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Advertising and Recent Developments in the Fairness Doctrine

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retailer. For example, some have suggested that the success of the shopping center indicates the future of downtown redevelopment.[71] If unchecked, it would seem that the veto power could be forming the blueprint of retail competition in both suburban shopping center and downtown areas. Through an unrivalled system of highways, crossovers, and cloverleafs, the regional shopping center is becoming more than just a place to buy and sell. Already there are reports of shopping centers that are satellite urban centers themselves, with plans including the construction of community recreational and cultural centers and housing for up to 12,000 people.[72] Confronted with these possibilities, the veto power assumes an entirely new perspective as the shopping center takes on new dimensions in both the retail and social communities. Thus, the reevaluation must consider not only present day perspective, but future implications as well. That such a reevaluation is imminent seems clear, and it would not seem unwarranted to conclude that the veto power in regional shopping centers will not endure.

JAMES F. PASCAL

ADVERTISING AND RECENT DEVELOPMENTS IN THE FAIRNESS DOCTRINE

For over two decades the duty of radio and television broadcasters to present balanced and fair coverage of controversial issues has been known as the fairness doctrine. The origins of the duty, however, go back to the early days of radio when limited frequencies and numerous stations made for chaotic conditions.[1] To remedy the situation, Congress passed the Radio Act of 1927,[2] establishing the Federal Radio Commission[3] as the agency which was to regulate broadcasting.[4] Station licenses were issued pursuant to the "public convenience, interest or necessity."[5] Shortly after

[71]*See* N. OWNINGS, THE AMERICAN AESTHETIC 129 (1969).

[72]BUS. WEEK, Sept. 4, 1971, at 36.

[1]For a discussion of these conditions see NBC v. United States, 319 U.S. 190, 210-17 (1943).

[2]Act of Feb. 23, 1927, ch. 169, 44 Stat. 1162 (repealed 1934).

[3]*Id.* § 3.

[4]*Id.* § 4.

[5]*Id.* § 9.

the passage of the Act, the Commission asserted that the "public interest" required "free and fair competition of opposing views" and that this principle applied "to all discussions of issues of importance to the public."[6] This "public interest" obligation was carried over into the Communications Act of 1934[7] and was used by the Federal Communications Commission to provide the foundation for the fairness doctrine as formulated in 1949.[8] The doctrine requires, *inter alia,* that if one side of a controversial issue has been raised during a broadcast, the licensee has the responsibility of making sure the contrasting viewpoint receives fair coverage.[9]

The fairness doctrine has recently come under great strain due to the difficulties encountered by the FCC in defining controversial issues and in deciding if coverage has been fair.[10] These difficulties can be traced in large part to the FCC decision in *Applicability of the Fairness Doctrine to Cigarette Advertising*[11] which was subsequently affirmed by the District of Columbia Circuit Court of Appeals in *Banzhaf v. FCC.*[12] *Cigarette Advertising* held that the advertising of cigarettes inherently raised a significant issue of controversy. As a result, radio and television stations which carried cigarette advertising[13] were required to devote a substantial amount of broadcast time to presenting the case against smoking.[14]

Since its affirmance of the FCC ruling in *Banzhaf,* the D.C. Circuit has opened up the possibility in *Friends of the Earth v. FCC*[15] that controversial issues can be implied in other commercial advertisements. In addition, the same court in *Business Executives' Move for Vietnam*

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[6]Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 377 (1969), *citing* Great Lakes Broadcasting Co., 3 F.R.C. Ann. Rep. 32, 33 (1929), *rev'd on other grounds,* 37 F.2d 993 (D.C. Cir.), *petition for cert. dismissed,* 281 U.S. 706 (1930).

[7]47 U.S.C. §§ 151-609 (1970).

[8]Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949). For a concise but comprehensive history of the fairness doctrine, see Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375-86 (1969).

[9]Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949).

[10]*See* The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, Notice of Inquiry, 30 F.C.C.2d 26 (1971).

[11]9 F.C.C.2d 921 (1967). In this opinion the FCC affirmed its earlier ruling in Television Station WCBS-TV, 8 F.C.C.2d 381 (1967) and gave a more elaborate explanation of the reasons for its action.

[12]405 F.2d 1082 (D.C. Cir. 1968), *cert. denied,* 396 U.S. 842 (1969).

[13]Since January 1, 1971, cigarette commercials have not been allowed on radio or TV. Public Health Cigarette Smoking Act of 1969, 15 U.S.C. § 1335 (1970).

[14]Applicability of the Fairness Doctrine to Cigarette Advertising, 9 F.C.C.2d 921, 942 (1967).

[15]Friends of the Earth v. FCC, no. 24,556 (D.C. Cir. Aug. 16, 1971), *rev'g* Letter to Gary Soucie, 24 F.C.C.2d 743 (1970).

Peace[16] seemed to indicate that due to the powerful impact of such advertising, the use of spot editorial advertisements might be necessary to give the opposing viewpoint full, balanced, and fair coverage.

Broadcasters have shown some concern over these recent decisions which, they maintain, will involve the government much too deeply in daily programming operations.[17] This possible extension of the fairness doctrine has been under review by Senator Sam Erwin's Judiciary Subcommittee on Constitutional Rights. Testimony has ranged from CBS newsman Walter Cronkite's denunciation of government censorship through expanded regulation of broadcasting[18] to George Washington University Professor Jerome Barron's view that some government control of broadcasting is necessary in order that important controversial views be heard: "Censorship is no less censorship if it is in private hands . . . ."[19]

THE FAIRNESS DOCTRINE IN GENERAL

In 1959 Congress amended section 315 of the Communications Act of 1934[20] and in so doing provided a statutory framework for the fairness doctrine.[21] That section was originally enacted to insure that broadcast time made available to any legally qualified candidate for public office be made equally available to legally qualified opponents.[22] The amendment of 1959 exempted appearancesof the candidates on bona fide news programs from the operation of this "equal time" provision but added the following language:

> Nothing in the foregoing . . . shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from *the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.*[23]

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[16]Business Executives' Move for Vietnam Peace v. FCC, no. 24,492 (D.C. Cir. Aug. 3, 1971), *rev'g* 25 F.C.C.2d 242 *and* Democratic National Committee, 25 F.C.C.2d 216 (1970).

[17]*See* BROADCASTING, Oct. 25, 1971, at 42. BROADCASTING is one of the most important trade magazines for broadcasters.

[18]Washington Post, Oct. 1, 1971, at A12, col. 5.

[19]*Id.*

[20]Act of Sept. 14, 1959, Pub. L. No. 86-274, § 1, 73 Stat. 557, *amending* 47 U.S.C. § 315 (1958) (codified at 47 U.S.C. § 315(a) (1970)).

[21]Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380 (1969).

[22]*Id.*

[23]47 U.S.C. § 315(a) (1970) (emphasis added).

Although the term "fairness doctrine" appears nowhere in the amended section, the legislative history specifies that the above language was added as "a restatement of the basic policy of the 'standard of fairness' . . . imposed on broadcasters under the Communications Act of 1934."[24]

The fairness doctrine withstood a constitutional challenge in *Red Lion Broadcasting Co. v. FCC*.[25] The case involved a specific application of the doctrine by the FCC in promulgating certain "personal attack" rules.[26] These rules required in part that the broadcaster provide reasonable response time to an individual or group whose "honesty, character, integrity or like personal qualities" had been attacked during the course of certain programs.[27] In upholding the constitutionality of this limitation of broadcasters' free speech, the Court emphasized the paramount right of viewers and listeners

> to have the medium function consistently with the ends and purposes of the First Amendment . . . It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.[28]

The Court cautioned, however, that since the issue at hand was a narrow one, it need not ratify every past or future fairness doctrine decision by the FCC.[29]

Thus the fairness doctrine finds support in both the Constitution and federal statutory form. But neither the first amendment nor the statute outlines any specific fairness requirements. The first real attempt to define these requirements was made by the FCC in a 1949 report, *Editorializing by Broadcast Licensees*,[30] which was issued after the FCC had held hearings to inquire into the obligations of broadcast licensees with respect to their treatment over the air waves of news, commentary and opinion.[31] The discussion in the hearings and in the report centered on the relationship between the licensee's own editorializing and his public interest obligation to insure that all sides of controversial issues were fairly presented over his facilities.[32]

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[24]H.R. Rep. No. 1069, 86th Cong., 1st Sess. 5 (1959).

[25]395 U.S. 367 (1969).

[26]47 C.F.R. § 73.679 (1971).

[27]The broadcaster is required to notify the person attacked, send him a script or summary of the broadcast and offer him a reasonable opportunity to respond over the broadcast facilities. 47 C.F.R. § 73.679(a) (1971). For a list of the exempt programs see 47 C.F.R. § 73.679(b) (1971).

[28]395 U.S. at 390.

[29]*Id.* at 396.

[30]13 F.C.C. 1246 (1949).

[31]*Id.*

[32]*Id.*

A broadcaster could not be deemed a "common carrier"[33] and thus be forced to accept all requests for broadcast time.[34] On the other hand, since the available broadcast frequencies constituted a scarce and important resource,[35] the broadcaster was not the owner[36] thereof but a trustee for the public at large.[37] An important aspect of this relationship, according to the Commission, was the fact that the broadcaster, in order to fulfill his duty as a trustee, needed to make various opinions and views available to the general public for their "consideration and acceptance or rejection."[38] Thus the broadcaster, in choosing between the various individuals desiring access to the medium, had to refrain from acting only in his own self-interest. A prerequisite for his license from the FCC was that the public interest, convenience or necessity be thereby served.[39]

In its 1949 formulation, the Commission further decided that the licensee could in fact air his own editorial opinions within reasonable limits suggested by the general requirements of fairness.[40] But the fairness requirements involved an active and affirmative effort on the part of the licensee "to afford a reasonable opportunity for the presentation of all responsible positions on matters of sufficient importance . . . ."[41] It was to be left up to the licensee to exercise his own best judgment and good sense in determining the subjects, the particular format of the programs, the different shades of opinion to be presented, and the spokesman for each point of view.[42]

The FCC made another attempt in 1964 to define fairness standards and controversial issues of public importance. In *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*[43] [hereinafter cited as *Fairness Primer*] representative rulings were set forth to give the broadcasters a sensitivity for the types of issues

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[33]Communications Act of 1934, 47 U.S.C. § 153(h) (1970) reads in part: "[A] person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

[34]Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1247 (1949).

[35]Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 376 (1969).

[36]Communications Act of 1934, 47 U.S.C. § 301 (1970) reads in part:

> It is the purpose of this chapter . . . to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the *use* of such channels, but *not the ownership* thereof. (emphasis added)

[37]Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1247, 1258 (1949).

[38]*Id.* at 1247.

[39]*Id.* at 1248.

[40]*Id.* at 1252-53.

[41]*Id.* at 1250.

[42]*Id.* at 1251.

[43]40 F.C.C. 598 (1964).

which might require balanced coverage. Controversial issues included such topics as fair employment, pay TV, the nuclear weapons test ban treaty, and effective methods of combating communism.[44]

According to the *Fairness Primer*, the keystone of the fairness doctrine was the right of the public to be informed and this necessitated coverage of all major issues, national as well as local.[45] Furthermore, the licensee had an affirmative, non-delegable duty to encourage and search out contrasting viewpoints.[46] Neither sufficient coverage of a topic by other media such as newspapers[47] nor lack of sponsorship[48] would excuse failure to present balanced coverage of opposing views.[49] However, the licensee still retained his usual discretion in deciding the amount of time[50] to be given as well as the appropriate spokesmen and program format.[51]

CONTROVERSIAL ISSUES INHERENT IN ADVERTISING

I. *Implicit Issues*

In determining whether or not a controversial issue has been raised in a program, the FCC has generally looked only to the obvious issue or the issue directly raised.[52] The Commission has been reluctant to probe beneath the surface of a broadcast for other issues, emphasizing that if every statement or inference could be the subject of a separate fairness requirement, the result would be excessive government intervention in broadcast journalism.[53]

Upon occasion, however, the FCC has approached a broader definition of a controversial issue of public importance. For instance, in *Editorializing by Broadcast Licensees*, the Commission stated that an issue or a program need not be obviously controversial from the start, but that the opposition and debate could become manifest at a later time.[54]

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[44] *Id.* at 600-04.

[45] *Id.* at 604.

[46] *Id.* at 604-05.

[47] *Id.* at 605-06.

[48] *Id.* at 609; Letter to Cullman Broadcasting Co., 40 F.C.C. 576 (1963). In this letter, the FCC informed a licensee that when he has broadcast a program which raises a significant controversial issue and has been unable to obtain paid sponsorship for an appropriate contrasting view, he cannot reject an otherwise suitable presentation on the grounds of lack of sponsorship. In other words, such situations would require the station to bear the cost.

[49] 40 F.C.C. at 607-09.

[50] "Equal time" is required only with respect to legally qualified candidates and "personal attacks." *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); Applicability of the Fairness Doctrine to Cigarette Advertising, 9 F.C.C.2d 921 (1967).

[51] 40 F.C.C. at 606-09.

[52] *See* National Broadcasting Co., 25 F.C.C.2d 735 (1970).

[53] *Id.* at 736-37.

[54] 13 F.C.C. at 1251.

In addition, the Commission in the *Fairness Primer* listed among the representative rulings an earlier decision which stated that the substance of a broadcast could very well raise a controversial issue, *i.e.*, the discussion of water fluoridation during an otherwise innocuous program on health and nutrition.[55]

The Commission seemed to place a very liberal interpretation on what issues would require fairness doctrine treatment in a 1963 public notice:

> In determining compliance with the fairness doctrine the Commission looks to *substance* rather than to label or form. It is immaterial whether a particular program or viewpoint is presented under the label of "Americanism," "anti-communism" or "states' rights," or whether it is a paid announcement, official speech, editorial or religious broadcast. Regardless of label or form, if one viewpoint of a controversial issue is presented, the licensee is obligated to make a reasonable effort to present the other opposing viewpoint or viewpoints.[56]

As early as 1946 the FCC considered in *Petition of Sam Morris*[57] whether a controversial issue could be implicit in a commercial advertisement. The complaint, involving an attempt by the National Temperance and Prohibition Council to block the license renewal of a radio station, stated that the broadcasters had been selling choice advertising time to those "counseling the drinking of alcoholic liquors," but had refused to sell any time whatever to those who wanted to preach abstinence.[58] Since the issues were large and the advertising practice in question widespread, the Commission refused to take any action against the single station.

It is interesting to note, however, that the Commission, in dismissing the petition, rejected the station owner's contention that the advertising of commercial goods and services could not be controversial.[59] The Commission stated that what for some individuals was "merely a routine advertising 'plug' extolling the virtues of a beverage . . . [was for other] individuals the advocacy of a practice which they deemed to be detrimental to our society."[60]

II. Banzhaf

As mentioned above, the FCC in *Cigarette Advertising* held that a

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[55]40 F.C.C. at 603; Report on "Living Should Be Fun" Inquiry, 33 F.C.C. 101 (1962).
[56]Controversial Issue Programming, 40 F.C.C. 571, 572 (1963) (emphasis added).
[57]11 F.C.C. 197 (1946).
[58]*Id.* at 197.
[59]*Id.* at 198.
[60]*Id.* at 199.

controversial issue of public importance was inherent in the advertising of cigarettes and thus required the broadcasters to present programs with the anti-smoking viewpoint.[61] This was the first time since *Petition of Sam Morris* that the fairness doctrine was regarded as relevant to commercial advertising.[62] It is important to note several additional aspects of the *Cigarette Advertising* ruling. The Commission maintained that the controversial issue raised was the desirability of smoking in light of an extreme health hazard; the issue was not the health hazard itself.[63] In addition, this issue was implicit in the advertisements, not having been posed directly by the advertiser.[64]

The Commission stressed that this obligation to present anti-smoking programs stemmed from the broadcaster's duty to operate in the public interest and not from any esoteric requirements of the fairness doctrine.[65] The public interest meant nothing, the Commission asserted, if it did not include the responsibility of informing the public of health hazards.[66] This public interest basis of the ruling was in turn supported by two key factors: (1) governmental and private reports, *e.g.*, the 1964 Report of the Surgeon General's Advisory Committee,[67] as well as congressional action, *e.g.*, the Federal Cigarette Labeling and Advertising Act of 1965;[68] and (2) their common assertion that "normal use of . . . [cigarettes] can be a hazard to the health of millions of persons."[69]

Another important aspect of the ruling in *Cigarette Advertising* was the recognition by the FCC of the unique position of advertising with respect to the question of whether the licensee has presented fair coverage to both sides of an issue. Since cigarette spot advertisements were numerous, repetitive and continuous,[70] balanced presentation required more than just "an occasional program a few times a year or . . . some appropriate announcements once or twice a week."[71] But the FCC was adamant in

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[61]9 F.C.C.2d 921 (1967).

[62]Banzhaf v. FCC, 405 F.2d 1082, 1092 n.34 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

[63]9 F.C.C.2d at 927, 939.

[64]*Id.* at 938. The portrayal of smoking as desirable was an issue because of the tremendous health hazard involved. The issue of health had also been raised, despite the absence of any specific health guarantees, through minimizing the risk involved in smoking, *i.e.*, the mention in the advertisements of improved and recessed filters. *Id.* at 939 n.18.

[65]*Id.* at 949.

[66]*Id.*

[67]*Id.* at 951.

[68]15 U.S.C. §§ 1331-39 (Supp. III 1968).

[69]9 F.C.C.2d at 943.

[70]*Id.* at 941.

[71]*Id.* at 942.

its assertion that since cigarette advertising presented a unique situation, the ruling was not to be extended to other commercial advertising.[72]

In *Banzhaf v. FCC*,[73] the D.C. Circuit affirmed the *Cigarette Advertising* ruling and attempted to narrow the holding even more by placing greater emphasis on the relationship between the public interest and the public health. According to the court, the cigarette ruling was an extension of the fairness doctrine and an independent public interest ruling.[74] As such it required independent support.[75] The public interest indisputably included the public health, which was itself a type of basic law, "both justifying new extensions of old powers and evoking legitimate concern of government wherever its regulatory power otherwise extends."[76] And the public health was certainly at stake, since normal use rather than abuse of cigarettes endangered the lives of a substantial body of the population.[77] Furthermore, the danger had been thoroughly documented and Congress had taken action to warn the public.[78]

III. Chevron *and* Esso

Despite the Commission's warning that it would not extend the cigarette ruling to product advertising generally,[79] it softened this view in two recent advertising rulings. The complaint in *Alan F. Neckritz*[80] [hereinafter cited as *Chevron*] stated that certain gasoline commercials had raised two controversial issues: (1) whether a gasoline additive would help solve the air pollution problem and (2) whether the advertisements

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[72]*Id.* at 942-43.

[73]405 F.2d 1082 (D.C. Cir. 1968).

[74]*Id.* at 1096.

[75]*Id.*

[76]*Id.* at 1096-97.

[77]*Id.* at 1097.

[78]*See* text accompanying notes 67-68 *supra*. The court concluded:

> Thus, as a public health measure addressed to a unique danger authenticated by official and congressional action, the cigarette ruling is not invalid on account of its unusual particularity. It is in fact the product singled out for special treatment which justifies the action taken. In view of the potentially grave consequences of a decision to continue—or above all to start—smoking, we think it was not an abuse of discretion for the Commission to attempt to insure not only that the negative view be heard, but that it be heard repeatedly. The Commission has made no effort to dictate the content of the required anti-cigarette broadcasts. It has emphasized that the responsibility for content, source, specific volume, and the precise timing rests with the good faith of the licensee.

405 F.2d at 1099.

[79]9 F.C.C.2d at 942-43.

[80]29 F.C.C.2d 807 (1971).

had themselves become controversial in light of the filing of a Federal Trade Commission complaint against the advertisements and the sponsor's rebuttal thereto.[81] In declining to take any action on the complaint, the Commission pointed out that the advertisements had not raised the issue of air pollution but had instead advanced a claim for product efficacy which was not in itself a controversial issue of public importance.[82] With regard to the FTC complaint, the Commission felt it would be improper to intrude on the FTC's primary jurisdiction.[83]

Thus the Commission did not think it would serve the purposes of the fairness doctrine to apply it to claims of a product's efficacy or social utility.[84] However, with reference to the applicability of the doctrine generally, the Commission noted that in some situations product commercials would raise controversial issues:

> For example, if an announcement sponsored by a coal-mining company asserted that strip mining had no harmful ecological results, the sponsor would be engaging directly in debate on a controversial issue, and fairness obligations would ensue. Or, if a community were in dispute over closing a factory emitting noxious fumes and an advertisement for a product made in the factory argued that question, fairness would also come into play.[85]

In *Wilderness Society*[86] [hereinafter cited as *Esso*] the Commission sustained a fairness complaint which concerned institutional advertising primarily designed, according to the sponsor, to create good will.[87] The messages spoke of the investment the oil company was making on the North Slope of Alaska in order to supply America's pressing energy needs.[88] In addition, other messages portrayed the oil company as caring for and working to protect the ecology of the area where it was exploring and drilling for oil.[89]

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[81] *Id.* at 808.

[82] *Id.* at 812.

[83] *Id.* at 810.

[84] *Id.* at 812.

[85] 29 F.C.C.2d 807, 812 n.6 (1971).

[86] 30 F.C.C.2d 643 (1971). In a subsequent rehearing, the FCC affirmed its decision that the advertisements raised controversial issues. But the Commission declined to take further action since the network had shown that it was affording reasonable opportunity for the contrasting viewpoints to be heard. Wilderness Society, 22 P & F RADIO REG. 2D 1023 (1971).

[87] 30 F.C.C.2d at 644.

[88] *Id.* at 643. Complainants submitted transcripts of three advertisements; the first spoke of the oil company's large investments and the remaining two indicated the company's concern for ecology during exploration and drilling for oil in the Arctic.

[89] *Id.*

The Commission thought that in light of the examples given in the *Chevron* case,[90] the advertisements directly raised the issues of the need for quick development of the oil reserves in Alaska and the ecological effects stemming from such development.[91] It is noteworthy that the Commission stated that the advertisements also "inherently" raised a controversial issue, *i.e.*, the ecological effects of the actual transportation of the oil "since the company's large investment in drilling for Alaskan oil quite obviously is based upon the assumption that transportation of the oil to other parts of the world will be permitted."[92]

IV. Friends of the Earth

The refusal of the FCC to extend its cigarette ruling to product advertising in general[93] received a substantial blow when the D.C. Circuit reversed the Commission in *Friends of the Earth v. FCC*.[94] The complaint to the Commission insisted that the advertising of high-test gasoline and large-engine automobiles conveyed the message that such products were "a requirement for the full rich life."[95] This message, it was claimed, raised the specific issue of automotive pollution and whether in view of this pollution the public should prefer unleaded gasoline and small-engine cars.[96]

In declining to apply the *Banzhaf* rationale, the FCC said that the considerations in the cigarette ruling were distinguishable from those involving high-powered gasolines and cars. The Commission maintained that the government was attempting for health reasons to dissuade the public from smoking, whereas products which caused ecological problems but also conferred substantial benefits involved a much more complex balancing of competing interests.[97] The real question in the cigarette ruling, according to the Commission, had been how such an unhealthful product could have been "promoted at all on a medium impressed with the public interest." However, no one was suggesting the abolition of automobile advertisements.[98]

The D.C. Circuit rejected these distinctions, stating that it was unable to see how the FCC could plausibly differentiate the gasoline and car

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[90]See text accompanying note 85 *supra*.

[91]30 F.C.C.2d at 646.

[92]*Id.*

[93]See text accompanying note 72 *supra*.

[94]Friends of the Earth v. FCC, no. 24,556 (D.C. Cir. Aug. 16, 1971).

[95]Letter to Gary Soucie, 24 F.C.C.2d 743, 744 (1970).

[96]*Id.* at 744.

[97]*Id.* at 746.

[98]*Id.*

situation from *Banzhaf*.[99] The court pointed to the conclusion in *Banzhaf* that cigarette advertisements portrayed smoking as socially desirable, manly and an important part of a rich full life.[100] Likewise, the commercials at hand insinuated that the human personality found tremendous fulfillment in a large car with a fast getaway.[101] The portrayal of such products in the light of a thoroughly documented health hazard,[102] especially when Congress had taken action,[103] rendered the parallel with cigarette advertising and the relevance of *Banzhaf* inescapable.[104]

With regard to the FCC's effort to distinguish cigarette advertising from the advertising at hand,[105] the court concluded that the Commission departed from its own precedent in *Banzhaf*

> in insisting that, because cigarettes are unique in the threat they present to human health, the public interest considerations which caused it to reach the result it did in *Banzhaf* have no force here.
>
> The distinction is not apparent to us, any more than we suppose it is to the asthmatic in New York City for whom increasing air pollution is a mortal danger.[106]

V. *Military Recruitment—Selling the Army*

The FCC has refused to find controversial issues requiring application of the fairness doctrine in four military advertising cases: *San Francisco Women for Peace*,[107] *David C. Green*,[108] *Alan F. Neckritz*[109] and *Citizens Communications Center*.[110] In each of these cases, the complainant had sought an FCC ruling declaring the licensee in violation of the fairness doctrine for its refusal to broadcast messages opposing military service and informing the public of alternatives to the draft.[111] The complainants all argued that these messages were necessary since army recruitment

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[99]Friends of the Earth v. FCC, no. 24,556 at 14 (D.C. Cir. Aug. 16, 1971).

[100]*Id.* at 11.

[101]*Id.* at 12.

[102]*Id.* at 4.

[103]National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-47 (1970).

[104]No. 24,556 at 12 (D.C. Cir. Aug. 16, 1971).

[105]See text accompanying notes 97 & 98 *supra*.

[106]No. 24,556 at 11 (D.C. Cir. Aug. 16, 1971).

[107]24 F.C.C.2d 156 (1970), *aff'd sub nom.* Green v. FCC, 447 F.2d 323 (D.C. Cir. 1971).

[108]24 F.C.C.2d 171 (1970), *aff'd sub nom.* Green v. FCC, 447 F.2d 323 (D.C. Cir. 1971).

[109]24 F.C.C.2d 175 (1970), *aff'd*, 446 F.2d 501 (9th Cir. 1971).

[110]21 P & F RADIO REG. 2D 1222 (1971).

[111]Citizens Communications Center, 21 P & F RADIO REG. 2D 1222 (1971); San Francisco Women For Peace, 24 F.C.C.2d 156 (1970); David C. Green, 24 F.C.C.2d 171 (1970); Alan F. Neckritz, 24 F.C.C.2d 175 (1970).

advertisements had raised the controversial issue of the desirability of military service.[112]

In these cases the FCC and the courts on appeal concluded that no controversial issues were inherent in the military advertisements.[113] If any issues did exist, they concerned American involvement in Vietnam,[114] the draft[115] or the morality of participating in any war.[116] But in any event there had been no indication that the stations had failed to treat these particular issues in conformance with the fairness doctrine.[117]

Commissioner Nicholas Johnson, dissenting in *San Francisco Women for Peace*, argued that the FCC's earlier cigarette ruling[118] was definitely applicable to the military recruitment announcements.[119] He maintained that the advertisements had portrayed enlistment as desirable in terms of the satisfactions to be derived from the experience of associating with attractive people and "real" men.[120] Furthermore, the reasons why volunteering might not be so desirable had not been presented, *i.e.*, the hazard of death and the legal alternatives[121] to the draft other than enlistment.[122]

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[112]Citizens Communications Center, 21 P & F RADIO REG. 2D 1222 (1971); San Francisco Women For Peace, 24 F.C.C.2d 156 (1970); David C. Green, 24 F.C.C.2d 171 (1970); Alan F. Neckritz, 24 F.C.C.2d 175 (1970).

[113]Neckritz v. FCC, 446 F.2d 501, 503 (9th Cir. 1971); Green v. FCC, 447 F.2d 323, 329-32 (D.C. Cir. 1971); Citizens Communications Center, 21 P & F RADIO REG. 2D 1222, 1223 (1971); San Francisco Women For Peace, 24 F.C.C.2d 156, 157 (1970); David C. Green, 24 F.C.C.2d 171, 173 (1970); Alan F. Neckritz, 24 F.C.C.2d 175, 176 (1970).

[114]Green v. FCC, 447 F.2d 323, 330 (D.C. Cir. 1971).

[115]*Id.*

[116]*Id.* at 330-31.

[117]Green v. FCC, 447 F.2d 323, 330-31 (D.C. Cir. 1971); San Francisco Women For Peace, 24 F.C.C.2d 156, 158 (1970); David C. Green, 24 F.C.C.2d 171, 173 (1970).

[118]Applicability of the Fairness Doctrine to Cigarette Advertising, 9 F.C.C.2d 921 (1967). All of the complainants relied on the cigarette ruling (the *Banzhaf* rationale). In addition, the petitioners in *Green* relied on Local 880, Retail Store Employees v. FCC, 436 F.2d 248 (D.C. Cir. 1970). In this case the fairness doctrine issue arose in the context of a labor dispute during which a broadcaster was regularly airing a department store's advertisements. The advertisements requested public patronage of the store and in response the labor union sought to air announcements urging a boycott. Because the broadcast licensee refused these announcements, the labor union attempted to block the renewal of his FCC license. Although never really reaching the question of whether the fairness doctrine was applicable, the court indicated that the store advertisements could have raised an "implicit" controversial issue. *Id.* at 258.

[119]24 F.C.C.2d 156, 160-64 (1970).

[120]*Id.* at 161.

[121]The sample announcements which petitioners in *Green* sought to broadcast attempted to portray military service as highly undesirable. The announcements ended by emphasizing that legal alternatives were available and giving phone numbers and addresses for further free information. Green v. FCC, 447 F.2d 323, 325 n.3 (D.C. Cir. 1971).

[122]San Francisco Women For Peace, 24 F.C.C.2d 156, 166 (1970).

With regard to the importance of congressional action to the holding in *Banzhaf*,[123] Congress, of course, has not attempted to discourage the public from serving in the military.[124] Nevertheless, Commissioner Johnson emphasized that Congress in enacting the Selective Service Act had exempted for strong national policy reasons persons in certain categories.[125] Since the goal of the fairness doctrine is the "promotion of informed decision-making by the public,"[126] informing the public of these exemptions would seem an appropriate task for the licensee to undertake.[127]

The real question in the military advertising cases was whether or not the recruiting advertisements had raised a controversial issue, *i.e.*, legal alternatives to military service other than volunteering or waiting to be drafted.[128] The FCC did suggest in *David C. Green* that if the issue of the draft had been raised, then the "controversial issue" of legal alternatives would also have been raised.[129] But that ruling upheld as reasonable the licensee's decision that the draft issue had not been involved.[130] In any event, that issue was being afforded fair coverage.[131]

The latter indication in these cases that the broadcaster was already treating the issue fairly appears to be, as Commissioner Johnson pointed out, a mere assumption unsupported by any evidence.[132] Perhaps more importantly, it is unclear whether the supposed coverage of the draft included the specific information the claimants sought to present[133] concerning the existence of alternatives. Furthermore, Commissioner Johnson suggests that the finding of a "reasonable" licensee decision[134] is a meaningless appraisal.[135]

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[123]See text accompanying notes 67-69, 78 *supra*.

[124]This discussion should be compared with text accompanying note 97 *supra*.

[125]San Francisco Women For Peace, 24 F.C.C.2d 156, 166 (1970).

[126]Green v. FCC, 447 F.2d 323, 333 (D.C. Cir. 1971). *See* Fairness Primer, 40 F.C.C. 598, 604 (1964); Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1247 (1949).

[127]The complaints in the military advertising cases all insisted on the necessity of informing the public of the exemptions. See text accompanying note 111 *supra*.

[128]San Francisco Women For Peace, 24 F.C.C.2d 156, 157 (1970).

[129]24 F.C.C.2d 171, 172 (1970).

[130]*Id.* at 172-73.

[131]*Id.* at 173.

[132]San Francisco Women For Peace, 24 F.C.C.2d 156, 167 (1970) (Johnson, Comm'r., dissenting).

[133]Note 121 *supra*.

[134]The FCC will not substitute its judgment for the reasonable judgment of the licensee who acts in good faith. Fairness Primer, 40 F.C.C. 598, 599 (1964).

[135]24 F.C.C.2d at 162. Commissioner Johnson criticized the Commission's apparently complete deference to licensee judgment:

> Next, the majority drags out the customary and familiar boilerplate recita-

BALANCED COVERAGE

It seems clear that there is great pressure urging an expansion of the definition of a controversial issue to include issues inherent or implicit in commercial advertising. Once the issue is recognized the fairness doctrine requires balanced presentation of opposing viewpoints.[136] In view, then, of the effect of commercial advertising on the definition of controversial issues, the question remains whether such advertising has also had an impact on the way the issues are to be given balanced coverage.

The Commission in *Cigarette Advertising* laid great stress on the "repetitive and continuous" nature of cigarette commercials.[137] It noted further that frequency of the presentation of one side of an issue was clearly a factor to be considered in the administration of the fairness doctrine:

> [W]hile the Fairness Doctrine does not contemplate "equal time," if the presentation of one side of the issue is on a regular continual basis, fairness and the right of the public adequately to be informed compels the conclusion that there must be some regularity in the presentation of the other side of the issue.[138]

The Commission stressed that though it was not usurping licensee judgment as to the type of programming or the amount or nature of time to be afforded, the cigarette advertisements called for a significant allocation of rebuttal time.

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tion that the Commission will defer to the licensee's judgment on a Fairness Doctrine matter so long as it is "reasonable." ("In short, it is not a question of the Commission substituting its judgment for that of the licensee, but rather whether, in light of the showing before the Commission, the licensee's judgment can be said to be arbitrary.") Of course, everyone must know that this double talk is nonsense, and is used primarily when the Commission does not want to apply the Fairness Doctrine to a particular factual situation. Obviously at some point this Commission must decide that the licensee is wrong in his determination that the Fairness Doctrine is inapplicable, and I do not see how we can do this unless we substitute our judgment for the licensee's. Whatever may be the initial responsibility of the licensee, some agency must arbitrate disputes regarding the applicability of the Fairness Doctrine—and that task has been assigned to the Federal Communications Commission, with review by the courts. In any case, the majority treats this "throwaway" language precisely for what it is—a useless appendage inserted routinely in Commission opinions—and proceeds to make its own, independent determination anyway . . . .

[136] *Id.* See text accompanying note 9 *supra.*

[137] 9 F.C.C.2d at 941.

[138] *Id.*

The court in *Banzhaf*, in a different context,[139] cited the "subliminal impact" of advertising which it called a form of "pervasive propaganda" capable of being heard even when not listened to:

> In an age of omnipresent radio, there scarcely breathes a citizen who does not know some part of a leading cigarette jingle by heart . . . . [A]n ordinary habitual television watcher can *avoid* these commercials only by frequently leaving the room, changing the channel, or doing some other such affirmative act.[140]

In all but one[141] of the military advertising cases referred to above the complainants specifically requested time to present spot advertisements to rebut the military public service announcements.[142] The answer to this request was again that it was in the licensee's discretion to determine the specific manner of complying with the fairness doctrine, and the Commission would "not dictate the form of the presentation—*e.g.*, discussion or panel shows, news shows, etc."[143] Nevertheless, the argument for spot advertisements as articulated by the complainant in *San Francisco Women for Peace* seems appealing. The group wanted to argue its point of view

> through spot announcements rather than news and discussion coverage because of the more effective motivating factors inherent in an "uninterrupted" "prepackaged message" which "allows the sponsor . . . to prepare the announcements in such a manner as to have a desired psychological effect" rather than the "straightforward manner aimed at persuading the listener's rational sense" which is the way views are presented on news and talk programs.[144]

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[139]The court was stressing the differences between the newspaper press and the radio/TV press which justified, in spite of the first amendment, more government control over the latter than the former. 405 F.2d at 1099-1101.

[140]405 F.2d at 1100.

[141]Alan F. Neckritz, 24 F.C.C.2d 175 (1970). See text accompanying notes 107-10 *supra*.

[142]The complainants actually sought free time to present their spot announcements. The court never reached the question of free time since it held that no controversial issues had been raised. For a summary of the FCC's position on the granting of free time in order to satisfy fairness requirements, see note 48 *supra*.

[143]David C. Green, 24 F.C.C.2d 171, 173 (1970). The Commission did indicate that the stations had offered the complainants time to present their views in the context of regular substantive programming. *Id.*

[144]2d F.C.C.2d at 156-57. A good indication of the unusually powerful impact of spot advertising as compared to normal news coverage is the success of such advertising. In a letter to radio and TV presidents, Secretary of the Army Robert F. Froehlke reported that response from a spring, 1971, TV-radio advertising campaign had been remarkable and that approximately 8,000 enlistments could be attributed directly to the campaign with many other volunteers having been influenced. BROADCASTING, Sept. 27, 1971, at 43.

Perhaps the most far-reaching recognition of the impact of advertising as it relates to the fairness requirement of full coverage of controversial issues is found in *Business Executives' Move for Vietnam Peace v. FCC.*[145] This case reversed two FCC decisions[146] which had permitted a broadcast licensee policy of refusing to sell advertising time to groups or individuals wishing to speak out on controversial issues.[147] The court held only that where some commercial advertising time was sold, a total ban on editorial advertising was in violation of the first amendment. It did not require that the stations accept the specific editorial advertisements in question,[148] but remanded the case with instructions to the Commission that it develop reasonable regulatory guidelines[149] to deal with such questions as what and how many groups or individuals should be given or sold what broadcast time.

Although it is beyond the scope of this note to examine in detail what has been referred to as this underlying constitutional right of access to the mass media,[150] it is worthwhile to note certain considerations which led to the conclusion in *Business Executives' Move for Vietnam Peace.* In its analysis, the court quoted from *Red Lion Broadcasting Co. v. FCC:* "[i]t is the purpose of the First Amendment to preserve an *uninhibited* marketplace of ideas [in the broadcast media]."[151] According to the court it followed that the goal of an informed public[152] was not the only first amendment interest constraining broadcasters,[153] since the interest of individuals and groups in effective "self-expression" was perhaps more important.[154] This "self-expression" interest is related to the more specific first amendment interest in editorial advertising through the control ex-

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[145]Business Executives' Move for Vietnam Peace v. FCC, no. 24,492 (D.C. Cir. Aug. 3, 1971).

[146]Business Executives' Move for Vietnam Peace, 25 F.C.C.2d 242 (1970); Democratic National Committee, 25 F.C.C.2d 216 (1970).

[147]Business Executives' Move for Vietnam Peace v. FCC, no. 24,492 at 3 (D.C. Cir. Aug. 3, 1971).

[148]*Id.* at 4.

[149]*Id.*

[150]*See* Johnson & Westen, *A Twentieth-Century Soapbox: The Right to Purchase Radio and Television Time,* 57 VA. L. REV. 574 (1971); Note, *A Fair Break for Controversial Speakers: Limitations of the Fairness Doctrine and the Need for Individual Access,* 39 GEO. WASH. L. REV. 532 (1971); Note, *Free Speech and the Mass Media,* 57 VA. L. REV. 636 (1971).

[151]Business Executives' Move for Vietnam Peace v. FCC, no. 24,492 at 22 (D.C. Cir. Aug. 3, 1971).

[152]See text accompanying note 126 *supra.*

[153]Business Executives' Move for Vietnam Peace v. FCC, no. 24,492 at 22 (D.C. Cir. Aug. 3, 1971).

[154]*Id.* at 23.

erted by broadcasters over controversial issue programming.[155] While the advertiser generally controls and edits a paid advertisement, the broadcaster's editing of regular news programs often decides what is emphasized and what is minimized.[156] With this in mind, the court concluded that "[e]ditorial advertising is . . . a special and separate mode of expression, not simply a duplication of other expression on the same medium."[157]

A further argument was presented that in airing an issue such as war, the fact that antiwar views had been presented on news and interview shows did not mean that a particular antiwar editorial advertisement would add nothing to the public's information and understanding.[158] Much could be gained through individual self-expression in which matters of style and intensity of feeling were important components.[159]

In making these suggestions the court was aware that short editorial announcements could be misleading:

> [T]he onesidedness and private editing of particular "spot" editorial advertisements may in the end steer viewers and listeners away from the "truth" by distorting complex issues. . . . But that does not mean that they are unprotected by the First Amendment. Our Constitution protects many forms of misleading and overly simplified political expression in order to ensure robust, wide-open debate. . . .
>
> We conclude, therefore, that the fairness doctrine's goal of full and fair coverage of issues on normal programming time does not eliminate the public's interest in a further, complementary airing of controversial views during advertising time.[160]

CONCLUSION

Despite the reluctance of the FCC to extend the applicability of the fairness doctrine to advertising, it appears that commercial advertisements of products other than cigarettes can raise controversial issues of public importance. Such was the view adopted in *Friends of the Earth.*[161] In addition, the characteristics of advertising may be such that when a product commercial is seen as raising one side of an issue, balanced

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[155] *Id.* at 24.

[156] *Id.*

[157] *Id.*

[158] *Id.* at 27.

[159] *Id.* at 28.

[160] *Id.* at 28-29.

[161] No. 24,556 (D.C. Cir. Aug. 16, 1971). *See also* Local 880, Retail Store Employees v. FCC, 436 F.2d 248 (D.C. Cir. 1970); Avco Broadcasting Corp., 23 P & F RADIO REG. 2D 111 (1971).

coverage of the other side may require more than the normal panel and news shows. Spot editorial advertisements might be needed to balance the repetitive impact[162] and psychological effect[163] of controversial product advertisements. This was the basic approach taken in *Cigarette Advertising*[164] and appears to be strongly supported by *Business Executives' Move for Vietnam Peace.* In that case, although the court was dealing specifically with a constitutional right of access to the media,[165] the court seems to have suggested that editorial advertisements might be necessary to the balanced presentation of opposing views.[166] This requirement would preserve the first amendment goals of "an uninhibited marketplace of ideas"[167] and a robust and wide-open debate within the broadcast media.[168]

The difficulties involved in reconciling the fairness doctrine with advertising appear to be immense. For example, the list of products which suggest controversial issues appears endless, *e.g.*, fluoride toothpaste, drugs, detergents, and beer.[169] An extreme attempt to invoke application of the doctrine is exemplified by the argument before the FCC of Joseph N. Onek in behalf of the National Welfare Rights Organization and the Sierra Club.[170] He contended that the fairness doctrine should apply to the entire TV advertising system in order to allow a rebuttal to advertising's encouragement of increased personal spending. The opposing side would encourage greater expenditures for public services. The example

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[162]See text accompanying note 70 *supra.*

[163]See text accompanying notes 139-40, 144 *supra.*

[164]The Commission in *Cigarette Advertising* did stress that it was not compelling a licensee to treat the issue of smoking through spot messages. Again the emphasis was on a significant amount of time to present the anti-smoking viewpoint to rebut the numerous smoking commercials. 9 F.C.C2d at 941-42. But the Commission did point with favor to the availability of such anti-smoking commercials and to the use already being made of them by some licensees. 9 F.C.C.2d at 941 n.24.

[165]No. 24,492 at 10-11 (D.C. Cir. Aug. 3, 1971).

[166]With such an overwhelming recognition of the value and impact of spot advertising, it seems arguable that no licensee could reasonably conclude that issues raised in advertising could be balanced with regular panel shows and discussions. Compare the contrasting viewpoints of FCC Chairman Dean Burch and Commissioner Nicholas Johnson on the question of spot advertisements and balanced coverage in Wilderness Society, 22 P & F RADIO REG. 2D 1023, 1029-37 (1971).

[167]Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

[168]Business Executives' Move for Vietnam Peace v. FCC, no. 24,492 at 28-29 (D.C. Cir. Aug. 3, 1971).

[169]Applicability of the Fairness Doctrine to Cigarette Advertising, 9 F.C.C.2d 921, 942-43 (1967), *aff'd sub nom.* Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied,* 396 U.S. 842 (1969).

[170]Raspberry, *Public Interest TV Ads?,* Washington Post, Oct. 15, 1971, at A23, col. 6.

given was that if advertisers urge a man to spend money for a new car, others should be allowed to encourage him to spend more money to feed the hungry, educate the ignorant and stop pollution.[171]

Broadcasters are concerned that the extension of the fairness doctrine to product advertising is just another example of unwanted government regulation.[172] In addition, they contend that it would mean tremendous revenue loss from advertisers. John A. Schneider, president of CBS Broadcast Group, remarked in a recent speech that he could think of no sales presentation or discount price which could convince an advertiser to make use of broadcasting if the advertiser were doomed to watch counter-advertisements, advising that his product was unsafe, injurious to health or endangering the environment.[173] With regard to increased government regulation, it should be remembered that failure to comply with the fairness doctrine, which really means failure to operate in the public interest,[174] can jeopardize a broadcaster's license.[175]

The problems the FCC faces with respect to the fairness doctrine in general, as well as those involving the doctrine's relationship to advertising, are overripe for resolution. It appears that the FCC has persisted too long in applying vague criteria in an attempt to ensure fairness. Whether Congress will resolve the issues through legislation[176] or the FCC through new regulations is unclear at this moment. The Commission has in fact initiated "a broad-ranging inquiry into the efficacy of the fairness doctrine" which at this writing has just begun.[177]

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[171] *Id.*

[172] See text accompanying note 17 *supra*.

[173] BROADCASTING, Oct. 25, 1971, at 42.

[174] *See* text accompanying notes 6-9 *supra*.

[175] Broadcasting licenses are granted by the FCC for three years. Upon expiration of a license and "upon application therefor, a renewal of such license may be granted . . . if the Commission finds that public interest, convenience, and necessity would be served thereby." Communications Act of 1934, 47 U.S.C. § 307(d) (1970). It has been held that members of the public in general have standing as parties in interest to contest renewal of these licenses. Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966). Thus a number of special interest groups have successfully blocked the license renewals on such grounds as oppressive overcommercialization by advertising announcements, racial discrimination and violation of the fairness doctrine. For an interesting discussion of this problem as the broadcaster views it, see BROADCASTING, Sept. 20, 1971, at 36; BROADCASTING, Sept. 27, 1971, at 24.

[176] Richard Barron, president of the North Carolina Association of Broadcasters, urged legislative repeal of the fairness doctrine in his testimony before Senator Sam Erwin's Judiciary Subcommittee on Constitutional Rights. BROADCASTING, Oct. 25, 1971, at 47.

[177] The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, Notice of Inquiry, 30 F.C.C.2d 26 (1971). *See* Notice of Inquiry and Notice of Proposed Rulemaking, 23 F.C.C.2d 27 (1970).