	20	7	28	12
Louisiana	108	86	10	12	21	11
Maine	43	32	5	6	9	1
Maryland	75	46	25	4	12	3
Massachusetts	98	60	29	9	47	9
Michigan	182	115	51	16	53	11
Minnesota	98	78	10	10	30	7
Mississippi	96	83	5	8	21	8
Missouri	129	89	23	17	52	14
Montana	53	41	4	84	16	9
Nebraska	64	41	10	13	19	5
Nevada	27	18	4	5	7	4
New Hampshire	31	22	8	1	9	1
New Jersey	52	31	21		30	6
New Mexico	63	50	7	6	19	13
New York	240	149	66	25	85	16
North Carolina	249	179	56	14	47	16
North Dakota	32	22		10	11	2
Ohio	215	107	87	21	96	16
Oklahoma	85	61	15	9	52	41
Oregon	103	80	11	12	21	5
Pennsylvania	257	163	75	19	116	12
Rhode Island	23	15	5	3	7	2
South Carolina	119	91	18	10	17	7
South Dakota	38	26	2	10	12	4
Tennessee	171	126	31	14	29	11
Texas	389	272	71	46	113	81
Utah	37	30	4	3	5	4
Vermont	18	16	1	1	8	1
Virginia	162	114	37	11	32	12
Washington	129	92	24	13	24	11
West Virginia	75	56	10	9	30	9
Wisconsin	137	87	36	14	37	7
Wyoming	33	29	1	3	10	2

Note: Compiled from tables in U.S. Bureau of the Census, Statistical Abstract of the United States; 1966, pp. 519, 523 87th edition).

II. BROADCASTING STATIONS AND DAILY NEWSPAPERS IN THE 5 LARGEST METROPOLITAN AREAS IN THE UNITED STATES[1]

	1960 population	Daily newspapers	Broadcasting stations	AM	FM	TV
New York	10,694,632	21	79	35	35	9
Chicago	6,220,913	13	79	32	39	8
Los Angeles-Long Beach	6,038,771	21	76	32	35	9
Philadelphia	4,342,897	17	52	23	22	7
Detroit	3,762,360	5	41	12	23	6

[1] In each instance the area referred to is the appropriate standard metropolitan statistical area (SMSA) as defined by the Bureau of the Census. The figures are compiled from U.S. Bureau of the Census, County and City Yearbook, 1967 table 3; Editor and Publisher Yearbook, 1966; Broadcasting Yearbook, 1966; and Television Fact Book, 1966.

Mr. VAN DEERLIN. The committee will have to recess for a few minutes at this time to answer a call to the floor.

(A brief recess was taken.)

Mr. ADAMS (presiding). The subcommittee will be in order. I understand that Mrs. Pilpel does have some other things to do. So in order to accommodate her, and with the permission of the rest of the panel, I thought we might proceed and then as the other members arrive, we will take their questions.

Dean BARROW. I understand Mrs. Pilpel wishes to give an oral comment on Mr. Frank's paper, which was her assignment and then to offer for the record a longer prepared statement, if permissible.

Mr. ADAMS. Mrs. Pilpel, you want to just have your prepared statement entered into the record?

Mrs. PILPEL. Yes.

Mr. ADAMS. If you wish to do that, we will have your comment and without objection the statement will be entered into the record immediately following your remarks at this point.

COMMENT ON PAPER NO. 4, BY HARRIET F. PILPEL

Mrs. PILPEL. Thank you, Mr. Chairman.

The reason for this oral presentation is that I did not receive Mr. Frank's paper until it was too late to change my paper which I found was not really an answer to what he said. I will now orally direct my attention to the points he made.

Ever since the American Civil Liberties Union was founded in 1920, it has been committed to the defense, support, and expansion of the first amendment's guarantee of free speech.

Because this guarantee is made meaningful only when citizens enjoy access to the full range of information and opinion, the ACLU is vitally concerned with the realization of diversity of expression, and believes that the Fairness Doctrine serves that end.

I was pleased to note that Mr. Frank has not actually experienced any of the dire consequences which he fears might flow from the Fairness Doctrine but he thinks nonetheless that we had better be very super careful to avoid any of them coming into existence.

He points out that 25 percent of NBC's time is spent on news reports, analyses, special events, political coverage, news interview programs, and documentaries, which does seem to me an enormous amount, and he acknowledges nothing has happened to cause serious concern on his

part, since, as he said, the Fairness Doctrine has in no way impeded or interfered with the NBC operation.

He does, however, refer to the Fairness Doctrine as possibly being more accurately described as the government interference doctrine or the news regulatory doctrine, or doctrine X.

I think that these descriptions of the Fairness Doctrine misconceive the nature of the doctrine entirely. It is certainly not news regulatory. It says nothing whatever about what the broadcasters shall treat of in their broadcasts.

As to Government interference, certainly Government interference, if we want to call it that, in the direction of insuring diversity of presentation and balance of points of view, is not interference.

The failure of the Government to do anything to prevent broadcasters from presenting only a single point of view would, I think, be far more of an infringement on freedom of expression than the Government's acting as it does through the Fairness Doctrine as a means of insuring that a diverse number of points of view will be represented.

Mr. Frank goes on to say, in what I think is a rather hopeful manner, that the community of American journalism is charged with keeping its eye on the Government. I had not realized that.

He then deduces that there is a logical flaw in having a part of the Government judging how the professional journalistic community performs its function. However, the FCC does not judge whether the broadcasters are satisfactorily keeping an eye on Government, nor has it asked them to do so.

The FCC's job is to determine whether broadcasters are fairly dealing with public issues, and whether private individuals are given a right to defend themselves.

Surely the people of this country are entitled to that much protection with reference to the functioning of public franchises, which in the final analysis belong to them.

There is an article in the Harvard Review of some years ago, which I am sure many of you will be interested in reviewing again, called Regulation of Program Content by the FCC, which makes clear that we really need checks and balances in the broadcasting arena, that the only safeguard against the big government which the broadcasters so fear is, of course, big business, and vice versa, that the only real protection against the broadcasters must be the Government.

I submit it is better to have two big daddies than one, and that the kind of equilibrium which can be arrived at by the Government watching the broadcasters and the broadcasters watching the Government is probably the best we can hope for in the forum of free expression.

However, Mr. Frank says that we should leave all judgments to the broadcast news organizations and to the reactions of the public which they seek to serve.

I can't help but ask why. Why should federally licensed corporations not be subject to even a minimum regulation such as the Fairness Doctrine?

The argument that Mr. Frank makes proceeds on a basic misconception, it seems to me, namely that the first amendment exists for the freedom of the broadcasters, and that nobody else's free speech or free press is involved.

It hardly seems necessary to state that recent decisions of the Supreme Court and other courts have established that freedom of expression is also the right of the public and of the audience, and not primarily, certainly not solely, the right of the broadcasters.

I doubt that Mr. Frank would oppose the recent antitrust proceedings in the newspaper field which are designed to prevent further concentration of ownership or control with respect to the relatively few remaining newspapers. Diversity is the watchword there and there is no danger to freedom of the press.

Diversity is also the watchword of the Fairness Doctrine. Mr. Frank states a number of reasons for opposing the Fairness Doctrine. First he says that we need the intricate skills of the professional journalist rather than the Federal regulators.

No one disputes this. The point is that if the broadcasters fail to do their job in the direction of fairness and diversity, surely the audience, the people of the United States, are entitled to some mechanism to insure that their freedom of expression can be respected and that they can get a balanced presentation.

But, says Mr. Frank, there is diversity in the broadcasting field, no less, anyway, than in any other news media, and audiences will be alienated, he says, by obvious bias and distortion.

In many communities, particularly as to television, the audience does not have much choice. There is a scarcity of channels. Moreover, as with problems of democracy, generally, the test should not only be whether a majority is served. The genius of our Constitution is its protection of minority rights and viewpoints, and the Fairness Doctrine may be essential in this regard because the directional attitude and reaction of audiences is likely to reflect majority views, but not necessarily minority views.

Mr. Frank, however, fears "the increasing Government penetration into the operation and content of the news media."

Surely, this is absurd. Just to read Mr. Frank's own formulation of the doctrine makes clear that it involves no Government penetration, but simply, as he puts it, that if a station presents views on one side of a controversial issue, it should make time available for the opposing side, or sides.

That does not sound like Government's penetration or Government imposing its point of view. Even the example Mr. Frank gives in regard to the DuBois Clubs proves the opposite of his point.

He refers to the "accuracy of the statements made about the DuBois Club" as being "confirmed" by the Attorney General, the FBI and two congressional committees.

But surely Mr. Frank knows that such sources do not and cannot "confirm the truth of the statement." In this country everyone, even the DuBois Club, is innocent until found guilty by a court, not by a prosecuting agency like the FBI or a legislative committee, and surely the DuBois Club should be given a right of reply, which is apparently all that they were asking for in the situation he referred to.

Mr. Frank then states that if the Fairness Doctrine goes on, there is a danger that it can restrict broadcast journalism to a mixture of the dull and the frivolous.

I assume he does not think that is a good description of the present content of television. However, I find the statement rather shocking.

Broadcasters are licensees. They are franchised to operate public air waves which are loaned to them in the public interest, convenience and necessity. The Federal Communications Act, which gives the broadcasters their licenses, so provides, and if what they broadcast becomes only a "mixture of the dull and the frivolous," they are surely not entitled to any special consideration to have their licenses renewed.

Perhaps other broadcasters would be able to find something other than the "dull and frivolous." So long as the number of available frequencies is limited, surely it is the duty of the Commission to impose at least such minimal safeguards on freedom of speech over the years as the Fairness Doctrine represents.

I suggest that we would all agree, Mr. Frank says, that it would be unthinkable to impose anything like a Fairness Doctrine on newspapers or magazines. He has acknowledged that he no longer thinks it is unthinkable, at least by other people, since I suggested to the committee before that a Fairness Doctrine in certain situations in the press might be an excellent idea.

So I will not repeat that. And finally, Mr. Frank says that when the Constitution and first amendment were adopted, there were only 43 newspapers in all the States.

I hardly need remind Mr. Frank that at the time of the adoption of the amendment, the number of States was 13, and the total population, most of it illiterate, a few million.

And although Mr. Frank says that there is a large and increasing number of competing voices in broadcasting he does not mention the fact that increasingly newspapers and broadcasters are coming together in one ownership, a threat to diversity with which we, I presume, are not here concerned today, but a threat nevertheless.

Moreover by and large, newspapers have more editorial content than television stations anyway. It may well be that a Fairness Doctrine should apply to print media, as I said, but just addressing myself to broadcasting and to Mr. Frank's conclusion that we should rely on the interaction between broadcasting and its audience rather than on Federal regulation, I would submit to the committee that every case in which the Fairness Doctrine was held violated reveals the necessity for its existence.

If Mr. Frank were right, that audience reaction would do the necessary, even to the protection of minority and unpopular views, then at worst, the Fairness Doctrine would be surplusage.

On the other hand if as seems to be the case violations take place then Mr. Frank should not object to the Fairness Doctrine as an available corrective. While we do not agree that FCC regulation under the Fairness Doctrine is clumsy (the way he describes it) we do have a suggestion which is set forth in the written statement which I am filing, which might make for a simpler and more effective way of enforcing the Fairness Doctrine.

Because of the lateness of the hour, I will not go into our suggestion except to say that what it is, is that we might adapt the system employed in hearing complaints of election frauds to hearing complaints of violations of the fairness doctrine.

In other words, you might have local citizens' committees of three members throughout the United States in each community and five member citizens' regional advisory committees covering the same

geographical areas, as for example, the courts of appeal, which would investigate and pass upon fairness complaints.

The final decision would be made by the Commission, but this proposal would have the advantage, it seems to us, of stimulating local interest, of giving people in the community the possibility of registering their own views, and making it possible for the FCC not to become unduly involved in the day to day operation of stations in terms of finding out whether a Fairness Doctrine complaint is justified or not.

As you said, Mr. Chairman, the rest of what I have to say as to why the Civil Liberties Union feels that the Fairness Doctrine is a vital cog if we are to preserve free speech on the air is set forth in my prepared statement. Thank you very much.

(The statement referred to follows:)

STATEMENT OF MRS. HARRIET PILPEL, CHAIRMAN OF COMMITTEE ON COMMUNICATION MEDIA, AMERICAN CIVIL LIBERTIES UNION

Ever since the American Civil Liberties Union was founded in 1920, it has been committeed to the defense, support and expansion of the First Amendment's guarantee of free speech. Because this guarantee is made meaningful only when citizenry enjoys access to the full range of information and opinion so essential to the democratic process, the ACLU is vitally concerned with the realization of diversity of expression.

Inherent in the Union's concern with diversity is its conviction that controversy on public issues must be presented with the greatest possible diversity of viewpoint especially where decisions will be made that directly and intensely affect people's lives. All sides of the issues should be represented so that in taking positions the public is aware of whatever choices or alternatives are involved.

One significant route to broadcasting diversity which the Union has endorsed repeatedly is the fairness doctrine, which we believe has the potentiality to expand the scope of controversy on the air, thus expanding the marketplace of ideas to which the public is exposed. Our interpretation of the doctrine is that if broadcasters are to operate their publicly-granted licenses in the "public interest, convenience and necessity" they must present various sides of important public issues. The doctrine expresses the broadcaster's responsibility as a public licensee to acquaint his audience with a variety of points of view, and when individuals and organizations are under specific attack to grant them a right to be heard.

The fairness doctrine reflects three distinct sources: the First Amendment, which has meaning only if all kinds of ideas can freely circulate; the American tradition of fair play, which calls upon us all to be receptive to all sides of the story; and the public nature of the airwaves, which obligates the licensee to perform in the best interests of listeners and viewers.

The ACLU's vigorous support for the fairness doctrine is in no way inconsistent with its constant awareness of the danger of censorship which may inhere in government regulation including the fairness doctrine, which touches so closely on programming. Moreover, while aimed at encouraging controversy on the air, the doctrine must be carefully applied lest the licensee avoid controversy in programming rather than risk involvement with a government agency over interpretation of what is controversy. For example, an interviewer might avoid asking his guest certain provocative questions for fear that the responses would be interpreted by the FCC as an attack on an absent individual, to whom the station would then have to give reply time. However, on balance the Union believes that the fairness doctrine is a stimulator and not an inhibitor of diversity. Each FCC step toward actually increasing diversity—without interfering with program content—deserves the backing of civil libertarians eager to have informed discussion from diverse sources as a background against which public issues are considered and resolved by the American people.

The FCC standards comprising the fairness doctrine are threefold:

1. Where a licensee permits the use of his facilities for a personal attack upon an individual or organization, the licensee is required to give the person or group attacked time from an adequate response. This policy, set forth in 1964, was further clarified by the Commission in the summer of 1967. Licensees are required

to send a tape, transcript or summary of the attack to the attacked person or group within a reasonable time and in no event later than one week after the attack. Exempted from this requirement are "bona fide newscasts" and "on-the-spot coverage of a bona fide news event."

2. Where a licensee permits the use of his facilities for any person other than a candidate for political office to take a partisan position on the issues involved in an election or to attack one candidate, the licensee must accord the candidate concerned a "comparable" opportunity to answer.

3. Where a licensee permits the use of his facilities for the presentation of views regarding issues of current importance, there must be similar opportunity for the expression of contrasting views accorded to other responsible groups within the community.

We shall consider each of these separately.

1. *The personal attack principle.*—This issue is complicated by the dual needs of the attacked parties and of the licensee. Any standard of fairness and equity must recognize that an individual being attacked on the *public* airwaves should be given an opportunity to vindicate himself, especially a private individual who does not have the resources or recourses to respond to the attack in any other way—unlike public figures whose views stations may frequently solicit but who also have other arenas in which to rebut attacks. Not only is the public nature of the media involved but also the inherent nature of radio and television as electronic media is that they may leave no record behind in the absence of tape, transcript or summary for an attacked person who would be unable to reply because he wouldn't know what to reply to.

On the other hand, any requirement obliging the licensee to seek out the attacked party and send him a tape, a transcript or summary does impose an administrative burden on the licensee. This burden has been said to threaten diversity by discouraging the programing of material which might set off the personal attack mechanism. It is feared that the number of complaints registered might be very large and that the licensee would have to locate all of the attacked persons, no matter where or how many they might be. The actual scheduling of rebuttals, particularly if they are numerous, might be extremely difficult since time is limited on the air. Program shifting might be involved. To carry out these tasks a station would need proper personnel, possibly having to hire special people. If the station operated on a tight budget, this might prove a financial strain that could force the station to relinquish its license or cut down on its public service programs and staff.

In order to meet the needs of both the licensee and the attacked party, and in order to achieve broadcasting diversity, the Union's position is that stations should be required to give time to reply to attacks if it is requested, but should not be required to seek out each attacked party and send him a tape, transcript or summary. In other words, in order to make the principle workable, we should place the burden of asking for the right to reply on the attacked party.

2. "*Bona fide newscasts and on the spot news coverage.*"—Often both the licensee and the attacked party are seeking the same end—diversity—but reconciliation of their interests may be difficult. This is especially so with reference to the special exemption which excludes bona fide newscasts and on-the-spot news coverage from the personal attack principle. Probably, the reason for the exemption is a fear that the obligation to seek out, etc. a person attacked might inhibit news reporting. Query whether if an individual is attacked on a news program, the harm done to him is in anyway different or less damaging than it would be if he had been attacked on a non-news program? It could be argued that newscasts are of a different breed, that their substance is primarily spontaneous reactions to the news of the day and therefore special care must be taken so as not to spoil their specialized function. But it is precisely because newscast coverage deals with public events, often involving political controversy where attacks are so frequent, that fairness dictates that people who have been attacked should have a right of reply if they request it. Moreover, because political controversy is an area in which the public needs as much enlightenment as possible, the public interest as well as the other side's interest is served by giving the other side an opportunity to be heard.

Therefore, the Union favors the same approach in the case of newscasts and on-the-spot news coverage as it uses toward all other attack situations. We most emphatically support the right to reply here, but we are opposed to a requirement that the station take the initiative in informing the individuals and groups of the attack. If the attacked party requests a reply opportunity,we think the station should honor the request.

3. *Spokesmen for political candidates who make attacks and the right of the offended candidate to rebut.*—It seems clear that if a partisan position is expressed in a political campaign, fairness dictates that the other side be heard. This is particularly important since the electorate needs all the information possible in order to use the vote most intelligently. The fact that little complaint has been heard on this part of the fairness doctrine indicates the merit and need for this section.

4. *A similar opportunity for presentation of contrasting views.*—The Union regards this part of the fairness doctrine, known as the "affirmative obligation" section, as a vital measure for the encouragement of diversity on the air. The current debate over the doctrine has not focussed on this area, perhaps again because its value is self-evident. If fairness has any meaning it is that one-sided presentations of any issue must be balanced by the expression of other and different views. This section does not deal with the perplexities of the personal attack-rebuttal principle. It means simply that if a station decides, on its own, to air a controversial social issue, the citizens living in the area reached by the station are entitled to hear different approaches to the same issue. An informed citizenry is a prerequisite to meaningful exercise of the right of free speech, and to have an informed citizenry, not just a single position on a current issue but a variety of positions should be aired. Only then can the members of the audience draw their own conclusions.

At the present time, this section of the fairness doctrine is the one most subject to ambiguities of interpretation. It is felt by some that the "affirmative obligation" provision is an intrusion by the FCC into the area of program content. Others feel that a simple requirement to make opportunities available in no way tells broadcasters how they must fulfill the obligation vis-a-vis content. The ACLU shares this latter point of view.

The Union has called on the FCC to clarify the meaning of the "affirmative obligation" section because we regard vigorous action by the Commission as the *sine qua non* for the success of the fairness doctrine. In a letter to the FCC on November 10, 1966 asking that the original grant of a renewal license for station KTYM (Inglewood, California) be reviewed, we said:

However, we feel that the Commission's decision in granting the renewal application did not take into account the full thrust and scope of the Fairness Doctrine, which provides both that attacks on individuals and groups will be answered and that the licensee has an affirmative obligation to air contrasting viewpoints when he allows his facilities to be used for the presentation of a controversial issue.

Court decisions upholding the Commission's regulatory authority as well as many rulings by the Commission, make it clear that the Fairness Doctrine was promulgated to insure that a station licensee supply the listening public with a balance of viewpoints relating to controversial issues. The undisputed facts in the instant case make clear that Station KTYM broadcast programs which were anti-Sematic and otherwise offensive to certain minority groups. Nowhere is there any evidence that this Station licensee has fulfilled its obligations under the Fairness Doctrine, in seeking out and broadcasting other viewpoints on this subject.

Surely the Fairness Doctrine is, and always has been, broader in its scope and application than the application by the Commission in the instant case would indicate. It does require and should require more than (*a*) the transmission of a transcript of an intended broadcast to a named person attacked in that broadcast and an offer of time for that person to reply, and (*b*) an offer of time to a group whose views may be opposed to those broadcast. Rather, in a case such as this, where the attacks were flagrant and continuing, in our opinion, the Fairness Doctrine requires that the station licensee more than merely offering time, must take affirmative steps to carry opposing viewpoints, in order that the public may be served a balanced diet and thereby may be better able to evaluate the issues broadcast. The principle of diversity is served not only by aggrieved individuals and organizations being given time to rebut attacks but in exposing the community at large to a variety of views on a particular issue.

The Commission's June 17 decision apparently makes some reference to this function of the Fairness Doctrine when, in the fifth paragraph of letter, it asserts: "Your obligation to afford a reasonable opportunity for the discussion of viewpoints that conflict with those of Mr. Cotten is a continuing one. The statements which you have filed with the Commission indicate that you understand

this and will provide time for the presentation of such conflicting viewpoints." However it appears that this statement treats the rebuttal section of the Fairness Doctrine rather than the section requiring balanced and fair presentation of controversial issues. In view of the intrinsic importance of implementing the second section of the Fairness Doctrine, we believe that a hearing on this phase in the Station KTYM case would be desirable. Such clarification is doubly important because the owner of KTYM now has pending before the Commission an application to purchase television station KAIL–TV in Fresno, California. The question of whether he has operated his radio station in accord with the Fairness Doctrine's full meaning seems an essential fact for the Commission to know.

The Union is aware of the burdens which a hearing places upon a station licensee or applicant. Often such a hearing, if extensive, may effectively prevent the station from proceeding with its renewal application. However, even our brief survey of the station's programming tends to show such a glaring disregard of the Fairness Doctrine that a hearing should be held in order to determine the nature and extent of programming, if any, which has been broadcast by the station to balance the views expressed on the anti-Semitic programs. It is only after such a hearing, we submit, that the Commission can most accurately determine whether the license should be renewed.

Another recent elaboration of the fairness doctrine which has been noted by the Union is the ruling last June that the fairness doctrine applies to cigarette advertising. While the ACLU Board of Directors has not yet taken action on the matter, its Communications Media Committee has considered the question. The Committee endorsed the FCC action in the interest of balanced programming. The Committee agreed with the Commission's staement: "Governmental and private reports and Congressional action assert that normal use of this product can be a hazard to the health of millions of persons. The advertisements in question clearly promote the use of a particular cigarette as attractive and enjoyable. Indeed, they understandably have no other purpose. We believe that a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance—that however enjoyable, such smoking may be a hazard to the smoker's health." In light of the public health danger involved in cigarette smoking and in light of the one-sidedness of the material broadcast on it, the right to reply to the advertising in this instance is fully consistent with the principle of the fairness doctrine.

Procedures for implementing the doctrine.—The problem of what principles to apply is not the only question that needs clarification. Assuming one agrees on the principles, how do we make the fairness doctrine work? This, in turn, brings to the fore some of the elementary questions concerning FCC operations.

Over the years the Union has taken the position that a station must be judged on the totality of its programming over its three-year license period—criticisms of *individual* programs are not and should not be the basis for sanctions against a station. However, more recently we and other organizations have pointed to the fairness doctrine as the recourse for obtaining in specific cases (*a*) fairer treatment, and (*b*) presentation of more controversial issues on the air.

Although resort to the fairness doctrine has increased, persons worried about the involvement of government in programming content continue to express their fear of government control. One argument advanced is the administrative burden placed on the FCC to handle large numbers of complaints filed annually with the government agency. It has been pointed out that already important decisions are made at lower administrative echelons because of the inability of the few commissioners to deal with the heavy caseload. Although this anxiety covers the wide range of issues brought to the FCC, it seems clear that if there is increased reliance on the fairness doctrine, particularly if the more complicated "affirmative obligation" provision were to be actively pressed on stations, the FCC pipelines through which decisions flow might be further clogged. In addition to the administrative burden, the involvement of the FCC staff in the various stages of decision-making before ruling on a fairness compliant would accentuate that which is so feared already—government influence in programming.

If, despite the fear of government control, there is need to increase diversity—to have various sides of controversial issues heard—what can be done to strengthen the fairness doctrine?

The Union recommends the creation of machinery which would take off the shoulders of the FCC all of the responsibility for hearing and studying complaints of violation of the fairneess doctrine, *except* for the final decision by the Commissioners themselves. This would be done by adapting the system employed in

hearing complaints of election frauds—designating a person immediately to investigate the complaint who certifies whether a violation has occurred. The decision of this election fraud officer is appealable to the courts so as to insure review of arbitrary, unfair decisions.

Applying this type of procedure to radio-TV, we propose the appointment of (1) a local citizens' committee of three members in each community in the U.S. and (2) five-member citizens' regional advisory committees paralleling the geographical structure of the U.S. Courts of Appeals, the FCC's own geographical breakdown of the nation's radio-TV areas, or some other workable territorial division. Both the local committees and regional advisory committees might be named by the FCC, or perhaps appointed by the President. The appointees would be drawn only from certain specified fields, such as the law, education, and communications, and would serve for specific term, perhaps no more than one three-year term (frequent rotation of officers and board would help in preventing bureaucratic decision-making). In fact, they might be picked from a pool of names provided by the legally-qualified political parties in the regions.

This plan envisages that individuals (or groups) who feel that they have been treated in a way which violates the fairness doctrine would take their complaint to the local Committee. The Committee would make a prompt investigation, including a hearing where necessary, and render a decision. Either the station or the complaining party could appeal the local decision to the regional committee within a specified period of time, for example, ten days. The regional Committee's ruling in the case in the form of a written report, could be appealed to the FCC and the Commissioners would make the final decision. This procedure with focus on the local officers, would allow for speedy decision in some cases where *timely discussion* on an important public issue is essential. For example, if a city council is about to vote on a proposal to fluoridate the city's water supply, it would be essential to have the local committee act promptly on a complaint that a station has not met its obligation under the fairness doctrine.

At first glance this procedure seems to add new layers of administrative machinery and to involve the government further in programming. This is partially true because the local and regional committees are in many ways government officials. However, there are offsetting factors: They would *not* be part of the FCC structure or involved in the day-to-day myriad functions of that agency. Because their sole function would be to evaluate fairness doctrine complaints, and because they would operate away from Washington, the dangers of centralized bureaucracy—and the evils it brings—would be lessened. More importantly, knowledge of the local advisory committees and regional committees' availability would hopefully increase citizen interest in following the programming of the publicly-licensed stations and offer those persons (and their organizations) who feel that a station is not abiding by its publicly-licensed responsibility an avenue of redress. Better informed decisions should result as the local committees would come from the local community and know local issues and how they have been treated by stations. In short, creation of these committees could stimulate increased interest in balanced programming dealing with controversial issues, and offer a technique for achieving this kind of programming.

Dean BARROW. Mr. Frank, do you wish to respond?

Mr. FRANK. Yes; I think so, I must apologize to the committee for not being more convincing. First of all, there is one correction that I think ought to be made when I referred, in my written statement, to the point that I suggested we would all agree it would be unthinkable to apply this kind of regulation to newspapers.

I amended that, as I read it, to say that that might have applied until a half hour before I said it. Mrs. Pilpel seemed to interpret that as meaning that I no longer think it is unthinkable.

I still think it is unthinkable. I found out we would not all agree. The problem I have, since my training is not in law, is the problem that I have had all day. With all due humility, if I may associate myself with Dr. Stanton and Mr. Lower, those of us who are involved in putting on programs live in a different universe of words and ideas

than the preponderance of legal scholars and students at the table.

We have to get the stuff on. Specifically, I am here to talk to one point. That is what I was asked to talk about. How the Fairness Doctrine, where it seems to be going, affects me in trying to maintain an organization of 900 people with respect to our function, what we are paid for, what our obligations are to society.

The legal arguments, and this includes people whose views I agree with, and who expressed them much better than I did, seemed to me to live in a vacuum. Nobody has to put anything out. Nobody has to get anything on. It is better to follow the rules than to do anything practical in terms of problems.

There has been a great deal of talk about public interest and no reference to what the public is interested in. Mrs. Pilpel kept parroting or coupling the words "fairness" and "diversity."

I truly believe that as the Fairness Doctrine or as the personal attack subhead of the Fairness Doctrine get more and more specific in their application, there will not be more diversity but there will be less.

We can always do programs about rivers and creeks, and I guess somebody could object to that, though not too many. I am worried about self-censorship, by professionals and journalists. I am worried that each one of them must so concern himself, improperly or unjustifiably, with the threat of somebody catching him short, that he will hold back his training, his instincts, his talents, and the result will be less and less challenging, and less stimulating, television journalism.

Also, by the way, I think one thing ought to be clear. I said that enough of this regulation would reduce journalism—television news presentations in various forms—to the dull and frivolous.

Mrs. Pilpel seemed to think that I thought the rest of television was something more than dull and frivolous. I won't speak to that. For the rest of television, I am merely a viewer, like anybody else. A lot of us like it and those who don't like it don't watch it much. Those who don't watch it much know they don't like it.

The general problem is in my specific case, in my experience, that if you are too careful in maintaining all these theoretical criteria in some small station at some distant place, you are inhibiting a very large operation that I am associated with from doing what it ought to do.

Like everything else, there are certain relative goods to be matched against each other to decide which is the more important.

Dean BARROW. Mrs. Pilpel?

Mrs. PILPEL. I am somewhat puzzled by what Mr. Frank just said and by what other speakers have said. Perhaps they could answer this question.

Section 315(a) does refer to the obligation imposed on broadcasters to afford reasonable opportunities for the discussion of conflicting views on issues of public importance.

I assume this is the Fairness Doctrine. This is what I understand the Fairness Doctrine to be.

Those who object to the Fairness Doctrine, then, presumably would object to section 315(a), but they don't seem to. Apparently they are

in favor of this sort of statement of policy just so long as there is no agency in existence to make it mean anything.

It would seem to me that if Congress was correct in including that language, as I certainly think it was, then it follows naturally, and inevitably, that there must be a Federal agency entrusted with the task of seeing whether a reasonable opportunity for the discussion of conflicting views is afforded, and whether issues of public importance are being discussed.

It was in that sense that I said that I thought there was responsibility on the broadcasters even under the present act to do something more than broadcast "the dull and the frivolous".

They do have an obligation to discuss issues of public importance. If the objection is that the FCC Fairness Doctrine regulation is too tight or too specific, it would seem to me that this objection is not justified by what has actually happened in the enforcement of the doctrine, and I think there need be no further proof of that than Mr. Frank, himself, who has indicated that the doctrine has in no way interfered with the excellence of his performance, and it has in many respects been very excellent.

So I am confused as to whether they just want the statement of policy without any implementation, or whether they want implementation by someone other than the FCC or what.

Mr. JAFFE. I think I can partly answer that question, Mrs. Pilpel. The Fairness Doctrine simply requires that over the course of a period of time there will be a fair representation of different points of view.

It is a very relaxed, very loose doctrine. It doesn't require anyone to police it. It is simply a sort of model for the way in which the broadcasters operate. I take it what the broadcasters are objecting to is the present regulation which requires that for each attack upon an individual, it is required that there be the opportunity for that individual to defend himself specifically, regardless of whether the station is, generally speaking, presenting fairly the variety of views involved in the situation.

Some of the FCC people I have talked with say that they have always required, in a situation of a person being attacked, a right immediately to reply, even though it has never been formulated in a regulation.

It is quite possible that in the past people haven't been terribly aware of this specific right to reply, and haven't made much of a point of it. It may well be that as this thing becomes publicized, as people realize whenever they are the object of an attack that under the regulation they have a right immediately to be notified and to reply, these demands might increase very considerably. It does seem to me that the broadcasters have left rather vague whether this would be a terrible burden. That is, whether in the course of preparing programs or putting people on, or having panels, or whatnot, whether in the course of such programs there will be a great deal or a great number of specifically personal attacks that will be subject to this doctrine.

It seems to me a question of fact which we probably don't have enough evidence on, just as it also seems to me the FCC has almost no evidence as to whether it is necessary to have this right to reply.

I think it could be said that the FCC has always assumed, without much demonstration, that it would be a good thing without any investigation as to whether it is necessary in order to protect people.

I don't think there has been, really, any record, either pro or con, as to the necessity either for the Fairness Doctrine or the right to reply.

Maybe this is one of the situations where we have to go through with it and find out whether we need it, to find out whether it will be so difficult for the broadcasting people to function under it.

One of the recent cases is the *Red Lion* case, which is before the Supreme Court. It involved Fred J. Cook, who has been before the public for years.

People have been fighting him pro and con, and raising the question of whether he did or did not lie about something and whether he is a leftwinger, just what his affiliations are. There has been a vast amount of public discussion about him.

Does it serve any purpose when some broadcaster in Pennsylvania attacks him once more, to require that Fred Cook be able to come down to Pennsylvania and to reply to this particular audience, a rather specialized audience, judging by the kind of station this is.

The question whether this right of reply has a practical meaning and a value to set over against such risks as it might entail has not been very realistically faced and there really hasn't been very much material of this sort brought to bear on the doctrine.

Dean BARROW. Dr. Goldin.

Dr. GOLDIN. I think Professor Jaffe is coming to the nub of the problem, which is essentially this: I think both the Commission and the proponents of fairness, and the broadcaster and the opponents of fairness, are concerned with the issue of free speech. Which policy will promote free speech? I think the Commission is convinced that the policy of fairness, with the opportunity to hear all sides, is a preferable policy. It has less dangers. Conversely, the broadcasters feel the contrary. I think basically this is the case that the Congress and the courts ultimately must face.

In respect to the *DuBois* case specifically, I think it would be interesting at least to read the philosophy which the Commission used in describing its reasons for taking the position it did on the *DuBois* case.

With your permission, I would like to read parts of the Commission's decision on that point, because I think it does raise the fundamental philosophical issues here.

I am reading now from the Commission's decision. The case involved the Storer Broadcasting Co.

In effect the Commission said—

> Storer's argument is thus, that if a mayor were indicted for embezzlement, it could editorially condemn the mayor on this ground and need not afford time for response since the allegations in the indictment suffice to take the matter out of the controversial area.
>
> As we have stressed in other similar areas, the truth or falsity of the attack is not a matter for determination by this Commission. The short answer is that in these circumstances the licensee cannot aver that the attack is true and, therefore, there is no need to let the public hear the other side.
>
> But, rather, the other side must be given an opportunity to reach the public which will thus be in a position to make its judgment on this issue which the licensee chose to present as one of importance to its audience. At the risk of going over well-plowed ground we think the latter point should be emphasized.

We have stressed that our holdings have sought to promote the fullest possible robust debate on public issues. We recognize that it may be urged that our action here is inconsistent with the above objectives, that it will inhibit Storer and other licensees from presenting robust points of view as the editorial in question.

We do not believe that it will do so. If a licensee determines that the series of a public interest to broadcast or permit to be broadcast a personal attack on some group or person, including public officials, we believe that he will do so, and will not be deterred by the consideration that there will be a right of reply.

The premise of the contrary position is that the licensee is willing to alert his audience concerning an important issue only if he can be sure of doing so in the one-sided manner, that he does not trust the public to hear both sides and then make up its mind.

But as the Courts have noted in First Amendment cases, this Nation has staked its all on the proposition that the public should be given the opportunity to hear the fullest, most wide-open debate on public issues. Responsible broadcasters recognize this and when they have covered such issue take steps to present the other side.

It is our experience over the years of operation in this area that there has been no indication of inhibition of robust debate by our fairness policies. Indeed, such debate has been increasing, not declining, during the last seven years that the personal attack principle was being developed and brought specifically to the notice of all licensees.

Finally, we cannot properly obtain a contribution to public debate by adopting the concept that the public airways may be restricted by the licensee solely to the presentation of views which he espouses or with which he agrees. Such a course is inconsistent with the Act and its underlying concept that the broadcaster for the duration of his license has the preferred position of determining the material to be presented over his frequency and thus must act as a public trustee.

We believe, therefore, that even assuming some minor inhibiting factor, the fairness principles, including our action here, affirmatively promote rather than hinder the above quality policy objective in KTYM and are essential to insure the maintenance in radio and television as a medium of free speech and freedom of expression for the people of the Nation as a whole.

I think basically that is what the problem is about. As Mr. Jaffe suggested, there is a possibility that we have not determined factually whether or not it is inhibiting or not inhibiting and to what extent.

Mr. JAFFE. I didn't say that. That isn't what I am talking about. I raised the question how necessary it was. I said there isn't much evidence that people can't in a great variety of ways defend themselves rather than have to have a specific right to reply over that very station on which the statement was made against them.

Mr. ROBINSON. I think the point should be made here that, if there is uncertainty involved as to what the effect of this doctrine is, or whether it promotes or hinders free speech, at least we are entitled to put the burden upon the Government to show that its actions are not a hindrance.

I submit that the notion that somehow what the FCC does here is not truly a hindance on free speech runs counter to the assumptions that underlie the Supreme Court decision in the recent libel cases.

I would suppose for example that a damage action, the award of damages against the New York Times, did not threaten the existence or further publication of the New York Times, nor did a similar damage award against the Curtis Publishing Co. threaten the existence or further publication of the Post.

The point here is, to what extent can we place any burdens upon the free and open robust debate? I can't quite accept the idea that we are promoting free speech and not hindering it. At least, I think, the burden ought to be on the Government to prove that there is absolutely

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

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

Quoting from the FCC—

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

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

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

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

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

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

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

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

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

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

In that sense, as I understand it, there is a burden.

Dean BARROW. Mr. Chairman, we have held to our schedule quite well today. The indicated time of adjournment was 5 o'clock. We will turn the meeting back to you for your pleasure, sir.

The CHAIRMAN. I think there are others who want to speak, and I know there will always be. Someone said after the first paper this morning that we could have spent all day discussing it. I am sure this is true, especially if you turn it over to this committee.

There are others who will want to speak afterwards. I think we better recess for the evening and start again tomorrow morning. We will have enough food for discussion and talk tomorrow. Then maybe we can take care of some of these thoughts in other ways, if you wish.

Tomorrow morning we will reconvene at 9:30.

I want to thank all of this panel. I am just sorry that I couldn't be here all day. I had a meeting with Secretary Udall and other Congressmen, and there were other appointments that had to be kept. But we will have the record and we will read it.

I don't know when we have had such a fine panel in Washington on such a vital subject. I say vital and I mean it—vital to America and to our future.

I don't know that the Congress will take up anything more important in regard to the way we are headed and what we are going to do in the future.

I want to thank you, Mrs. Pilpel, for being here; I understand you have to be in New York shortly. We hope you have a safe journey back.

We look forward to seeing the rest of you tomorrow morning at 9:30. The committee is now adjourned for the day.

(Whereupon, at 5:30 p.m., the subcommittee adjourned, to reconvene at 9:30 a.m., Wednesday, March 6, 1968.)

In that sense, as I understand it, that's the burden.

Dean [illegible]. Mr. Chairman, we have held [illegible] roll today. The indicated time of adjournment was 5 o'clock. We will [illegible] the meeting [illegible] you for your [illegible].

The Chairman. I think there are others who want [illegible] there will [illegible] and after the [illegible] that we could have [illegible] all day discussing it. I [illegible] especially if you [illegible] to the committee.

There are others who will want to speak afterwards. I think we better recess for the evening and start again tomorrow morning. We will have enough food for discussion and talk tomorrow. Then maybe we can take care of some of these things in other ways, if you wish.

Tomorrow morning we will reconvene at 9:30.

I want to thank all of the panel. I [illegible] have all day. I had a meeting with [illegible] men, and there were other [illegible] that had to be [illegible] will [illegible] the record and we will read it.

I don't know [illegible] we have [illegible] the panel in Washington [illegible] our [illegible].

I don't know that the Congress will take up anything [illegible] in regard to [illegible] what we are going to do in the future.

I want to thank you, Mrs. Pilpel, for being here. I understand you have to be in New York shortly. We hope you have a safe journey back.

We look forward to seeing [illegible] of you tomorrow morning at 9:30. The committee is now adjourned for the day.

(Whereupon, at 5:[illegible] p.m., the subcommittee adjourned, to reconvene at 9:30 a.m., Wednesday, March [illegible], 1965.)

FAIRNESS DOCTRINE

WEDNESDAY, MARCH 6, 1968

HOUSE OF REPRESENTATIVES,
SPECIAL SUBCOMMITTEE ON INVESTIGATIONS,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The special subcommittee met at 9:30 a.m., pursuant to notice, in room 2123, Rayburn House Office Building, Hon. Harley O. Staggers (chairman) presiding.

The CHAIRMAN. The special subcommittee will come to order.

I have one or two thoughts before we start this morning.

We originally thought of this panel discussion as an experiment. It has turned out so successfully that we think it is a good idea. This is turning out to be a very useful and productive set of hearings.

At the end of these hearings, I would like to have any suggestions you gentlemen may have for legislation. If you do have recommendations, please give them to us and we will deeply appreciate them.

I am not sure this will necessarily lead to legislation. We think, however, that the hearings are timely and appropriate at this time.

Today, if the members of the subcommittee have a question that they would like to ask, which would not take too much time, that will be all right. However, we would still like to restrict questions as much as possible so that the panel will have the time to give their views. It might sound a little contradictory, but we want the panelists to have all the time necessary.

I might also say to the panel that we don't want to curtail their remarks at any time. At the same time, any panelist may insert all of his statement into the record and summarize it in his own words. We don't want to curtail you in any way. This is too important a panel. The reason I say this is because we want to give the members of the subcommittee an opportunity to ask questions at the end of the hearing. I am sure all of them have questions in mind.

With that, Dean Barrow, we turn this meeting over to you again.

PANEL MEMBERS PRESENT [1]

ROSCOE L. BARROW (MODERATOR), HERBERT E. ALEXANDER, HOWARD H. BELL, JOHN R. CORPORON, JAY CROUSE, REUVEN FRANK, LINCOLN M. FURBER, HYMAN H. GOLDIN, WILLIAM G. HARLEY, ROSEL H. HYDE, LOUIS L. JAFFE, LOUIS M. LYONS, FRANK ORME, PAUL A. PORTER, GLEN O. ROBINSON, CHARLES A. SIEPMANN, VINCENT T. WASILEWSKI

Dean BARROW. Thank you, Mr. Chairman.

Mr. Chairman, the first paper this morning will be read by Mr. William G. Harley, president of the National Association of Educa-

[1] See pp. 7–14 for bibliographic data.

tional Broadcasters. His subject is "The effect of section 315 and the Fairness Doctrine on educational broadcasting."

PAPER NO. 5—WILLIAM G. HARLEY: THE EFFECT OF SECTION 315 AND THE FAIRNESS DOCTRINE ON EDUCATIONAL BROADCASTING

Mr. HARLEY. I would like to begin by saying that the NAEB gives enthusiastic endorsement to the goals which have prompted these informative panel discussions on the Fairness Doctrine and related subjects.

The fair and reasonable discussion of controversial topics is a matter of deep concern and interest to all educators, and the association I represent is proud to participate in these hearing sessions.

The NAEB is the organized professional association of institutions and individuals engaged in areas of educational radio and television in the United States. Its membership consists of universities, colleges, public and private schools, and nonprofit community corporations which operate or hold construction permits for 170 educational radio stations, more than 150 educational television stations, and over 700 closed-circuit television systems and program production centers. Its membership also includes individuals who are classroom and studio teachers, producers, directors, technicians, and researchers involved in educational application of radio and television.

As we at NAEB understand the nature of the problems that arise under the general heading of "fairness," three broad areas of inquiry can be identified. The first of these is the Commission's so-called Fairness Doctrine. The second is the somewhat related, but specialized, problem of editorializing. The third is the matter of political broadcasting under section 315 of the Communications Act.

The principles underlying the Commission's Fairness Doctrine are basic to the philosophy of educational broadcasting; namely, that reasonable opportunities must be provided for the discussion of conflicting views on issues of public importance.

Educational broadcasting has from its inception emphasized that diverse viewpoints on important local, regional, national, and international issues must be actively encouraged. Variety in thought and opinion is the mainspring of an informed American public.

To our knowledge educational stations have been able to adjust without undue difficulty to the specific provisions and procedures of the Commission's fairness doctrine. Although there has been some misunderstanding of the nature of the doctrine, and considerable dissatisfaction with the hypertechnical nature of certain procedures such as the methods and manner of notification in so-called personal attack situations, educational stations are nonetheless readily attuned to the necessity, and indeed the desirability, of presenting opposing conflicting viewpoints on controversial issues.

Responsible discussion of issues under intense debate in the community of nations is healthy, not only in terms of a greater awareness of the issue at hand, but also in terms of a greater receptivity and tolerance for viewpoints by others. An important byproduct of the airing of controversial topics has been an increase in the size and interest of audiences for educational broadcasts.

There have been rare instances where educational broadcasters have faced complaints with respect to particular programs which have been broadcast. I know of few, if any, instances, however, where the educational broadcaster has been found to have acted unfairly in terms of the concerns of the fairness doctrine.

In the instances that I know of, the educational station has assiduously provided ample time for all responsible viewpoints, either in the context of the individual program or within comparable time spans. To a much larger degree than most commercial broadcast stations, educational stations foster the development of local programs on controversial issues. Such programs are usually prepared with the direct participation and guidance of interested local groups and individuals, thus assuring the representation of all shades of thought and opinion.

The chief concern of educational broadcasters in the area of the Fairness Doctrine relates to the manner of its administration by the Commission. Such a doctrine, which by nature touches on the borderlines of free speech and thought, must be wisely and reasonably administered. Otherwise, the effect on educational broadcasters, and on commercial broadcasters as well, is likely to be substantially inhibiting.

Thus, if the Commission were to follow a practice of close over-the-shoulder surveillance of controversial programing, and insist upon second-guessing the reasonable judgments of licensees, then educational broadcasters and others might ultimately have to avoid the discussion of important issues in their programing.

I do not believe that these are active concerns at present. I believe that the vast majority of educational stations freely and enthusiastically encourage this type of programing. Nor do I think that the Fairness Doctrine to date has been a substantial inhibiting force.

Moreover, considering the caliber of decisionmakers at the Commission, I do not think it likely that these concerns will grow to such an extent that there will be a serious threat to the continuation of a pattern of controversial-issue programing on educational stations. But the fear must be expressed, and it must be expressed often, in order to guard against even the potentiality for any curtailment of this necessary form of dialog on important issues.

With respect to the second area of concern—editorializing—educational stations have not heretofore editorialized on any significant scale, if editoralizing is defined to embrace only the broadcast of licensee or station management opinions on specific issues.

This subject of editorializing was discussed in detail in the House hearings on the Public Broadcasting Act. As a result of those hearings, language specificially forbidding educational stations from editorializing was subsequently included in that act. Section 399 of the Communications Act, as amended, now provides that—

> No noncommercial educational broadcasting station may engage in editorializing or may support or oppose any candidate for political office.

As clarified by the statement of the managers on the part of the House, appended to the conference report accompanying the Public Broadcasting Act:

> The prohibition against editorializing was limited to providing that no noncommercial educational broadcast station may broadcast editorials representing the opinion of the management of such station. It should be emphasized that

these provisions are not intended to preclude balanced, fair, and objective presentations of controversial issues by noncommercial educational broadcast stations.

In a comparable development, the conference report clarified the purposes and activities of the Corporation for Public Broadcasting to emphasize that the corporation is authorized to "facilitate the full development of educational broadcasting in which programs of high quality, obtained from diverse sources, will be made available to noncommercial educational television or radio broadcast stations, with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature."

As the House managers' statement declared, the conference added language to this provision to make it clear that "each program in a series, when considered as a whole, must" meet such a test. Thus, the standards of objectivity and balance apply both to the programing made available by the Corporation for Public Broadcasting and to the presentation of controversial issues by noncommercial educational broadcast stations.

The clarifications in the legislative history are helpful but there still remains substantial confusion among educational broadcasters concerning the scope of the editorializing ban. Therefore, these hearings will prove useful to the industry if they merely reemphasize in abundantly clear language that the prohibition in section 399 does not embrace controversial-issue programing in general. On the contrary, educational stations should be encouraged to the utmost to persevere in this programing field.

The ban on editorializing in section 399 of the act may not be of practical consequence to many educational broadcasters who would either choose voluntarily not to follow such a program format, or avoid editorializing because of the "no substantial lobbying" provisions of statutes dealing with their tax-exempt status. But in the opinion of the NAEB, this statutory ban on editorializing by educational broadcasters raises serious public interest questions, as well as a basic issue of free speceh under the first amendment of the Constitution.

Editorializing may take many forms, dependent on the judgment, the skill, the initiative, and the research ability of the local broadcasters, as well as the nature of the subject under discussion. What one educational broadcaster may not want to do in the area of station opinion, another broadcaster may find essential to proper educational broadcast responsibility.

I know of no educational broadcaster who would have any doubts of the necessity for fairness and objectivity in such editorial broadcasts. In fact, the standard of fairness should perhaps be even higher in these situations, where the station itself is using its own facilities to state a personal point of view.

Section 399 removes all areas of judgment, however, and imposes a flat prohibition. Moreover, in view of the fact that the legislative enactment is an amendment to the Communications Act itself, rather than a provision of the Public Broadcasting Act alone, and contains no self-limiting language, this provision apparently applies to all educational broadcast stations and not simply to those receiving funds from the Public Broadcasting Act.

In fact, educational broadcasters alone face this prohibition. Operators of commercial stations are free to editorialize on any and all subjects. Indeed, the Commission nearly two decades ago established the clear principle that a broadcast station could editorialize, provided that—

> The opportunity of licensees to present such views as they may have on matters of controversy may not be utilized to achieve a partisan or one-sided presentation of issues.

In its programing policy statement in 1960, the Commission listed editorials as one of the 14 "major elements usually necessary to meet the public interest, needs, and desires of the community in which the station is located as developed by the industry and recognized by the Commission."

The NAEB believes it is unwise to ban educational stations from the privilege of editorializing. This form of statutory discrimination between educational and commercial stations as to permissible program format is, in the NAEB's opinion, a disservice to the educational broadcast industry.

Moreover, in an even more fundamental sense, section 399 of the Communications Act raises a serious question of unconstitutionality, and should in our opinion be deleted from the act.

With respect to the third area of concern—political broadcasting—both the Public Broadcasting Act of 1967 and the Internal Revenue Code specifically provide that educational broadcast stations may not "support candidates." Educational stations must also, of course, adhere to the equal time provisions of section 315 of the Communications Act when political candidates utilize their facilities.

However, the Internal Revenue Code has been interpreted to permit a wide latitude in nonpartisan poltical broadcasts without endangering tax-exempt status. As the IRS stated in a 1962 ruling:

> It would appear that the noncommercial educational station could not, without jeopardizing its tax-exempt status, take sides in a political campaign, or "editorialize". But it would also appear that if the noncommercial educational station presents political broadcasts in a truly nonpartisan manner, acting "entirely in the public interest" and without itself "participating or intervening in a political campaign on behalf of a candidate for public office," it would not run afoul of the cited tax provisions.

The NAEB believes that the political broadcast ban in section 315 should be clarified to accord with the standard of nonpartisan political broadcasting recognized by the IRS and the Federal Communications Commission. We hope that these hearings themselves will serve as a useful forum to accomplish that worthwhile objective, permitting educational stations a meaningful role in the political education of the American electorate.

The NAEB believes that provision for local political debates on a strictly nonpartisan basis is an important service which educational stations should be free to render. Compounding the problem, however, is the fact that in certain areas, local rules, ordinances, or State laws actually prevent or hamper candidate appearances on educational stations.

The NAEB believes that such provisions are deleterious to the fulfillment of prime public interest responsibilities of educational stations. We believe, therefore, that the members of this distinguished

committee and all those interested in the development of educational broadcast service to enrich American life and culture should study carefully means by which fair and impartial and thoughtful examination of political issues and positions may be fostered over the facilities of educational broadcast stations.

I want to thank this committee for their courteous invitation to the NAEB to participate in these discussions. The issues and problems we are exploring here are vital ones for the educators I represent. They are vital also for all Americans. We at NAEB trust that, through these discussions on these difficult and controversial issues, all of us will have a sharper understanding and a clearer guideline for future conduct in this area.

Dean BARROW. Thank you, Mr. Harley, for your excellent contribution to the program.

The comment on Mr. Harley's paper will be made by Mr. Lincoln Furber, who is director of public affairs, WETA–TV in Washington.

COMMENT ON PAPER NO. 5, BY LINCOLN M. FURBER

Mr. FURBER. Thank you.

It is a real honor for me to appear before this important and distinguished subcommittee, and in the company of such able and knowledgeable participants.

I doubt that my contribution will be significant, but it may give the members a little insight into the effect of the Fairness Doctrine and the equal-time provision on the actual thinking and considerations which go into the creation of programs at a local educational television station. And programs shown by television stations are the ultimate concern of this conference.

First, since it is my responsibility to comment upon Mr. William Harley's well-formulated statement, let me say that I agree with his three basic points.

At the outset, he says:

> Educational stations are * * * readily attuned to the necessity and, indeed, the desirability of presenting opposing conflicting viewpoints on controversial issues.

For a person whose job it is to dream up programs and to transform these dreams into informative and engrossing scripts, documentaries, events to be covered, confrontations or whatever the final program is, this statement, "the desirability of presenting opposing conflicting viewpoints on controversial issues" is kind of a basic tenet. A program on a controversial issue has built into it the excitement and challenge that make this television business the intriguing one it is. The burden of the producer, of course is that fairness in presentation be paramount.

I don't know if the subcommittee has discerned it or not, but there seems to be a new program trend developing in educational television. This is the trend of immediate reaction or comment; a kind of "instant fairness."

Instead of presenting a program on a controversial subject, and then sometime later on presenting another program with "the other side" after the initial impact has been felt, educational programers are now heading toward the form of immediate comment.

The recent National Educational Television program on the President's state of the Union address is such a case. While the state of the Union message probably cannot be categorized as a classic "controversial topic," it is one about which people hold strong feelings. And this year, as it did last, NET presented over the educational stations of this country a couple of hours of discussion on the address immediately afterwards.

The people who discussed it held various views and represented various positions. In the end, the viewer was treated to the President making his address, with all the impact of such a ceremonial occasion—and this was followed by judicious and sometimes impassioned reaction from prominent Americans from several cities across the Nation who both agreed and disagreed with the contents of the address.

This new trend is going a little further; in fact, it is going directly to the public which watches these programs. The educational stations in Boston and Philadelphia and other cities have done this, and very shortly my own station here in Washington will be doing it.

This extension of the "instant fairness" trend is to follow a program concerning a controversial subject not only with informed comment by people who agree and disagree on the subject, but also by response from viewers via the telephone. Viewers who have had a strong reaction to the program—for or against—can call in and talk with the people who have commented on the program.

The public's opinion, in effect, is immediately expressed. The result is not only a solid in-depth treatment of a subject with a variety of views, but it also is an involvement of the local community in an important issue, and this is what a public television station can do and should be doing.

As a producer of programs in a local educational television station, this new form of, as Mr. Harley says, "presenting opposing conflicting viewpoints on controversial issues" is something I regard as worthwhile and valuable.

Mr. Harley makes a point that he does not feel "the Fairness Doctrine to date has been a substantial inhibiting force." But he expressed fear that it might potentially curtail controversial programing. I agree that it has not, in my experience, been a substantially inhibiting force in the creation of programs.

I also agree that the doctrine's potential for curtailing controversial programing must be guarded against. At present, and with what limited vision I have into the future, however, it does not appear to me to be any threat to free and constructive programing.

As for Mr. Harley's remarks about educational stations and the privilege of editorializing, here I agree also. This subcommittee surely has heard more argument pro and con on this subject than I have even thought of. But for what it is worth. I feel my station should have an opportunity to editorialize if it wants to. This would not, I think, include endorsements of political candidates.

I do not know if we ever would present editorials if we had the option. It is a profoundly serious area for a station and especially a public television station intimately involved in the community. Such editorials, if aired, would have to be given the utmost thought.

But right now we do not have that option and it seems to me that, in the interest of fairness to educational stations, in the interest of an

informed public, and in the interest of a station's basic obligation to be an involved participant in its local community, editorializing by educational stations should be allowed.

On Mr. Harley's final point concerning political broadcasting, again, I agree. He says:

The NAEB believes that provision for local political debates on strictly nonpartisan basis is an important service which educational stations should be free to render.

A station such as mine should do this and does do this.

A sticky point arises, however, when a station such as mine makes a nonpolitical program which might be seen elsewhere and which involves a person who is or may become a political candidate elsewhere.

As you probably know, educational stations across the country make programs, and, through several networking arrangements, these programs may be distributed to all the other educational stations for showing as they wish. As I mentioned in the beginning of my remarks, it might be of some value to the subcommittee to know how such a thing as the equal-time provision actually affects the people who make the programs.

Basically, it can pose problems. While straight news broadcasts are exempt from the provision, public affairs programs are in another less clear area. Specifically, WETA recently had a couple of problems involving the appearance of U.S. Senators on certain nonpolitical programs which were made for showing in other areas as well as Washington.

In one case, the program was one of a series with important and noted public figures in which the aim was to show, through an informal, relaxed interview, what kind of a man the interviewee really was, how he thought, why he held the views he did, what he liked and disliked about his life, and, in sum, just who this person was. This was not a political program, but it did involve a politician.

The problem arose with one Senator who was on the verge of announcing his candidacy for reelection. Our difficulty, obviously, was, would the stations in the Senator's home State be able to show this program if he announced his candidacy before they broadcast the program? Would they be able to show it; that is, without having to give equal time to any and all of his possible opponents?

In this case, the Senator did announce his candidacy before the program was shown in his State. At the time there were no other announced candidates in his State. And even if there had been, the station in the State's biggest city felt that it would happily agree to any requests for equal time from any opponent of the Senator. Other stations conceivably might have felt otherwise.

A second case involving a U.S. Senator was somewhat different. We had asked him to come on a program which would be seen nationally, including his own State. But he was asked to come on the program as an expert on a specific subject—in this case an international issue. He was not asked because he was a Senator, but because he was a nationally known authority on the subject.

He, too, was on the verge of announcing his candidacy for reelection. We decided to utilize him anyway, and as it turned out, he did not announce for reelection until after the program had been shown.

The point of these two cases is that the use of candidates, or candidates to be, on programs which are nonpolitical is a matter of some concern to producers of programs.

To conclude, I would say that the equal-time provision undoubtedly puts restraints on stations, restraints which probably deter abuses, but which also can hinder nonpolitical programing.

I thank the committee very much for this opportunity to discuss some of the workday realities involved in the Fairness Doctrine and the equal-time provision.

Dean BARROW. Thank you, Mr. Furber.

We now invite discussion on these papers. Inasmuch as both Mr. Harley and Mr. Furber have been in agreement on the effect of section 315 on educational broadcasting, and the fairness doctrine on educational broadcasting, we would invite first any contrary views which the panel may have.

Can it be, Mr. Chairman, that we have found one area of agreement?

Mr. Chairman, would members of the subcommittee care to present questions on these papers at this time?

The CHAIRMAN. Are there any questions from members of the subcommittee?

I just might make a comment that we just passed this law last year, and all these gentlemen had an opportunity to come here and give their views, as well as everyone else, at that time.

Dean BARROW. Mr. Chairman, the restrictive provisions in the law came about because of the feeling that use of Federal funds in support of educational television could have an effect on the programing.

I have the privilege of serving as a member of the board of trustees of WCET, which is the educational broadcasting station in Cincinnati, Ohio, and as such, have had an opportunity to appreciate its financial problems, as all educational broadcasting stations have.

Educational stations have to beg from everyone for financial assistance. Federal funds are only a part of the total. I think it is doubtful that this Federal support will have the impact on programing which was feared at the time the statute was passed.

In any event, I feel that although this act has been on the books for such a short time, it would bear reexamination.

The CHAIRMAN. I am sure that it will be reexamined at the proper time. But this would not have been law if these provisions had not been put into this act. I can assure the gentleman of that. There would have been no public broadcasting in the Nation.

We have to make a start, however. If there are inequities or things that need correcting, we can remedy that. The Congress may not be the same men, but there will be a Congress, we hope, for a good while.

Dean BARROW. Mr. Harley?

Mr. HARLEY. The chairman has made my speech. I do not think that the position I have expressed this morning is inconsistent with that which I maintained during the hearings, because we were trying to get a Public Broadcasting Act passed. One of the major concerns was whether the educational stations, using Federal money, would indulge in editorializing.

The thrust of my remarks was that we did not editorialize; that we weren't interested; and, therefore, they shouldn't be concerned. But we didn't anticipate that they would put in a specific prohibition into the law, which is quite a different thing.

We think it is unfair or at least highly unnecessary to proscribe educational broadcasters from enjoying the same privilege that commercial broadcasters have. Furthermore, it is almost redundant and superfluous because the fairness doctrine plus our tax exempt status prevents us from getting very far off base if we did have the opportunity to editorialize.

We just think, along with Professor Siepmann, that all broadcasters, including educational broadcasters, should have maximum scope within which to exercise their initiative and creativity in the program area.

The CHAIRMAN. I might say in response to that, again, that we would not have had a Public Broadcasting Act if this had not been in there. I don't believe that you or any other member here believes that we are going to change that with Federal funds.

There were those on the committee who felt that if the Government put money into Public Broadcasting, it could control it. It was felt better not to have the money in there in the first place, if the Government could influence positions on questions affecting the life of the Nation. I think everyone attending the hearings knew that.

Mr. SIEPMANN. Mr. Chairman, I think it would be a sorry business if the record showed we were in total agreement on anything in these debates. Therefore, to avoid such a situation, I think I should be on the record as repeating what I said yesterday: that with reference to the right to editorialize, I would dissent from Mr. Harley's views. Whether they be educational or commercial broadcasters, it is my considered judgment that they should not have the privilege of personally editorializing as a privilege of the licensee.

The CHAIRMAN. I might add that there are millions of people in this land who feel the same way.

Dean BARROW. Mr. Chairman, the remainder of the papers on the program have to do with one subject—the continued or increased use of the Fairness Doctrine, implications of technological changes such as cable TV, the increased number of broadcasters, suggested improvements in or alternatives to the doctrine, and related Federal Communications Commission policies.

Our first paper on this subject will be presented by Mr. Vincent T. Wasilewski, president of the National Association of Broadcasters.

PAPER NO. 6—VINCENT T. WASILEWSKI: THE EFFECT OF THE FAIRNESS DOCTRINE ON THE BROADCASTING OF PUBLIC CONTROVERSY

Mr. WASILEWSKI. I would like to say that I agree with the principle espoused by Mr. Harley that educational broadcasters should not be prohibited from editorializing.

The Fairness Doctrine is a statement of policy by the Federal Communications Commission that a broadcast licensee has an affirmative obligation to afford reasonable opportunities for the presentation of contrasting viewpoints on any controversial issue which he chooses to cover.

Until as late as 1959, the only statutory basis asserted for the Commission's doctrine was the "public interest" standard of the act. The Commission took the position that fairness requirements are "inherent in the conception of the public interest * * *" In 1959, Congress amended the equal opportunities provision of section 315 to exempt news broadcasts and, in so doing, provided:

> Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, new 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.

The Commission now also relies upon the language of the 1959 amendment as authorization for its fairness doctrine.

I am convinced that most broadcasters feel that the doctrine is (*a*) legally unsupportable and (*b*), in operation, impractical.

At the outset it should be noted that broadcasting, like other media, is protected by the first amendment. Thus, in *United States* v. *Paramount Pictures* (1948), the Supreme Court said:

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

Freedom of the press has been consistently interpreted by the Supreme Court to mean that the press has a vital role to perform in assessing the activities of public figures and taking positions on public issues, and that it shall in no way be hampered in its performance in this role by governmental intrusion.

The Fairness Doctrine constitutes an abridgment of the right of free speech. The first amendment states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof: or abridging the freedom of speech, or of the press.

The word "abridgement" means a diminution, lessening, or reduction. In other words, neither Congress nor its creature, the FCC, may diminish, lessen, or reduce the right of free communication.

This is precisely the net result of the Fairness Doctrine. It discourages the use of broadcasting for the expression of opinion, and thus abridges the broadcaster's right of free speech.

Historically, there are several limitations on speech that have been held not to violate the first amendment. These are situations in which speech defames, is offensive to the basic mores of society, is injurious to the public health, or presents a clear and present danger to the Nation.

While conceivably a single program or editorial might fall within one of these categories, broadcasting as a whole obviously does not. Other arguments are advanced to justify the abridgment of freedom of speech by radio and television.

Some suggest that, because broadcasting is licensed, different considerations apply. For example, in the recent case of *Red Lion Broadcasting* v. *FCC* (1967), Judge Tamm, speaking for the Court of Appeals for the District of Columbia, gave voice to this concept by stating that since radio is inherently not available to all, "the compulsory granting of free time may, and probably does, impose a burden on the licensees" but not an unreasonable one.

This rationale, however, will not withstand close analysis. Since the early days of radio, when the concept of scarcity was first voiced, the development of broadcast technology has created more than 5,000 channels of broadcasting communications. During that same period, the number of daily newspapers has decreased from over 2,000 to slightly more than 1,700. Thus, broadcasting is more multivoiced than the daily newspapers—by a margin of about four to one—the comparable and competitive medium for the dissemination of current news and information.

Apart from this, however, there is nothing in the first amendment which says that it is proper to abridge freedom of speech because of scarcity, whether it be a scarcity of public halls, of soapboxes, or churches, or printing presses, or newsprint. As a matter of fact, we are warned by conservationists that the supply of timber is being rapidly exhausted and we may have an acute shortage of newsprint in the not-too-distant future. Will this justify a Fairness Doctrine for newspapers?

Finally, it is argued that the people own the airwaves and broadcasters operate in the public domain. Therefore, since private persons can be prohibited from using the spectrum, their privilege to use it can be conditioned in any way that the Congress or the FCC, in their own discretion, deem desirable.

It is axiomatic that the power of government to grant or withhold a privilege does not carry with it power to bargain with a citizen for the surrender of his constitutional rights.

It is clear that, even though it be said that Congress merely extends a privilege which it is free to withhold—access to a microphone in the public domain—it nevertheless may not exact for that privilege the surrender of the right of freedom of speech. Assuming that the Constitution no more guarantees the private use of a microphone than it guarantees the private use of Government buildings, once that use is permitted, the constitutional rights attach to and govern it.

Indeed, if anything, the assumption that the Government has absolute discretion to refuse the private use of a means of comunication makes it more than ever necessary that the constitutional rights be given the broadest reach.

In sum, the facts are: that none of the judicially acceptable limits on freedom of speech apply to broadcasting per se, that broadcasting is an important part of the press, that the available channels for broadcasting are not only abundant but far more numerous than those of the daily newspaper and no constitutional distinction can legitimately be drawn between the two, and that the Government may not compel a broadcaster to surrender his constitutional rights in exchange for the privilege of using the spectrum.

The doctrine, conceived originally as a policy of a very general nature designed to bring out a balanced presentation on matters or public controversy, has been repeatedly extended and broadened. These raise additional serious questions. It now contains specific rules relating to personal attacks and political editorializing, and has even been applied to product advertising.

Under this extension of the doctrine, the Commission actually compels licensees to broadcast particular programs or to offer time to particular spokesman. Failure to comply subjects licensees to fine, forfeiture, or immediate revocation-of-license proceedings. This is in contrast to the general requirement of fairness in other areas which are reviewable, along with other items of station operation, at renewal time.

In many ways, the burdens imposed upon the broadcasters by the personal attack rules are, if anything, more severe than the burdens of damages for defamation that have been held unconstitutional as applied to even false, nonmalicious statements in printed media.

The Commission's personal attack doctrine imposes governmental sanctions on licensees for statements that might reflect adversely upon the character of individuals or groups, even though those statements are made in the context of a discussion of an issue of public importance. Instead of imposing civil damage liability, however, which obviously it may not do, the Commission compels the broadcaster to carry the reply of the person attacked.

To the extent that the sanction is to be imposed, even if the statement involved is entirely true or, if false, is made without malice, this right of reply goes much further than the remedy struck down by the Supreme Court. Thus, the "personal attack" rules impose burdens as onerous as many that have been held unconstitutional on the ground that they encroach on constitutionally protected rights of speech or press.

I would like to turn now from legal questions to the practical application of the Fairness Doctrine.

The purpose of the doctrine is to stimulate discussion of important issues and to insure that all views are heard. In its application to broadcasting, however, it operates in just the reverse.

The application of the doctrine requires the FCC to make subjective judgments involved in determining what is controversial and what is not, in determining who and how many have the standing to reply to a controversial issue, in determining what is "fair" and what is not.

The regulatory process operates as follows: The FCC examines any suspect broadcasts. First, it must determine whether the broadcast is of a controversial nature—no easy task. Then it tests the program content, examining the substance, to determine whether the correct degree of fairness was present. Finally, it tells the licensee whether he was right or whether he was wrong. Any errors are entered on his record to be considered at renewal time.

Thus, the basic problem with the Fairness Doctrine is that it has the effect of discouraging the use of broadcasting for the expression of opinion. There is a basic inconsistency in a policy that purports to encourage the voicing of controversy on the air while at the same time closely supervising and policing its execution and punishing mistakes.

The mere idea of this policing will discourage some broadcasters. The complex thicket of rules which necessarily grow out of such a policy will discourage many more. The penalty for being wrong will discourage more. And if that isn't enough, the inevitable harassment from various groups who feel that they are entitled to free time will just about discourage the rest.

This bears emphasis. Other media of expression and entertainment—for example, the newspaper or the theater—can be vigorously independent of the views of Government as to what is good for the people. But the broadcaster, faced with Government's power to decree life or death for his enterprise at a maximum of every 3 years, with judicial review a gamble against longest odds, does not have the same independence. The views—even the hinted views—of the FCC can prevail to such a degree that its power, practically speaking, has become known as the power to regulate by the lifted eyebrow.

Few would disagree with the objectives of the Fairness Doctrine. Fairness is, indeed, a quality desired by all. But it is a quality that can rarely be defined or measured to the satisfaction of all. When a

Government agency determines what is fair and what punishment shall be meted out to those judged unfair, when there is an end result that must be achieved at a licensee's peril, then leverage is available to Government that can induce behavior in accord with certain preconceived ideas. Licenses can become mere privileges to be dispensed periodically to those who sustain successfully the burden of proving conformity with whatever standards of conduct the dispenser of privilege may espouse.

This, we submit, is destructive to an atmosphere of free expression and represents a real power over broadcasters' freedom of speech. While these actions may be neither deliberate nor conscious, this does not make the result any less certain or more palatable.

Thus, the question is whether, both in concept and operation, the Fairness Doctrine encourages communication of controversial matters, promotes the communication of unpopular as well as popular views, and otherwise serves the objective of a fully informed society. In our view, it does none of these.

It discourages communication of controversial matters, restrains the vigorous debate of controversial questions, and keeps serious issues beneath the surface of community attention.

The expression of opinion on important matters by media is of vital importance, for without an informed, intelligent citizenry, democracy cannot function.

NAB believes that fairness should not be made a legal requirement. There is no doubt in my mind that the vast majority of broadcasters, if given freedom from governmental domination, would still provide balanced views on important matters. With some 5,000 radio stations and 650 television stations, diversity of ownership and competition will assure overall fairness.

NAB figures show that there has been a slow increase in editorializing among broadcasters. Some of these attempt to articulate the tough, bitter, emotion-filled problems of our times. A great many skirt them, because they fear the tangled net in which the Fairness Doctrine will inevitably enmesh them.

A recent NAB survey shows that 60 percent of all station managers stated that their reluctance to take on controversial subjects on their stations was due to the difficulties they knew they would encounter under the Fairness Doctrine.

But there are those who will ask: "Can we trust broadcasters to be fair?" What they mean is that if broadcasters have only a moral obligation to be fair, there will be some who will abuse it. I would agree with that. There are always some. But those who believe in free speech must believe that it is strong enough to withstand some abuse.

There are some newspapers which are grossly unfair, some magazines, some speakers; yet, the greater good is accomplished by not attempting to censor all in the guise of imposing the duty to be fair.

The first amendment was adopted with full understanding that varying degrees of one-sidedness and unfairness existed among the members of the press. But uninhibited public data, with all of its inherent abuses, was considered a superior means of informing the electorate rather than controlling expression by requiring that it conform to a standard selected by Government. Overall fairness in debate

was to be achieved by the varying multiplicity of voices that freedom of expression invited, and not by action of Government.

Dean BARROW. Thank you, Mr. Wasilewski, for your excellent contribution to the program.

The comment on Mr. Wasilewski's paper will be presented by Mr. Frank Orme, executive director of the National Association of Better Broadcasting.

COMMENT ON PAPER NO. 6, BY FRANK ORME

Mr. ORME. Mr. Chairman, honorable members of the committee, Mr. Wasilewski has just painted a picture which could supply the theme for one of television's animated cartoon programs. Instead of "Birdman," "Spiderman," or "Super President," the title of this new show will be "Super Antenna," and its hero will be the head of a great association of broadcasters. It will stir the hearts of children everywhere to watch these 5,000 inspired broadcasters defending their right to freedom from responsibility in their use of the public's airwaves.

The villains are ready made. Mr. Wasilewski's creature of Congress, the FCC, can be portrayed either as a seven-headed monster or as seven separate vultures waiting to spring upon any broadcaster who sticks his head up anywhere in the vast wasteland. Supporting villains can be drawn from governmental intrusionists such as the House Commerce Committee members, or they can be selected from the District of Columbia Circuit Court judges who last June dared to uphold the Fairness Doctrine.

Behind these twisted monsters, the producers of "Super Antenna" will have the greatest menace of all—the 160 million Americans who argue, to use Mr. Wasilewski's term, that the people own the airwaves and broadcasters operate in the public interest.

The background for all of this will be the dark recesses of the Capitol, the chambers of the House and Senate, and governmental meetings rooms such as this where public interest is brazenly discussed for all to hear.

The program will, of course, be produced in black and white in order to harmonize with its hero's views of broadcaster interest versus public interest.

There need be no misgivings about the commercial success of this program. It has superaction, supervillains, and a superhero who is steadfastly dedicated to a unique interpretation of constitutional rights and responsibilities.

It is full of nightmarish characters and of opportunities for violence which make it eminently suitable as a network show for children.

I won't add further details of the "Super Antenna" show. I don't want to give away the ending.

In some ways, we have to consider Mr. Wasilewski's statement seriously, even though those attending this hearing will recognize it as propaganda designed to serve the special economic interests of the commercial broadcasting industry. As Mr. Wasilewski says, there are 5,000 radio stations and 650 television stations which can, if they choose, use their transmitters to relay his cry of Government oppression to millions who are far less sophisticated than those in this room.

The statement contains nothing new. It is a reiteration of the distortions of public rights and denials of broadcaster responsibilities with which broadcasters traditionally entertain themselves at their State and regional trade association meetings.

Time will not permit enumeration of the many places in which Mr. Wasilewski fails to differentiate between fact and his own fancy. Many of his conclusions, usually expressed as facts, are drawn from assumptions that are either false or highly suspect.

For example, his flat assertion that the Fairness Doctrine constitutes an abridgment of the right of free speech superimposes his own judgment over the ruling of a distinguished Federal court, and he gives no recognition whatever to the possibility that scores of FCC commissioners, Congressmen, judges, et cetera, might be right and that the NAB might be wrong.

Actually, a powerful, convincing case can be presented to indicate that the Fairness Doctrine substantially extends freedom of speech rather than diminishes it.

Mr. Wasilewski seems to assume that the first amendment and other convenient sections of the Constitution are the special property of commercial broadcasters. He tells us that the net result of the Fairness Doctrine is the reduction of the right of free communication because it discourages the use of broadcasting for expression of opinion.

We do not believe that the Fairness Doctrine has reduced free expression, but that, on the other hand, it has added both quantity and diversity to responsible presentation of controversial issues. Governmental domination simply does not exist in broadcasting. Commercial broadcasters have been given all possible freedoms consistent with the overall public necessity. Regulation has been enforced so loosely that the FCC has had an almost continuous record of resignations by chairmen and commissioners who have been frustrated by the power of the industry lobby to block their most dedicated efforts in the public behalf.

Broadcasters can, and they do, apply pressure on Congress, particularly in the House, where the cooperation of a local broadcaster, or a few local broadcasters, can be the difference between victory and defeat at election time. The industry lobby knows this and it works at it all the time. They worked at it 4 years ago when the Rogers bill, a single-sentence directive to the FCC not to restrict the amount of commercial time with which broadcasters could saturate their air channels, drew only 46 negative votes in the House.

The bill—which, incidentally, was not sponsored by the Honorable Mr. Rogers here this morning—apparently got very short consideration in the Senate, where it could not get to the floor through the committee.

Abolishment of section 315 at the community level would make it possible for local broadcasters, one or two, and a local politician of either party to gain a dominating advantage for a single political position.

If I were a Member of the House or Senate, or of the Federal Communications Commission, I would be sickened and appalled at the arrogant contempt which has been expressed in this hearing by several persons for the holders of public office. These people do not recognize that the Constitution, the first amendment, and the entire structure of

American broadcasting is the result of Government action or that the Government of the United States is the people of the United States.

The fact that we have 5,000 radio stations and 650 television stations does not assure us at all that these broadcasters will operate with policies of overall fairness. Many do not, even with the influence of the Fairness Doctrine.

Mr. Wasilewski has two suggested solutions to any problems that might exist. First, the people of the United States must reverse their mandate to Congress and its agencies to regulate broadcasting service within the public interest, convenience, and necessity.

We should, in other words, abolish or abridge our right to trespass upon our own property.

The second part of the solution is that we rely on what broadcasters call self-regulation. In many vital aspects, self-regulation by the broadcasting industry has been a complete failure, an open invitation to indulge in irresponsible, self-serving practices.

The radio and television codes, for example, in spite of their success as propaganda tools to delude the public, have dismally failed to maintain acceptable standards in many aspects of broadcast programing. The most disturbing thing about Mr. Wasilewski's statement is its failure to recognize the obligations and responsibilities which every broadcaster freely assumes in return for the privilege of using public domain air channels for what is, in most instances, a spectacularly successful commercial enterprise.

Nor does the statement recognize the devotion to public service of many members of the Federal Communications Commission and of Members of Congress. He views the Commission and the Congress with an arrogant disdain. He even fails to recognize the achievements of many broadcasters themselves who have illustrated that the Fairness Doctrine can and does work to the benefit of both broadcasters and the public when they apply its principles with intelligence and a sense of responsibility.

Our association, the National Association for Better Broadcasting, would like to express its recognition and appreciation to the News and Public Affairs Departments of all three television networks for their continuing outstanding contributions to fairness and public enlightenment. There are scores of broadcasters who make such contributions in their own communities. But we are deeply disappointed, although not surprised, at the fact that the National Association of Broadcasters has come to this hearing with an attitude which appears to reject the entire purpose of this hearing—to examine and discuss these things—and is aimed at destroying these things in any possible way.

I thank you very much for the privilege of being invited to this hearing.

Dean BARROW. Thank you, Mr. Orme.

Mr. CHAIRMAN. I should have noted before Mr. Orme gave his comment that his comment and the remaining two on basic position papers were not reproduced in advance, and you will not find them in the materials at your desk.

Mr. ORME. May I say, Dean Barrow, we did not receive the paper in time for us to duplicate this.

Dean BARROW. This is, of course, the explanation.

Mr. Wasilewski, would you care to comment upon the comment upon your paper?

Mr. WASILEWSKI. I would say Mr. Orme and I are in disagreement, but I would quickly hasten to add that I don't know of anybody that holds this Congress and the FCC in higher esteem than I. I think the attributing of such thoughts to me is highly improper.

I am presenting a point of view here that represents not only my point of view, but the point of view of many, many broadcasters and many other thinking people in our society. I didn't come here with any intent to hold in disrepute the FCC or the Congress.

I think that the substance of my statement, and perhaps Mr. Harley's references to the doctrine, is that we are not so concerned about dealing with these villains, or as I would put it, with the devils we know. We are a little concerned about the ones in the future that we don't know. That would be my response to Mr. Orme.

Dean BARROW. We now invite comment on these papers.

Dr. GOLDIN. The last thing in the world I want to do is launch a personal attack on you, Mr. Wasilewski. I do have a slightly different view, though, of how the Commission operates under the Fairness Doctrine than the one you presented.

I don't think anything you said was technically incorrect, but I think perhaps just to round out the picture I would like to give the committee my recollection of how it works.

I think it starts first with the notion that the Commission itself does not go out and monitor stations. It waits for complaints to come in to the Commission. It operates under the theory that it accepts the broadcasters' judgment first as to what is a controversial issue. It is a kind of rebuttable assumption. It assumes that the broadcaster is going to make a reasonable judgment in this area, what is a controversial area, and what fairness consists of. Then it receives the complaint and it considers that. It then sends the comments to the station.

It seems to me, as I have seen the Commission operate in this field, that the broadcasters' view is the one that is given considerable weight; that is, the Commission does not really substitute its judgment in a categorical sense, as perhaps is implied, but in effect, is saying: "We are assuming that the broadcaster is trying to do a fair job, and that he does understand the community activity, and he knows what a controversial issue is."

Then the Commission intervenes when, in its judgment, after reviewing both sides, it decides that perhaps the broadcaster in this particular case has made a mistake.

I would suggest that it might be helpful if the committee asked the FCC for some materials in terms of a period of time as to how many complaints there have been in which the Commission overturned the judgment of the broadcaster. I went through the fairness statement which the Commission has issued, and it goes through 1964. I think I saw cases there starting in 1950. I know that there are cases that are not there, but those that are there were just about 12 or 13 in a very long period of time.

So my impression is that the instances in which the Commission overturns the broadcasters are quite unusual, rather than the usual thing. I would suspect that the record would be strengthened by a factual view of how the system operates.

The other point that I did want to make was that Mr. Wasilewski says that then the broadcaster is punished. I would like to raise the question of what does this punishment consist of?

In those cases where the Commission has held that the broadcaster made an honest mistake in judgment, the punishment consists in asking the broadcaster to either itself put on another point of view or to ask some other group to put on a point of view. That is what the punishment consists of.

I think, taken in that context, the picture is slightly different from the one that Mr. Wasilewski drew.

Mr. WASILEWSKI. My response to that would be that I would agree that there have been very, very few cases wherein there has been punishment, per se, in a true sense. The thrust, however, of my argument is, sir, that what happens in an individual situation to a particular station becomes very minute in relationship to the overall problem we are talking about here.

The overall problem is: Does or does not the Fairness Doctrine as applied and administered by the FCC have an inhibitory effect upon stations engaging in controversy? My point is that it does have such an effect because of the fact that they are subject to hindsight by the FCC. As we all know, hindsight is 20–20. And the consequent retaining of counsel to respond to complaints.

I have seen one case, for example, of some time ago, where there was a student teacher, as I recall, from Berkeley, Calif., who requested of a station the right to respond to spots to join the Peace Corps, a right to respond to the savings bond drive as put on by our Government and carried in spot announcements by the station.

The station was under an obligation because of that to respond to the FCC at considerable length, indicating why they did not feel an obligation to put on this particular teacher from Berkeley.

What I am getting at is the administrative details that one gets involved with can become quite enormous, and I think they are a deterrent to this wide open debate that Mrs. Pilpel was talking about yesterday.

Dean BARROW. Mr. Chairman, the panel has been joined by Mr. Paul Porter, of Arnold & Porter, who, as you know, is a past chairman of the Federal Communications Commission. He is recognized for comment.

Mr. PORTER. I think the statute of limitations, Mr. Chairman, has run against me as far as service with the FCC is concerned. That was back, I think, in the Garfield administration.

I would like to comment on what my friend Mr. Wasilewski had to say about the double theory of regulation. I was defending the Commission some time ago in the court of appeals because of the position of my client, and I was suggesting that the FCC could be trusted.

A member of the panel, Judge McGowan, said, "Mr. Porter, suppose some day we get a bad Commission?" I thought that was a good question.

I said, "Your Honor, I no more like to contemplate that remote contingency than I do that some day we might get a bad court."

I lost the case, incidentally.

But with respect to the administrative burden, and I share the concern, I am sure, of my friend and former colleague, Chairman

Hyde, as to the administrative complexity of dealing with the kind of complaints that come in with respect to the Fairness Doctrine, I took the liberty, Mr. Chairman, of making a little survey which I think at this point in the record might be of some interest.

I had a member of my staff make an inquiry of the Complaints Branch at the FCC, in the Complaints and Compliance Division. He indicated that at present there are three full-time professionals assigned to the Fairness Doctrine complaints received by the Division and two clerical workers.

To the gentlemen of this committee, this may come as a great shock to you, but he said that this number was woefully inadequate to deal with the burden of the matters they had before them.

I undertook further an inquiry as to the number of complaints received in a representative period under the Fairness Doctrine. There was no breakdown because the published figures are amalgamated to include all complaints. The only way to determine it would be to go through the files, which were not available to us.

For January of this year, 1968, the figures were available. It was reported that 288 complaints were received during the month of January, largely under the Fairness Doctrine. For a single month, 288 complaints were received, in January 1968. I have no idea as to the nature of the complaints.

Mr. HYDE. That would be high for fairness complaints.

Mr. KEITH. Dean Barrow, it seems to me that at the same time we are considering the staff that the FCC has, we might point out that one network alone, having a great many public service programs as stated by Mr. Frank, has a staff of 900 people to handle them. Some of these are undoubtedly involved with the Fairness Doctrine.

It seems that with such staffs they can afford to defend themselves in instances where their judgment is challenged.

Mr. PORTER. I don't think there is a question that the networks and even the stations have the personnel to process any complaints that are received. I was just giving this figure as to the administrative burden at the agency. I shed no tears for the burdens on the networks.

Mr. HYDE. I would like to say a word about the indicated number of complaints. Two hundred eighty-eight in a month would be very high, according to my understanding of the situation. There would be that number of comments, complaints, some of them repetitive of others. But the number of specific complaints raising the fairness issue for resolution by the Commission would be much less than that. I think the number would be in the order of between 350 and 400 in a year.

Dr. GOLDIN. Could I ask Mr. Hyde what his recollection is of how many times a year the Commission overturns the judgment of the broadcaster?

Mr. HYDE. The cases that Dr. Goldin examined would seem to be the list of precedents that were published by the Commission for the information of the industry and the public. As his analysis indicated, a fairly high proportion of those were cases in which the Commission determined that it should not interfere with the judgment of the licensee.

If you were to examine the total number of complaints that came to the Commission, I am sure that you would find that typically the Commission would refer the complaint back to the licensee, and that

the matter would be resolved there. In the usual situation, the complaint is satisfied by the licensee, and there are only a limited number of cases where the Commission makes a finding that the judgment of the licensee has not been fair and reasonable.

The CHAIRMAN. Mr. Goldin asked the question of how many. Could you give an estimate of how many the Commission has overturned? I believe that was his question.

Mr. HYDE. Mr. Chairman, I think it would probably be well for me to get a specific count on these, which I can supply for the record. I have given it to you in rather general form, but I can supply specifics, and I will be pleased to do that.

The CHAIRMAN. Were there 10, 20, 30, 50, 100?

Mr. HYDE. I believe it would be less than a dozen in the year, but I will give you a precise figure.

The CHAIRMAN. It isn't wholesale, then?

Mr. HYDE. It is a very low figure.

(The following information was received by the committee:)

FCC STATEMENT ON CORRESPONDENCE CONCERNING COMPLIANCE OF FAIRNESS DOCTRINE AND SECTION 315

During the period March 1, 1967 to February 29, 1968 the Commission received approximately 5,100 pieces of correspondence concerning the fairness doctrine and Section 315. The monthly flow of correspondence varied from a high of 800 received in October 1967, to a low of 214 received in February 1968. However, some letters referred to more than one station.

It is estimated that one third of such correspondence constituted complaints against broadcasters, although the percentage varies from month to month. The balance consists of complaints against the Commission's administration of the fairness doctrine (the greatest number was against the Commission's ruling that the fairness doctrine is applicable to cigarette advertising), letters urging repeal or retention of Section 315, and courtesy copies of correspondence between licensees and the public.

The number of complaints actually referred to licensees for their comments ranges from 300 to 400 a year.

A count was made of the number of instances in the period March 1, 1967, to February 29, 1968 where the Commission found licensees had failed to achieve compliance with the fairness doctrine or Section 315. There were 16 instances where the Commission determined licensees had failed to comply with the fairness doctrine and two instances where it found licensees had failed to comply with Section 315.

Thus, out of approximately 5,100 pieces of correspondence received annually which mentioned fairness doctrine or Section 315, only 300–400 per year were referred to licensees for their comments, and, during the past year, in only 18 instances did the Commission find that licensees had failed to comply with the fairness doctrine or the equal opportunities obligations imposed by Section 315.

Mr. WASILEWSKI. May I point out, Dean Barrow, that this is pertinent, but it is really not germane to what I am stating is the main issue here, because a broadcaster is going to get into the posture of not getting controversial. He will be chaste, pure, and virtuous, and not engage in controversy to avoid the need for determinations to be made.

That is the point I am trying to make. I am not arguing any individual cases now or in the past.

Mr. ROGERS. Mr. Chairman——

The CHAIRMAN. Mr. Rogers?

Mr. ROGERS. The only comment I would make about this, is that broadcasting then becomes chaste. I would think that in applying the

Fairness Doctrine, what you are saying is that to be fair in presenting both sides does not present an open question.

Mr. WASILEWSKI. I really didn't understand your point, sir.

Mr. ROGERS. I thought the point of the Fairness Doctrine was to see that both sides of a question are presented. Your argument says that this is restrictive of that. I don't understand why.

Mr. WASILEWSKI. My argument is this: that a broadcaster is going to be fair, and that audiences are going to be exposed to all degrees of viewpoint in this society of ours from the 5,000 stations and the television stations. It is the audience and the broad public interest that we are concerned about.

My point is that they are going to get a fair presentation of viewpoints in the overall and, furthermore, that a broadcaster himself will try to be fair. But the burden is imposed by the FCC looking over his shoulder each and every time.

Mr. ROGERS. That is all the law wants you to do.

Mr. WASILEWSKI. The law is triggered by anyone who thinks the station is unfair.

Mr. ROGERS. They have a right to have their point considered, do they not, under the law?

Mr. WASILEWSKI. They have a right to do what?

Mr. ROGERS. An individual would have the right to be considered under the law, at least to have the station consider it. You may object to it, but the law is designed to do what you claim you want the broadcaster to do.

Mr. WASILEWSKI. I am saying the broadcaster would do this and the public would benefit more if you didn't have a law, because with the law I am personally convinced that many, many local stations, and we will not talk about networks—there is no question about the fact that the networks have the wherewithal and people to engage in all the research necessary—many, many local stations refrain from getting into controversy because of being entwined in the law. They don't do it out of malice. They do it because it is easier to avoid it.

Mr. SIEPMANN. Mr. Chairman, it would seem to me that this argument is equivalent to saying that we would all be more virtuous if we had no policemen.

Dean BARROW. While we are on this aspect of it, and in light of Mr. Wasilewski's treatment of freedom of speech in his paper, I would like to make a brief comment on that aspect.

I think it ought to be clear in the record that there is a freedom of speech for the public which is to be protected. As free speech for all is not possible through broadcasting, the facilities being limited, it is appropriate for free speech for the public to be protected to hear all sides of public controversy, which must be achieved by operation of the channels in the public interest under some such doctrine as a fairness doctrine.

There is a kind of trusteeship here of the right of free speech of the people. This has to be recognized as well as the free speech of the broadcaster. These interests have to be accommodated to each other.

This was never better recognized than in the *National Broadcasting Co.* case when it was in the lower court, and Judge Hand wrote the

opinion in that case—a great judge who was always very much concerned with matters involving rights of people.

The issue in that case involved the chain broadcasting rules which limited the broadcaster's choice to limit his source of programing to the networks. The broadcasting industry alleged that this violated the first amendment, freedom of speech.

Judge Hand's opinion says this, and I wish to quote it because it is quite brief. It is the best statement in the judicial records on the point:

> The Commission does, therefore, coerce their choice and their freedom—

Meaning the choice of broadcasters—

> and perhaps, if the public interest in whose name this was done were other than the interest in free speech itself, we should have a problem under the First Amendment; we might have to say whether the interest protected, however vital, could stand against the constitutional right. But that is not the case. The interests which the regulations seek to protect are the very interests which the First Amendment itself protects, i.e., the interests, first, of the listeners," next, of any licensees who may prefer to be freer of the "networks" than they are, and last, of any future competing "networks." Whether or not the conflict between these interests and those of the "networks" and their affiliates" has been properly composed, no question of free speech can arise. 47 Fed. Supp. 940, 946.

I wanted to put this into the record because I believe it to be the best statement of the proper accommodation of the free speech via broadcasting of the public itself as well as the free speech of the broadcaster.

Mr. ROBINSON. On that particular point, Dean Barrow, it does seem to me that the characterization here is that somehow the only interest that is being served is that of the broadcaster, and somehow the broadcasters are invoking the first amendment as their sort of private right. But the point, I think, is that to the extent that broadcasting free speech, if you want to use that phrase, is inhibited, it is ultimately the public that is losing, not just the broadcaster. It is the public who is going to lose the benefit of sharp debate, or robust discussion of public issues, if the broadcaster is inhibited.

There has been some suggestion that really the Fairness Doctrine isn't much of an inhibition because, after all, in spite of all the many complaints, nobody ever lost their license. We are told that in very few cases is the broadcaster's judgment overturned. There has even been the suggestion that the broadcaster is, under Commission practice, presumed to be correct. But the Commission has never stated such a presumption. It has never come out and said, "We presume that the broadcaster's judgment is, in fact, right, unless proven otherwise," and its actions on several occasions, I think, belie this.

One recent particular case that comes to mind, speaking of broadcaster discretion, was a case decided last week, the *King Broadcasting Co.* case. This involved an application of the political editorial regulations. The Commission, second-guessing the broadcaster in this case, actually counted the number of seconds that were devoted to the opposing viewpoint and finally overturned the judgment—which it deemed to be unsatisfactory in this regard—of the broadcaster. It doesn't seem to me that this is much deference to the discretion and judgment of the broadcaster.

If the King case is not to be taken as a statement of the FCC's policy, I think it behooves the FCC to say something like, "We presume the broadcaster is right and we will not overturn his judgment unless it is

convincingly shown that he is wrong." But to say simply, "Well, we don't often overturn his judgment" to my mind is like saying, "Well, we have this doctrine and we mean for everybody to follow it, but we just don't implement it very strongly."

Mr. ADAMS. I have been listening for 2 days and I wish someone on this half of the panel would answer this question for me.

There are only 170 V's in the whole country. Under the present rules of the Commission, one can own up to five. I want to know what happens when you have two applicants for one of these V's and that is all there is in a particular market. You can't get any more. Someone has to say "One doesn't get it." In other words, one is out. And the broadcaster who wins it is now in.

What happens to the free speech of the man who lost, who may have a violent disagreement with the broadcaster who won and with his whole philosophy of life? What happens to his free speech when the Government has said, "You get it and you don't"? Some of you keep saying you have to have free speech for the broadcaster.

Mr. ROBINSON. I would like to make a brief statement on that. It is true that not everybody can have a broadcasting station, just as not everyone can have an audience in, for example, Hyde Park, and not everybody can own a newspaper, and not everybody can use a sound truck.

Mr. ADAMS. Wait a minute. You have a limited spectrum in television. In that limited spectrum you may have only two or three V's in the area. It is agreed by everybody that the Government has to say "You get it and you don't." If you want a newspaper, if you want to put your money up, you can get into the field. In Hyde Park you can go in or out of the park. But here we say "You are in and you are out."

Doesn't that put an obligation on the Government to say that those who are "out" have a chance?

Mr. ROBINSON. Are you suggesting that the only basis for choice between two applicants is a programing choice, or are you saying that because they deny the one person——

Mr. ADAMS. I am saying, as a matter of fact, you are in and everybody else is out. That is just a fact. It has to be that way. What are we going to do about the fact that you are in and everybody else is out?

Mr. ROBINSON. If we are talking just about facts, I would suppose that the fact that we have the Washington Post, the Star, and the Daily News here——

Mr. ADAMS. We now have a new one. Somebody didn't like it and they started a new paper here. But nobody is going to start a new V station in one of the major markets, because the Government says, "There are only three spectrums. You are in and everybody else is out."

Mr. ROBINSON. I dare say there will never be permanently in this city as many daily newspapers as television stations. There will never permanently be even four major daily newspapers in this city, and there are four major VHF television stations alone, in this city.

Mr. ADAMS. In broadcasting, the Government does have to say that. I would like that answered. Don't we have an obligation if we say "You are in and everybody else is out" to do something about it?

Mr. WASILEWSKI. May I comment?

I would agree with you that it is a fact that there are only so many V's here, just as it is a fact that it takes 9 months to have a baby. The fact remains that whether the Government does it or whether economic facts of life do it, the same result accrues.

For example, in the newspaper field, economics will dictate that there are only going to be so many newspapers in a given city. The governmental scarcity argument that has been used has operated to provide more broadcasting outlets than the economic facts have allowed in the way of newspaper outlets.

I agree with you. It is a fact of life. I don't know what the answer to it is, how to get more broadcasting stations. There are more than 170, by the way. It is over 500 V's.

Mr. ADAMS. I am talking about the 50 major markets which are now controlling 90 percent of the television market in the United States. You talk about 5,000 radio stations, or a great number, but if you have five stations, you can get down in this Nation to 34 companies controlling 90 percent of the television market.

We both know there is an upgrading process, so the country is continually moving toward that position. What I am saying is the Government is involved in allowing a particular economic group to have a spectrum and keeping everybody else out. What is our obligation, once having done that?

Mr. WASILEWSKI. I would say that everybody in this country has an inherent right to utilize radio and television. I would agree on that proposition. It is just as we have an inherent right to utilize the land we own in our backyard. But we are not allowed to use our land in the backyard unreasonably, to the deprivation of someone else.

The whole point here is that Government recognizes the right of everybody to use it, but then it picks and chooses so that one person is chosen and he is allowed to use it so that he doesn't interfere with others.

Mr. ADAMS. In other words, we have created a trust in an individual by giving him this spectrum.

Mr. WASILEWSKI. I would say he has been licensed to serve the public interest. That is not a true trust situation, in a legal connotation, but I will use those words for this purpose.

Dean BARROW. I wanted to recognize Mr. Hyde for a remark on this point.

Mr. HYDE. Chairman Staggers, may I ask the committee to incorporate the Commission's ruling in the King matter? I think it will supply for the record the basis of the Commission's decision. It will also illustrate, I believe, that what the Commission expects of the licensee is that they make a reasonable, good-faith judgment.

The CHAIRMAN. We will be glad to have it.

(The ruling referred to follows:)

Federal Communications Commission

(Public Notice—B—November 2, 1967)

KING, SEATTLE, PETITION FOR REVIEW OF FAIRNESS DOCTRINE RULING DENIED

The Federal Communications Commission has denied a petition by KING Broadcasting Company, licensee of stations KING–AM–FM–TV, Seattle, Washington, for review of a Commission ruling that KING was not in full compliance with Fairness rules and calling on the licensee to negotiate with Seattle City

Council candidate George E. Cooley in good faith in order to provide adequate time for Cooley to respond to KING editorials.

The Commission telegram notifying KING of the decision follows:

Mr. GEORGE E. COOLEY,
Seattle, Wash., October 31, 1967.

KING BROADCASTING COMPANY,
Licensee of Station KING,
Seattle, Wash.:

The Commission has today considered your petition for review of the ruling of October 27, 1967, in the matter of the complaint of Mr. George E. Cooley. This ruling found that your offer of response time to Mr. Cooley was not in full compliance with Section 73.123 of the Commission's rules and regulations and requested you to negotiate in good faith with Mr. Cooley concerning adequate response time.

In accordance with the Commission's rules, the licensee may make a good faith judgment as to what constitutes a "reasonable opportunity to respond" in the particular circumstances of each case. In this instance, the station has made a determination to broadcast editorials of 20 seconds duration urging the election of the candidates supported by your station and has determined to broadcast these editorials on 24 occasions. It follows that in making a judgment as to what constitutes a reasonable opportunity for response, the station must give consideration both to the amount of time directed to each candidate and to the frequency of the announcements (which involve the factors of effective repetition and the reaching of possibly different audiences). No question has been raised concerning your determination to allot 120 second of response time per candidate. Mr. Cooley's complaint goes directly, however, to your determination as to what constitutes an adequate number of responses.

Although you have decided to broadcast an editorial campaign in which you reach the audience 24 times with your editorial endorsement of selected candidates, you have offered Mr. Cooley an opportunity to reach that audience on only 6 occasions—a disparity of 4 to 1. While Mr. Cooley has requested opportunity to make additional responses, you have denied this request without advancing any basis upon which the Commission can make a judgment that this restriction is reasonable. For example, it is not alleged that a 10-second announcement, resulting in 12 opportunities to reach audiences appropriately characterized as early daytime, daytime, prime time (as you have done in the case of the six announcements), is not feasible, and indeed, based upon the Commission's experience, the 10-second spot is oft-times used in political campaigns.

Your reliance on the *Massart* ruling is misplaced. As the Commission there stated, the delineation of both the total amount of time to be afforded for response and the frequency of presentation is a matter for good faith, reasonable judgment by the licensee and negotiation with the candidate involved. Thus, in the case of a 120 second allotment of time, some candidate's may propose to have only two announcements but with the longer time period of 60 seconds each to develop some particular issue; Mr. Massart accepted 6 with 20 seconds duration. Mr. Cooley, on the other hand, has opted for greater frequency and as stated, no reason apears to suport your judgment that Mr. Cooley or his spokesman should not be afforded greater frequency of response in these circumstances.

In view of the foregoing, your petition for review is denied.

By Direction of the Commission:

BEN F. WAPLE, *Secretary.*

Action by the Commission, November 1, 1967. Commissioners Lee, Cox, Wadsworth, and Johnson.

Federal Communications Commission

(Public Notice—B—September 19, 1967)

KING, SEATTLE, WASH., ORDERED TO AFFORD CITY COUNCIL CANDIDATE REASONABLE OPPORTUNITY TO RESPOND TO EDITORIALS

King Broadcasting Company, licensee of station KING, Seattle, Washington, has been ordered to give a candidate for the Seattle City Council reasonable opportunity to reply to KING editorials. The action, taken in a telegram to the licensee, followed a fairness complaint by the candidate, Clarence F. Massart.

Mr. Massart had complained to the Commission that KING AM, FM and TV

had endorsed five candidates for the City Council in editorials being broadcast 30 times on each of the stations. He stated that he had been offered 2 one-minute broadcasts on each station for response.

The Commission notified KING that the offer of two one-minute broadcasts did not appear to constitute reasonable opportunity for response to thirty broadcasts endorsing other candidates, even though the editorial endorsements were only 20 seconds long.

The Commission stressed that in view of the imminence of the primary the matter called for immediate good faith negotiation between KING and the complainant.

A KING petition for review of the order was denied. In a statement concurring with the denial, Commissioner Kenneth A. Cox, said that the equal opportunities provision of the rules does not apply and that the amount of time offered is adequate. He agreed that the discrepancy between 30 exposures and two is not fair and felt that the station and complainant should negotiate for a mutually agreeable distribution of the two minutes offered for response.

Action by the Commission, September 15, 1967, by telegram, Commissioners Hyde (Chairman), Cox, Loevinger and Johnson; Commissioner Cox concurring with a statement.

FEDERAL COMMUNICATIONS COMMISSION,
September 15, 1967.

KING BROADCASTING CO.,
Licensee of Station KING,
Seattle, Wash.:

Your petition for review is denied. See our telegram of September 14, 1967. Matter is therefore one for immediate good faith negotiation between you and complainant.

Commissioner Cox concurs but believes that a fuller explanation is desirable. He agrees that equal opportunities does not apply, and believes that in any event the amount of time offered is adequate. He also agrees that the discrepancy between 30 and two exposures is not fair, and believes that, on the facts before us, the station should negotiate with complainant for a mutually agreeable distribution of that time.

By direction of Commission:

BEN F. WAPLE, *Secretary.*

FEDERAL COMMUNICATIONS COMMISSION,
September 14, 1967.

Mr. C. M. MCCUNE,
MCCUNE & GODFREY,
Seattle, Wash.:

The Commission has sent the following telegram to KING Broadcasting Company in connection with complaint filed by you on behalf of Clarence F. Massart: "Your response has been received to complaint filed by Clarence F. Massart, who states that you have not offered him adequate opportunity to respond to editorials which are being broadcast 30 times each on your AM, FM and TV stations endorsing five candidates in next Tuesday's primary election for city council. You have offered him two 1-minute broadcasts on each station. Apparently, you have not stated the times at which the 1-minute broadcasts would be presented, or whether such time periods are comparable in audience potential with the periods in which your editorials are being broadcast. Commission's rules provide that when a licensee editorially endorses candidates it shall within 24 hours after broadcast of such editorial transmit to the other qualified candidates for the same office an offer of a reasonable opportunity for such candidates or spokesmen thereof to respond over the licensee's facilities. From the facts before us, it does not appear that the offer of two 1-minute broadcasts constitutes reasonable opportunity for response to 30 broadcasts endorsing other candidates, even though the editorial endorsements are only 20 seconds long. Moreover, there is no showing as to whether responses of other candidates will be presented in time periods of comparable audience potential. Accordingly, you are directed to afford reasonable opportunity to respond to your editorials. In view of imminence of primary, we stress that is a matter for immediate good faith negotiation between you and complainant."

BEN F. WAPLE, *Secretary.*

Dean BARROW. Mr. Porter has a comment.

Mr. PORTER. In response to Congressman Adams' question, I am reluctant to inject a note of controversy into these proceedings, but perhaps one answer, if the Fairness Doctrine is based upon the limitation of spectrum space, if the Commission and the Congress will take the handcuffs off of CATV, you could get 20 channels at least into every consumer's home in the major markets. That diversity might be a partial answer to the scarcity and the limitation of frequencies.

Dean BARROW. Professor Jaffe?

Mr. JAFFE. Apropos of Congressman Adams' questions, I don't think, in the first place, that the first amendment gives one a right to speak at any particular time or place. It says that the Government shouldn't keep people from expressing themselves. In fact, nobody really has a right, and not even the FCC has said that anyone has a right to speak over a station.

The Fairness Doctrine doesn't assure someone the right to speak over a station. The excluded person who didn't get the station has no rights and the Fairness Doctrine doesn't give him any right.

The Fairness Doctrine simply says that—

> We think it is necessary in order to promote general discussion, in order to have all sides represented, that over the course of a period of time a broadcaster air different views.

For example, a particular person who may have a view to air, the FCC and the courts have held, has no particular right to express himself.

The question comes down, in my mind, to the practical question whether the Fairness Doctrine is necessary. I don't say it isn't necessary. I think it is arguable both ways. But is it necessary to assure that there will be general discussion of public issues and the formation of public policy?

It is a fake assumption that if a particular point of view, or a particular person isn't heard over broadcasting, or heard over TV, he won't be heard.

Broadcasting isn't a world of itself. It is part of the whole world of communications. To isolate it and say, "If somebody is kept off the radio or if he doesn't have a station, he is kept from speaking or broadcasting and it is an interference with his rights of free speech," I think that is the same thing as saying if the New York Times won't let me appear in their columns I am prohibited from appearing on the New York Times and this is a violation of my right of free speech.

I don't think the thing is set up that way as a matter of law or that the first amendment means that every individual has a right to speak every place. As a matter of practical fact, I don't think the world of communications works in terms of simply speaking over one particular place.

Mr. ADAMS. I defer to the professor on a lot of subjects, but he has said that someone can talk over the air waves and somebody else cannot when we make the original determination that "You go on and you don't."

In the practical sense that you referred to, of an overall picture, you have the moving up of various corporations into greater and greater ownership of greater and greater outlets in the major markets, which means, then, that a television station can represent a particular point of

view, and somebody else builds up in that station and can buy it out and that viewpoint then goes to him.

In each of these cases what I am saying is you give a powerful speech opportunity to one and foreclose others from this. Having given it to him, and this isn't like Hyde Park, isn't like the newspapers, and it isn't like other areas because it is limited, this having been done, doesn't he have a responsibility in that area to let the ones we have shut out in?

Mr. JAFFE. Not under the Fairness Doctrine. The Fairness Doctrine doesn't say that anybody in particular is entitled to speak. It just says that the various points of view must be represented. But it doesn't proceed at all in terms of anybody's rights, as I understand it. It does in connection with the right to reply, if you have been personally attacked.

But the Fairness Doctrine generally doesn't speak at all in terms of anybody's rights. As a matter of fact, I think you have overstated the picture. I think there is a much greater variety of ownership in radio and TV than you express, and quite different points of view will be expressed. Even if there is some limitation, it doesn't follow that the way you do it is to have a law.

Mr. ADAMS. You are aware, of course, of the linkage between the major newspapers and the major television outlets in a great portion of the 50 major markets. This being so, as you build this during the coming years, you arrive at a point where if you have two V's in an area and two newspapers, and the newspapers own each V, where do you get the opportunity for this opposing viewpoint?

When we talk of freedom of speech, I talk of the freedom of speech of the individuals who say "We have a right to be on." This doesn't mean an individual. We have already made that determination when we let the broadcaster on and kept somebody else off.

But I would like to know what your feeling is about the trust, call it, or call it public service, whatever it is, the responsibility of that broadcaster because of what the Government has given him.

Mr. JAFFE. I think it is part of the public responsibility of the stations to put on general programs representing various points of view, and that on the whole this is more or less done. I don't really object to the Fairness Doctrine because it seems to me so relaxed a doctrine. It really has so little sanction behind it. It probably sets a good model.

I don't, on the other hand, regard it as a very significant doctrine. It doesn't seem to me that with respect to the formation of general opinion it is terribly important that every particular TV and every particular radio be policed with respect to the expression of views that happen to come off on this particular station.

It seems to me that public opinion is not formed in terms of particular audiences that have listened to particular stations and have heard particular things, but in terms of a whole mass operation of communications that are constantly impinging upon people.

Maybe there is a distinction between local broadcasting in small places with respect to small local issues. It may well be that there the operation of a station and its position is more crucial. But take things like Vietnam, all these large issues, and the claim that if station A lets so-and-so speak about Vietnam to one effect, then they should let somebody else who has the opposite view speak to the other effect on Vietnam, as if it were significant that one particular station on a particular

day had made a certain expression about Vietnam. I don't see that public opinion is formed that way.

I don't see that is the way communication takes place or the way free speech functions. What I am doing is suggesting that, isolating each station as if it were a thing unto itself, with a particular audience that only listened to that station, is an unrealistic way of looking at freedom of speech in communications.

On the other hand, I am not particularly opposed to the Fairness Doctrine because it doesn't seem to me to do more than say, "Be good boys," generally speaking. I do agree with Professor Robinson that every so often the Commission forgets what it said about the way the Fairness Doctrine operates and begins to count up minutes on both sides. Of course, that counting up had to do with political editorials, the counting up of time.

The CHAIRMAN. I might say to the subcommittee, if you wish to ask a question, address Dean Barrow.

Mr. KUYKENDALL. Could I ask a question, Dean? I would like to be specific in line with our discussion.

Mr. Jaffe, let's quit talking of generalities and be specific. I am a candidate for the Congress of the United States. I am the incumbent. The only radio station, TV station, and the newspaper in the town announces against me. The law today says he cannot keep me from buying time on his station. If it were not for the law, he could. Is this not true?

Mr. JAFFE. I am much less prepared to question 315 than I am the fairness or the right-of-reply doctrine. I am not strictly against any of these things. I am making an analysis in terms of the significance of the issues and how significant I think the views are on either side.

But to my mind, the strongest case for control is the question of political candidates, particularly insofar as one candidate is allowed to appear and another might not be allowed to appear. I think TV, particularly, has very fundamentally changed the character of the political campaigns; that it has personalized it to an enormous extent.

I distinguish between that and the Fairness Doctrine, where you are dealing with general communication of ideas. In political broadcasts I think there is a very strong and powerful impact, and the individual who has access to TV as compared to those who don't have access, has an important point.

Mr. KUYKENDALL. Don't you think a person who was selling a particular idea that may be just as important to him as going to Congress would be just about as lost?

Mr. JAFFE. No, I don't. I don't think you sell ideas like you sell medicine or sell aspirin.

Mr. KUYKENDALL. I disagree.

Mr. JAFFE. It takes a long time to sell an idea, doesn't it?

Mr. KUYKENDALL. It depends on how clear the idea is.

Mr. ROBINSON. Was the question you put, the question of whether you had the right to go on the station in the first instance? If so, I think Mr. Jaffe answered that question before. As he said, neither the Fairness Doctrine nor section 315 gets you air time in the first instance unless your opponent has had it.

Mr. KUYKENDALL. I am discussing the entire item of fairness on the air. I don't know much about these section numbers you are discuss-

ing and I am not too interested in learning their numbers. I am talking about the whole idea of fairness on the air.

As a Member of this Congress, I think all of it stems from the fairness to us. I have a great comfort in knowing that no one can go into Memphis, Tenn., and buy up all the TV time. Many people have enough money to do it. I take great comfort in the fact that that cannot be done in our broadcasting system today. To me, that is the first basis of our fairness and I like it.

Dean BARROW. It might be observed that where the broadcast takes the form of a political editorial in behalf of a candidate, the time for the other candidate would then be free.

Dr. Siepmann has had a point to make for some time.

Mr. SIEPMANN. At this late stage in our discussion, I am groping in my own mind for clarity as to what precisely the issue before us is. I think our discussions have in some degree made that clear to me.

Mr. Robinson yesterday came clear and clean in his statement that he disbelieves entirely in the regulatory powers of the FCC respecting any aspect of programing. He received Mr. Jaffe's solid endorsement on that view.

It would be my conclusion that if that be the case, any discussion of the Fairness Doctrine or any regulatory procedures of the FCC are thereby undermined. It begs the whole question. If the FCC should not have regulatory powers respecting program service of any kind, don't let's bother discussing any aspects of its regulations.

It begs the question of what I—and I think the rest of us—have always assumed to be our system of broadcasting, which is a regulatory system of free enterprise within the framework of Government regulation.

So, my first conclusion is that any arguments deriving from Mr. Robinson's position are out of order in that they are irrelevant because they beg the question. Mr. Robinson does not believe that the FCC or any agency of Government should regulate any aspect of programing.

The rest of us, I think, believe in our system of broadcasting, whether we derive the regulatory powers of the FCC from the scarcity theory, the problem you have raised—and it is an important one—or from the conception that I advanced, that the airwaves are the public domain to which licensees receive conditional and privileged access, whether the basis of our system derives from one, the other, or both of these.

There remains, then, the question that I think is still at issue between us: To what extent should the FCC go in its regulations as applicable to particular program situations, particularly within the realm of fairness?

My view as expressed yesterday was, and I think it was a minority view, that it is dangerous and undesirable, and in many senses impracticable, for the FCC to spell out in specific terms and by precise regulations, of which we have had instances in the issues before us, the particular meaning of fairness.

Fairness is a very broad, abstract conception. My view is that I am not prepared to accept the assumption that an agency of Government is by definition or even potentially a scoundrel. Our position in Government is based upon trust in those whom we elect to office and who are appointed to govern for us. Without that basis of trust, I do not

see that we can proceed to any sensible discussion of the proprieties of the actions of our governors.

So that my view would be that while, with others, Mr. Robinson and Mr. Jaffe excepted, I believe in the regulatory system, my view is we should trust to the FCC to concern itself with particular complaints relating to unfairness in broadcasting, and rely upon their discretionary judgment of the properties of the complaint, knowing always that any arbitrary or capricious decision on their part is subject to overruling by the courts of law.

My view is that some applications of the Fairness Doctrine, particularly with reference to the rights of reply, and the notifying of people, and the sending of letters and all the rest of the business, go too far and become too difficult in terms of administration, and that we would do much better to rely in good faith upon the good sense of the Commission. If it acts arbitrarily, appeal to the courts.

It seems to me that this is the remaining issue between us, how far the Fairness Doctrine itself can be applied in particular instances through regulatory procedures. My view is that those regulatory procedures should be broad, general, and discretionary rather than specific, precise, and applicable to every case that one can think of, because fairness applications are manifold and are not subject to such kind of rulings.

That is the picture I get so far of where we stand on the controversy that remains before us.

Dean BARROW. Mr. Porter.

Mr. PORTER. Mr. Chairman, I would like to put the Commission on the spot in connection with the discussion of Dr. Siepmann.

As I gather, he feels there should be a continuing surveillance of broadcast content in the context of the fairness concept. That has been held by Harry Kalven as regulation by dossier. It is not public. It does not have the virtue of rulemaking.

An instance came to Professor Kalven about a broadcast by Walter Lippmann on June 15, 1961. It appears that some critical person complained to the FCC that Lippmann was biased in his foreign policy views, and charged that there was an absence of some counterpoints of view.

Lippmann's broadcast was so impressive, Senator Mansfield read it into the Congressional Record. The Commission, with its automatic dossier procedure, forwarded this complaint to CBS. CBS, of course, had no difficulty replying. But the mailroom there apparently was not working very well. After some brief delay, the following was sent to the network:

> The Commission records indicate that as of this date no response to the above-mentioned letter has been received. As you are aware, expeditious handling of Commission requests for information is a minimum requirement which the Commission has a right to expect of its licensees.
>
> Accordingly, it is expected that you will submit the information requested in duplicate within 10 days of the date of this letter.

Professor Kalven comments:

> Think of the outcry if a great daily newspaper were so preemptorily requested to furnish a justification of printing the views of Walter Lippmann.

The answer to the letter, of course, was no great burden, but I think that is part of the vice of administering something that is as imprecise and as amorphous. I don't know what fairness really means. I remem-

ber my high school history professor, a great Confederate War partisan, wrote a textbook that I have in my library. He called it: "A Short, Unbiased History of the War Between the States Written From a Southern Point of View."

Dean BARROW. Mr. Hyde.

Mr. HYDE. I think Mr. Porter ought to give the Commission's ruling on the complaint. Was there a ruling?

Mr. PORTER. I don't know.

Mr. HYDE. On the basis of the record, it would appear that the Commission did not invoke any sanction or issue any order to CBS.

Mr. PORTER. As Professor Kalven points out, which I commented on, there are two important aspects of what he describes as the FCC dossier technique. First, it serves to extend the appearance of control far beyond what rulemaking or formal decisions would suggest, and it does so by a process that is not public, and which is really awkward to challenge.

Dean BARROW. Congressman Rogers.

Mr. ROGERS. It seems to me that the Fairness Doctrine, the way it is presently administered, is almost a self-policing doctrine because those who have not been fairly treated have an opportunity to come to the Commission, and they can review the specific facts in the case. I think in setting rules we cannot foresee all circumstances.

Professor Robinson, what assurance should be given the public that both sides should be heard or can be heard, or do you leave this entirely to the discretion of the broadcaster, simply because he has been given a license and he becomes all omnipotent? Should there be some procedure where someone who has an opposing view which has not been given the public should have some forum to go to to have this considered as to whether or not that viewpoint should be presented to the public?

What would be your remedy?

Mr. ROBINSON. I think that, as Professor Jaffe pointed out, it is a mistake to isolate broadcasting and say because a particular viewpoint is not expressed over the radio or television, that somehow there is some censorship of that viewpoint or there is some denial of equal opportunity for that viewpoint to be expressed.

Mr. ROGERS. You do see the difference. You do distinguish between the newspaper business and the broadcasting business. I am sure you make that distinction. The Government doesn't go in and license a newspaper. If I want to start a newspaper anywhere, if I can get people together, I can start it, I can express my viewpoint that way.

But I cannot do that with a station unless I get a license in the broadcasting field. There is a great distinction. And that license can be taken away from me. The Government can't come in and shut up my newspaper, but they can come in and take my license. There is a great difference.

Once that trust has been given to a licensee, should there be some forum that people can go to or some remedy? I understand you believe the viewpoints should be varied.

Mr. ROBINSON. Absolutely.

Mr. ROGERS. How would you assure this?

Mr. ROBINSON. I am frankly a little dubious that Government or any Government agency—not pointing my finger at anyone in particular—

can somehow remedy any particular deficiency in the exposure of diverse viewpoints.

Mr. ROGERS. What is your remedy?

Mr. ROBINSON. To some extent we rely on the marketplace for these things.

Mr. ROGERS. On broadcasting you rely on the market to get a different point of view across?

Mr. ROBINSON. I don't know why that is so strange. We have already pointed out, I think, that there is potential for greater diversity here, subject, of course, to some limitations inherent in limited ownership. Mr. Adams expressed his concern with the fact that broadcasting licenses are being accumulated by perhaps a handful of corporations. But if this is so, it doesn't follow that the appropriate remedy is to invoke something like a fairness doctrine. More appropriately, we should limit multiple ownership of stations.

Mr. ROGERS. I think we are getting off of what I asked you. I am saying how would you assure that diverse points of view are given? You admit this is a goal.

Mr. ROBINSON. Over broadcasting alone?

Mr. ROGERS. Yes. This is the only area the Government is in.

Mr. ROBINSON. Of course, it is true that we have Government licensing here. But the point is, what follows from the fact of licensing? I don't know that it follows from the fact of licensing alone that we have to insure that in this particular license medium there is a diversity.

Mr. ROGERS. Then you don't agree that there should be diversity?

Mr. ROBINSON. I am saying that I don't think we can require in this medium alone diversity other than by trying to structure the marketplace, and by that I mean structure the broadcasting industry in such a way that the competitive interplay of various licensees will ultimately provide it.

Mr. ROGERS. Then you have no remedy to accomplish the goal of diversity of opinion, as I understand it.

Mr. ROBINSON. No. Indeed, it would be my position that any direct, positive effort is inappropriate and unlawful.

Mr. ROGERS. Then you are willing to let a broadcaster put out only one point of view; is that right?

Mr. ROBINSON. A broadcaster? Yes, sir.

Mr. KEITH. He apparently feels that various licensees wouldn't necessarily have the same point of view.

Mr. ROGERS. They conceivably could, too, so there would be no remedy to make sure the public could get a diverse point of view.

We just disagree basically.

Mr. PORTER. I might suggest to my friend the Congressman from Florida that maybe a partial answer to your question insofar as constitutional issues are concerned, if that is what we are talking about among other things, could be found in the case of *Hanigan* v. *Esquire* which involved the mail subsidy. It was withheld from the mail because the then Postmaster General did not think the publication met the esthetic standards and contributed to education and culture. The Supreme Court gave him very short shrift.

Mr. ROGERS. I don't think this goes to the same point at all, if the gentleman permits. This simply says an opposing view may be ex-

pressed. This is the goal, supposedly, of broadcasting, to get the public knowledgeable on subjects, to present both sides.

Mr. PORTER. I find nothing in the statutes to support that, really.

Mr. ROGERS. When you make a complaint and say, "One point of view is presented, and I would like to see that the other point of view is presented," that is the fairness statute.

Mr. PORTER. I am talking about the legal compulsion.

Mr. KEITH. A few moments ago a letter from the FCC to a network was read into the record and you commented that the letter asked for "justification" of the act to which the letter referred. I didn't note that the letter in fact requested "justification." Did it?

Mr. HYDE. What would happen, and I do not have the particular case immediately in mind, but the procedure is to send the complaint to the station or network and ask that they give their response.

Mr. KEITH. But you relay the complaint?

Mr. HYDE. That is right.

Mr. KEITH. You relay the complaint and ask for comment. You don't ask for justification as to the content, do you?

Mr. HYDE. No.

Mr. KEITH. That is what Mr. Porter said.

Mr. HYDE. I think the point Mr. Porter was making was that even a letter of inquiry is a sort of sanction and has some impact on the operation of the station.

Mr. KEITH. It sounded like a pro forma letter to me. Was not your letter to the station a routine affair?

Mr. HYDE. Yes. As I would understand it from his reading, the Commission apparently had referred a complaint to the network. Not having received an answer, there was a followup which was a little sharper than perhaps might seem appropriate.

Mr. KEITH. But it didn't ask for justification; it asked for comment.

Mr. HYDE. It asked for their reply to the complaint; that is correct.

Mr. KEITH. So there was no assumption made on your part.

Mr. HYDE. None at all. I pressed the point that there was no ruling following this in which the Commission undertook to substitute its judgment for that of the licensee.

Mr. PORTER. I was reading this from a very interesting piece by Prof. Harry Kalven of the University of Chicago—"Broadcasting, Public Policy, and the First Amendment"—contained in the October 1967 issue of the Journal of Law and Economics.

Mr. KEITH. Were you not trying to convey the thought to the panel that the FCC was asking for justification?

Mr. PORTER. No. Professor Kalven leaves us in suspense. He doesn't say how it came out. I am sure the FCC and CBS had no problems.

Mr. KEITH. Was the word "justification" in the correspondence?

Mr. PORTER. We don't have the original request.

Mr. KEITH. So the word "justification" was one that you chose to apply, not one that was contained in the correspondence?

Mr. PORTER. "Justification" was Professor Kalven's word, to furnish a justification for the views of Walter Lippmann.

Mr. KEITH. Do you infer that the letter, in effect, was asking for justification?

Mr. PORTER. I assume that it must have been.

Mr. KEITH. The letter is not contained there?

Mr. PORTER. The original inquiry is not contained. This is the followup letter.

Mr. KEITH. But the followup letter does not ask for justification?

Mr. PORTER. No; but I think they at least ask for an explanation.

Mr. KEITH. I am trying to find out if there is harassment or assumption of guilt. By saying "justification," you would imply one of those.

Mr. PORTER. I doubt that this letter caused Frank Stanton any sleepless nights.

Mr. GOLDIN. I want to make one comment on the article Mr. Porter referred to. This is an article which appeared in the Journal of Law and Economics for October 1967. The first footnote says:

> This essay is largely based on a memorandum written a year ago for the Columbia Broadcasting System, a circumstance which accounts for certain emphasis of style and content.

Usually a professor of law is writing for a law journal and is addressing his peers in the field and doesn't usually write a memorandum for a company in terms of presenting the whole story.

Mr. PORTER. Are you suggesting by this that Professor Kalven is not a man of principle?

Mr. GOLDIN. I am sure he is a man of principle. I am merely calling the attention of the committee to the particular circumstances.

Mr. KEITH. He was revealing the special interest nature.

Mr. PORTER. He had been consulted by CBS and he makes full disclosure of that fact. While we are on that subject, I might add that in the Seventh Circuit, I have in my hand a brief on behalf of CBS attacking the Fairness Doctrine as beyond the Commission's jurisdiction, and of counsel is included Professor Herbert Wexler, the distinguished professor at Columbia, and Mr. Newton M. Minow, now back in private practice.

Dean BARROW. Mr. Corporon, vice president of news, Metromedia TV.

Mr. CORPORON. I think there is a better answer for Congressman Rogers on this business of what guarantee is there that there will be fairness without a strict enforcement of the Fairness Doctrine.

I think it is this: I think the broadcasters do have a constituency, and I think we were getting close to that when the gentleman was discussing it being in the marketplace. I think it has to be expanded further.

I think the audience of the broadcaster constitutes the constituency. You can ask the question, is this an absolute guarantee that there will be fairness and all issues elucidated fairly and fully?

No; there are no guarantees, just as there are no guarantees that Congressmen once sent to Washington are going to do a good job, either. Most of them do, I think.

But if they don't do a good job, their constituency takes care of it.

I realize the parallel is not precise, but I think there is a connection here.

Mr. ADAMS. Would you expand that a little more as to how the constituency does in any way at that point control a broadcaster on a controversial issue to see that both sides are shown? A Congressman can be put out. Are you suggesting that we ought to lift the licenses

every couple of years and put somebody else in based upon some type of survey of the audience?

Mr. CORPORON. I am not suggesting that at all. I think that is an FCC function. I am suggesting that the constituency which I speak of, which in this case are the viewers, the audience, is the best judge, a better judge, than the FCC.

I submit to you that the viewers of a TV station and the listeners of a radio station do exert considerable pressure upon a broadcaster in any given market.

I think if a broadcaster month after month is unfair or incomplete, I think if he becomes very irresponsible, I think the public is smart enough to recognize this. I think the American public, by and large, and there are exceptions, has the intelligence to make a decision whether or not a particular station is performing fairly.

Mr. ADAMS. Suppose they never hear the other side during this period of time, and he is the only one on, which is what we have been discussing, several of us here, that he is the one who was allocated this channel, and he is unfair? How do they make a judgment on this?

The second thing is what do they do about it, unless they have the FCC pull the license?

Mr. CORPORON. It is a good question, but I think the answer is to look at the various markets. You simply do not find, except in rare instances in small cities, a monopoly situation with the broadcaster. You have the force, the counterplay, of one broadcaster versus another.

The subject was brought up of newspaper ownership of broadcasting stations. This is true. This occurs in many markets.

On the other hand, in a market where a newspaper owns a TV station, there is another TV station in most instances. There are one-market stations, I am aware, but there are very few of them.

So, taken as a whole, you have one station playing off against the other. If you find one station becoming so irresponsible that under the Fairness Doctrine or a strict interpretation of fairness that the FCC would move in and would strike down——

Mr. ADAMS. Not strike down, just put on the other side.

Mr. CORPORON. Senator, OK. I think you would find that the opposing broadcaster in that market would probably move to exploit the situation. I have seen situations where newspapers, radio stations, TV stations, have lost their balance and have gone overboard in support of an issue or a candidate. I have seen this remedied because other stations would move in and make an effort to be fair, not to be extreme on the other side but to be fair, I think the public recognizes this.

Mr. ADAMS. Then your viewpoint could lead to a situation that if a station is popular and puts on the viewpoint that the majority of its viewers wants to see, and if we would carry this over into the news area it could be awful. I think many of the television stations have a problem with now of copying another so if everybody likes westerns then everybody puts on westerns; if everybody likes spies they put on spies; if everybody likes sophisticated spies, they put on sophisticated spies.

So in the news area, you would get conformity by saying it is popular to be on this side of this issue and our listenership approves of this stand and, therefore, we will go this way.

That, then, becomes station news and editorial policy.

Mr. CORPORON. But I don't think it operates this way in practice.

Mr. ADAMS. Don't you think it operates that way in practice in television media now in terms of areas of programing?

Mr. CORPORON. I think that the broadcaster in one market finds a popular formula, whether it be in news or in the entertainment field. I think if another station comes in and wants to compete, he sees that station A has got the jump on him, with enormous ratings, very successful, and he may try to imitate.

But, it is just as likely he may try to find another area of programing or another style of news presentation and present a different point of view. I think if you go market to market you will find this does exist.

Mr. ADAMS. Don't you think the market is more imitative than innovative?

Mr. CORPORON. There is a great deal of imitation; yes. There is not enough innovation. I am quick to concede that. Of course, there is always room for more. But I still contend the basic point that the constituency, because you do have multiple ownership in most markets, does act as an absolute guarantee, that it acts as a great encouragement to fairness, and I think it works.

In conclusion, I think the listeners are more likely or just as likely to arrive at a correct conclusion as to whether it is truly in the public interest than the FCC Commissioners, not because the Commissioners are inferior people, but because the listeners are in that given audience, they are in the given community. I think they can best decide.

Mr. SPRINGER. Mr. Chairman.

Dean BARROW. Congressman Springer.

Mr. SPRINGER. We have just gone through educational TV. Personally, I come back again to the two amendments, which I was responsible for getting in there, that you get guaranteed nonpartisanship, not something that somebody is going to give you who owns a local station, but something that the FCC would, in their power, guarantee to every single citizen.

This comes about not by virtue of a newspaper, but by virtue of your having been given a grant to the public airways. This isn't something someone is supposed to give me. If I have a run-in with Brock Adams, then do I have to go to another station to say, "Will you hear my side of the story?"

What I have said here is that you are guaranteed this right and all you have to do is ask for it and you can get it. If you take a poll of this committee, I don't think you would find a single one—if you could find one, I would like to know him—on this committee who would be in favor of abandoning this to the ownership of a TV station to make that decision.

Somehow or other, if this is the proposal that is being made here by industry generally, I think it certainly wouldn't strike home with the members of this committee.

Personally, I can't understand what is unfair about making the public airways available to a citizen who has been offended or chal-

lenged for any substantial reason whatever. The point has been made that he shouldn't have the right to reply.

I can't see where there can be anything wrong with that. Why should it be necessary for a citizen to go beg and say, "I think I should have a reply." I will admit in my area the TV stations have been very fair. In fact, they have been out searching for people to please put up the other side. So, I don't think that is the problem involved, but I can think of many instances wherein the stations might not give it to the person.

This, it seems to me, is a right to which he is really entitled to under this act. I think the Commission under all the chairmen, has been pretty fair about this.

They have been rather strict, and in fact, in some instances, a little overstrict, as to whether a person ought to be able to reply. But at least it has been some degree of fairness.

Can you find anything wrong with that?

Mr. CORPORON. I think that——

Mr. SPRINGER. You are a good company. You operated in my area until recently, in Decatur, Ill. I think you did a good job there.

I can't see, philosophically, putting aside the legal problems, that this is unfair.

Mr. CORPORON. I just think that in a free democratic society, this type of regulation, particularly where it relates to the news media, could be a dangerous procedure.

Mr. SPRINGER. Does this keep you from expressing youself under, we will say, any of the amendments of the Constitution? You have the same right to express yourself. But aren't you guaranteeing someone you have discussed, let's say, which would fall within the rule of the Commission, the same right to answer? I think this is the greatest guarantee for free discussion there is, to be sure that the other other side is heard.

Mr. CORPORAN. I will draw a parallel with Congress. If you set up a Federal or congressional commission where Congress would act as the reviewer, it would be a ridiculous situation. You answer to your constituents. But, on the other hand, if a constituent comes to you and says he wants a bill put through to stop the shearing of sheep you would laugh him out of your office.

He has no right to ask you to present this point of view before Congress.

Mr. SPRINGER. I don't see any analogy between the two. I don't see the analogy between what you are talking about as a Member of the Congress and the right to be heard over public airways and to reply with what was said.

Dean BARROW. Mr Alexander has a comment to your point, Congressman.

Mr. ALEXANDER. I would like to say that there is an orderly procedure by which, if a Congressman is not fulfilling his responsibility to his constituency, either his party may not renominate him, or, in the general election, there is an orderly procedure by which he can be removed from office, and the election is administered by Government.

What you are arguing, it seems to me, is that there should be no orderly procedure through the FCC or through equal opportunity or Fairness Doctrines by which a broadcaster can be chastised. You are

talking about the free play of the market in the long run. But in the long run, we are all dead.

Mr. CORPORON. But there is a very orderly procedure for taking care of the bad broadcaster in the capitalistic system. That is, he will go broke and be forced to sell. So, there is a remedy here. A bad broadcaster will not survive.

Mr. ALEXANDER. But the audience is not organized in an appropriate way to be able to put sufficient force on the broadcaster to comply with the complaint.

As it is now, if the audience is unhappy, it can make a complaint to the FCC, and the FCC can look into it. In that regard, I just had one question I wanted to ask the Chairman of FCC.

Does the FCC follow through to see that there is compliance, or does it merely send the complaint and suggest that the broadcaster make some remedy?

Dean BARROW. Chairman Hyde.

Mr. HYDE. Yes; we do follow through. In the great majority of cases the complaint is satisfied and no further ruling is required by the Commission. My answer to your question is that there is a follow through.

The letter that was read awhile ago indicates that the Commission undertook to get the matter resolved even when the licensee was being a little tardy in answering the correspondence.

Dean BARROW. On the point under discussion, I think that when the public interest standard was included in the Federal Communications Act, the Congress was recognizing that 200 million people can't, practically, handle matters as between themselves and the broadcasters to an ultimate end which gets the correct societal values. So, the Congress said: "We will establish the FCC as the representative of the people and it will provide, through rulemaking and adjudication, only procedures through which the people can gain expression and an achievement of those societal values which a free society must have if it is to be meaningful and different from other types of societies in the world."

I think the citizens are doing through the Commission what Mr. Corporon suggests that people should do, but in the only practical way in which it can be done. We do have to live in a practical world.

Mr. Wasilewski?

Mr. WASILEWSKI. I would like to go back to the point that the chairman just mentioned and what Mr. Keith was talking about earlier, relative to the initial letter sent by the Commission with the complaints to the licensee.

There was much discussion as to whether or not justification was expected. I can assure you that most broadcasters that receive a complaint feel that justification is expected. They just don't send a letter back and say "How about that?" They realize that there is a justification expected.

As expressed with regard to a Houston, Tex., station, which was an educational station, the Commission received a complaint from the John Birch Society relative to a program put on by the educational television station in Houston. The director of the station responded to the Commission and indicated he didn't think the John Birch Society was entitled to time to respond.

The Commission disagreed, and in their last paragraph, though I think the whole letter would be appropriate for the record, said:

With the foregoing as general guidance, the matter of amount of time and selection of program for presentation of reply is left to the good faith and reasonable judgment of the licensee. The response should be presented. You are requested to notify this Commission as to the steps taken to achieve compliance with this ruling.

There is the followup and there was this request for justification. I just bring this up to clarify the record and make it a little more complete.

Dean BARROW. Dr. Goldin.

Mr. GOLDIN. I think there is one area of this discussion where there hasn't been too much concern. We have talked about the individual broadcaster, but as everybody knows, the broadcasting industry operates both in terms of an individual market and also on a nationwide basis. I think one of the most significant aspects is the nationwide operation, as well as the local operation.

It is a fact that three networks have an opportunity to reach all of the homes of the country, particularly between the hours of 7:30 and 11.

In fact, they do very well in reaching all those homes. So that at any one time there may be as many as 20 or 30 million homes watching a program from one source. Networks have been exemplary, I think, in the fairness area.

I don't think there has ever been a complaint about that. The Commission has never chastised a network in terms of an error in fairness, it has never found one guilty. But from a structural standpoint there is an enormous degree of power which resides in the network organization.

I am aware, of course, that in order for that program to get on the air, each of the individual affiliates in the 200 markets has to carry the program, or some large number of them.

However, as a matter of fact, when we go into the real world, by and large, most of the affiliates carry most of the network programs. The network organization, itself, has owned and operated stations in five of the larger markets of the country.

What I am saying is that there is a tremendous potential danger. Fortunately, that danger has not been actualized. What I am saying is I cannot visualize a network structure which doesn't have on the other side of it a Fairness Doctrine, Mr. Chairman, not because they have done any evil, but because I think structurally there should be this counterweight.

Dean BARROW. Mr. Robinson.

Mr. ROBINSON. On this market structure idea, it is a bit curious to me that the Commission seems to take the position that there is in broadcasting an inherent monopoly—and at the same time there is talk about the concentration of ownership of newspapers and radio or television stations in the same city—yet the Commission's policies dealing with concentration and monopoly have been, I think, a total failure. The fact is they just recently abandoned their top 50 rule-making proposal which would have presumably directed itself to one aspect of what Dr. Goldin has mentioned, this idea of concentration.

Nor have they rigorously enforced any separation between newspaper and broadcast ownership in spite of their statements, often repeated, that this is an adverse factor in comparative hearings.

In point of fact, the FCC has allowed this concentration to take place, and I don't notice any discernible trend toward decreasing the amount of concentration today. It seems to me a lot more could be done with diversifying the market structure than has been done.

Instead, reliance has been placed upon the more direct form of control by the Fairness Doctrine than upon attempting to shape and structure a market which would have built-in assurance of diversity and fairness.

The CHAIRMAN. Dean Barrow?

Dean BARROW. Chairman Staggers.

The CHAIRMAN. Mr. Robinson, would you suggest legislation about this multiple ownership, about this joining of newspapers and TV?

Mr. ROBINSON. I am not sure I would make newspaper interests an absolute disqualification. In any event I am not sure that the tendency has not gone almost beyond repair at this point. I would suggest that either by resolution, or by perhaps legislation, there should be a very substantial and very meaningful adverse factor on the diversification of mass communications media criterion generally.

That would include not only broadcast-newspaper ownership, but it would include joint ownership of television stations, including perhaps an increased tightening of the multiple-ownership rules that now exist, and perhaps a reinstatement of the top 50 rule-making proceeding which was recently terminated, to control the degree of concentration in the top 50 markets.

The CHAIRMAN. Would you, Professor Robinson, give this committee the benefit of your suggestions in writing along this line?

Mr. ROBINSON. I would be happy to do so. I really haven't crystalized any particular proposal other than on one proposal, which would be to reinstate the rule-making proceeding on the top 50 markets.

Dean BARROW. Dr. Goldin.

Mr. GOLDIN. I am happy to take this occasion to state I am glad to associate myself with him.

Dean BARROW. Are you associating yourself with his total position? I think you might want to clarify that.

Mr. GOLDIN. No; but enough so that I can say I am basically in agreement with Mr. Robinson.

Mr. PORTER. I would like to ask Mr. Goldin a question.

In the event there was no limitation of the spectrum space, and any legally, technically, and financially qualified applicant could find a place, through CATV, satellite, multiplexing, all the technology that is around the corner, would you still feel there was a justification and a necessity for some kind of surveillance by an instrumentality of government?

Mr. GOLDIN. I think then you get close to the idea that every man can publish his own pamphlet concept. If you get to that point, then I will reconsider my position.

Mr. PORTER. I have always claimed my theoretical right to compete with the New York Times though I have never found it too practical.

Mr. ADAMS. I don't want to get too legalistic about the first amendment problem that is involved. I would ask you gentlemen who are defending this position if they would comment on this of anyone wants to.

As I view it, the Fairness Doctrine, section 315, and the editorial policy which the FCC has established, all contain no prohibition of any statement on any subject by any broadcaster at any time.

I would like you to address yourself first to that. The second part of it as I understand is all of these doctrines, all they require, legally, practically, or in any other way, is that there be a reply.

In other words, that somebody else gets to talk, too. It then appears to me that the objections to this are not legal but are practical, that it is impractical to put somebody else on, it is expensive to put somebody else on.

Then you have to build an argument of some type of inhibition only, and this inhibition comes only out of, I understand, the marketplace. There is nothing legal on it, unless you are going to build a marketplace argument.

Will one of you gentlemen comment on it?

Dean BARROW. Mr. Wasilewski.

Mr. WASILEWSKI. In response to your first question, my understanding would be the same as yours; namely, that there is no prohibition against that which you would like to talk about, except with regard to obscenity, lottery, and other specific areas of prohibition, but nothing in the Fairness Doctrine precludes areas of discussion.

I would say that our disagreement, if it would be a disagreement, goes to the fact that I do not believe there has been a demonstration of the fact that there is a serious and imminent danger that the public would not receive full, wide debate, information, and controversy absent the Fairness Doctrine.

In other words, my point is that we have the cart before the horse. If in truth there were a serious and imminent danger, the danger that the public would not be receiving overall fairness in the presentation of issues from all media, then I could see governmental justification for the Fairness Doctrine.

I think we have another disagreement; namely, I believe that the Fairness Doctrine does inhibit wide-open debate at the present time because, in my judgment, it results in self-censorship by a licensee.

By that I mean that licensees refrain, because of these burdens, be they administrative, economic, or otherwise from engaging in certain controversial areas of discussion.

So my line of reasoning goes thusly: One, the Fairness Doctrine is inhibitory and because it is inhibitory it causes self-censorship as a result of Government action, and therefore, it should not be allowed, absent a clear and imminent danger of the lack of various viewpoints being expressed.

Dean BARROW. Then your point is that it is not constitutionally or legally prohibited, but maybe we are using bad judgment in establishing such a policy?

Mr. WASILEWSKI. No, sir. I would say we are using bad judgment in establishing the policy as well as creating inhibitions which, in effect, are abridgments of free speech.

Dean BARROW. I think Professor Jaffe also has a comment on your question.

Mr. JAFFE. I wouldn't give a judgment as to whether it is constitutional or not, but I think the form of your argument is not sufficient.

The Supreme Court seemed to go beyond holding that the protection of free speech is limited only to restraints on free speech.

For example, in the so-called *Grosjean* case, there was a tax on a newspaper in New Orleans which, of course, did not in any way inhibit statements by the newspaper, which was held to be a violation of the right of free speech on the ground that it was a burden, or it might inhibit, or might tend to inhibit.

So the Supreme Court has gone much beyond protection, under the first amendment, against denying you the right to say certain things. The Court, as I understand it, has said that there may be inhibitions on the right to free speech, if there are adequate reasons for these inhibitions, if there is a sufficient justification for the inhibition.

Then, they will uphold it. So the form that the argument will take in the U.S. Supreme Court will be granted that there may be some inhibitory characteristics in these regulations, is there a sufficient justification for these inhibitions.

Dean BARROW. Mr. Porter would like to make a brief comment.

Mr. PORTER. I would like to respond to Congressman Adams' question.

It may have been brought out here, but in France and Germany there are statutes that require the press to afford the right of reply in the event a person is subject to a personal attack.

Reading from one of our distinguished historians in this field—

> The radio is obviously unsuited to the machinery for reply provided by French and German statutes. It might be entirely natural for a commentator to mention two or three prominent persons, Mr. Ickes, Mr. Pauly, and Mr. Truman, in a single broadcast.
>
> Those three men possess the legal right to reply, would take over practically all the time of this commentator for the next broadcast. The whole character of the news comments might be easily changed by such a requirement.

Consequently, French and German courts have held that their statutes are not to apply to radio communications.

Dean BARROW. Dr. Goldin.

Mr. GOLDIN. One last comment in terms of the practicalities of how the system works. The Commission's present posture, as I understand it, on fairness is that the licensee has an obligation affirmatively to encourage the presentation of conflicting views. That doesn't mean that the broadcaster in fact, when he takes a position on a particular point of view, goes out and seeks a spokesman for the other side.

Some do. But if he says on the air that time will be available for the presentation of contrary views, in most cases that is where the matter ends. If someone doesn't come on, the Commission doesn't audit the station to see whether, in fact, somebody did come on or not.

Mr. PORTER. Is that true?

Mr. GOLDIN. Yes.

The CHAIRMAN. The time is now 12:15.

I am sorry that I can't be with you this afternoon as we have a bill on the floor, and I must be at the White House at 1:30.

This has been very interesting. I think it has been very helpful. I am going to recommend to every Member of Congress that they read this transcript. We have some of the most expert discussion on this that I have ever heard.

For me, as I said yesterday, the direction we should go in this field is one of the most important questions that will come before this Congress and maybe many Congresses.

We will recess until 1:30 this afternoon.

(Whereupon, at 12:15 p.m. the special subcommittee recessed to reconvene at 1:30 p.m. the same day.)

AFTER RECESS

(The special subcommittee reconvened at 1:30 p.m., Hon. Paul G. Rogers presiding.)

Mr. ROGERS. The subcommittee will come to order, please.

Would you proceed, Dean Barrow?

Dean BARROW. Thank you, Chairman Rogers.

The papers for this afternoon, as mentioned this morning, are on the same subject matter which we had this morning.

The first paper is to be presented by Mr. Jay Crouse, who is president of the RTNDA.

PAPER NO. 7—JAY CROUSE: THE FAIRNESS DOCTRINE: ITS USE AND IMPLICATION

Mr. CROUSE. I am Jay Crouse, director of news for WHAS, Inc., Louisville, Ky. I am president of the Radio Television News Directors Association, an organization of more than 1,000 members throughout the United States and Canada.

Our vice president and president-elect is Eddie Barker, director of news for KRLD in Dallas, Tex., and our executive secretary is Rob Downey, WKAR, Michigan State University, East Lansing, Mich.

The story is told of the little old New England grandmother who had a good word even for the devil, saying, "At least, he's industrious." In that spirit let me express the hope that some good may come out of the debate over what's called the Fairness Doctrine.

It's certainly worth the reams of copy and hours of debate if we finally arrive at the point where broadcast journalism is granted its majority.

The Fairness Doctrine seeks to assure that controversial issues receive an airing consistent with the principles of a free society. I maintain that the Fairness Doctrine stifles discussion of controversial issues over the airwaves owned by the people.

As broadcasters we are licensed in order that we may serve the public interest, convenience, and necessity. The Fairness Doctrine precludes effective service of the interest and necessity of the public.

Nowhere in the Federal Communications Act is the Federal Communications Commission granted the atuhority or the power to determine standards of fairness for its licensees. Moreover, the FCC cannot substitute its own definition of journalistic freedom as a standard to replace the first amendment.

As you may know, RTNDA has a case pending in the U.S. Court of Appeals, Seventh Circuit, against the Fairness Doctrine. We are seeking to have reviewed and set aside a final order of the FCC adopted July 5, 1967.

The order was issued by the Commission at the conclusion of a rule-making proceeding and adopted regulations imposing specified obligations upon radio and television licensees in connection with their programing on controversial issues.

The Commission's order and regulations, we submit, violate the first amendment to the U.S. Constitution and also exceed the authority granted to the Commission by Congress under the Communications Act of 1934.

The proponents of the Fairness Doctrine often fall back on the argument that broadcasters enjoy a licensed monopoly. They are granted the right to operate communications channels which use publicly owned avenues.

However, the granting of a broadcast license does not grant the isuing agency the authority to determine what can and cannot be presented to the public so long as a clear and present danger issue is not involved.

The U.S. Supreme Court has held that the Government may not abridge or limit the freedom of expression by granting a privilege or benefit.

The Supreme Court has postponed oral argument in the *Red Lion Broadcasting Co.* v. *United States* case pending the seventh circuit decision in the case of the *Raidio Television News Directors Association et al.* v. *United States*.

Our counsel views that order as constituting a major procedural victory for RTNDA and a further sign of the Supreme Court's serious concern about this issue.

Our counsel feels further that RTNDA, together with other petitioners in the pending Fairness Doctrine appeal in the seventh circuit, will apparently be given the opportunity to argue fully the constitutionality of the new FCC rules on personal attacks and political editorials—not only in the court of appeals but also in the Supreme Court—before the latter Court rules on a similar question presented in the *Red Lion* case.

It is sometimes argued that broadcasters occupy a special status. This argument holds that they operate stations which are scarce. The implied throught is that a special burden should be placed on broadcasters because of the unique franchise granted them.

As far as I know, no responsible official has seriously suggested that a similar restraint be placed on the activities of newspaper publishers. Yet a check of the record shows that daily newspapers are becoming the scarce commodity while broadcasting outlets are becomming more plentiful.

I do not believe it can be disputed that we are still on the threshold of the importance of broadcast journalism. Further, it cannot be disputed that our future course of development could be drastically affected unless broadcast news finally establishes itself on a par with print media as far as journalistic freedoms are concerned.

The Founding Fathers could not have foreseen the development of broadcast journalism as we know it today when they drafted the first amendment. The line of reasoning that applies the first amendment only to print media and excludes broadcast journalism loses merit in light of today's communication technology.

I said earlier we are still on the threshold of the importance of broadcast journalism. That importance is understood rather heavily when we are told that the majority of the American public today says it receives the bulk of its news from television. There is, of course, a corollary to this importance, and that is responsibility. More on that responsibility in a moment.

If the first amendment is to apply to the print media alone, is not the American public then being deprived of a vital flow of information?

Ninety-four percent of the people watching television have a choice of at least three stations to view. But 94 percent of the daily newspapers in America have no competition.

The average newspaper reader has no choice. There are more radio and television stations on the air today than there are daily newspapers. And these broadcast outlets are increasingly devoting more time to news and information programing.

It was back in 1965 when Fred Friendly, then president of CBS News, predicted before an RTNDA gathering in St. Petersburg, Fla., that by 1970, more than 50 percent of prime time television programing would be devoted to news or information.

More hours per week will be devoted to general news programing in 1968 than there were last year. There was more news programing in 1967 than in 1966, and the trend continues upward.

The half-hour news format inaugurated by CBS–TV in September of 1963 was viewed with skepticism by many at the outset. Now there is serious discussion with the industry about 30 minutes not being long enough and new methods are being sought to increase the flow of broadcast news.

We all know that length alone is not the answer. Substance is the key. And broadcast news is producing substantive news programing to such a degree that additional program time is a necessity.

Our role in broadcast journalism is the same as printed news—to inform the public. This is journalism and trained journalists must do the job. Basically, the only difference between the newspaper reporter and the broadcast newsman is equipment.

Both deal in facts. Both weave these facts into a report, or story. Both communicate this finished product, the story, to the general public.

I believe the broadcast newsman has a distinct advantage over our newspaper colleagues. Our facts are fleshed out with the sight and sound of the story, which breathes life into our reports. The television viewer not only hears what we are talking about, he sees the story developing as we sketch it for him.

This type of reporting really is not so excitingly new that it can't be easily defined. It is basic communication. And it demands that the practitioners be good reporters first. They must also be responsible.

I am confident, however, that the mere existence of the Fairness Doctrine carries the implication that, without it, broadcasters would not be fair or responsible. The record has proven otherwise.

The American public have grown to know and trust what they see and hear via broadcast news. They have come to expect excellence, and I believe the industry has grown right along with that trust and is providing the viewing public with a high quality—and responsible—product.

In the Commission's own words, the Fairness Doctrine "provides that if broadcast licensees permit their facilities to be used for the discussion of a controversial issue of public importance, they must afford a reasonable opportunity for the presentation of conflicting views."

Further, although no statute or Commission rule or regulation requires licensees to broadcast programs concerning controversial public issues, the Commission has plainly indicated in policy statements that carriage of an unspecified number of such programs is necesary to operate in the "public interest."

FCC Counsel Henry Geller has said, "A station's record in this area will be taken into consideration at license renewal time."

Certain critics of broadcast news have been complaining of late that the news documentaries on radio and television have lost their punch, that they amount to little more than a compilation of opposing opinions.

Isn't it just possible that the existence of the Fairness Doctrine is the root cause of this trend? The Fairness Doctrine must of necessity inhibit, rather than encourage stations to engage in meaningful news programing on vital matters of controversy in their communities.

Then, too, how do you even define the concept of controversial issues? Is it always plainly obvious what constitutes a controversial issue? What is a definition? One definition might be "anything that I disagree with."

If we grant the area of controversial issues to be a fertile ground for governmental intrusion, it seems to me then that the difficulty of such a definition is bound to be a source of continuing trouble.

How does the Fairness Doctrine inhibit? I submit, by its very existence. It's there and the FCC has insured that broadcasters are aware. A simple complaint to the FCC can touch off an incredible amount of unnecessary work at the station level.

The FCC inquires of the station: "What have you done? Have you been fair and responsible in this instance?" The station must then document what actually was done on the particular item in question and submit its findings to the FCC.

All of this can tie up the workday or workdays of one or more employees depending on the complexity of the issue. And, of course, station attorneys must be consulted. And, sometimes, consulted again. It takes time. As my boss has said, once attorneys become involved, life loses all simplicity.

Mr. ROGERS. May I say the lawyers might like to be heard on that with equal time.

Mr. PORTER. I will take either side.

Mr. CROUSE. At any rate, the Commission either accepts the station's position or orders compliance with the Fairness Doctrine. I wonder if any figures or percentages are available on the number of times the Commission has found a station in question to have acted fairly and responsibly?

It has been my experience and that of several of my colleagues that in the great majority of cases, the FCC concludes that the stations are operating in the public interest.

However, that's small consolation for the station operator who desires to provide his community with informative programing on con-

troversial matters. For more than 2 years we have had an educational crisis in my community. Many private citizens, as well as ad hoc committees, and formal groups have studied the problem.

There have been proposed solutions and there have been counter-proposals and amended proposals. A blue ribbon committee of civic leaders and private citizens (the Charter Committee) was formed to attack the problem with the aid of a reputable outside survey.

The boards of education of both the city and county reached prior agreement and announced publicly that they would accept and be bound by the Charter Committee's recommendations.

The Charter Committee recommended merger of the two school districts. Not simple merger, but a rather complicated so-called umbrella plan which amounted to a unique approach to the growing problem of elementary and secondary public education.

We covered these developments as well as we were able within the confines of our regular news programs. But various groups began springing up in opposition to the Charter Committee report, thus effectively blocking any of our attempts at planning any additional special programing to provide the community with information vital to their understanding of the controversy.

Or how about this one? The chamber of commerce complained about our running Federal water pollution control spots, contending they didn't apply to this area. Now I believe we're doing and have done a lot in my community to control water pollution. But the fact that Secretary of the Interior Stewart Udall and Kentucky Governor Louie Nunn discussed this problem of Federal standards, last month, indicates there's more to be accomplished than the chamber would admit.

We had a controversy last spring about open housing in my community. It led to nightly street demonstrations for a time, and even caused cancellation of some of the events normally held in conjunction with the Kentucky Derby. We were vitally concerned that our community have as much information about this crucial issue as possible. But the emotion of the issue, coupled with the number of groups with varying viewpoints that sprang up to participate just militated against opening the doors of our studios to the parade of groups and individuals who would be demanding a "fair" hearing under the fairness doctrine.

Once a broadcaster has decided to program in the area covered by the fairness doctrine, he has the immediate obligation to present all sides of the issue in question.

But who decides what are the responsible sides of a given issue? Is it the broadcaster? The FCC? The general public? Is it really possible for an agency with a liberal outlook to define what is responsible in the same context as a conservative would?

Then, assuming the broadcaster has embarked on the hazardous course of programing on a controversial issue, and assuming further he has afforded all sides an opportunity to be heard, who determines whether he has, in fact, acted fairly?

Editorials have been treated separately from controversial issues, and controversy has been classified as political and nonpolitical so it is necessary to refer continually to those classifications. The Congress itself apparently has distinguished between political and nonpolitical

controversy and has dealt with the former in an amendment to the Communications Act.

However, the lowly, nonpolitical controversial issue is controlled only by administrative rule.

For the past several years, the Commission has been involved conspicuously with problems of fairness. A Federal Communications Commission order issued January 22, 1964, which granted license applications to educational and FM stations controlled by Pacifica Foundation received unusual notice in the press because of its asserted encouragement of provocative broadcasting.

It was the subject of a page 1 story by Anthony Lewis in the New York Times and a feature story by the Washington Post television critic, Lawrence Laurent.

Certain listeners had complained about five specific programs presented by Pacifica. We'll devote our attention here to one of them, "Live and Let Live," a program in which eight homosexuals discussed their personal problems and views.

That panel on the life and views of homosexuals was highly controversial. In a much quoted paragraph the Commission stated:

> Such provocative programing as here involved may offend some listeners. But this does not mean that those offended have the right through the Commission's licensing power, to rule such programing off the airwaves. Were this the case, only the wholly inoffensive, the bland, could gain access to the radio microphone or TV camera. No such drastic curtailment can be countenanced under the Constitution, the Communications Act, or the Commission's policy.

In effect the Commission asserted that it would not impose any sanction upon a licensee for any individual program presentation simply because it was provocative or offensive to some.

The Commission recognized that to discourage the provocative was to encourage only the bland and the inoffensive. Yet at least three statements in the order reflect an approach to free speech which is suspect and may be self-defeating.

The Commission stated in the same paragraph quoted above:

> Our function, we stress, is not to pass on the merits of the program—to commend or to frown. Rather, it is the very limited one of assaying at the time of renewal, whether the licensee's programing, on an overall basis, has been in the public interest and, in the context of this issue, whether he has made programing judgments reasonably related to the public interest.

The standard of "public interest" leaves an agency with a discretion without which the administrative process would be in many cases unworkable. But it is precisely this implication of broad discretion which is inconsistent with a standard for determining the propriety of free expression.

The Supreme Court consistently has struck down attempted statutory limitations on speech because the standards were too vague and lacked specification. The Commission itself used the following language in the *Pacifica* case:

> We have tried to stress here—an underlying policy—that the licensee's judgment in this freedom of speech area is entitled to very great weight and that the Commission, under the public interest standard, will take action against the licensee at the time of renewal only where the facts of the particular case, established in a hearing record, flagrantly call for such action.

It would have been simplier for the Commission to have stated that licensees have a constitutionally granted right of freedom of speech, which may be limited only in circumstances of clear and present danger.

It would seem that in the area of controversy, the Commission has assumed the right to condition the presentation of controversy upon the obligation to be fair. There can be little comfort in an agency decision which condescends to place "great weight" upon a licensee's freedom of speech, when it implies that the exercise of that right might be the basis of license revocation if the Commission felt strongly that the public interest so required.

What does the Fairness Doctrine mean over the long range? My guess would be blandness and mediocrity in news and public affairs programing. There's a journalistic adage that holds if you show the people the light they shall find their own way.

I submit that if you filter and diffuse that light, the chances of tripping are multiplied. This is not to say that abuses may not occur. Some channels may be misused. But I, for one, would prefer to put my trust in the public's ability to judge for themselves what is ax grinding and what is fair comment.

The Fairness Doctrine, in effect, seeks to limit personal attack on the honesty, character, or integrity of individuals. A principle of a free press is that it should serve as the public's watchdog. And I use the phrase "free press" here in its fullest connotation—to include all the media.

Yet personal attack is most definitely discouraged by the Fairness Doctrine.

Perhaps the most potentially dangerous aspect to the whole Fairness Doctrine question is who sits in judgment. On the basis of present evidence it would be the FCC. Though specifically forbidden to censor programing, the FCC, under the Fairness Doctrine, is in a position to serve as the most potent "Monday morning quarterback" the Nation has ever known.

Armed with a vaguely worded regulation, the Commission would assume the authority to determine what is fair and what is not. An individual broadcaster, under these circumstances, would be foolish, or foolhardy, if he did not observe what met the Commission's favor and what drew its wrath.

A form of what might be labeled precensorship has already evolved.

As cited earlier, television is the medium that is depended on most for news. That trend is not apt to be reversed. If we believe in an informed electorate, we must trust its judgment.

But judgment to be sound must be based on knowledge. The Fairness Doctrine is a crippling restraint. To paraphrase a line from T. S. Eliot:

Let us hope that when the World ends * * * it will not be with a disclaimer.

Dean BARROW. Thank you, Mr. Crouse, for your excellent contribution. I think we also ought to thank you for the rapidity with which you read, yet the clarity with which you are received.

A comment on this paper will be made by Paul Porter.

COMMENT ON PAPER NO. 7, BY PAUL PORTER

Mr. PORTER. Thank you.

I am glad to undertake to comment on the paper of a fellow Kentuckian. I remembered the comment some years ago of a really great Kentuckian by the name of Alban Barkley, when on one occasion I asked him in a very hot primary in the State, "Senator, where do you stand?" He said, "Well, I am for everybody some." I suspect that that is the dilemma that we all find ourselves in in considering this very vexatious problem of where protected speech begins and where it ends.

The only thing I can think of to say in criticism of this paper is to attack the techniques of broadcast journalism. I was reminded of a comment of a British comedian I heard in London a few months ago, when he was mimicking an American newscaster. He said, "Good evening, ladies and gentlemen. This is the news. The Soviet Union and the United States are engaged in nuclear warfare. Washington is in flames. More about this and other news in just a moment; but first, a word from Ex-Lax."

I don't think that is typical, however, of the general quality of our newscasts. But what bothers me about the Fairness Doctrine, and always has, is the impreciseness of the standard of what is fair.

I have had some limited experience in attempting to administer a statute that had a similar standard, and I refer to the late and unlamented OPA. I was the last Price Administrator of OPA. The standard in the Emergency Price Control Act was that there should be no price schedule that was not "generally fair and equitable."

You could measure that. You could take raw material costs, manufacturing costs, historic profit margins, and by a process of arithmetic you could come out to where you thought you were reasonably being generally fair and equitable. My recollection is it took a staff of 70,000 people in the agency to assure that we were being generally fair and equitable as Congress had demanded.

The problems we are here considering today are not new. I go back in this a very long way. I was reminiscing with my old friend and colleague, Chairman Hyde, about the time in 1939 when the Commission spelled out criteria for the licensees of short-wave international broadcasting.

The standard they developed as a condition for licensing was that these facilities had to promote international good will, cooperation, and understanding, and reflect the culture of this country.

When that standard was promulgated, there was a hue and cry that came up from the American Civil Liberties Union, from the academicians, and from the broadcasters. I took the position as counsel for one of the licensees—CBS at that time—that it was impossible to determine, in the first place, how to reflect the culture of this country, and that to reflect that culture might negate the earlier mandate in the statute—to promote international good will, cooperation, and understanding.

Then, too, I urged that the Founding Fathers when they wrote our first amendment and our Bill of Rights did not have the vagaries of broadcast transmission in mind. I also noted that broadcast signals could cross national boundaries and that what might promote good will and understanding in one country might do the opposite in

another. In short, you are undertaking to measure something that I do not believe is measurable.

I think fairness is perhaps as vague. So I have about turned the compass on this matter. I think that consideration should be given as to whether or not it is time to scrap the Fairness Doctrine and to rely on the Commission's residual powers of overall licensing responsibility, and the traditional review on renewal.

I certainly would not, under any circumstances, abandon the Brinkley Doctrine. I am referring to Dr. Brinkley, the goat gland specialist, not David, who pedals another kind of nostrum, but is more wholesome, I trust. It seems to me that if a facility is being utilized as a personal organ or is being utilized to promote a specific product, or a specific point of view, the Commission can stop this under its general renewal standards. I don't think I would abandon that general power, although I find myself in a trap if free speech is protected absolutely, and I admit that there is that contradiction which I think Mr. Adams pointed out this morning. I would reserve the general renewal standards. That doesn't cause any trouble.

But what does make me uncomfortable is my friend, Chairman Hyde and his staff, with the automatic inexorable process of forwarding even frivolous complaints, such as the Lippmann example I cited this morning, that makes me a little uncomfortable.

I think that, ultimately, you get down to licensee responsibility and the residual power of the Commission to review performance. So I associate myself with my friend's paper here. I agree that there is, with the Fairness Doctrine technique, some form of psychological prior restraint, and that somehow makes me uneasy.

I suspect, gentlemen, what we are really talking about here is the distinction between broadcast communication and the printed media. I suspect, too, that even those who have the custody of the broadcast media are not aware of its power.

I perceive that that is what we are really concerned about, because this does have such an impact. It is so powerful that Congress is reluctant to give complete freedom of licensees to do with this facility as they please, even though you can abstractly make out a strong first amendment case that that should be the policy.

So, it comes down, I suppose, in the final analysis, to whom do you trust? Do we trust the FCC? Do we trust Frank Stanton? I just use Frank Stanton symbolically.

I am reminded of this chap who said he never trusted anybody over 30, to which the cynic replied, "He trusted nobody over 30, anybody under 30, or anybody 30."

Somewhere, there must be reposed the opportunity for people to make decisions and to make judgments. I assume that with the Commission reserving its overall review on license renewal that is about the best we could do.

But day-to-day surveillance is improper and raises the threat of escalation. Mr. Chairman, I would like to make my position clear on one matter. I filed a brief in the Court of Appeals in the District of Columbia this week on behalf of the cigarette manufacturers on the escalation of the Fairness Doctrine to product advertising. This matter being in the court, I feel some trepidation as to the propriety of discussing it. However, I will file with Mr. Lishman and the committee staff copies of

our brief, and invite my dear friend, Chairman Hyde, to do likewise, with equal time. The court will, of course, grapple with that problem.

To me, a key point is the escalation of the Fairness Doctrine. We have many procedural reservations in our brief, as well as the substantive issues that are involved—for example, Congress preemption in the Cigarette Labeling Act. There was a temptation there for the agency, however well intentioned, to move into the area under the guise of the Fairness Doctrine.

So I think we ought to be very, very careful and scrupulous about entering into the regulatory process in areas which, for the want of a better term, Max Lerner once called the opinion industry.

Outside of that, I want to applaud the paper I have just commented upon.

Dean BARROW. Thank you, Mr. Porter, and thank you both for the substance and the pleasant humor of your remarks.

Chairman Rogers, would you rule on the admission into the record of the brief?

Mr. ROGERS. I understood he is just going to present it to the staff and it will not be made a part of the record.

Mr. PORTER. I would not like it made a part of the record, Mr. Chairman, but just for information.

Mr. HYDE. We would be pleased to submit a copy of our brief for the information of the staff and the committee.

Mr. PORTER. I do not want to put this committee into the position of usurping the power of the judicial branch, because they were very scrupulous last week in respecting the power of Congress.

Mr. ROGERS. It was very welcome.

Dean BARROW. I wonder if the record should show, Mr. Crouse, whether your paper is presented in addition to your personal view as the view of the association of which you are president?

Mr. CROUSE. That is correct, sir.

Dean BARROW. I didn't ask that of Mr. Wasilewski. I don't recall whether his paper made that clear.

Might I ask the same of you, Mr. Wasilewski?

Mr. WASILEWSKI. The paper did not make it clear, and the paper has not been presented to our board of directors, though I am the chief executive officer of the association.

As a result, it will remain the position of our organization until I am let go.

Dean BARROW. I just thought it was well for the record to indicate that because I think it has additional significance.

These papers are now open for discussion.

Mr. VAN DEERLIN. Dean Barrow, I thought it might be interesting to show who was the matchmaker on section No. 7. I wouldn't call it exactly an adversary proceeding. I suppose if anyone on this committee could be said to have a conflict of interest in the area of this discussion, it would be I, inasmuch as I once worked in news broadcasting.

The thrust of the testimony by Mr. Crouse, it seems to me, is that his station really has not been inhibited. I don't see in his testimony, in any of the three principal illustrations that he gave, that those matters went to the FCC. Moreover, I can't believe that, in the open housing controversy, a station like his was really intimidated by the

multiplicity of viewpoints and emotions in the community—and didn't want to get into it too deeply.

The matter of a fair housing is an open and shut issue, which I think could be explored full and fairly, within bounds of the Fairness Doctrine, without resulting in too great an imposition on the station's scheduling.

The Chairman of the FCC told us this morning that the number of cases, other than frivolous cases, amount to not more than about a dozen a year.

I think perhaps the greatest threat to free expression is not against a large, well-equipped, well-lawyered station, such as Mr. Crouse's, but in that greater number of small stations where managment lacks expertise to prepare the material, and to understand the law. Isn't the presence of the Fairness Doctrine, an inhibiting factor on the vast array of small stations, rather than the major stations?

I know in my community there is as much editorializing on the air, as much reporting in depth, and as much really interpretive reporting—special treatment of important subjects—as in any city I know. There is a brisk competition among the stations with this kind of reporting. They haven't had any trouble with the FCC.

Getting back to my own conflict of interest, I have tried to keep an open mind on this because, as a reporter on the air, I always wanted the ultimate in freedom. But I remain unpersuaded, by this presentation, that the Fairness Doctrine does inhibit.

Dean BARROW. Mr. Adams.

Mr. ADAMS. I want to cast a specific question here because I think we are dealing in the spectrum of wanting free speech and yet debating how far does the overlay of Government apply.

I gather you would implement this on a case by case complaint basis rather than on a fixed, rulemaking, administrative procedure basis; is that correct?

Mr. PORTER. I think, Mr. Congressman, this is really a tough question, and that is why we are here. My own view is that the issue is what is a reasonable accommodation between the areas of protected speech and licensee responsibility.

That has always seemed to me to be the issue. There are certain things we can sort out that are not protected—obscenity, however the Supreme Court has recently defined it, profanity, lottery, false and misleading representation, which the Federal Trade Commission, of course, under section 5 is equipped to deal with.

But when it comes to the area of controversy, social, political, ideological discussion, there is where I am unable to measure. Hence, I say it is not susceptible of handling either on a complaint or ad hoc basis, but upon a review of the station's overall performance. I would concede that that is probably a power that, under the vague public interest standard, the Commission my exercise.

Mr. ADAMS. You would use that, I understand, in the Fairness Doctrine in particular.

Now, I want to turn to Mr. Crouse's position. What I understood was that he would expand that concept even to the personal attack area. I think we have different concepts that we may apply to different areas. It is my understanding that in the personal attack section, you say that even the right of reply on a personal attack is inhibitory to

the station and, therefore, you would not have the Government or the FCC require that there be an opportunity to reply to personal attack, is that correct?

Mr. CROUSE. Yes.

Mr. ADAMS. I would like you to help me by telling me why it is that you believe that this is violative of free speech or unduly inhibitory. Maybe you want to shade this into the news broadcasts or the spot news.

But tell me how you are inhibited if you decide in your own judgment you want to attack somebody. The doctrine says you can say anything you want, you can say it about anybody you want, you can say it any time you want to say it. Why is it so bad to simply say that he has a right to reply to whatever you say about him?

Mr. CROUSE. The position is why should an agency of Government have the right to make that determination for you. The mere existence of the Fairness Doctrine implies that broadcasters are not going to be fair without it.

I just don't agree with that position. I think the broadcasters are fair. I think they are operating fairly and I think they are doing an excellent job.

Mr. ADAMS. As I understand the way the system works now, no agency tells you—well, I will put it this way: Would you object, then, to a system that would say, "You don't have to reply or offer the opportunities to reply unless he complains. Then, if he complains, then you have to let him on." Do you object to that?

Mr. CROUSE. You have the situation where if somebody objects to something that you have said in your coverage of the news and they complain to you, you have the direct confrontation. That decision can be made at the local level.

Mr. ADAMS. I didn't understand you. You make an accusation or a statement and he complains. What was it you said then?

Mr. CROUSE. If he complains to the station on the local level. That is where it ought to be worked out.

Mr. ADAMS. If we had a system where if he complained at the local level and you said, "Don't forget it," and he had a right to go to the FCC and say, "I have asked but they won't let me," would you agree with that kind of a system?

Mr. CROUSE. Only if the regulation that the FCC would be operating under would be spelled out in specifics. I think Mr. Porter put his finger on the key when he said the root of the problem is the impreciseness of what is fair.

Mr. ADAMS. You want rules and a complete system as opposed to Mr. Porter who indicated that a case-by-case basis might be a little better. Get down to nuts and bolts on what you are going to do.

Mr. CROUSE. First, what I want is the abolition of the Fairness Doctrine. If you are going to make it an either/or, we can go in that direction.

Mr. ADAMS. And you don't distinguish on personal attacks either. You spread the whole spectrum. Thank you.

Mr. PORTER. I would like to add one thing, if I may, to this dialog, which may have been mentioned when I was not here yesterday. Any aggrieved citizen who is injured because of an unfair personal attack,

either by error or otherwise, obviously has his tort remedy in a suit for defamation, if he cares to exercise it.

Mr. ADAMS. Do you agree after the New York Times case and the other recent cases, referring either to the tort remedy or the libel remedy, that it has been limited in the area of news coverage, to agree that this may not be a remedy at all?

Mr. PORTER. I think that *New York Times* versus *Sullivan* brought out quite clearly the area of protected speech to encourage what I believe they said was challenging, robust discussion, and that that was in the area of fair comment where malice could not be established.

Mr. ADAMS. You have to prove malice, do you not?

Mr. PORTER. I think malice could be imputed. I think that case stands on its own facts, where there was substantial injury to a person who was personally attacked, and was denied the opportunity of reply.

Dean BARROW. Dr. Goldin has a comment on this same point.

Dr. GOLDIN. I didn't understand Mr. Porter the same way as you did, Congresman Adams. You seem to conclude that Mr. Porter was in favor of a case-by-case approach to fairness. He was not. He specifically said that he would not do it on a case-by-case basis, but what he would do is to accumulate these complaints and when the licensee came up for renewal at the end of the 3-year period, the Commission would look at these complaints, and if there were presumably only a small number of complaints the Commission would say, in effect, "We only have a few complaints about this station, and otherwise he seems to be operating fine, so we will renew his license."

Is that my understanding of your position?

Mr. PORTER. I would take the licensee's overall performance during the license period as the test.

Mr. ROGERS. Wouldn't this open the door for the person who was refused the license to build up a great case of complaints against you and force a change in your license?

Mr. PORTER. That, Mr. Rogers, would have to be an issue of fact.

Mr. ROGERS. I agree, but I think it would open the door for that.

Mr. PORTER. If these were unsubstantiated, frivolous, contrived complaints, obviously the Commission's hearing process would resolve that. But, if they were of substance, he should take his risk. I know of no better way to get responsible broadcasting than to require that broadcasters give an account of their stewardship periodically.

Broadcasters I know are perfectly willing to do that.

Mr. ROGERS. I think that was the point of the Fairness Doctrine, in making them account for this if there is a complaint. I just wondered if we all agree that Congress does have the right to license.

Mr. Crouse, would you feel that Congress has the power to delegate this power to the FCC? Do you feel there is a constitutional question there?

Mr. CROUSE. Apparently not.

Mr. ROGERS. You say in your statement it is to serve the public interest, convenience, and necessity. But then you say to do this, you should turn over completely the determination of what the public interest is to the broadcasters, and there should be no forum which people who object to the way he presents views can question him at; is that correct?

Mr. CROUSE. I don't think I put it that way. We are talking about the inhibitory effect of the Fairness Doctrine. Every public issue of controversy involves people. This is where it inhibits, because if somebody goes down the street and says you have impugned my honesty or my integrity, under the present setup he is going to get on, you have to put him on, or you go through a long series of processes to satisfy the regulatory agency.

Mr. ROGERS. This hasn't been the history of it. As I have seen, there are very few complaints, even, that have been processed by the FCC.

Mr. CROUSE. We have been assured throughout this hearing, Mr. Chairman, that the FCC is acting fairly and honestly, and almost kindly. We are looking down the road to, "Is this aways going to be the case?"

Somebody this morning said: "What about the future devils?" This is also a problem.

Mr. ROGERS. It is also a problem to not have a Fairness Doctrine. Then what happens when you don't have the different views presented? Perhaps you would. But you would leave it to the broadcaster's opinion and his determination alone to make the determination of what is in the public interest completely.

Mr. WASILEWSKI. Mr. Chairman.

Dean BARROW. Mr. Wasilewski.

Mr. WASILEWSKI. Pursuing your logic, you presume that there will be unfairness absent the Fairness Doctrine.

Mr. ROGERS. I presume there will be.

Mr. WASILEWSKI. Therefore, we will have the Fairness Doctrine.

Mr. ROGERS. What I am saying is that there may be and there should be some possibilities of a remedy for this existing at all times.

Mr. WASILEWSKI. My point is that there may be. I don't think you should have a law on the books because there may be a potential possibility without any indication for such a factual conclusion.

Mr. ROGERS. We have demonstrated cases of this.

Mr. WASILEWSKI. A few.

Mr. ROGERS. In January, 288.

Mr. WASILEWSKI. Complaints, but those were not indicated as being unfair, as the chairman pointed out.

Mr. ROGERS. Maybe not.

Mr. WASILEWSKI. My point, getting back to Mr. Adams' point, was this: that by accepting a license from the Federal Government, you do not waive constitutional rights that you may have.

Mr. ROGERS. Nor the constitutional rights of the public are not waived, as pointed out by the dean in an opinion by Judge Hand.

Mr. WASILEWSKI. But just as in the New York Times case, which you mentioned, sir, even though there is a false, nonmalicious, defamatory statement, you, as a public official, have no right, under the Supreme Court, New York Times case to recoup damages therefore, correct?

Mr. ADAMS. Correct.

Mr. WASILEWSKI. That is the constitutional application to the newspapers.

Mr. ADAMS. If you are in the public domain as a public official, you take your chances.

Mr. WASILEWSKI. That is correct. That is applied to newspapers as a member of the free press. The Supreme Court has also said that radio and television are members of the free press.

Also, there is a point in constitutional law that by accepting a privilege from the Federal Government you do not waive your constitutional rights. We say the obligation imposed under the Fairness Doctrine to notify a person attacked, for example, or to supply that person with information as to the subject matter of attack, is identically comparable to a requirement that the Supreme Court has struck down, to give time to reply under the New York Times case.

Mr. PORTER. Dean Barrow?

Dean BARROW. Congressman Adams.

Mr. ADAMS. In reply, to go back to exactly the fundamental that we have been discussing since we got into the act a little here, which is that the public has a limited television domain which we have given to a private individual——

Mr. CROUSE. And he does not waive his constitutional rights when you give it to him.

Mr. ADAMS. Wait a minute. Waive his constitutional rights? The other doctrine that you get into, when we come to what Mr. Porter says, is if there isn't any waiver of constitutional rights, then the public, every year, looks at a license and judges it in terms of the private individual, which would mean that the people that you represent, each year, would have a judgment on whether or not they had acted in the public interest and whether or not they would renew his license.

Mr. CROUSE. That is exactly correct, sir. That is the law.

Mr. ADAMS. I don't think that is exactly what the people who presently hold these licenses want to have since this is a guillotine-type operation. The Fairness Doctrine operates as really a protection and a buffer in this area to say: "No, we are not going to come up with a guillotine once a year and say we think you have not presented things right, or you have been too partisan, or you didn't answer his complaints, or you didn't do this right, and, therefore you are out, sell your station and get out of the business."

Instead, on a case-by-case basis, you decide. You decide this case, the next one and so on, whether or not in each case the man has been fair.

Mr. CROUSE. We have both things.

Mr. KEITH. Dean Barrow?

Dean BARROW. Congressman Keith.

Mr. KEITH. Following the logic of this discussion, in the meantime, the fellow who has had the injury done to him has to wait until the license is up for renewal, perhaps 3 years, under the suggestion they are making.

It seems to me we are concerned about that fellow as well as you fellows.

Dean BARROW. It might also be observed that to a person living in a community and among people whose respect he would like to retain, it is disconcerting to go into the grocery store or the gasoline station and hear the people ask, "Did you hear what they were saying about you on station thus and so? It was highly critical of you." This does happen, considerably.

Assume the station does not give notice to the person attacked. Sound is perishable—not permanent, as in the newspaper. Moreover, unless the attack is countered promptly, his image is marred permanently. I think the committee might well consider whether a tort remedy and damages, even if it is available—and we are not in this area of the Sullivan case—is an adequate remedy.

Money really is not equal to character and prestige. Shakespeare had some good words to say about that.

Mr. Porter?

Mr. PORTER. I think what Mr. Crouse and the rest of us have been talking about here is really, does the Fairness Doctrine operate as a deterrent to constitutionally protected speech. That is the issue, as I see it.

Mr. ROGERS. Do you feel by simply having another expression of a viewpoint that it is a limitation or is it an expansion?

Mr. PORTER. It could be a deterrent, Mr. Rogers. The reason I say that, and I have been exposed to this in analyzing the briefs that are now pending in litigation, if a broadcaster or commentator, a person like Eric Sevareid, for example, if he knows that his 2-minute commentary is going to generate a number of applications for rights to reply, no matter how it is construed, from a personal attack, that is going to operate psychologically as a deterrent.

He will say: "The front office will have me in trouble if I keep on creating situations that put this pressure on."

Mr. ROGERS. Right at that point, may I interrupt to say, is he really giving the public the proper viewpoints? If it is so disorted, should that be given?

Mr. PORTER. I was coming to that point. Under the Fairness Doctrine, even if the utterance that was made was true, that does not immunize it from the Fairness Doctrine.

Judge Tamm, in the Red Lion case, had this to say:

> Any attempt by the Commission to make factual determinations of truth or falsity in controversial issues of public interest would constitute illegal exercise of a nonexistent authority.

Therefore, it is a circle and you meet yourself coming back. It becomes automatic, the right to reply, whether true or false, if you follow the Tamm dictum.

That is pretty hard to rationalize.

Mr. ROGERS. But that then comes under the discretion of the FCC?

Mr. PORTER. No; absolutely not.

Mr. ROGERS. They don't have to require, not in any cases, do they?

Mr. CROUSE. Yes, sir; they do.

Mr. ROGERS. I had understood there were many claims made that were not processed.

Mr. PORTER. If it is a personal attack.

Mr. ROGERS. I thought you were getting to a viewpoint that was true, that may have been true.

Mr. PORTER. I was talking about the personal attack, even if it were true.

Mr. ROGERS. I understand in the Fairness Doctrine, it is not necessarily true that the FCC must require the time for presentation of views. Perhaps the Chairman can straighten me out.

Mr. HYDE. In the rules relating to personal attacks situations, the right is limited to that case where an individual's personal qualities, such as his integrity, were attacked in connection with a statement on a matter of signficant public concern.

It is in that connection that the Commission would require that the person attacked have an opportunity to state his side.

Mr. PORTER. Whether true or false?

Mr. HYDE. The test would not be whether it was true or false, but, rather, whether his personal character was subjected to attack.

Mr. PORTER. Mr. Chairman, I would say that as I read the Fairness Doctrine, even in the *New York Times* v. *Sullivan* case, if that had been a broadcast facility, Sullivan, and those who claimed their personal integrity, character or like qualities were impugned, would have had an automatic right of reply.

But in the printed media this was constitutionally protected speech.

Mr. ADAMS. Nobody stopped them for saying it, did they? There is no prevention other than your psychological prior restraint.

Mr. PORTER. Then you would get back as to whether this is a deterrent, I think the weight of most of the argument falls.

Mr. ROGERS. This same argument that some have applied is we will let the public judge, decided whether the station is doing right or not. Is it all right to let the public decide on the two charges, the one charge made and the one who denies it? Do they mistrust the public here?

Mr. PORTER. Suppose it is true?

Mr. ROGERS. Can't the public judge that? This is exactly what we are saying. How do we know that everything the broadcaster always puts out is true. Does he determine whether it is true or not or does the public decide?

Professor Robinson said he wanted the public to decide all this, but he wouldn't want the public given the right of the two viewpoints here, as I understand it.

Dean BARROW. Mr. Hyde has a comment on this.

Mr. HYDE. The comment I would offer is relevant to the question raised by Congressman Rogers. I endeavored to explain before that the personal attack right to be heard arises when someone's character is attacked in connection with a presentation of public significance.

This right isn't given just as a matter for the defense of the individual or as a personal thing to him. It arises out of the interest of the public in hearing both sides and having the opportunity to choose.

In other words, when there is an attack on an individual's character in connection with the discussion of an issue of public importance, then the public should have a right to hear the other side as expressed by the person whose character is attacked.

Mr. ROGERS. Dean, may we suspend a minute. This is the second call to the floor of the House. We will hear the next paper as soon as we come back.

Mr. KEITH. Isn't Congressman Adams one of your former students?

Mr. JAFFE. If he says so. I don't doubt the word of a Congressman.

Mr. ROGERS. We will recess at this time.

(A brief recess was taken.)

Dean BARROW. Chairman Van Deerlin, as we recessed we were discussing how the complaints coming in on the Fairness Doctrine as distinguished from personal attack were handled. I believe the record is not as complete in that respect as it could be and I am sure if Chairman Hyde were requested to do so, he would be glad to comply.

Mr. VAN DEERLIN. It may be admitted for the record.

Mr. HYDE. We will be pleased to supply such a statement.

(The following statement was received by the committee:)

FCC STATEMENT REGARDING HANDLING OF FAIRNESS DOCTRINE AS DISTINGUISHED FROM PERSONAL ATTACK COMPLAINTS

The Commission has considered the question of a licensee's compliance with his obligations under the fairness doctrine and the personal attack rules primarily in the context of specific complaints. Many of these complaints are vague and indefinite. In such cases the complainant is advised of the general scope of the fairness doctrine and/or personal attack rules and the obligations they impose upon licensees. The complainant is also advised that if he wishes to submit additional information which would show that his complaint is within the scope of the fairness doctrine or the personal attack rules, further attention will be given to the complaint.

Where a complaint is specific and raises a substantial question under the fairness doctrine, the personal attack rules, or both, a copy of it is promptly furnished to the licensee and he is requested to submit his comments, usually within 10 days. He is also requested to furnish a copy of his reply to the complainant. The complainant is also notified of our referral of the complaint to the licensee and is given an opportunity, usually seven days, to reply to the licensee's comments on his complaint. This procedure is followed in processing complaints brought under the equal opportunities provision of Section 315 as well as those under the fairness doctrine and the personal attack rules, except that where time is of the essence the matter is handled by telephone or telegram.

Upon receipt of all information the complainant and the licensee wish to submit concerning a complaint under the fairness doctrine or the personal attack rules, a ruling is issued based on the specific factual showing. Thus, general fairness complaints have been considered in the light of the licensee's over-all programing on the specific issue involved and the policies embodied in the fairness doctrine. Complaints as to personal attacks, however, have been considered to determine if the material broadcast constituted a personal attack, as defined by the Commission's rules, and, if so, whether the licensee has followed the procedure required by those rules.

Mr. VAN DEERLIN. Mr. Barrow.

Dean BARROW. Mr. Chairman, the last of the papers is by Professor Jaffe and is on the same subject which we have been considering throughout the day.

Mr. Jaffe.

PAPER NO. 8—LOUIS L. JAFFE: THE FAIRNESS DOCTRINE, EQUAL TIME, REPLY TO PERSONAL ATTACKS, AND THE LOCAL SERVICE OBLIGATION; IMPLICATIONS OF TECHNOLOGICAL CHANGE

Mr. JAFFE. I want to talk for a moment, by way of clarification rather than opinion, about the question put by Mr. Adams when he asked, is the personal attack regulation inhibitory and then unconsciously repeated the question, asking is this bad?

I don't think inhibitory is the same as bad. Then he further downgraded inhibitory by saying, "Oh, you mean psychological." Of course that is what is meant by inhibitory. Inhibitory, I take it, just goes to the question of fact, will it keep people from speaking, will it keep people from making these charges.

Maybe it is a good thing to keep them from making such charges. The question whether it is inhibitory is a question of fact. I don't know that we know the answer. If, for example, to say that somebody is a bad man or is an evil man is going to cost you $100,000, you may not say it. That is inhibitory. I would suppose, in the absence of any evidence about it, which is rather difficult to come by, I would think, human nature being what it is, the regulation will keep a certain number of charges from being made that otherwise would be made.

There will be that much less freedom.

You may say maybe on the whole that is a good thing. Maybe there are too many idle charges being made.

I don't think it would cut off attacks completely. It might change the character of the attack. Instead of attacking an individual in terms of his character you would put it in terms of his policy and then perhaps it would not bring into operation the personal attack doctrine.

Whether the doctrine is bad depends on whether you think this is too great a cost. Maybe it is a good doctrine. You might decide that something is inhibitory but that a certain amount of inhibition is worthwhile because of other considerations of justice.

In my own paper I want to address myself in somewhat slightly different terms to the question here than have been used so far. I am not going to address myself to the constitutional argument which I think has been well considered pro and con.

I would like to make what might be called a functional analysis and I make this analysis somewhat in terms of speculation. I don't know that my notions about communication and how public opinion is formed are correct but it seems to me that if one should raise the question as to the usefulness of these doctrines.

The questions are worth asking not only in reviewing the situation as it stands but in determining to what extent these doctrines should be pushed further.

You have already heard that the climate opinion at the FCC is to push these things further. So that it seems to me that it is appropriate in determining the direction in which you want these things to proceed to ask a few questions as to certain assumptions that are made as to how broadcasting works in the area of forming opinion.

What I want to do first is to point out that there are really four doctrines that are in question here.

My own feeling is that two of these docrines are quite important, that is positively valuable. My own feeling is, in terms again of usefulness, that the two others are not particularly useful though they may not do any great harm.

Oh, I know another thing I was going to say, if you will permit me to interrupt again.

It is apropos of the bearing of *New York Times* v. *Sullivan* on the questions that have been raised here on inhibitions and constitutionality. I don't think the Sullivan case points all one way. It cuts both ways, I think, with respect to the constitutional issue. Insofar as the case is based on the notion that inhibitions on speaking that regulations which inhibit speaking are contrary to the first amendment, it seems to me that it cuts against constitutionality of some of these doctrines because at least presumptively it may do some inhibiting.

But insofar as the right of reply goes, it may on the other hand point in favor of the right of reply because if you are not going to give any damages to people, public officials, or people in the limelight, and it goes beyond public officials now, it goes to everyone in the limelight, it is not just people who have put themselves in a special position by being public officials, it is everybody now who is not protected by the law of defamation—if he gets in a public fight, if he no longer gets damages there will be a strong claim for his right to a reply, assuming also that this is not inhibitory.

I do want to make the point that I don't think you can accept the *New York Times* case as cutting all in the direction of the Constitutionality of these doctrines.

It may indeed tend to show that they are a necessary adjunct of the *New York Times* case.

The four doctrines that I speak of, first is equal time for political candidates. The second is the opportunity to respond to an attack on one's personal qualities. The third is fairness in the presentation of conflicting positions on issues of public importance and finally, and this is what Mr. Porter has made so much of and it does seem to be a distinct and valuable doctrine, the obligation in serving an area to take account of the needs and interests of all substantial segments of the community.

This is the public responsibility of the broadcaster, As I said, I think the first and fourth of these doctrines have more positive things in their favor than the two middle ones.

By and large these doctrines are based on the notion that television and to a lesser extent, radio, are unique media of communication, unique that is in senses which make these doctrines necessary in the public interest.

It is true that there are statutes of this sort in the newspaper field too. There are two States which have a right-of-reply statute with respect to newspapers. Nevada and one other State, I am not sure which. These statutes are very old. They don't seem to have been taken up.

By and large, for one reason or another there seems to be very little opinion in favor of the right-to-reply statute with respect to newspapers. Now, is TV unique or rather do the admittedly unique characteristics of TV as compared with newspapers, magazines, and books demonstrate the necessity or if not the necessity at least the value of these doctrines?

And, if there is a value in one or another of these, what are the countervailing considerations and do they finally outweigh the value of the doctrine.

Now, let us take first the equal time for political candidates. It seems to me that in this field the unique characteristics of TV are most evident, in part because TV has itself changed to some extent the nature of the political content.

The personal characteristics of the candidate observed close up and in the viewer's home have a much stronger impact than was the case when the candidate was seen on the hustings by fewer persons and then only occasionally and at a distance.

The balance thus between political program and personality has probably been altered.

It does not matter whether one believes this to be a fortunate development or not.

The fact is that if the contestants are to have the relatively equal opportunity to reach the public, which our political system assumes, they must have an equal opportunity to procure time on TV.

At this point we are confronted with the fact that there is not a competitive market in TV time. Because of this it has been thought necessary to achieve the goal of equal opportunity by legal prescription.

It is not my purpose here to consider whether section 315 or something like it is, in fact, necessary or whether assuming the need of some regulation, section 315 is the best solution.

Section 315 has not been my particular field of study and my remarks are directed to the point that TV is indeed unique in this area and that this uniqueness makes a prima facie case for some regulation or in its absence a commitment to well-understood customary practices amounting to self-regulation.

It may well be that given the pressure that would always bear on the stations and the fact that if they did not live up to this kind of obligation, they would get legislation that might be enough, but as I say, I don't think we are principally concerned here or interested in section 315 except as part of the analysis of the situation and as a kind of counterpoint to the other one.

Opportunity to respond to attack: It is my opinion that it is only in connection with political campaigning that the uniqueness of TV is overwhelming demonstrable. In the other three areas its uniqueness is at least debatable and is at best one of degree.

Closely related to the notion of TV's uniqueness is the notion of what I would call its autonomy. This is the notion—more or less resting on its uniqueness—that TV is not simply a part of the whole complex of communication. It is thought to be separate, a complete system of communication in itself, in the sense that it has an audience which is reached primarily, even exclusively, by it.

A large mass of TV and radio listeners are conceived as insulated from other channels of communication. It is supposed that they do not read newspapers, magazines, or books and, it would seem, do not receive information informally from their friends, associates, or organizations.

Thus, if an attack on the personal honesty of a reporter is broadcast, it is assumed that unless a defense is subsequently broadcast the listener will not otherwise receive any countercommunication.

In the absence of more precise information than I have, I can only speculate as to the validity of these ideas. I question the validity of the notion of the insulated listener both as a fact and as a significant phenomenon.

My questions go, of course, only to degree. Undoubtedly there are insulated listeners but what I question is that the typical listener is thus insulated, that is to say, that he hears and knows only what is broadcast.

Furthermore, I would conceive of most listeners—and particularly those whose mental habits incline them exclusively to listening—as casual listeners. The impact of any one communication on a casual listener would not be great.

If the communication is a particularly startling one, it may have a greater effect, but by the same token—that is, its exceptionable character—it is unlikely that it will go unchallenged if not on a subsequent broadcast then by means of one or another formal or informal avenue of communication.

Furthermore, in these same terms, I think that the case for the value of the broadcast reply is much weaker than it is assumed to be. Most attacks as I have said are received casually and without advance preparation by the listener. After he has heard it, will he be conditioned to expect, wait for, be alerted to a reply?

How will the mandated reply or defense reach him? The advance programs do not give notice of specific replies though it would be possible for the regulation to require such notice.

It may seem something of a paradox but I would hazard the hypothesis that a reply in a newspaper—that is, as a news item—is more likely to reach a listener than the later program.

The newspaper both in time and space has greater extension and great permanency. In short, I would conclude that the autonomy of TV and radio have been much overstated.

It is my purpose primarily to question the positive premises on which the opportunity for reply rests. They are in my opinion not nearly so persuasive as is usually assumed.

There is still, of course, a case for such regulation. There are some people who will hear the attack and will not in one way or another receive a reply and some of these will be reached because of the regulation.

Arguably this is enough to justify it.

I think the way you will resolve it will depend somewhat on the determination as to how important you think the right of reply is from the point of view of public information.

Chairman Hyde was very frank, by the way, in saying, in contradistinction to some of the suggestions from the committee, that the right of reply is not conceived as something which the person attacked has a right to.

It is conceived as something that the public has a right to.

For example, if the attack as it has been made is not in a matter of general public interest, he has no right to reply at all.

It is in those terms that the question, that the right is framed, namely in terms of the public interest in getting the information and if the public is apt to get the information in other ways and the effect of this doctrine is to cut down on free discussion, then you have an argument against it.

But, I wouldn't personally say how that argument should be referred.

The "Fairness Doctrine": What I have already said as to uniqueness and autonomy of TV is basic to the justification of the Fairness Doctrine. It is to my mind the weakest of the four doctrines under discussion.

I would as an analytic matter make distinctions within the area in which it operates. The pronouncement on TV as to a proposed initiative or referendum the day before an election might have very considerable impact.

But even that is doubtful and in any case the Fairness Doctrine may not reach it. The doctrine requires only a general overall fairness with respect to the presentation of an issue.

If the matter was of great importance—open housing in California—it will have been discussed for a considerable period of time and have been the subject of a vast amount of printed and oral communications of a formal and informal nature.

It is difficult to believe that the existence of a Fairness Doctrine would make or have made much difference in the public's consideration of the subject.

What goes for the open occupancy question goes for most questions. Public thinking, communication, and ultimately discussionmaking on a controversial issue of public importance is not a matter of a broadcast or of a day or of a year, of something heard or read here or there.

It is a social process in which all of the media of communication—and the informal, personal ones may be the most important—play a role. To isolate the role of TV and provide a special rule for its participation seems to me questionable.

I would not, however, go so far as to say that the Fairness Doctrine serves no useful purpose at all. It has had, I think, an educational effect in improving the character of public discussion programs.

It has, as it were, provided a model of good programing exemplified by the panel discussion. Not all panel discussions, perhaps very few, are highly informative or stimulating. But as with most matters requiring special talents of direction and performance, the ideal is important.

There are certain types of broadcasting, what might be called saturation broadcasting, in which the case for a Fairness Doctrine is somewhat more persuasive, if not entirely so.

I refer to its application to two types of communication of rather different character. One is exemplified by its application to cigarette advertising. Clearly the effect of cigarette advertising is debatable.

How much, one may ask, is added by TV and radio advertising to the already massive inducements to smoke provided by printed advertising, social custom, quickly established habituation? Possibly very little. On the other hand, arguably the persistency of cigarette advertising and its inexplicit, its unstated assertions of the goodness of smoking may present a special case; that is, special as distinguished from the overt and occasional debate of a public issue.

Furthermore, it might be argued that TV offers a unique opportunity by the use of certain graphic devices of pointing up the risks of smoking, an opportunity at least so long as the manufacturers continue to advertise.

The other example is the broadcasting station such as Red Lion or KTYM which exists primarily as an organ of special pleading—for example, anti-Semitic or some variety of so-called rightwing orientation.

This type of programing may violate both the Fairness Doctrine and the more general doctrine of the broadcaster's responsibility for balanced service to the community.

The latter aspect I shall discuss under that heading. Though I state it as a special case, I am not sure whether the case provides much support for the utility of the Fairness Doctrine.

My doubt is whether the constituency of such stations can be much persuaded by the occasional, somewhat forced appearance of a leftwinger or a pro-Semite. Indeed such broadcasters deal in communication for which it is difficult to find answers which will dissuade those who find the communications persuasive.

I am told that this overdefines the listeners and that there will be a significant number who are more open to argument.

The *Red Lion* case is interesting. It had to do with Fred Cook, a person much discussed over the years. He came into public view by himself writing a book. He subsequently expressed his views off and on in the New Republic.

He was attacked on the Red Lion, a Lancaster broadcaster, first for having been a disreputable character, for having falsified in certain respects, which apparently he had done, and also for generally being Red and leftwing.

He asked for a right to reply without payment and free. What purpose you might ask is served in this whole network communication about this man—the pros and cons have already been gone over and over—what purpose will be served particularly by this man getting up on the Red Lion and saying—I don't know what he would say—"I am not a leftwinger" or "I am not a rightwinger"—"They have done me wrong."

When you isolate the case and say it is terrifically important that Fred J. Cook be permitted to appear, at least significant from the point of view of public illumination, that it is important he appear on Red Lion to reply to these charges that have been made 6 months back, at some unspecified moment of time, you don't know who will be listening, it seems to me it is highly unrealistic to see the right to reply as very significant.

But even granting the weakness of the foundation for the Fairness Doctrine we can believe that it has some beneficial effects on programing and that it has fewer disutilities than either the equal time for political campaigning or the opportunity to respond.

The reason is that it is primarily a guide to the exercise of the broadcaster's exercise of operation. The broadcaster is admonished to be fair. This means he has discretion in determining whether a question is a "controversial issue of public importance."

Thus, he may decide that the broadcasting of religious services does not rise to the level of an important controversy concerning the existence of the Diety, therefore, does not require the application of the Fairness Doctrine.

Second, he had discretion in deciding in what form, and in what measure, the various positions involved shall be presented.

For me the upshot is that the Fairness Doctrine does have a marginal utility, compounded of its modest positive values and its very slight disutilities.

It is a major premise of the FCC's regulation of broadcasting that the licensee must program for local needs. The most important example, to date, of this policy—and most nearly related to the Fairness Doctrine—is Lamar Life Broadcasting Corp. (5 R.R. 2d 205 (1965)) reversed and remanded sub nomine *United Church of Christ* versus *FCC* (359 F. 2d 994 (D.C. 1966)).

This matter concerned the renewal of the license of a broadcaster in Jackson, Miss. Its programing presented heavily and continuously the position, attitudes, and opinion of the predominant white community and little or no representation of the Negro community.

The Commission criticized the licensee but (without an evidentiary hearing of the opposition) gave it a 1-year license. The court held that an evidentiary hearing was required.

It is my opinion that the local service doctrine as applied here is justified in terms of broadcasting functions and characteristics. Broadcasting has a pervasive, ongoing, character which does give its communications an institutional, overall character.

What is in question in "Lamar" is not a pinpointed, an isolated communication as is true of the personal attack or the discussion of a "controversial issue," but the representation in the life of a community of an important segment of that community.

Because broadcasting figures so continuously in the life of the community, the daily broadcasting absence or persence of a class of persons and their point of view—particularly one so marked as the Negroes—is potentially as significant factor in the formation of public opinion along representative lines.

The future: We may be at the beginning of a period of proliferation of broadcasting outlets (CATV, satellite communication) and a consequent fragmentation of audiences.

This fragmentation may mean that audiences will be less coherent, stable, predictable in time and place. Arguably this condition will further weaken the functional support for the doctrines here under consideration.

These doctrines assume a given broadcaster reaching a given audience, an audience relying to a significant degree for its news and information on the particular broadcaster. Even today as I have argued, this assumption is open to debate.

But as channels multiply, as communications reach shifting audiences from far and near, the assumption will become more debatable. That need not, however, mean any immediate change in current doctrine.

I see the situation as fluid and experimental. The present doctrines, though hardly so axiomatic as the FCC and others assume, can be taken as a starting point. They do no great harm and they may do some good. We can keep them under surveillance.

Dean BARROW. Thank you, Professor Jaffe, for your excellent contribution.

The comment on Professor Jaffe's paper will be made by Mr. Howard Bell, who is president of American Advertising Federation.

Mr. Bell.

COMMENT ON PAPER NO. 8, BY HOWARD H. BELL

Mr. BELL. Thank you.

On behalf of the American Advertising Federation, I wish to express my appreciation to the subcommittee for the opportunity to participate in this significant panel discussion.

The federation includes representatives from all segments of advertising—manufacturers, advertising agencies, advertising media, advertising associations, and media associations. In addition, the federation represents 173 advertising clubs throughout the country with an aggregate membership of approximately 40,000 people.

My comments are directed to the issue of the extension of the application of the Fairness Doctrine to product advertising as touched on by Professor Jaffe.

It has been stated earlier in these discussions that the Fairness Doctrine itself is of questionable legal validity, with which I concur.

I do not agree with Professor Jaffe's contention that the case for a Fairness Doctrine application to cigarette advertising is "somewhat more persuasive" than its application to other types of communication.

At no time prior to the September 15, 1967, memorandum opinion and order of the Federal Communications Commission was there statutory or regulatory history suggesting that the doctrine was intended to cover general advertising in any form whatsoever.

Nowhere in congressional floor debates, testimony, or committee reports is there any reference to product advertising. The doctrine's application had been consistently and exclusively related to free or paid-for programing involving the presentations of controversial issues. I think the discussions in the past 2 days have clearly demonstrated that this has been the thrust of the doctrine.

Consequently, the Commission's ruling is not only a further extension of a questionable policy, but it is a radical departure from that policy as it had been understood and interpreted prior to that time.

In essence, the extension amounts to a regulation of advertising itself, contrary to FCC authority and jurisdiction or congressional intent. The general regulation of advertising has not been vested in the FCC by the Congress.

Further, the Congress itself has spoken on the cigarette issue. It has precluded the Federal Trade Commission's imposition of special health warning regulations in the cigarette package itself.

At the time this act was under consideration by the Congress, the FCC advised the Congress that it proposed no independent action with respect to broadcast cigarette advertising and that such advertising should not be specially regulated.

The subsequent law made no provision for any special FCC responsibility for cigarette advertising. Professor Jaffe says that broadcasting is not distinct, it is part of the whole. That being so, I believe it should be treated as such.

The singling out of the broadcast media for special regulation of its advertising is both highly discriminatory and manifestly unfair. It encroaches upon the freedom which broadcasting should enjoy equally with all other media.

The FCC rationale for its extension of the Fairness Doctrine to cigarette advertising is stated in paragraph 38 of its order:

> It comes down, we think, to a simple controversial issue: the cigarette commercials are conveying any number of reasons why it appears desirable to smoke but understandably do not set forth the reasons why it is not desirable to commence or continue smoking.
>
> It is the affirmative presentation of smoking as a desirable habit which constitutes the viewpoint which others desire to oppose.

The same reasoning cited here by the Commission to support this policy could easily be applied to advertisements for many other products which some may consider to be, now or in the future, of a controversial nature, such as aspirin, beer, wine, insecticides, lead-base paints, caffeine products, vitamins, fluoridated toothpaste, and automobiles.

There is no legal barrier to such extension despite the expression of current Commission intentions. It has been reported, for example, that the president of the Women's Christian Temperance Union, when asked whether the FCC would be petitioned to decree that temperance messages must be broadcast by stations accepting beer and wine accounts, replied, "We have something like that in mind."

Irrespective of the legal and jurisdictional questions raised by the FCC's cigarette advertising ruling, there are practical policy reasons why the Commission's order should be rescinded.

To place in any regulatory agency the power to decide that the advertising of any legal product is per se "controversial" is to impose a life-or-death power over advertising itself. Such a burden on advertising becomes a burden on commerce itself and erodes the principle of free choice in the marketplace.

And, if a requirement can be imposed to present contrary views to those contained in an advertising message, the ultimate and disastrous extension is to require the advertisement itself to state affirmatively reasons why the public might not wish to purchase the product or service.

The very essence of advertising is its use in informing the buyer about a product or service and seeking to persuade the buyer to select one product or service over another. This, too, is the essence of competition itself, on which our whole free enterprise system is based.

This power of persuasion is the means by which the demand for goods or services is created and stimulated, thereby creating mass markets and mass economies. It is this process which makes the whole economic system tick, and grow, and flourish.

Now a Government edict opens the door for a policy of dissuasion which could offset or negate the traditional role of advertising and competitive enterprise in our economy. Such a precedent, however limited in scope, should not be allowed to stand.

So long as advertising is truthful and otherwise consistent with public policy, there should be no governmental restrictions interfering with its freedom to perform its legitimate and traditional function in the marketplace.

In the case of cigarettes it is argued that there are public policy issues and controversies involved. However, the public policy issues and controversies involved with cigarettes relate to the product itself and not to its advertising. These are matters beyond the purview of competence of the FCC.

Several years ago, the FCC sought to regulate another aspect of advertising by proposing adoption of the commercial time standards of the radio and television codes of the National Association of Broadcasters.

The House of Representatives in February 1964, voted by an overwhelming 317 to 43 to preclude the FCC from adopting such advertising standards.

Irrespective of pending litigation, we strongly urge this committee and the Congress to consider enactment of legislation specifically overruling this order of the commission applying the Fairness Doctrine to product advertising.

Dean BARROW. Thank you, Mr. Bell.

Mr. Jaffe, do you have any matters to reply to immediately in respect to Mr. Bell's comments?

Mr. JAFFE. I would make a very short statement.

I agree with some of the things that Mr. Bell says and disagree with others. I agree with him that the ruling about cigarettes is logically applicable to any other product, the advertisement of which asserts that it is a good thing to have and do, where there is some kind of controversy as to whether it is.

I would not like to have to write the FCC opinion distinguishing liquor from cigarettes. I mean if an opinion does distinguish it, I think it will bring another question, it will raise the kind of queries that have been raised about the Fairness Doctrine here.

I do not agree at all with Mr. Bell that it is inappropriate for an advertiser to have to indicate risks of a product. He says the purpose of advertising is to inform the buyer of the qualities of the product.

Well, one of the qualities of its product is that it may give you cancer. It does seem to me that it is perfectly appropriate, indeed I agree with him absolutely it may cut down business and it may cut down mass markets and it may cut down lots of other things, and if your only interest is in maximizing products and maximizing the purchase and sale of goods, I think the advertising doctrine of the FCC is all wrong but I can't conceive that that is the only interest.

Dean BARROW. Professor Robinson.

Mr. ROBINSON. I have one comment on the tobacco ruling. That is, apart from the particular cigarette controversy the notion, the underlying assumption, of this ruling seems to be inconsistent with what the Commission has already ruled in another context of nonproduct advertising, that is the well known *Madalyn Murray* case.

The Commission has ruled squarely that merely carrying religious broadcast does not sell religion, does not present the religious viewpoint but somehow that has been shoved to one side in the cigarette ruling because it has now distinguished that case and has said specifically that we are only here concerned with health issues. Now, maybe health issues are arguably distinct but it seems to me that the distinction is irrelevant to the underlying assumption that they make, that the mere carrying of advertising is sufficient presentation of a "view" with respect to cigarettes—and presumably other products.

I would agree with Professor Jaffe that one would be hard pressed to distinguish beer from cigarettes or any other product about which there is some controversy. But if this is so, why don't we take it all away? We walk up to the situation in some cases where we don't like the product, cigarettes, but we all like religion and we don't like atheists or something like that. That is what was in effect said in *Madalyn Murray* when the Commission said, "No, you may not have the opportunity to reply to the mere carrying of religious broadcasts."

Dean BARROW. I would like, if I could, to get one or two other comments from people whose hands have been up for some time.

Dr. Goldin?

Dr. GOLDIN. As I understood Professor Jaffee, one of his criticisms of the Fairness Doctrine was from what he calls the functional approach. As I understand the functional approach, it means that you have to make some factual determinations. That is what I understand functional means in this case. What I fear is a problem is that the thrust of his position would be that in considering fairness the Commission now would have to make a factual determination as to how many people really knew Fred Cook in terms of the service area of any particular station, that is to say what he says in effect is that everybody knows about Mr. Cook.

That is a factual question, does everybody know about Mr. Cook? Does everybody know about "X," the particular individual attacked who may not be Mr. Cook?

It seems to me that the Commission then would have to make some factual determination that everybody knows about Mr. Cook and the argument about Mr. Cook and, therefore, there is no reason to put on Mr. Cook.

I find that position untenable for the Commission or for any agency to attempt to do.

Dean BARROW. Chairman Hyde, do you have any comment on this?

Mr. HYDE. The suggestion has been made here several times that cigarette advertising cannot be distinguished from advertising of other products. The Commission opinion in the cigarette matter states a distinction very cogently and one of these distinctions is the finding by Congress, itself. Evidence of congressional attitude about it can be found printed on the cigarette package.

There is no such congressional finding as to any of these other products that have been mentioned. I would rather leave this matter to the Commission's opinion itself which is being litigated.

Mr. ADAMS. Could I ask some questions?

Dean BARROW. Mr. Adams.

Mr. ADAMS. I assume we have some type of regulation which in advertising products by TV requires on all labels that if in any way any product is dangerous that the advertiser must so state on television.

For example, in the description of drugs if you have somebody take too many tablespoons of it, it will kill you, you have to state that, don't you?

Mr. HYDE. I believe the only regulation we have about the advertising form is this in the cigarette ruling but we do refer any questions regarding whether the advertising is fraudulent or whether it offends public policy to the Federal Trade Commission with which we do have a close liaison.

Mr. ADAMS. If the FDA or the FTC says you must have this label on this product in order for it to be sold in public, you would require it, would you not, that if the advertiser puts it on television he would have to show it on the label?

Mr. PORTER. The answer is no.

Mr. ADAMS. You mean there is nothing——

Mr. JAFFE. On drugs.

Mr. HYDE. The only ruling that we have, the only specific regulation we have with respect to advertising is the cigarette ruling.

However, there are many instances where complaints have been brought to our attention that the advertising is fraudulent or offended public policy.

Mr. ADAMS. What about harmful to health?

Mr. HYDE. The distinction here is this. According to the Surgeon General and according to his advisory committee and according to the finding of Congress, the normal use of cigarettes may be injurious to health.

In the cases that you are mentioning there are certain conditions as to the use. Certain medicines would not be used except under advice of the physician. Certain medicines should not be used except in accordance with the directions printed on the bottle and so forth.

What is involved here is a finding by Congress that the normal use of cigarettes according to the Surgeon General may be injurious to health. That is the difference.

Mr. BROWN. Are you talking about if taken internally? Is there any requirement of a warning in the advertising of a product on television and radio that it is dangerous if taken internally?

Mr. HYDE. I don't know of any.

Mr. BROWN. But a warning must be on the label of a can or other container. I think there is a distinction here. I would like to draw it.

Mr. JAFFE. Also there is the distinction that the Congress made between advertising and labeling. As I understand it the labeling requirements apply to drugs but cigarettes have been carefully exempted by Congress from any such regulation.

Mr. ADAMS. I was just inquiring generally because the subject was brought up of the cigarette ruling and its extension to other products. I don't know what the rule is. I was asking for information on it.

And I would like somebody who is familiar with it in the broadcasting industry to answer, what do you do if you have a product that the FDA or the FTC states is dangerous in a particular fashion and it is being advertised? What do you do about it?

Mr. WASILEWSKI. We comply with all laws in the first place, Mr. Adams.

Mr. ADAMS. What is the law?

Mr. WASILEWSKI. The law does not require us to put on any warning label in addition. Let me go back, if I may. This is the thrust of the argument in the cigarette case at the present time.

The Congress considered whether or not there should be a requirement in the advertising of cigarettes; whether the advertisement itself should say, "Caution. Cigarette smoking may be dangerous to your health." Congress considered this and did not adopt it into law.

Now, the FCC adopted it not in regard to the advertising but they let somebody else come in and say the same thing. We comply with the FTC act but there is no requirement for us to carry a warning.

Furthermore, prescription drugs are not advertised on——

Mr. ADAMS. I am not talking about drugs. I am talking about the fact that one product is mentioned, like Drano. There are many others.

Mr. WASILEWSKI. Take aspirin. We advertise Bayer aspirin. There is no requirement to say, "Be careful. Don't put these in the hands of your children," or, "Don't take more than two every 4 hours."

We don't say that but a warning may be on the label.

Mr. ADAMS. Is tobacco the only product that is given this special status?

Mr. HYDE. The ruling with respect to cigarette advertising is the only such ruling, yes.

Dean BARROW. Congressman Brown.

Mr. BROWN. I would like to point out that the position of Congress with reference to tobacco is ambivalent—we subsidize growing tobacco.

Dean BARROW. Mr. Bell.

Mr. BELL. I would like to make a couple of comments on what was said.

First of all, to answer that question again, I think another way to state what Mr. Wasilewski was saying is that the rules generally are that on labeling with respect to advertising, and this would be an FTC matter with respect to general advertising applying the FDA rules, the only rule at all is that advertising cannot be inconsistent with labeling.

That has been the rule that the broadcasters have followed with their own codes.

If there is a warning on a package that says "Keep out of the reach of chidren" under the radio and television codes they would not permit children to be shown utilizing the product.

That is the general standard of responsibility I think that is shown in presenting advertising rather than having an affirmative warning in the advertising you could have have a warning in almost every commercial about almost every product if it is not used properly.

With respect to Chairman Hyde's comments about why and how they distinguish cigarettes from other products, he pointed out that they did because Congress has spoken. But Congress has spoken on a lot of subjects, including automobile safety and packaging and on other matters of that kind affecting the consumer and all of which also have some effect on advertising.

By logic, therefore, you would almost have to say that anytime that Congress declared as a matter of public policy that there was a danger involved in a given product, that a special rule should be developed with respect to the advertising of that product.

Therefore, I think that is unrealistic in terms of approach.

I also want to say here in defense of this question that Professor Jaffee raised about whether or not advertising of cigarettes is not inducing people to smoke and, therefore, he distinguishes between advertising and other aspects of the Fairness Doctrine, I think it should be noted for the record here that it has been clearly demonstrated in the case of cigarette advertising that the question is not one of inducing people to smoke.

It has been shown in a number of studies, for example, one study among high school students a year or so ago in Scholastic Roto magazine, that in some 2,300 schools the reason young people started smoking was because the "in" group in school was smoking or their peers were smoking and that advertising was not the factor.

Basically, with respect to cigarette smoking which is an inherent habit people have, there are other factors, in other words, besides the advertising that relate to whether or not they do smoke.

The advertising is really a question of brand choice. It is not saying "Smoke this cigarette." Generally it is saying, "If you smoke, we would like you to take this brand over brand X," which I believe was also a cigarette for awhile.

The advertising is not making a direct health claim or inducement to begin the habit of smoking. It is really directed at the person who is smoking now and saying, "We think you ought to smoke this brand of cigarettes."

Therefore, I don't think that is so controversial. If it was making a direct claim about health, there might be a greater argument for the fact that it is controversial.

Dean BARROW. Mr. Bell, are you saying that cigarette advertising only affects selection of brands and does not tend to increase the number of people who smoke or the amount of cigarettes that they smoke even among the adults?

Mr. BELL. I am saying basically the decision to smoke was probably arrived at on other considerations.

Dean BARROW. I asked you a different question. I asked you whether cigarette advertising influences adults to take up smoking or influences their increasing the quantity of smoking in addition to brand selection.

Mr. BELL. I think that as to such a personal habit, Dean Barrow, they make the decision not on the advertising. They make it on other bases.

Dean BARROW. And advertising does not have anything to do with that?

Mr. BELL. He is trying to get his share of the market.

Dean BARROW. I thought you had a more effective service than that, that it had more impact, but I have not made any surveys in this area, myself.

Mr. ADAMS. I notice some recent ads come on, about the children not using it, saying this product is for adults as part of a campaign that is on, leaving the connotation that they can be used by anybody.

Now, what I am trying to get at is, suppose that product you are going to advertise is for adults but you advertise it without the slogan, "This is for adults only," what happens; do they have to say this is "for adults only" because it is the type of product which is comparable to a number of others all being fizzy ones you drink when you have a hangover and so on but some apparently have things in it that are not good for young people, harmful to health, but others aren't?

Now if both adults and children are watching, what happens?

Mr. BELL. Congressman, that was not some requirement with which they were conforming. That is a matter of creative license on the part of the advertising.

Mr. ADAMS. Suppose they advertise it and they do not have to say anything then, even though apparently it is not recommended for children but for adults only?

Mr. BELL. I think that becomes apparent by the advertising that it should not be used by children, so long as they do not suggest overtly in the advertising of a product that they should use it.

Mr. ADAMS. Even though the comparable and competitive products are all being used by children and in fact one product uses a very clever advertisement that is very attractive to children and I do not know how

to tell the two products apart; they both fizz and they are put in a glass and you drink both of them.

There is no distinction.

Mr. BELL. The one advertiser is trying to convey the impression that his product is robust, so to speak, and has a particular appeal for adult use.

Mr. ADAMS. You would require him to say——

Mr. BELL. There is no requirement. He is trying to find some platform on which to distinguish his product.

Mr. ADAMS. If he decided he was not going to use that pitch any more, is there any requirement that you do say——

Mr. BELL. No; there is no public health or public interest question involved there. It is just a matter of the individual judgment of the advertiser to decide how best to present his product.

Dean BARROW. Mr. Alexander.

Mr. ALEXANDER. It seems to me Mr. Bell is trying to divorce the picture in the advertising, and what the advertisement is for.

Many of the cigarette ads show young couples out on strolls and are pitched specifically at young people, giving the impression that it is desirable to smoke, that you get a girl or something if you smoke that brand.

Mr. BELL. Could I respond to that by pointing out with some personal knowledge of this field, that there are restrictions in the broadcast field specifically relating to that and there are restrictions relating to the advertising of cigarettes generally adopted by the industry itself.

There is the cigarette advertising code, for example, which provides that no one under 25 years of age in appearance, not only actual age but looking younger than 25 years of age, may be portrayed in the cigarette commercials.

The radio and television codes of the NAB have similar restrictions on the advertisements appealing directly to young people.

Mr. ALEXANDER. Aren't those recent, as a result of the cigarette advertising code?

Mr. BELL. Those are adopted by the industry itself in recent years, yes; but they were adopted before some of the other actions including the FCC's recent application of the Fairness Doctrine.

In fairness to the industry it is worthy to note that they have sought to exercise a degree of restraint here and self-policing as part of a public responsibility and they have been able to do it without the Government dictating specific rules and regulations to them.

I think the cigarette advertising code has been very effective in eliminating many of the appeals to young people such as testimonials, for example, of athletes and others that young people look up to. They are no longer shown on the air in advertisements because of the codes of the industry, itself.

I think that is a commendable approach which should be noted.

Dean BARROW. Professor Robinson.

Mr. ROBINSON. I would not like to have the burden of making the argument that cigarette advertising does not induce smoking. I think that would be a pretty heavy burden. I think the real question comes down to whether or not, if we think cigarette advertising is bad, the Fairness Doctrine is an appropriate vehicle for addressing ourselves to the problem.

It seems to me that what we have here is an agency which has traditionally steered clear of advertising regulation. It has an arrangement with the FTC—a "liaison" with the FTC—whereby the FTC is apprised of complaints that go to the content or manner of advertising of products and the FTC handles the matter.

The FTC has been heavily involved in cigarette advertising. I don't say wrongly. It seems to me that we have a situation here in which the FCC has only a peripheral concern and is in a sense, backing into the matter via the Fairness Doctrine.

There is pending, I understand, an investigation of the question of what requirements or limitations should be put on cigarette advertising. If it is decided by Congress and the people that cigarette advertising should be severely limited, or, indeed, banned altogether, I think that would probably be a legitimate exercise of legislative prerogative. But I think it is highly questionable to apply the Fairness Doctrine here to maneuver in and about a problem which ought to be tackled head on.

Let us consider openly to what extent advertising of products such as cigarettes and like products, liquor or beer, or what have you should be permitted. If we are really concerned about the effects of advertising, I think that perhaps we ought to come out and rule on it squarely and not dance around the problem by invoking the Fairness Doctrine simply to require both sides to be heard.

It seems to me this application of the doctrine becomes highly artificial. The Commission has recently ruled that if the station does not carry advertising but it does decide that smoking is bad, and it decides to carry a public health spot announcement, for example, sponsored by the Heart Association or the Cancer Association, then the Fairness Doctrine applies and presumably the cigarette manufacturers can come back and promote cigarette smoking. It seems to me that that is at odds with the real philosophy underlying the ruling which is that this advertising of cigarettes is a bad thing.

Dean BARROW. Mr. Wasilewski has a comment.

Mr. WASILEWSKI. It has occurred to me that we could discuss the application of the Fairness Doctrine to cigarette advertising ad infinitum but this matter is in the courts at the present time.

I think the discussion is useful to show the extent to which the Fairness Doctrine has been extended here. It is in the courts, so is the question of the first amendment application to the Fairness Doctrine as such.

I think I would agree with what Professor Jaffe said a while ago that the real issue is the pragmatic effects of the Fairness Doctrine upon society as a whole during the course of these hearings.

Dean BARROW. Are there questions on these papers by the members of the committee?

Mr. KEITH. We have exercised our prerogative.

Dean BARROW. Then, Mr. Chairman, though we have a half-hour remaining on the schedule, I believe we have come to a convenient point of departure.

May I say on behalf of the members of the panel that we were honored highly in being invited to come and participate in your inquiry.

We had no idea it would be so pleasant. But the interest that the committee has shown in what we have had to say, the constant attendance of each member of the committee, and the excellent preparation and hard work of Mr. Lishman, Mr. Manelli, and other members of your staff, have made this truly an enjoyable experience for us.

We thank you deeply for having given us the opportunity to appear before this honorable subcommittee.

The CHAIRMAN. Dean Barrow, I would like to say that I believe you and all of this panel have done a great service to the Nation.

I believe that the papers that have been given, and the different views reflected in the hearings, will be a matter of interest to a lot of people in America today and in the future. We are deeply indebted to all of you. During the time I have been here I have learned a lot. I want to apologized to the panel that I could not be here this afternoon because I was waiting on the floor all afternoon for my bill to be called up.

I am still waiting and it has not been called up. I don't know what time of the night it will be called up. I did want to come back in order to say thank you so much to all of you.

I am sure all of you will get a transcript of the hearings and everything that has gone on. Not only the committee but all the communications industry is indebted to all of you for the contribution you have made.

I think it is democracy in action that we could come and discuss the issue on both sides. Both sides were well expressed today and yesterday.

I think it has been very profitable to the committee and to the future of the Nation.

Thanks to all of you.

Dean BARROW. Thank you, Mr. Chairman.

(Whereupon, at 4:30 p.m., the subcommittee adjourned.)

APPENDIXES

Appendix A—Legislative history of the fairness doctrine, a special subcommittee staff study, February 1968.

Appendix B—Applicability of the fairness doctrine to cigarette advertising, memorandum opinion and order of the Federal Communications Commission (FCC 67–1029).

Appendix C—Letter dated February 28, 1968, from Howard Stalnaker, vice president-general manager, Meredith WOW, Inc., Omaha, Nebr., including several recent resolutions re Fairness Doctrine adopted by the Nebraska Broadcasters Association.

LEGISLATIVE HISTORY OF THE FAIRNESS DOCTRINE

STAFF STUDY

FOR THE

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE

HOUSE OF REPRESENTATIVES

NINETIETH CONGRESS

SECOND SESSION

FEBRUARY 1968

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[1] Mr. Springer is an ex officio member of the subcommittee with voting privileges.

LETTER OF TRANSMITTAL

HOUSE OF REPRESENTATIVES,
SPECIAL SUBCOMMITTEE ON INVESTIGATIONS,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C., February 19, 1968.

DEAR CHAIRMAN STAGGERS: In accordance with your request, I have prepared a memorandum summarizing the legislative history relevant to the FCC's Fairness Doctrine, and submit it herewith.

The Doctrine, as enunciated by the FCC, requires that when a broadcast station presents a point of view on a controversial issue of public importance "reasonable opportunity must be afforded for the presentation of contrasting views." The purpose of the Doctrine is to promote the development of an informed public opinion through the dissemination of views and ideas concerning the vital public issues of the day. Despite this salutary purpose, the Fairness Doctrine has raised serious public policy and constitutional questions.

Supporters of the Doctrine state that it is required in order to insure that the public will have an opportunity to hear both sides of controversial issues of public importance. Statutory authority for the Doctrine is said to be inherent in such sections of the Communications Act as 307 which imposes a standard of "public convenience, interest or necessity" upon the granting of broadcast licenses, and 315 which refers to "the obligation imposed upon [licensees] under this act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

Opponents of the Fairness Doctrine assert that it is an unconstitutional abridgment of free speech and freedom of the press, that it constitutes an unwise policy which defeats its asserted purpose, and is not authorized by the Communications Act.

Thus the Fairness Doctrine itself constitutes a "controversial issue of public importance."

The purpose of this paper is to summarize the legislative events leading up to the present Communications Act which have direct bearing on the question of legislative intent with respect to the Fairness Doctrine. Aside from the act itself, focus has been on official committee reports, hearings, congressional debates, and judicial and administrative decisions.

Other materials have been consulted as well. Two memorandums by the Legislative Reference Service of the Library of Congress have been especially helpful in the preparation of this paper: *Legislative History of 47 U.S.C. 315; Censorship of Radio and Television Broadcasts*, by Mary Louise Ramsey, and *The Fairness Doctrine*, by Elizabeth Yadlosky, both of the American Law Division.

Since the Doctrine involves the most serious of constitutional and public policy issues, no attempt has been made to arrive at conclusions which are based on speculative interpretation of isolated language appearing in the legislative history. Nor has any attempt been made to venture opinions as to the constitutionality of the Fairness Doctrine or its desirability as a matter of public policy. Both of these issues are beyond the scope of this paper. The purpose here is to ascertain whether the Congress has intended to incorporate the Fairness Doctrine, or a similar requirement, into the law.

Respectfully submitted.

DANIEL J. MANELLI, *Attorney.*

CONTENTS

LEGISLATIVE HISTORY—FAIRNESS DOCTRINE

I. INTRODUCTION

A. SCOPE OF MEMORANDUM

The FCC's Fairness Doctrine has been the subject of steady and longstanding controversy. This controversy can be subdivided under three headings:

1. Conformity of the doctrine with the first amendment to the Constitution and section 326 of the Communications Act.
2. Desirability of the doctrine as a matter of communications policy.
3. Conformity of the doctrine to the legislative intent of the Congress.

The purpose of this memorandum is to review the legislative history relevant to the doctrine. Questions of policy and of the constitutional limitations on the power of the Congress to legislate in the area of broadcast program content (i.e., the first two subheadings set forth above) are beyond the scope of this memorandum except insofar as they may impinge on the question of congressional intent.

1967 was a year of great activity with respect to judicial and administrative action affecting the Fairness Doctrine. Despite its long history as an administrative policy, the doctrine did not receive its first judicial challenge until 1967, in the case of *Red Lion Broadcasting Co.* v. *F.C.C.*, 381 F.2d 908 (D.C. Cir. 1967) opinion dated June 13, 1967. The Fairness Doctrine was upheld by the Circuit Court and *certiorari* has been granted by the Supreme Court.

Two other actions by the FCC during 1967 precipitated legal challenges to the doctrine. One was the so-called "cigarette" decision in which the FCC held that the presentation of cigarette commercials constitutes an exposition of one side of a "controversial issue of public importance," and therefore gives rise to an affirmative obligation to present other points of view.[1] By this the Commission had reference to statements explaining that smoking, however enjoyable, may be hazardous to health. This ruling has been challenged as beyond the scope of the FCC's authority. These legal actions have been consolidated for consideration by the Circuit Court of Appeals for the District of Columbia.

Another series of legal challenges was occasioned by the FCC's promulgation of rules to cover personal attack situations and political endorsements.[2] These cases are being considered by the Court of Appeals for the Seventh Circuit.

The Supreme Court has decided to delay its consideration of the *Red Lion* case pending the outcome of the "personal attack" cases in the

[1] Station WCBS, 11 R.R. 2d 1901 (1967). The citation "R.R." used in this memorandum refers to Pike and Fisher, *Radio Regulation*.
[2] *Fairness Doctrine Rules*, 10 R.R. 2d 1901 (1967), hereafter referred to simply as FCC "personal attack" rules.

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seventh circuit. The decisions in these cases should cast much light on the constitutionality permissible scope of regulation affecting program content.

As stated above, however, this paper does not deal with questions of the permissible scope of program regulation or the desirable extent of such regulation. Rather, the question examined herein is the statutory basis for the doctrine as reflected in the language of the Communications Act and the relevant legislative history.

Before taking up this legislative history, however, it would be well to establish definitions of terms and concepts to be used herein.

Broadcast regulation affecting program content, as distinguished from technical regulation and economic regulation

"Program content" refers to the substantive import of a broadcast communication. The degree to which the Fairness Doctrine, and other FCC policies, exert an influence on broadcast licensees with respect to their programing may be debated. It is clear, however, that such policies do have some effect on subject matter and mode of presentation.

Program content regulation, direct or indirect, should be differentiated from two other types of broadcast regulation: technical and economic. Technical regulation concerns the purely scientific or physical aspects of broadcasting. Under this heading would be included assignment of frequencies, signal power, hours of station operation, antenna location, and the like. Economic regulation deals with the financial and economic considerations peculiar to the broadcasting industry. It includes such topics as multiple station ownership and contractual relationships between networks and stations.

Equal time

This term refers to the requirement contained in section 315 of the Communications Act that legally qualified candidates for public office shall be afforded equal opportunity with competing candidates for the same office in the use of a licensee's facilities. While the words "equal opportunities" appear in the statute, they have been interpreted as being equivalent to equal time. In order to assert a right to equal time, an individual must himself be a legally qualified candidate, and the station's facilities must have undergone a prior use by a competing legally qualified candidate for the same office.

The concept of equal time for political candidates is often confused with the Fairness Doctrine (see below). For example, many communications have been received by this subcommittee which assert or suggest that a statement on some controversial issue raises an obligation on the part of a station licensee to provide equal time for some spokesman of a contradictory persuasion. While the Fairness Doctrine does require a reasonable opportunity for the discussion of opposing views on controversial public questions, it does not impose any "equal time" obligation for the presentation of such opposing views. Furthermore the mode of presentation is left to the licensee's good faith judgment.

The "equal time" obligation arises only when demand is made by a legally qualified candidate. Obligations under the Fairness Doctrine arise whenever a "controversial issue of public importance" is discussed, regardless of any request for presentation of contrasting viewpoints. Furthermore, the right of a candidate to equal time is not absolute; he is not entitled to free time to reply unless his opponent was

also accorded free time. Otherwise the candidate must be charged at the same rate as his opponent. In contrast, the obligation to present contrasting views on issues of public importance is independent of sponsorship or lack thereof; if sponsorship is unavailable, they must be presented on a sustaining basis.

Editorializing

This term, as used herein, refers to a statement reflecting the views of the station licensee or network, which is identified as such. Such statements often involve such uncontroversial subject matter as traffic safety or regular church attendance. They may also, of course, involve quite controversial issues or political endorsements. The term "editorializing" itself, however, has a neutral import, and does not necessarily signify an expression on a controversial subject.

Personal attack

According to the FCC, this refers to an attack made upon the "honesty, character, integrity, or like personal qualities of an identified person or group" which occurs "during the presentation of views on a controversial issue of public importance." This language seems designed to exclude purely private or petty feuds and disputes. The definition is thus limited to situations where, either because of the position or reputation of the victim of the attack, the attack itself takes on the weight of a public issue.

B. DESCRIPTION OF THE FAIRNESS DOCTRINE

(*1*) *FCC definition*

The FCC has described the doctrine as follows:

> The Commission's "Fairness doctrine," first enunciated in its 1949 "Report on Editorializing by Broadcast Licensees," requires, in short, that when a broadcast station presents one side of a controversial issue of public importance reasonable opportunity must be afforded for the presentation of contrasting views.[3]

While the Fairness Doctrine is susceptible to such short descriptions as the above, its application has raised many problems and legal issues. The recent application of the doctrine to cigarette commercials, which has already been mentioned, is one example.

The term Fairness Doctrine itself has reference to the Commission's 1949 *Editorializing Report.*[4] As a policy of broadcast regulation however, what has now become known as the Fairness Doctrine seems to have been applied, in one form or another, for almost 40 years by both the FCC and its predecessor, the Federal Radio Commission.[5]

This memorandum will not attempt to draw any conclusions from the absence of any congressional action specifically intended to overrule the policy of the FRC and the FCC in this area. This involves the principle of statutory construction that the failure of a legislature to express disapproval can bolster an administrative or judicial

[3] FCC 32nd annual report fiscal year 1966, page 90.
[4] *Editorializing by Broadcast Licensees,* 25 R.R. 1901 (1949).
[5] The 1929 Annual Report of the Federal Radio Commission states: "It would not be fair, indeed, it would not be good service to the public, to allow a one-sided presentation of political issues of a campaign. Insofar as the program consists of discussion of public questions, public interest requires amply play for the fair and free competition of opposing views, and the Commission believes that the principle applies not only to addresses of political candidates but to discussion of issues of importance to the public" (page 33).

construction of a statute. In the case of the Fairness Doctrine, this must be weighed against the equally established principle that the rejection by a legislature of a specific provision contained in a reported bill militates against an interpretation of the resulting statute which, in effect, includes that provision.[6] Certain events in the legislative histories of both the Radio Act of 1927 and the Communications Act of 1934 suggest the applicability of the latter principle (see below).

The underlying principle of the Fairness Doctrine is that broadcasters, because of the unique circumstances which distinguish them from those who communicate through other media, have a legal obligation to communicate in such a way as to achieve a proper, or reasonable, balance of conflicting ideas on issues which are (1) controversial, and (2) of public importance. Despite the obvious first amendment issues raised by the assertion of this principle, and the length of time it has been asserted, it is only recently that the question has moved into the courts.[7]

(*2*) *Illustrative cases*

The basic FCC position paper on the Fairness Doctrine is the 1949 *Editorializing Report*.[8] This was supplemented in 1964 with a policy statement on the applicability of the doctrine and summaries of a selected number of previous FCC rulings. These were presented as illustrative of the scope and applicability of the doctrine.[9] This document is usually referred to as the Fairness Primer. The following cases have been selected from the Fairness Primer and other cases to illustrate the FCC's holdings in this area.

In *New Broadcasting Co. (WLIB)* [10] the FCC stated that the proposed establishment of a National Fair Employment Practices Commission was a controversial question of public importance. A licensee who broadcast editorial programs in support of this measure, and took no affirmative steps to encourage and implement the presentation of differing points of view was held to have violated the Fairness Doctrine.

Pay TV was the subject of a number of programs broadcast by another station. These included expressions of opinion by various persons either favoring or opposing pay TV. The anti-pay TV side was accorded the greater representation although it could not be said that the station had choked off debate. The licensee stated that pay TV, though a subject of national controversy, was not a "controversial issue" within its own service area. The FCC held that the licensee had violated the doctrine: "a licensee cannot excuse a one-sided presentation on the basis that the subject was not controversial in its service area * * * ." In re *The Spartan Radiobroadcasting Co.*[11]

A number of stations broadcast a discussion program featuring a nutritionist giving comment and advice on diet and health. His discussions of such subjects as water fluoridation, the value of Krebiozen in the treatment of cancer, the nutritive qualities of white bread, and the use of high potency vitamins without medical advice were held to

[6] See Carey v. Donohue, 240 U.S. 430 (1916) (Bankruptcy Act).
[7] Red Lion v. FCC, 381 F.2d 908 (D.C. Cir. 1967).
[8] 25 R.R. 1901 (1949).
[9] *Fairness Doctrine*, 2 R.R. 2d 1901 (1964).
[10] 6 R.R. 258 (1950).
[11] 33 FCC 765, 771, 794–95, 802–03 (1962).

be controversial issues of public importance so as to require adherence to the Fairness Doctrine. *Report on "Living Should be Fun" Inquiry.*[12]

The "cigarette" decision has already been mentioned. The FCC held that the Fairness Doctrine is applicable to advertising, but stressed that its ruling in this case was limited to cigarette advertising.[13] The 1946 decision in *Petition of Sam Morris*,[14] suggests that the doctrine might also be applied to advertising for alcoholic beverages. The licensee in this case had refused to sell time for abstinence broadcasts despite the fact that it carried advertisements for alcoholic beverages. The FCC rejected the licensee's assertion that the advertising of goods and services is not "controversial." The Commission stated that the advertising of alcoholic beverages over radio can raise "substantial issues of public importance." The FCC declined to act on the complaint, however, noting that the problem was industrywide and not restricted to the single licensee involved in this case.[15] This case, which predated the 1949 *Editorializing Report*, did not make specific reference to the Fairness Doctrine. The underlying rationale of the opinion, however, is substantially identical to the Doctrine.

A program entitled "Communist Encirclement" discussed the alleged transitory nature of socialist forms of government and their evolution to communism, shortcomings in this country's foreign policy, moral weakening in the home, and the like. The FCC noted that licenses would not be required to present the Communist viewpoint, but indicated that contrasting viewpoints on the best methods of combating communism should be presented.[16]

In a more recent case, the Commission held that a broadcast editorial constituted an expression of a viewpoint on a controversial issue of public importance, and a personal attack. The editorial contained the following language:

> The Communist Party of the United States is waging an intensive campaign to subvert the minds of American youth. Foremost among the activities currently directed against our young people is the new Marxist youth organization known as the DuBois Clubs of America founded at a special meeting in California dominated and controlled by American Communists.

The Commission held that the question of whether the DuBois Clubs is used by the Communist Party to subvert the minds of American youth is a controversial issue of public importance. The Commission also held that inasmuch as the editorial characterized the DuBois Clubs as a Communist organization, against which the American public should be on guard, it constituted a personal attack. This required that the DuBois Clubs be notified and given a chance to respond.[17]

The Fairness Doctrine has been held not to require that broadcasters balance expressions of religious programs with contrasting viewpoints from athiests or the adherents of "freethought" (defined as "the total antithesis of religion").[18]

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[12] 33 FCC 101, 107; 23 R.R. 1599, 1606 (1962).
[13] 11 R.R. 2d 1901, 1929 (1967).
[14] 11 FCC 197 (1946).
[15] *Id.*, page 198: "It is the Commission's view that the problem raised by the petition is of industrywide proportions and is not restricted solely to KRLD. Therefore, the petition involving, as it does, issues of such extensive scope should not be granted as to one particular station, when there is no urgent ground for selecting it rather than another."
[16] Letter to Tri-State Broadcasting Co., 3 R.R. 2d 175 (1962).
[17] Letter to Storer Broadcasting Corp., 12 R.R. 2d 184 (1968); see also Letter to Station KUHT, 12 R.R. 2d 179 (1968) (attack on John Birch Society requires offer of reply time).
[18] Mrs. Madalyn Murray, 5 R.R. 2d 263 (1965); Robert Harold Scott, 3 R.R. 259 (1946).

The doctrine has also been applied to discussions of the nuclear test ban treaty.[19]

The licensee has been held to have an affirmative duty to encourage the presentations of contrasting views; he may not merely make time available upon request.[20] The licensee's duty to observe the Fairness Doctrine is not affected by the positions on public questions which may be taken by other media.[21] The licensee may not seek to avoid Fairness Doctrine problems altogether by refusing to carry programs dealing with controversial issues.[22]

C. COMMISSION RULES

The FCC has not promulgated any general rule or regulation on the Fairness Doctrine.[23] The Commission has decided Fairness Doctrine questions on an *ad hoc* basis.[24]

On July 5, and August 2, 1967, the FCC adopted rules covering the special cases of personal attacks and political endorsements. These rules, however, are applicable only in the specialized fact situations to which they are addressed.[25]

The reasons for the formal promulgation of these rules were stated by the Commission as follows:

> The purpose of embodying the procedural aspects of the Commission's long-adhered-to personal attack principle and political editorial policy in its rules is twofold. It will clarify and make more precise the obligations of broadcast licensees where they have aired personal attacks and editorials regarding political candidates. Further, in the event of failure to comply with these rules, the Commission will be in a position to impose appropriate forfeitures (503(b) of the Act) in cases of clear violations by licensees which would not warrant designating their applications for hearings at renewal time or instituting revocation proceedings but on the other hand do warrant more than a mere letter of reprimand.[26]

This raises by negative inference the question of whether violations of the Fairness Doctrine which do not involve personal attacks or political endosements might be immune from fine under section 503(b) of the Act.[27]

This in turn bears upon the question of whether the Fairness Doctrine is a statutory requirement or merely an administrative policy. If

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[19] Cullman Broadcasting Co., Inc., 25 R.R. 895 (1963).
[20] *Fairness Primer*, paragraph 9.: see also John J. Dempsey, 6 R.R. 615 (1950).
[21] Letter to WSOC Broadcasting Co. 17 R.R. 548 (1958.)
[22] See United Broadcasting Co., 10 FCC 515 (1945).
[23] A fact noted by the FCC in its Fourth Report and Order on Subscription TV. 10 R.R. 2d 1623, at page 1719 (note 48).
[24] On September 5, 1963, Chairman Harris of the House Commerce Committee addressed a letter to the FCC taking issue with the *ad hoc* approach to regulation under the Fairness Doctrine: "If the Commission in an attempt to achieve fairness seeks to apply its Fairness Doctrine to the content of individual programs involving the discussion of issues of public importance then, contrary to the policy of the Act, the Commission inevitably will inject itself into programing on a day-to-day basis."
The Commission defended its approach to Fairness Doctrine questions in its reply dated September 20, 1963. Letter to Oren Harris, 3 R.R. 2d 163 (1963).
[25] See note 2, above.
[26] *Fairness Doctrine Rules*, 10 R.R. 2d 1901 (1967), at 1904.
[27] The section reads, in part, as follows:
"Any licensee or permittee of a broadcast station who—
(A) willfully or repeatedly fails to operate such station substantially as set forth in his license or permit,
(B) willfully or repeatedly fails to observe any of the provisions of this Act or of any rule or regulation of the Commission prescribed under authority of this Act or under authority of any treaty ratified by the United States,
(C) fails to observe any final cease and desist order issued by the Commission,
(D) violates section 317(c) or section 509(a)(4) of this Act, or
(E) violates section 1304, 1343, or 1464 of title 18 of the United States Code,
shall forfeit to the United States a sum not to exceed $1,000. Each day during which such violation occurs shall constitute a separate offense. Such forfeiture shall be in addition to any other penalty provided by this Act. * * *"

the doctrine is actually embodied in the law, violations thereof would seem to be subject to fines on the same basis as other violations of the Act, even in the absence of an administrative rule on the subject.

The position of the FCC is that the doctrine is an integral part of the Communications Act:

> [J]ust as there is a specific statutory obligation upon the licensee to afford "equal opportunities" to legally qualified candidates, so also there is one "to afford reasonable opportunity for the discussion of conflicting views on issues of public importance—to be fair in treating controversial issues." [28]

It is not clear whether the Commission in its notice of July 5, 1967, quoted above, actually intended to take the position that violations of the Fairness Doctrine which do not come under the purview of its "personal attack" rules are immune from fine, although such seems to be a permissible inference from its above-quoted language.

II. Section 315 of the Communications Act of 1934

The language of the Communications Act of 1934 which seems to refer to the Fairness Doctrine appears in section 315 which is entitled "Facilities for Candidates for Public Office." Subsection (a) thereof provides that any broadcaster who permits a legally qualified candidate to use his facilities must afford equal opportunities to all other such candidates for the same office. The subsection then goes on to exclude appearances by a candidate on certain news programs from being classified as a "use" of the station such as would entitle his opponents to equal time.

The subsection concludes as follows:

> 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 Act* to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance. [Emphasis supplied.]

The last two sentences in subsection 315(a) are still the subject of debate as to their effect and the legislative intent behind them. The language was added as part of the Communications Amendments of 1959.

The words "the obligation imposed upon them under this Act" seemingly contemplate some statutory provision located elsewhere in the Communications Act. No such specific provision exists, however. The words "reasonable opportunity for the discussion of conflicting views on issues of public importance," which seemingly paraphrase the Fairness Doctrine, are found nowhere else in the Communications Act.

The position of the Federal Communications Commission on the statutory mandate for the doctrine seems to be that the policy is a necessary corollary of the requirements in the Act that licensees operate in the "public interest convenience or necessity", and that radio is to be preserved as a medium of freedom of speech (see 1949 *Editorializing Report*). The enactment of the 1959 amendments is regarded by the FCC as a congressional ratification of the doctrine:

> Congress recognized this policy [i.e., the Fairness Doctrine] in 1959. In amending section 315 so as to exempt appearances by legally qualified candidates on

[28] Letter to Hon. Oren Harris, 3 R.R. 2d 163, at 165 (1963).

certain news-type programs from the "equal opportunities" provision, it was stated in the statute that such action should not 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." * * * The legislative history establishes that this provision "is a restatement of the basic policy of the 'standard of fairness' which is imposed on broadcasters under the Communications Act of 1934" (H. Rept. No. 1069, 86th Cong., first sess., p. 5).[29]

Similarly, in a memorandum submitted during the hearings on political broadcasts and equal time held before the Subcommittee on Communications and Power of the House Commerce Committee, the FCC stated:

> The legislative history of the 1959 amendment [to Sec. 315] establishes that Congress, by such amendment, was in effect codifying the basic principle of the Commission's Report on Editorializing by Broadcast Licensees.[30]

The following FCC statement refers to the Fairness Doctrine as having been an administrative policy prior to the 1959 Amendments to the Communications Act:

> Formerly by reason of administrative policy, and since September 14, 1959, by necessary implication from the amended language of section 315 of the Communications Act, the Commission has had the responsibility for determining whether licensees "afford reasonable opportunity for the discussion of conflicting views on issues of public importance."[31]

With respect to the FCC interpretation, it is observed that the legislative history of the 1959 amendments does not contain any unequivocal expression of congressional intent to codify the Fairness Doctrine.[32] It has also been questioned whether a comprehensive codification of the Fairness Doctrine, which encompasses the whole gamut of "controversial issues of public importance" was intended by Congress inasmuch as the section under consideration, section 315, relates specifically to candidates for office. These considerations will be taken up in more detail below.

Certain alternative hypotheses may be advanced in construing the legislative intent and proper construction to be attached to section 315(a) in connection with the Fairness Doctrine:

1. The Fairness Doctrine is inherent in the Communications Act of 1934 and its predecessor, the Radio Act of 1927. It therefore exists independently of section 315(a) whose language merely restates a preexisting legal requirement.

2. The congressional intent behind the 1959 amendments to section 315(a) was to incorporate the Fairness Doctrine, which until then was merely an FCC policy, formally into the Act.

3. Congress intended the new language added to section 315(a) by the 1959 amendments, to apply to political matters, and especially to the treatment of candidates for public office on news programs, and did not intend an overall ratification of the FCC's Fairness Doctrine in all of its applications.

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[29] *Fairness Doctrine*, 2 R.R. 2d 1901, at 1903 (1964).

[30] *Political Broadcasts—Equal Time, Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives*, 88th Cong., first sess., on H.J. Res. 247, at page 87 (1963).

[31] *Commission Policy on Programing*. 25 Fed. Reg. 7291, 20 R.R. 1901 (1960), at 1910.

[32] This is in contrast to the amendment of section 317(a)(2) of the Act, which was a part of the 1960 Communications Act Amendments, wherein it was expressly stated that one of the purposes of the amendment was to provide specific statutory authority for a pre-existing FCC policy. See House Rept. No. 1800, 86th Cong., second sess. (1960).