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FIRST AMENDMENT CLARIFICATION ACT OF 1977

GOVERNMENT
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HEARING BEFORE THE SUBCOMMITTEE ON COMMUNICATIONS OF THE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE NINETY-FIFTH CONGRESS

SECOND SESSION

ON

S. 22

TO AMEND THE COMMUNICATIONS ACT OF 1934 IN ORDER TO
RECOGNIZE AND CONFIRM THE APPLICABILITY OF AND TO
STRENGTHEN AND FURTHER THE OBJECTIVES OF THE FIRST
AMENDMENT TO RADIO AND TELEVISION BROADCASTING
STATIONS

JUNE 7, 1978

Serial No. 95-109

DOCUMENTS

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FIRST AMENDMENT CLARIFICATION ACT OF 1977

WEDNESDAY, JUNE 7, 1978

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
SUBCOMMITTEE ON COMMUNICATIONS,
Washington, D.C.

The subcommittee met at 10 a.m. in room 235, Russell Senate Office Building, Hon. Ernest F. Hollings (chairman of the subcommittee) presiding.

OPENING STATEMENT BY SENATOR HOLLINGS

Senator HOLLINGS. Today the Communications Subcommittee will consider S. 22, introduced by Senators Proxmire, Matsunaga, and Metcalf on January 10, 1977, and amendment 1697 to S. 22 introduced by Senator Proxmire on February 10, 1978.

The main purpose of S. 22 is to repeal those provisions of the 1934 Act resulting from the imposition of the Fairness Doctrine and equal time requirements. While their validity under existing law is not questioned, we must determine whether these requirements have had a chilling effect on broadcast journalism.

The subcommittee must consider the impact upon broadcast journalism resulting from the imposition of the Fairness Doctrine and equal time requirements. While their validity under existing law is not questioned, we must determine whether these requirements have had a serious chilling effect on broadcast journalism.

We must also determine what protections have been afforded the public because of these requirements.

The witnesses who will appear before us today will address these questions.

[The bill follows:]

(1)

S. 22

IN THE SENATE OF THE UNITED STATES

JANUARY 10, 1977

MR. PROXMIRE (for himself, Mr. MATSUNAGA, and Mr. METCALF) introduced the following bill; which was read twice and referred to the Committee on Commerce

A BILL

To amend the Communications Act of 1934 in order to recognize and confirm the applicability of and to strengthen and further the objectives of the first amendment to radio and television broadcasting stations.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 SHORT TITLE AND STATEMENT OF PURPOSE

4 SECTION 1. (a) This Act may be cited as the "First
5 Amendment Clarification Act of 1977".

6 (b) It is the purpose of this Act to recognize and
7 confirm the applicability of and to strengthen and further
8 the objectives of the first amendment of the Constitution of
9 the United States by removing statutory and regulatory

1 restrictions on broadcasters operating under the Communica-
2 tions Act of 1934.

3 DEFINITION OF PUBLIC INTEREST, CONVENIENCE, AND
4 NECESSITY

5 SEC. 2. Section 309 of the Communications Act of 1934
6 is amended by inserting at the end thereof the following:
7 " (i) Notwithstanding any other provision of this part,
8 effective on and after the date of the enactment of this sub-
9 section for the purposes of this part, the term 'public inter-
10 est, convenience, and necessity' shall not be construed to give
11 the commission jurisdiction to require the provision of broad-
12 cast time to any person or persons or for the expression of
13 any viewpoint or viewpoints or otherwise to exercise any
14 power, supervision, control, influence, comment, or review,
15 either directly or indirectly, over the content or schedule
16 of any program or any other material broadcast by licensees,
17 except where the broadcast of such material is otherwise
18 prohibited by law."

19 REPEAL OF LICENSE OR CONSTRUCTION PERMIT REVOCATION
20 POWER RELATING TO FACILITIES FOR CANDIDATES
21 FOR FEDERAL PUBLIC OFFICE

22 SEC. 3. Section 312 (a) of the Communications Act
23 of 1934 is amended by inserting "or" at the end of clause
24 (5), striking out the semicolon and "or" at the end of
25 clause (6) and inserting in lieu thereof a period, and strik-
26 ing out clause (7).

1 REPEAL OF SECTION 315 RELATING TO FACILITIES FOR
2 CANDIDATES FOR PUBLIC OFFICE

3 SEC. 4. Section 315 of the Communications Act of 1934
4 is repealed.

5 RECOGNITION OF APPLICATION OF RIGHT OF FREE PRESS

6 SEC. 5. Section 326 of the Communications Act of 1934
7 is amended by inserting after "speech" the following: "or
8 the right of free press" and by striking the period after "com-
9 munication" and inserting in lieu thereof a comma and "in-
10 cluding the right of a radio station to determine the schedule
11 of its programs and the content of its programs. Nothing in
12 this Act shall be construed to require the provision of broad-
13 casting time to any person or persons."

14 REPEAL OF CERTAIN LIMITATION ON CORPORATION FOR
15 PUBLIC BROADCASTING

16 SEC. 6. Section 396 (g) (1) (A) of the Communications
17 Act of 1934 is amended by striking out all beginning with
18 the comma following "broadcast stations" to the semicolon
19 at the end thereof.

20 REPEAL OF PROHIBITION OF POLITICAL EDITORIALS

21 SEC. 7. Section 399 of the Communications Act of 1934
22 is repealed.

Purpose:

To delete certain provisions relating to program content.

Amdt. No. 1697

95TH CONGRESS
2D SESSION

S. 22

IN THE SENATE OF THE UNITED STATES

FEBRUARY 10 (legislative day, FEBRUARY 6), 1978

Referred to the Committee on Commerce, Science, and Transportation and ordered to be printed

AMENDMENT

Intended to be proposed by Mr. PROXMIRE to S. 22, a bill to amend the Communications Act of 1934 in order to recognize and confirm the applicability of and to strengthen and further the objectives of the first amendment to radio and television broadcasting stations, viz:

- 1 On page 2, line 13, beginning with "or otherwise"
- 2 strike out all to the period in line 18.

Senator HOLLINGS. Our first witness is our distinguished colleague from Wisconsin, Senator Proxmire.

Senator, we welcome you. We will be delighted to hear from you at this time.

STATEMENT OF HON. WILLIAM PROXMIRE, U.S. SENATOR FROM WISCONSIN

Senator PROXMIRE. Thank you very much, Mr. Chairman, and Senator Goldwater.

I very much appreciate your calling this hearing, and I want to call your attention to the fact that the House Subcommittee on Communications announced this morning that they have decided to recommend to the full committee that the Fairness Doctrine not apply any longer with respect to radio; that it be modified with respect to TV. Equal time not apply to radio, and that it be modified with respect to TV. So I think that is an indication of the interest in the other body in this.

As you indicated, I first introduced this bill in 1975, then again last year, in order to give fuller meaning to your first amendment guarantee of freedom of the press by abolishing the so-called fairness doctrine and the equal time rule.

I am most grateful for this opportunity to touch briefly on some of the major considerations that have convinced me that broadcasters deserve to be free of these onerous restrictions on their first amendment rights.

I shall limit my remarks this morning to about 10 minutes, but I ask that the full text of my statement be entered in the hearing record.

The first amendment forbids the Congress from passing any law that might diminish our right to have a free press, and I think few people realize what an accident it was on the part of our Founding Fathers, because the newspapers at that time were a great deal more bigoted, prejudiced, and critical of public figures than they are now; far less professionalism.

It was quite an action. As a matter of fact, Thomas Jefferson, who was, of course, the author of the first 10 amendments to the Constitution, Bill of Rights, said this in a letter to a friend in 1811:

A man who never reads in the newspaper knows nothing. He who reads nothing will still learn the great facts and the tales are all false.

What that suggests is that the man who was more responsible than anybody else for our first amendment recognized how fallible, how wrong, wrong-headed, and bias the newspapers often can be, and yet he recognized also that if you are going to have a free country, you have to have a free press.

Unfortunately, the free press doesn't really apply to the main source of news for the American people in America today. Not everybody recognizes that broadcasting is a part of the press. If they did there would be little to argue about. The need to maintain the freedom of the printed press has, in general, not been attacked.

Other means of mass communication—newspapers, magazines, pamphlets, books, and motion pictures—have kept their free press rights. But not broadcasting.

This would be a grave omission under any circumstances. But broadcasting—radio and television—is the preferred source of news for 76 percent of the American people. Yet, because of governmental controls

like the Fairness Doctrine and the equal time rule, broadcasters are second-class citizens when it comes to first amendment rights.

In practical terms, this means that our first amendment is only about 24 percent effective when it comes to freedom of the press. Obviously, we can and must do better.

Denying broadcasters their first amendment rights is wrong for many reasons. I wish I had time to discuss them all. But in the minutes that remain, I want to concentrate on three of the most important of these reasons.

First of all, this denial is unnecessary. Second, it is self-defeating. And, third, it is dangerous. I shall consider each of these, in turn, in the remarks that follow.

More and better professionalism has been demonstrated in recent years in broadcast journalism. Professionalism means that there is less bias in news coverage, that contrasting opinions are aired when it comes to editorializing, and that opinion and news are clearly separated.

But isn't that what the Fairness Doctrine seeks? Unfortunately, it has not worked that way. Rather, the Fairness Doctrine has stifled professionalism.

On the other hand, newspapers, operating without Government regulation and with full constitutional freedom, have improved vastly in fairness, objectivity, accuracy and relevance. For one thing, they have expanded their coverage. There was a time, not too long ago, when we could not read stories about environmental and health hazards, such as those caused by insecticides, food additives, and other previously arcane chemicals.

There was a time, too, when we did not see stories about social concerns such as crime-ridden neighborhoods, venereal diseases, old age, population growth, race relations, and school curriculum.

Women's rights, it is true, have been reported on since long before the Bloomer Girls. But now we get searching reports on what women's rights really mean.

The list is endless. But fair coverage means that problems, advances, and experimentation in areas of life affecting all of us are covered in all their aspects.

But what would happen if we had something like an FCC for newspapers?

Let us never seriously contemplate the establishment of anything like a so-called Federal Newspaper Commission. Newspapers have become responsible and professional voluntarily. Fairness has not been imposed by Government fiat.

Yet, television and radio broadcasters have the FCC and its Fairness Doctrine to contend with. By law, they must be fair.

Newspapers are fair without Government control. And I maintain that radio and television would also be fair without Government control.

Simply put, again, it is not necessary to deny freedom in order to gain fairness.

Denying broadcasters their first amendment rights is also wrong because it is self-defeating.

Under the Fairness Doctrine, for example, broadcasters are required to (1) devote a reasonable amount of time to the discussion of controversial issues and (2) afford reasonable opportunities for opposing viewpoints.

This sounds fine. But, in actual operation, the fairness doctrine has not stimulated the free expression of diverse ideas. Rather, it has had the opposite effect. It has promoted the sameness of ideas. Stations avoid the airing of controversial issues because they fear a challenge to their license renewal or expensive litigation resulting from a fairness complaint.

NBC's problems in airing two television documentaries help to illustrate the point.

And I go on into some detail in describing the experiences that they had that persuaded them to take it easy with documentaries in the future that are controversial, because they would have to do another one with another side, and perhaps a third one with a third side.

I firmly believe that broadcast journalists would not be chilled into blandness and sameness if it were not for governmental controls as exercised through the FCC's Fairness Doctrine.

I believe that without the Fairness Doctrine there would be more, not less, programing of controversial issues.

Restrictions like the Fairness Doctrine are, in my view, self-defeating. Their proponents want diversity of ideas and the presentation of controversial and contrasting points of view. What they promote, instead, is sameness, blandness, timidity, and conformity. The American people are the losers.

Denying broadcasters their first amendment rights is wrong for a final reason. It is dangerous.

Letting Government be the final arbiter of fairness for example, confers immense power. This is especially true when the same Government decides on the granting of broadcast licenses.

Three examples from the recent past remind us how the power of Government—although often exercised in the name of fairness—can amount to the tyranny of Government.

These examples all involve past Presidents of the United States. The President, of course, is the head of Government, the same Government that controls broadcasters through the FCC.

In recalling the stories that follow, it is important to remember, too, that the President himself appoints the members of the FCC and designates who shall be Chairman.

THE NIXON ADMINISTRATION

My first example comes from the Nixon administration. I think we are all familiar with that and the example in my prepared statement spells it out in detail.

THE KENNEDY AND JOHNSON ADMINISTRATIONS

But this is not a partisan matter. Fred Friendly has reported that the Kennedy and Johnson administrations, with financial backing from the Democratic National Committee, used the Fairness Doctrine to subdue rightwing radio commentators who were critical of administration goals.

These clandestine campaigns, which reportedly began in 1963, were also meant to inhibit stations from carrying commentary supporting Senator Barry Goldwater, who was then a prospective Presidential candidate in the 1974 campaign, where they had to eventually end up suppressing their statements and views.

Such demand for air time, which the stations would have to provide at no cost, were regarded by many broadcasters as harassments that they chose to avoid. As a result, they either dropped the commentaries or diluted them. This, according to Friendly, was exactly what the White House had in mind.

What do these three examples of the abuse of Government power tell us?

It is wrong to deny broadcasters their first amendment rights because a free press—and that should include free broadcasters—is needed to protect us all from the tyranny of Government power.

To those who would claim that it is safer to take a chance on Government than a chance on freedom and a free press, there are two clear rebuttals.

First, governments traditionally have gathered more and more power unto themselves without regard to the liberties of their citizens. Europe, South America, and Asia are replete with such examples. And we in this country can cite some near-misses, the most recent being, of course, what we have come to know by the shorthand term of "Watergate."

And second, it is easy for a Government, with its power to give jobs and favors, to present a solid front in controlling information about itself. But it is impossible, with members of a free press competing among themselves, to conspire to suppress information about Government or anything else. As Jefferson once said, whoever heard of a newspaper suppressing a government.

Freedom of the press can be abused by individual reports, papers, magazines, broadcasters, or broadcasting stations. But with competition—the drive to be best, to be first with the news, to make money—there is little or no danger of all elements of the press forming a clique or cabal to take over the Government, or—and more important—to deceive the citizens, their customers.

Finally, as long as the Government is kept from the neck of the press by the first amendment, the public should be informed. And that is why the first amendment was written the way it was—as a direct prohibition against governmental interference with five basic freedoms: Of religion, of speech, of press, of assembly, or redress.

Let us not brush away the wisdom of the men who wrote the Constitution and its Bill of Rights.

But it is easy to do that. Look at what the Government has done already through abridging the freedom of the press by imposing controls over the content of radio and television broadcasts.

If there is any risk in the belief that, in Jefferson's words, " * * * the people * * * may safely be trusted to hear everything true and false, and to form a correct judgment"—and there is—then it is the risk inherent in any free society. But a free society is not the safest way of life. It is only the best.

One more word, Mr. Chairman.

I think what I failed to note here is that the reason why the FCC was given this control was because of the limitation of access to the frequencies and the limitation that had to be determined by somebody as to who would get access.

Well, of course, the fact is that we now have a technology in which access is far more readily available. There is the tremendous avail-

ability of television, WCA-TV, with radio FM, so much so it is far cheaper to establish a radio station or TV station than a newspaper.

There is not a major city in the country, none, that doesn't have more TV and more competition in TV, than in newspapers, and far more in radio. To argue because of the scarcity, because of the limitation of the opportunity for various groups to be heard we have to have this kind of censorship—with respect to radio and television—no longer stands with the oncome of technology.

Senator HOLLINGS. Senator, the committee has been having oversight hearings on that point for a year with varied problems. One of the main problems is the expansion of the spectrum.

I have gone to the technicians, the artisans in the field, and have asked, "when it comes down to minority ownership and minority participation, how do you get the TV stations, the substantial ones, in minority hands?" They weren't around when licenses were granted nor in on the ground floor."

Senator Joe Biden said, "How does a minority in the State of Delaware get a minority TV station?"

It is a restricted spectrum and anybody working in the field will tell you so.

You can't take it away from Philadelphia to give it to Delaware. How to do that is a constitutional question relating to the obligation of a contract, and it goes right to the fundamental, as when you quote our friend Thomas Jefferson. He hadn't met radio and TV or Herbert Hoover, but Hoover talked about the captive audience and the nature of radio back in the midtwenties.

The audience couldn't control what was coming through the air like a reader can control his reading of a newspaper by disregarding advertisers and everything else.

As a result of this scarcity, as a result of the technology itself being different than a newspaper, you just can't come in a categorical fashion and talk about first amendment rights. On the contrary, the courts have worked out under the Constitution with these considerations and concerns that you have for the first amendment of the Constitution, various sections which your bill, if they had a listing of them, I think section 2, for example, section 3, or 9, prohibits the FCC from requiring the presentation of certain viewpoints, or otherwise exercising any control over the content of a scheduling program.

Your bill itself repeals section 312(a)(7) of the 1934 Act, requiring reasonable access to broadcast facilities by candidates for Federal office.

Section 4 repeals section 315 of the 1934 Act which requires equal time to all candidates, and so forth.

Section 5 remands section 326 and the 1934 Act to include free press in the section of prohibition of censorship by the FCC, and the requirement under section 6 of 396(g)(1)(a) of objectivity and balance in public broadcasting. And 399, by a very reading of the Proxmire bill, you begin to see the pattern that has been worked out over the years, trying to balance that technology with the first amendment and fairness, and realizing everybody doesn't have a network. And realizing should be important issues that should be aired, and if they are going to be aired, then there should be opposing views.

In the Barry Goldwater case you referred to, when the particular writer attacked a document saying they were trying to smear our distinguished colleague, they went back and said the view was an important view and should also permit the airing of an opposing view.

Senator PROXMIRE. I think we are talking about different cases. I am talking about a case in which the supporters of Senator Goldwater were intimidated by the people in the incumbent administration with which the Senator had to contend in the 1964 campaign.

At any rate—

Senator HOLLINGS. I am talking about the Hargis attack on Fred J. Cook which was the basis for the *Red Lion* case, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367. During a radio broadcast Hargis attacked Cook's book, *Goldwater: Extremist on the Right*, and claimed that Cook had been fired by a newspaper for making false charges against city officials, that he had worked for a Communist publication, and that he had defended Alger Hiss and attacked J. Edgar Hoover, and that now he had written a "book to smear and destroy Barry Goldwater."

Of course, they did allow the opposing view to be aired at that time.

A number of things become interrelated as we consider the question of fairness. One concern of this committee is that we don't come back to the Nixon days of trying to control public broadcasting through the budget and White House influence. In that connection we have invited our friend, Barry Jagoda to testify, though I don't know whether he is in charge, or Mr. Rafshoon is, but we would like one of them to appear. Of course, we will have the Assistant Secretary in charge of telecommunications one way or the other.

We certainly will not have acted wisely if we end up giving the White House first amendment rights.

If you want first amendment rights to go over to that group, they would take over public broadcasting and everything else they can get their hands on regardless of who is in that office at the time.

Every President has shown that disposition.

Senator PROXMIRE. I was going to say, I had an initial bill that would have gone much farther than this, but I recognized the impracticality of getting that adopted.

I am going to the provisions in the present law that enables a form of censorship, whether we don't like the term, or not, that's what it is going to do with it, the Fairness Doctrine and equal time, it inhibits the radio and television stations from expressing their view as they will. I wanted to knock that particular element out. I think we have to recognize that we could make the same case that you made here: For some kind of licensing requirement to apply to newspapers. After all, in many cities they really have a monopoly.

In the biggest city in my State, Milwaukee, there is only one newspaper ownership. You could argue they should be looked over carefully by the Government; the Government should tell them they have to provide equal time for both sides to be represented, that they have to have the Fairness Doctrine. If they have an opinion expressed, then another opinion expressed the other way. We all know how much the newspapers have been able to progress in the last 100 years in providing this kind of balance in the atmosphere of freedom without being told what to do, with the Federal Government sitting over there.

Senator HOLLINGS. I think the Fairness Doctrine has brought about that one newspaper. You have that in my State. You wouldn't see me in the U.S. Senate if it were left to the newspapers of Greenville, Charleston, Columbia, and Spartanburg. They are all Republicans. So the Fairness Doctrine got old Fritz up here in the Senate because I could get on the air.

The Fairness Doctrine has worked on the newspapers, too, and has made them more responsive. They certainly have not come out with a grand generosity and great understanding all of a sudden.

Senator PROXMIRE. That used to be my view when I supported the Fairness Doctrine, but I believe since I have had a chance to judge it and think about it, the newspapers have improved, because the newspaper situation have made them realize it's better business, it makes more sense, it is fairer—

Senator HOLLINGS. What improvement?

Senator PROXMIRE. The Chicago Tribune used to be one of the most biased—

Senator HOLLINGS. What is that? That is competition. They indirectly have adopted the Fairness Doctrine because it has worked so well on TV. You get opposite views.

Senator PROXMIRE. That's the first time I heard that theory.

Senator HOLLINGS. You better listen to it.

Senator PROXMIRE. Anything the chairman says I will listen to very carefully.

Senator HOLLINGS. I am listening to you too. Go right ahead please.

Do you have any questions?

Senator GOLDWATER. No. I enjoyed sitting here listening to my experience. I don't know what they did, but it worked.

I am very concerned about the possibilities of continued Presidential interference with PBS—our public broadcasting system.

I know that Kennedy, Johnson, and Nixon abused public broadcasting, and I think we have had rather sufficient indication that the Carter administration has started out that way.

Would you suggest any way to prevent the political use of public broadcasting by the White House? For example, the chairman pointed out we have been trying to get Mr. Jagoda up here for a long time. He has now agreed to come to my office and talk to me personally, but he no longer is in the position.

Senator PROXMIRE. I think it raises another reason why I think it is time to provide less Government interference with less Government domination and less Government censorship of the commercial radio and television.

You have, as you say, the public broadcasting system which, I think, has done a splendid job in many respects. I think it is a marvelous contribution to our understanding. They have undoubtedly raised the level of broadcasting in many respects. I hope it continues, and I favor it, and support it.

We can get away from the fact, as you say, it's a Government entity. It is very limited, the effect Government has on that, I think.

I think it is quite free. But I think we have to be very sensitive to the fact that it is a powerful instrument that can be used by Government. It is controlled by Government. The budget is approved by the executive branch and by the Congress, and this is all the more reason

why it seems to me that the commercial sections should get as much freedom as possible, and why it is time to do as did the House committee, and move in that direction.

I can't, frankly, Senator Goldwater, I can't think of any way, although I am sure you can, and this committee, because you have put in a lot more thought about this matter than I have, offhand, off the top of my head, how you can provide a greater insulation of public broadcasting from interference.

After all, it's a Government entity, they spend Government money, we have to be responsible for the money we spend, we have to follow it, make sure it is not wasted. It's a real quandry.

My only suggestion is that we give a greater head and greater degree of freedom than we have so far to the commercial end.

Senator GOLDWATER. The political use of public broadcasting by the White House can be done very subtly and in a way that is difficult to argue with.

Senator PROXMIRE. It certainly can.

Senator GOLDWATER. I can recall a recent example. One of the world's greatest musicians was enticed out of a 12-year retirement to come to the White House and play. The commercial networks were prohibited from covering the recital, but the public broadcasting system was there. Then notices were sent to all PBS stations that at a certain time on a certain day that tape would be used.

Now, is this political? It doesn't hurt anybody in office to have people at home, or people elsewhere think—this man is a great supporter of the arts—when he might not know one end of the keyboard from the other. That's the type of problem that I worry about.

I do want to point out that the public broadcasting station near my home does a good job. It has three programs that have a higher rating than the network affiliates.

Now, one other question. It isn't directly related to this, but I know you have given this matter some thought.

We had a situation in this town where a newspaper owned television and radio stations, not just in Washington, but around the country.

Do you believe a newspaper should be allowed to own a television station, or vice versa?

Senator PROXMIRE. As you know, there are limitations on it, and the FCC has tried to the extent that they can, that the newspaper in a particular town will not also own a TV station. It is hard to get away from that. But they have succeeded, to some extent, some places where they have been able to trade. A newspaper in one city, for example, that owns a television station, can trade with another newspaper that owns a television station.

The point I would make here, however, while the newspaper chain has become a problem, because there is more and more consolidation, more greater and greater degree of monopoly in the newspaper area, this has been limited. And I think it should be continued to be limited with respect to television.

I think it is five television stations, nobody can have more than that. And I think that represents a limitation on the kind of monopolistic power that TV has compared to a newspaper. And I think it is perfectly proper to maintain that limitation.

Senator GOLDWATER. Well, they apply that in some places, but I don't think it has been properly applied in Washington. It is again a question of what the FCC wants to do. I wonder how the Fairness Doctrine is practiced by that outfit at the television stations it owns around the country.

Senator PROXMIRE. When the relicensing comes up they put pressure on. I think they have succeeded in a couple of cases. Chairman Ferris, who follows me, can undoubtedly give you the answer on that.

Senator Hollings.

Bob?

Senator PACKWOOD. No questions.

Senator HOLLINGS. Senator, I was talking about "jumbling." We are also jumbling. We will always have the threat of influence or pressure, or the threat of an abuse by the very fact that the Government itself grants the license, not with the newspapers, but with the TV stations. The granting of a favor by the Government itself. And so we have to watch very carefully.

Suppose the Government was able to work around the threat of pressure, or perhaps, by threatening not to relicense. There will only be one station in a particular town, like one newspaper. The Fairness Doctrine guarantees a multiplicity of voices, opposing views to be heard. This is one thing that you and I are both concerned with, namely, the freedom of speech, which is embodied the multiplicity of voices.

If you can sell that out, we can't sell out the pressure or threat of abuse, but we can try to control it. As long as the Government grants the license there is always that potential.

Senator PROXMIRE. That's true, but you do have a variety of TV stations and they compete much more than newspapers do.

If you give a freedom of choice this way, it seems there would be competition, you will get a variety of expressions.

I am not sure that the—I am positive, as I say, what you lose in the vigorous kind of journalism you can have on radio and television that you have in the newspapers, where they go after controversial issues and go after them in depth. They are afraid to do that on television. You have mentioned documentaries of the kind that NBC has, and they get in so much trouble, it's so difficult, it is so costly that they just throw up their hands and say, "To heck with it. We are not going to that kind of thing."

I think we would have far more stimulating, more useful presentations on TV if we could find a way to encourage them to do this and not penalize them for it, which is what we do now.

Senator HOLLINGS. Very good. We appreciate very much your appearance and the presentation of this bill. We will be in touch with you.

Thank you very much.

[The statement follows:]

STATEMENT OF HON. WILLIAM PROXMIRE, U.S. SENATOR FROM WISCONSIN

Mr. Chairman, I commend you for holding today's hearing on my bill, S. 22, the First Amendment Clarification Act of 1978.

As you know, I first introduced this bill in 1975—and then again last year—in order to give fuller meaning to our First Amendment's guarantee of freedom of the press by abolishing the so-called fairness doctrine and the equal time rule.

I am most grateful for this opportunity to touch briefly on some of the major considerations that have convinced me that broadcasters deserve to be free of these onerous restrictions on their First Amendment rights.

I shall limit my remarks this morning to about ten minutes, but I ask that the full text of my statement be entered in the hearing record.

FIRST AMENDMENT: 24 PERCENT EFFECTIVE

The First Amendment forbids the Congress from passing any law that might diminish our right to have a free press.

But, unfortunately, Congress has passed a law that does just that. And the executive and judicial branches have supported that law.

I refer, of course, to the Communications Act, which has abridged the rights of a part of the free press.

Not everyone recognizes that broadcasting is a part of the press. If they did, there would be little to argue about. The need to maintain the freedom of the printed press has, in general, not been attacked.

Other means of mass communication—newspapers, magazines, pamphlets, books, and motion pictures—have kept their free press rights. But not broadcasting.

This would be a grave omission under any circumstances. But broadcasting—radio and television—is the preferred source of news for 76 percent of the American people. Yet, because of governmental controls like the fairness doctrine and the equal time rule, broadcasters are second-class citizens when it comes to First Amendment rights.

In practical terms, this means that our First Amendment is only about 24 percent effective when it comes to freedom of the press. Obviously, we can and must do better.

Denying broadcasters their First Amendment rights is wrong for many reasons. I wish I had time to discuss them all. But in the minutes that remain, I want to concentrate on three of the most important of these reasons.

First of all, this denial is unnecessary. Second, it is self-defeating. And third, it is dangerous. I shall consider each of these, in turn, in the remarks that follow.

Unnecessary denial: if newspapers, why not broadcasters?

More and better professionalism has been demonstrated in recent years in broadcast journalism. Professionalism means that there is less bias in news coverage, that contrasting opinions are aired when it comes to editorializing, and that opinion and news are clearly separated.

But isn't that what the fairness doctrine seeks? Unfortunately, it has not worked that way. Rather, the fairness doctrine has stifled professionalism.

On the other hand, newspapers, operating without government regulation and with full constitutional freedom, have improved vastly in fairness objectivity, accuracy, and relevance.

About 30 years ago I started to write my Harvard Ph.D. dissertation on developing standards to evaluate the political content of newspapers in the United States. I never finished that undertaking. But in the course of my research, I determined that newspapers had improved enormously over the past 100 years, thanks largely to the atmosphere of freedom permitted by the First Amendment.

BROADCASTERS DESERVE EQUAL OPPORTUNITY

Broadcasters deserve that same opportunity to be free. And if they get it, broadcasters will demonstrate, as newspapers have done, that it is not necessary to "deny freedom" in order to "gain fairness."

We know, of course, that newspapers, down through the years, have not always been fair.

I might point out, for instance, that I grew up with the Chicago Tribune. That was the newspaper I read regularly as a youngster being raised in the Chicago area. The Tribune was, during those years, often marked by biased and subjective reporting. But today, the Chicago Tribune is a much more fair-minded and objective newspaper.

PROGRESS BY NEWSPAPERS

Clearly, newspapers have come a long way. Today, many newspapers carry op-ed pages. Today, most newspaper editors try to make their news columns unbiased and informative. And when an error is made, it is usually corrected. In fact, more and more newspapers are clearly labeling corrections—and they are doing it voluntarily.

In what other ways have newspapers become more fair and unbiased? Here's how:

For one thing, by expanding their coverage. There was a time—not too long ago—when we could not read stories about environmental and health hazards, such as those caused by insecticides, food additives, and other previously arcane chemicals.

There was a time, too, when we did not see stories about social concerns, such as crime-ridden neighborhoods, venereal diseases, old age, population growth, race relations, and school curricula.

Women's rights, it is true, have been reported on since long before the Bloomer Girls. But now we get searching reports on what women's rights really mean.

The list is endless. But fair coverage means that problems, advances, and experimentation in areas of life affecting all of us are covered in all their aspects.

POLICING ADVERTISING

Nearly all newspapers police their advertising, watching for misleading ads and refusing to run them, even though it means lost revenue.

What about big advertisers trying to influence an editor, threatening to pull their ads unless some news is left uncovered? That abuse is almost unheard of these days. I suspect the reason is that enough fearless editors and publishers have stood up to such advertisers to discourage attempts of this kind.

Errors and excesses can still be found on the pages of today's newspapers. I concede that. But the fact remains that the press, overall, acts responsibly.

The press of this country has accomplished what it has because it has not been controlled by the government. There are no licenses. There are few restraints, other than those dealing with libel and obscenity, and the press wants to live with those.

Responsible, professional newspaper journalism has risen out of necessity: to satisfy demanding readers.

And, of course, it has also come about through the need to compete with the nearly instantaneous delivery of news by radio and television.

FCC FOR NEWSPAPERS?

But what would happen if we had something like an FCC for newspapers?

Let us never seriously contemplate the establishment of anything like a so-called Federal Newspaper Commission. Newspapers have become responsible and professional voluntarily. Fairness has not been imposed by government fiat.

Yet, television and radio broadcasters have the FCC and its fairness doctrine to contend with. By law, they must be fair.

Newspapers are fair without government control. And I maintain that radio and television would also be fair without government control.

Simply put, again, it is not necessary to "deny freedom" in order to "gain fairness."

SELF-DEFEATING DENIAL: CONTROVERSY AVOIDED

Denying broadcasters their First Amendment rights is also wrong because it is self-defeating.

Under the fairness doctrine, for example, broadcasters are required to (1) devote a reasonable amount of time to the discussion of controversial issues and (2) afford reasonable opportunities for opposing viewpoints.

This sounds fine. But, in actual operation, the fairness doctrine has not stimulated the free expression of diverse ideas. Rather, it has had the opposite effect. It has promoted the "sameness" of ideas. Stations avoid the airing of controversial issues because they fear a challenge to their license renewal or expensive litigation resulting from a fairness complaint.

NBC's problems in airing two television documentaries help to illustrate the point.

In 1972, NBC broadcast a documentary entitled, "Pensions: The Broken Promise," which dealt with corporate pension plans and how they often do not keep faith with the workers they are intended to benefit.

The airing of the program led to the filing of a fairness doctrine complaint with the FCC.

NBC claimed in defending itself that the subject of private pension plans was not controversial because as far as it knew the subject had not been dealt with previously on network television.

CATCH 22

Accuracy in Media, Inc., complained that contrasting viewpoints were not aired on the program.

The FCC rejected AIM's allegation of distortion but did decide that NBC had violated the fairness doctrine. It then ordered the network to broadcast balancing material.

NBC said that it had done a fair job and had no intention of giving the subject more air time.

Before moving on to what happened in the courts, I should point out a "Catch 22" aspect of this situation. I do so because it is but one example of the nightmare of complexities that accompanies the attempt to administer the fairness doctrine. Had NBC devoted more time to the subject, giving additional viewpoints, there would have been no issue before the FCC. So in order to prove its point, to test the matter in the courts, NBC could air no more shows on the subject without making its case moot.

Now back to the courts. A three-judge panel of the District of Columbia Court of Appeals ruled in favor of NBC, saying that this country needs investigative reporting. Subsequent court actions left this ruling intact.

What is the lesson of the "Pensions" case? It is this. The fairness doctrine can interfere with journalistic discretion, particularly in investigative reporting.

RESTRICTING BROADCAST EFFORTS

Just think of the implications if the court had decided the other way. Such a ruling would have meant that Government could, in the words of fairness doctrine analyst Fred Friendly, "substitute its judgment for that of the network as to what issue was involved in a broadcast documentary and order that more air time be given to elements that the journalist never thought central to the story."

The end result would be to restrict broadcast efforts at investigative reporting because of the difficulty in airing any program that took a point of view or was controversial.

But wait a minute, you might say. There's no problem here. NBC won its case. It was home free and clear. There is no lingering "after-effect."

True? Not necessarily. Let's look at how NBC reportedly agonized over its 1975 television documentary on handguns entitled "A Shooting Gallery Called America?"

According to New York Times writer John J. O'Connor, complaints from the public even before the program was shown caused a rewriting of the script to avoid fairness doctrine complaints to the FCC after the fact.

And, O'Connor further reports, this documentary on a controversial issue of public importance—gun control—drew little response from a national television audience of about 10 million (381 complaints out of the 441 letters received in the two weeks after the show) because it failed to take a stand.

CHILLING EFFECT

If O'Connor is right, then this is a good example of the chilling effect on journalism caused by governmental control of broadcasting.

I believe NBC executives should not have felt the hot breath of the FCC and its fairness doctrine on the backs of their necks. For if O'Connor is correct, the existence of the fairness doctrine indirectly restrained the producers of "Shooting Gallery."

And if O'Connor is right, if NBC news executives ordered a new script for the "Shooting Gallery" because of the fairness doctrine, I wonder if it was because of the time and expense NBC went through before the FCC and the courts in the wake of its 1972 documentary on "Pensions: The Broken Promise?"

I firmly believe that broadcast journalists would not be chilled into blandness and sameness if it were not for governmental controls as exercised through the FCC's fairness doctrine.

I believe that without the fairness doctrine there would be more, not less, programming of controversial issues.

Restrictions like the fairness doctrine are, in my view, self-defeating. Their proponents want diversity of the ideas and the presentation of controversial and contrasting points of view. What they promote, instead, is sameness, blandness, timidity, and conformity. The American people are the losers.

DANGEROUS DENIAL: THE TYRANNY OF GOVERNMENT

Denying broadcasters their First Amendment rights is wrong for a final reason. It is dangerous.

Letting Government be the final arbiter of "fairness," for example, confers immense power. This is especially true when that same Government decides on the granting of broadcast licenses.

Three examples from the recent past remind us how the power of Government—although often exercised in the name of "fairness"—can amount to the tyranny of Government.

These examples all, involve past Presidents of the United States. The President, of course, is the head of Government, the same Government that controls broadcasters through the Federal Communications Commission.

In recalling the stories that follow, it is important to remember, too, that the President himself appoints the members of the FCC and designates who shall be Chairman.

NIXON ADMINISTRATION

My first example comes from the Nixon Administration. Relevant episodes from that period are still fresh in our minds. I need only cite some of them briefly here.

FCC Chairman Dean Burch called CBS President Frank Stanton in November 1969 to request a transcript of that network's news analysis after a Nixon address the night before.

Vice President Agnew made his famous Des Moines speech nine days later blasting the network's news coverage and reminding them that they held licenses at the pleasure of the FCC.

CBS President Stanton reported that there were a number of White House phone calls over the succeeding three years conveying displeasure with news broadcasts.

There was a memo of September 1970 from Charles Colson to H. R. Haldeman proposing that the White House get a ruling from the FCC on the "role of the President, when he uses TV." This, Colson argued, would have "an inhibiting impact on the networks."

There was, too, the December 1972 Indianapolis speech by Clay T. Whitehead, director of the White House's Office of Telecommunications Policy, condemning the "ideological plugola" and "elitist gossip" of network news.

And there was, finally, President Nixon on tape telling Haldeman that, "The main thing is The Post is going to have damnable, damnable problems out of this one. They have a television station. . . . And they're going to have to get it renewed."

KENNEDY AND JOHNSON ADMINISTRATIONS

But this is not a partisan matter. Fred Friendly has reported that the Kennedy and Johnson Administrations, with financial backing from the Democratic National Committee, used the fairness doctrine to subdue right-wing radio commentators who were critical of Administration goals.

These clandestine campaigns, which reportedly began in 1963, were also meant to inhibit stations from carrying commentary supporting Senator Barry Goldwater, who was then a prospective Presidential candidate.

Friendly reported that both the Kennedy and Johnson Administrations maintained professionally-staffed organizations that monitored stations carrying right-wing commentary and then demanded time for reply under the fairness doctrine.

Such demands for air time, which the stations would have to provide at no cost, were regarded by many broadcasters as harassments that they chose to avoid. As a result, they either dropped the commentaries or diluted them. This, according to Friendly, was exactly what the White House had in mind.

What do these three examples of the abuse of government power tell us?

It is wrong to deny broadcasters their First Amendment rights because a free press—and that should include free broadcasters—is needed to protect us all from the tyranny of government power.

WHY NOT TAKE A CHANCE ON FREEDOM?

What I have been saying today can be reduced to this simple thought—why not take a chance on freedom?

If it is power we are concerned about, and we should be, the power of the electronic media is as a pygmy compared to the power of government.

In 1977, U.S. News & World Report surveyed the leading citizens of this country in business, labor, the universities, the newspapers and the government as to who were the people who ran America.

Where did the electronic media rate?

The only person from the media who was rated in the 10 most influential Americans was Walter Cronkite and he was a distant ninth. In fact, Cronkite was the only electronic media person in the 30 most influential Americans.

Who are the most influential? The answer is emphatic. It is government. Eight of the top 10 persons who run America were government officials.

By denying the electronic media their First Amendment rights, we give the big guy—government—more power and from the less influential—the media—we take it away.

To those who would claim that it is safer to take a chance on Government than a chance on freedom and a free press, there are two clear rebuttals.

GOVERNMENTAL POWER

First, Governments traditionally have gathered more and more power unto themselves without regard to the liberties of their citizens. Europe and South America and Asia are replete with such examples. And we in this country can cite some near-misses, the most recent being, of course, what we have come to know by the shorthand term of Watergate.

And second, it is easy for a government, with its power to give jobs and favors, to present a solid front in controlling information about itself. But it is impossible, with members of a free press competing among themselves, to conspire to suppress information about government or anything else. As Jefferson once said, whoever heard of a newspaper suppressing a government?

Freedom of the press can be abused by individual reports, papers, magazines, broadcasters, or broadcasting stations. But, with competition—the drive to be best, to be first with the news, to make money—there is little or no danger of all elements of the press forming a clique or cabal to take over the Government, or—and most important—to deceive the citizens, their customers.

FREE SOCIETY IS BEST

As long as the Government is kept from the neck of the press by the First Amendment, the public should be informed. And that is why the First Amendment was written the way it was—as a direct prohibition against governmental interference with five basic freedoms: Of religion, of speech, of press, of assembly, of redress.

Let us not brush away the wisdom of the men who wrote the Constitution and its Bill of Rights.

But it is easy to do that. Look at what the Government has done already through abridging the freedom of the press by imposing controls over the content of radio and television broadcasts.

If there is any risk in the belief that, in Jefferson's words, "... the people ... may safely be trusted to hear everything true and false, and to form a correct judgment"—and there is—then it is the risk inherent in any free society. But a free society is not the safest way of life. It is only the best.

Senator HOLLINGS. Mr. Ferris, Chairman of the FCC.

STATEMENT OF HON. CHARLES D. FERRIS, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION

Mr. FERRIS. Mr. Chairman, thank you for the opportunity to present my views on S. 22. I would like to put my prepared testimony in the record and attempt to summarize as briefly as I can that testimony before responding to your questions.

Senator HOLLINGS. The statement will be included with its appendices, and you can highlight as you wish.

Mr. FERRIS. S. 22 would repeal the sections of the Communications Act covering the Fairness Doctrine, political broadcasting and public

broadcasting editorializing. The bill also proposes a sweeping amendment to the Communications Act that would bar the FCC from exercising any regulatory oversight of a broadcast station's program "schedule—and the content of its programs."

Senator Proxmire amended S. 22 on February 10 to make it clear that he did not intend the bill to bar FCC regulations affecting broadcast content except in the areas of the Fairness Doctrine and political broadcasting. I would only point out that the language remaining in the bill that I have quoted still may have this potential effect. It should be eliminated in the bill is, in fact, intended to be limited to fairness and political broadcast regulation.

The Commission as a whole has not had the opportunity to address this bill since Commissioner Tyrone Brown and I have come to the Commission. I will, therefore, not today state any official views of the Commission.

If the subcommittee wishes, we can, as a body, take up the subject at a later time and supply the subcommittee with additional views.

Certain areas covered by the bill have been addressed by past commissions and I have attempted in my statement to outline those past views where appropriate.

First I would like to make some overall observations concerning the relationship of basic first amendment principles to the provisions of the Communications Act relating to the Fairness Doctrine and political broadcasting.

There has been, since the early days of the medium, a fundamental tension between the first amendment and broadcast regulation. The Congress, the Commission and the courts have wrestled with this tension for many years.

Broadcasting presents unique problems among forms of mass communication. Because of the finite nature of the radio spectrum—scarcity, if you will—there are substantially more individuals who want to broadcast than there are frequencies needs to allocate.

Because these facilities are limited, Congress and the Commission have treated broadcasting station licensees as "public trustees" of a valuable national resource.

Congress and the FCC have, therefore, imposed upon them certain programing responsibilities, consistent with their fiduciary role.

The statutory section addressed in S. 22, and the Commission policies under them, cannot be viewed, I believe, in isolation. They are part and parcel of, and indeed they are the most well-known and most fundamental examples of, the entire public trustee scheme on which title III of the Communications Act of 1934 is based.

As a basic long-term goal, I have consistently stated my support for efforts to move away from Federal regulation over broadcasting content. But I believe that effort must be taken within the broader context of efforts to increase the voices to which the public has access.

I hope that we can substitute a more diverse and more competitive marketplace of ideas and voices, for the existing public trustee regulation of a limited number of voices.

In this context, I support freeing the broadcast medium of content regulation. In fact, I regard this overall effort as critical to our Nation's future, since we are becoming more and more a Nation dependent on electronic means of communication.

I believe that we can through new technology and services expand such accesses exponentially. This can provide the opportunity for wider play of free market forces. It could mean greater access for minorities, who today control less than 1 percent of existing broadcast frequencies, and for all others as well.

But despite advances in technology, there is still scarcity in electronic outlets.

Cable television, for example, serves only one home of every 6 in America and does not provide a significant amount of separate information apart from carrying existing broadcast signals.

Comparison of the number of daily newspapers and the number of broadcast outlets in a particular market does not validly measure the scarcity that underlies the public trustee scheme.

There are, undeniably, substantial differences in the public ability to publish and to receive information by print as opposed to electronic communications.

In the print medium, citizens can reach vast numbers of their fellow citizens, and be reached, through both broad appeal and highly specialized magazines, newsletters, and brochures.

In the electronic medium there now exists no comparable capability.

We need not await total comparability with print before we can loosen the bonds of public trustee regulation in electronic communication. But there should be sufficient outlets for expression, and sufficient diversity of the ownership and control of those outlets, that we can be reasonably assured that marketplace forces will bring important issues, and a diversity of views on those issues, to the electorate's attention.

We may have reached the point in the evolution of radio. The increasing financial viability of commercial FM, and the increase in noncommercial public radio, is leading to a more abundant use of the spectrum now assigned to radio.

Additional portions of the spectrum might also be assigned to relieve excess demand. We may, therefore, be reaching a point where Congress might fairly make the judgment that public trustee content regulation of radio, which would include the Fairness Doctrine, should be replaced with a less restricted, market oriented regulatory framework that still yields a public dividend for the privilege of using the public spectrum.

Even here I would urge that Congress take a hard overall look at the radio medium in all its forms, commercial and noncommercial, large and small markets, and including the new development of cable radio, and make careful determinations whether adequate diversity is present or can reasonably be expected.

Such a review should also be undertaken not simply as to Fairness Doctrine and political broadcasting. It should address the broader context of public trustee regulation of radio which includes regulation of format, percentage limitations on commercial time, and ascertainment of community needs.

Meanwhile, I expect the FCC will continue to regulate radio content, to determine what can and should be changed within our existing statutory authority.

As to television, I believe the time frame for removal for the public trustee status may be longer. There are promising developments in the technology of television sets that may make UHF television—channels 14–81—ultimately an equivalent voice to VHF television—channels 2–13. Other technical improvements may make it possible to add additional VHF and UHF stations.

Increased Federal funding for public television may make these outlets more diverse and effective voices. And, of course, cable, optical fiber, and direct broadcast satellites can significantly increase the choice of information available in the home of the future.

I do not believe that we should await the ultimate development of the video medium before addressing the critical choices we face in content regulation of television under the public trustee standard. But I believe we should discuss these issues on a more comprehensive basis than S. 22.

We should recognize that a basic shift in the public trustee regulatory framework in the television field may be on a different track than in radio.

Before turning to the specific legislative amendments before you, I want to assure the subcommittee that the Commission itself has been reevaluating how to enforce the Fairness Doctrine and equal time provisions of section 315, as well as other political broadcasting regulations.

We are, for example, currently holding an inquiry into means of enforcing broadcasters' fairness obligations with less involvement in broadcasters' activities on a case-by-case basis.

Two other current inquiries attempt to deal with definitional problems that have arisen in enforcement of the "equal time" provisions of section 312(a) (7).

Finally, we are rewriting our basic primer on political use of broadcast facilities in a "plain English" format. This will enable candidates, broadcasters, and the public to better understand how our policies actually operate.

Turning specifically to the Fairness Doctrine, I would note that there are many misconceptions about exactly what this doctrine does and does not require. It requires only that broadcasters: (1) must devote a reasonable percentage of their broadcast time to programs devoted to discussion of issues of public importance; and (2) must do so fairly by providing a reasonable opportunity for the presentation of conflicting points of view on those issues.

This doctrine, in my view, is simply good journalism. It should be framed on every journalist's wall.

It is often argued that the Fairness Doctrine chills broadcaster presentation of controversial issue discussion. But its goal, like that of the first amendment itself, is not to suppress speech but, rather, to encourage uninhibited, robust, wide-open debate on public issues.

In fact, the most important part of the Fairness Doctrine is the first half, the affirmative obligation to present controversial issues.

This is a basic condition of a licensee's public trustee status. A licensee cannot reasonably fail to meet its duty to cover controversial issues on the grounds that in doing so it must cover them fairly.

In evaluating arguments as to a Fairness Doctrine chill it is important to stress what the doctrine does not require.

First, a broadcaster does not have to present contrasting viewpoints on controversial issues within the same program. He is simply expected to do so within his overall programming.

Second, the policy does not require that equal time be afforded for each side, as would be the case if a political candidate appeared during his or her campaign.

Finally, no particular person or group is entitled to appear on the station.

The Commission enforces the doctrine in a very cautious manner to avoid undue Government intrusion in licensee affairs. I have detailed that method of enforcement in my statement for the record.

The Commission's enforcement of the doctrine under these guidelines has accorded considerable discretion to licensee judgment.

In light of the first amendment values involved, I think it has quite properly done so. In a typical year, of some 5,000 fairness complaints and inquiries we receive, only about 15 to 20 are ultimately resolved in a manner unfavorable to the broadcaster.

Even where the Commission does find a violation, it does not levy an onerous penalty. It simply determines that additional views must be aired for the public to hear.

I have in my prepared statement detailed the genesis of the Fairness Doctrine and Commission and court precedent and the Commission's recent reexamination of that doctrine.

I have also detailed the new inquiry the Commission instituted in March of this year to explore alternative ways of achieving compliance with the Fairness Doctrine.

The real significance of this inquiry is not the specific alternatives proposed by any particular party. It is that, while the Commission and courts continue to view the Fairness Doctrine as valid, the Commission is of an open mind as to whether the manner in which its obligations may be met by licensees may be improved.

I have attached as appendices to my statement copies of our Notice of Inquiry and the special mailing the Commission sent out to solicit wide public comment on it.

Turning to equal time for political candidates, the FCC has at one time gone on record as supporting repeal of the equal-time provision of section 315 insofar as it applies to legally qualified candidates for the offices of President and Vice President.

Since this proposal was submitted before I came to the Commission, I did not participate in the drafting of this position; nor has Commissioner Brown.

The Commission has not as yet had an opportunity to revisit the issue since last August. Nevertheless, I can add a few personal observations.

It is now possible, of course, because of the Commission's 1977 Aspen Institute ruling, to broadcast the debates between candidates as on-the-spot coverage of bona fide news events.

There are advantages as well as disadvantages to going further to formally repealing section 315. For example, it is argued that repeal of section 315 for Presidential elections might permit greater coverage of the major candidates than under the present operation of section 315. But the drawback of repeal is its adverse impact on new minority parties, and their ability to attract the electorate's attention.

The impact of broadcasting on the electoral process is so significant, and the dynamic nature of our political system is so essential, that I am not certain at this point whether I would be prepared to abandon the basic protection afforded by section 315 to that process, and to minority parties, in view of the existing administrative flexibility to allow broadcast debates under the *Aspen* ruling.

The Commission has started another inquiry into how to define a legally qualified candidate under the equal-time law.

This inquiry, a copy of which I have also attached to my prepared statement, may help provide greater certainty to the broadcaster and the public, and allay some of the concern about time required for candidates who have not in fact demonstrated the seriousness of their candidacy.

Congress might also fruitfully address this limited area, to see if some more rational means of identifying those Presidential candidates entitled to equal time could be developed, perhaps using similar triggering tests to those presently in effect for qualification for Federal financing.

S. 22 would also repeal section 312(a)7 of the Communications Act. This section requires broadcasters to provide reasonable access by either giving or selling reasonable amounts of time to Federal candidates. It was added to the Communications Act by the Federal Election Campaign Financing Act of 1971.

The statute does not establish a precise definition of what constitutes reasonable access. Commission review in this area has to date generally deferred to the good faith judgment of broadcasters.

In March, however, the FCC instituted an additional inquiry on this subject to determine, among other things, whether specific rules are necessary and whether it would help candidates in complying with this section.

I must wait for experience to develop my own views on whether this section should be repealed. At this stage, I cannot favor repeal. I have, however, already dealt with the adverse effect of the "reasonableness access" provision on public broadcasting stations, and I believe this area should, as I discussed at greater length in my prepared statement, receive specific congressional action. I also discuss in my statement my views on those parts of S. 22 specifically addressed to public broadcasting and would be glad to discuss those views at greater length with you, if you wish. I do view these sections as important, but I would like to provide time for questions by the subcommittee.

Senator GOLDWATER. Mr. Ferris, you mentioned the problem that this act presents. Who is entitled to equal time in Presidential campaigns? Do you have any suggestions?

If you try to set guidelines, you more or less affect the rights of individuals to seek the Office of President, regardless of whether they are a Democrat, Republican or what.

Mr. FERRIS. I like the basic protection of section 315. What we are trying to balance here, is the electorate's right to be informed before an important national election about the person that probably will be the next President of the United States. We could look at it in each election—who are the two real, viable candidates. But there may be some time when there are three or four candidates who could be viable, if they had the same opportunity to make an input to the dialog, and to reach the electorate in the same manner that the two major parties reach the electorate.

I think the fact that the Congress made a repeal, or suspension, of section 315 in 1960, was in the context of the fact that there were at that time only two viable candidates, and the electorate should be informed as to their views and they repealed it for that purpose. If you repeal it totally, I have fears about minor candidates in the future, who might turn into major candidates, not having the opportunity to reach the public because of repeal.

I prefer the ad hoc basis, so a determination can be made as to who might be the next President, and for the electorate to have the opportunity to view the major competitors, but I fear eliminating it totally, because there might be minor parties that might change into major parties if they have the same access.

Senator GOLDWATER. This is something you ought to give more than just passing attention to, because if this election yesterday showed anything, it showed that we may wind up with candidates from other than the two parties.

I have sensed that trend in this country, and it may be growing. I am worried that if we try to confine the equal time requirement to those the FCC determines are viable candidates, you might exclude people who have a right to run for President. I hope you can come up with something.

We are going to be faced with this question.

Mr. FERRIS. I agree. I don't envision the FCC making the judgment. While section 315 is on the books, the broadcasters must give equal time to all the candidates for that office, and I think Congress would be the appropriate institution to make an ad hoc judgment in any one particular election as to whether it should be limited or suspended in some form for that election. But doing away with it totally, I think would not be a wise decision, either.

Senator GOLDWATER. You suggest in your statement that the Fairness Doctrine requirements should be eliminated as to radio stations, particularly in those markets where there are a multitude of stations. What dangers, if any, do you perceive in such a proposal?

Mr. FERRIS. I think we should proceed very slowly on eliminating the Fairness Doctrine. I think where you have radio, markets where you have 50 radio outlets reaching a particular market, you have tremendous diversity, you have all news stations, different types of formats, and I think there is the opportunity for the electorate to choose, and be informed.

I think the real obligation under the Fairness Doctrine is that the listener will be able to have provided to him if he chooses, a full and rich diet of information, so that he can be informed on the matters he wants to be informed on. But I think the free marketplace can provide that type of diversity in the large markets because there will be all-news stations, and there will be something for every taste, and there will be the opportunity through the electronic medium to provide that kind of diversity. In small markets, if you have 2 or 3 stations, they all might turn to all-music, and there would be no informational public trustee responsibility fulfilled by the use of the spectrum. I think one should be very careful about doing away entirely with requiring statistics to fulfill that obligation to the listeners.

So, I don't think that necessarily when one starts to throw away the Fairness Doctrine, and leave it to the marketplace, one should take the entire medium of radio or television and apply it totally across the board. You might want to start with large markets, and see how it works in large markets before we do away with it in the small markets across the board, in any particular form.

Senator GOLDWATER. If you follow that far enough, you begin to tamper with the station's right to produce the programs it wants to produce. They will produce the programs that will produce profit for them, whether it be all music, all news or whatnot.

Mr. FERRIS. I agree.

Senator GOLDWATER. Do you see any legal problems with applying the doctrine to some stations, and not to others?

Mr. FERRIS. I see possibilities, because there is the argument that the policy of the Fairness Doctrine exists in the absence of legislation, and section 315 is really an expression of how the Fairness Doctrine will be implemented or what sort of specific obligations broadcasters will have under their general obligations to inform the listener, and to be doing it in a fair manner.

But I do think that a record could be developed whereby, in certain market areas, we make the basic judgment that the listeners in that market would be fully informed, and that their right to be informed with this public resource is being met in that market, so, I think the record could be upheld, certainly, in doing away with particular expressions of the Fairness Doctrine as it is embodied in section 315.

Senator GOLDWATER. In your testimony, you indicate that you believe that the objectivity and balance provisions of the Communications Act, which applies to public broadcasters is superfluous. For the record, would you tell us how many Fairness Doctrine complaints you received against public broadcasters in 1976 and 1977?

Mr. FERRIS. I will be glad to submit that for the record, Senator.¹

Senator GOLDWATER. As you know, section 399 of the Communications Act prohibits editorializing by certain public broadcasters. The Senate version of the broadcasting legislation, S. 2283, leaves this provision intact. S. 22 would abolish the requirement.

Now, since public broadcasting is supported by all the taxpayers' money, why should some taxpayers be forced to subsidize points of view that may be morally repugnant to them?

Mr. FERRIS. I think it is somewhat anomalous that commercial broadcasting stations have a higher obligation to inform the public than public broadcasting stations.

I think public broadcasting stations should inform the public as well. I think the Fairness Doctrine does apply to public broadcasting stations, as well. I think they should be obligated to discuss controversial issues, and I think the Fairness Doctrine applies to them. When they do discuss these issues, they have to do it fairly. If a public broadcasting station takes a particular position which I don't agree with, or you don't agree with, their overall programing has to reflect a balanced view on that particular issues that they chose to discuss, over the term of their license.

¹ See p. 54.

I think they should have at least the same public trust obligations to inform the public that commercial stations should. I think they should be encouraged to involve themselves in controversial issues, do it vigorously, and, of course, do it fairly, and they would be required to do it fairly under the Fairness Doctrine.

Senator GOLDWATER. Thank you.

There are two aspects of the Fairness Doctrine: One, a broadcaster can devote a reasonable amount of time to discussion of issues of public importance, and reasonable opportunity for opposing viewpoints must be afforded.

Some commentators believe too much stress has been placed on the second requirement and not enough on the first.

Mr. FERRIS. I agree with that.

Senator GOLDWATER. What does the FCC do to insure the first requirement has been met?

Mr. FERRIS. Well, on a case by case, we don't do anything, other than at licensee renewal time when we do look at what the performance of each licensee has been with respect to what promises he made when he got the license with respect to the informational type of program he was going to present. But we do not look presently at what issues he covered, or what issues he ignored. So the broadcasters have tremendous discretion as to what they should cover.

There have been cases, of course, where the first part of the Fairness Doctrine has been specifically enforced against stations, as was the recent case in West Virginia on strip mining, where strip mining was a very significant issue in West Virginia but the station for 2 years didn't mention it at all. They were required to cover that issue and, when they did, they had to give a balanced coverage, pros and cons.

So our involvement in the first section, from the standpoint of actually going out and saying cover X issue or Y issue, is far less than when a licensee does cover an issue, and it has to be done in a balanced and fair way.

Senator GOLDWATER. On a scale of 1 to 10, where would you put the first aspect of the Fairness Doctrine that I have outlined when a station seeks relicensing?

Mr. FERRIS. We wouldn't look at it in the context narrowly of part 1 of the Fairness Doctrine. It would be more going back looking at what they claimed they were going to do, and what percentage they did of informational programs.

I have a particular sensitivity in looking at the content of specific programs from the standpoint of the first amendment. You know, looking at a broadcaster, what he said, how he said it, other than if the question is raised under the present framework by someone who didn't agree with what was said, joining the issue and then looking at the broad record, with the broadcast licensee making a submission why he was fair over the full range of the license term by showing how balanced he was. I feel much more comfortable in that context than in actually getting into being an editor of specific content of a specific program and saying, "You shouldn't have said it that way. You should have said it another way."

Senator GOLDWATER. I asked that question because I have witnessed several license renewals where this was a factor that was emphasized

by people opposing the relicensing of the station. When it comes to your judgment, will you place compliance with the Fairness Doctrine in the top 10 percent of your decision, or the bottom 10 percent?

How important is it that a station keep their word?

Mr. FERRIS. Oh, I think the precedent that the Commission historically has put upon the keeping of one's word has been very, very high. As a matter of fact, it has been the main emphasis at the Commission from the standpoint of the representations made to the Commission and the validity of those representations. Any form of misrepresentation has been dealt with traditionally in the most severe fashion by the Commission.

I think the rationale for that is we have to rely upon the statements of the broadcast licensees and we have to put credence in that.

When they do make misrepresentations, the remedy has to be very severe. I think it has been very severe.

Senator HOLLINGS. Your judgment, too, is limited by that *Columbia Broadcasting* decision of Chief Justice Burger when he said the licensee was not a common carrier and that a licensee may impose a flat ban on all paid public issue announcements.

How does that affect the judgment now that you follow with respect to the first section of the Fairness Doctrine, namely, to carry all important public issues?

Mr. FERRIS. I think that falls into the category of where does the real benefit of the doctrine lie—where is the real obligation of the Fairness Doctrine? It is really not that any particular individual or groups of people having a particular viewpoint have a right to present themselves to a licensee, and since the licensee has permitted a viewpoint to be expressed that they have an obligation and a right to do that particular broadcast. The broadcaster has the right to choose whatever way to present that view he wants.

Senator HOLLINGS. If I say I want to put an ad on relative to sugar cereals, they can ordinarily not accept it. Except, you can look at the Saturday morning programming of that particular schedule and they say, well, you are carrying them yourself, so that would be under the second part again.

That is a bad example.

To get a better example: for one that has not been advertised or aired, and I make a presentation, you can ban me. You can say no, we are not going to carry that. Then how does the Commission look upon that particular licensee when it comes up for his relicensing and ban the various groups or something of that kind?

It is still a judgmental thing. He is going to exercise his own judgment.

Mr. FERRIS. Absolutely. On the commercial example, coming in with a particular paid viewpoint, I think the Commission looks at it from the standpoint of did the broadcast licensee act fairly during the term of his license? It wasn't the fact that any particular viewpoint came to him and said: "I have a right to go on your station because you have been covering a particular issue." There is no such right at all.

The broadcast licensee has a right to do it fairly and choose whom-ever he wishes and in what manner to present a balanced and fair presentation on any particular issue.

No particular outside group has a right under the present law to demand time because the broadcast licensee presented a view that it disagreed with.

The broadcast licensee has an obligation to present the public at large a balanced view, but in whatever form and by whatever spokesman he chooses to present that view.

We will look and see if it is a fair presentation and if it is really performed that way, but I don't think there is a right in any individual on the outside to demand time to present any particular view under the Fairness Doctrine.

Political candidates do.

Senator HOLLINGS. Has the FCC ever lodged a Fairness Doctrine inquiry, inquiry into a station's actions on its own? Do you have to receive a complaint or—

Mr. FERRIS. I will have to check on that and submit a written response.² I don't know, Mr. Chairman.

Senator HOLLINGS. I just wondered whether you had to have a complaint and had to have a prima facie showing.

Mr. FERRIS. I will check. I know the overwhelming number are initiated from the outside. I mean they are stimulated from the outside, not from the Commission on its own initiative.

I don't know. If there have been cases, I will find out and submit them for the record.

Senator GOLDWATER. A case somewhat related to that was reported in the Hall radio report of May 8 which involved a KIOI editorial in San Francisco. Are you aware of that?

Mr. FERRIS. I read something in one of the trade journals, about a paragraph, dealing with that, Senator, recently.

Senator GOLDWATER. It raises a question about the propriety of a Federal employee's involvement in the request for time.

According to the station manager, the request for time arrived in a franked envelope and was written on Federal Trade Commission paper.

The individual making the request, Dr. Haverkamp, is an economist with the FTC. In subsequent conversations he gave every indication he was acting as an FTC spokesman. It was not until Haverkamp's reply was broadcast, and the public response was against what was said, that it was requested that the station broadcast a disclaimer, that he was speaking for himself and not for the FTC.

I ask that that report be made a part of the record.

Senator Hollings. It will be included.

[The following information was subsequently received for the record:]

[From the Hall Radio Report, Special Supplement, May 8, 1978]

The following is a KIOI editorial broadcast on the San Francisco station on April 3:

As you are filling out your tax returns and sitting there wondering where your tax dollars go, I'd like to give you an example of what a regulatory agency does with your dollars.

The Federal Trade Commission in Washington, D.C. now believes that you don't understand advertising, your children don't understand advertising, and there is too much choice on the marketplace. The Federal Trade Commission

² See p. 54.

believes children are being seduced into wanting products which the staff of the commission says are not good for them, such as, sugared breakfast foods. They claim the kids force the parents to buy this stuff, or the parents don't have any control over the kids. Hence: A rule from the federal government is needed to protect the kids from the ads which will protect the parents from the kids, and protect the kids from the food. Really, only a government agency could come up with that line of reasoning.

I think they are trying to turn the Federal Trade Commission into the great national "nanny." But it doesn't end there. Your guardians at the FTC fear that you might be misled with terms such as: acid indigestion, nervous tension, or that bloated feeling. So, they want to force advertisers to use only the appropriate technical, medical terms in describing their products. No longer will the cough medicine fix the cough because a cough would have to be "rinitis" or some other latin name and you wouldn't even know what they were talking about.

Also the problems of selection. The FTC feels in breakfast cereals there are too many brands on the market, too few manufacturers. They propose to break them up, cut down on the selection, and they feel it will be less traumatic for you as a consumer. You won't have to choose between sugar pops and rice krispies and cornflakes. You just get what's there. Think about this, your tax dollars are being spent on that. Next time you complain about inflation, look at the impact this will have on the business industry and you as a consumer.

The following are the views of Dr. Larry Haverkamp, in response to KIOI's editorial. Dr. Haverkamp is an economist for the Federal Trade Commission.

The station to which you are now listening, KIOI, recently presented a misleading editorial concerning the Federal Trade Commission's attempts to regulate advertising to children.

With the aid of competent child psychologists, the FTC staff has discovered that children are more influenced by what they see on television than are adults. In some instances, children actually believe that little people are inside the TV set, standing beside a box of cereal. When some little TV character, whom the children are taught to admire, persuades them they would like to eat sugar-laced cereals, they obey the suggestions, the FTC staff has found, not as a suggestion only, but as if it were an authoritative command.

Young children have not yet developed the sophistication of their parents; they actually believe Freddy Flintstone when he pours great gobs of chocolate over cereal and tells them that the resulting product is not only fun to eat but is good for them. Innocent little children never consider the possibility that their pal, Freddy Flintstone, is attempting to trick them, and to make them eat things which are *not* good for them for the purpose of increasing cereal company profits. Yet this is exactly what is happening.

We adults have the sophistication to say 'Oh, that's just another stupid commercial so I'll not take it seriously.' Most adults forget that little children lack the sophistication to separate commercial messages from the rest of their education and believe that a commercial message is directed to each of them individually. This vulnerability of children has not escaped the notice of big business, however, who spend \$660 million each year to brainwash young children in order to sell products to them. If they were confident of the merits of their products, wouldn't they be directing their ads to parents instead of children?

The FTC staff, in response to two consumer group petitions, has described the many ways in which little children are at an extreme disadvantage to advertisers and wants to do something about it. This station, KIOI, wants the FTC to do nothing about this problem. If you agree that the FTC should help our children who are innocent victims of big business, register your vote by turning to another radio station. And don't turn back to KIOI until big business, in their unrelenting search for profits, is constrained from unilaterally determining the commercial wants and desires of the most innocent victims of big business—our children.

Jim Gabbert, president & general manager of KIOI wrote the following letter to Rep. Lionel Van Deerlin, chairman of the House Communications Subcommittee, and Henry Geller, chief of the Commerce Department's Office of Telecommunications Policy:

As you know, I have been an advocate of less government intervention in broadcasting. I am enclosing a copy of a recent editorial I ran on KIOI, and the reply which the Federal Trade has demanded to run on KIOI. If you read my editorial, you will see that I am not advocating that children eat sugared

cereals. I am advocating the principal that the FTC has no business in this area. In the reply, notice how he is telling our listeners to turn off KIOI until 'big business' does what the FTC wants it to do. This mentality reminds me of Nazi Germany. In fact it scares the hell out of me that the FTC could attempt to use its awesome power to intimidate free speech and opinion because it disagrees with their philosophy. Never have I seen such a clear-cut example of government using the regulatory agencies to intimidate and restrain free speech. Unfortunately, this is only the tip of the iceberg.

FEDERAL TRADE COMMISSION,
Washington, D.C., June 7, 1978.

Memorandum to: Staff.
From: Mike Pertschuk.
Distribution: All employees.

I am disturbed by two recent press accounts involving this agency. In one an FTC staff member reportedly characterized the recent congressional action on children's advertising as "stupid." In another a staff member reportedly urged radio listeners to turn off the station which had editorialized against the children's advertising rulemaking proceeding until "big business . . . is constrained from unilaterally determining the commercial wants and desires of the most innocent victims of big business—our children."

Both of these alleged remarks are unacceptable as expressions of the Commission's views and betray a lack of understanding of the legitimate role for public and Congressional criticism. This agency, like any agency of the government, derives its authority and responsibility from Congress, the elected representatives of the public. In pursuing this mandate, it is our responsibility to carry out both the letter and the intent of Congress. Our intention is to serve the public interest vigorously and resourcefully, seeking the most effective consumer protection and competition programs within our legislative framework.

While it is also our responsibility to explain both to Congress and to the public why the Commission acts as it does in the public interest, we remain public servants, accountable to the public and to the Congress. As such we must listen carefully and respond constructively when our initiatives are criticized. We have no license to ignore or ridicule those who disagree with Commission action.

We must ensure that any statements which any of us make fully reflect our responsibilities as public servants. I urge you henceforth to make certain your statements scrupulously avoid the arrogance in the two remarks that prompted this memorandum.

Senator GOLDWATER. Should Government agencies be able to respond to attack on their policies?

Mr. FERRIS. Not by rights. The broadcast licensee, even in that particular case, has an obligation where they editorialize with respect to an activity of the FTC, a controversial issue, they had to be fair; but it didn't mean—apparently this one here was not an official spokesman of the FTC. Even if he had been sanctioned by the FTC and made a request to go on, the broadcaster had no obligation to put him on.

He has to present a fair view, but he determines how that view should be presented, and through what spokesman.

There is no right of response on the part of any institution to do that because who is the spokesman for any particular point of view is pretty hard to determine.

Senator GOLDWATER. I don't want to take up too much time. Any time you feel I have gone too far, blow the whistle, invoke the Fairness Doctrine.

It was reported in a New York Times magazine in 1975, that the Fairness Doctrine was used by the Kennedy White House in the early 1960's as part of an effort to blunt conservative criticism of administration policies.

The article quotes a former Assistant Secretary of Commerce in the administration as saying,

Our massive strategy was to use the Fairness Doctrine to challenge and harass right-wing broadcasters, and hope the challenges would be so costly to them they would be inhibited, and decide it was too expensive to continue.

Apparently, this strategy worked because the same article reported that proadministration spokesmen received 1,700 free radio broadcasts. Now, in view of the possibility that the Fairness Doctrine can be used for political purposes, can you suggest an alternative which would accomplish the goal of fairness, but without the dangers of abuse for political purposes?

Mr. FERRIS. I think, probably, the greatest step forward would be an understanding of what the Fairness Doctrine really requires of broadcasters. I think broadcasters really don't have a very clear understanding of what the Fairness Doctrine does and requires.

Senator GOLDWATER. Do you really believe that?

Mr. FERRIS. Yes; one, I think with respect to them going out and covering controversial issues, I think they have a great confusion with respect to the notion of equal time, as opposed to being fair over the entire range of broadcasts on issues.

I think they have a great misconception about any one program—thinking that you have to present both views—which the Fairness Doctrine does not require.

I think the Fairness Doctrine is a good journalistic doctrine whether in the printed media or electronic media.

Senator GOLDWATER. I agree with you.

Mr. FERRIS. I think the misunderstanding and misuse and misapplication of it, is caused probably by the nonjournalists who have the broadcast licenses who are attempting to make judgments with respect to what good journalistic doctrine is.

I don't think the Fairness Doctrine is at all a problem if it is understood, and if it is applied in the way I think it is intended to, and has been construed by the FCC and courts to be.

The notion that you are to cover controversial issues, fairly, I don't think is a problem in view of the fact you choose the spokesman if you are a licensee, and there is no particular demand for a particular person to make that statement. I don't think of the statistics that you presented on the 1,700 people in the administration that got appearances, they didn't have to be given appearances by those licensees.

They had an obligation to present the controversial issues they raised on the airwaves in a fair and balanced way, but they made the determination of how to present it. But I think it is a misunderstanding that there is an obligation for any particular party to be given airwave time. That was their misunderstanding of what the thrust of the Fairness Doctrine is.

Senator GOLDWATER. My own opinion is that the owner-publisher, even the editor of a newspaper has the right to express his own personal opinions on the editorial page. He is not required by any law, nor is he necessarily required by any feeling of fairness to do otherwise.

In other words, there is no law that says, if you don't give equal time on the editorial page to your opponents, that you are not going to be relicensed.

Now, would it be fair to say the same thing to the owner of a radio station? Many television stations have an editorial each evening, and they announce, if you are in disagreement with this, you can write a rejoinder.

Is this fair? Shouldn't that owner of the television or radio station have the same editorial privilege that the editor of the Washington Post or the Phoenix Gazette?

Mr. FERRIS. I think he has a higher obligation, because he is not the owner of that airwave. He is a trustee of it for 3 years, and it is a public resource that he is being given a license to use, to further the public interest. Newspapers, I don't think, have that obligation.

Senator GOLDWATER. Yet, you say you don't believe that the broadcasting industry, including TV, really understands the Fairness Doctrine?

Mr. FERRIS. I think so.

Senator GOLDWATER. What can you do to get them to understand it?

Senator HOLLINGS. Can I interrupt? Isn't it a question of the politicians bringing pressure? We can't make much pressure, but let's say over in the executive branch, can call me and say, "You do so and so on that television station or we are going to do this and that."

You may have a good understanding of the Fairness Doctrine but it is a fairness thing. I can say, "That squirt at the White House called me, and he doesn't know what the Fairness Doctrine is," but I can't argue with him because my license is coming back up. If I stand on my rights, I might not get relicensed, whether, I know the Fairness Doctrine or not. That is an internal thing. A lot of people do understand it. It is abuse of the Fairness Doctrine. It is not a flaw, or a flaw in the document, itself, but how it is being deployed.

The administration appointed Mr. Ferris. If I start telling him what the law is, I might win that issue. Then my license comes up for renewal and all of a sudden I have all kinds of difficulties.

Mr. FERRIS. I don't know, Mr. Chairman, what has been the type of relationship that has existed in the past, between the White House and FCC. I certainly know what it has been in the past 7 months. It has been one of noninvolvement, totally, by the White House. I think they have total appreciation with respect to the independence of the FCC.

I have a very strong concept, myself, as to what the independence of the FCC is. I think we are independent. I have full confidence and understanding, and based on the fact that this White House has that concept about the independence of the FCC, and with respect to the inhibiting effect, as you say, on the licensees. No, sir. I was appointed by President Carter, therefore if someone in the executive branch calls and tried to inhibit the use of their discretion in any particular way, I can be very helpful because I can make every effort to let them know how I feel.

Senator HOLLINGS. I know how strong and independent you are, otherwise I wouldn't have used the example. I am talking about the practicality.

Mr. FERRIS. I realize that, but I will do everything I can to make sure they understand the notion I have, and the understanding I have.

Senator HOLLINGS. Senator Goldwater pointed out, that the administration ought to say they understand the rules. I don't know why they hesitate in answering Senator Goldwater's inquiry on this score, because it brings suspicions and misgivings to the public mind.

Mr. FERRIS. From my end of the dialog, I can give you that assurance. There has been no problem at all.

Senator GOLDWATER. Mr. Chairman, I have an 11:30 meeting with a man I have had to cancel four times. He is a good Democrat Catholic priest. That is a real combination.

I apologize to those who will be coming later, particularly my friend, Bill Leonard, for not being able to be here. I am sure he will understand. But I would hope that you could—

Senator HOLLINGS. We have Dr. McIntire coming. Are you going to choose the Catholic priest or Dr. McIntire?

Senator GOLDWATER. I will split it.

Senator HOLLINGS. Thank you very much, Chairman Ferris. I appreciate it very much.

[The statement follows:]

STATEMENT OF HON. CHARLES D. FERRIS, CHAIRMAN
FEDERAL COMMUNICATIONS COMMISSION

Mr. Chairman: Thank you for the opportunity to present my views on S. 22.

Briefly stated, this bill would repeal the sections of the Communications Act covering the fairness doctrine, political broadcasting and public broadcasting editorializing (Sections 315, 312(a) (7) and 399). The bill also proposes a sweeping amendment to Section 326 of the Communications Act that would bar the FCC from exercising any regulatory oversight of a broadcast station's program "schedule—and the content of its programs." The stated purpose of these amendments, as set forth in the bill, is:

"... to recognize and confirm the applicability of and to strengthen and further the objectives of the first amendment of the Constitution of the United States by removing statutory and regulatory restrictions on broadcasters operating under the Communications Act of 1934."

Senator Proxmire, on February 10 of this year, amended S. 22 to eliminate certain language that would have amended Section 309 of the Act. (Amendment No. 1697, Cong. Rec. Feb. 10, 1978, p. S1817) This change, he said, was intended to make it clear that he did not intend the bill to bar FCC content regulation except in the areas of the fairness doctrine and political broadcasting. I would only point out that language remaining in the bill, quoted above, amending Section 326 still may have this potential effect, and should be eliminated if the bill does, in fact, have this limited intent.

Because the Commission as a whole has not had an opportunity to address this bill, or subsections of it, since Commissioner Tyrone Brown and I have come to the Commission, I will not state any official views of the Commission. If the Subcommittee wishes we can, as a body, take up the subject at a later time and supply the Subcommittee with additional views. Certain areas covered by the bill have been addressed by past Commissions, and I will attempt to state those past views where appropriate.

First, I would like to make some overall observations concerning the relationship of basic First Amendment principles to the provisions of the Communications Act relating to the fairness doctrine and political broadcasting. As the Subcommittee is well aware, there has been, since the early days of the medium a fundamental tension between the principles of the First Amendment and of broadcast regulation. The Congress, the Commission, and the courts have over the years wrestled with those vexing and sensitive public policy issues. There has been a general recognition, I believe, that broadcasting presents unique problems among forms of mass communications.

In broadcasting, the most important obstacle to free expression arises from the physical characteristics of the medium itself. Because of the finite nature of the radio spectrum—"scarcity," if you will—there are substantially more individuals who want to broadcast than there are frequencies to allocate. Because the facilities are limited, and therefore precious, Congress and the Commission have treated broadcast station licensees as public trustees of a valuable national resource. Congress and the FCC have therefore imposed upon them certain programming responsibilities consistent with their fiduciary role. A licensee's program efforts must render substantial service to meet the problems, needs and interests of its community of license.

These unique aspects of the medium were described by the Court of Appeals for the District of Columbia Circuit when it stated:

"A broadcaster has much in common with a newspaper publisher, but he is not in the same category in terms of public obligation 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 with enforceable public obligations. A newspaper can be operated at the whim or caprice of its owners; a broadcasting station cannot . . . ([A] broadcast license is a public trust subject to termination for breach of duty." (Office of Communications of the United Church of Christ v. FCC, 359 FCC 2d 994, 1003 (1966))

The statutory sections addressed by S. 22, and the Commission policies under them, cannot be viewed, I believe, in isolation. They are part and parcel of—and indeed are the most well known and most fundamental examples of—the entire "public trustee" scheme on which Title III of the Communications Act of 1934 is based. That scheme has led to the allocation and licensing of a number of broadcast outlets to local communities based upon the FCC's determination of the overall "public interest, convenience and necessity."

As a basic long-term goal, I have consistently stated my support for efforts to move away from federal regulation of a broadcaster's content. But I believe that effort must take place within the broader context of efforts to increase the voices to which the public has access. I hope that we can substitute a more diverse and more competitive marketplace of ideas and voices for the existing "public trustee" regulation of a limited number of voices. In this context, I support freeing the broadcast medium of content regulation. In fact, I regard this overall effort as critical to our nation's future, since we are becoming more and more as a nation dependent on electronic means of communication.

I believe that we can, in the future, through new technologies and services, expand such access exponentially. This can provide the opportunity for wider play of free market forces. It could mean greater access for minorities, who today control less than one percent of existing broadcast frequencies, and for others as well.

But despite advances in technology, as the Supreme Court stated in the *Red Lion* case, there are still "substantially more individuals who want to broadcast than there are frequencies to allocate" (395 U.S. at 388). Cable television, for example, serves only one home out of every six in America. And a far smaller number of homes today receive a significant amount of information separately provided on cable—apart from existing broadcast signals carried.

Comparison of the number of daily newspapers and broadcast outlets in a particular market, or in the nation as a whole, does not result in a valid measure of the scarcity in electronic communications that underlies the "public trustee" scheme of the Communications Act.

There are undeniably substantial differences in the public's ability to "publish" and receive information by print as opposed to electronic communications. In the print medium, citizens can reach vast numbers of their fellow citizens and be reached through both broad appeal and highly specialized magazines, newsletters and brochures. In the electronic medium there now exists no comparable capability.

I do not, however, believe that we must await total comparability with the print medium before the bonds of public trustee regulation in electronic communications can be loosened. But there should be sufficient outlets for expression and sufficient diversity in the ownership and control of those outlets that we can be reasonably assured that marketplace forces alone will bring important issues and a diversity of views on those issues to the electorate's attention.

We may have reached that point in the evolution of radio. The increasing financial viability of commercial FM, and the increasing flow of applications for and the increasing federal funding of noncommercial public radio is leading to a more abundant use of the portion of the spectrum now assigned to radio. Additional portions of the spectrum might also be assigned to relieve excess demand.

We may, therefore, be reaching a point where Congress might fairly make the judgment that "public trustee" content regulation of radio—which would include the fairness doctrine and other content controls—should be replaced with a less restrictive market-oriented regulatory framework that still yields a public dividend for the privilege of using the public spectrum.

Even here I would urge that Congress take a hard overall look at the radio medium in all its forms—commercial and noncommercial, large and small market, and including the new development of cable radio—and make careful determinations whether adequate diversity is present or can be reasonably expected. Such a review should also be undertaken not simply as to the fairness doctrine and political broadcasting portions of the public trustee regulatory scheme S. 22 is intended to address. It should address the broader context of public trustee regu-

lation of radio, which includes regulation of radio formats, percentage limitations on commercial time, ascertainment of community needs, and similar content-oriented requirements.

Meanwhile, I expect the FCC will continue to reexamine our regulation of radio content, to determine what can and should be changed within our existing statutory authority.

As to television, I believe that the time frame for removal of public trustee status may well be longer. There are promising developments in the technology of television sets that may make UHF television (channels 14-81) ultimately an equivalent voice to VHF television (channels 2-13). Other technical improvements may make it possible to add additional VHF and UHF stations.

Increase federal funding for public television may make these outlets more diverse and effective voices. And, of course cable, optical fiber, and direct broadcast satellites can significantly increase the choice of information available in the home of the future.

I do not believe that we should await the ultimate development of the video medium before addressing the critical choices we face in content regulation of television under the public trustee standard. But I believe we should discuss these issues on a more comprehensive basis than S. 22, and with a real expectation that a basic shift in the public trustee regulatory framework in the television field may be on a different track than in radio.

Finally, before turning to the specific legislative amendments before you, I want to assure the Subcommittee that the Commission itself has been reevaluating how it enforces the fairness doctrine and "equal time" provisions of Section 315, as well as its other political broadcasting regulations. We are, for example, currently holding an inquiry into means of enforcing broadcasters' fairness obligations with less involvement in broadcasters' activities on a case-by-case basis. Two other current inquiries attempt to deal with definitional problems that have arisen in enforcement of the "equal time" provision and the "reasonable access" provisions of Section 312(a) (7). Finally, we are rewriting our basic primer on political use of broadcast facilities in a "plain English" format. This will enable candidates, broadcasters, and the public to better understand how our policies actually operate.

My views on the individual components of S. 22 are as follows :

FAIRNESS DOCTRINE

There is often a misconception of exactly what the fairness doctrine, as codified in Section 315, does and does not require. It requires only that broadcasters (1) must devote a reasonable percentage of their broadcast time to programs devoted to discussion of issues of public importance, and (2) must do so fairly by providing a reasonable opportunity for the presentation of conflicting points of view on those issues.

This doctrine, in my view, is simply good journalism. It should be framed on every journalist's wall.

It is often argued that the fairness doctrine "chills" broadcaster presentation of controversial issue discussion. But its goal, like that of the First Amendment itself, is not to suppress speech but rather to encourage "uninhibited, robust, wide open debate" on public issues. (*New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). In fact, the Commission has often stated that the most important part of the fairness doctrine is its first half: the affirmative obligation to present controversial issues, which is a basic condition of a licensee's public trustee status.

The Commission avoids detailed supervision of what issues a broadcaster must cover. But a licensee cannot responsibly fail to meet its duty under the doctrine to cover controversial issues on the grounds that in doing so it must cover them fairly.

In evaluating arguments as to a fairness doctrine "chill", it is important to underline that the fairness doctrine affords a broadcaster considerable latitude in structuring programs to satisfy both the affirmative obligation to cover issues and the obligation to balance views on those issues. The licensee need only exercise its best judgment in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokespersons for each point of view. The Commission does not—and will not—interfere unless that judgment is exercised in a patently arbitrary or unreasonable manner.

Let me also make clear what the doctrine does not require. First, a broadcaster does not have to present contrasting viewpoints on controversial issues within the same program. He is simply expected to do so within his overall pro-

gramming. This, of course, includes statements or actions reported on news programs.

Second, the policy does not require that "equal time" be afforded for each side, as would be the case if a political candidate appeared during his or her campaign. A reasonable balance of views, at various times, length and formats chosen by the broadcaster, is all that is necessary.

Finally, no particular person or group is entitled to appear on the station. The fairness doctrine is intended to assure the right of the public to be informed, not the right of any individual to broadcast his or her views. Again, licensees are left with great latitude and discretion.

The Commission enforces the doctrine in a very cautious manner to avoid undue government intrusion in licensee affairs. It always urges a person with a complaint to first contact the licensee or network before complaining to the Commission. The Commission has found that if a complaint is brought to the licensee's attention prior to recourse to the Commission, the licensee often will be able to show that it has treated the issue in question in a fair manner through its overall programming—some of which the complainant might have been totally unaware.

If, however after contacting the licensee or network, a complainant is not satisfied that fairness obligations have been met, he or she can then submit to the Commission a complaint stating the allegations in specific terms. The FCC will reach the threshold point of asking a broadcaster for a response only if a prima facie case of violation of the doctrine is set forth.

The Commission's enforcement of the doctrine under these guidelines has accorded considerable discretion to licensee judgment. In light of the First Amendment values involved, I think it has quite properly done so. In a typical year, for example, we estimate we receive some 5,000 fairness complaints and inquiries. Of these, about 97% do not set forth a prima facie case and we require no licensee response. Of the remaining 150 cases per year referred to a licensee for response, only about 15-20 are ultimately resolved in a manner unfavorable to the broadcaster.

Even where the Commission does find a violation, it does not levy an onerous penalty, but simply determines that additional views must be aired for the public to hear.

The fairness doctrine as we know it today has evolved from a long line of Commission rulings on a case-by-case basis. The Commission's first general statement of fairness doctrine principles, in the 1949 Report on Editorializing by Broadcast Licensees (13 FCC 1246), stressed that:

"It is the right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting." (13 FCC 1246, 1249 (1949)).

In 1959, the Congress amended § 315 of the Communications Act and gave the fairness doctrine statutory recognition. Ten years later, in the landmark decision of *Red Lion Broadcasting Co. v. FCC* (395 U.S. 367 (1968)), the Supreme Court established a comprehensive First Amendment theory which upheld the Commission's fairness policies. Specifically, the Court concluded that, because of the scarcity of frequencies, in this unique medium, "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." (395 U.S. at 390). It defined the constitutional status of the broadcast licensee in the following terms:

"[A]s far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share its frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which would otherwise, by necessity, be barred from the airwaves." (395 U.S. at 389).

These principles were reasserted by the Court in 1973 in the so-called "BEM" case (*Columbia Broadcasting System, Inc. v. Democratic National Committee*, 413 U.S. 94). They still represent the definitive judicial statement concerning the First Amendment and broadcasting.

In recent years, the Commission has reexamined its fairness doctrine policies. The Commission in June, 1971 began a comprehensive reassessment and clarification of the doctrine. The product of this proceeding, in which the public and the broadcast industry played active roles, was the Commission's Fairness Report, released in July 12, 1974. The Commission reaffirmed the continued need for the

fairness doctrine and reiterated its view that adherence to the doctrine was still an important requirement of a broadcaster's operation in the public interest.

The Fairness Report did, however, make one modification to the doctrine. It declared that most standard product commercials make no meaningful contribution toward informing the public on any side of a controversial public issue and that in the future the doctrine would not be applied to most such announcements. Only where an advertisement presents "direct and substantial commentary on important public issues"—as we have in the past found in the case of certain oil company, utility, and other ads—will the doctrine apply.

Several groups and individuals asked the Commission to reconsider portions of the Fairness Report. The Committee for Open Media (COM) urged the Commission to allow broadcasters, if they voluntarily elected, to adopt an "access message alternative" method of providing "reasonable opportunities for contrasting views on issues of public importance." Henry Geller, who will testify before you today, suggested that the Commission adopt a "Ten Controversial Issues" approach to determine a licensee's compliance with its fairness doctrine obligations. Both suggestions were based on the theory that these alternative enforcement approaches would dampen any real or alleged "chilling effect" of the doctrine.

The Commission did not at that time adopt either approach. Last November, however, the United States Court of Appeals for the District of Columbia Circuit (*National Citizens Committee for Broadcasting, et al. v. FCC*, Civil No. 74-1700, 76-1351, 76-1360, slip op. at 5), while generally upholding the FCC's Report, remanded the Report to the Commission so that it might "undertake further inquiry" into the two "alternative courses of action" proposed by the Committee for Open Media and Mr. Geller.

Accordingly, in March of this year the Commission instituted the Inquiry to which I earlier referred, exploring not only the voluntary public access message alternative submitted by COM and the "Ten Issue Approach" proposed by Mr. Geller, but also, as suggested by the Court, other ways of achieving compliance with the fairness doctrine either in conjunction with, or as an alternative to, these procedures.

This Inquiry is a matter currently before the Commission. Therefore I will not express my own views on these specific approaches or any others that parties may suggest until the comments are in. But the real significance of this Inquiry is not the specific alternatives proposed by any particular party. It is that, while the Commission and the Courts continue to view the fairness doctrine as valid, the Commission is of an open mind as to whether the manner in which its obligations may be met by licensees can be improved. Attached as Appendices are copies of this Notice of Inquiry and the special mailing the Commission sent out to solicit comments on it.

Before leaving the fairness doctrine, I would like to call to the Committee's attention a decision of the United States Supreme Court issued just last week. In that action, the court denied certiorari of an appeal of that aspect of our Fairness Report, summarized earlier, which exempts most paid commercial products advertising from the scope of the doctrine.

"Equal Time"

Mr. Chairman, I shall now direct my remarks to the portion of S. 22 that would eliminate the so-called "equal time" provisions of § 315. As the Subcommittee is of course aware § 315 does not provide for "equal time" but, in fact, speaks of "equal opportunities" for political candidates.

The Commission has long emphasized the significance of political broadcasting. In a 1968 policy statement (*In Re Licensee Responsibility As To Political Broadcasts*, 15 FCC 2d 94 (1968)), the FCC states:

In short, the presentation of political broadcasting, while only one of the many elements of service to the public * * *, is an important facet, deserving the licensee's closest attention, because of the contribution broadcasting can thus make to an informed electorate—in turn so vital to the proper functioning of our republic.

Under the current statutory scheme, every appearance by a candidate triggers an obligation to provide equal opportunities to other candidates for the same office unless the candidate is presented on an exempt newscast, news interview, documentary or in on-the-spot coverage of a bona fide news event.

The FCC has at one time gone on record as supporting repeal of the "equal time" provision of § 315 insofar as it applies to legally qualified candidates for the office of President and Vice-President. A proposal submitted by the FCC to this Subcommittee last August would exempt all appearances by Presidential and

Vice-Presidential candidates from the equal time provisions of § 315 in both general and primary elections. It would permit a licensee to afford such candidates broadcast time, regardless of program type or format, without being subject to the requirement of providing equal time to all other candidates for the same office.

Since this proposal was submitted before I came to the Commission, I did not participate in the drafting of this position; nor has Commissioner Brown. The Commission has not as yet had an opportunity to revisit this issue since last August. Nevertheless, I can add a few personal observations.

It is now possible, of course, because of the Commission's 1976 Aspen Institute ruling, to broadcast debates between candidates (under certain circumstances) as "on-the-spot coverage of bona fide news events." (Aspen Institute, 55 FCC 2d 697 (1975), affirmed sub. nom. *Chisholm, et al. v. FCC*, 538 F.2d 349 (D.C. Cir. 1976), cert. denied, 97 S.Ct. 247 (1976)).

There are advantages as well as disadvantages to formal repeal of § 315 for Presidential and Vice-Presidential candidates.

For example, it is argued that repeal of § 315 for Presidential elections might permit greater coverage of the major candidates than under the present operation of § 315. Because of the multiplicity of minor candidates which often occur in political races, broadcasters may often be unwilling to present the views of any candidate for fear of having to afford "equal time" to all candidates, regardless of their electoral following. Unlike the fairness doctrine, where wider discretion is offered, the fact that political candidates are entitled to "equal time" may well have an inhibiting effect. This may result in no coverage at all or a restriction in formats to come within the current § 315(a) exemptions to equal time.

The drawback of repeal is, of course, its adverse impact on new minority parties and their ability to attract the electorate's attention. The impact of broadcasting on the electoral process is so significant, and the dynamic nature of our political system is so essential, that I am not certain at this point whether I would be prepared to abandon the basic protection afforded by § 315 to that process, and to minority parties, in view of the existing administrative flexibility to allow broadcast debates under the *Aspen* ruling.

I should also add that, within our existing powers, the Commission has started an Inquiry into how to define a "legally qualified candidate" under the "equal time" law. This Inquiry, a copy of which is attached, may help resolve some questions in this area and provide greater certainty to the broadcaster and the public in the application of the "equal time" principle. This may allay some of the concern about time required for candidates who have not in fact demonstrated the seriousness of their candidacy. Congress might also fruitfully address this limited area, to see if some more rational means of identifying those Presidential candidates entitled to "equal time" could be developed, perhaps using similar triggering tests to those presently in effect for qualification for federal financing.

Also, as I have previously mentioned, we have started to revise our basic handbook on "equal time" as well as the "reasonable access" provisions I will discuss next, to provide a clearer statement of our existing rules and policies.

REASONABLE ACCESS BY POLITICAL CANDIDATES

S. 22 would also repeal § 312(a) (7) of the Communications Act. This section requires broadcasters to provide "reasonable access" to their facilities for candidates for Federal elective office. Section 312, as now written, insures that broadcasters will either give or sell reasonable amounts of time to federal candidates. It was added to the Communications Act by the Federal Election Campaign Financing Act of 1971. Its purpose apparently was to give federal candidates "greater access to the media so that they may better explain their stand on the issues and thereby more fully and completely inform the voters." (117 Cong. Rec. S12872 (daily ed., August 2, 1971)).

The statute does not establish a precise definition of what constitutes "reasonable access." Commission review in this area has generally been limited to a determination of whether the licensee has made a reasonable, good faith judgment in determining what constitutes reasonable access for a particular candidate or group of candidates.

In March of this year, however, the FCC instituted an Inquiry on this entire subject to determine, among other things, whether specific rules are necessary and would help licensees and candidates in complying with the provision. The Notice of Inquiry sets forth the history of our actions in this area. I have appended a copy of that Inquiry and the Public Notice inviting comments on both

it and the "legally qualified candidate" definition applicable to both § 312 and to "equal time" under § 315. The results of this Inquiry should enable the Commission more effectively to administer the "reasonable access" provision of § 312.

The Commission has in the past deferred to the judgment of Congress on the issue of whether this provision should be retained or repealed. I have not yet dealt with many cases applying this section, and must await more experience with its operation to develop my own views. At this stage I could not favor repeal. I have, however, already dealt with the effect of the reasonable access provision on non-commercial, public broadcasting station.

The Commission has in the past expressed concern that Congress did not squarely face the effect of this provision on public stations when it adopted § 312(a) (7). I would agree that this issue needs specific attention. These stations, having no commercial time rates that would act as a screen to separate the serious from the frivolous candidate, may be required by the terms of § 312(a) (7) to provide free time to a host of minor or insignificant candidates. While I do not believe such stations should have no rule whatsoever in providing viewers with access to political views, I do believe their access requirements should be tailored carefully to their unique status.

"OBJECTIVITY AND BALANCE" IN PUBLIC BROADCASTING

Section 6 of S. 22 would repeal the "objectivity and balance" requirement of subparagraph (A) of § 396(g) (1) of the Communications Act, which was inserted by the Public Broadcasting Act of 1967. In 1975, the Court of Appeals for the District of Columbia Circuit rejected the contention of Accuracy in Media that § 396(g) (1) (A) required the Commission or gave it the authority to regulate the "objectivity and balance" of programming funded by the Corporation for Public Broadcasting. (*Accuracy in Media v. FCC*, 521 F.2d 288 (D.C. Cir. 1975)). The court found the requirement to be a "hortatory" direction to CPB itself, and not a basis for regulation by the FCC. At the same time, the court found that § 398 (which expresses the intent of Congress that there shall be no direct jurisdiction by the FCC over CPB) does not limit the Commission's normal authority to regulate local noncommercial public broadcasting stations, including application to them of the general fairness doctrine.

Since the Commission has no responsibility for enforcement of this provision, I defer to Congressional judgment as to its retention or repeal. It does seem to me that while the court has in effect rendered this section inoperative as a more specific duty, the section's apparent intent is fulfilled already by our enforcement of the general fairness doctrine as to public stations.

PUBLIC BROADCASTING EDITORIALIZING

The bill would also repeal § 399 of the Communications Act. This section provides that noncommercial educational broadcasting stations shall not engage in editorializing on public issues or support or oppose any candidate for public office. In the past the FCC has supported repeal of § 399's ban on public station editorializing. It has pointed out that, because the fairness doctrine would insure that competing views were aired, there seems no reason why a noncommercial licensee should be prevented from setting forth its own views on controversial issues. I personally support this position. It seems anomalous that a station operated for commercial purposes should have a greater claim to expound on community issues of public importance such as local transportation, health or safety, than a public station like, for example, WETA here in Washington.

As to the ban on support or opposition to political candidates, I believe the balance is much closer. The Commission has also taken no firm position on this issue, except to urge the Congress to address the First Amendment issues inherent in applying a ban to certain electorate-informing speech by one class of licensees and not to others.

I appreciate this opportunity to discuss this bill and will be pleased to respond to your questions.

[From FCC Actions Alert, Apr. 18, 1978]

WHAT ARE YOUR THOUGHTS ON THE FAIRNESS DOCTRINE? IS IT WORKING? COULD IT WORK BETTER?

WHAT IS THE FAIRNESS DOCTRINE?

Briefly, the Fairness Doctrine places a two-part requirement on radio and television stations: First, stations must cover controversial issues. Second, stations must allow time for presenting opposing viewpoints on those controversial issues

in its overall programming. The Fairness Doctrine does not require that 'equal time' be given to each side.

IS THE FAIRNESS DOCTRINE WORKING?

The FCC studied the Fairness Doctrine extensively during a three-year inquiry from 1971 to 1974. During this inquiry, the FCC received many proposals to improve the enforcement of the Fairness Doctrine. After careful review of all the alternative proposals, the FCC issued a report in 1974 reaffirming the Fairness Doctrine as it is now enforced. (You can obtain a copy of this document from the Consumer Assistance Office, address below.) The Fairness Doctrine is now enforced by reviewing individual complaints by members of the public to determine whether in fact a station has met its Fairness Doctrine obligations.

Several individuals and groups, including Mr. Henry Geller, a former General Counsel of the FCC, and the Committee for Open Media, requested the FCC to reconsider the conclusions announced in the 1974 report. In late 1977, the United States Court of Appeals ordered the FCC to conduct further inquiry into the alternatives proposed by Mr. Geller and the Committee for Open Media, and into any other proposals to improve the way the FCC enforces the Fairness Doctrine.

On February 16, 1978, the FCC adopted a Notice of Inquiry, requesting comments on alternatives to existing FCC means of assuring that stations comply with the Fairness Doctrine. The FCC especially asked for comments on the alternative proposals made by Mr. Geller and the Committee for Open Media.

WHAT ARE THE ALTERNATIVE PROPOSALS?

The "Right of Access" Proposal

The Committee for Open Media proposed a voluntary 'public access' system which, if a station chose to use it, the FCC would accept as compliance with the Fairness Doctrine. In order to insure that important controversial issues were aired, the Committee proposed that stations electing this system:

(1) Air a specified number of spot messages discussing public issues each week, repeated at times throughout the broadcast day, so as to reach the bulk of their audience, with maximum impact.

(2) Make half of this time available to individuals or groups in the community on a first-come, first-served basis, and half available on a representative spokesperson basis determined by petition signatures or other objective criteria.

Under the Committee's proposal, the FCC would not consider individual or renewal complaints based on the Fairness Doctrine against a station which had such an "adequate access system" in operation.

The "Ten-Issue" Proposal

Mr. Geller proposed that the FCC check compliance with the first part of the Fairness Doctrine—to air controversial issues—by requiring each television station to prepare an annual list of the ten (or some other specific number) controversial public issues chosen by the station for the most coverage that year. The Geller proposal also requires that each TV station licensee list the "offers for response" made by the public and to note the representative programming that was presented on each issue. The list of issues, "offers for response" and representative programming would be kept in the station's public files.

WHAT ARE THE SPECIFIC PROPOSALS?

Your comments are sought on the two alternatives described above: the "right-of-access" proposal and the "ten-issue" proposal. Further, your comments on any other alternatives which might achieve compliance with the Fairness Doctrine are needed. Consider the following questions:

The "Right-of-Access" Proposal

How would a right-of-access system guarantee airing of controversial issues? How must time should a broadcast station devote to such a system to be considered to have met the Fairness Doctrine?

Under a right-of-access system, what should be the role of the person or company who holds the station license? Should the station have some discretion to select the persons, the groups, or issues which are given access?

How would a station using a right-of-access system prevent users from broadcasting things that are contrary to FCC Rules (such as lottery information or obscenity)?

Should the FCC conduct a two-year test of the public access proposal, and judge its effectiveness at the end of the two-year period?

Some stations around the country are already airing "right-to-access" message spots. (Some stations are calling them "Free Speech messages" or "viewer feedback" messages.) Have you seen or heard them? Do you think they help air public issues? Do you think they help air opposing views on those issues?

The "Ten-Issue" Proposal

How should a station use a "ten-issue" system? Should a ten-issue system alone be considered full compliance with the Fairness Doctrine? Or should it be used together with a right-of-access system or together with the present system of enforcement of the Fairness Doctrine?

Would a ten-issue system impose an unreasonable administrative burden on stations or on the FCC?

How would a ten-issue system improve the operation of the Fairness Doctrine?

General Considerations

Should the FCC adopt these or other alternative ways to administer the Fairness Doctrine?

Will these or other ways of enforcing the Fairness Doctrine help the FCC avoid becoming involved in daily station operations, such as choice of programming? Or would they require more involvement?

In making comments the FCC is particularly interested in knowing any thoughts you might have on Fairness Doctrine compliance today. (Are the stations you see or hear presenting controversial issues? Are they presenting opposing views on such issues?)

If you want more information about the inquiry, write for a copy of the complete inquiry notice and the current Fairness Report. Send your request to the Consumer Assistance Office; Federal Communications Commission; Washington, D.C. 20554.

Comments are due by May 3, 1978. However, requests for an extension of the comment dates have been filed. Sometimes comment dates are extended by the FCC. You may want to call the Consumer Assistance Office, (202) 632-7000, to learn if the dates have been extended in this inquiry.

Reply comments (which are responses to comments filed by others) are due by June 2, 1978. You can read the comments filed by others by coming to the FCC's Washington office at 1919 M Street NW., Room 239.

Your comments should note the Docket number BC Docket No. 78-60, on the first page.

Address your comments to: Secretary, Federal Communications Commission, 1919 M Street NW., Washington, D.C. 20554.

If you want your comments to be considered as a formal filing, you must submit an original and five copies. You may simply submit one copy to be filed in the Docket as an informal comment.

COMMENTS SOUGHT ON ACCESS BY POLITICAL CANDIDATES TO RADIO AND TELEVISION

The FCC is seeking comments from broadcasters, candidates and members of the public on possible changes to existing rules dealing with political broadcasting. Two issues have been raised: (1) What constitutes "reasonable access" by candidates seeking time on radio and television? and (2) Should the definition of a "legally qualified candidate" be revised?

The Communications Act requires a radio or television station to give a reasonable amount of free time or sell a reasonable amount of time to a legally qualified candidate for Federal elective office (President, Vice President or Congress). (Section 3.12(a)(7)). People seeking a state or local office are not included. Thus, this inquiry concerns the adequacy of the FCC's enforcement of the "reasonable access" policy as it pertains to candidates for Federal elective offices only.

The Commission has generally relied upon the reasonable, good faith judgment of radio and television stations, subject to Commission review, to determine what constitutes reasonable access for a particular candidate or group of candidates. No rules specifying what is "reasonable access" have ever been adopted. A number of guidelines have, however, been provided by individual FCC decisions:

1. A station can offer free or paid time, or a combination of the two.
2. Federal candidates are normally entitled to prime time programming. Exceptions are made in certain circumstances (such as too many candidates, in which case spot announcements may be appropriate).
3. Candidates do not have a right to buy or be given a particular length of program time or time at a particular period of the broadcast day other than prime time.
4. These requirements apply to "public broadcasting" and other noncommercial stations as well as to commercial stations.

QUESTIONS TO BE ADDRESSED

The Commission would like to find out whether it would help the stations, political candidates and the public if it were to adopt more specific guidelines on "reasonable access." In particular, the FCC would like to know:

1. Has the FCC's policy of relying on stations' reasonable good faith judgment, under the circumstances of each individual case, been successful?
2. Are specific rules needed outlining requirements for complying with the "reasonable access" provision? Do the differences in number of candidates and type of offices from area to area make this too difficult?
3. What type of guidelines might be helpful:
The point in time when a station's access obligations begin?
The total amount of program time and/or spot announcements the FCC would consider to be "reasonable"?
4. The length of such programs and placement of announcements?
4. Should licensee be required to offer candidates all lengths of spot announcements that it offers to commercial advertisers?
5. Should any of these "reasonable access" policies be different for public broadcasting and other non-commercial educational stations than for commercial stations?

WHO IS A "LEGALLY QUALIFIED CANDIDATE"?

The Commission has proposed a revision of the term "legally qualified candidate" as it appears in the FCC rules. In the current rules:

1. There are no specific criteria for qualifying as a candidate for nomination by means other than by a public election;
2. Write-in candidates can be legally qualified far in advance of the time ballot candidates can be qualified; and
3. No mention is made of the requirements necessary to qualify on a national level for nominations for President or Vice-President of the United States.

The proposed definition provides that:

No person may be a legally qualified write-in candidate before the time when candidates running for the same office or nomination may qualify for the ballot.

Candidates who seek nomination or office by means other than an election (such as convention or caucus), must publicly announce their intention to be candidates and make a substantial showing of their candidacy.

Persons seeking nomination for the office of President or Vice-President will be considered to be qualified in all states and territories of the United States and the District of Columbia if they (or delegates on their behalf) have qualified for the primary or Presidential preference ballot in any state, territory or the District of Columbia or if they make a substantial showing of their candidacy.

QUESTIONS TO CONSIDER

1. The proposed definition requires a candidate to make a 'substantial showing' of bona fide candidacy (through such acts as issuing a press release and leaflets, addressing political meetings or establishing a campaign committee). Should the 'substantial showing' requirement be more specific? What additional criteria should be included?
2. Should a time period be established to define when a station must afford access to legally qualified candidates who seek nomination by other means than a public election (for example, by caucus or convention)?
3. The proposed definition says that a person who seeks the nomination for U.S. President or Vice-President is a 'legally qualified candidate' in all states if (a) that person—or proposed delegates—has qualified for the primary or Presidential preference ballot in any state or; (b) if that person has made a substantial showing as a bona fide candidate for the nomination. Should a substantial showing in only one state be enough to consider the candidate qualified on the ballot of another state? Is the substantial showing provision necessary? What modifications are needed?

IN MAKING COMMENTS

Your practical experience with a radio or television station, as a candidate or part of a candidate's campaign effort, or as a member of the public viewing or listening to radio or television will help the FCC in its consideration of these important issues.

If you would like a copy of the complete Notice of Inquiry on the "reasonable access" requirement (BC-Docket 78-102), or the Notice of Proposed Rulemaking (BC-Docket 78-103), please write to the Consumer Assistance Office, Federal Communications Commission, Washington, DC 20554.

Comments for both the Inquiry and the Proposed Rulemaking are due by May 1, 1978. Sometimes the comment deadlines are extended. You may want to call the Consumer Office to learn if the dates have been extended in either of these two proceedings. Call (202) 632-7000.

Reply comments (which are responses to comments filed by others) are due by May 16, 1978. You can read the comments filed by others by coming to the FCC's Washington office at 1919 M Street, NW, Room 239.

Your comments should note the Docket number on the first page. The number of the 'reasonable access' Inquiry is BC-Docket 78-102. The number of the redefinition of 'legally qualified candidate' is BC-Docket 78-103.

Address your comments to: Secretary, FCC, 1919 M Street, NW, Washington, DC 20554.

If you want your comments to be considered as a formal filing, you must submit an original and five copies. You may simply submit one copy to be filed in the Docket as an informal comment.

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION, WASHINGTON, D.C.

BC Docket No. 78-60

IN THE MATTER OF THE HANDLING OF PUBLIC ISSUES UNDER THE FAIRNESS DOCTRINE
AND THE PUBLIC INTEREST STANDARDS OF THE COMMUNICATIONS ACT

Notice of Inquiry

Adopted: February 16, 1978; Released: March 2, 1978. By the Commission: Commissioner Lee absent.

I. INTRODUCTION

1. By Notice issued July 11, 1971, 30 FCC 2d 26 (1971), the Commission instituted a "broad ranging inquiry" into the function and applicability of the Fairness Doctrine and other related Commission policies to determine their efficacy in light of the public's right to be informed of contrasting views on controversial issues of public importance. This inquiry focused on the Fairness Doctrine's general application, on its specific application to the broadcast of paid "commercial" announcements, and on the general questions of access to the broadcast media for the discussion of controversial issues of public importance.

2. On July 12, 1974, the Commission released its Fairness Report, 48 FCC 2d 1 (1974) which reassessed and clarified the basic principles of the Fairness Doctrine. There we carefully examined numerous proposals relating to the two affirmative responsibilities the Fairness Doctrine imposes on the broadcaster: adequate coverage of controversial issues of public importance, and the affording of reasonable opportunities for presentation of contrasting viewpoints on such issues.

3. With respect to the licensee's "first part obligation" under the Fairness Doctrine, several parties to the proceeding filed comments urging the Commission to adopt a system of either paid or free access for persons or groups wishing to express a viewpoint on a controversial issue of public importance. Although we had no specific direct access proposal before us, our investigation into the need for such a policy did not reveal "any scheme of government dictated access which could be utilized as a substitute for or alternative to current Fairness Doctrine enforcement which we considered "both practicable and desirable." We felt that, on the contrary, the public interest would best be served by continued reliance on the present Fairness Doctrine structure, "which leaves questions of access and the specific handling of public issues to the licensee's journalistic discretion." Fairness Report, supra, 48 FCC 2d at 28.

4. The Commission also gave serious attention to, but rejected, a proposal by Mr. Henry Geller that Commission television licensees list annually the ten (or some other specific number) local and national controversial issues of public importance, which they chose for the most coverage in the prior year. Under the Geller proposal, licensees would also be required to set forth their offers to the public for response and to note the representative programming that was presented on each issue.¹

¹ As noted above, our inquiry also dealt with the Fairness Doctrine and its relation to broadcast commercials. We determined to withhold application of the Fairness Doctrine from commercials which promote only the sale of commercial products and do not "obviously and meaningfully address a controversial issue of public importance." This conclusion was subsequently "left undisturbed" by the Court of Appeals decision referred to, infra.

5. Subsequent to issuance of its Fairness Report the Commission received petitions urging the Commission to reconsider several conclusions that we reached therein. Among the petitions received was that of the Committee for Open Media (COM) which urged the Commission to reconsider or clarify its position with regard to right of access to broadcast facilities. Mr. Geller also filed a petition which reiterated his suggestion that the Commission adopt a ten controversial issue approach to the licensee's Fairness Doctrine obligations. See Reconsideration of the Fairness Report, 58 FCC 2d 691 (1976) (hereinafter cited as Fairness Reconsideration).

6. COM's access proposal, which it asserted would be adopted by licensees on a voluntary basis and would be deemed presumptive compliance with the Fairness Doctrine, was summarized by the Court as follows:

(1) A licensee would set aside one hour per week for spot announcements and lengthier programming which would be available for presentation of messages by members of the public.

(2) Half of this time would be allocated on a first-come, first-served basis on any topic whatsoever; the other half would be apportioned "on a representative spokesperson system."

(3) Both parts of the allocation scheme would be "nondiscretionary as to content with the licensee."

(4) However, the broadcaster would still be required to ensure that spot messages or other forms of response to "editorial advertisements" are broadcast. *NCCB, supra*, Slip Op. at 36.

7. Having carefully considered the elements of the COM proposal we concluded that while it offered a potential format which would serve to complement the Fairness Doctrine, it could not be utilized as a substitute for fairness obligations.

8. On November 11, 1977 the United States Court of Appeals for the District of Columbia Circuit ruled on three consolidated petitions for review challenging various aspects of the Fairness Report and the Fairness Reconsideration.

9. Petitioner COM challenged "the Commission's failure, on reconsideration of the Fairness Report, to adopt, or order further inquiry into its access proposal as an alternative to current Fairness Doctrine enforcement." *National Citizens Committee for Broadcasting et al. v. FCC*, Civil Nos. 74-1700, 76-1351, 76-1360, Slip Op. at 5 (hereinafter cited as *NCCB*). Intervene Geller opposed, inter alia, the Commission's "failure to consider and adopt his '10-issue' proposal relating to the Fairness Doctrine requirement that a broadcaster devote a reasonable amount of time to coverage of public issues." *Id.* The Court concluded that it was necessary to remand the Fairness Report to the Commission so that it may "undertake further inquiry" into these two "alternative courses of action."

10. In view of the foregoing, notice is hereby given of the initiation of an inquiry into the "right of access" policy submitted by COM, the "ten issue approach" to the Fairness Doctrine proposed by Mr. Geller and, as suggested by the Court, into "other ways of achieving compliance with the Fairness Doctrine's first obligation that deserve critical consideration, either in conjunction with, or as alternatives to, the procedures referred to above." *NCCB, supra*; Slip Op. at 41. Comments are requested on the questions raised below.

II. THE FAIRNESS DOCTRINE AND ACCESS TO BROADCAST FACILITIES

11. Compliance with the Fairness Doctrine in "the sine qua non of every licensee." *Office of Communications of the United Church of Christ v. FCC*, 359 F. 2d 994,1009 (D.C. Cir. 1966). By requiring sufficient exposition of controversial issues of public importance and guaranteeing a reasonable opportunity for the broadcast of contrasting views of those issues, the Fairness Doctrine promotes informed discussion and protects the public's right to "receive suitable access to social, political, esthetic, moral and other ideas and expressions." 47 USC 315(a); *Red Lion Broadcasting Company v. FCC*, 395 U.S. 367,390 (1969). The basis for the Fairness Doctrine is that the public must not be left uninformed. *Green v. FCC*, 447 F.2d 232,329 (1971). Therefore, an important question concerning the COM or any other access proposal is whether such schemes would better serve the public interest by more actively promoting the principles inherent in the Fairness Doctrine. Could a direct access plan be utilized as a substitute for the present methods of complying with the Fairness Doctrine or could it be used only in conjunction with other methods of achieving fairness?

12. Both an access substitute and an optional access system supplemented by present Fairness Doctrine procedures must, as noted in the Fairness Reconsideration, make adequate provisions for assuring the timely discussion of controversial issues of public importance and the presentation of contrasting viewpoints

on those issues. How can this essential requirement be achieved in an access framework? How would an access alternative or substitute compare or contrast with existing Fairness Doctrine Administration in terms of this "timeliness" requirement?

13. The Fairness Doctrine is designed to protect the right of the people to be informed rather than the right of any person or group to broadcast a particular viewpoint. *Green v. FCC, supra* at 328. It would not promote the public interest to have that period of time which is to be devoted to the satisfaction of a licensee's Fairness Doctrine obligations utilized for the promotion of the private interests of those who seek access. Consequently, the question arises of how a licensee using an access scheme can insure that the time devoted to free speech messages-access on a "first come, first served basis" will be dedicated to the presentation of significant viewpoints and replies on important public issues rather than to personal opinion on matters of purely private concern? As stated by the Court of Appeals in *NCCB, supra*, slip op. at 40.

"We recognize, of course, that there may be significant difficulties with the COM access proposal. For instance, there is no absolute assurance that the issues addressed during access time will be the most important or controversial issues facing the licensee's community, and even less assurance of balance in presentation of opposing viewpoints. In its further inquiry into the COM proposal, we expect the Commission to ascertain how serious these potential defects are and to examine whether they can be overcome. Throughout this process, it is especially important that the nature and scope of issue coverage under the proposed access scheme be compared to the degree of coverage actually achieved under the current system of fairness doctrine implementation, not to the coverage that would be achieved were both fairness obligations currently complied with and enforced."

Comments are requested on the above-quoted passage of the Court's opinion. Also, should the Commission alter its longstanding policy that no right of access accrues to a particular individual or group? Moreover, given the need to present service which is useful to the community and to the interests of the many, how will the access system still preserve licensee discretion and maintain non-involvement by the Commission in the day-to-day determination of who should be given access and when? Would an access system be likely to achieve the same degree of issue coverage currently attained under existing Fairness Doctrine administration?

14. Under an access plan, including free speech messages, a licensee would presumably have no control over the selection of speakers or subject matter. How would the decision in *WCUA v. WDAY*, 360 U.S. 525 (1959) affect such an access plan? How could a licensee prevent the dissemination of material that would be contrary to the Commission's rules or the public interest, *e.g.*, lottery information: the use of station facilities to obtain money under false pretenses; obscene or indecent language? Would the station have authority to prohibit such broadcasts or prevent its facilities from being used for personal attacks? Should legally qualified candidates for public office or their spokesmen be prohibited from utilizing the licensee's access facilities?² Would licensee's control over the contents of the "first come, first served" free speech messages be consistent with the primary goals of an access system? In addition, what safeguards or review procedures would be developed to prevent a licensee who selects a "representative spokesperson" from controlling not only the subject matter to be discussed initially, but also the advocate and therefore potentially the content of any contrasting viewpoint? If such review procedures were established, what benefits would accrue over the present fairness system which involves the Commission as a judge of the licensee's reasonableness.

15. In administering the Fairness Doctrine the Commission is sensitive to the need to limit its intervention and to respect the broadcaster's journalistic discretion. Thus, the Commission will not substitute its judgment for that of the licensee but will review a licensee's decisions pursuant to the Fairness Doctrine only to determine whether the broadcaster acted reasonably and in good faith under all of the facts and circumstances presented. What would the Commission's role be if access is to be utilized as a total or partial substitute for or supplement to present Fairness Doctrine procedures? Under the foregoing, would the Commission be removed entirely from its "review" role and, if so, what assurance would there be that a licensee would carry out its stated access procedures in good faith and comply with the Fairness Doctrine?

² COM concludes that it could be necessary for the Commission to amend its personal attack rules to exempt spot access announcements. Also, the COM proposal would include licensee restrictions against defamation, profanity and obscenity and would prohibit appearances by legally qualified candidates.

16. What is the likelihood that free access and/or access on a representative spokesperson basis would substantially contribute to "robust, wide-open" debate on controversial issues of public importance? In this regard, we request the comments of all stations which have adopted a "first come, first served" access plan which gives only limited or no control to the licensee over the selection of spokespersons or the subject matter of their presentations. Specifically, we seek comments as to whether such existing access plans have contributed significantly to the presentation of contrasting views on important public issues. Also, if records of such plans exist, licensees are requested to provide the Commission with a list of the subjects discussed and by whom, and the length of the broadcasts.

17. In light of the problems raised herein, would it be feasible for the Commission to attempt an experiment using a form of access as a substitute for or supplement to present Fairness Doctrine procedures? The Commission could invite applications from radio and television stations in different sized markets, and then choose a representative number of stations in these services to engage in a two-year test of access as contrasted to present fairness methods. To determine the results of such experiments at the end of this period the Commission could require licensees adopting such an access system to submit a report as to (1) how many controversial issues of public importance were discussed (2) how many issues which the licensees considered not to be of consequence to the public were discussed; and (3) if controversial issues of public importance were discussed, whether contrasting viewpoints were adequately presented. The Commission could also examine comments received from the listening public on the overall programming and the access systems of those licensees participating in the experiment.

18. Additionally, the Commission solicits comments on Mr. Geller's "ten issue" proposal (outlined in paragraph 4, *supra*) and on similar approaches which would utilize an annual report basis to determine licensee compliance with the Fairness Doctrine. According to Mr. Geller, the Commission should require its television licensees to list a certain number of controversial issues which they had chosen for the most coverage in the prior year and briefly detail the programming devoted to each issue, the partisan spokesmen presented, and the source and time of broadcast. "Routine" news coverage would be excluded. Mr. Geller proposes that the list not be sent to the Commission but rather be retained by the licensee and made available for public inspection. The licensee would then submit its report to the Commission as part of its renewal application.³

19. While it appears that Mr. Geller's proposal might assist a licensee in determining how it has met its Fairness Doctrine obligations, it is unclear what role the Commission is to have under such a system. Should the Commission review these lists on a regular basis (annually or at renewal) or only upon receipt of a *prima facie* complaint alleging a licensee's failure to meet its Fairness Doctrine obligations? Could a method of review be devised which would not draw the Commission further into the day-to-day journalistic determinations of licensees? Could a "ten issue" proposal be utilized in conjunction with an access scheme, or act itself as a substitute for or complement to present Fairness Doctrine procedures? If so, how would its application comport with the statutory mandate of Section 315(a)? Would the adoption of such a proposal further the public interest? Would it constitute an undue burden on the licensee and impose an unnecessary and arduous administrative burden on the Commission? Does the Geller proposal constitute an unnecessary intrusion into the journalistic discretion of broadcasters? If there any justification for it in terms of failure of the present Fairness Doctrine procedures to achieve coverage of significant issues?

20. The questions raised above, both with respect to a direct access proposal and a "ten issue—annual report" approach to the Fairness Doctrine are by no means exhaustive, but may serve to highlight several areas which we believe call for further elucidation. We welcome comments on these specific proposals and the questions raised herein and if there are any other areas of interest or concern it is hoped that they will be brought to our attention.⁴

³ Mr. Geller's ten issue proposal was submitted as part of a package which included, *inter alia*, a suggestion that questions regarding Fairness Doctrine compliance be considered only at renewal. The Commission's selection of this approach in the Fairness Report and Fairness Reconsideration was upheld by the Court of Appeals. See *NCCB, supra*, Slip Op., at 42-44.

⁴ The Commission is also in receipt of a "Petition for Further Inquiry and Rulemaking," filed February 13, 1978, by COM. It raises several questions with regard to the desirability of an access system, the majority of which are submitted in the Notice of Inquiry that we are adopting today and which will be considered during the course of this Inquiry. COM is, of course, free to raise these matters in any comments, it files during this proceeding including its suggestion that the Commission hold panel discussions. However, since the Commission has wide discretion in issuance of this Notice of Inquiry we do not believe it necessary to grant COM's February 13 Petition at this time.

21. Pursuant to applicable procedures set out in Sections 1.4, 1.415, 1.419 and 1.430 of the Commission's Rules and Regulations, interested parties may file comments on or before May 3, 1978 and reply comments on or before June 2, 1978. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such reply comments shall be accompanied by a certificate of service (see sections 1.420(a), (b) and (c) of the Commission's Rules).

22. In accordance with the provisions of Section 1.419 of the Commission's Rules and Regulations, an original and 5 copies of all comments, reply comments, pleadings, briefs or other documents shall be furnished the Commission. Members of the general public who wish to participate informally in the proceeding may submit one copy of their comments, specifying the docket number in the hearing. All filings in this proceeding will be available for public inspection by interested persons during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M street, N.W., Washington, D.C.

23. Authority for this inquiry is contained in Sections 4(i), 303, 307, 309, 315(a) and 403 of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary*.

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION, WASHINGTON, D.C.

BC Docket No. 78-103

IN THE MATTER OF AMENDMENT OF PARTS 73 AND 76 OF THE COMMISSION'S RULES
RELATING TO BROADCASTS AND CABLECASTS BY LEGALLY QUALIFIED CANDIDATES
FOR PUBLIC OFFICE

NOTICE OF PROPOSED RULEMAKING

Adopted: March 16, 1978; Released: March 24, 1978 By the Commission:

1. The Commission, on its own motion, gives Notice of Proposed Rulemaking in the above-entitled matter and seeks comments on the necessity, adequacy and possible results of its proposed changes in the definition of legally qualified candidate for purposes of the Communications Act.

2. Under present Commission Rules,¹ a legally qualified candidate is defined as follows:

(a) Definitions. A "legally qualified candidate" means any person who has publicly announced that he is a candidate for nomination by a convention of a political party or for nomination or election in a primary, special, or general election, municipal, county, State or national, and who meets the qualifications prescribed by the applicable laws to hold the office for which he is a candidate, so that he may be voted for by the electorate directly or by means of delegates or electors, and who EITHER:

(1) Has qualified for a place on the ballot, or

(2) Has publicly committed himself to seeking election by the write-in method, and is eligible under the applicable law to be voted for by sitcker, by writing in his name on the ballot, or other method; and makes a substantial showing that he is a bona fide candidate for nomination.

3. The Commission believes that this definition should be amended for a number of reasons: First, the definition does not cover fully certain candidates. Although the first paragraph provides that candidates seeking nomination by convention must publicly announce their candidacies and be eligible to hold the particular office, the additional criteria listed in subparagraph (1) and (2) cannot be met by these candidates. Therefore, in order to establish a rational method of determining when candidates running for nomination by means other than a public election become legally qualified, some specific criteria are necessary. Second, in its present form, the definition discriminates against candidates who wish to qualify for an election by the ballot method in that the rule permits write-in candidates to qualify much earlier than ballot candidates, perhaps even years

¹ Sections 73.120 (AM), 73.290 (FM), 73.590 (non-commercial Educational FM), 73.657 (TV) and 76.5(y) (cablecasts), respectively.

before an election. Finally, the present definition makes no mention of the criteria necessary to qualify for the benefits of the Communications Act as a candidate for nomination to the offices of President or Vice President of the United States.

4. The Commission proposes to adopt the following revised definition of legally qualified candidate in order to eliminate the problems described above:

(a) *Legally qualified candidate*

(1) A legally qualified candidate for public office is any person who:

- (i) has publicly announced his or her intention to run for nomination or office;
- (ii) has qualified under the applicable local, state or federal law to hold the office for which he or she is a candidate; and,
- (iii) has met the qualifications set forth in either subparagraphs (2), (3) or (4), below.

(2) A person seeking election to any public office, or nomination for any public office except that of President or Vice President of the United States, by means of a primary, general or special election, shall be considered a legally qualified candidate if, in addition to meeting the criteria set forth in subparagraph (1), above that person:

- (i) has qualified for a place on the ballot, or
- (ii) has publicly announced his or her intention to be a write-in candidate and makes a substantial showing that he or she is a bona fide candidate for nomination or office: Except That no person shall be considered a legally qualified write-in candidate prior to the time that candidates for the same nomination or office are able, under applicable local, state or federal law, to qualify for a place on the ballot.

(3) A person seeking nomination to any public office, except that of President or Vice President, by means of a convention, caucus or similar procedure, shall be considered a legally qualified candidate if, in addition to meeting the criteria set forth in subparagraph (1), above, that person makes a substantial showing that he or she is a bona fide candidate for such nomination.

(4) A person seeking nomination for the offices of President or Vice President of the United States shall be considered a legally qualified candidate in all states and territories of the United States and the District of Columbia if, in addition to meeting the criteria set forth in subparagraph (1), above.

- (i) he or she, or proposed delegates on his or her behalf, have qualified for the primary or Presidential preference ballot in any state or territory of the United States, or the District of Columbia, or

- (ii) he or she has made a substantial showing that he or she is a bona fide candidate for such nomination.

5. Subparagraph (1) is a restatement, in simpler form, of the first paragraph of the present definition.

6. Subparagraph (2) is essentially the same as the present definition except that subparagraph (2) (ii) seeks to equalize the period of time prior to an election in which write-in and ballot candidates may be considered legally qualified for purposes of the Communications Act. Under the Commission's present definition, write-in candidates may become legally qualified well in advance of the time when applicable law would allow other candidates to qualify for the ballot. Although the Commission has never held that a candidate is entitled to access to a broadcasting station immediately upon becoming legally qualified (see *Anthony R. Martin-Trigona*, — FCC 2d — (1978) FCC 78-110) there may be instances in which a candidate would benefit by being legally qualified before ballot candidates. For instance, some stations may wish to allow the candidate to purchase broadcasting time at regular commercial rates before candidates may qualify for the ballot (see e.g., *Anthony R. Martin-Trigona*, *supra*), but candidates who intend to qualify as ballot candidates would not be entitled to equal opportunities for these appearances under Section 315(a) of the Communications Act. We see no substantial reason for allowing write-in candidates to become legally qualified before ballot candidates are able to do so. The individual localities and states have adopted procedures concerning the period prior to an election during which candidates may be legally qualified by prescribing certain time limits for filing and certification of ballot status. We feel that it would be equitable and in keeping with our policy of deferring to state and local law in such matters to apply those same time limits to write-in candidates. Comments are requested from interested parties or groups concerning the appropriateness of a change such as the one proposed and any possible problems resulting from such change.

7. Subparagraph (3) is intended to apply to candidates seeking nomination by means other than a primary, general or special election, who are not fully covered under the present Commission definition. As in the case with write-in candidates under subparagraph (2), candidates covered by subparagraph (3) will be required to make a "substantial showing" of bona fide candidacy. In *Socialist Workers 1970*, 26 FCC 2d 244 (Broadcast Bureau 1970), the Commission outlined some of the elements of a substantial showing: for instance, the issuance of press releases, distribution of leaflets, addresses to political meetings, and maintenance of a campaign committee. We invite comments on the adequacy of the "substantial showing" requirement in the proposed rule. Should that requirement be more specific in outlining elements of a substantial showing? Should the requirements for qualifying as a candidate under this subparagraph be more extensive? If so, what additional criteria should be included?

8. In the proposed rule we have included no limitation on the period during which candidates covered by subparagraph (3) may be legally qualified, similar to those imposed by subparagraph (2). However, there may well be reasons for limiting the period during which a candidate seeking nomination by means other than a public election may be considered legally qualified. Some of these are: to establish a possible guideline for broadcasters concerning their obligations when a person becomes a legally qualified candidate under such circumstances; to put such candidates on a somewhat similar footing with write-in and ballot candidates who have time limitations imposed on them by subparagraph (2); and to establish a possible guideline for broadcasters concerning their obligations under Section 312(a)(7) of the Communications Act.² We recognize that rule-making in the area to which subparagraph (3) applies is difficult because of the large variation from locality to locality and state to state in the methods of selecting nominees and officeholders. Comments are requested as to whether there should be some time period prior to which a person under subparagraph (3) would not be considered legally qualified, e.g., can a candidate under subparagraph (3) become legally qualified more than X number of days prior to the convention or event which will determine who shall be nominated. Would a limitation work under hardships on candidates?

9. In subparagraph (4) we propose to incorporate into the Commission's Rules the finding in *Walt Disney Productions, Inc. (Pat Paulsen ruling)*, 33 FCC 2d 297 (Broadcast Bureau 1972), affirmed 33 FCC 2d 835 (1972) (upheld by the Court of Appeals in *Patrick L. Paulsen v. FCC*, 491 F. 2d 887 (9th Cir. 1974))³ that a person who has qualified as a candidate for a political party's nomination for President in one state must be considered such a candidate nationwide. Thus, a person who has qualified for ballot status in one state under subparagraph (4)(i) would be a legally qualified candidate for nomination for the offices of President and Vice President in all states and territories, whether or not ballot status was obtained in any of these other jurisdictions. Qualification under subparagraph (4)(ii) presents a more difficult problem. For example, should a substantial showing in only one state qualify such candidate to seek 315 rights in other states and territories, or should failure to qualify on the ballot in at least one state require a substantial showing under subparagraph (4)(ii) in more than one state? Is the inclusion of this provision necessary to complete the definition of a legally qualified candidate? Are there any modifications necessary to make this provision clearer? Are modifications necessary in the Commission's policy in this area?

10. Pursuant to applicable procedures set out in Sections 1.4, 1.415, 1.419 and 1.430 of the Commission's Rules and Regulations, interested parties may file comments on or before May 1, 1978, and reply comments on or before May 16, 1978. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such reply comments shall be accompanied by a certificate of service (See Sections 1.20(a), (b) and (c) of the Commission's Rules).

² The Commission's policy regarding Section 312(a)(7) is the subject of a separate Notice of Inquiry adopted by the Commission on March 16, 1978.

³ The Court of Appeals upheld the decision of the Commission that nonpolitical appearances of legally qualified candidates were subject to "equal opportunities." However, the Broadcast Bureau's finding that a legally qualified candidate in one state primary is legally qualified nationwide was not an issue on appeal, either at the Commission or the court level.

11. In accordance with the provisions of Section 1.419 of the Commission's Rules and Regulations, an original and 5 copies of all comments, reply comments, pleadings, briefs or other documents shall be furnished the Commission. Members, of the general public who wish to participate informally in the proceeding may submit one copy of their comments, specifying the docket number in the hearing. All filings in this proceeding will be available for public inspection by interested persons during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary*.

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION, WASHINGTON, D.C.

BC Docket No. 78-102

IN THE MATTER OF COMMISSION POLICY IN ENFORCING SECTION 312(a) (7) OF THE COMMUNICATIONS ACT

NOTICE OF INQUIRY—ADOPTED: MARCH 16, 1978; RELEASED: MARCH 22, 1978

By the Commission: Commissioner Quello concurring and issuing a statement.
1. The Commission intends, through this Notice, to initiate an inquiry into Commission administration of Section 312(a) (7) of the Communications Act (47 U.S.C. 312(a) (7)). That Section provides as follows:

(a) The Commission may revoke any station license or construction permit—

* * * * *

(7) For willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

It has generally been the policy of the Commission in interpreting Section 312 (a) (7) to defer to the reasonable, good faith judgment of licensees, subject to Commission review, in determining what constitutes reasonable access for a particular candidate or group of candidates. Thus, we have promulgated no Commission Rules outlining criteria for compliance with the statute. We now wish to receive comments from interested parties concerning whether that policy has proved adequate to ensure that Federal candidates received reasonable access on broadcasting stations, or whether the promulgation of specific Commission Rules in this area is necessary or would be helpful to facilitate licensee compliance with the provision.

2. There is little legislative history surrounding the enactment of Section 312 (a) (7). It was passed by Congress as part of the Federal Election Campaign Act of 1971. The purpose of that legislation, according to Senator Pastore, one of its sponsors, was:

"... to give candidates for public office greater access to the media so that they may better explain their stand on the issues and thereby more fully and completely inform the voters." (117 Cong. Rec. S12872 (daily ed. August 2, 1971)).

But, as indicated in the language of the provision itself, the right of access was not to be absolute since the licensee could limit candidates to a "reasonable" amount of broadcast time. We took note of this fact in our 1972 Public Notice entitled *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 FCC 2d 510 (1972), where we stated:

"Congress clearly did not intend to take the extreme case, that during the closing days of a campaign stations should be required to accommodate requests for political time to the exclusion of all or most other types of programming or advertising. Important as an informed electorate is in our society, there are other elements in the public interest standard and the public is entitled to other kinds of programming than political. It was not the intention that all or most time be pre-empted for political broadcasts." *Id.* at 536.

While Congress made it clear that the access afforded to Federal candidates was to be a "reasonable" amount, it was left to the Commission to determine what was to be considered reasonable for compliance with Section 312(a) (7).

3. Through its interpretation of the "reasonable access" provision, the Commission has attempted to strike a balance between the rights of Federal candidates and the obligations of licensees to present political as well as other types of programming. In our decision in *Summa Corporation*, 43 FCC 2d 602 (1973), we articulated the standard we have consistently employed in judging licensees' actions under Section 312(a) (7). There we stated:

"[W]here a licensee's judgments or policies under the circumstances represent a reasonable, good faith attempt to accommodate both the right of Federal candidates to fully inform the voters of their candidacies, and the interest of the public in programming other than political broadcasts, this Commission will be disposed to affirm such judgments and policies as reasonably fulfilling the obligations of a licensee under Section 312(a)(7)." *Id.* at 604.

4. Although the Commission reviews each individual complaint to determine whether the licensee has exercised reasonable good faith judgment under all the circumstances present, we have, through experience in the application of Section 312(a)(7), developed some basic guidelines as to what that provision requires. Thus, we have determined that, absent countervailing circumstances such as a multiplicity of candidates, Federal candidates are entitled to program time in prime time, *Licensee Responsibility Under Amendments to the Communications Act Made by the Federal Election Campaign Act of 1971*, 47 FCC 2d 516 (1976). We have declined, however, to recognize a candidate's right to a particular length of a program time¹ or a particular placement on a licensee's broadcast schedule. *Honorable Pete Flaherty*, 48 FCC 2d 833 (1974), *Paul A. Talmey*, 49 FCC 2d 678 (1974, Broadcast Bureau). We have indicated that a licensee has the option of offering either free or paid broadcast time or a combination of the two to political candidates, *Use of Broadcast and Cablecast Facilities by Candidates for Public Office, supra*, and have stated that Section 312(a)(7) applies to non-Commercial as well as commercial broadcast stations, *Public Broadcasting Council of Central New York*, 63 FCC 2d 952 (1976).

5. We request comments from interested persons as to whether the Commission's policy of deferring to a licensee's reasonable, good faith judgment, under the circumstances of each individual case, has proved effective and equitable for licensees and candidates. If not, should the Commission, by Public Notice, promulgate general guidelines concerning what is required under Section 312(a)(7), and, if so, what should the guidelines include? Should the Commission, instead, promulgate specific rules outlining requirements for compliance with the "reasonable access" provision? Considering the differences in the number of candidates for a particular office and the number of nominations or offices in contention from area to area, is it feasible to devise specific rules? If additional Commission guidance to licensees or candidates is necessary, in what particular areas should such guidance be given—the point in time at which the reasonableness obligation begins, the total amount of program and spot announcement time, the particular lengths of such time, the placement of political announcements, etc.?

6. We have received many inquiries from licensees and candidates as to when the licensee's obligation to afford reasonable access begins. This has been especially difficult to determine in the case of a write-in candidate or a candidate who is seeking nomination by means other than a primary, general or special election. In those situations, persons have been able to qualify as candidates for public office under the Commission's present definition far in advance of the time when the nomination or election to office was to be determined. We desire comments on whether the Commission should require licensees to begin to afford reasonable access to persons as soon as they qualify under Commission rules as legally qualified candidates. If not, is there any particular point at which such access should begin?

7. As we noted above, the Commission has stated that under Section 312(a)(7), a Federal candidate is entitled to program time on a station, but not to a particular length of program time.² As a result, some candidates have complained that their campaigns have been handicapped by licensees who refuse to offer them lengths of time which they consider most advantageous to their

¹ In *WGN*, 58 FCC 2d 1142 (1976) we concluded, with two Commissioners dissenting, that it was unreasonable for a licensee to refuse to sell spot announcements to a Federal candidate. Five of the seven voting Commissioners based their conclusions on the "lowest unit charge" provision, (47 U.S.C. 315(b)). Three of these five also based their conclusions on Section 312(a)(7). Recently, in *Martin-Trigona*, — FCC 2d — (1977), the Commission reversed its decision in *WGN* insofar as it relied on Section 315(b). Thus, since the rationale for *WGN* based on Section 312(a)(7) represented the views of only three of the seven Commissioners, a minority of those voting, it remains to be decided whether the sale of spot announcements to Federal candidates is required under the "reasonable access" provision.

² *Cf. Senator Frank Church*, 37 RR 2d 337 (1976), where we concluded that under the particular circumstances of that case, involving a Presidential primary and a limited number of candidates, two five-minute programs did not constitute reasonable access and that the candidate was entitled to a longer program period.

campaign plans. See *Donald Riegle*, 59 FCC 2d 1314 (1976). Because of the finite nature of broadcast time, licensees may not be able to satisfy all candidates' requests for particular lengths of time. However, should licensees be under some obligation to accommodate candidates' requests for particular lengths of time? For instance, should they allow candidates a certain amount of time to be used in any lengths they desire? Or should licensees be required to offer a range of program time, e.g., five-minute and half hour availabilities, which would give candidates some flexibility in the conduct of their media campaigns?

8. There is, at present, no Commission policy concerning the obligation of a licensee to offer spot announcements to Federal candidates. See footnote 1, page 3. Does Section 312(a) (7) require licensees to afford spot time to candidates for Federal office, or to offer all lengths of spot announcements which it offers to commercial advertisers?

9. Although the Commission has concluded that no Federal candidate is entitled to a particular placement of his spot announcement or program on a licensee's broadcast schedule, the Commission does presently require that licensees offer such candidates broadcast time in prime time. Should this requirement be extended to any other class of time or to all classes of time?

10. The "reasonable access" provision of the Communications Act makes no exemption for non-commercial, educational broadcasting stations. See *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, *supra*. Such stations are prohibited from levying charges for broadcast time and must, therefore, give a reasonable amount of time to legally qualified candidates for Federal elective office. The argument has been made that because of the special educational and public service obligations of public broadcast stations, a different standard of "reasonable access" should be applied to them. Comments are requested as to whether a different interpretation of Section 312(a) (7) should be applied to non-commercial, educational stations than that which applies to commercial stations. If so, what interpretation would best apply? What effect would the no-censorship provision of Section 315(a) have on any different interpretation of Section 312(a) (7)?

11. The above are suggested areas of inquiry which interested persons may wish to address. This inquiry, however, is not limited to those issues delineated here, and the Commission will give careful consideration to all suggestions as to how Section 312(a) (7) should be implemented.

12. Pursuant to applicable procedures set out in Sections 1.4, 1.415, 1.419 and 1.430 of the Commission's Rules and Regulations, interested parties may file comments on or before May 1, 1978, and reply comments on or before May 16, 1978. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such reply comments shall be accompanied by a certificate of service (See Sections 1.420(a), (b) and (c) of the Commission's Rules).

13. In accordance with the provisions of Section 1.419 of the Commission's Rules and Regulations, an original and 5 copies of all comments, reply comments, pleadings, briefs or other documents shall be furnished the Commission. Members of the general public who wish to participate informally in the proceeding may submit one copy of their comments, specifying the docket number in the hearing. All filings in this proceeding will be available for public inspection by interested persons during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,³
WILLIAM J. TRICARICO, *Secretary*.

CONCURRING STATEMENT OF FCC COMMISSIONER JAMES H. QUELLO

IN RE: COMMISSION POLICY IN ENFORCING SECTION 312(A) (7) OF THE
COMMUNICATIONS ACT

Section 312(a) (7) imposes upon broadcasters the requirement to provide "reasonable access" to candidates for federal elective office. In according this unique privilege to federal candidates, the Congress declined to provide any

³ See attached Concurring Statement of Commissioner James H. Quello.

definition of "reasonable access" and the FCC decided to rely upon the judgment of licensees. Our reliance has been tempered by doses of Commission judgment overruling licensees from time to time.

Reasonableness, like beauty, is largely in the eye of the beholder. Therefore, I strongly suspect that the Commission's present approach to administering Section 312(a) (7) is as good as any and better than most. I am opposed to a catalogue of "shalts" and "shalt nots" imposing further governmental judgments upon licensees and the public at large. What is reasonable in one situation may well be unreasonable in another. Had Congress intended a specific prescription for access, it had the capability of providing one or of mandating the Commission to provide one. It did neither.

If the question to be answered by this Notice relates to the equity and efficacy of the statute, itself, then I will be very interested in the comments. If it merely seeks certainty where there is none, then I doubt that it will produce anything useful.

Therefore, I concur.

[The following information was referred to on pp. 26 and 29:]

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D.C., July 12, 1978.

HON. ERNEST F. HOLLINGS,
*Chairman, Subcommittee on Communications, Committee on Commerce, Science,
and Transportation, U.S. Senate, Washington, D.C.*

DEAR SENATOR HOLLINGS: During my testimony on Senator Proxmire's bill (S. 22) on June 7, 1978, two questions were posed to which I indicated I would submit a written response. Additionally, a third question was submitted later to which I will respond. Finally, I would like to take this opportunity to explain, for the record, my views on the subject of potential "misuses" of the fairness doctrine for political ends on which I was questioned and which was extensively raised in the remainder of the day's hearings.

Question. Of the total number of fairness doctrine complaints received for the years 1976 and 1977, how many were directed toward public broadcast stations?

Answer. Separate data is not maintained for commercial and public broadcasting stations, but of the average 5,000 complaints received per year, our staff estimates that about two (2) percent concern public broadcasting stations.

Question. Has the Commission ever instituted an inquiry into a station's fairness doctrine compliance which was not initiated by a complaint, but rather was initiated by the staff itself?

Answer. No.

Question. You have testified that abuses of the fairness doctrine may have taken place because broadcasters don't have a very clear understanding of their obligations under the doctrine. You further contended that "they have a great confusion with respect to the notion of equal time." Because the doctrines can only serve the public interest if it is properly understood by those obligated to implement it, how does the FCC intend to improve the licensees' understanding of his fairness doctrine responsibilities? How can you improve the public's understanding of the fairness doctrine? Will the proposed revisions of the primer on the political use of broadcast facilities that you mentioned in your statement accomplish this objective?

Answer. Yes. Our revised primer will, we expect, resolve many of the misunderstandings about the fairness doctrine and political equal opportunity requirements of Section 315, and do so in a "plain English" easy to use format. We intend to make a substantial effort to ensure wide distribution of this primer to both licensees and the general public.

I also want to expand my views on the subject of allegations of "misuse" of the fairness doctrine by past Administrations and its potential misuse in the future. The fairness doctrine may, of course, present an opportunity for misuse by government officials for political ends. However, this potential is present in almost all statutes promulgated by the Congress for legitimate and proper ends. For example, the ability of the IRS to grant, deny or revoke non-profit tax-exempt status of certain organizations has been shown to have the potential for abuse; however the fact that such authority has been or could be abused is not a valid reason for removing the IRS's authority to make determinations of tax-

exempt status. Abuse of the IRS's authority would violate the First Amendment, and should and can be severely dealt with if found; and safeguards can be adopted for the future to assure evenhanded enforcement. But the statute itself need not necessarily be repealed. I believe that the same is true of the Fairness Doctrine.

Sincerely,

CHARLES D. FERRIS, *Chairman.*

Senator HOLLINGS. Mr. Henry Geller, please.

You may proceed.

STATEMENT OF HENRY GELLER, NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION

Mr. GELLER. Thank you, Mr. Chairman.

If I may, I would like to have my statement introduced into the record and then I will just go over some highlights.

Senator HOLLINGS. Please do that.

Mr. GELLER. Prior witnesses have described what S. 22 does, so I will therefore just move on to discuss the merits of the bill.

The purpose of the bill is to eliminate Government interference with broadcast journalism.

Now, this sensitive area poses problems and we believe that there are long-term and short-term revisions that may be appropriate. But we do oppose the approach in S. 22, and I would like briefly to state why.

The Fairness Doctrine is an important part of the public trust concept. In my statement, I use the example of Jackson, Miss. Two VHF channels are allocated to Jackson; they total 12 megahertz of spectrum. These channels were not allocated by auction nor were the recipients required to pay any rental for them, the way you would if you use Federal land for grazing or as an oil lease. (With respect to broadcasting allocations, the Government chooses the party who will best serve the public interest and gives spectrum space to him free because he volunteers to serve the public interest. Every 3 years, the recipient is required to show that he has acted as a fiduciary for the entire community.)

Now, in Jackson, Miss., 45 percent of the population is black. If a licensee ignores the blacks, if, say, he is a segregationist and puts on only the viewpoint he agrees with and will not put on the integrationist viewpoint, then it is hard to see how his attitude is that of public trustee.

The situation I am speaking of is not hypothetical. I am referring to an actual case—*WLGT* or the *Church of Christ* case.

Senator Proxmire has stated he believes the Fairness Doctrine prohibits broadcast journalism and wide open debate. The purpose of his bill as the the Senator stated, is to put the broadcast journalist on the same footing as the print media journalist.

In our view, S. 22 won't accomplish that because it ignores the complexity of public trustee concept. The Fairness Doctrine is just one part of the public trustee concept. With this concept, you can have—and indeed to have—a very pervasive regulatory scheme, characterized by multiple ownership rules, comparative hearings, renewals, and economic regulation such as prime time access. If, therefore, an ad-

ministration wants to suppress certain viewpoints and has the support of the FCC—and I am just talking in hypothetical terms, Mr. Chairman—it wouldn't seek to do so by skewing its fairness rulings. That would be a very hard way to proceed—and those rulings wouldn't survive in courts anyway, as the *Pensions* case and the *Strauss* case have shown.

What this hypothetical administration and FCC would do, rather, would be to put out a notice of proposed rulemaking, suggesting, for example, that the networks should only be permitted to own one or two stations.

They are now allowed to own five and these are very valuable properties.

Then, with this notice outstanding, the administrator would have one of its people visit the network in order to discuss problems of mutual concern.

With the networks under the gun in this fashion, you might find that somebody will listen to that administration. This fictional situation illustrates the way pressure would be most likely be brought to bear, on stations in reality.

I am saying to you that eliminating the Fairness Doctrine will not get you anywhere so long as the public trustee concept is maintained. The broadcast journalist will still not have the same footing as his print counterpart and the public will be left unprotected in situations such as the *WLBT* case, in Jackson, Miss. We think that this is the flaw in the approach taken in S. 22.

We think there are basic problems here and the way to get at them is to tackle this public trustee scheme.

Now, that is a very fundamental issue and obviously requires lengthy hearings. It is our understanding that this has begun on the House side, in the rewrite process. We think that that is the forum to consider these basic issues.

With respect to the substantial problems in implementing the Fairness Doctrine, I have attached, in appendix A, a list of these problems, along with some examples and some specific cases. In addition, in appendix B, I have set forth several interim measures I think would help alleviate these strains. We recommend them to your consideration.

They are not a panacea. They do not get at this public trustee concept. They would merely be helpful as interim measures. If time permits I will be glad to discuss them in the question period.

S. 22 also repeals section 315. Again, we don't favor that, for two reasons. First of all, portions of section 315 are clearly desirable. One portion says that broadcasters cannot censor legally qualified candidates. Another portion provides for the lowest unit rate to be charged candidates and says there can be no discrimination against candidates. We think those are all desirable sections and should be retained.

Our second reason pertains to "equal time." We believe there should be consideration of other alternatives. Examples would be those enumerated in the FCC's first report, in 1973, which we think are worthy of consideration.

So, as you can see, we have not reached a definitive opinion on equal time, but we believe that what I have just suggested is a better approach.

As to other matters, in view of the time, I would rely upon my statement.

However, I do want to stress that the administration does favor the widest possible breathing space for broadcast journalism.

We also favor deregulation where it serves the public interest.

In our judgment, S. 22 would not accomplish either of those basic goals. We therefore do not recommend its adoption. Rather we urge you to proceed along the lines we have set forth in appendix B and to consider the public trustee notion in the rewrite process.

I will be glad to try to answer any questions.

Senator HOLLINGS. What do you think of the elimination of the first part of the Fairness Doctrine in the House rewrite and inserting in lieu thereof an equity rule? Namely, there is no requirement to carry issues of public importance.

Do you have a comment on that?

I thought that was a pretty good part of the doctrine.

The Chairman of the FCC just attested to the fact it has not been adhered to, examined as closely or responded to as it should be. Where we are asking for a strengthening of it, the House rewrite eliminates it.

Mr. GELLER. I don't know what equitable fashion means and how it differs from reasonable opportunity.

There is another section of the doctrine—the first part—that says that the FCC can require that time be provided for news and public affairs.

I don't know that the House subcommittee has eliminated the first part. All of this is preliminary because I have just received a copy of the rewrite and haven't had a chance to study it. But it does not seem to me, Mr. Chairman, that they have eliminated either part for television.

Senator HOLLINGS. Very good.

We appreciate your presentation of the administration's position and your entire statement this morning. If we have any questions, we will leave he record open and submit them to you. We will insert your statement in the record.

[The statement follows:]

STATEMENT OF HENRY GELLER, ASSISTANT SECRETARY-DESIGNATE FOR
COMMUNICATIONS AND INFORMATION, DEPARTMENT OF COMMERCE

We appreciate the opportunity to present views on S. 22. The bill raises important issues in the sensitive area of broadcast journalism. We shall first briefly analyze the bill, then set forth the reasons for our opposition to enactment of its main provisions, and finally make some suggestions for alternative courses of action to deal with the problems.

As we understand it, a prime purpose of the bill is to repeal the fairness doctrine. As introduced, the bill would also prohibit any FCC review of programming, but this section is to be eliminated by an amendment. However, Section 5 of the bill still revises Section 326 to prohibit the Commission from regulating "the right of a radio station to determine the schedule of its programs and the content of its programs." This would appear to ban Commission consideration of such matters as the overall provision of local or informational programming by the licensee.

The bill also repeals Section 315 and Section 312(a) (7) in their entirety. Finally, in the public broadcasting area, the bill repeals the ban on editorializing in Section 399 and the provision in Section 396(g) (1) (A), requiring "strict adherence to objectivity and balance in all programs or series of programs of a controversial nature" made available to noncommercial stations by the efforts of the Corporation for Public Broadcasting.

REPEAL OF THE FAIRNESS DOCTRINE; ELIMINATION OF PROGRAMMING REVIEW¹

The concepts in this area—free press, free speech, fairness, public interest—are so loaded that they tend to block rather than promote insight. So perhaps it is best to proceed by example. There are two VHF channels in Jackson, Mississippi. These are valuable channels and there are many more than two applicants desirous of operating on them. To prevent interference chaos, the government chooses two parties, and enjoins all others from using the channels (wholly unlike the case of print media). These parties do not purchase the privilege, or pay a rental as for grazing rights on Federal land. Rather, they are given the short-term license to use the frequencies solely on the ground that they will operate in the public interest. They are, in short, volunteer public trustees, "... given the privilege of using scarce radio frequencies as proxies for the entire community * * *."²

Suppose that one or both these parties ignore their public trustee obligations. Even though 45% of the population of Jackson is black, the stations broadcast programs featuring only white churches or white educational institutions, and cover the raging issue of integration by presenting local programming that gives only the segregationist viewpoint. You will recognize by now that I have chosen Jackson because the facts above reflect those set out in the FCC's 1965 Lamar Life decision.³

Under the approach in S. 22, the FCC would be powerless to call the licensee to account; it would be compelled to find that a grant of renewal serves the public interest. Indeed, even though the FCC has allocated the 12 megahertz of VHF spectrum space to Jackson in order to have a local outlet that contributes to an informed electorate, the Commission—under S. 22—could not deny renewal even if the station's schedule revealed a complete absence of local or informational programming or programming presenting only the segregationist viewpoint.

The approach in S. 22 clearly strikes at the foundations of the notion of the broadcaster as a public trustee. It does so in order to serve higher First Amendment values. For, as the courts have noted, requiring the Government (FCC) to ensure that the broadcaster serves the public interest calls for a difficult and delicate balancing act—a "tightrope" performance.⁴ Programming—including fairness aspects—is the essence of service to the public,⁵ and thus the Government is involved in sensitive First Amendment areas. As I discuss in Appendix A, serious First Amendment problems have arisen in this tightrope performance.

S. 22 resolves these First Amendment problems by giving the broadcasters the entire ball game. It says to the broadcasters, "It's your frequency to use as you see fit—without any accountability to the licensing authority for fairness or programming scheduling." And to the blacks in Jackson, it says, "Sorry, but your rights—to be informed of the contrasting viewpoint—are squelched in order to serve the higher 'free press' right of the broadcasters." I believe that this is poor policy on several grounds.

Under the basic public interest licensing scheme which has been held constitutional, there is permitted considerable Government involvement with broadcast operations: licensing and renewal in the public interest; comparative hearings; public interest regulation such as prime-time access, multiple ownership, sponsorship identification, etc. Because of the existence of this pervasive public interest regulatory scheme, elimination of the fairness doctrine would not accomplish the goal sought by its critics—placing broadcast journalism in the same position regarding the Government as print journalism.

There has been legitimate concern and cited examples of how Government might use improper means to "chill" critical journalistic efforts.⁶ However, a closer examination of the problem as well as the examples indicates that the fairness doctrine is an unlikely tool for government control and has not been the real threat of most of the situations cited. An Administration with an improper purpose would be likely to use approaches that directly affect the eco-

¹ We include some brief discussion of the programming review issue because the bill's language in section 5 does raise the matter; it may be that the amendment inadvertently failed to include elimination of this language.

² *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 376, 394 (1968).

³ *Lamar Life Broadcasting Co.*, 38 FCC 1143, reversed and remanded, *Office of Communication of the Church of Christ v. FCC*, 395 F. 2d 994 (D.C. Cir. 1966).

⁴ *CBS v. DNC*, 412 U.S. 94, 105, 117 (1973).

⁵ *Johnston Broadcasting Co. v. FCC*, 175 F. 2d 351, 359 (D.C. Cir. 1949); *Office of Communication of the Church of Christ v. FCC*, *supra*, 359 F. 2d at p. 1009.

⁶ See *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F. 2d at 78 (Brazelon, C.J. dissenting); Brazelon, "FCC Regulation of the Telecommunications Press," 1975 *Duke L.J.* 213, 214-16; F. Friendly, "Politicizing TV," *Columbia Journalism Rev.*, March-April 1973, at 9; H. Ashmore, *Fear in the Air* (1973).

conomic health of the licensee or network in important vital respects—for example, by delaying the renewal, changing the multiple ownership rules applicable to networks or large VHF stations, or changing the network programming process through prime-time access and syndication rules. I believe that so long as the public interest licensing/regulatory scheme is maintained along the current lines, elimination of the fairness doctrine will not insulate broadcast journalism from the possibility of improper Government activity, and the egregious case of public trustee failure such as *WLBT-TV, supra*, will be left without a remedy.

The fairness doctrine does raise substantial problems in its implementation, and changes may be required to be fully effective; however, such changes may call for a fundamental evaluation of our notions of broadcasters as "public trustees." All aspects of the public trustee concept are interrelated and should be dealt with in a comprehensive manner, with a fully rationalized policy, rather than seeking to whittle away at it piecemeal.

This raises a host of questions. The public trustee scheme was adopted to achieve certain goals—effective local outlets; programming to inform the electorate; educational or cultural programming; etc. An initial question is what plan should be substituted to achieve these goals, assuming that they remain valid while discarding the parts which have been shown not workable. Further, the trustee concept provides a strong rationale for license assignment philosophy. Broadcasters volunteered to be public trustees, in order to gain the right to operate on the channels in Jackson. If public trustee obligation is to be modified or deleted, on what basis should these particular parties have the right to operate on their channels—to the exclusion of everyone else? Other entrepreneurs or minority groups such as the excluded Jackson blacks who will be clamoring for the right to be the licensee—will be insisting that the choice should be made by other means, such as lottery, since the public trustee notion is no longer valid.

Further, if the broadcaster is to be relieved of that fiduciary obligation, the question will be asked—why should it not pay for the use of the scarce spectrum? For example, it has been suggested that the broadcaster might pay in recompense a specified and reasonable sum into a special local fund. To achieve many of the goals mentioned, this fund might be used for public broadcasting and for access purposes in the community, including the training and presentation of programming by significant minority groups.

We believe it desirable to consider a range of approaches which would resolve the First Amendment problems raised by the public trustee fairness concept and still promote the public interest "in the larger and more effective use of radio."⁷ S. 22, by focusing solely on the free press rights of the broadcasters, ignores these other approaches.

We are not now advocating any particular course of action as to the basic problems raised by the public trustee/fairness scheme. While our predecessor office, OTP, has in the past urged an experiment to eliminate fairness regulation as to radio stations in some major markets, we think it appropriate to await the proposals in the re-write process now before the House Subcommittee on Communications, and to respond to these proposals.

During the necessarily longer process concerning such comprehensive proposals, more expedited consideration could be given the significant First Amendment problems that have arisen in implementing the fairness doctrine. These problems have been recognized by the courts⁸ and in several studies.⁹ In Appendix A to this statement, I list some example issues. In Appendix B, I list several actions that would alleviate to some extent the strains raised by the implementation of the doctrine. They do not represent a full solution and do not strike at the trustee concept.

In sum, we do not favor the approach of S. 22. We do recommend serious consideration of the long-term solution on the basis of the re-write process and of the recommendations in Appendix B as a short-term, "temporary fix" that would help significantly.

Section 315

The bill repeals Section 315. We do not support such a broad sweep. First, we believe it desirable to retain provisions of Section 315 such as no censorship of candidate's use, no discrimination and lowest unit rate for such use, etc.

⁷ Section 303 (g) of the Communications Act, 47 U.S.C. 303 (g).

⁸ E.g., *Straus Communications, Inc. v. FCC*, 530 F.2d 1001, 1008 (1976).

⁹ E.g., S. J. Simmons, "The Unfairness Doctrine"—Balance and Response Over the Airwaves," *Comm/Ent*, Vol. 1, Fall 1977, at 1-63.

Second, we believe that as to equal opportunities, there should be consideration of other alternatives such as set forth in the FCC's First Report in 1972.¹⁰ We have reached no position, tentative or definitive, on these alternatives but believe that they are worthy of study.

As for Section 312(a) (7), we believe its revision to be a matter largely for legislative judgment. We do urge that consideration be given to the apparent special preference shown Federal office and to the anomalous position in which it places noncommercial broadcasting under the Commission's construction of the section.¹¹ A revision applicable to all offices and allowing licensees greater flexibility should be given serious consideration.

Public Broadcasting

S. 22 would also repeal the "objectivity and balance" provision of Section 396 (g) (1) (A). This provision has been construed by the court and the FCC to be unenforceable by Federal agencies.¹² Its language is vague and there is some doubt as to need in view of the fairness doctrine's full applicability to the non-commercial licensee. We are continuing our study of this provision, and thus are not now ready to state a definitive position on the substantial issues raised.

For reasons already stated in consideration of the recent public broadcasting financing bill, we support the provision of S. 22 repealing Section 399.

In conclusion, we favor affording broadcasters the "breathing space" to engage in robust, wide-open debate but believe that remedial action should be taken as part of a comprehensive evaluation of the public trustee concept. Interim action along the lines in Appendix B would be helpful.

APPENDIX A

The Commission's practice of *ad hoc* fairness rulings has led it ever deeper into the journalistic process, and has raised several serious problems:

(i) What is a controversial issue of public importance or a personal attack can be most difficult to judge; indeed, it is only after a Commission ruling and court review that the matter can be definitely settled.¹

(ii) *Defining balance or reasonable opportunity.*—The doctrine requires that reasonable opportunity be afforded the contrasting viewpoints on an issue. There has thus been lurking in the doctrine's administration a very difficult question—namely, at what ratio of overall time (i.e., 2 to 1, 3 to 1, etc.) would the FCC say that the opportunity for presenting opposing viewpoints has not been reasonable? Further, how does frequency of presentations or choice of time (e.g., prime or nonprime time) affect this evaluation? Not only have these problems arisen recently,² but this basic issue of reasonable balance had led to other difficulties.

¹⁰ *First Report Regarding Handling of Political Broadcast*, 39 Fed. Reg. at 26388.

¹¹ *Labor Party Complaint Against WNET*, 42 Pike & Fischer, Fed. Reg. 2d 307 (1978); *Penny Mines*, 42 FCC 2d 878, 882-83 (1973).

¹² See *AIM v. FCC*, 521 F.2d 288 (D.C. Cir. 1975), cert. denied, U.S. (1976); see Sec. 398 of the Communications Act of 1934, as amended, 47 U.S.C. Sec. 398.

¹ See *NBC (Pensions)*, 44 FCC 2d 1027 (1974), *NBC v. FCC*, 516 F. 2d 1101 (D.C. Cir. 1971), vacated, cert. denied, 424 U.S. 910 (1976); Simmons, The Problems of "Issue" in the Administration of the Fairness Doctrine, 65 Calif. L. Rev. 546 (1977); Simmons, The FCC's Personal Attack and Political Editorial Rules Reconsidered, 125 U. of Pa. L. Rev. 990 (1977).

On personal attack, compare *Straus Communications, Inc.*, 51 FCC 2d 385 (1975) (calling congressman a coward personal attack) with *Philadelphia Federation of Teachers*, 31 Pike & Fischer, Rad. Reg. 2d 36 (1974) (calling public teacher association guilty of "blackmail" and "blood money" not personal attack; *WMCE, Inc.*, 26 FCC 2d 354 (1970) (charging persons with "deliberate lie or being paranoid" personal attacks); *WCMP Broadcasting Co.*, 41 FCC 2d 201 (1973) (not a personal attack to charge public officials with "hiding county funds," "hoodwinking" another agency about them and using them for "taxi service"); *University of Houston*, 11 FCC 2d 790 (1968) (stating that group engages in "physical abuse and violence" and "local terror campaigns" personal attack); *J. Allen Carr*, 30 FCC 2d 894 (1971) (calling university a "breeding ground" for "terrorists" and "guerilla" not a personal attack).

² See *Public Media Center*, 59 FCC 2d 444 (1976); concurring Statement of Chairman Burch in *Complaint of the Wilderness Society against NBC (ESSO)*, 31 FCC 2d 729, 734-39 (1971).

Cases like *Public Media Center* show the Commission's strong desire to avoid any ratio (three-to-one or five-to-one) or formula. But while this desire for flexibility is understandable, it presents constitutional problems when licensees and the public are left in doubt in this sensitive First Amendment area, and the Commission can rule "flexibly" after the fact: "Yes, this is fair" or "No, it is not." See *NAACP v. Button*, 371 U.S. 415, 433 (1963), where the Court stated that "precision of regulation must be a touchstone" in the area of freedom of expression.

(iii) *The "stop-watch" problem.*—In order to ascertain whether there has been reasonable balance, the FCC literally has used a stop-watch to time the presentations that have been made on the various sides on an issue.³ Even more difficult can be the problem of judging whether a program segment is for, against, or neutral in regard to a particular issue. In the gray areas that are bound to arise in this respect, it is not appropriate for a governmental agency to make such sensitive programming judgments.

(iv) *The "stop-time" problem.*—An associate problem arises from the fact that during and after the period in which the FCC makes a decision on a fairness complaint, a broadcaster frequently continues his coverage of an issue for a number of reasons (e.g., new developments). The FCC then finds that the circumstances upon which it made its decision have changed significantly. For example, in one case, during the period between the time of the original FCC decision on the complaint and the Commission's action on reconsideration, the licensee broadcast several presentations that crucially affected the FCC's judgment on whether reasonable opportunity had been presented.⁴

To give one final example of the chilling effect of FCC implementation of fairness, I shall give a full analysis of one case, routinely issued by the Commission, *Complaint of Sherwyn H. Heckt*, 40 FCC 2d 1150 (1973). In this case, Station KREM-TV, one of whose top officials was associated with an Expo 74 proposed for Spokane, editorialized strongly in favor of the project and its supporting bond issue. There was considerable disparity in the amount of time actually afforded the anti-bond viewpoints, and the station rejected one of the spokesmen for that viewpoint. But the station had a reasonable explanation for its rejection (i.e., the spokesman did not appear to represent groups for which he claimed to speak), and showed that it solicited opposing viewpoints.⁵ Further, the station actively

In *Public Media Center*, *supra*, the Commission has, in effect, established that if the two sides have had roughly the same amount of time, the frequency and audience factors are not to be considered. See, e.g., decision as to *KATY* (at 499-500) (503-04 519), *KPAY* (505-06, 526), and *KVON* (509-523), where the Commission found "reasonable opportunity" relying solely on roughly the same amount of time, despite great disparities as to frequency—34-to-1, 25-to-1, 14-to-1, and 16-to-1 (but see *Clarence F. Massart*, 10 FCC 2d 968 (1967); *George E. Cooley*, 10 FCC 2d 969, 970 (1967) where the Commission found unfairness in two political editorializing cases because of an imbalance in frequency even though overall time was roughly the same; and see *KSRO* (507-08, 522) where there was a four-to-one disparity in total time, so the Commission looked to "frequency and audience" and finding an 8-to-1 frequency ratio, found unfairness—but see *NBC*, 16 FCC 2d 956 (1969), holding a 5-to-1 total time and 8-to-1 frequency ratio to be reasonable). Our point is obvious: The area is confused and contradictory, when it should be clear and consistent.

³ *Complaint of the Wilderness Society against NBC (ESSO)*, *supra*, FCC 2d 735-379. In that case the staff set forth the following "stop-watch" analysis of the material broadcast on the issue (pp. 738-739):

Date of broadcast	Pro	Anti
June 7, 1970	4:40	5:35
Sept. 10, 1970	:20	1:00
Jan. 13, 1971	:06	:15
Feb. 14, 1971		:10
Feb. 16, 1971	:49	1:05
Feb. 24, 1971	:15	1:30
Feb. 28, 1971	1:32	
June 4, 1971	1:58	
July 11, 1971		
Aug. 6, 1971	:27	2:15
Aug. 26, 1971	:45	1:10
Sept. 15, 1971		:15
		8:00
Total	10:52	21:15

See also *Sunbeam TV Corp.*, 27 FCC 2d 350, 351 (1971).

⁴ *Complaint of Wilderness Society against NBC (ESSO)*, *supra*, 31 FCC 2d at pp. 733, 735.

⁵ The stations' editorial, with an offer of time to respond, was mailed to 194 community leaders and 400 members of the public; the station contacted 22 area organizations. 40 FCC 2d at 1152.

sought to obtain the views of leading spokesmen for the opposition and did present them. On the basis of these facts, the FCC staff ruling found that the licensee had afforded reasonable opportunity.

However, the FCC process for resolution of the significant issues was a long, arduous one—licensee response to complaint on October 12, 1971; further investigation on June 5 through 9, 1972; licensee response on February 6, 1973; and finally, the decision on May 17, 1973, 21 months after the broadcasts in question (40 FCC 2d at p. 1151). The licensee's letter of February 6, 1973 concludes:

"Finally, . . . we desire to comment briefly upon the procedures followed here. With due respect for the Commission's important responsibility in administering the fairness doctrine, we think there is a grave question whether it serves the public interest to require a station to account in such minute detail for everything it has said and done on a particular issue. We cannot believe that such a requirement contributes to an atmosphere of licensee independence or robust presentation of issues; we know that it is tremendously burdensome. We hope the Commission can find a way to give reasonable consideration to individual fairness complaints without the kind of exhaustive investigation that has apparently been thought necessary here."⁶

In order to quantify the extent of burden, a 1973 Rand Study⁷ inquired of the licensee as to the amounts of time and money expended in the handling of this fairness complaint. The licensee reported legal expenses of about \$20,000, with other expenses (e.g., travel) adding considerably to the total; this is not an insubstantial amount, in light of the fact that the total profits reported by all three TV stations in Spokane for 1972 was about \$494,000.⁸ However, from this licensee's standpoint, the important factors were the amount of time spent by top-level station personnel and the emotional strain on them.

Thus during the period from September 14, 1971, to May 18, 1973, the president and vice-president of the station devoted a total of about 80 hours; the station manager, 207 hours; and six members of his staff, an additional 194 hours. The station pointed out:

"In round numbers, then 480 man hours of executive and supervisory time was spent on this matter. This, of course, does not include supporting secretarial or clerical time attendant to the work carried out. This represents a very serious dislocation of regular operational functions and is far more important in that sense than in the simple salary dollar value."⁹

Finally, there is the factor of deferral of license renewal. The KREM-TV renewal would normally have been granted on February 1, 1972; because of the fairness complaint, however, its application for renewal (and that of its companion AM station) was placed on deferred status until May 21, 1973. The FCC has recognized that placing the renewal in jeopardy because of licensee activity in the news field can have a serious inhibiting effect and should be done only when a most substantial and fundamental issue is presented.¹⁰

Consider here the possible impact of such deferral upon a station manager or news director. Because of editorials such as that on Expo 74, the renewals of the station's license can be put in question and for a substantial period. What effects—perhaps even unconscious—does this have on the manager or news director the next time he is considering an editorial campaign on some contested local issue? What effect does it have on other stations? These questions raise a most important consideration—namely, that what may be crucially significant here is not the number of fairness rulings adverse to the broadcaster,¹¹ but the effect of such rulings as *KREM*, whatever their number.

All the above considerations raise a basic issue: Is the goal of promoting robust, wide-open debate better served by focusing on whether the licensee has been fair in handling a particular issue or on whether he has generally remained faithful to the concept of a public trustee over his licensee period?

⁶ KREM-TV letter of Feb. 6, 1973, pp. 31-32; Rand Study, p. 41.

⁷ Geller, *The Fairness Doctrine in Broadcasting: Problems and Suggested Courses of Action*, R-1412-FF, 1973. (herein called Rand Study).

⁸ Rand Study at 41; TV Broadcast Financial Data, 1972, FCC 05693, table 17.

⁹ Rand Study, *supra*, at 41-42.

¹⁰ See CBS ("*Hunger in America*"), 20 FCC 2d 143, 150 (1969).

¹¹ Thus, the Commission misses the mark when it states that "only 94" fairness complaints were forwarded to licensees in the fiscal year 1973. Fairness Report, *supra*, 39 Fed. Reg. at 26375 (par. 19).

Suggested Short-term Measures

(i) *Part one of the fairness doctrine.*—The first duty under the fairness doctrine is to devote a reasonable amount of time to public issues. The Commission has held that in filing complaints on the first duty, "... petitioners would have to show . . . that specific issues of public importance were not afforded a reasonable amount of broadcast time. . ." (*American Broadcasting Co. [KGO-TV]*, 56 FCC 2d 275, 283 [1975].) (*Reconsideration denied*, 60 FCC 2d 509 (1976)). This "specific issue" standard for implementing the first part of the fairness doctrine is entirely inappropriate in view of the First Amendment considerations. The FCC should not be concerned with whether a broadcaster covered specific issues to a degree shown to be reasonable to the agency, but rather only whether the licensee generally has devoted a reasonable amount to public issues. But see *In re Complaint of Representative Patsy Mink (WHAR)*, 59 FCC 2d 987 (1976).

We suggest that the Commission implement the first part of the fairness doctrine by adopting time percentage guidelines in television as to what constitutes substantial (strong, solid) service with respect to programming that informs the electorate on matters of public concern. If, as the Commission says, this is "the single most important requirement of operation in the public intent" (*Fairness Report*, 48 FCC 2d 1, 9-10 (1974)), it clearly should be effectively implemented but in a way which does not interfere with licensee judgment as to what issues are to be covered.¹

Another approach would be to require the TV licensee to list annually the ten issues, local and national, which it chose for the most coverage in the prior year; to set out the offers for response made; and to note representative programming that was presented on each issue (i.e., a brief description of the programming, including partisan spokesmen presented, source, and time of broadcast.) The material would be kept on file at the licensee's office, and would simply make the licensee focus on what it is doing to carry out this "most basic" requirement. There again should be no interference with licensee discretion in choosing the issues to be covered, and specifically no review by the Commission as to the appropriateness of the particular issues selected as compared with other possible issues. We stress again our vigorous opposition to any plan that involves censorship or intrusion into daily broadcast editorial decisions.

(ii) *The second part of the fairness doctrine.*—The second duty is to cover issues fairly. To avoid the problems discussed in Appendix A, we suggest that the Commission apply the fairness doctrine only at renewal and then only determine if a flagrant pattern of violation of the doctrine is indicated. This preserves the public trustee concept and avoids any "super editor" role for the FCC, since the FCC would no longer attempt to ensure fairness on all issues at all times—a notion difficult to implement without undue FCC intrusion. At the least, this approach should be tried as to the newscast (with the exception of any explicit station editorial portion).

In radio, the Commission should encourage the licensees to substitute modified access techniques for fairness. There is usually no shortage of available response time in radio. Why then cannot the licensee simply broadcast announcements that contrasting views to those presented on the station will be welcome in appropriate talk periods? This would substitute only for the second duty; the broadcaster would still be required to raise the community consciousness by presenting controversial issues of public importance under their first duty. Other than the notification requirement in the personal attack or political editorializing rules, it is difficult to perceive why as a general matter fairness complaints should arise in the radio field. The station should welcome the added controversy or interest in presenting views on issues covered by it.

In television where time is much more at a premium, the Commission should also encourage the use of access techniques as a means to alleviate fairness strains. We stress that under *CBS v. DNC*, 412 U.S. 94 (1973), access is a voluntary undertaking by the licensee. Our point here is that it appears worthy of trial by the broadcaster and encouragement by the Commission.

¹ We stress that we are not advocating percentage guidelines in every programming category (e.g., agriculture, minorities, religious); this would be very poor policy. But the Act and the Commission make local and informational service the bedrock for renewal and the heart of the spectrum allocations process for broadcasting. See Sections 307(b); 315(a); *Storer Broadcasting Co.*, 11 FCC 2d 678 (1968). It follows that the Commission must examine what licensees have done quantitatively in these areas (since quality review is wisely foreclosed under Section 326), and should make the process as clear and objective as feasible in this sensitive area.

For example, suppose the three TV stations in South Bend, Indiana, agreed to provide a significant number of spots each week and a reasonable block of prime time (e.g., one-half hour per week on a rotating basis—one week on station A, next week on station B, etc.) for those wishing to present contrasting viewpoints (or possibly to open the discussion of a new issue) and to make periodic announcements of the availability of this time (particularly after a discussion of a controversial issue). This would generally constitute compliance with the statutory requirement in Section 315(a)—to afford reasonable opportunity for the discussion of contrasting viewpoints. It could also constitute compliance with the Commission's direction in the Prime Time Access report that the licensee has the duty to use the cleared time, in part, to present locally significant material.² The licensee would remain the public trustee, and could, of course, reject material on such grounds as poor taste or total lack of public significance. By proceeding with an experiment of this nature—joined in by all the stations of the community—the Commission, the broadcasters, and the public would receive valuable information as to whether access works, and is a sound device to assist in accomplishing both goals of the fairness doctrine—that broadcasters contribute to an informed electorate and that they do so fairly.

Here again, we do not urge access as a substitute but as an important complement to the licensee's own programming efforts. Licensees will undoubtedly have their own notion of what issues should be covered, and who are the most appropriate spokesman to be invited to speak. They thus will present programming reflecting this licensee judgment. Access of the foregoing nature would appear to be a helpful complement for two reasons: (i) It allows the community to bring up issues which the licensee might overlook and thus significantly complements the licensee's own activities under the first part of the fairness doctrine; and (ii) while the licensee remains responsible for achieving fairness (the second duty), in all but the unusual case, access should take care of the general fairness obligation by affording the reasonable opportunity to present the contrasting viewpoint. If, for example, the *Pensions* case arose in an access situation, rather than the long acrimonious dispute, the complainant might well have presented a 5-10 minute access segment in an access time period that completely resolved the matter. Most fairness complaints would be resolved in this fashion, the exception being the need to meet certain time and notification requirements in the present personal attack/political editorializing rules and the unusual case of lengthy or very frequent presentations by the station on one side of the issue, with only brief or few access opportunities. In short, access on a voluntary basis appears to be a definite help, not a panacea.

(iii) *The personal attack rules.*—We suggest that these be revised in accordance with the basic notion of permitting large discretion to the licensee to fulfill his fairness objectives. These areas, in effect, would be treated under the general fairness approach rather than singled out for especially burdensome requirements.

For if the licensee can be trusted to achieve fairness as to personal attacks in important informational areas such as newscasts or news interviews, why should this not be the standard in all cases? The rule or policy should state simply that where the licensee has presented a personal attack as a part of the discussion of a controversial issue of public importance and has not achieved fairness or made timely plans to do so, it should notify the person or group attacked within a reasonable time period and offer the opportunity for response.

Senator HOLLINGS. Next we have a panel: Mr. Leonard, Mr. Irvine, Mr. Schultz, Mr. Jennings, Mr. Hobler, and Mr. McGannon.

We welcome you, gentlemen. You are the fellows we really want to hear from. Since I recognize Mr. Bill Leonard here on my left, perhaps you can start, and we will go right across. Is that satisfactory?

First is Mr. Bill Leonard, vice president of CBS.

² Second Report and Order in Docket No. 19622, FCC 75-76, par. 60.

STATEMENTS OF BILL LEONARD, VICE PRESIDENT, CBS; REED IRVINE, CHAIRMAN, ACCURACY IN MEDIA, INC.; ERNEST J. SCHULTZ, JR., PRESIDENT, RADIO TELEVISION NEWS DIRECTOR ASSOCIATION; RALPH M. JENNINGS, DEPUTY DIRECTOR, OFFICE OF COMMUNICATION, UNITED CHURCH OF CHRIST; HERBERT W. HOBLER, PRESIDENT, NASSAU BROADCASTING CO.; AND DONALD H. MCGANNON, PRESIDENT AND CHAIRMAN, WESTINGHOUSE BROADCAST CO., INC.

Mr. LEONARD. Thank you, Senator Hollings.

My name is Bill Leonard, and I represent CBS here in Washington, but I guess I speak not only in behalf of my company, with its various broadcast interests and concerns, but perhaps just as particularly for the men and women journalists at CBS News, or the CBS-owned radio and television stations, men and women who go at their jobs uneasy in the knowledge that in their chosen craft they are second-class citizens.

Senator HOLLINGS. Do you really believe that? Good Lord, man, second class. Gee, Roger Mudd and I saw Walter Cronkite the other night. They don't act like second-class citizens to me. Where in the world did you get that statement?

Mr. LEONARD. I think perhaps if you follow along with me, Senator Hollings, you will understand I am saying that in the context of their relationship with their brethren in the print media. It is in that context.

Senator HOLLINGS. I will follow along with you.

Did they read this thing?

Mr. LEONARD. I would be inclined to think they—I am almost certain in the knowledge that they haven't, and I am almost certain they would agree exactly with what I say. I have been a journalist—maybe that's a little fancy—too fancy a word. I have been a newsperson for 45 years, sometimes writing for newspapers and sometimes for magazines, but mostly involved in radio and television.

I have never felt my calling was less honorable, or my responsibility less serious when I worked in radio or television rather than in print. Quite the reverse. And yet here I am, at a time when there are many more radio stations than daily newspapers in this country, and when most Americans rely on and trust the television as their primary source of information, here I am testifying before a distinguished subcommittee of the U.S. Senate, and pleading for support of a bill which simply declares that the first amendment of the Constitution of the United States means what it says: That the American press is free whether it be print or broadcast.

I am glad to do this. But I am unhappy that it is necessary for those of my trade to beg, so far with no real success, for what should automatically and unquestionably be accepted.

But here we are, and being here, CBS strongly supports Senator Proxmire's efforts to amend the Communications Act so as to insulate broadcast journalism from Government oversight.

Under present law, the Fairness Doctrine and the equal opportunities provision of the Communications Act remove from the broadcast press the ultimate responsibility for editorial decisionmaking, and place that

responsibility in the hands of a Government agency. This gives the Government the right to tell the broadcast press what it may and may not publish. It is hard to imagine a concept more at odds with the spirit and intent of the first amendment.

Indeed, a unanimous Supreme Court, in *Miami Herald v. Tornillo*—a case involving the applicability of right-of-reply statute to a newspaper—strongly affirmed that the Government has no role to play in the newsroom of this Nation. While I'm not a lawyer, I am aware that the applicability of the Tornillo standard to the broadcast press has not been finally and clearly resolved by the Supreme Court. I most sincerely hope that the Court soon recognizes that the broadcast press is entitled to full rights under the first amendment.

The purported justification for placing restrictions on broadcasters—a “technological scarcity” of frequencies—is an argument which has little basis in fact, and will, as time goes by and technology develops, have less. There are in excess of 8,000 broadcast stations in the United States—more than four times the number of daily newspapers. I suggest that the multiplicity of voices heard over broadcast stations far exceeds that provided by any other mass medium at any time in our history.

In addition, the public receives information not only from the broadcast media, but from newspapers, magazines, and books, newsletters, civic and professional associations, and educational institutions. The possibility of any major news organization distorting or misusing its function in light of all of these competing sources is virtually nonexistent. This pluralism reflects the strongest safeguard that a free society can have against abuses of press freedom.

Those who argue that information can somehow be “controlled” by those so-called powerful networks overlook the fact that there are not only competing wire services that supply material to thousands of outlets, print and broadcast, but also that on virtually every station in the country there is far, far more locally originated news than network originated.

Repeal of the “equal time” law and the Fairness Doctrine will represent a vote of confidence in the intelligence of the American public and in its ability to distinguish truth from falsity. And if such action represents a risk, I believe that it is a risk that the framers of the Constitution were willing to accept in enacting the first amendment. That amendment, in Judge Learned Hand's words, “presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.”

I would like to address briefly that aspect of S. 22 which would repeal the equal opportunities provision of section 315.

As a former newsman and news executive, I am keenly aware that the “equal time” law represents a most direct affront to the ability of the press to report the news based upon independent journalistic judgments. Since section 315 requires equal time for every candidate for an office, however frivolous his candidacy, the practical effect of the law has been to deny free broadcast time, or reduce the ability of broadcasters to provide in-depth coverage to major candidates.

Let me tell you from practical experience in an election year there have been any number of times that we at CBS News would have wished to provide greater and more meaningful campaign coverage—through documentary and other types of broadcasts not exempt from section 315—but were thwarted by the prospect that if we did, it would result in the airwaves being flooded with dozens of fringe candidates.

I submit that repeal of the “equal time” provision of section 315 would allow broadcasters to provide the public with fuller coverage of political campaigns consistent with journalistic judgments, rather than mechanistic standards of equality mandated by law.

Similarly, we support Senator Proxmire’s efforts to repeat section 312(a)(7) of the Communications Act—that’s the “reasonable access provision—which, on threat of license revocation, requires broadcasters to provide time to candidates for Federal office.

This provision unduly intrudes on the ability of broadcasters to make independent programing decisions regarding the allocation of their program schedules. Broadcasters recognized, long before the enactment of this provision, their responsibility to inform the public in connection with election campaigns. I feel confident that if that section is repealed, broadcasters will continue to recognize and carry out that responsibility.

Finally, Senator Proxmire has amended S. 22 so as not to affect whatever authority, if any, the FCC may have to regulate sex and violence in broadcast entertainment programing.

In introducing the amendment, Senator Proxmire noted that present law is unclear with regard to the FCC’s regulatory authority in this area. While the Senator has emphasized that he is not advocating that the FCC gain, retain, or lose any such power, his amendment appears to reflect an understandable desire that the emotional issues of violence and sex on television not cloud the Senate’s consideration of this vital bill to remove constraints on broadcast journalism.

We do appreciate the concerns of Senator Proxmire, but the first amendment does not say there are separate standards for news on the one hand, and entertainment programing on the other.

Of course, we believe that entertainment programing should meet reasonable standards of taste, but these standards should be measured by public acceptance or rejection, not by governmental fiat.

The speech of dramatists, actors, and entertainers is protected by the first amendment, too. And in our quest for the full rights of journalists, we won’t hesitate to defend the rights of all those who use the airwaves. Thank you very much.

Senator HOLLINGS. Do we have a fiat, governmental fiat?

Mr. LEONARD. I suppose we could argue—I am not referring to the automobile, sir. But rather to the governmental regulations over our medium.

Senator HOLLINGS. Well, where is the fiat? I would like to get one, if I could, constitutionally, is what I am saying.

If you would identify it for me, I would strengthen it.

Mr. LEONARD. Are you sure you would really like to, Senator? I know we can debate that, but I really wonder, because I think you can find a lot of countries which there are indeed Government fiats governing.

Senator HOLLINGS. Not in this one.

Mr. LEONARD. That is right. I hope you believe there will never be.

Senator HOLLINGS. I don't think there will be as long as we have that constitutional right.

Mr. Hobler, the president of the Nassau Broadcasting Co.

Mr. HOBLER. Thank you. With your permission, I would like to have my prepared text put on the record, and present some ad-lib comments.

Senator HOLLINGS. Your statement in its entirety will be included.

Mr. HOBLER. I am a practical broadcaster, and I think my very presence here today is an indictment of the fairness doctrine, because I was elected Broadcaster of the Year nationally 3 years ago because I criticized the FCC and the Government on the air regularly with editorials, and offered them response time under the Fairness Doctrine.

Senator HOLLINGS. Did they respond?

Mr. HOBLER. Mr. Wiley kindly declined. I am waiting to hear from the new Chairman. I have sent him a letter and offered him response time.

Senator HOLLINGS. I am not surprised. He sees a law that is unpopular. You can shoot somebody and get an award around time.

Mr. Wiley never responded?

Mr. HOBLER. Yes; he did. When I received my award as Broadcaster of the Year from the Southern Baptists Radio & Television Network in Fort Worth, the key speaker was Mr. Wiley, and he personally handed me an award, which I was proud of.

He said something I thought was important. He said "I wish, Herb, more broadcasters would speak out like you."

And I said, "Commissioner, they're afraid to, and are inhibited."

I hear testimony here by people in Washington that say we are not inhibited, and I stand before you to contradict that, sir.

I would like to give you a couple of examples of what I have done to find my way here today.

In 1973, there were 12 gubernatorial candidates running for Governor in the State of New Jersey. And I chose to dramatize that broadcasters cannot be journalists, particularly. So I wrote all of them and offered them 2 minutes of prime time weekly for 7 weeks.

I talked to my lawyer in Washington to make sure I was following every aspect of the Fairness Doctrine and equal time law. As a result, I had the Communists, Libertarians, Tax Repeal, Gypsy Party, and even the Democrat Governor Byrne and the alternate from the Republican Party, who did not win. Ninety-nine percent of the people in the State of New Jersey voted for the Republican and Democrat, but I could not educate and provoke and get discussion going among only the principal candidates.

I put it all into a book, which was widely circulated both here in Congress and throughout the country. And, most important, in order to dramatize further, we decided to endorse 46 political candidates a week before the election.

We took 30-second spots to endorse approximately 46 candidates throughout the day. We took 14 minutes of elapsed time on our two stations, and under the Fairness Doctrine and equal time law, we were liable for 396 minutes in response.

On Friday we had rebuttal day, and we had 108 minutes of rebuttal time. I do not know who listened to our stations.

It was havoc during the week, and certainly I rather dramatically demonstrated that with the Fairness Doctrine and equal time law, we couldn't pick out and get the issues drawn on behalf of the public.

As Chairman Ferris said a few minutes ago, he doesn't believe the broadcasters understand the Fairness Doctrine and equal time law. And I agree in part, because most of them are confused and afraid to learn about it.

I can speak from practical experience. I shied away from trying to learn about it until 6 years ago when I got concerned about it.

There seems to be a constant concern in Washington that broadcasters can't be trusted. I have had that from many different sources. But Government oversight in the name of protection, and enforced by punitive sanctions, is no way to provide diversity of opinion.

As previously noted, there are only some 1,700 daily newspapers left in this country. The only one editorial voice in these towns. Yet there are from 1 to 30 broadcast services who could be free in these same areas.

I live in a country, and I speak in Washington in a society that believes in free enterprise and in the fact that we take some good with the bad. And I cannot comprehend a governmental overview that says we really can't be trusted like the newspapers.

Can't we accept a little bit of irresponsibility? Besides, every 3 years we have to have a license renewal, in any event.

There have been many decisions in the courts. I am concerned that the U.S. Supreme Court says that this country can have pornography on every newsstand, but broadcasters can't be an advocate.

I think being a public trustee is to be an advocate, to take positions.

I find it incredible that through the FCC and Congress we have a common mold thrust upon us. There is no real diversity. Every station must take an ascertainment, they must seek out opinions, they must respond under the Fairness Doctrine to controversial subjects.

I think the most exciting thing that can happen in this country is a freeing of radio and TV. A lot would be to the right, and a lot to the left, and some down the middle. But people looking for diversity will get it by freedom for the broadcasters.

Again, we have something going for the public, as a public trustee the newspapers don't. We have to face up to a license renewal every 3 years, and there are many criteria on which we can be judged.

I certainly would heartily agree with Bill Leonard, and other statements made here this morning. I don't see how Americans can benefit by not having the networks put on white papers and documentaries. And why should radio stations stick their necks out to make positions if they think they are going to be sued by an organization and be taken to court?

So I will agree with the statement made earlier today that the suspension of the Fairness Doctrine and equal time law will not reduce, but will actually stimulate issues and provide more access.

If there are 35 stations in New York and half of them go one side and half the other, or there is a mixture, those who are bias left or right will find their outlets. They will be on the air more often. They will get mad at the ones they will disagree with.

This is the way our country has grown and kept honest.

I was very interested to see an Eighth U.S. Court of Appeals opinion on cable earlier this year that said every individual's right to speak is precious and paramount as it is, does not include every individual's right to be given the possibility of an audience by Government, or to speak in a nonpublic forum, like a newspaper, a magazine, or on the Senate floor.

There are no easy answers to a lot of this.

The last thing I want to mention in what otherwise could be a 3-hour speech, I am sure, I am chairman of the First Amendment Committee of the NAB, having been elected to that NAB, I think by and large, by my fellow broadcasters who feel I am doing something special in using the Fairness Doctrine and equal time law to speak out.

I created an idea, and the NAB published a thing called the National Free Press. It was distributed a year ago at the NAB convention.

On July 1, 1984 Congress creates a newspaper commission, the FNC, with seven commissioners, and they license newspapers immediately and they say you can be fined, or lose your license. You will be restricted to 7-day newspapers, you can't have cigarette advertising.

Many people that saw this at first were amused, until they read it. It is a frightening thing to speculate, and it dramatically brings home the impositions placed on the broadcast industry if indeed they were placed upon the press.

I appreciate being here, and I will welcome any discussion that continues.

Senator HOLLINGS. Thank you.

[The statement follows:]

STATEMENT OF HERBERT W. HOBLER, PRESIDENT, NASSAU BROADCASTING CO.,
PRINCETON, N.J.

My name is Herbert W. Hobler, founder and President of the Nassau Broadcasting Company in Princeton, N.J. owners of WHWH-AM Princeton, WPST-FM Trenton, and a cable television company on the Jersey shore. My 32 years in the communications business includes close to 18 years in television with CBS, NBC, Videotape Productions and TelePrompTer Corporation as well as 18 years in radio, both network and local.

I speak as an individual, though I am also a board member and Chairman of the First Amendment Committee of the NAB.

Like many broadcasters, I choose to believe the Fairness Doctrine and the Equal Time Law not only inhibit the broadcaster but more importantly actually deny the American public their right to diversity of opinion over the airwaves. My very presence here today is an indictment of these policies because I have chosen for almost five years to regularly editorialize on the air in critical commentary of the FCC and Congress on these issues . . . and many of my fellow broadcasters consider my editorials criticizing the institution that provides me with a license as daring. Indeed, I have been called gutsy and courageous by some and I even was named Broadcaster of the Year nationally in 1975 by the Southern Baptist Radio and Television Commission as a result of my on-going efforts.

Gentlemen, I am embarrassed that by playing the rules properly (in spite of not agreeing with them) that there should be anything special about responsible editorializing. Certainly an editorial writer on the New York Times or the Washington Post would not be called courageous for criticizing the FCC on these matters. But, most broadcasters necessarily live under constant concern about making a false step that can cause economic injury, challenges, even loss of a license.

My greatest compliment came when former Chairman of the FCC Richard Wiley personally handed me my Broadcaster of the Year Award in Fort Worth over the ABC-TV network. He told me that night that he wished more broadcasters would bring out these issues to the public. I wish they would too—and I am hopeful many more will soon recognize they have a responsibility on behalf of the American public to create a free electronic press.

My interest began in 1973 when there were 12 legally qualified gubernatorial candidates in New Jersey. It presented an excellent opportunity to dramatize the impracticality of the Fairness Doctrine and the Equal Time Law. We offered all 12 candidates two minutes of prime traffic time weekly for seven consecutive weeks before election. Eleven candidates accepted, and we spent five weeks hunting down the 12th. And so, we had the Communist candidate, the Tax Repeal Candidate, the Libertarian Candidate, the Socialist—even the Democratic and Republican. Over 99% of the New Jersey citizens voted Republican or Democrat but they heard no more about them in non-news programs than about the other 10. The Libertarian, by the way, on the air and in a letter said it was unfair for us to be required to give him time under Section 315.

We then decided to endorse 46 candidates with some 72 opponents. We chose Tuesday before election day as Endorsement Day. Monday night we spent hours calling the non-endorsed candidates and sending telegrams to be sure we did not violate the Fairness Doctrine. They were offered free response time with all production at our expense. Tuesday, we used 14 minutes on our two stations (30 seconds per hour) to endorse 46 candidates—24 Republicans and 22 Democrats.

On Thursday, we took out a full-page newspaper ad and explained in the free press what we were doing and what we could not do on the air.

Now, gentlemen—let me tell you what happened on Friday—our rebuttal day. Under the Fairness Doctrine and the Equal Time Law, if all candidates had used our legally required offers, we would have been liable for 396 minutes of air time—compared to the 14 minutes we took! We actually had 102 minutes of rebuttal time on our two stations—in one day! I don't know who listened.

Now, frankly, I am embarrassed, upset, and terribly concerned that our principle means of communications in this country—radio and TV—cannot responsibly serve the public with free speech.

I am embarrassed because the Fairness Doctrine and Equal Time issues I share on the air with the public and in speeches invariably is an educational eye-opener. Most people are downright concerned for they do not realize how inhibited and restricted our industry is.

I am upset because broadcasters are treated like second-class citizens by the Federal government who encourage the public to feel we must be controlled in these areas. There is a constant feeling that we cannot be trusted. Our industry is incredibly responsible—do incredible things to bring news, programming, information, and entertainment to the public—and there are indeed a few in our industry who are less responsible. And yes, there have been and will be periods when there are too many westerns, or too much violence or sex, or too many commercials. But, I would venture to say that thanks to a license requirement and the pressure of the public advertisers, that on these criteria alone, there are far less irresponsible broadcasters than newspapers who are free to be biased.

Finally, I am terribly concerned that the public is being denied the very kind of diversity that pressure groups and well-meaning federal rules seem to feel can only happen by controls and regulation.

The laissez-faire policy for print in this country has been compromised for both journalists and the public in broadcasting, repressing the very freedoms the First Amendment was designed to protect. Government oversight, in the name of protection and enforced hierarchy of punitive sanctions, is no way to provide diversity of opinion to the American public.

There are some 7500 radio and TV stations in this country. There are only 1725 daily newspapers left—and over 1300 of them are the only newspaper in town—1300 small and large towns and cities where there is only one editorial voice—town and cities where locally and from outside there are from two to 30 radio and TV stations restricted in the opportunity to stimulate, advocate and, indeed be biased.

Bias is an inherent right of the First Amendment. After all, bias for one man is the opinion of another. Bias shows—bias can upset us—move us to action . . . bias in the form of advocacy is the very thing that has kept this country moving forward by causing interest and concern. The media bias and advocacy regarding Richard Nixon and the Viet Nam war and then Watergate was, in retrospect, a great service to this country. And so it has been for over 200 years.

Let's talk practically about the dangers of freeing broadcasters from the Fairness Doctrine and Equal Time Law.

First, it is totally unfair and unrealistic to assume that broadcasters will be any less responsible than the press—a press that with Supreme Court judgments permits pornographic literature on every newsstand in the country.

Second, under no circumstances will broadcasters not have to demonstrate that they have served the public interest, convenience and necessity at the end of their license term. And the public interest is best served by being provocative—not by sitting by and doing nothing. Our country survives only on change and change comes from advocacy.

Third, whether five or 30 stations in a market be freed of these controls. . . . some would slowly become activists, left, right, or middle. Many would do nothing. But very quickly more minority viewpoints would emerge, the public desiring more access would have it—because they would find one or more stations eager to express, support, or provide a platform if for no other reason than it would identify the station better in the market.

Fourth, I cannot imagine a radio or TV station lasting long in its marketplace if they choose to be utterly biased with no response time . . . they would lose listeners, lose respect, lose advertisers. Why do those who would continue to inhibit broadcasters and who live in the greatest free enterprise and competitive system in the world have so little faith that these are also the very ingredients that would be the best guarantees of an exciting new era in broadcasting?

Fifth, I would also predict that there would indeed be a number of stations who might become, in the judgments of some, irresponsible. If they weren't smart enough to start a weekly letter-to-the-editor, or their own free-will access period, or guest editorials or some means of response under their own editorial judgment—then their irresponsibility will show at renewal time, or before.

Is not some irresponsibility, which we already have in the free press, a small cost to pay for the exciting new exchange of information and opinion that necessarily will occur with a free broadcast industry?

There are many, including Chairman Ferris, who all too frequently use the provocative term "the public owns the airwaves" when under the present Communications Act there is no such specific language. A public trust does not mean public ownership. Nor do the broadcasters own their frequency. The frequency can be re-allocated. The real dangers that are developing is the backlash of press restriction that may more and more take away free speech from Americans. Henry Geller and others have used the quote from Lord Devlin which says: "If freedom of the press or freedom of speech perishes, it will not be by sudden death. It will be a long time dying from a debilitating disease by a series of erosive measures, each of which, if examined singly, would have a good deal to be said for it".

Suspension of the Fairness Doctrine and the Equal Time Law will not reduce coverage of issues—it will stimulate more. Broadcasters will do more for democracy by becoming more involved. It doesn't take government to tell Broadcasters they can't ignore the interests of his area. Nor, however, should all broadcasters be required to be cut out of the same cloth—which is what present rules and regulations demand through these doctrines, ascertainment, and statistical requirements of programming.

Actually, these doctrines involve government intervention daily because either from fear of governmental reprisal the editor cuts something out that may be controversial, or the editor may eliminate something important to the story to prevent a Fairness Doctrine challenge.

The scarcity problem of frequencies is a myth. Over 2000 new stations have gone on the air in the past 10 years. Over 6000 radio and TV stations have been sold in the past 22 years. The old adage that anyone can start a newspaper is true—but the economic risk and high failure and the opportunity for more than a modicum of readers contradicts this adage. On the other hand, the availability for a similar investment to reach a few or reach many is always there in buying a broadcast station . . . though don't buy one if you wish to be an advocate!

One FCC Commissioner said that if our AM spectrum is opened up next year or thereafter to add 4000 more AM stations—and this is a possibility—then there would be no scarcity—and perhaps the Fairness Doctrine should be eliminated. I heard a similar story 15 years ago.

There are few people in this country in and out of government who would suppress our free press—which also is constantly defending itself. And yes, the press—like Congress—needs to gain more respect by more self-disciplines. I created with the NAB a fictitious newspaper dated April 1, 1984—the George Orwellian year. Suddenly, Congress creates a Federal Newspaper Commission—superimposing upon all newspapers the same controls as those on broadcasting. It is amusing at first, and frightening as you read it.

Gentlemen, unless the Fairness Doctrine and the Equal Time Laws are eliminated, I predict a continuing erosion of our First Amendment Freedoms. I think it is time that Congress took a look at themselves, look at 50 years of broadcasting industry maturity and finally . . . look at the right of all Americans and what they can gain by the increased diversity of opinion that will be possible. It is not all black and white—but on balance our forebears had an incredible concept that has served us well for 200 years. We cannot do other than be concerned that the federal government, or this group or that group, can play God with free speech. Let it comeout—freely—where it belongs.

Senator HOLLINGS. The next witness is Dr. Ralph Jennings, deputy director of the office of communications, United Church of Christ.

Dr. JENNINGS. My name is Ralph M. Jennings. I am deputy director of the office of communication of the United Church of Christ.

The United Church of Christ has approximately 1.8 million members. The church was formed in 1957 through a union of two historic Protestant denominations, the Congregational Christian Churches and the Evangelical and Reformed Church. The office of communication has since conducted a ministry in mass communication in fulfillment of its responsibilities under the constitution of the church.

We have been vigorous supporters of provisions of the Communications Act that insure fair treatment of candidates and public issues, and of the FCC's Fairness Doctrine, personal attack and political editorial rules. We have stood for the broadcast possible diversity of broadcast ownership, and for competition of ideas on the air. At the same time, we have opposed any kind of official censorship of program content.

I cannot say I am pleased to be here today. The need for this testimony implies that the numerous past efforts we have made to explain the importance of the Fairness Doctrine to this and other congressional committees, to the FCC in rulemaking proceedings, and in the *Red Lion* case before the Supreme Court, have been in vain.

Over and over, we have faced the same debate. The attacks by broadcasters on the Fairness Doctrine, on fair treatment of political candidates, and on the first amendment rights of the public, remind me of a spoiled child trying to avoid personal responsibility by quoting Dr. Spock to its perplexed and permissive parents. The parents are not firm in their own convictions, and the less favored siblings are forced to wage a never-ending fight for fair play.

The issue before you today has become a tiresome and boring debate. The facts and arguments are shopworn. Broadcasters have been granted a rare and valued privilege, the use of a large portion of the scarce electronic spectrum. The few who are lucky enough, receive a license to broadcast from the Government. The rest of us are denied the same right, also by the Government.

It is scarcity itself that gives value to the spectrum space the Government grants to a broadcaster. It has been equated to "a license to print money." But more important than the certainty of getting rich, is the fact that a broadcast license constitutes a monopoly over an exclusive public channel of communication.

The central questions before us today—as they have been in countless discussions of this kind in the past—are (1) whether we, as a society, can ask the holder of a broadcast license to make a part of its time on the air available to carry on the work of a democratic society, and (2) whether some modest rules of fair play can be imposed on that

use. Or, (3) does the granting of a broadcast license by the Government imply that the people have no further interest in how that frequency is used, that they have turned it over to the exclusive use of the broadcaster for whatever purpose he or she may desire?

Sometimes, it seems, in our lofty desire to be true to the first amendment, we lose sight of what the Fairness Doctrine says. It is really a very modest proposition.

First, it says that the broadcaster must use some unspecified amount of time to inform the public about controversial issues of public importance. The broadcaster is given broad discretion in choosing issues and spokespersons. The licensee is also encouraged to disclose its own point of view in editorials.

Second, the Fairness Doctrine requires the broadcaster to provide the listeners and viewers with an opportunity to hear opposing viewpoints on issues that are raised.

This service seems little enough for the broadcaster to afford to the public, whose rights the Supreme Court has declared to be "paramount." It is an exceptionally low return to the consumer in a democratic society that has granted the broadcaster monopoly use of our most powerful means of communication.

It seems clear that we can attribute a great deal of the news and information on television and radio stations to Government regulations, rather than to the enthusiasm of broadcasters for airing news and important controversial issues. In all probability many of the broadcast journalists who argue most vigorously against the Fairness Doctrine owe their jobs to that FCC policy.

Without the FCC requirement that each station deal with public controversy, however weakly that requirement may be enforced, many stations would not contribute to public debate at all. Some stations already flirt with the bare minimum of nonentertainment programming, and a few dare report having done none at all.

At least one New York radio station has asked the FCC for permission to give up its news and public affairs responsibilities entirely. Newspapers reports say that at least one network will virtually abandon documentary programming this fall in its frantic grab for ratings.

Let us be realistic about broadcasting. Mostly, broadcasters use their facilities to entertain, not to inform. The ultimate purpose of this entertainment is to gather the largest possible, highest spending audience to hear commercials.

I am not here today to debate the value of broadcast entertainment. We all find things that are memorable and enjoyable. Nor am I here to belittle the importance of the relatively rare journalistic triumphs that broadcasters have achieved. But we must not be hoodwinked into fiction that television and radio are primarily public forums.

Most of the time and resources of broadcasting are devoted to selling goods to the American public—and to a deliberately limited portion of the public—those persons 18 to 49 years old.

We must recognize that broadcast journalists are confined to a rather small branch of the broadcast station or network. The boundaries are fixed by corporate management. Within these limits, the broadcast journalist may work long and hard. He or she may resent public notice or criticism because it can bring with it the ire of management.

The program that stirs public concern may suggest additional treatment, or requests for the airing of other viewpoints. Such concern may require more money or broadcast time. Management may punish incursions into profits or commercial time to meet the public's interest.

The broadcast journalist is caught in a trap. He or she must perform like a journalist, but think and act like a corporate manager. The public must be kept quiescent.

Maybe this is why we are invited to believe in the omniscience of television journalists, to accept broadcast journalism as a pure science, and to believe that members of the public have nothing worthwhile to add.

There is little, if any, incentive inherent in broadcasting, except regulation, to cause it to keep the public informed. Indeed, controversy is the antithesis of most broadcast programing. It is fanciful indeed to blame the Fairness Doctrine for chilling public debate in television and radio. It is rather the fear of chilling corporate profits that keeps controversy off the air.

There are 8,400 radio and over 950 television stations in the United States. Each year, the FCC estimates that it receives approximately 4,000 fairness complaints. They tend to clump, with a large number of complaints being filed on a particular issue. Therefore, the total number of issues and the number of stations affected are small. For example, only about 120 stations—3 percent of the total—receive a fairness inquiry from the Commission each year. Only from 12 to 18 stations a year (10–15 percent of those stations that receive inquiries) are subjected to adverse rulings from the FCC on their handling of fairness questions. At this rate, a broadcaster might expect to be faced with a fairness inquiry every 75 years, and an adverse ruling from the Commission about every 500 years. Since the Commission usually allows an adverse fairness ruling to be satisfied by carrying programing which presents the missing viewpoint, the greatest harm done to the broadcaster is the loss of a few minutes of air time and, perhaps, a little damaged vanity. It is inconceivable that the pale threat of fairness complaints should thwart a broadcast licensee in its search for truth and its exercise of free speech.

I will defer to Chairman Ferris' recitation of statistics about enforcement of the Fairness Doctrine, except to point out that at the rate he mentioned, a broadcaster might be expected to be faced with a fairness inquiry about every 75 years, and an adverse ruling about every 500 years.

It is inconceivable that the veiled threat of the Fairness Doctrine should thwart a broadcast licensee in the search for truth or in the exercise of free speech.

Finally, I am tempted to compare the Fairness Doctrine to the NAB Code. It protects the majority of broadcasters from the worst elements in the industry. Mostly, it prevents stations from being used as weapons against any particular groups or persuasion in a community of license.

In many cases, it stimulates just enough public debate to keep the more restless elements in the community from taking stern action to get important issues on the air, and before the people. The Fairness Doctrine may not be a boon to public discussion, but it surely provides guidelines for "good practice." It may just be the best insurance policy any broadcaster ever had.

In my darkest moments, I am tempted just to let the Fairness Doctrine go. Let the industry have its head. But that, too, is a frightening prospect, even for broadcasters. What will happen when those bad elements in the industry get out of hand? What kinds of laws will be demanded of Congress when favored causes or important constituents are abused? We might then be up against a bill proposing real censorship on the air.

Clearly, the public is best served by the principles embodied in the Fairness Doctrine. What we should be considering today are ways by which these principles can be applied to enhance public discussion on the air. We need ways to protect broadcast journalists from corporate restraint. Broadcast licensees must be required to meet their obligation to use their facilities for meaningful public discussion.

No other society has granted private broadcast licensees so much discretion to decide how the electronic spectrum will be used. The public has asked for very little in return.

Our system of broadcasting will be superior only if the rights of the public are protected by fair and firm Government regulation. The public's rights, not the broadcasters' desires, should be the first concern of this committee today.

Thank you.

Senator HOLLINGS. Thank you very much, Mr. Jennings.

Our next witness is Mr. Reed Irvine, the chairman of Accuracy in Media, Inc. in Washington.

Mr. IRVINE. Thank you, Mr. Chairman. I shall abbreviate my statement, but request the whole statement be included.

Senator HOLLINGS. Yes; it will be.

Mr. IRVINE. The unstated premise of those in the broadcast industry who are campaigning for the elimination of the simple requirement they give all sides a fair hearing when dealing with controversial issues, is obvious. They assume those that now have their hands on the levers of power, in the broadcasting industry, will not only retain that power, but will find it greatly increased.

What happens to the value of a broadcasting license when it can be used freely and without restraint to make or break candidates for political office? We have seen important election reforms in recent years that were designed to make it more difficult to buy election victories.

If a broadcaster were given the power to decide which candidates were to get TV time, and which should be denied access, that broadcaster influence and power would be greatly enhanced.

And those who formerly poured huge sums of money into election contributions would have every reason to seek to acquire control of broadcast properties. Licenses would increase in value tremendously under that circumstance. You may decide therefore that some restraint must be applied to insure equal time for political candidates, while permitting the broadcasters total freedom to decide which side of a controversial issue would be put on the air, and which side shut out.

Those of us who believe in the power of ideas think that in a democracy it is perhaps even more important that the people are informed about all sides of the issues than that they see all of the candidates for

the office. If the broadcasters are free to propagandize on issues, they will be able to influence not only elections, but what your constituents try to get you to do between elections.

A Congressman will have to think twice before bucking the wishes of the broadcast magnates, and taking a stand on legislation in which they have an interest. If you want to strip away the hypocrisy on this important issue of mandated fairness, simply ask the broadcaster demanding abolition of the Fairness Doctrine this question: How would he feel if he should wake up and find that conservative Texas billionaires had acquired control of all three networks, fired their liberal news staffs and had hired, say, James J. Kilpatrick to replace Walter Cronkite and Bill Buckley to replace Eric Sevareid. Would he then have the same enthusiasm for freedom from the fairness requirement?

I have tried for years to get the top officials of the networks to answer this question.

While they have been evasive, their response has left not the least doubt in my mind if this were to happen, they would denounce Congress as irresponsible for permitting the public's airways to be so abused by men of great wealth.

Those in the industry who clamor for removal of the fairness requirement insist, of course, that they would be fair if they weren't required to be fair. The simple fact is that the networks are not fair now, even if with the requirement on the books.

It would be naive to think that they would be more fair if the requirement were removed. You have plenty of examples to prove that. Let me point out that one of the organizations that demands the abolition of the fairness requirement is the Radio and TV News Director's Association, whose representative is with us today.

Now, I have had some experience with the RTNDA which suggests that they oppose not merely the requirement of fairness, but fairness itself. The retiring president of the organization made a speech to the association's convention in December 1976, in which he made a personal attack on the number of media critics, including me. When we demanded substantiation of his charges, he was unable to provide any. We asked that the RTNDA publish our rejoinder to this inaccurate and unfair personal attack in their newsletter, the Communicator. They have refused to do so, even though they publicized the inaccurate and unfair charges in that medium.

Again, in the June 1977 issue of the Communicator, they carried a statement by Senator Proxmire on the Fairness Doctrine, which contained a number of serious factual errors. Accuracy in the Media sent a letter to Senator Proxmire pointing out these factual errors. We sent a copy to the editor of the RTNDA Communicator asking if he would run it in order to correct the misinformation that had been disseminated.

The editor has informed us, orally, that they would not run the letter, because they agreed with Senator Proxmire's opposition to the fairness requirement. He explained that they did not feel that they had any obligation to publish material on the other side of the question, even if it involved the correction of statements that were factually incorrect. The editor indicated that this had been taken up at a board meeting, and so he was presumably reflecting a decision of the board.

Now these are the people that represent the radio and television news directors of this country. There is no law that requires them to be fair in their speeches or in their publication, and they make no bones about refusing to be fair, and about refusing to correct serious factual errors. And yet, they expect us to believe that their professional ethics would insure the fairness of broadcast news and public affairs, even if fairness were not mandated by law.

Mr. Chairman, the power of television is so great that I would not want to entrust its absolute exercise to angels, much less to the media magnates or the gentlemen who make up the RTNDA.

"Absolute power corrupts absolutely," Lord Acton so truly said.

The Fairness Doctrine has not served the American people particularly well because it has been foully administered by men who appear to be intimidated by the might of the networks. But it provides some slight protection to the public, by reminding the broadcasters that their power to stack the deck, freeze out uncongenial points of view, and launch personal attacks on those that they don't like is by no means absolute.

[The statement follows:]

STATEMENT OF REED IRVINE, CHAIRMAN OF ACCURACY IN MEDIA, INC.

Mr. Chairman, Accuracy in Media is deeply concerned with the treatment of news and public affairs by the broadcasters. Because of the penetration of television and radio into virtually every household in the country and because of the great attention-getting power of audio-visual presentations, most Americans already depend primarily on the broadcast media for their news of what is going on in the world.

You know the extraordinary power these media have to influence public opinion. In considering legislation bearing on these media, one of the most important questions you must decide is whether or not that tremendous power is to be freed of the minimal restraints that have been imposed upon it by Congress and the courts.

Put another way, the question is whether the law will continue to uphold the principle laid down by the courts that it is the rights of the viewers and listeners that are paramount. Or will you place foremost the rights of a limited number of individuals who are responsible to no one but themselves and whose primary interests in the management of the broadcasting property they control is the enhancement of their profit and their power?

The unstated premise of those in the broadcast industry who are campaigning for the elimination of the simple requirement that they give all sides a fair hearing when dealing with controversial issues is obvious. They assume that those who now have their hands on the levers of power in the broadcasting industry will not only retain that power, but will find it greatly increased.

The talk of high principle, first amendment freedoms, and parity with the print media is window-dressing designed to deceive those who characteristically mistake clichés and slogans for thought and analysis.

Let's get down to the nitty-gritty. What happens to the value of a broadcasting license when it can be used freely and without restraint to make or break candidates for political office? We have seen important election reforms in recent years that were designed to make it more difficult to "buy" election victories. If a broadcaster were given the power to decide which candidates were to get TV time and which should be denied access, that broadcaster's influence and power would be greatly enhanced. And those who formerly poured huge sums of money into election contribution, would have every reason to seek to acquire control of broadcast properties. Needless to say, the value of a broadcast license would increase tremendously under that circumstance.

You may decide, therefore, that some restraint must be applied to insure equal time for political candidates, while permitting the broadcasters total freedom to decide which side of a controversial issue would be pushed on the air, and which side would be shut out. Those of us who believe in the power of ideas think that

in a democracy it is perhaps even more important that the people are informed about all sides of the issues than that they see all the candidates for office. If the broadcasters are free to propagandize on issues, they will be able to influence not only elections, but what your constituents try to get you to do between elections. A Congressman will have to think twice before bucking the wishes of the broadcast magnates in taking a stand on legislation in which they have an interest.

If you want to strip away the hypocrisy on this important issue of mandated fairness, ask the broadcaster who is demanding abolition of the fairness doctrine this: How he would feel if he should wake up and find that conservative Texas billionaires had acquired control of all three networks, fired their liberal news staffs, and had hired, say, James J. Kilpatrick to replace Walter Cronkite and Bill Buckley to replace Eric Sevareid? Would he then have the same enthusiasm for freedom from the fairness requirement?

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One of the organizations that demand the abolition of the fairness requirement is the Radio and TV News Directors Association (RTNDA). I have had experience with the RTNDA which suggests that they oppose not merely the requirement of fairness, but fairness itself. The retiring president of the organization made a speech to the association's convention in December, 1976, in which he made a personal attack on a number of media critics, including me. When we demanded substantiation of his charges, he was unable to provide any. We asked that the RTNDA publish our rejoinder to this inaccurate and unfair personal attack in their newsletter, the Communicator. They have refused to do so, even though they publicized the inaccurate and unfair charges.

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This is the organization that represents the men in charge of the news operations of the radio and television stations throughout the country. There is no law that requires them to be fair in their speeches or in their publication. And they make no bones about refusing to be fair and about refusing to correct serious factual errors. And yet they expect us to believe that their professional ethics would insure the fairness of broadcast news and public affairs even if fairness were not mandated by law.

The power of television is so great that I would not want to entrust its absolute exercise to angels, much less to the media magnates or the gentlemen who make up the RTNDA. "Absolute power corrupts absolutely," Lord Acton so truly said. The fairness doctrine has not served the American people particularly well because it has been foully administered by men who appear to be intimidated by the might of the networks. But it provides some slight protection to the public, by reminding the broadcasters that their power to stack the deck, freeze out uncongenial points of view, and launch personal attacks on those that they don't like is by no means absolute.

THE PUBLIC BROADCASTING FAIRNESS ACT

There is one specific recommendation that we wish to make to this committee. We would like to see you hold hearings on a bill that has been introduced by Senator Hatch called the Public Broadcasting Fairness Act, S1926.

When Congress created the Corporation for Public Broadcasting, it recognized that there was a danger that funds appropriated for public broadcasting might be used to propagandize. It recognized that tax dollars supplied by taxpayers representing diverse points of view ought not to be utilized to promote controversial views or positions that would be offensive to a majority or a substantial minority of the people.

It therefore wrote into the act a provision stipulating that programs funded by the Corporation for Public Broadcasting that dealt with controversial issues were to be produced "with strict adherence to objectivity and balance." This is section 396(g) (1) (a) of the Communications Act. This provision of the law has been flouted by the Corporation for Public Broadcasting repeatedly. Public broadcasting program on controversial issues, including those financed by CPB, have been lambasted by many critics, including Accuracy in Media, for their lack of objectivity and balance. Some of the CPB-funded programs that have departed far from the standards of objectivity and balance over the years are:

1. "Justice"—A program about Angela Davis and the Soledad Brothers from a very sympathetic point of view. The New York Times faulted its lack of balance.
2. "the three r's . . . and sex education," of which Lawrence Laurent of the Washington Post said, "Some question may be raised about the openness of producer McCutchen's mind."
3. "The Children of China," which was such good propaganda for Communist China that it won praise from the Chinese Central Broadcasting Administration, which said that it would help the American people "understand New China."
4. "China Memoir," produced by Shirley MacLaine, which Ralph Rogers, chairman of the Public Broadcasting Service admitted was "pure propaganda."
5. "El Corrido," described by Barron's as "a guerrilla theater piece on farm labor."
6. "A Day Without Sunshine," which, according to a protest filed by the American Farm Bureau Federation, presented farmers as "heartless exploiters" businessmen as "calloused opportunists" and legislators as "dupes."

One-sided, propagandistic programs such as these were not at all what Congress had in mind when it approved funding for public broadcasting. Mr. Chairman, you made this clear in a statement made to the House on May 31, 1972, in which you said: "We have in our law for public broadcasters the statement that there shall be 'strict adherence to objectivity and balance,' to an extent which leaves them open to challenge if there is not almost a minute-by-minute distribution of time on controversial issues."

The reason your expectations in this regard have been disappointed is because there has been no machinery for enforcement of section 396(g) (1) (a) of the Communications Act.

Senator Hatch and Congressman Dornan introduced legislation last year to correct this deficiency. Their bill would give the Federal Communications Commission the power to order the Corporation for Public Broadcasting to make funds available to finance the airing of opposing viewpoints if the FCC determines that a program funded by CPB has failed to meet the requirements of Section 396(g) (1) (a).

This legislation is needed to get public broadcasting back on the track that Congress intended it to follow, i.e., providing programs on controversial issues that are more objective and more balanced than those provided by commercial broadcasters.

THE ADMINISTRATION OF THE FAIRNESS DOCTRINE

I want to say just a word about the administration of the fairness doctrine by the FCC.

Accuracy in Media has filed sixteen fairness doctrine complaints with the FCC since 1971. These complaints were professionally researched, and it was our feeling that in all cases the broadcasters had provided their audience with a one-sided presentation of a controversial issue of public importance.

In five of these cases it took more than one year for the FCC to reach a decision. In one case the complaint was before the commission for 19 months.

In all but a few of these cases, the FCC did not even ask the broadcaster responsible for the programming about which we complained for any defense or explanation of the programming. In only one case did the FCC agree with us that the programming had violated the fairness doctrine. That was in the case of the NBC program on private pension plans, "Pensions: The Broken Promise." In that case, NBC took the case to court, and won a reversal of the Commission's finding

in the Court of Appeals. The FCC refused to seek a rehearing, and when AIM, as intervenor, won a rehearing en banc, the FCC failed to fight the case vigorously as it had promised us it would do, even though it would have been challenging an opinion that one legal scholar has recently described as "tortured" and "a departure from traditional standards of judicial review." (Steven J. Simmons, "The Problem of Issue in the Administration of the Fairness Doctrine," *California Law Review*, May 1977, p. 576).

Our experience indicates that the FCC is most reluctant to enforce the fairness requirement against the powerful networks or against public broadcasters. The chairman of the FCC has said that in fiscal year 1973, the FCC ruled against the broadcasters on only five complaints out of a total of 2,500 complaints received during the year. In other words, the odds against a citizen getting a complaint accepted by the FCC are about 500 to 1.

That is a very sad record for a regulatory agency, because the performance of the broadcasters simply is not that near to perfection. The broadcasters recognize that they have little to fear from the FCC and the fairness doctrine. A recent survey showed that the overwhelming majority of them ranked the fairness doctrine very low among the problems that gave them concern.

We believe that your committee would perform a most useful public service if it would investigate the administration of the fairness doctrine by the FCC, with a view to ascertaining what might be done to improve the speed with which complaints are processed and reducing the odds against members of the public who file complaints.

Mr. Chairman, I request permission to have included in the record my letter to Senator Proxmire to which I have referred in this testimony.

ACCURACY IN MEDIA,
Washington, D.C., June 15, 1977.

HON. WILLIAM PROXMIRE,
U.S. Senate,
Washington, D.C.

DEAR SENATOR PROXMIRE: I read with interest your testimony of May 11 before the Communications Subcommittee.

I regret to say that your discussion of the case of "Pensions: The Broken Promise" contains several factual errors. Knowing your interest in accuracy and fairness, I am sure that you will want to have the record set straight.

First, you stated that the documentary "dealt with corporate pension plans and how they often do not keep faith with the workers they are intended to benefit."

One of the complaints about the program was that it failed to make clear to the viewers that the abuses discussed in the program that involved failure to keep faith actually could be charged against only a minute number of the private pension plans in existence. NBC, departing from any reasonable concept of fairness, created the impression that these abuses were found in most pension plans. By failing to provide proper perspective, they did a serious injustice to the great majority of businesses operating pension plans that are sound and fair. NBC did not subsequently contend that the abuses were characteristic of most pension plans. Indeed, it eventually made its defense the claim that it was not talking about pension plans in general, but only about the small number in which these abuses were found.

The fact that you are under the impression that the NBC program was about how the plans "often" do not keep faith only serves to demonstrate that the NBC program served to mislead the audience rather than inform them.

You say that "NBC claimed . . . that the subject of private pension plans was not controversial because as far as it knew the subject had not been dealt with previously on network television."

This is incorrect. NBC argued that its program dealt only with abuses in certain pension plans, not with the general subject of private pension plans. It argued that the narrow subject of abuses was not controversial, since no one would want to defend the abuses. The FCC did not accept this argument, finding that the program dealt with the general subject of private pension plans and that the question of the performance of these plans was clearly controversial. NBC did insert a footnote in their initial letter of defense in which they tried to show that there had not been much public discussion of private pension plans in the media, suggesting that the whole subject was not very controversial. This was clearly not their main line of defense, and wisely so, since that argument was clearly untenable.

You assert that the FCC "rejected AIM's allegation of distortion." This is incorrect. The FCC reiterated the position it had enunciated in earlier decisions, beginning with "Hunger in America," that it would not try to determine questions of truth and falsity in broadcast programs. It did not reject our allegations of inaccuracy and distortion. It simply refused to consider them, under its standing policy.

You say that "NBC said that it had done a fair job and had no intention of giving the subject more air time."

In its letter to the FCC of February 14, 1973, NBC said: "NBC does expect to treat from time to time, in future programming, various aspects of pension plans to the extent that the subject remains newsworthy. The subject does appear to us to be of more than momentary importance. Should NBC return to the matter of private pensions in the future, it will continue to attempt to explore the significant contrasting point of view within the context of the specific subject matter presented."

I think that rather undermines your "Catch 22" argument. As of February 14, 1973, five months after the program was aired, NBC was admitting that the subject remained newsworthy and might merit further discussion on the air. John O'Connor, TV critic of The Times, pointed out that all they had to do was give the subject 10 minutes on the Today Show and they would have satisfied the demands of their critics. The fact is that it was not high principle, but sheer arrogance that led them not to do this. They thought so little of any obligation to air the other side, that they did not even respond to AIM's letter of complaint about the program for over one month, and then only after we had carried our complaint to the FCC.

I might point out that NBC now responds to complaints very promptly. That is one of the beneficial fall outs from the "Pensions" experience.

You state that "subsequent court actions left this (the Court of Appeals) ruling intact."

That is untrue. The decision you refer to was dated September 27, 1974. On July 11, 1975, the Court of Appeals handed down an order reading: "On consideration of respondent's suggestion of mootness and the oppositions filed in response thereto, it is ordered by the Court that the judgment of the court entered September 27, 1974, is hereby vacated, and it is further ordered that the case is remanded to the Federal Communications Commission in order for it to vacate its order of December 3, 1973, and to dismiss the complaint which led to the order."

That is what was done. The September 27, 1974 order of the Court was vacated. The FCC vacated its own order on the ground that the case had become moot. So there was no final resolution of the case on the merits, which is why both AIM and NBC opposed the FCC petition to have the case declared moot.

It is untrue to say that the decision of the FCC in anyway inhibited investigative reporting, in my opinion. There have been many fairness complaints, and they are almost invariably rejected by the FCC because it manages to find some shred of balance in the program or overall programming. The "Pensions" case was different in that NBC neglected to put in more than a few sentences on the other side of the controversial issue. This was not investigative reporting. It was simply propaganda on one side of an issue on which legislation was pending in Congress.

I am surprised at your criticism of the NBC program on gun control. Your measure of the goodness of a program seems to be how much protest it arouses. By that standard, the CBS program, "The Guns of Autumn," must have been the greatest documentary ever aired, because it aroused the most protest.

That implies that the more unfair a program is and the more it upsets the viewing audience, the better it is. I would have thought that a good program was one which informed people of the facts, not one which through unfair presentation of the case angered them.

ABC pioneered with a program on gun control that was a model of fairness. It assigned two teams to the subject, one to do the best job for gun control and the other to do the best job it could against. They had equal time on the air. The result was an interesting and informative program. The public was given the facts and left to make up its own mind about which side it favored. Doesn't that make a lot more sense than having a powerful network load the dice and try to determine the outcome by giving only one side or giving one side 90 percent of the time and the other side 10%?

Are you for using the medium of television for informing the public or for propagandizing them?

Let me again point out one of the many important differences between newspapers and TV that undermine your insistence that the two should be treated equally. I have had scores, if not hundreds, of letters printed in newspapers taking issue with material they had printed. We have spent thousands of dollars on ads in newspapers to present information the newspapers had refused to print. Not all of my letters have been printed and not all of our ads have been run, but a substantial number have made it.

Senator Proxmire, there is simply no comparable access to television. In the eight years that Accuracy in Media has been in existence, I think we may have had one sentence from a letter read over CBS at 11 P.M. Sunday night. Each network has broadcast a couple of corrections of errors that we have pointed out. That is with the fairness doctrine hanging over their heads. As I said earlier, prior to the Pensions case, you were lucky to get NBC to even reply to a letter.

I think that as a U.S. Senator you probably don't encounter such problems. However, you are out of touch with the problems of the ordinary citizen if you think that these giants of the broadcast media are as responsive to the average viewer's complaints as they are to yours.

Sincerely yours,

REED IRVINE.

Senator HOLLINGS. Each of you are all strong and dynamic spokesmen. I don't know how each of you got seated together.

Mr. SCHULTZ. Can I respond to that now?

Senator HOLLINGS. Do you want to do that? We will hear first Mr. Ernest Schultz, and finally from Mr. McGannon.

Mr. SCHULTZ. I would like to respond by pointing out—on behalf of the 1,750 members of the Radio Television News Directors Association, I want to thank you for inviting us and giving us an opportunity to get our views on Senate bill 22 on the record.

I would like to begin, since Mr. Irvine has mentioned our name first, by responding to his allegations about the association. They are just not true.

I have in my hand a copy of the September issue, September 1977 issue, of the RTNDA Communicator in which Mr. Irvine of Accuracy in Media is quoted, and I would like to show that to him.

Mr. IRVINE. I am delighted to receive it.

Mr. SCHULTZ. You may subscribe, if you wish, sir, but it has been there since September 1977.

That is my copy. I would like to put it back.

Mr. IRVINE. Do you want to put this extensive quotation in the record? It is one paragraph.

Mr. SCHULTZ. We didn't print the entire speech of Mr. Salsbury. We digest it and, therefore, we didn't do it on Mr. Irvine's statement either. What he says is not true.

Mr. IRVINE. How long after the speech did this appear?

Mr. SCHULTZ. September of 1977.

Mr. IRVINE. The speech was in December of 1976.

Senator GOLDWATER. Did you print Proxmire's letter?

Mr. IRVINE. They printed the letter.

Mr. SCHULTZ. I have no knowledge of the circumstances of that instance, Senator. I could look it up and find out what actually happened and respond to it, to the committee, if you wish.

Senator GOLDWATER. He thought that was the charge.

Mr. IRVINE. No. Two things. One was the speech by Salsbury in December of 1976 when he attacked me, Pat Buchanan, and others, and we tried very hard to get them to print our statement, which they never did.

What they put in the record here is a statement, somewhat similar to that that I have given to the Van Deerlin committee last year, some 9 or 10 months after the event.

Now, there was also the Proxmire letter. To my knowledge, they have never given our correction of the errors in the Proxmire letter to their membership and have said they refused to do so because they didn't agree with it.

Mr. SCHULTZ. I just know about the first instance, and responding to that.

Senator HOLLINGS. Go ahead.

Mr. SCHULTZ. My name is Ernie Schultz, and I am president of RTNDA. The active membership of the association I head is made up of news executives at the networks and at local stations across the Nation.

As director of information at Station KTVY in Oklahoma City, I work full time supervising the preparation and presentation of news, weather, sports, farm, and public affairs programing for that station.

I would like to begin by applauding the courage of Senator Proxmire and complimenting his eloquence in speaking out so forcefully and effectively against his own legislative child.

I subscribe to and endorse his characterization of the Fairness Doctrine and candidate equal-time requirements as unnecessary, self-defeating, and dangerous. They simply do not work, and they are contrary to this Nation's free press tradition.

My colleague on this panel, Bill Leonard, knows better than I the legal struggles of the network news departments to practice the craft of journalism within the confines of these regulations. And those struggles have gained a degree of publicity.

Less publicity and less concern have been generated by the effect of these regulations on local stations, stations like the one I work for, who also must struggle for journalistic freedom.

Let me give you some examples.

A station in Spokane won a dispute over a fairness complaint filed with the FCC, but it cost the station \$20,000 to defend itself, and it took 21 months.

The station expended 480 management hours on the complaint and its defense, and its license renewal was delayed. The station won, but at what price?

Just recently a station in Florida won a fight with the Better Business Bureau over a complaint filed under the personal attack rule of the Fairness Doctrine. But at what a price?

Another example—it has cost thousands of attorney-hours to litigate whether and under what circumstances debates between political candidates are exempt from the equal-time law. Two cases on the issue of rebroadcasts are still pending.

I could go on and on. The fact is, as Senator Proxmire says, the first amendment forbids Congress from passing any law that diminishes our right to have a free press. But, unfortunately, Congress has passed a law that does just that.

Broadcast journalists are second-class citizens when compared with their colleagues in the print press. Yet there is no reason to believe that broadcasters would be unfair if there were no Fairness Doctrine.

Sure, there would be a few abuses—just as there are now. But, as Chief Justice Burger stated in the *CBS* case:

Calculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility—and civility—on the part of those who exercise the guaranteed freedoms of expression.¹

Today we find ourselves bogged down in definitions and exceptions and all the other snares or regulation. This requires us to be over-cautious and to seek advice on journalistic matters from lawyers—and that costs money.

I agree with Chairman Ferris, there is confusion about the Fairness Doctrine. FCC regulations said at one time we could not editorialize; now they say we can editorialize. FCC regulations at one time said cigarette advertising came under the Fairness Doctrine, there should be advertisements on the other side, and Congress outlawed cigarette advertising; the FCC decided it doesn't come under the Fairness Doctrine.

What is it going to be this week and next week?

It is a lot easier for us to avoid the problem with something bland or nothing at all concerning a particular controversial issue.

Instead, why not try a course that would be a lot better—a truly free broadcast press? Repeal section 315—or suspend it for a couple of years—and see for yourselves that deregulation will do more good than harm.

There are those who argue that the answer lies not just in repealing fairness and equal time but, as a tradeoff, adding some new regulations requiring direct citizen access to every station's microphones.

Exchanging one reel of redtape for another is not the answer. You can no more write workable regulations implementing access than you can for fairness or equality.

Mandated access, which really means either special interest access or chaotic access, is not the answer.

"Editing is what editors are for," as Chief Justice Burger has said. Journalists should select and edit news and opinion rather than merely act as "common carriers" for everyone in the community who wants to be heard.

The solution, RTNDA believes, is the repeal of section 315 and the extension of full first amendment rights to the broadcast journalist.

Senator HOLLINGS. Thank you.

Finally, we have Mr. Donald H. McGannon, chairman and president of Westinghouse Broadcasting Co.

Mr. MCGANNON. Thank you, Mr. Chairman, Senator Goldwater, members of the committee, I would like to have my entire statement incorporated in the record.

I have been in favor of the Fairness Doctrine since its original adoption and have publicly supported it before this committee and other public groups. I believe that the doctrine is an essential ingredient of a broadcaster's obligation to the public which he serves.

The duty to seek out and cover fully and fairly issues of public importance is essential to the maintenance of a well-informed and enlightened public electorate. The basic principles which underlie the Fairness Doctrine are still as sound and applicable as they were over 40 years ago.

¹ *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 125 (1973).

That is, it is necessary to allocate this scarce resource consistent with the interest, convenience, and necessity of the public. The doctrine has not worked perfectly, but its elimination would place the public's fundamental first amendment rights in far greater jeopardy than they are presently asserted to be.

Opponents of the doctrine argue that such Government control restricts and inhibits broadcast journalism. From my years of experience, I can say that implementation of the doctrine has not been a significant or troublesome problem. It has never hampered our editorial judgment nor caused us to shy away from issues other than for reasons of good journalistic practice. We have had our problems and we've made our mistakes, but it is our continuing conviction that the public interest has been better served by the existence of the doctrine than it would have been without the doctrine.

One of the prime reasons that the Fairness Doctrine is viewed as restrictive and as an intrusion into the broadcaster's journalistic discretion is that over the years the FCC has tended to focus its regulatory efforts on the second part of the doctrine and appears to have neglected the first, and more important, precept. It is only recently that the FCC has ordered stations to cover a particular controversial issue.

The lack of enforcement of the affirmative obligation to provide coverage of controversial issues springs from a natural reluctance to interfere in a broadcaster's day-to-day editorial decisionmaking.

Opponents of the doctrine say that it imposes censorship by the FCC. However, I feel that this may be an unfortunate choice of words, because the word "censor" is defined as "* * * an official empowered to examine written or printed matter * * * in order to forbid publication, circulation, or representation if it contains anything objectionable."

Senator GOLDWATER. Objectionable to whom?

Mr. McGANNON. Objectionable to any person, I suppose under that definition.

It can be argued that the doctrine represents the direct antithesis of censorship by requiring the licensee to seek out any present controversial issues. It is designed to further discussion, not inhibit it.

Furthermore, under the authority of the Fairness Doctrine, the FCC cannot change, prohibit or delete program content; it can only serve to multiply the divergent points of view which are aired. The individual licensee remains responsible for the selection of program material and the licensee is allowed great latitude. He must use his best judgment and good sense in identifying the issues, as well as in choosing the program format, the spokesmen and the different viewpoints to be presented.

As the Supreme Court, in the *Red Lion* case stated, "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." The Commission's role under the doctrine is to determine only whether the broadcaster has made an arbitrary or unreasonable judgment, not to substitute its judgment for that of the licensee.

I would like to turn now to the other major part of this legislation—the repeal of the equal time provision for political candidates. It is claimed that section 315 discourages broadcasters from supplying free time to major party candidates because they are then required to provide equal time to numerous minor candidates.

Although the burden imposed on broadcasters by the minor candidates might be excessive, and the benefits derived from granting them equal time minimal, the potential loss to the public is even greater. In order for the public to evaluate and understand the issues of our complex society, they must hear all the arguments, not just those a broadcaster may wish to present.

On several occasions in the past, I have supported a limited repeal of the equal time requirement as applied to the offices of President and Vice President. I do so again today.

This, in my opinion, will best serve the public interest and afford the highest level of flexibility on the part of broadcast licensees and the networks in presenting the significant issues by the principal Presidential and Vice Presidential candidates.

If the equal time provision is repealed in this manner, then I would suggest the need for an application of the Fairness Doctrine to minority party candidates and the issues they espouse. The doctrine may be the only practical method by which the balancing of attitudes and views on important controversial subjects can be brought to the public.

The repeal of section 315 would greatly reduce the public accountability of broadcasters and would render the FCC powerless to do anything about arbitrary and one-sided presentations of important issues. Yet, contrary to what the sponsors of this bill argue, this would not make broadcast journalism equal to print journalism with respect to Government regulation. There would still be a very large body of regulation surrounding the technical and administrative aspects of the business of broadcasting.

The electromagnetic spectrum is a public resource subject to an inherent physical limitation which prevents all those who possess both the desire to communicate and the money to do so from being satisfactorily accommodated. It is this unique characteristic which originally motivated the Congress and, in turn, FCC to treat licensees as public trustees and which currently justifies the imposition of certain Government regulation.

The FCC has concluded, and correctly I believe, that it would not be in the best interests of the public to make the few who secure a license the sole custodians of the precious right to communicate to the public at large.

I am pleased to have had this opportunity to present our views in this regard and would be pleased to answer any questions.

Senator HOLLINGS. Thank you very much, Mr. McGannon.

[The statement follows:]

STATEMENT OF DONALD H. MCGANNON

I am Donald M. McGannon, President and Chairman of Westinghouse Broadcasting Company, Inc. (Group W), and I appreciate this opportunity to appear before you on these important matters.

The legislation under discussion today appears to be based on the premise that the government has become too deeply involved in program decision-making. As a remedy, S. 22 would repeal the Fairness Doctrine and section 315 of the Communications Act. These are two of the most important precepts of broadcasting today. Their elimination would leave third party and minority candidates, as well as countless proponents of various viewpoints on a wide range of issues, with no assured ability to secure access to the airwaves. It would also tend to deprive the general public of an effective degree of exposure to candidates and issues in today's society.

Although the Fairness Doctrine was not formally articulated by the FCC until 1949, the legislative history of the 1927 Radio Act and cases in the 1930's and early 1940's demonstrate a concern for the problem of airwave scarcity, the need to present balanced public affairs information, and the danger of powerful private parties using broadcast facilities for personal gain. [See Simmons, Fairness Doctrine: The Early History, 29 Federal Communications Bar Journal 207 (1976) for an excellent discussion of the beginning of the Fairness Doctrine. The author concludes that the fairness doctrine had been clearly defined before 1949.]

As early as 1947 my company had a written policy on the subject of fairness which read as follows:

"It is the obligation of a station to operate in the public interest, and this includes giving a full, fair, and balanced presentation of responsible points of view and all material facts concerning the controversial issues of significant concern to at least a substantial portion of the community."

In the *Report on Editorializing by Broadcast Licensees*, 13 FCC 1246 (1949), the twofold duty of broadcasters was clearly set out: that the broadcaster devote a reasonable amount of time to the discussion of controversial issues of public importance and that the broadcaster afford reasonable opportunity for the discussion of contrasting viewpoints.

I have been in favor of the Fairness Doctrine since its original adoption and have publicly supported it before this Committee and other public groups. I believe that the Doctrine is an essential ingredient of a broadcaster's obligation to the public which he serves. The duty to seek out and cover fully and fairly issues of public importance is essential to the maintenance of a well-informed and enlightened public electorate. The basic principles which underlie the Fairness Doctrine are still as sound and applicable as they were over forty years ago. That is, it is necessary to allocate this scarce resource consistent with the interest, convenience and necessity of the public. The doctrine has not worked perfectly, but its elimination would place the public's fundamental First Amendment rights in far greater jeopardy than they are presently asserted to be.

Opponents of the Doctrine argue that such government control restricts and inhibits broadcast journalism. From my years of experience, I say that implementation of the doctrine has not been a significant or troublesome problem. It has never hampered our editorial judgment nor caused us to shy away from any issues other than for reasons of good journalistic practice. We have had our problems and we've made our mistakes, but it is our continuing conviction that the public interest has been better served by the existence of the doctrine than it would have been without it.

One of the prime reasons that the Fairness Doctrine is viewed as restrictive and as an intrusion into the broadcaster's journalistic discretion is that over the years the FCC has tended to focus its regulatory efforts on the second part of the doctrine and appears to have neglected the first, and more important, precept. It is only recently that the FCC has ordered stations to cover a particular controversial issue. [See Rep. Patsy Mink, 37 R. R. 2d 744 (1976)]. The lack of enforcement of the affirmative obligation to provide coverage of controversial issues springs from a natural reluctance to interfere in a broadcaster's day-to-day editorial decision making.

Opponents of the Doctrine say that it imposes censorship by the FCC. However, I feel that this may be an unfortunate choice of words, because the word "censor" is defined as "... an official empowered to examine written or printed matter ... in order to forbid publication, circulation, or representation if it contains anything objectionable." [Webster's 3rd New International Dictionary, emphasis added.] It can be argued that the Doctrine represents the direct antithesis of censorship by requiring the licensee to seek out and present controversial issues. It is designed to further discussion, not inhibit it.

Furthermore, under the authority of the Fairness Doctrine, the FCC cannot change, prohibit or delete program content; it can only serve to multiply the divergent points of view which are aired. The individual licensee remains responsible for the selection of program material and the licensee is allowed great latitude. He must use his best judgment and good sense in identifying the issues, as well as in choosing the program format, the spokesmen and the different viewpoints to be presented.

As the Supreme Court, in the *Red Lion* case stated, "it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." [*Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 390 (1969)]. The Commission's

role under the Doctrine is to determine only whether the broadcaster has made an arbitrary or unreasonable judgment, not to substitute its judgment for that of the licensee.

I would like to turn now to the other major part of this legislation—the repeal of the equal time provision for political candidates. It is claimed that section 315 discourages broadcasters from supplying free time to major party candidates because they are then required to provide equal time to numerous minor candidates. Although the burden imposed on broadcasters by the minor candidates may be excessive, and the benefits derived from granting them equal time minimal, the potential loss to the public is even greater. In order for the public to evaluate and understand the issues of our complex society, they must hear all the arguments, not just those a broadcaster may wish to present.

On several occasions in the past, I have supported a limited repeal of the equal time requirement as applied to the offices of President and Vice-President. I do so again today. This, in my opinion, will best serve the public interest and afford the highest level of flexibility on the part of broadcast licensees and the networks in presenting the significant issues by the principal Presidential and Vice-Presidential candidates. If the equal time provision is repealed in this manner, then I would suggest the need for an application of the Fairness Doctrine to minority party candidates and the issues they espouse. The Doctrine may be the only practical method by which the balancing of attitudes and views on important controversial subjects can be brought to the public.

The repeal of section 315 would greatly reduce the public accountability of broadcasters and would render the FCC powerless to do anything about arbitrary and one-sided presentations of important issues. Yet, contrary to what the sponsors of this bill argue, this would not make broadcast journalism equal to print journalism with respect to government regulation. There would still be a rather large body of regulation surrounding the technical and administrative aspects of the business of broadcasting.

The electro magnetic spectrum is a public resource subject to an inherent physical limitation which prevents all those who possess both the desire to communicate and the money to do so from being satisfactorily accommodated. It is this unique characteristic which originally motivated the Congress and in turn FCC to treat licensees as public trustees and which currently justifies the imposition of certain government regulation. The FCC has concluded, and correctly I believe, that it would not be in the best interests of the public to make the few who secure a license the sole custodians of the precious right to communicate to the public at large.

The purpose of this bill, according to its sponsors, is to strengthen the objectives of the First Amendment with respect to the electronic media, but it is the Fairness Doctrine itself which embodies the goal of the First Amendment—to foster “uninhibited, robust, wide-open debate” on public issues [*New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)]. The First Amendment theory of the marketplace of ideas is furthered by the Fairness Doctrine and its encouragement of full discussion of a wide range of views.

Senator HOLLINGS. I think I will yield to my colleague, and let him ask questions. I want to hear from Dr. McIntire before we leave.

This is not to minimize your presentation. You are all strong spokesmen, but I just can't believe or agree with the idea that these people are second-class citizens.

Eric Sevareid has been in this for years. He was nice enough to have us all over, and kind enough to reflect on some things. He didn't say he was a second-class citizen.

On the contrary, he said back in the 1930's when he started, everything was simple, black-and-white moralistic questions.

He talked about World War II, the Depression, McCarthyism, and various other topics, but he couldn't summarize any present-day issues in a minute and 20 seconds, because of the complexity involved. He felt too restricted because life had become so complex.

I don't think he was referring to the complexity of the Fairness Doctrine, because he spoke eloquently and dynamically of everything. People looked for him.

I think there could be some adjustments with relation to candidates. I think Mr. Irvine really put it in the bull's-eye when he said, "Let some billionaires buy them out," liberal or conservative, and allow them to control it, and see how much freedom of the press we have.

In reference to the testimony about not trusting broadcasters, I can say I am in the game. We might have a peak from time to time with respect to newspaper writers and editorial writers, but I have never heard Senators say they don't trust the broadcasters.

On the contrary, they have a mutual trust and respect.

You don't have to trust newspapers, they don't have to. They own their own.

This is a public spectrum.

When you comment in that fashion, it is a trustee role, you can't get away from it. It is not easy.

But there must be certain requirements, and a pattern of requirements has emanated over the trial-and-error period. Actually the FCC, as Mr. McGannon and others, have paid too much attention to the second part of the Fairness Doctrine and not enough on the first part. Maybe that will change.

In any event, it's been a very valuable contribution to us for the panelists to present their views.

Let me yield to Senator Goldwater.

Senator GOLDWATER. I just have a few comments, then a question that you might toss around.

I am sorry I wasn't here for Mr. Leonard's comments, but I believe he stated there was more local news than network news. I would agree with that. I know the three television stations in my home, four counting public, devote far more time to local matters than to network news. I have never known a subject that seems to divide people across this country as much as television news. You have people who are mad at Walter Cronkite and people that love him. You have people the same way with every network commentator. I have often wondered whether licensing the networks would be a solution? Would you comment on that idea?

Mr. LEONARD. I probably should be the last person to address that subject, Senator Goldwater; but I think, in general, in the first place, there is some kind of de facto regulation of networks now, through their ownership of radio and television stations. We recognize that.

But I can't see how a legislative trend in the direction of larger and more governmental control, as if to say that because networks are larger, it is more important that they be restricted by the Government, I can't see how that would lead in the direction of a greater freedom, but only in the direction of a larger possibility that the Government, a government, some government, some aspect of government, would persuade themselves, as perhaps there may have been examples in the past, of governments that seem to be approaching the point of persuading themselves, that it should "do something about something it does not like."

I think that is the very kind of thing that you and, if I may suggest, Senator Hollings, don't want to see happen in this country, that the heavy hand of a White House or some future dictator can say to themselves, "We can get the network, and we have the law, we have the regulation, let's use it."

I don't think that is the direction you want to go.

Mr. SCHULTZ. I agree.

Senator HOLLINGS. Mr. Irvine.

Mr. IRVINE. I don't think that licensing the networks is a problem. The networks are subject to the Fairness Doctrine, as Mr. Leonard has suggested, to come about, worked out on a de facto basis, although perhaps not de jure, but I think there is concern with the network power.

One of the things that has bothered Accuracy in Media is the fact that the Fairness Doctrine enforcement seems to be directly primarily against very small stations.

It originated with the little station at Red Lion, Pa., the Supreme Court decision that really dates it.

There have been other small stations. Dr. McIntire's station, Mr. Nichols' station, others, that have been the targets of this. But the big problem of unfairness and the power in the country really lies in the networks and yet in the one case, in which a Fairness Doctrine complaint against the network was upheld, that is the complaint of Accuracy in Media against NBC in the *Pensions* case the FCC showed all of the spine of a jellyfish in pursuing that case vigorously to the end.

It is our feeling that if there is anything that can be accomplished, it should be pressure on the FCC to devote more attention to looking at the networks are doing and how, they are living up to the fairness requirements, which, I believe, they are not very definitely not, and quit wasting so much time worrying about 500-watt stations in Pollyap or somewhere else. It takes an incredible amount of time to get a Fairness Doctrine complaint processed through the FCC, we have timed it. We have filed some 16 complaints and we have given up because you can't get any reasonable, prompt action out of the bureaucracy at the FCC.

I think they ought to give much more priority to complaints about the networks and stop wasting time on the little stations.

Mr. MCGANNON. I don't think the licensing of networks would serve the area we are talking about.

However, in talking about the whole question that we are on this morning, the Fairness Doctrine situation, I believe that from my perspective and my cost perspective, the reason for great concern about the elimination of the Fairness Doctrine is the considerable power on the national basis held by the three individual television networks and in major markets generally speaking of three individual stations in that market.

They have, in effect a very substantial and dominant situation, which I think, requires, at least insofar as the stations are concerned, and I look at this from the owner and operator aspect of the stations as well, that these stations be held accountable in this area and the Fairness Doctrine be applied against them when and if the circumstance arises.

We do a significant amount of programing in the form of the Fairness Doctrine type, editorials, speak-out messages, prime time programing every week.

And yes; we get letters about the Fairness Doctrine, but to the best of my knowledge and recollection, we have never had a serious situation go to the Commission or have a situation in which a person walked away feeling that they had not, if you will, be effectively understood or appreciated or reacted to.

I think the big issue is the tremendous concentration of power in a given communication and in the Nation at large by individual stations in the community and networks in the overall situation.

I think it demands the fact that the Fairness Doctrine should continue.

Mr. HOBLER. Mr. McGannon, who I have known for many years—way back, anyway—stands behind the Fairness Doctrine, and a certain number of broadcasters do, because it is also an easy way out.

If you follow the rules, you don't have to get too controversial; therefore, you can't be a public advocate.

I think also from the network viewpoint, the networks own 5 or 6 stations, and then have 200 affiliates that may have different political viewpoints, that already take disagreement with the network by not even taking their programs sometimes.

I would like to make two comments, because you referred to Eric Sevareid. He gave a speech last year saying, "The central point about free press is not that it be fair, but that it try to be, and that it be free."

He feels very strongly about the freedom that broadcasters should have.

I would like, with your permission, to pose a practical problem because I am, I think, the only practical local radio broadcaster here.

Yesterday something significant happened in New Jersey. Senator Case was upset by a conservative, Jeff Bell, who is 34 years old.

Bill Bradley won the Democratic primary.

There are now two 34 year olds, one of whom will be sitting up there with you gentlemen next year in the U.S. Senate.

I would very much like to have taken the three principal Democratic candidates and had them on every week on our station debating the issues, but there were three others that got less than 2 percent.

As a public trustee I would like very much now to go to Bill Bradley and Jeff Bell and say we would like to have them on our station every single week for the next 12 or 14 weeks debating the issues and we will pose tough questions to them and we might take some editorial positions for and against both of them, because the people of New Jersey have two unknown young men to decide upon.

I can't do that if we wind up having to put on three or four other candidates for the U.S. Senate in addition to the Democrat and Republican now, and I would like to ask you if, despite the fact you were elected because of the Fairness Doctrine—how we should cover the news the way I do anyway, but I would like to give them the free time the way I did the Communists and Libertarians—I don't care about the money. By the way, on the air the Libertarian attacked in an editorial position saying I think 315 is unfair.

How would anybody in this room try to serve the public with the situation in the State of New Jersey?

Dr. JENNINGS. I would like to refer Mr. Hobler to John Stuart Mill and John Milton. I think you should look at them and see if the things you are proposing really contribute to a free and open discussion.

I think the way to solve these problems in terms of fairness complaint is just to give a little more time.

I have heard some horrendous stories about hundreds of thousands of dollars that get spent fighting fairness complaints and I just wonder

what would be the price of the broadcast time that would satisfy the complaint in the first place and forget all the regulation and the lawyers and the FCC and all of the rest of it.

It would probably be minimal and would probably make good programing too.

As far as the story Mr. Hobler told is concerned, living in New York City, I am familiar with rulebook slowdowns whenever the subway workers get upset and it is possible to use the rules to crank everything to a grinding stop.

I don't think that is the purpose of the Fairness Doctrine, and I don't think that is a fair test of it.

I think that in the long run the Fairness Doctrine and section 315 have given the public a better chance at hearing issues and candidates and being able to make decisions in a democratic society than it would have experienced in the absence of them.

Senator GOLDWATER. To get back to my question, maybe Mr. Leonard could answer this. Do you have any idea what percentage of your affected stations' time is occupied by CBS news?

Mr. LEONARD. Well, I haven't got the exact figure. Of course, it would vary somewhat from station to station, depending on really whether or not they carry the hour-long morning news, which would vary it—which would be quite a variation. But most of them, of course, carry a half hour of evening news.

Let's assume they carry 1 hour of the morning news. That is 1½ hours a day. And somewhat less over the weekends, because there is no morning news, although there is evening news. But a maximum of 1½ hours a day plus a 5-minute—and a couple of 1-minute news broadcasts at maximum. An hour and 37 minutes a day out of a broadcast day that sometimes extends to 24 hours and sometimes does not.

If you wish to include 60 minutes, you add—and the documentaries—that would swell the total—with Face The Nation—but, as far as hard news is concerned, what would that be, 1½ hours of the—the average station, if it is 20 hours, that would be 15 percent, 10 percent, something like that. But those are dangerous figures to quote. I can certainly get you something more accurate, Senator Goldwater.

Compared to the local news, it is small. Not very small, but small.

Senator GOLDWATER. But small.

Some of the witnesses have talked about the power of the networks. Now, where would that power be? It seems to me that power must be divided between news and entertainment programing. What does the network have to offer?

The news is almost obligatory. I don't know how you can run a local television station without national news. But can the local station survive without the entertainment programing provided by the networks?

Mr. MCGANNON. My allusion to the power of the networks relates to news and public affairs in which the networks do a fine and outstanding job.

I think it is lacking insofar as prime time is concerned, but that is another issue.

I think the power goes beyond that, however. The networks occupy 70 percent of all of this time on a given station and 100 percent of the prime time, so you can see there is a tremendous concentration in that situation.

As a consequence, depending on the station or the market involved, it is extremely difficult to get programming other than the way you described, Senator Goldwater, namely of getting off network reruns, because of the very serious limitation on the ability of stations to generate their own programming, because of the relatively small base.

Stations like ours can do some of this, not even to the extent that a network can do in any sense of the word.

Now, I am not using the word power in a derogatory way per se. I am talking about reality as we view it.

I think this is a very serious question.

I would like to have the record, however, in response to Herb Hobler, report that we don't use it for a copout purpose, the Fairness Doctrine.

I think you will find if you investigated that probably we are among the leaders, if not the leader, in our communities as far as all of these elements are concerned, editorial judgment, editorial undertaking, investigative reporting, documentary material, prime time programming, at least once a week, of local programs.

It is not to be the end to end all, but it is not second, necessarily, to any of our competitors we know.

Mr. SCHULTZ. I think the power of the network is overestimated, with all due respect to Bill Leonard. The highest rated news shows in our market, newscasts are local newscasts, and we draw considerably more viewers than do the networks.

I think we have considerably more impact on our local community than does the network.

I can understand why in Washington the networks would be considerably more powerful than they would be in Oklahoma City. Given the nature of the society. But in Oklahoma City our local newscasts draw many more viewers than the network newscasts.

The power of the newscaster, I think, is overestimated; as David Brinkley has said, he knows of many countries that have taken over newspapers, but no newspapers that have taken over a country. Seavareid says we don't have the power to draft; we can't even make you fill out a form. The lowest tag agent has more power, actual power.

I think we have influence.

Jessie Jackson says it is the power of the appraiser, of the man who looks through the lens at the piece of jewelry or at the society, and he pronounces upon that, and there is that power, but it is influence rather than actual power.

So I think there is a tendency to overestimate the effect on the public of imagined powers, in radio and television, both at the network level and at the local level.

I find that my audience is much more sophisticated, and in terms of diversity of output of news, I recall, in the old days, 150 years ago when there was one newspaper in town, and now there are three in my town, plus four television stations, and a half dozen radio stations, yet we survived that one newspaper and grew strong. Much before the Fairness Doctrine.

I think there is a multiplicity of voices. I think that is what it is all about.

I think passage of S. 22 would enhance that concept. That is how we got here. That is how it would be better.

Mr. IRVINE. I would like to give an illustration of the power the networks have. Senator Robert Byrd last week gave a speech, very important speech, in which he made some suggestions about what ought to be done, in view of the Cuban and Soviet actions in Africa. He said strong retaliatory measures should be taken, and he specified some of those measures.

On May 22, Senator Talmadge, a senior Democrat, made even a stronger speech, suggesting some specific measures that should be taken. The House minority leader made a similar speech, and perhaps others have; those are three that I happen to know of.

As far as I know, the network news departments have not reported this. Now, this is power. The local newscaster in Mr. Schultz' community is not going to tell you what Senator Byrd said or what Senator Talmadge said. That has to come from the network news, basically. If the network decide that they don't agree with Senator Talmadge or Senator Byrd that people ought not to be mobilized to get behind their suggestion, they simply don't report it. They cut it off. Now, to give another illustration, we remember during the Vietnam war when Presidents of the United States were giving speeches on important issues of policy, they wanted to rally public opinion.

What did CBS do? They invited a panel to discuss what the President said on this momentous question of policy. I remember one, specifically, where they had three panelists, or four, all of them were critics of what the President had just said.

I raised this with Mr. Paley, the chairman of CBS; I said, "You would think that out of four, you could get one that would agree with the President of the United States." He said, "Well, we thought we had one, but he disappointed us."

Senator HOLLINGS. One more. Go right ahead.

Mr. JENNINGS. Before we get through with this conversation, I would like to say, we talked a great deal about broadcast journalism and networks, but I would like to get in one point I think is important.

The Fairness Doctrine not only provides an opportunity for balanced presentations whenever a journalist may present what turns out to be a one-sided program. The Fairness Doctrine also offers an opportunity to spokespersons of various points of view from the community to be heard on the air, and to circulate their ideas in the community.

That is important, and we shouldn't forget it. It is not just network journalists that are concerned. It is local people having access to the air to discuss issues and to work out democratic solutions to problems. We don't have over 9,000 AM, FM, and TV stations in this country simply to pipe in network programming. They are supposed to provide a place for a dialog to go on in the community to deal with local controversies. Let's not forget that. The broadcaster has the responsibility. I am not interested in a lineup of people outside the station wanting to deal with questions.

I am interested in the broadcaster exercising fair, evenhanded responsibility, and providing time for controversial issues to be aired in the community.

That is what these facilities are for, in this instance.

Senator HOLLINGS. Fine.

Mr. Leonard, do you want to say a final word?

Mr. LEONARD. I couldn't help choking. Mr. Irvine's suggestion that the networks decide, the idea, the very idea that in a world, a network world, that you all recognize, everyone in this room recognizes, is competitive, perhaps to the point where it might even make a subject of a motion picture of that competition, you might even call it "Network," the idea there is some network cabal that decides the agenda of news for this country—

Mr. IRVINE. I didn't say that. I didn't say there was a cabal, but what you do have is a homogenized staff, and this has been admitted by the network presidents, themselves, that their staffs, almost to the man, share an identical point of view. One network executive said the problem was that conservatives go into business, and that they are not very articulate people. He said, "So, naturally * * * liberals."

Mr. Leonard. I hate to comment on one of your—comment on one of your statements that I consider ridiculous, only to be asked on another one. I think I am using up valuable time of the committee, and I don't think we need to do that.

Senator HOLLINGS. We appreciate very much the appearance of each of you. We have the most articulate conservative right here listening, Senator Goldwater.

Thank you for coming. We will keep the record open for questions. [The following information was subsequently received for the record:]

ACCURACY IN MEDIA, INC.,
Washington, D.C., June 7, 1978.

HON. ERNEST F. HOLLINGS,
Chairman, Communications Subcommittee, Senate Commerce Committee, U.S. Senate, Washington, D.C.

DEAR SENATOR HOLLINGS: Towards the end of the panel discussion before your committee this morning, I referred to a program on which network news executives were interviewed and told something of their policies and attitudes.

I referred to the statement of one network executive, who, I said, had admitted that they tended to hire only liberals because conservatives tended to go into business and were not articulate.

I was recalling a statement that had been aired on Channel 26 on December 22, 1968, and my recollection was not precise, though it was close. If it would be possible to do so, I would like to have my statement footnoted with the notation that I had called to the subcommittee's attention the fact that the statement I had in mind actually said the following:

ROBERT MCNEIL. Do you put a conservative on as often as you put a liberal on? BLAINE LITTEL ABC News. There is a problem there. They are hard to find.

MCNEIL. How hard do you look?

LITTEL. We look very hard. What seems to be true is that most people that write well and are in the arts and the business of communicating tend to be liberal. Conservatives tend to be businessmen, and businessmen do not tend to write well.

While the question seems to refer to guests on broadcast programs, the answer seems clearly to refer to people who write, which would suggest staffers. However, I did exaggerate what Mr. Little said, and the record should include his actual words.

By the same token, I believe that the record should include the two paragraphs about me in the September 1977 issue of the RTNDA Communicator. Mr. Schultz asserted that these paragraphs proved that I was inaccurate in saying that they had refused to publish my answer to either the attack made on media critics by their former president, John Salisbury or the corrections to Senator Proxmire's published statement on the fairness doctrine. Mr. Schultz left the impression that my answer to Mr. Salisbury did, in fact, appear in the September 1977 issue of the Communicator.

That is not true. The small item in the Communicator simply reported that in testifying before Cong. Van Deerlin's subcommittee last year, I had criticized

the RTNDA for not giving us space to reply. I do not have the exact text, since Mr. Schultz took back the copy of the publication that he showed me, but I am sure that he will be happy to supply you with a copy so that the exact text can be included in the record.

It was a pleasure appearing before your committee, and I thank you for giving me this opportunity. I am enclosing a copy of the page proofs of the latest AIM Report, which includes a discussion of the reluctance of the news media to report the demands of influential senators and congressmen for action against Cuba. I think you will find it of interest.

Sincerely yours,

REED IRVINE.

Senator HOLLINGS. Thank you. Dr. Carl McIntire is our next witness. We welcome you, Dr. McIntire and Reverend Nichols. Please proceed.

**STATEMENT OF DR. CARL McINTYRE, WTMR; ACCOMPANIED BY
JIM NICHOLS, NATIONAL ASSOCIATION FOR RELIGIOUS LIBERTY
ON THE AIR**

Dr. McINTIRE. Thank you, gentlemen.

I support the Proxmire bill S. 22.

For 23 years, since March 5, 1955, I have been the daily speaker on the 20th Century Reformation Hour broadcasts, which at one time was heard on 610 stations over the country.

I was chairman of the Radio Commission of the American Council of Christian Churches as early as 1941, and have appeared at various hearings over the years. I am president of the International Council of Christian Churches, which consists of 274 Protestant denominations over the world.

We have had long, costly, tragic experiences at the hands of the FCC, and especially with its Fairness Doctrine, Radio Station WXUR, Media, Pa., was removed from the air, its license revoked, July 5, 1973. This station belonged to Faith Theological Seminary, Elkins Park, Pa., of which I am president.

I present some facts which reveal the loss of free speech, free exercise of religion, denial of first amendment rights.

On July 7, 1970, the FCC, with its Chairman Dean Burch, reversed the decision of its examiner favorable to WXUR. Nine months of hearing preceded the original decision, December 13, 1968. The FCC's action focused on the Fairness Doctrine. More than 100 stations immediately dropped the 20th Century Reformation Hour program.

Station KBLE, Seattle, Wash., September 21, 1970, wrote as follows:

Under the terms of the WXUR decision, controversial issues are virtually ruled off the radio airwaves. Accordingly, in order to protect our license, we have to suspend the 20th Century Reformation Hour tomorrow morning.

It is indeed to be regretted that present FCC rule interpretations force such a peremptory termination of a relationship which has gone on so long and so cordially as ours.

This type of action has now affected the entire radio world.

The FCC codified its Fairness Doctrine in August 1967. At that time I received letters revealing the fear and the restriction placed upon speech.

WRIB, Providence, R.I., September 20, 1967, wrote:

According to the Fairness Doctrine, I must notify all those which are attacked on your program, or any other, within 7 days following the broadcast and allow them time in which to answer charges.

Failure to comply with the above is subject to a \$10,000 fine.

In order to stay away from what I consider unnecessary trouble, I must ask that you refrain from mentioning names on all future broadcasts.

WUNS, Lewisburg, Pa., September 8, 1967, explained their cancellation in these terms.

It is with regret that we at WUNS have to announce the discontinuation of the program "Twentieth Century Reformation Hour." Our relationship has continued amiably for nearly six years, and we are sorry to have to terminate your broadcasts.

However, in view of the fact of the recent FCC ruling, which causes many, many man-hours of work over and above the regular weekly chores of an already understaffed small radio station, we find we have no alternative. The ruling about which you speak, of course, is the one regarding equal time.

WMEN, Tallahassee, Fla., September 21, 1967, explained their cancellation as follows:

Cancel shipment of tapes of WMEN Radio here in Tallahassee. We are off the air due to a change in station ownership. The new owners have stated that your program does not fit their type of broadcasting.

I am trying to get the program on one of the other stations, but it seems that the management is frightened about the new doctrine of the FCC, in that any party that is criticized in a broadcast must be notified two weeks in advance. These people here are afraid to do anything that might upset the FCC. The stations are aware of your popularity here, and realize that the program would be an asset, but I am yet unable to get a commitment for radio time.

One of the greatest losses was the decision of the owner of WFAX, Falls Church, Va., to remove my program after 15 years. This covered the Washington, D.C., area at 8 a.m. each morning. The owner had himself earlier been employed by the FCC. He attended numerous sessions of the hearings. He continued the program until after WXUR died on July 5, 1973. His remark to me was, "My idealism does not extend to the loss of my license."

It was this station which caught the ear of Congressman L. Mendel Rivers, chairman of the Armed Services Committee of the House. He came early to his office and had a radio on his desk tuned to WFAX.

At one of his annual "quail dinners," when he asked me to pronounce the benediction, he recommended that all present tune in to that station at 8 a.m. and hear me.

Mr. Rivers one day called me and asked me to come to Washington to see him. He requested that I organize a March for Victory for the Vietnam war.

The first one was held April 4, 1970, with 100,000 people. The second was held October 3, 1970, with 200,000 people. This was the march that Vice President Ky was on his way to address when Secretary of State Kissinger flew to Paris and stopped him. It was halfway between these two events with wide public attention that the FCC reversed its examiner's opinion.

Stations dropped me because I was appealing for victory. This was considered "controversial" by many stations who believed that they would be obliged to give equal or free time to the antiwar groups. My use of radio was restricted, frustrated, censored, and repressed because I talked of winning the war.

Every effort I put forth to get another outlet in Washington failed. WIVE, Colonial Hills, a part of the Richmond, Va., community,

removed my program from its station just last year. The station changed hands, and the chairman of my local committee was informed that the attorney for the station wanted the program removed before the station came up for its license renewal. This the station did.

Two stations in Pennsylvania—WPEL, Montrose, and WPGM, Danville—under the same ownership, also dropped our program.

At a religious congress in Switzerland, I had reported the presence of churchmen from Communist Hungary and from other Iron Curtain countries and their activities. When these broadcasts were delivered to the stations by tape, they refused to carry them and played music instead. Later the program was discontinued on those two stations.

Appeal was taken from the July 7, 1970, decision of the FCC to the U.S. Circuit Court of Appeals. Three judges heard the case: Bazelon, the chairman; Wright, and Tamm. Two of the justices, Bazelon and Wright, refused to sustain the FCC in the matter of the Fairness Doctrine charges.

Let it be clear that on this major issue, the FCC failed to prevail but it sent its message to all the stations.

Judge Bazelon delivered a devastating opinion, which so affected Senator Sam Ervin, who was then in the Senate, that on November 14, 1973, he delivered a 5,000-word speech before the Senate, entitled, "Carl McIntire, the Fairness Doctrine, and the first amendment."

Wright and Tamm nevertheless sustained the FCC in the allegation that the original application before the station ever went on the air, or made any broadcast whatsoever, was defective and misrepresented the intentions of the station by failing to reveal its full program schedule.

It was alleged that this was misrepresentation and deception. Nothing like this was involved at all. It had been made clear to the FCC that the station was purchased in order that Carl McIntire's program could be aired in the Philadelphia area, where no station would carry it.

Bazelon took the position that it was a violation of the first amendment rights for the FCC to require the submission of programing intentions and listings as a condition for licensing. The Supreme Court dismissed the appeal, letting stand the charge of deception.

Senator Ervin, however, described the situation:

When we recall the extremely controversial nature of Reverend McIntire's opinions, and the fact that the criticism the FCC received came from those who vehemently opposed his views, the real reason for the termination is clear. Dr. McIntire lost his right to speak because of his controversial exercise of the first amendment. The FCC rationales are the formal justification, but not the true cause of the FCC rejection.

Senator Ervin then concluded:

When all the legal mumbo-jumbo is cleared away, the fact remains that the FCC chose to apply highly technical rules to this single station, having been forced by outside political pressure to do so. It does matter that the station's audience was small. Those few people who chose to listen have as much right to hear what they wish—and what WXUR alone was broadcasting—as anyone else. Unfortunately, the FCC and the Court chose to regard these technical rules and strained reasoning as more important than the first amendment rights of the station and its listeners.

His last paragraph reads:

I hope the Commerce Committee will take a close look at the WXUR case, and begin to consider how to move broadcasting out of the Government control that

was justified in its infancy. It is high time broadcasting be afforded the benefits of the first amendment. More important, it is high time for the public to have the benefits of the first amendment.

Honored Senators, I tell you we have suffered the loss of our God-given liberty in a land which we call the land of the free and the home of the brave.

We represent a small religious minority. We are the Fundamentalists. The seminary had placed a mortgage on its property of \$425,000. The \$450,000 purchase price of the station virtually evaporated. The cost of attorneys' fees and litigation was over a half million dollars. More than \$1 million in outright cash was lost. It came from the pockets of Christians who wanted to hear what was going on in the Christian world.

Five times the chairman of the Oversight Committee of the FCC, Senator Pastore of Rhode Island, promised that he would give a full hearing to this matter in view of the questions raised concerning the first amendment. He retired from the Senate, and this had never been done.

He said the first amendment was sacred in this Nation.

A situation has been created by the Congress where a man's opponents on a ideological and religious level can secure the assistance of a Government bureau to silence and limit the expression of contrary views in the marketplace.

This situation has existed at different times in the history of the church, where church interests have been able to use Government power to crush other church interests. It was the Greater Philadelphia Council of Churches which led in the WXUR silencing.

The United Church of Christ, another religious enterprise, has been most active in this field, and when WXUR was silenced, it was the spokesman for the United Church of Christ Broadcast Commission, Dr. Everett Parker, whose voice was brought to the Philadelphia radio to explain to the public the FCC action in the death of the station.

This church group has developed courses of study for clergymen and other groups to instruct them in how they may put pressures on radio stations at the time of license renewal, or formal complaint, in order that they may improve community programming—which has meant removing from the air programs they dislike.

In 1969, the National Council of Churches had its convention in Cobo Hall, Detroit, Mich. Our group of churches held a meeting across the square in the Ford Auditorium with a couple of thousand people present.

The United Church of Christ, a member of the NCC, had its broadcast commission booth in the foyer with the material of their communications commission. When the churches' representative at the booth was asked what it was all about, he specifically said it was to get Dr. McIntire off the air.

Religious conflicts in the United States have entered into the struggle over radio, and the FCC's Fairness Doctrine has become a tool, or a weapon, in the hands of majority religious interests to silence dissent and opposition opinion.

We, therefore, respectfully request the following:

1. To us nothing is more important than liberty. Will this committee please hold a hearing which will enable the Fundamental preachers—and there are scores of them—to present their reports as to the denial to them of their first amendment rights all over the country? There is repression, censorship, discrimination, and fear: fear of the FCC, and especially fear of Dr. Parker and his powerful nationwide apparatus, which is used against their preaching. Let the preachers preach on radio.

2. That the Fairness Doctrine be abolished. It is full of political mischief. I cannot develop this here, and under the FCC, denies the equal protection of the law.

Any penalties or regulations in this area should be enacted by the representatives of the people and made into law. We presently have our libel and slander laws. To tie penalties in with the licensing power involving many subjective factors multiplies injustices.

3. Abolish the FCC, and set up an entirely new structure which severs all connection with the FCC's rules, regulations, interpretations, that relate in any way, shape, or form to speech, programing and licensing, complaints, petitions involving the same. Free men in a free country must have free speech and free radio. They can operate their stations even better than Government bureaucrats who establish the regulations, who glory in this power. The newspapers are doing very well without a Federal license. It is Congress which must make all laws, and in the area of speech, it is forbidden to do so.

4. A new structure should be provided which only assigns wavelengths on a permanent basis and protects them by law. Stations will then exist in our free, competitive, and economic world, and enjoy the same benefits of free speech which are presently protected in the newspapers and print media under the same amendment which is supposed to protect the speech of the people on radio and television.

The first amendment must be returned to the radio world and the American people who listen. It is not a question of simply working toward that end; it is a question of these rights being restored now, immediately, to the people. Without free speech a free America cannot exist. Without the free exercise of religion with its moral implications, our Republic will go down in disaster.

There is no justification at any time for taking from the people their God-given liberties, and their full enjoyment of their first amendment rights.

It is, I believe, the duty of the Congress of the United States to give first priority to the liberties of the people; for every servant of the people in the Congress of the United States has taken an oath to support and defend the Constitution.

The FCC makes the rules, administers the rules, fixes the penalties, and judges its offenders. Legislative, executive, and judicial functions are all compounded within one bureau. Even that which the Constitution sought to provide for us in our three branches of Government, serving as a check and protection for our liberties, now arises to plague the radio stations and all who broadcast on them, and to generate uncanny fear; our Founding Fathers fought the war for independence in order to deliver us from such concentration of power and repression.

Please return the Constitution to the Congress, and may we enjoy the benefits of our three branches of Government. Liberty has to be under law.

The first amendment reads:

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

Thank God for it. The price of liberty is eternal vigilance.

Thank you. And I appear in my capacity as president, International Council of Christian Churches.

Thank you, Senator.

Senator HOLLINGS. Thank you, Dr. McIntire.

The young lady here used to work for a good friend of yours, Mendel Rivers, and I have always been a big admirer of him.

I started under him many years ago. As is too often the case, our earlier witnesses have run us beyond our time. I have had to be at another meeting since 12:30. I would appreciate it if you and Reverend Nichols could sum up and we will file your entire statements, in their entirety.

Mr. NICHOLS. I would just like to leave the statement for the record.

Senator HOLLINGS. Fine.

Mr. NICHOLS. I saw Mr. Ferris, the new Chairman of the FCC, as he went out. You may have noticed that I followed him out in the hallway.

Senator HOLLINGS. No, sir, I didn't.

You have a case before the FCC, do you?

Mr. NICHOLS. Not that I know of. The case still isn't settled after almost nearly 10 years now. However, I am no longer a party in this case. But I followed Mr. Ferris out and I said, "Mr. Ferris, are you going to be able to stay for the rest of the hearing?"

He said, "No, I am unable to do so."

I said, "I am sorry, sir, for I wish you could be there and you could hear with your own ears what I have to say. Because, sir, I am going to tell them that you—the FCC—tell this committee one thing, and then you go and practice something else."

"You believe I do?" was his reply.

I said, "Yes, sir., Mr. Chairman, that is my considered opinion, and from my personal experience, I have sat in almost every hearing that has been held for about the last 4 years."

I have heard from year to year the FCC Chairman and Commissioners telling the Senate Commerce Committee one thing and yet they go out and do the complete opposite.

Senator HOLLINGS. That is with respect to the Fairness Doctrine?

Mr. NICHOLS. In respect to the Fairness Doctrine, sir.

You have a gigantic task before you to determine just what really is the truth. Now, I hope Dr. Ralph Jennings is here because I hope he can hear with his own ears what I have to say.

He sat right down in this chair right before you, and with a straight face, sir, he told you one thing, and yet he leaves this place and he goes out and practices the complete opposite.

In other words, he is nothing more than a hypocrite. I make a strong statement, and I am prepared to defend that statement before you,

and I hope to God some day, some place, you can get that man and you can get Dr. Parker, and you can get the Chairman of the FCC and Commissioners, and get them all in one room and just lock the door until you get some answers until you know what the truth really is, sir. You are not getting that.

Senator HOLLINGS. All right, sir.

Senator Goldwater has an Intelligence Committee meeting in just a few minutes. He cannot continue any longer with us, but the statements will be included in their entirety, and any additional submissions that you wish to submit for the record.

Dr. McINTIRE. Mr. Senator, is it too much to ask that the speech that Senator Sam Ervin made when he was in the Congress which deals with this whole issue very thoroughly, be incorporated in this record?

Senator HOLLINGS. It will be included in the record by reference.

Senator GOLDWATER. Reverend Nichols makes a very good point. I am not taking your side, or the other side, but I don't have the highest regard for Government agencies. And I have always said in our business when we get a letter back in answer to a question, if it is more than 1 page, the answer is, "No." If it is less than 1 page, the answer is, "Yes."

I am new to this committee. I would like to hear from both sides on how they interpret the Fairness Doctrine. There is a lot of good in the Fairness Doctrine and there is a lot of bad in it, but we are not going to understand each other until we can knock heads.

Senator HOLLINGS. Very good.

Mr. NICHOLS. I think, sir, that if my testimony before the previous committees, if it could be inculcated by reference into this record, you could find some interesting comments that might help you understand some of the problems. But my former Congressman told me the only way I am going to get justice is to take to the streets, to get some guns and get some bombs, kill a few people, and only then will I get some justice. And, sir, I am here to ask you to please do something because there are many, many thousands of people in our area that are completely deprived of their constitutional rights.

The Fairness Doctrine is supposed to protect the public, but it has deprived them of their rights.

Dr. McINTIRE. Senator, may I say in reference to being second-class broadcasters, I would say we are worse than that. We are the corpses.
[The statement follows:]

STATEMENT OF REVEREND JIM NICHOLS

Yesterday, I went past the Archives Building. In front of it, carved in stone was the admonition "Study the Past". That is why I am here. I represent the past. I am a victim of what the Fairness Doctrine does. You can study me. You can ask me any question you desire. As you do, I believe you will find ample reason why, the Fairness Doctrine and ALL that it stands for MUST be done away with.

Over the main entrance into the Union Station engraved in stone is a famed quote taken from the Bible, "The Truth Shall Make You Free". It is my belief that the proof of the pudding is in the eating. The greatest source of learning comes from the school of hard knocks. If you gentlemen want truth, not theories, facts not fantasies, then, Mr. Chairman, I am the person, as the expression says, you should fire away at.

Since 1967, the Fairness Doctrine has been used as a weapon to try and silence me. Then in the middle of 1968, Dr. Everett Parker and the Broadcast Commission of the United Church of Christ, supplied a small group of citizens (of differing views, yet having access and opportunity to air those views) with expertise,

attorneys, much of the work force, and using the Fairness Doctrine launched a citizens challenge against radio station KAYE, way out in the northwest part of our nation. KAYE is a small radio station having 1000 watts day time, and 250 watts during the nighttime hours. It is in a small community called Puyallup, adjacent to the second largest city in the State of Washington, Tacoma. Finally in April of 1969, Dr. Parker's group filed a "Petition to Deny" with the FCC against KAYE, of which I was the President and general manager, thus I have been the principal in the case.

As a result of this challenge under the Fairness Doctrine and without one single complaint being verified or proven I have seen some of the following happen: (It should be stated that when the listeners heard of this Petition to Deny being filed, some of them made up a Petition to Renew the license. All told there were 69 signing the one to deny, 7000 signed the Petition to Renew.)

1. Thousands of people have been deprived of the kind of radio programing they wanted. In fact, wanted so much they contributed in cash and in kind contribution in excess of \$500,000.00 for legal fees.

2. The heartbreak and anguish as thousands of people have been deprived of that which is sacred to them, Constitutional Rights.

3. Gone through the face of two FCC hearings both of which were aborted by the Administrative Law Judge ejecting my attorney. This is something that had never happened before in FCC hearing history. My attorney has the distinction of being the first attorney to be ejected from an FCC hearing. Then he has the more being the first attorney to be ejected from an FCC hearing. Then he has the more

4. After the first aborted hearing costing approximately \$150,000.00, and the expenditure of another \$100,000.000, we appealed the Administrative Law Judge's decision to the FCC Commission, who, overruled their own Judge's decision and ordered him to give us an opportunity to present our rebuttal.

5. We then went into a second hearing, costing approximately another \$150,000.00. This too was aborted and the Administrative Law Judge making a second adverse ruling against KAYE.

6. Spending approximately \$100,000.00 we succeeded in appealing this second decision to the FCC Commission. The FCC for the second time overruled their own Judge's decision and ordered a third hearing which as yet, for several reasons has not taken place.

7. Because of legal action that I have personally taken this point and other testimony is omitted.

THE FAIRNESS DOCTRINE SHOULD BE ABOLISHED FOR THE FOLLOWING REASONS

1. The public are being deprived of their Constitutional rights

Fact 1. A survey taken during an 11 state convention of the National Association of Broadcasters, Portland Oregon in 1969 revealed that 95 percent of the licensees admitted to being censored and gaged through fear of FCC Rules and Regulations including the Fairness Doctrine.

Fact 2. The Washington State Association of Broadcasters held their State Convention for 1970-1 in Olympia, our State Capital. During the Convention a further survey was taken. This revealed that 87 percent of the licensees admitted to be controlled or censored because of FCC Rules and Regulations and the Fairness Doctrine.

Fact 3. During the 1977 California Broadcasters Association Convention held in Monterey July 17-19 another survey was taken. 100 percent of the licensees who responded admitted to slanting the news so they would not jeopardise their license.

Fact 4. Presidents of 5 state Associations of Broadcasters have tried to encourage me to stay in this battle for they recognize it as their's. They have further stated that though they will like to contribute funds to help me fight this battle, they dare not. The reason given is one of FEAR. They have reason to believe that if it became known they had contributed as little as one penny, then the same forces that caused my problem could turn on them.

Mr. Chairman, you and some of your committee may find it hard to visualize that this fear is so real so far reaching. Because of my unique position I can assure you it is for real. I have found it has spread, like a deadly virus, to broadcast from the north to the south, and from the west to the east.

2. The public has been and are being deprived of their constitutional right because the broadcasters are deprived of their constitutional rights.

The power to license is the power to control. And CONTROL is exactly what the FCC (whether deliberately or otherwise) has accomplished. One of the shock-

ing revelations of Watergate was brought to light by Senator Richard Schweiker, when he released 42 "super secret" "Confidential" "For eyes only" memorandums showing how certain political forces were planning to control the news media. This must not happen, but, it could happen unless broadcasters are given 1st Amendment protection. This Senator Proxmire advocates in S.B. 22.

When one person is deprived of their Constitutional Rights, there is a chain reaction effecting and depriving others of their basic rights.

3. *Without a free press (a press free from Government control) there can be no free society*

Constitutional right must not under the guise of regulation be abridged or denied.

There is no valid reason to deprive the radio broadcaster of 1st Amendment rights. The press is the press, is the press.

Any objective, such as the Fairness Doctrine, however good or noble it may be, if it can not be achieved without the sacrificing of fundamental Constitutional rights, then, it must be abolished. Remember, this is not merely my opinion but it is also my experience.

The intent of the framers of our Constitution is made very clear, Madison's version of the speech and press clauses, introduced in the House of Representatives on June 8, 1789, provided: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable." (Annals of Congress 434 (1789))

That the "simple, acknowledge principles" embodied in the First Amendment have occasioned controversy without end both in the courts and out should alert one to the difficulties latent in such spare language. Insofar as there is likely to have been a consensus, it was no doubt the common law view as expressed by Blackstone. "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is proper, mischievous, or illegal, he must take the consequence of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the Revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion and government." (Freedom of Speech and Press in early American History—Cambridge; 1960—U.S. Constitution revised and annotated p. 936-7)

In *New York Times Co. v. Sullivan* is provided the principal doctrinal justification for the development, although the results have been fully applied by the court. In *Times*, Justice Brennan discerned in the controversies over the Seditious Act a crystallization of "a national awareness of the central meaning of the First Amendment," *id.*, 273 which is the right of free public discussion of the stewardship of public officials . . . is a fundamental principle of the American form of government." *id.*, 275 (*New York Times Co. v. Sullivan*, 376 U.S. 254 1964)

"The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false." (*Patterson v. Colorado*, 205 U.S. 454, 462 1907). See also Justice Frankfurter in 1951 United States Constitution Revised and Annotated 939

4. *Because of your oath of office*

Each one of you have, upon your sacred honor, taken an oath or affirmation to support and uphold the Constitution of the United States of America. Certainly in this day and age of suspicion and distrust by the general public on the part of our government, it behooves each elected public servant to determine, as never before, to live by, and if needs be, die by our Constitution. If any of you feel you can not honor your oath of office then you have no business being there. You should do the honorable and resign.

5. *Because elected officials are alone entrusted with the responsibility of making laws (Article I, Section 8, Clause 18, U.S. Constitution)*

Appointed and nonelected officials have no Constitutional authority to make laws. When non elected officials make Rules and Regulations, they are in reality making laws. For Rules and Regulations have, to all intents and purposes the power of law until someone with enough gumption and fortitude proves them otherwise.

True, it might be easier and more convenient for elected officials to have bureaucrats make Rules and Regulations, but elected officials fail in their responsibility when they allow such to happen. And in most cases the intent of Congress, the Constitution and the general public is not carried out and we have developed an arrogant and tyrannical type of bureaucracy like what several thousands of people have seen of the FCC in the handling of the KAYE case. There are those who fled from the tyranny of totalitarian governments in Europe and they have stated they have never seen, or heard anything there, like they did during the KAYE hearings and losing their station.

Only when elected officials make the laws do they know what is going on. A good example of this is the Fairness doctrine itself. This was evident when the former chairman of this subcommittee describes it as one thing and the FCC Commissioners describe it as something else.

As the Executive Secretary of the Committee For the Preservation of Our Religious Minority Rights it has been my opportunity to observe and then conclude, that the Fairness Doctrine is not fair. The Fairness Doctrine does not work. The Fairness Doctrine did not work for Pastor Buddy Frankland and the people of the Bangor, Maine area. It did not work in regards to Radio Station KTRG and the people of Honolulu, Hawaii. It did not work in behalf of The American Board of Mission to the Jews when only 1 out of 19 television stations carried their program. The Fairness Doctrine did not work for Dr. Epp and Back to the Bible Broadcast on Radio Station KFOR, Lincoln, Nebraska. It did not work for Pastor Jerry Falwell when 105 stations refused to air his Sunday morning service. The fairness doctrine did not keep the kind of programing which a large number of people wanted on KXA in Seattle, Washington.

The Fairness doctrine has not worked in presenting to the American people a fair presentation in regards to the defense of our nation. This is proven by the Lefever report. Nor did the Fairness Doctrine work in regards to the confrontation or whatever it was we had in Vietnam.

For the above and other reasons I urge you to abolish the Fairness Doctrine and give the American Public their Constitutional Right by supporting the Proxmire bill. Thank you.

"Ye shall know the truth and the truth shall set you free." John 8:32.

Senator HOLLINGS. The committee will be in recess until the call of the Chair.

[Whereupon, at 12:17 p.m. the subcommittee recessed, to reconvene subject to the call of the Chair.]

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

STATEMENT OF HON. WALTER D. HUDDLESTON, U.S. SENATOR FROM KENTUCKY

Mr. Chairman, I am pleased to offer this testimony before the Senate Commerce Committee's Subcommittee on Communications which is holding hearings on S. 22. This bill would, among other things, overturn the "fairness doctrine" as it applies to federally licensed broadcasting stations. I am offering this testimony to the Subcommittee for two primary reasons. First, as a Senator, I am concerned that the elimination of the fairness doctrine may deprive the public of the broad spectrum of ideas, concepts and information that is vital to the successful operation of any democracy. And, secondly, I would like to share with the members of this subcommittee my firsthand knowledge of the doctrine which I acquired during the twenty years that I owned and managed broadcasting stations in Kentucky. My long experience in the broadcasting industry has permitted me to observe closely the operation of the fairness doctrine from a point of view that is not accessible to many lawmakers. Hopefully, my comments will lend some balance to the testimony of some detractors of the doctrine who have never dealt with it on a day-to-day basis and, therefore, are unfamiliar with its practical application.

The fairness doctrine has been a viable part of our communications laws for many years and is well founded in both statutory and case law. I believe that it is important to know the history of the doctrine in order to understand how its development meets specific needs of the American people while complementing and enhancing our First Amendment rights.

Before 1927, the federal government adopted a laissez-faire policy with regard to the broadcasting industry. Private broadcasters were left to regulate themselves with each broadcaster deciding when, where and how to broadcast. The result was chaos. Frequencies often overlapped, and broadcast interference was a common part of almost every program.

A series of National Radio Conferences recognized the need to bring some order to the chaotic conditions by imposing some type of control. The result was a resolution calling for regulation of the broadcasting industry by the federal government. With this resolution and knowledge of the existing chaotic conditions as impetus, the Congress established the Federal Radio Commission in 1927 to allocate frequencies among competing applicants in a manner consistent with public convenience, interest and necessity. Thus, the concept of public trustee of the airways was established on the basis of clear and convincing need.

From this authority the Commission developed the two-fold duty of broadcasters which has become known as the "fairness doctrine." In the Report on Editorializing by Broadcast Licensees, 12 FCC 1246 (1949) this duty was described as requiring the broadcaster to give adequate coverage to public issues, and such coverage must be fair in that it accurately reflects opposing views. The basic fairness concept was consistently supported and upheld by case law and later ratified by the Congress.

In 1959, Congress amended Section 315 of the Communications Act to state specifically that broadcasters had an obligation under the act "to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." It was clearly evident to Congress, after seeing the chaos of self-regulation and reviewing the operation of the industry under the two-fold duty imposed by the Commission, that the fairness obligation should be formally recognized and restated in the statute.

The validity of the fairness doctrine has been upheld by the courts on numerous occasions. In 1969, the Supreme Court, which is the ultimate authority on the constitutionality of our laws, reviewed the issue of the doctrine and spoke out forcefully in its defense. The court in the case of *Red Lion Broadcasting Co. Inc., v. FCC* 395 U.S. 367 (1969), held that the FCC had the authority to enforce the doctrine and that the doctrine did not violate the First Amendment of the Constitution. The court stated in this historic decision that :

"It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgement of freedom of speech and freedom of the press. Congress need not stand idly by and permit those with licenses to ignore the problems which beset the people or to exclude from the airways anything but their own views of fundamental questions. The statute, long administrative practice, and cases are to this effect."

The Supreme Court could not have been clearer or more unequivocal in its holding and, as we all know, this case still stands as controlling law.

We should not be stamped into hasty and unwise actions by allegations that the fairness doctrine has not worked perfectly or that it may have a "chilling" impact upon some broadcasters. This does not mean that the law is basically unsound or has not dealt effectively with the problem it was designed to cope with.

The vitally important point to bear in mind is that the basic principles which underlie the fairness doctrine are still as sound and applicable as they were over forty years ago. Admittedly, the doctrine has not worked perfectly, but I fear that the alternative proposed—its termination—would leave our First Amendment rights in far greater jeopardy than they presently are.

Let me turn for a moment to the underlying philosophy of the fairness doctrine which is based primarily on the allocation of a scarce resource; consistent with the interest, convenience and necessity of the public which owns the airwaves. When we experimented with self-regulation in the 1920's, it became patently evident that a referee was needed to assign specific frequencies for transmissions. The referee became the federal government, and to it fell the responsibility of deciding which applicant received a license to broadcast. Since there were more applicants than available frequencies, many who wished to have the privilege of exercising their First Amendment rights over the airwaves were denied this right by the referee. This arrangement forced the referee to devise a system whereby the license could not monopolize this scarce resource by only presenting views that licensee adheres to or which are profitable to the licensee. The court in the *Red Lion* case found nothing objectionable with this arrangement and so stated on page 389:

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

The key word in this paragraph is "fiduciary"—or one who holds something of value in trust for another. A fiduciary is bound not to misuse that which he holds in trust or to use it for any other than the stated reason.

Some broadcasters are seeking sympathy for their efforts to kill fairness by referring to themselves as "second class citizens." On the contrary, the fairness doctrine is our way of recognizing that broadcasters are special citizens who possess a power which carries with it a higher duty to all other citizens. This concept is applied without objection to other professions. For example, lawyers are held by the law to be fiduciaries in handling certain legal matters for their clients. Because of this unique relationship, the lawyer is held to a higher standard of accountability than would be a non-lawyer. I do not believe that an attorney would refer to himself as a "second class citizen" because special duties are imposed upon him as a fiduciary. Furthermore, I do not believe that anyone would seriously accept the contention that the presidents of CBS or NBC are "second class citizens."

Furthermore, implicit in the right to express oneself freely is the right of others to hear those views. If the referee is required to limit the number of broadcasters, others have been denied by this action their right to hear the ideas of those refused licensees, and there arises a duty to provide a means whereby opposing or competing views can be presented. As the court in the *Red Lion* case stated, ". . . it is the right of the viewers and listeners, not the right of the broadcaster, which is paramount." In order to protect this paramount right, the trust of the airwaves must be administered fairly and equitably for all.

The argument has been made that the fairness doctrine, as administered by the FCC, has a "chilling" effect on creative programming and actually inhibits the initiation of more discussion programs or aggressive news coverage. As the argument goes, this constitutes an abridgement of the First Amendment rights of those who hold a broadcast license and engage in broadcast journalism.

In response to these contentions, let me say that my experience as a broadcaster and my personal knowledge of the operating policies of many stations lead me to believe that no substantial inhibition has resulted from the application of the fairness doctrine. If the doctrine has served as an inhibitor, and, again, I say that I do not believe that it has, it certainly would be a sad commentary on those who have received a license to use the public's airwaves on a pledge to operate in the public's "interest, convenience and necessity."

I believe that for every instance in which First Amendment rights might have been inhibited or restricted by the doctrine there are numerous instances where these rights have been vastly extended because of it.

The value of guaranteeing the presentation of opposing viewpoints and of extending the opportunity to be heard to other voices far outweigh, in my judgment, any additional burden there might be imposed upon the broadcaster in complying with the regulations. The burden imposed by the doctrine is not onerous and does not stand in the way of broadcasters who really want to engage in creative programming. I believe the allegations that the FCC's enforcement of the fairness doctrine and other communications regulations pose a pervasive threat to licensees are greatly exaggerated.

The FCC does not attempt to substitute its judgment for that of the licensee. The standard used by the Commission is one of reasonableness and good faith. The FCC states in its publication "The Fairness Doctrine and Public Interest Standards" that:

"Our rulings are not based on a determination of whether we believe that the licensee has acted wisely or whether we would have proceeded as he did. Rather, we limit our inquiry to a determination of whether, in the light of all of the facts and circumstances presented, it is apparent that the licensee has acted in an arbitrary or unreasonable fashion."

The statistics involving fairness doctrine complaints and violations do not support the contention that it is a suppressive statute which stifles controversial programming. The FCC receives, on the average, approximately 5,000 complaints under the fairness doctrine. Of these, 97 percent are dismissed without requiring the licensee to respond at all. In the remaining 3 percent, the complaints are forwarded to the broadcasters for their comment. Eighty-five to ninety percent of these are resolved favorably by the licensee without any further government involvement.

In only two cases have stations lost their licenses because of fairness violations. Both of these cases involved situations where the licensee was explicitly advised of fairness complaints and requested to reexamine his policies. These figures certainly do not support the allegation that the FCC is a super editor peering over the shoulder of every broadcaster.

Some anti-fairness individuals have claimed that the FCC Commissioners decide what is heard or seen on radio and T.V. I find this point of view misleading and simplistic. The contention implies that the Commissioners exercise some form of censorship over program content, which is not true. Section 326, Title 47 of the U.S. Code specifically provides that the Commission does not have the power of censorship nor the authority to interfere with the freedom of speech. Under the authority of the fairness doctrine the Commission cannot change, alter or delete program content; it can only require that divergent points of view be aired when a controversial topic is the subject of a program.

Those who oppose fairness on the airwaves argue that newspapers and broadcast stations are in essence the same and should be treated equally. However, this is not true; there is a distinct difference between them. The Supreme Court has recognized this difference and has applied different standards to each. In the *Red Lion* case the Court stated:

"Although broadcasting is clearly a medium affected by a First Amendment interest . . . differences in new media justify differences in the First Amendment standards applied to them. (*Red Lion Broadcasting Co. v. FCC*, 395 U.S. 386 (1969))."

The basic difference was again upheld and strengthened by the Supreme Court in its decision in *FCC v. National Citizens Committee for Broadcasting* (June 12, 1978). The Court rejected the argument that barring newspaper owners from owning broadcast stations was an infringement of their First Amendment rights. Justice Marshall stated that:

"... this argument ignores the fundamental proposition that there is no unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. . . ."

"The physical limitations of the broadcast spectrum are well known. Because of problems of interference between broadcast signals, a finite number of frequencies can be used productively; this number is far exceeded by the number of persons wishing to broadcast to the public. In light of this physical scarcity, government allocation and regulation of broadcast frequencies are essential, as we have often recognized."

The fact that the printed media are not licensed by the federal government while broadcasting stations are, and the fact that no person is prohibited by regulations from printing a newspaper, magazine, or book while all but a relative handful of citizens are prohibited from owning and operating a broadcasting station cannot be ignored in applying the provisions of the First Amendment.

Although considerable progress has been made in increasing the number of broadcast stations, their number does not come close to equalling the ubiquitous press. In 1977 there was approximately 9,000 broadcast stations in this country, yet there were 11,089 newspapers and 9,732 periodicals. If you consider the uncountable books, pamphlets, and mimeographed information sheets with these figures, you can only reach the conclusion that compared to the press, broadcast stations are an extremely scarce resource.

I think it is important to remember that the First Amendment to our Constitution guarantees both freedom of speech and freedom of the press. In the great media of broadcasting these two rights may conflict, and in order to extend the former to all citizens it is necessary to regulate the latter which is only available to a select few.

I do not believe that it would be consistent with the Constitution, or in the best interest of our country or the broadcasting industry to make the fortunate few who are eligible to secure a license the sole custodians of these precious rights as they apply to radio and television.

In considering this issue we should remember that broadcasters are both journalists and businessmen and must wear two hats when performing their jobs. As journalists they do a commendable job of bringing important and controversial issues before the public for full debate. Unfortunately, as businessmen they are often preoccupied with ratings and profits. Without a mandatory policy such as the fairness doctrine, I am afraid that programming would be unduly influenced by the business aspect and that the result would be a further deterioration in program quality. The technology of broadcasting has the potential for substantially improving and enhancing our lives. However, we will not be able to reach our full potential in this area if we remove those affirmative and worthwhile duties imposed by the fairness doctrine. It may be that as the state of the technology advances we can make some modifications which are not inconsistent with the underlying philosophy of the doctrine. However, we should not act even to make modifications without clear and convincing proof that the changes will be improvements. More speculation that elimination of the fairness doctrine would not adversely affect the quality of broadcasting is not enough.

Mr. Chairman, at this time, perhaps more than any other in our history, it is imperative that the American people be able to hear and consider a wide variety of ideas and viewpoints. The legislation before this subcommittee regarding the fairness doctrine would, in my judgment, substantially reduce the opportunity for our citizens to participate in full discussion of the major issues of the day. For this reason I urge that the subcommittee reject the pending measures as they apply to the fairness doctrine.

Mr. Chairman, another subject of these hearings is the possibility of changes in the equal time section of the Communications Act. As I am sure you are aware, I have introduced legislation, S. 1962 to modify the equal time requirements found in section 315 of the Act. In the 93rd and 94th Congress I cosponsored similar legislation with the distinguished Senator from Rhode Island, Senator Pastore.

My bill, as was the case with Senator Pastore's legislation, would exempt broadcasters from the equal time requirement only in regard to legally qualified candidates for the offices of President and Vice President of the United States. On July 27, 1977 the Federal Communications Commission endorsed this goal. I believe that the hearings being held this week are yet another indication that the time may be right for making necessary changes in the law.

It bears emphasizing that unlike elections for other offices the presidential campaign invariably attracts a virtual plethora of candidates, all of whom must receive equal treatment from broadcasters under section 315 regardless of the significance of their campaign or the breadth of their support. Therefore, broadcasters are necessarily inhibited from offering free time to major presidential and vice presidential contenders for fear of being deluged with requests for equal opportunity from fringe or minor candidates. It is my understanding that in past election years television networks have been prepared to offer substantial amounts of expensive air time to presidential and vice presidential candidates if the requirements of section 315 were lifted. There are a few of us who would not agree that the burden imposed upon broadcasters by the minor candidates is excessive and the benefits derived from granting them equal time would be minimal. On the other hand, the loss to the nation from being deprived the opportunity to hear major candidates state and defend their positions on the pressing issues of the day would be considerable.

One only needs to look to history for precedent, indeed support in justification for what I have proposed. Passage of Public Law 86-677, which called for in 1960 exactly what I suggest for future presidential election years, resulted in what few can dispute was one of the great political exercises ever undertaken, the Kennedy-Nixon debates.

In oversight hearings held by this committee to report on the effect of the implementation of Public Law 86-677, Mr. Frank Stanton, the then president of the Columbia Broadcasting System, made the following comments to those who contended that there are risks to the nation involved in the debates.

"The answer is, it seems to me that the whole democratic idea is shot through with risks. But democracy is not just a political system, it is an act of faith, a commitment to the proposition that given enough interest and information the people are better equipped to govern themselves than anyone is to rule over them."

An educated electorate is no less necessary now than it was in 1960. Arguments could be made that this need is ever increasing. The public should not be denied access to the ideas of the men who are striving to be their leaders.

With the enactment of S. 1962 we have the opportunity to both substantially reduce the cost of future presidential campaigns and to remove one of the primary impediments to a well informed electorate capable of wisely deciding the critical issues of national leadership. Thus, Mr. Chairman, I urge that the committee act quickly on S. 1962 or other similar measures pending before you.

STATEMENT OF CARL A. EIFERT

The first amendment to the Constitution protects five freedoms of all Americans. Each of those five freedoms—of religion, of speech, of press, of assembly, of petition—protects ideas and their expression. And the first amendment prohibits outright governmental interference with those freedoms. Because under our system the power to govern is given by the governed, the first amendment is the bulwark designed to stay the government from usurping authority over and beyond that granted by the people through their elected representatives.

The Congress shall pass no law abridging those five freedoms, the first amendment says. If Congress had passed no law touching those freedoms other than section 315 of the Communications Act it would be quite easy to persuade this Subcommittee to repeal that section. But down through the years many laws have been passed interpreting all of those freedoms.

The famous dictum that shouting fire in a crowded theater is not covered by the free speech protection of the amendment suffices to make the point. The clear and present danger of trampling injury or death that such a shout would bring is accepted as a legitimate abridgment or diminishment of free speech.

Similarly, libel and slander laws of the states are considered constitutional. But even with those, malice must be proved if public figures are to win damages. The only federal libel law that ever existed, the Alien and Sedition Act, was allowed to expire early in our history and has never been reenacted in any form because it was believed to be unconstitutional. It took away the right to criticize the government.

So, there are enough interpretative laws involving first amendment rights to fog the eyes of liberty-loving citizens when it comes to the danger of governmental interference with the free press rights of broadcasters as encompassed in section 315.

Section 326 of the law says that there should be no censorship of broadcasters, noting their right to free speech. But there is no such caveat in the law concerning free press rights of broadcasters.

Perhaps that is why the Federal Communications Commission steps warily around the content of entertainment programming. But that gingerly attitude is not taken by the FCC about news and public affairs.

A California court held that government officials wrongfully pressured broadcasters to adopt the so-called family hour, even though the FCC did not proclaim that the first two hours of prime time each evening should be programmed suitably for children. Actually, the broadcasters voluntarily adopted that stance upon seeing the upraised arm of officialdom. Even an implied threat was enough to persuade the court that the government, nonetheless, had interfered with broadcaster's first amendment rights.

In contrast is the *Red Lion* case. The Supreme Court held there that the FCC and the fairness doctrine "enhances" the first amendment. That often cited case, decided in 1969, was instigated it turns out by Democratic administrations wishing to still dissenting voices heard on the air. Fred Friendly made the revelation some six years later in the *New York Times Magazine* and later in a book. The court, of course, never knew about that nefarious use of the fairness doctrine by the government to step on first amendment rights. Had it known, might not it be safe to conjecture that the decision would have been different?

The *Red Lion* case also points up—although not an issue in litigation there—the fact that broadcasters with religious connections have had great trouble with the FCC. Another example is WXUR in Medina, Pa.

The point, to reiterate, is that down through the years the fairness doctrine has been a sword—mostly sheathed—threatening the exercise of free press rights by broadcasters. Meanwhile, the FCC has sanctimoniously cited free speech rights and its respect for the first amendment when it comes to entertainment.

Yet, the Supreme Court has given first amendment rights to publishers, movie producers and advertisers, making exceptions only for broadcasters of radio and television signals. Why? Somehow a specious argument that the electromagnetic spectrum is different than newsprint, high gloss paper and film because the spectrum is limited in its carrying capacity has arisen. But ideas are ideas whether they be propagated and transmitted electronically or committed to paper or film. Why should the means of dissemination make any difference in applying a principle that transcends technology?

Economically the limitation argument makes no sense. In what American city do daily newspapers outnumber even television stations, not to mention radio stations? Even if weekly and specialty publications printed locally are considered, one would be hard-pressed to find such a city.

To argue that if governmental controls were lifted broadcasters would ignore public issues or somehow present a monolithic ideology is to ignore a basic fact—they are in competition for listeners and viewers.

But, the argument goes, television especially, is more influential than any other medium of communication. That is a serious argument that seems to be accepted without question by critics and supporters alike. The argument, reduced to its simplest terms, is that exposure to television deprives one of the ability to think for oneself. The blinking tube, critics would have us believe, mesmerizes like the swinging watch of the hypnotist.

A jury in Florida would not accept the argument that a young killer's mind was captured by the many acts of violence he had seen while addicted to television. Sure, many instances can be cited in which fictional crimes depicted on television have been, within days, reenacted in life. But what about the minds that could be so led? Were they normal to begin with? Critics would have us believe that. They would have us believe that ideas picked up from television were the primary causes for turning normal minds into sick ones.

Even a rudimentary knowledge of psychology is enough to know that at best any form of communication—newspapers or television shows—reinforces ideas already held. The only way for a published or broadcast idea to change opinions is for the reader or listener to use his own mind to reason. And then there is no assurance that the idea published or broadcast will be accepted.

That idea can be rejected or altered by the thinking person. To hold otherwise would negate the very basis of our form of representative government. At the national level, our Constitution presumes the ability of the voter to accept or reject a candidate and his or her ideas. The Constitution is founded on the belief

that a majority of the voters will have the good sense in the long term to choose officeholders who will protect the commonweal. It is also founded on the presumption that a majority will be able to replace an officeholder who turns out to be undesirable.

The equal time rule required by section 315 seems to be founded on the assumption that if voters hear or see a candidate for office on radio or television but not his opponent that the voters will be compelled to vote for him. Surely it is only reasonable for those hearing the candidate's words to react in as many ways as the number hearing him. Some won't pay attention. Some will reject him outright. Some will find something to agree with and more to object to. Some will want to know what his opponent is saying and seek that out. Some will switch him off or change stations. Some will all but worship him. Some will retch. Some—perhaps most—will give him a fair hearing and decide for themselves.

The equal time rule's supposition that his opponent will go unheeded save for the rule is sheer nonsense. It overlooks the fact that an exact duplicate of the audience who heard the first candidate can never again be assembled or, if it could, could not have the exact frame of mind. Sure, it is built on the assumption that only the opportunity need be given. But it ignores that fact that other means of providing that opportunity exist through the free press—through other means of communication, including other broadcasters. It also ignores the real world situation that broadcasters, who can be forced to give time to a second, third, fourth candidate, may just refuse to provide time for the first. That frustrates the whole idea of equal time.

In any event, the government has no business under our system of involving itself in allocating time for candidates. After all, the Supreme Court struck down campaign spending limitations on individual citizens, reasoning that the government had no authority to tell a citizen how he could use his money in a political campaign if he acted alone.

At the center of this whole discussion should be a consideration of the psychology of listening and viewing. In general, there are two schools of psychology, behavioral and functional. To oversimplify, the behaviorists believe that outside forces can form thought and thus action. The functionalists believe that people can and do think for themselves despite outside stimulation. Until one or the other, or some middle ground, is found to be the correct theory, the Constitution should not be bent to favor an unproven theory. For if, indeed, a person—any normal person—cannot be trusted to watch television because of what it might do to him, then no one can be trusted to produce television shows and, further, no one can be trusted to write or read newspapers, or books, or magazines, or produce or watch films.

That, of course, is absurd.

But that is the ultimate if indirect governmental control over programming, as espoused in the fairness doctrine and the equal time rule, is right and just. For if it is, then complete and direct governmental control would be better, and the Constitution along with the first and other amendments, would have to be abrogated.

It is not absurd, however, to suppose that if the restraints on broadcasting now tolerated are permitted to continue that stronger and stronger demands will be made on the Congress to apply similar restraints to newspapers. The time could come when an amendment to the Constitution might be proposed to curtail freedom of the press. Imagine what impact a mere proposal of such an amendment would have. It could restrain enough editors lacking backbone to make a difference, a difference that would put a heavy burden on responsible editors and publishers to carry on with the ever-needed watchdog role concerning government.

Remember, there were few newspapers with that courage during the Watergate matter. Television nearly was unheard from during that period. Even Walter Cronkite reportedly was constrained to reduce coverage at one point.

The psychology of threats to press freedom, generally called the chilling effect, is real. Supporters of the fairness doctrine claim that there is no hidden threat from the government in requiring broadcasters "to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." Nevertheless, the Supreme Court has recognized the chilling effect in cases analogous to broadcasting in the past. And just the other day in the Stanford Daily newspaper case Justice Potter Stewart gave an example of the chilling effect in writing a dissenting opinion he wrote:

"Policemen occupying a newsroom and searching it thoroughly for what may be an extended period of time will inevitably interrupt its normal operations and thus impair or even temporarily prevent the processes of news gathering, writing, editing and publishing." And further on:

"It requires no blind leap of faith to understand that a person who gives information to a journalist only on condition that his identity will not be revealed will be less likely to give that information if he knows that, despite the journalist's assurance, his identity may in fact be disclosed."

The Supreme Court's 5 to 3 decision upset lower court rulings that a search warrant could not be used by police to get photographs believed in the student newspaper's offices that might lead to discovery of persons involved in a campus demonstration in which seven policemen were injured.

The case is important in the context of these hearings for it shows that the first amendment rights of newspapers must always be guarded and, more important, that the Supreme Court is more concerned about details than the philosophy behind freedom of the press. It was callous with that freedom in this case. So it is no idle musing to fear that the philosophy of first amendment rights are ignored in discussing the weaknesses of broadcasters, then someday the free press rights of newspapers can be eroded in the courts to a point at which our democratic republican form of government will be changed.

In defending freedom of the press one has to defend the right to be mediocre and bad as well as the right to practice sound, fair and professional journalism. If the government has a right to force broadcast newsmen to be fair and accurate, logic says it can do the same to newspapermen, authors and other writers. (Last week a Congressman is reported to have suggested that publishers be required to label their books fiction or nonfiction because he was concerned over a new book that was claiming to reveal an instance of human cloning, which science says is impossible.)

But it is obvious that the purpose of the first amendment's explicit protection of the press—the only industry expressly given protection in the Constitution—was to prevent the government from controlling what was said about it. If government can do that, it no longer will exist by the consent of its citizens, the governed.

Late in May, just a day before the *Stanford* case, the Supreme Court held that the fairness doctrine does not apply to ordinary commercial advertising. The court thus upheld a sensible rule of the FCC. But how does that square with the WTOP-TV case in which the Washington, D.C., broadcaster was forced to carry messages that countered institutional commercials by an oil company that purportedly argued for retention of the vertical structure of its ground-to-filling station marketing system?

Last month, a year or more after those so-called counter-ads were ordered by the FCC and carried by the station, the Supreme Court ruled in a Massachusetts case that states cannot forbid corporations from spending funds to promote political causes, although no candidates. WTOP-TV was forced to give free time to a group that attacked oil companies for saying, it would seem from the recent court decision, what they had every right to say.

Television and radio stations should be permitted to operate in the same way newspapers would under such circumstances. Anyone who wants to buy newspaper space to present a message arguing a point is able to do so if the newspaper will accept the ad. The newspaper has a right to reject any advertising (as do broadcasters), but newspapers cannot be forced to accept such advertising as broadcasters can be by the government.

That is not just.

In a gratuitous concurring opinion in the Massachusetts case, Chief Justice Burger went beyond the issues. There are various interpretations of what he wrote. One is that Burger seemed to be warning his colleagues that their decision might mean that because big news organizations are corporations, too, they might not continue to have special protection under the Constitution not given other corporations.

Justice Stewart has pointed out that special status given the press under the first amendment. Therefore, the Massachusetts case—and now the *Stanford Daily* case—might undermine freedom of the press.

The argument is sometimes made that broadcasting is the major source of news in this country and as such the governmental controls are necessary to keep it fair. It is just because it is the major source that broadcasting should be free from governmental controls. Reduce the effectiveness of the major source to communicate and communication is reduced. Our form of government needs full and unfettered communication to work.

TV news directors and producers are restrained by the fairness doctrine from practicing the kind of robust journalism that good newspapers produce. The time and effort required to protect themselves from complaints to the FCC is a

natural restraint. There is no doubt about that. Stopwatch journalism is not good journalism. Producers of documentaries are particularly subject to complaints. Scripts have been changed before airtime because word has got out of the subject matter, bringing complaints. Such worries must lurk in the subconsciouses of broadcast journalists. And this has nothing to do with fairness, for professionals will be fair. Besides, a mass medium must be fair if its practitioners are to stay in business.

Another argument often heard is that broadcasters make up a monolith of thought. If that's true, why the competitive nature of the business? Sure there is imitative programming. But don't newspapers do the same thing? Given their freedom, there is no reason why competing networks and stations would not try to put out more complete news and public affairs programs than their competitors. The June 2 New York Times reported that ABC wants a stronger news operation in order to attract strong, local stations now affiliated with CBS.

With full freedom would there be sensationalism? Perhaps. But wouldn't there be good solid programs, too? Of course there would. There are audiences for each.

It is not the place of government to dictate taste, just as it is not government's place to dictate ideas. Just an example.

Sears recently announced it would stop advertising on "Charlie's Angels" and "Three's Company" because of the sexy character of those shows. Sear's commitment for time on those shows was not great, but the public relations ploy was a big success. The company said it did not cave into pressure from the National Federation for Decency, but the announcement did come as pickets marched in front of Sears's Chicago headquarters. It can be surmised that public reaction created the change. The FCC cannot be blamed or credited with it.

Contrast "Charlie's Angels" and "Three's Company" with the "I, Claudius" dramatization that was on PBS last winter. There were few complaints about those episodes on "Masterpiece Theatre." PBS has not the audience of ABC, CBS, or NBC. It also has a more elite audience than any of the commercial networks. But where were the protectors of public morals when the nudity and the violence of "I, Claudius" appeared on the screens of America? "Charlie's Angels" and "Three's Company" are like Dick and Jane next to the Playboy or Penthouse of "I, Claudius." The paucity of complaints has more to do with the type of audience for PBS offerings than with its size. There is something to be learned from this concerning the diversity of broadcasters—something that should be encouraged rather than discouraged. Diversity can be increased without the fairness doctrine and the equal time rule when it comes to news and public affairs.

It is ironic that the FCC goes after broadcasters for news and public affairs programming, sometimes imposing fines (even withdrawing some licenses, although somehow the fairness doctrine seems not to be the prime issue in license denials or removals), but does nothing about sex and violence. The FCC had—perhaps still has—a form letter for people complaining about entertainment shows that said the FCC cannot censor and it cannot dictate taste. Yet the FCC has repeatedly gone after news and public affairs programming under the fairness doctrine. Because the Commission has power over news and public affairs it uses it. Section 326 stops it on entertainment (with a few exceptions, such as the George Carlin dirty words case now before the Supreme Court, and "topless radio").

Let the fairness doctrine and equal time rule stand and it shall be used. And we, all of us, as citizens shall suffer.

Repeal them and other controls over programming content and the world may not be perfect, but government will be barred from interposing itself into the sphere of ideas. That's what the first amendment is all about.

The first amendment says "no" to governmental involvement in what is said and written about government so that government cannot perpetuate itself without the will of those governed.

Without doubt the freedom to express ideas has produced the dissemination of some tasteless, repugnant, seditious, obscene and other totally undesirable ideas. First amendment rights have been stretched to the limits of endurance. First amendment rights have also permitted the dissemination of noble ideas. The republic has endured. It must continue to endure.

There is no reason to fear free dissemination of ideas in a free society. Television is not so powerful as to stifle that which is good. People everywhere are capable of making up their own minds. Even in Soviet Russia control of the press has not dried up dissent much less human reason. Aleksandor Solzhenitsyn has shown us that.

So why take a chance with our system?

Oh, nothing is going to happen this year or next or in the ominous 1984 if broadcasters do not receive full press freedom. But gradually freedoms will be worn away and dissenters will become fewer and fewer, and maybe, just maybe, there will be no modern John Peter Zenger that can be heard.

STATEMENT OF JULIAN GOODMAN, CHAIRMAN, NATIONAL BROADCASTING COMPANY, INC.

My name is Julian Goodman and I am the Chairman of the Board of the National Broadcasting Company. I appreciate this opportunity to express NBC's support for Senator Proxmire's bill (S. 22) which would repeal Section 315 in its entirety and abolish the Fairness Doctrine and related rules of the Federal Communications Commission.

We believe that this bill would enhance the ability of broadcasters to serve the public interest and we therefore support its principles and objectives.

For many years, NBC has urged that the equal time requirement of Section 315 works against the public interest and should be repealed. Short of total repeal, we have strongly supported repeal of the rule for appearances by Presidential and Vice Presidential candidates.

The 1959 amendments to Section 315 were helpful in exempting certain types of news programs from the equal time requirement. But the rule still limits the broadcaster's ability to bring major candidates to the public in a variety of program formats. This hampers the candidates, the public and the political process more than it hampers broadcasters. It limits the opportunities of major candidates to take their case to the voters, and it limits the public's opportunities to learn about the candidates through broadcast appearances.

We do not have to speculate about the public advantages of terminating the equal time rule, because we have a case history of experience that demonstrates these advantages.

In the 1960 campaign, the rule was suspended for Presidential and Vice Presidential candidates. As a result, the public saw much more of the candidates than at any time before or since—and not just in the Great Debates. In NBC's case we were able to schedule six hours of television network time apart from the Debates, for special interviews with the Presidential and Vice Presidential candidates of the major parties—interviews that permitted them to discuss the issues in detail. Such programs would now be subject to the equal time rule.

In 1976, by virtue of an interpretation of Section 315 by the FCC, we were able to carry the Ford-Carter debates that were produced and sponsored by the League of Women Voters without incurring "equal time" obligations.

We believe these broadcasts were of great benefit in informing the electorate. However, broadcast of an occasional debate—sponsored and controlled by others—is not by any means a substitute for the free, robust and totally wide open discussion of campaign issues by the significant candidates themselves that would undoubtedly result from a total repeal of Section 315. The FCC decision gives only a limited exemption for essentially "live" broadcast of debates and press conferences. Broadcasters, following a repeal of the "equal time" rule, would be free to experiment with various formats and innovative techniques in order to present the campaign, the issues, and the candidates to the American people.

Two arguments are typically made against repeal of this equal time provision: first, that it might invite unfair treatment of candidates; and second, that it might disregard coverage of candidates of lesser-established political parties.

On the question of fairness to opposing candidates, I need only refer to the record of performance in 1960, the only time broadcasters were freed from the overall restrictions of Section 315. During that campaign, the opportunities given the Presidential and Vice Presidential candidates were not only fair and balanced but wider and better than ever before or since—and this was the direct result of the suspension of the equal time requirement.

As to the treatment of minor party candidates, it is unrealistic to assume that broadcasters would disregard candidates of any significance. Such candidates are important in the news, and it is the business and practice of broadcasters to cover important news developments. We have undertaken, and we undertake now, to present minor party candidates on a basis that fully recognizes their following and importance. Elimination of the equal time provision would not prejudice minor party candidates and retention of this provision does not aid them. It simply reduces the opportunities of all candidates.

For all these reasons, we urge the Committee to take a real step forward by recommending total repeal of the equal time rule as proposed by Senator Proxmire.

NBC also supports the provision S. 22 which would abolish the Fairness Doctrine. We believe that, on balance, the Fairness Doctrine, while well-intended, has a greater potential to inhibit—rather than foster—the flow of press information to the public, which should be free of government interference. The rule has converted appropriate journalistic standards into regulatory requirements. As a result, it has subjected broadcast journalism to government supervision that clearly would not be permitted if it were applied to the print press.

On its face, the Fairness Doctrine expresses the laudable purpose of assuring that the public receives contrasting views on controversial issues of public importance. But abolishing the Doctrine would not mean that broadcasters would no longer be "fair." Fairness and balance are standards which all responsible and professional journalists follow as part of their own professional responsibility.

The danger of the Fairness Doctrine is not its objective, but its involvement of government in the news process. For better or worse, the Doctrine requires a Federal agency to oversee broadcast journalism and to make judgments about its quality. This supervision is described as seeing whether the broadcaster has made a reasonable good faith judgment on fairness. But the federal agency that undertakes that kind of decision tends to put itself in the editor's role; to investigate or review what the broadcast journalist has done; and to decide whether additional broadcasts must be made to meet the agency's idea of fairness. All of this gives government an influence over the press it should not have.

Broadcasting is a primary source of information to the public. There are more competing broadcast facilities than there are daily newspapers. Yet, similar restrictions have been held to be unconstitutional when applied to newspapers. Broadcast news—a significant medium of public information—should not be subjected even to the potential controls and influences that stem from government review and determination of journalistic fairness.

Like many government activities, the Fairness Doctrine, which set out from a narrow and moderate base, has been extended year by year in the ways it is applied. In 1966, the FCC received only 300 Fairness Doctrine complaints. By 1971, the number had grown to more than 1,500. Last year, the figure rose to over 4,000 Fairness Doctrine complaints and inquiries. This was not because broadcasting had changed or become less fair. It was because partisans, politicians and special pleaders latched on to the fact that the FCC's Fairness Doctrine could provide government review of broadcaster decisions, place burdens on broadcasters to respond to government inquiries and, if successful, get them a government-enforced opportunity of reaching huge television audiences with preachments of their own special causes. And they are using the situation without concern for the damage it may do to the integrity and value of the whole institution of an independent press.

Complaints under the Fairness Doctrine, regardless of their substance, compel the broadcaster to search his files, review reams of broadcast material to show "balance," probe the memories of his newsmen, consult his lawyers and prepare defensive responses. In a minor case affecting NBC three months of effort and correspondence were involved before the FCC acknowledge that the news judgments we made were within our discretion as journalists.

But the unnecessary effort and inconvenience this involves is only a small part of the problem. The major part lies in the inhibiting effect this sort of government intrusion can have on independent news investigation and reporting.

A broadcaster lacking substantial resources who has gone through one or two of these experiences may think twice before he tackles a subject of strong controversy—the kind that the public needs most to know about. It is not that he wants to avoid the obligation to be fair. But he knows that where there is controversy, there are advocates who will turn to the FCC, under the umbrella of the Fairness Doctrine, to obtain a broadcasting voice that may bear no relationship to the interest or newsworthiness of their cause. And once they invoke the government process, the broadcaster knows that he must defend himself from second-guessing that will come not from a specialist in journalism, but from a generalist in the government bureaucracy.

It is argued that the Fairness Doctrine is not censorship in its accepted definition, because nobody is telling anybody else specifically that material cannot be broadcast. Yet a form of censorship does exist—a censorship after the fact. The

peril to the American public is that with time, it can become self-censorship before the fact, inducing caution and blandness. The theoretical advantages of assuring fairness—even if they exist—are certainly not worth the weakening effect on the independence of the press—the strongest instrument democracy has.

We believe that fairness in covering controversial issues is an essential professional standard for any responsible journalist. But when the Fairness Doctrine becomes a government-enforced doctrine, it threatens to make government a super-editor for broadcasting. Balancing the advantages of the Fairness Doctrine against its potential for restricting press freedom by the prospects of government intrusion, we must come down on the side that judges the danger of the Doctrine to be greater than the public benefits that are often claimed for it.

In summary, we support each of the proposals contained in the legislation pending before this Subcommittee and express our appreciation for having this opportunity to present NBC's views.

STATEMENT OF THE PUBLIC RELATIONS SOCIETY OF AMERICA

As a society of professional communicators, the Public Relations Society of America is well aware of the importance of the Committee's consideration of S. 22, The First Amendment Clarification Act of 1977.

Members of PRSA are involved professionally in media communications on a daily basis. We welcome the Committee's exploration of potential amendments but urge some caution in consideration of fundamental changes to the existing fabric of communications law. Prior to actual mark-up of proposed legislation, we will restrict our comments to two fundamental areas: (1) The Fairness Doctrine; and (2) Personal attack.

FAIRNESS DOCTRINE

We suggest that any modification of Section 315 of the Communications Act should include further specific recognition of the continued application of the Fairness Doctrine in the overall operation of a licensed television station. We urge that this recognition be inclusive of all licensee programming so as to assure that it operates in the public interest and affords reasonable opportunities for the discussion of conflicting views on issues of public importance, fairly and without bias.

We recognize the present inclination of the Congress to move toward a "relative deregulation" of radio station programming. In this regard, without commenting on the general policy, we do urge that, where retained, the Fairness Doctrine be fully implemented.

PERSONAL ATTACK

We believe in equal time in response to all personal attacks.

We strongly suggest that any "clarification" of the Communications Act guarantees the rights of all individuals, corporations, organizations, institutions or other legitimate groups of equal and uncensored time in responding to attacks made upon their honesty, character, integrity or other personal qualities during the presentation of views on any program. News and documentary programs should not be excluded. We believe that provisions should be made to notify the person attacked within one day of the original broadcast. The licensee would then be required to offer equal and uncensored time for response either by the individual, or by his agents in approximately the same circumstances, without charge.

Although little discussion on the subject of personal attack has occurred, the importance of the right to respond cannot be over-emphasized. Radio and television have, as you well know, now replaced the print media as the initial information source for a majority of the population. The electronic media's occasional cursory treatment of individuals and issues, because of time limitations and/or programming style, increases the dangers of unfair, unwarranted, uninformed or untruthful attacks upon individuals and groups. Consequently, the persons attacked may be unfairly damaged in their home communities or business environments. The attacked party has a constitutional right to respond over public airways held in a fiduciary capacity by the broadcaster. The intrinsic rights of free speech of the broadcaster in news or documentary programming "does not embrace a right to snuff out the free speech of others."

We appreciate the Subcommittee's time and would welcome the opportunity to contribute further to your efforts.

STATEMENT OF TOWNES L. OSBORN, EXECUTIVE DIRECTOR OF THE NATIONAL
CITIZENS COMMUNICATIONS LOBBY

Chairman Hollings and members of the Committee, I am Townes L. Osborn, Executive Director of the National Citizens Communications Lobby, a non-profit membership organization devoted to research, education and action concerning the present and future structure of broadcasting and the impact that the structure will have on a diverse democratic society. On behalf of the NCCL, I am grateful for the opportunity to submit this statement for the record with regard to S. 22, which proposes to repeal the Fairness Doctrine and Section 315 of the Communications Act of 1934.

On July 15, 1974, the Chairman of the Subcommittee on Communications of the Senate Committee on Commerce, Senator Pastore, said:

"All the fairness doctrine says [is] make sure you afford a reasonable opportunity for conflicting views so the public will be informed. What, I ask, is wrong with that? . . . [should] the national airwaves be the private propaganda preserves of broadcasters . . . ?"

We believe the Fairness Doctrine to be a central and essential element in the current American system of broadcasting.

We emphasize "current" because there are alternative ways of running a broadcasting system in a free society in which a law analagous to the Fairness Doctrine would be relatively less important, or even totally unnecessary.

Thus, our major concern arises from the seeming willingness of the authors of S. 22 to eliminate the Fairness Doctrine without the consideration of substitutes or alternative systems to accomplish its purpose.

The Communications Act of 1934 recognizes the central role played by radio and television in the governing of a free society.

It provides that no one can own a radio frequency; that operators will be licensed as public trustees for a time period limited to 3 years.

Over the years the Congress and the FCC have evolved requirements that broadcasters must ascertain the needs of their local community, provide news and public affairs programming, originate programming locally, and otherwise provide a public service above and beyond the business practices that would be dictated by mere profit maximization.

One of the principle concerns of the Congress in the 1920s was the potential power of broadcasters to control the country politically and ideologically. Because of this concern broadcasters were, for many years, prohibited from editorializing at all—a prohibition which still applies to public broadcasting in this country.

Other provisions, allow broadcasters' to present views which they find compatible politically, economically, and ideologically, and guarantee the rights of others. Sometimes these rules create rights of reply or "equal time" for specific individuals (such as the personal attack doctrine and the Equal Opportunity Requirements of Section 315 for Political Candidates). The Fairness Doctrine is of more general applicability.

Aside from its first requirements, that a broadcaster must present programming about controversial issues of public importance, it requires that a broadcasting station not be used solely as an instrument of propaganda for a given point of view. That is to say, a Fairness Doctrine does not create a right of reply in any specific individual, it does not require "equal time" for opposing points of view, it does not require that an individual program be balanced and it says nothing whatsoever about the formats that broadcasters may use in presenting all points of view.

The Fairness Doctrine primarily represents little more than a statement of acceptable practice and social expectation. It is but a reaffirmation of everyone's general understanding (embodied in the 1934 Communications Act) that a broadcast licensee is a public trustee and not an "owner" of the airwaves, free to use monopoly powers to serve any ideological whim of the moment, to the exclusion of other points of view in the community. Although there need not be "equal time", there must be some effort to seek out and present a range of viewpoints on controversial issues.

The essential nature of the Fairness Doctrine within the current American system of broadcasting can also be illustrated by contrasting it with some alternative approaches.

(1) Some countries, such as Sweden, forbid commercial broadcasting altogether and turn the entire operation over to a public corporation. Even these systems have a standard analagous to the Fairness Doctrine as a matter of social policy.

(2) A legally enforceable right of free, or even paid, access to radio and television would also lessen the need for fairness doctrine in a commercial system such as ours. The Senate is familiar with the case in which 14 U.S. Senators sought to buy time to answer President Nixon on one occasion. No network would sell them time, and the courts ultimately ruled they had no right to buy it. If the law were otherwise, if there were a legally enforceable right to buy time on radio and television, then, there would be less need for a Fairness Doctrine. Still, this would not insure any balance in the presentation of issues, provide for any access by the poor, or provide any public protection in cases where no one sought to obtain time. But, it would at least provide some escape valve.

(3) Any other limitations on the current power of the broadcasters would also ease, to some small degree, the need for a Fairness Doctrine. A licensee is now permitted to own as many as 21 radio and television stations. Limiting ownership ultimately to one station per licensee—would insure greater diversity and thus the potential for greater diversity in viewpoints. Limiting the power of stations, and thereby increasing their number, would be another way of doing this.

(4) The use of cable television and radio as a common carrier, whether employed as a substitute for over-the-air broadcasting, or a supplement to it, would also reduce the need for a Fairness Doctrine. Under such a system, anyone who wanted to do so could have access to a cable radio or television channel with the same ease, relative price and legal right by which one now obtains access through the telephone system.

These alternatives are not listed for the purpose of encouraging this Subcommittee to consider them seriously as practical solutions at this time. Rather, their presentation helps illuminate those aspects of the broadcasting system currently in operation, that make the Fairness Doctrine so crucial to the full and fair functioning of our democratic society.

It is very easy for us to get so caught up in the issues and arguments of the day that we lose sight of the basic assumptions, philosophies, and purposes of the broadcasting system we now have. The Fairness Doctrine is essential to it, and we believe it would be the utmost folly to tamper with it without considering the role that it plays in our society and without offering either a substitute to accomplish similar purposes or an alternative system entirely.

In 1959 Senator Proxmire put the case for the Fairness Doctrine as well as anyone. He said:

"[T]elevision stations and radio stations are owned, by and large, by people with money, and they have a peculiar economic interest which often represents a political interest. . . I think we should do everything we can, not only to protect individual persons, but, far more important, to protect ideas which contradict the preponderant opinion of television and radio station owners throughout the country."

STATEMENT OF THE SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI

The Society of Professional Journalists, Sigma Delta Chi, believes that the Fairness Doctrine, by designating a government agency as arbiter of what is fair in news coverage, is incompatible with the First Amendment guarantee of a free press and should be repealed.

To deny broadcasters the same free press rights granted print media simply because broadcasters use a different medium is discriminatory and not justified by the record.

It would be intolerable for Congress to impose standards on the content of newspapers, magazines and books. Why is it any less intolerable when they are imposed on broadcasters?

Proponents of the Fairness Doctrine say it is justified because the airwaves are owned by the public. But it is one thing to license broadcasters—admittedly a necessary step to prevent chaos on the airwaves—and quite another to tell broadcast journalists what they can and cannot air.

Newspapers and magazines are dedicated to fairness and balanced coverage in their news columns and no government fairness edict was required. The Society sees no reason to believe broadcasters would react differently if the Fairness Doctrine were repealed.

The argument can be made that the doctrine inhibits free and independent coverage. To the extent that stations may avoid airing controversial subjects because of a fear of costly litigation stemming from a fairness complaint, the Fairness Doctrine discourages broad and balanced coverage.

To the argument that repeal of the Fairness Doctrine would give too much power to the press, quite the opposite is true. The doctrine, combined with the government's power to license broadcasters, has been used by several presidents to intimidate networks and stations that carried material disapproved by the White House.

As Eric Sevareid put it, "I have never quite grasped the worry about the power of the press. It has influence, surely, and influence is a kind of power—but diffuse, hard to measure.

"The press, after all, speaks with a thousand voices, in constant dissonance. It has no power to arrest you, draft you, tax you or even make you fill out a form, except a subscription form if you're agreeable.

"Many politicians have come to power in many countries and put press people in jail. I can't think of any place where the reverse has occurred."

For these reasons, the Society of Professional Journalists urge the Subcommittee to give favorable consideration to S. 22. Thank you.

AMERICAN BAR ASSOCIATION,
Washington, D.C., July 7, 1978.

HON. ERNEST F. HOLLINGS,
*Chairman, Subcommittee on Communications, Committee on Commerce, Science,
and Transportation, U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: I have been following with interest your recent hearings on S. 22, a bill to amend or repeal certain provisions of the Communications Act of 1934 (47 U.S.C. § 151 *et seq.*). I appreciate this opportunity to present the views of the American Bar Association for inclusion in your formal hearing record. As Chairman of the Special Committee on Election Reform, I am authorized to express the Association's support of this important legislation's provisions concerning the equal time provision, with suggested amendments discussed below.

In August, 1975, the American Bar Association adopted a resolution which expressed the view that the equal time provision of the Communications Act of 1934, as amended, (47 U.S.C. § 315(a)) has tended to discourage broadcasters from supplying free time to political candidates. The resolution states that the equal time provision should be repealed as it applies to candidates for the offices of President and Vice President. We also recommend that the provision should be amended as it applies to candidates for other offices so that qualified candidates would be afforded equal opportunity for broadcast time when it can be demonstrated that the candidate is a nominee of an established political party or has personally shown significant voter support. In the event, however, that the Congress declines to modify or amend Section 315(a) as suggested, the ABA supports the complete repeal of the equal time provision of Section 315(a). A copy of that resolution is attached to this letter.

Section 315(a) of the Communications Act of 1934 states that if a broadcasting station permits a legally qualified candidate for public office to use its facilities, that station must afford equal opportunities to other candidates for that office in the use of broadcast time. Thus, if one candidate receives free time, all candidates have a legal right to receive the same amount of free time at a comparable hour of the day. Similarly, a broadcaster who sells time to a candidate must make the same opportunities available at the same cost to all candidates for that office.

The purpose of the equal time provision was to permit and encourage dissemination of candidates' views in non-paid political broadcasts. It seems clear, however, that this legislative intent has not been accomplished. Dean Burch, former chairman of the Federal Communications Commission, has stated that the equal opportunity requirements of Section 315 have substantially discouraged broadcasters from supplying free time to presidential candidates. (Hearings before the Senate Commerce Subcommittee on Communications on S. 372, 93rd Cong., 1st Sess. (1973)). Free exposure has not been provided to major or minor party candidates. Debates and other forms of exchange of views by and between candidates have been avoided because when one candidate is given free time, all candidates in a race will likely request equivalent time. The major networks justifiably argue that the large number of qualified candidates makes it impractical to offer free time to everyone.

Political experts and candidates are aware of the vital role which the broadcasting media, especially television, plays in providing information about the electoral process and political campaigns to the voters. In 1960, Congress recog-

nized the problem inherent in the equal time provision and temporarily suspended that portion of the Communications Act for the presidential election; as a result, the three major networks provided almost 80 hours of free broadcast time, including the Kennedy-Nixon debates. In that election, the largest proportion of eligible voters in history—64%—voted in the presidential election.

In 1976, the League of Women Voters sponsored a series of debates between the major presidential candidates, Jimmy Carter and Gerald Ford, and vice-presidential candidates Walter Mondale and Robert Dole. These debates, which were open to all media, were exempt from the equal time provisions as a bona fide new event. An estimated 64.1 million households in the United States watched an average of 2.8 hours of the 4 debates. Thus, 90% of all U.S. households were reached by the debates, according to the Nielsen Television Index.

While voter participation in the 1976 election did not increase, the steady decline in voter turnout which had occurred since 1960 was slowed. Based on the experience of the Kennedy-Nixon and the Carter-Ford debates, the relationship appears strong between voter interest in elections and the amount of broadcast time devoted to the campaign process.

While repeal of the equal time provision would give broadcasters more opportunity to provide meaningful debates between candidates and to provide information of genuine importance to the voters, there are some problems which may result. It is argued that lesser known candidates, or those championing unpopular causes, may be subject to discrimination. However, broadcasters, like newspaper publishers, are undoubtedly responsible enough to devise policies and programs which would ensure equal opportunities for all significant candidates. Further, additional guidelines to ensure fairness could be developed to augment existing regulations. Finally, one of the most important safeguards against abuse and discrimination is the licensing and enforcement authority of the FCC.

One more way in which candidates for public office could be ensured that they would receive equitable treatment is the fairness doctrine, which requires broadcasters to give air time to issues of public interest and to present such issues fairly. S. 22, however, would eliminate the fairness doctrine by redefining Section 309 of the Communications Act. The phrase "public interest, convenience and necessity" could not longer be construed to give the FCC the authority to require a broadcaster to supply air time to any person for the expression of any viewpoint. (S. 22, §2). While the American Bar Association has taken no position on the fairness doctrine and its effects, it should be noted that this doctrine could tend to discourage discrimination on the part of broadcasters, were the equal time provision to be repealed.

As discussed above, the American Bar Association does support the proposal to repeal §315 (a) of the Communications Act. However, a preferable alternative to the elimination of the provision with respect to all public offices would be to expand the exemptions to §315 (a) to permit greater innovation in the presentation of candidates for public office. For example, networks and local stations could be required to devise their own proposals and formulas for free, or even government-subsidized, programming. The licensee would then present their plans to the FCC for review prior to implementation. Another suggestion would be to have local broadcasters share the responsibility for political races by dividing up the individual contests, with each providing air time to a certain percentage of the candidates rather than all stations attempting to provide time to all candidates in all races.

The importance of the broadcasting media in elections and a democratic form of government cannot be over-emphasized. Television is not only the preferred news source for a majority of Americans, it is now the primary communication tool for political campaigns. Broadcasters, however, are unable to provide sufficient amounts of free air time to candidates and the cost of purchasing such time continues to rise. Television time and production costs are likely to remain a major problem for those who seek public office. In this regard, I should note the Association's general support for the use of public matching contributions to candidates for federal office.

Congress, the FCC, networks, and local broadcasters should examine all possible alternatives for providing non-frivolous candidates and parties with optimal access to the electronic media. Before most innovative ideas may be developed or implemented, however, it is necessary that Congress amend or repeal the equal time provision of the Communications Act. In light of the low voter turnout in recent elections and the proven ability of the media to give a fair and adequate

presentation of public issues, we urge the Congress to act with dispatch in correcting the problems related to and caused by Section 315 (a) of the Communications Act. Consequently, we urge you to consider amending those Sections of S. 22 which would repeal the equal time provision, to comport with our recommendation. In the alternative, we do support outright repeal of the equal time provision.

Sincerely,

JOHN D. FERICK,
Chairman.

Enclosure.

AMERICAN BAR ASSOCIATION POLICY CONCERNING AMENDMENT OR REPEAL OF THE
EQUAL TIME PROVISION OF THE COMMUNICATIONS ACT OF 1934, AMENDED

(Adopted by Voice Vote in August 1975)

Resolved, That it is the opinion of the American Bar Association that the Equal Time Provision of the Communications Act of 1934, as amended (47 U.S.C. § 315(a)), has tended to discourage broadcasters from supplying free time to political candidates generally;

Resolved, That the American Bar Association recommends that the Equal Time Provision of Section 315(a) of the Communications Act should be repealed as it applies to the candidates for the offices of President and Vice President.

Resolved Further, That the American Bar Association supports in principle the following amendments to Section 315(a) of the Communications Act as it applies to candidates for offices other than the President and the Vice President:

1. The Equal Time Provision should be amended so that qualified candidates for public office will be afforded equal opportunity for broadcast time when it can be demonstrated that the candidate is not merely a fringe candidate, but rather is the nominee of an established political party or has personally demonstrated significant voter support.

2. The exemptions to Section 315(a) should be expanded to permit greater innovation in the presentation of candidates for public office, so long as the format and participants are determined by the broadcaster and the programming is devoted to exploring issues of public importance rather than to promoting the candidacy of any person.

Resolved, Further, That in the event Congress fails to take appropriate action to modify and amend Section 315(a) as suggested herein or by similar proposals, the American Bar Association supports the complete repeal of the Equal Time Provision of Section 315(a).

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