APPENDIX A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 72-534
79505

In the Matter of	)	
	)	
The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act.	)	Docket No. 19260

FIRST REPORT
(Handling of Political Broadcast)

Adopted: June 16, 1972 ; Released: June 22, 1972

By the Commission: Commissioner Johnson dissenting and issuing a statement; Commissioner H. Rex Lee concurring in the result.

I. Introduction

1. This first report deals with Part V of our Notice--the fairness doctrine as it relates to political broadcasts. We would ordinarily consider this aspect in the context of the revisions made in the general fairness area, including possible public interest decisions as to access. However, we are operating under time constraints here that we must take into account--namely, the appropriateness of disposing of this aspect well before the commencement of the general election period. See DNC v. FCC, ____U.S. App. D.C. _____, _____ FCC 2d _____, Case No. 71-1738 (D.C. Cir. Feb 22, 1972), (slip op. at 7). We therefore have expedited our consideration of this aspect and, if necessary, will re-examine this report in light of our later decisions in Parts II - IV.

2. While this was the last topic in this inquiry, it is not, of course, the one of least importance. Promotion of robust, wide-open debate in this field vitally serves the public interest.

II. Background

3. In applying the fairness doctrine the Commission has traditionally required licensees to afford reasonable opportunity for the presentation of contrasting views following the presentation of one side of a controversial issue of public importance. The licensee

has been given wide discretion in selecting the appropriate spokesman, format and time for the presentation of the opposing views on controversial issues, with two significant exceptions. Under § 315 of the Communications Act of 1934, as amended, licensees are required to afford equal time to legally qualified candidates; and under the Commission's political editorializing rules (§ 73.123(c), 73.300(c), 73.598(c), 73.679(c)) the licensee must afford a reasonable opportunity for a candidate or his spokesman to respond when the licensee has opposed him or supported his opponent in an editorial.

4. Under the ruling in Letter to Mr. Nicholas Zapple, 23 F.C.C. 2d 707(1970) the Commission further limited the licensee's discretion. The Commission held in Zapple that when a licensee sells time to supporters or spokesmen of a candidate during an election campaign who urge the candidate's election, discuss the campaign issues, or criticize an opponent then the licensee must afford comparable time to the spokesmen for an opponent. 1/ Known as the quasi-equal opportunities or political party corollary to the fairness doctrine, the Zapple doctrine is based on the equal opportunity requirement of Section 315 of the Communications Act; accordingly, free time need not be afforded to respond to a paid program.

5. Since some controversy has been generated as to the applicability or wisdom of this doctrine, the Commission asked for public comment on the following questions in its Notice of Public Inquiry in Docket No. 19260 (hereinafter, Fairness Inquiry).
"Should the quasi-equal opportunities approach be restricted or expanded and what is the feasibility and effect of any proposed revision on the underlying policies of the statute (see Section 315(a))?

"--Should the Commission adopt a position that Zapple applies only to political campaigns and not to other times?

"--Should Zapple be disassociated from the fairness doctrine and incorporated into Section 315?

"--Should Zapple be limited by applying a 7-day deadline for requesting "quasi-equal opportunities"?

1/ In In Re Complaint of Committee for the Fair Broadcasting of Controversial Issues, 25 F.C.C. 2d 283 (1970), affirmed on reconsideration sub nom. Republican National Committee, 25 F.C.C. 2d 739 (1970), the Commission extended the Zapple ruling to a non-campaign period proffer of time to a political party chairman where the licensee did not specify the issue or issues to be discussed. This ruling was reversed in Columbia Broadcasting Co. v. F.C.C., 454 F. 2d 1018, (D.C. Cir. 1971).

"--Should Zapple continue to apply only to major parties (see Letter to Lawrence M. C. Smith, 25 R.R. 291 (1963)), or should it be extended to all parties or to some mathematically-defined category of "parties with substantial public support" (e.g., percentage of popular vote)? How should it apply to "new" parties?

"--Should Zapple be extended to include spokesmen for ballot issues such as bond issues, amendments of state constitutions, etc.?"

6. One additional suggestion has been that the Zapple doctrine should be extended to include broadcast appearances of the President of the United States so that an automatic right to respond in comparable time, format, etc., would accrue to appropriate spokesman following a Presidential appearance. In Complaint of Committee for the Fair Broadcasting of Controversial Issues, 25 F.C.C. 2d 283, 294-298 (1970), the Commission declined to extend the Zapple quasi-equal opportunities concept generally to Presidential appearances, although it said that the fairness doctrine was applicable to Presidential appearances when dealing with controversial issues of public importance. Upon re-examination in Republican National Committee, 25 F.C.C. 2d 739, 744 (1970), the Commission again explained that Presidential broadcasts made in a non-election period do not come within the Zapple corollary but are included under the general fairness doctrine to the extent that controversial issues of importance are discussed. The question was raised once again and ruled on by the Commission in Democratic National Committee, 31 F.C.C. 2d 708 (1971), aff'd Democratic National Committee v. F.C.C., _____ U.S. App. D.C. _____. F. 2d _____, Case No. 71-1738 (D.C. Cir. Feb. 22, 1972). However, we solicited the comments of the public on the questions raised in these cases in this inquiry.

III. Summary of Comments

7. Extensive comments and reply comments addressing these questions were received in response to the Fairness Inquiry from fourteen parties. In addition, the Commission conducted panel discussions and heard oral argument for a full week in March 1972, during which these issues were exhaustively discussed. (A list of all participants is included in Appendix A) A variety of ideas, proposals, and criticisms were presented, a brief summary of which follows.

8. Storer Broadcasting Company observes that since the fairness doctrine, unlike Section 315, gives no particular person a right to reply to previously broadcast material, the extension of the fairness doctrine

to a quasi-equal opportunities doctrine in Zapple is a contradiction of the fairness doctrine. As presently constituted, Zapple and its progeny provide insufficient direction to licensees as to when comparable responses to non-campaign appearances of public officials are required, as to which party spokesman is entitled to reply when different factions within a party wish to respond, and as to the rights of minority parties to comparable time. Storer recommends, therefore, that Zapple should be codified in Commission rules or be incorporated into Section 315 to remove it from the ambit of the fairness doctrine. Storer further suggests that the Commission adopt a political broadcast primer to specify licensee obligations and responsibilities in this area.

9. The National Association of Broadcasters (NAB), General Electric Broadcasting Co., American Broadcasting Co. (ABC), National Broadcasting Co. (NBC), the Evening News Association, Lee Enterprises, Inc., Time Life Broadcasting, Inc. and others support the principles of the Zapple doctrine so long as the Cullman 2/ doctrine continues to be inapplicable, and licensees are not required to subsidize the campaigns of opposing candidates by affording free response time. Zapple is seen by those filing joint comments with the Evening News Association as an appropriate means to fulfill the purposes of Section 315, ensuring the equality of treatment of political candidates by broadcast licensees. Consequently, they would impose obligations on licensees only when a campaign is in progress in which the broadcaster has afforded time and relinquished content control to a spokesman for a candidate to support that candidate or to oppose rival candidates.

10. The NAB, ABC, NBC, and G.E. Broadcasting Co. argue that the Zapple doctrine should also apply to "political" broadcasts where a campaign issue (bond proposal, constitutional amendment, etc,) that is supported or opposed by a political spokesman has been placed on the ballot. It is argued that this situation is analogous to both Section 315 and Zapple, and, as is the case with the political spokesman doctrine, Cullman should not apply. NBC emphasizes that the quasi-equal opportunity approach of Zapple or its extension to ballot issues should apply only to paid presentations in campaign periods, since the equal opportunities approach involving free time inhibits the presentation of political programming and interferes with a licensee's editorial judgment.

2/ Cullman Broadcasting Co. Inc., 40 F.C.C. 576, 577 (1963) held that "...where the licensee has chosen to broadcast a sponsored program which for the first time presents one side of a controversial issue, has not presented (or does not plan to present) contrasting viewpoints in other programming, and has been unable to obtain paid sponsorship for the appropriate presentation of the opposing viewpoint or viewpoints, he cannot reject a presentation otherwise suitable to the licensee-and thus leave the public uninformed--on the ground that he cannot obtain paid sponsorship for that presentation."

11. Two commentators, Democratic National Committee (DNC) and American Civil Liberties Union (ACLU) suggest that the Commission extend the fairness doctrine or adopt a specific rule that would require licensees to broadcast the opposing views of appropriate spokesmen following an appearance of a public official. It is claimed that there is an overriding national concern in informing the public on both sides of issues dealt with by public officials, and accordingly, that licensee discretion in presenting opposing views and selecting appropriate spokesman should be more limited than at present.

12. DNC specifically urges the adoption of a rule that: (1) would establish a presumption that a Presidential broadcast appearance involves a controversial issue of public importance; (2) would require licensees to seek out appropriate spokesmen to present an opposing view and to afford them equal opportunities; and (3) would require licensees or networks to keep publicly available for three years a tape or transcript of every Presidential appearance. DNC asserts that such a rule is necessitated by the public interest standard of the Communications Act and by the First Amendment, in view of the public's need to be fully informed on important public issues discussed by the President. The public is not presently receiving balanced information on such issues, DNC believes, because the President's control of the time, format, and content of his appearances maximizes their impact and effectiveness while, on the other hand, the difficulties encountered by DNC in buying time to discuss public issues or in securing free time to respond to Presidential appearances limits the effectiveness of the presentation of their viewpoint. DNC's views are currently presented, it maintains, through news and panel show presentations in which DNC representatives are merely responding to questions and have no opportunity, comparable to the President's, to develop a reasoned and uninterrupted presentation of the issues. DNC thus argues that the First Amendment goal of promoting robust, wide-open debate is being thwarted by its rejection as an entity responsible for defining options for the American people on major public issues and by denying it access, comparable to the President's, to respond to his appearances.

13. ACLU maintains that the responsibility of the licensee under the fairness doctrine should extend to making available comparable opportunities for opposing spokesman to comment on the issues raised in the broadcast appearance of any public official, including the President. Because of the President's unquestioned power to command broadcasting time and to attract an audience, ACLU feels that comparable time can be afforded only if the contrasting viewpoint is presented immediately after each Presidential appearance. The President and other public officials should furnish copies of their statements sufficiently in advance of their broadcast to permit station licensees to fulfill these fairness obligations.

14. The proposals of DNC and ACLU were opposed by a number of parties. ABC and G.E. Broadcasting Co. argue that no justification for the proposed rule can be found in Section 315 of the Act, since under that Section, the recipient of an equal time opportunity to respond to a candidate's appearance must himself be a legally qualified opposing candidate and not just a representative of a political party or some other appropriate group. To extend a quasi-equal opportunities doctrine to non-election period Presidential appearances would require Congressional amendment of Section 315 because such extension would violate the intent of Section 315, and specifically, would negate the newscast, news documentary, and news interview exemptions to the equal time provisions contained in Section 315(a). Implementation of these proposals would also be a distortion of the fairness doctrine, it is argued, since the fairness doctrine focuses on issues, not individuals or candidates.

15. Those parties filing with the Evening News Association argue that the broadcast appearance of a public office holder should be treated as the appearance of a public official fulfilling the duties of his office, not as the appearance of a partisan spokesman presenting one side of a controversial issue absent some extrinsic evidence to the contrary. Otherwise, the public's right to be informed on important matters by its elected officials would be subordinated to the rights of a particular class (political candidates) to broadcast.

16. NBC believes that both DNC and ACLU have failed to show the necessity of their proposed policies or the present inadequacy of the fairness doctrine as a tool for informing the public on important public issues. Creation of an equal or quasi-equal time right to reply to all public official addresses would, as a practical matter, inhibit the appearance of public officials, NBC maintains. It would also ignore the difference in media use by different officials, as well as the fact that it is possible to distinguish the leadership appearances of an official from his political opinions. NBC also has argued that under present rules Presidential appearances during a campaign for his re-election are subject to the Section 315 equal time requirements, that Presidential appearances in a non-election period are subject to the fairness doctrine and the political party corollary, and that these doctrines are adequate to ensure that the electorate is informed.

17. WGN Broadcasting Co. (WGN) is also opposed to the DNC/ACLU proposals on the grounds that the standard proposed by DNC, that Presidential broadcasts that enhanced the political or personal image of the President would be subject to the rule and require the presentation of opposition programming, is too vague to be realistically applied by licensees; and that the FCC would be inexorably involved in politically sensitive adjudications which should be avoided.

18. Three parties argue that the Zapple doctrine should be repealed altogether. WGN maintains that Zapple exceeds the intent of Section 315, which grants equal opportunities only to opposing candidates and not to their supporters. That question, WGN maintains, was settled in Felix v. Westinghouse, 186 F. 2d 1 (3d Cir. 1950), where it was held that the supporters of a candidate were specifically excluded from Section 315.

19. The law firm of Haley Bader & Potts argues that the Zapple doctrine overlooks the fact that the informational needs of the public are of primary importance, and mistakenly confers rights on individual parties. The standards in Zapple are too vague for day-to-day application by the licensee, it maintains, and the resultant confusion will tend to inhibit licensee coverage of political matters. Moreover, it argues that Zapple unduly restricts licensee discretion in selecting spokesmen and regulating content.

20. The holding of Zapple would be acceptable to Public Broadcasting Service (PBS) as a fairness question if the Commission had limited itself to a discussion of the reasonableness of the balance of opposing views afforded by the licensee. PBS is opposed, however, to the extension of traditional fairness concepts of "reasonable balance" to a "comparable time" or "quasi-equal opportunity" doctrine because this restricts licensee discretion and creates artificial barriers to the discussion of controversial issues of public importance. Furthermore, PBS argues that Zapple cannot be limited to the two major parties nor to campaign periods only, but instead will engender a spiraling round robin of partisan responses. Several other parties also voiced this particular fear.

21. At the fairness panels, counsel for PBS further developed the foregoing argument by stating that the pricing mechanism and the economic realities of buying time on the commercial networks tend to discourage the broadcast appearances of minority candidates, but that no such economic barrier to access by minority parties exists in the Public Broadcasting Service. Counsel for PBS also argued that in extending quasi-equal opportunities to supporters of a candidate in Zapple, the Commission was doing what the Congress had decided not to do when it adopted Section 315 of the Communications Act.

22. Several parties submitted comments on the procedural methods or standards by which the Commission should enforce fairness concepts in the political broadcast area. As previously mentioned, Storer Broadcasting Co. urges the Commission to adopt political broadcasting rules or to develop a political broadcasting primer that would specifically define those situations in which licensees would be required to afford comparable time and which would specify guidelines for the selection of the appropriate opposing spokesmen in order to minimize the confusion that has resulted from the recent series of ad hoc adjudications (Zapple, RNC, etc.) modifying the traditional fairness doctrine.

23. Those filing with the Evening News Association argue that the FCC frequently oversteps its authority in judging the "reasonableness" of licensee action in the political broadcasting area. The Commission should therefore adopt a "grossly unreasonable" test of licensee conduct, and impose penalties only when licensee conduct meets an "actual malice" test.

24. Two other general points raised by commentators were as follows:

A. The G.E. Broadcasting Company believes that the Commission's recent ruling in In re Rosenbush Advertising Agency, 31 F.C.C. 2d 782 (1971). 3/ should be upheld since it affords discretion in making determination as to how a given licensee's facilities should be made effectively available to candidates or supporters of candidates. Section 315 itself permits a licensee to have discretion in scheduling and the Commission, it is contended, should not restrict this discretion any further in "quasi-315" situations.

B. During the panel discussions, former FCC Chairman Newton Minow discussed the recent study and recommendations of the bipartisan Twentieth Century Fund 4/ on this subject. He recommended that the Commission support legislation that would enable the major party candidates in a Presidential campaign to obtain six one-hald hour periods called "Voters' Time" in prime time for the simultaneous broadcast on all TV and radio stations of political presentations. Use of this time would be entirely within the candidates' discretion, and, since the beneficiary of these programs would be the American public who would thus receive information pertinent to the election of the President, public funds should be used to buy the time.

3/ The Commission held in Rosenbush that a licensee's policy of accepting only paid political advertising of five minutes or longer during a primary campaign was consistent with Commission precedent where the licensee recognized its public interest obligation to make its facilities effectively available to candidates. The licensee had stated its intention to make free time available to candidates for major offices in the primary; planned a one-hour special program presenting the candidates for mayor; and had announced the candidacies for the top three city offices in its regular news programs.

4/ Twentieth Century Fund, Voters' Time (1969).

IV. Discussion

A. The fairness doctrine with respect to appearances of the President or other public officials.

25. The Commission can appreciate why so much attention is focused on the question of the application of the fairness doctrine to Presidential appearances. As the Court noted in Democratic National Committee v. FCC, C.A.D.C., No. 71-1637, decided February 2, 1972, petition for writ of certiorari filed April 28, 1972, No. 71-1405, O.T. 1971, ". . . the President's status differs from that of other Americans and is of a superior nature," and calls for him to make use of broadcasting to report to the nation on important matters:

> While political scientists and historians may argue about the institution of the Presidency and the obligations and role of the nation's chief executive officer it is clear that in this day and age it is obligatory for the President to inform the public on his program and its progress from time to time. By the very nature of his position, the President is a focal point of national life. The people of this country look to him in his numerous roles for guidance, understanding, perspective and information. No matter who the man living at 1600 Pennsylvania Avenue is he will be subject to greater coverage in the press and on the media than any other person in the free world. The President is obliged to keep the American people informed and . . . this obligation exists for the good of the nation . . . . (Sl. Op. pp. 26-27)

Because of this use of broadcasting by the nation's most powerful and most important public office, the argument has been made by DNC and by ACLU that there must be special provision for a response by the opposition party -- some specific corollary to the general fairness doctrine that ensures equal or comparable use of the broadcast media by an opposition party spokesman.

26. We make two preliminary observations. First, the issue is not whether the American people shall be reasonably informed concerning the contrasting viewpoints on controversial issues of public importance covered by Presidential reports. The fairness doctrine is in any event applicable to such reports -- as indeed it is to a report by any public official that deals with a controversial issue of public importance. See Section 315(a). Rather, the issue is whether something more -- something akin to equal time -- is to be required. The word "required" brings us to our second point. Because our goal is robust, wide-open

debate, the Commission of course welcomes any and all programming efforts by licensees to present contrasting viewpoints on controversial issues covered by Presidential addresses. As we stated in our commendation of the CBS series, "The Loyal Opposition", Committee for the Fair Broadcasting of Controversial Issues, 25 FCC 2d 283, 300 (1970); Republican National Committee, 25 FCC 2d 739, 745-46 (1970, the more debate on such issues, the better informed the electorate. But the issue is not what programming judgment the licensee makes in this area but, rather, whether there should be an FCC requirement. With this as background, we turn to the proposal that equal time be afforded to an opposition spokesman to respond to a Presidential report. 5/

27. First, there is a substantial issue whether any such Commission prescription might not run counter to the Congressional scheme. In Section 315(a), Congress has specified that equal opportunities shall be applicable to appearances of legally qualified candidates and that in other instances "fairness" be applicable -- that is, that there be afforded ". . . reasonable opportunity for the discussion of conflicting viewpoints on issues of public importance." While fairness may entail different things in particular circumstances (see par. 30, infra), there is a substantial question whether it is not a matter for Congress to take the discussion of public issues by the President out of the fairness area and place it within the equal opportunities requirement -- just as, for example, it was up to Congress in 1960 to take appearances by candidates for President out of equal opportunities and place them under fairness. There is a further troublesome issue here -- whether we could create a special fairness rule for Presidential reports but then hold that a report by Governor Reagan in California or Mayor Lindsay in New York, for example, would come only under the "reasonable opportunities" standard of Section 315(a), in the face of arguments that such reports dealt with State or local issues of the greatest importance. Again we do not say that distinctions cannot be made here (compare Section 103(a)(2)(A) of the Federal Election Campaign Act of 1971, 86 Stat. 3 applicable only to Federal offices) but rather raise the issue whether such distinctions are not more appropriately the province of the Congress.

5/ We are not dealing here with Presidential appearances during election campaigns where equal opportunities or Zapple (see B, infra) would ordiniarily be applicable

28. But in any event, it would not be sound policy to adopt the DNC or ACLU proposals. From the time of the Editorializing Report, 13 FCC 1246 (1949), to the present, we have been urged to adopt ever more precise rules -- always in the cause of insuring robust debate (e.g., the argument, advanced in 1949 and now repeated by the ACLU, that fairness requires the contrasting viewpoint to follow immediately the presentation of the first viewpoint -- see par. 8, Report on Editorializing by Broadcast Licensees, supra, at pp. 1250-51). However well intentioned these arguments are, we believe that increasingly detailed Commission regulation militates against robust, wide-open debate. The genius of the fairness doctrine has been precisely the leeway and discretion it affords the licensee to discharge his obligation to contribute to an informed electorate. Editorializing Report, par. 10, supra, at pp. 1251-52. Thus, the arguments for flexibility, rather than rigid mechanical rules, discussed in Committee for Fair Broadcasting of Controversial Issues, 25 FCC 2d 283, 292, (1970), remain persuasive. Applying those principles, we do not believe it appropriate to adopt equal time policies that might well inhibit reports to the electorate by elected officials. Rather, the general fairness approach of facilitating such reports and at the same time insuring that the public is reasonably informed concerning the contrasting viewpoints best serves the public interest. 6/ See DNC v. FCC, supra, Sl. Op. p. 27, (". . . The President is obliged to keep the American people informed and as this obligation exists for the good of the nation, this court can find no reason to abridge the right of the public to be informed by creating an automatic right to respond reposed in the opposition party . . ."); Committee for Fair Broadcasting, supra, at pp. 296-98. The latter case demonstrates that fairness can and does operate to protect the public interest in this important area.

29. In this connection, we note that the Commission believes that the public interest would be served by revision of the equal opportunities requirement so as to make it applicable only to major party candidates, with such candidates liberally defined to include any candidate with significant public support (see infra, par. 35); it has also supported, as a less desirable alternative, suspension or repeal of that requirement as to the offices of President and Vice President. 7/ It would surely be anomalous for us to seek relaxation

6/ For obvious reasons already developed, we strongly decline to make evaluations whether a report by an official is "partisan" or "political" and thus requires rebuttal by a spokesman for the other party, or the contending faction, or whatever. This would drag us into a wholly inadministratable quagmire. See, e.g., In re Complaint of Democratic National Committee, 31 FCC 2d 708, 712-713 (1971).

7/ See Hearings Before the Senate Communications Subcommittee, 91st Cong., 1st Sess., on S. 2876, p. 50.

of the equal opportunities requirement as to candidates for the office of President, and at the same time to apply a new policy akin to the equal opportunities to Presidential broadcasts not coming within the present statutory equal opportunities requirement. We decline to do so.

B. The Zapple ruling.

30. Our 1970 ruling, Letter to Nicholas Zapple, 23 FCC 2d 707 (1970), concerned campaign presentations that did not involve the appearance of the candidate. We pointed out that in some such presentations, the requirements of the fairness doctrine become in effect quasi-equal opportunities. There has been considerable comment on this ruling, but in large part the interest in it may stem from a misunderstanding of the ruling (e.g., that the ruling extends quasi-equal opportunities to all candidates or parties, even of a fringe nature). We can appreciate how such a misunderstanding could arise. The terms we used, fairness and quasi-equal opportunities, are terms of art and have accumulated their own baggage. Thus, quasi-equal opportunities conjures up a notion of all parties -- even those of a fringe nature -- being treated equally. And fairness carries with it concepts such as Cullman (free time if the public has not been informed of the contrasting viewpoint). See, also, In re Complaint of George F. Cooley, 15 FCC 2d 828, 829 (1967). But, Zapple was neither traditional fairness nor traditional equal opportunities. It was a particularization of what the public interest calls for in certain political broadcast situations in light of the Congressional policies set forth in Section 315(a). 8/ With this as background, we turn to the ruling.

31. What we were stating in Zapple was simply a common sense application of the statutory scheme. If the candidate himself appears to some significant extent (cf. Gray Communications, Inc., 14 FCC 2d 766, 19 FCC 2d 532 (1968)), then the Congressional policy is clear: equal opportunities, which means no applicability of Cullman but rather mathematical precision of opportunity. Suppose neither the picture or voice of the candidate is used -- even briefly -- but rather a political message devised by him and his supporters is broadcast.

8/ Similarly, the personal attack and political editorializing rules are a particularization of what fairness requires in those situations. See, e.g., Report on Personal Attack and Political Editorializing Rules, 32 Fed.Reg. 10303 (1967); Editorializing Report, supra, at p. 1252.

In those circumstances, a common sense view of the policy embodied in Section 315 would still call for the inapplicability of Cullman 9/ and for some measure of treatment that, while not mathematically rigid, at least took on the appearance of rough comparability. If the DNC were sold time for a number of spots, it is difficult to conceive on what basis the licensee could then refuse to sell comparable time to the RNC. Or, if during a campaign the latter were given a half-hour of free time to advance its cause, could a licensee fairly reject the subsequent request of the DNC that it be given a comparable opportunity?10/ Clearly, these examples deal with exaggerated, hypothetical situations that would never arise. No licensee would try to act in such an arbitrary fashion. Thus, the Zapple ruling simply reflects the common sense of what the public interest, taking into account underlying Congressional policies in the political broadcast area, requires in campaign situations such as the above (and in view of its nature, the application of Zapple, for all practical purposes, is confined to campaign periods). Significantly, because it does take into account the policies of Section 315, the public interest here requires both more (comparable time) and less (no applicability of Cullman) than traditional fairness.11/

9/ In this respect, Zapple did not break new ground. In our Report and Order on the personal attack rules (32 Fed.Reg. 10303, 10305), we noted the applicability of the Congressional standard in Section 315 to attacks involving candidates, their supporters, or authorized spokesmen, and accordingly made our rules -- which result, as a practical matter, in free time -- inapplicable to such attacks. See Section 73.123(b), 73.300(b), 73.598(b), 73.679(b).

10/ This example is stated as if the RNC program were the only matter to be considered. Of course in a particular factual situation this may well not be so. See CBS v. FCC, supra, n. 1, where the DNC program was presented by CBS to offset Presidential speech appearances, and the Court held that this was perfectly appropriate and reversed a Commission holding that to avoid coming within Zapple, CBS should have specified the issues to which the DNC was to address itself. This case is of course the law governing similar future factual situations. Thus, each case must be judged in its factual setting, with the licensee having considerable discretion to discharge fairness obligations.

11/ And for the foregoing reasons, we do not believe that we have acted contrary to the legislative history. We have, on the contrary, acted to carry out the Congressional scheme in Section 315.

Based on practical experience, we stress that in any event -- taking into account the sum total of political broadcasts and news-type programs -- the American people are reasonably informed on campaign issues, and thus that the basic public interest requirement is being met in this vital area. Green v. FCC, 447 F. 2d 323 (C.A.D.C.).

32. It follows that Zapple did not establish that in the political broadcast field there is now a quasi-equal opportunities approach applicable to all candidates and parties, including those of a fringe nature. This would clearly undermine any future suspension or repeal of the "equal opportunities" requirement, because it would mean that despite such suspension or repeal, the fairness doctrine would require that fringe party candidates be given comparable treatment with major party candidates. Further, it would negate the 1959 Amendments to the Communications Act. The purpose of these amendments was to permit presentation of candidates on, for example, a bona fide newscast, news interview, or news documentary, without the station having to present the fringe candidates. 12/ We need not belabor the point further. The Zapple ruling did not overrule the holding in Letter to Lawrence M. C. Smith, 25 Pike & Fischer, R.R.291 (1963). 13/

33. The foregoing discussion -- and the general approach that we have adopted in the fairness area -- also dispose of the questions raised as to the desirability of extending Zapple, codifying it, or otherwise supplementing it with procedural and other trappings (e.g., a seven-day procedural requirement). Because Zapple reflects simply a common sense distillation of the public interest in certain political broadcast situations, there is no need to try to codify it or engraft new corollaries onto it. On the contrary, we have concluded that, generally, traditional fairness works better by setting out broad principles and permitting the licensee to exercise good faith reasonable discretion in applying those broad principles. We think that this is true here. Further, we doubt if we will be confronted with a host of ad hoc rulings in this field. Most problems should be disposed of at the licensee level by the application of rudimentary concepts of fairness and common sense. Significantly, Zapple itself

---

12/ In view of the 1959 Amendments, it follows that no quasi-equal opportunities doctrine is applicable when supporters or spokesmen for candidates are presented in bona fide newscasts; in this respect, the same general fairness principles that apply to the candidates are equally applicable to their supporters.

13/ We there held that as to fund raising announcements for political parties, fairness does not require equal or comparable treatment for the fringe parties but rather that the licensee can make reasonable good faith judgments as to the significance of a particular party in the area.

was a ruling on hypothetical questions; there have been very few times when the issue has arisen on concrete cases. As to its extension beyond political broadcasts, the short answer is that it is based in substantial part on Congressional policies applicable to such broadcasts. 14/

C. Commission efforts to encourage the widest possible coverage of political campaigns.

34. We have considered most seriously what steps we can take in this respect. There would appear to be little we can do on an administrative agency basis. Let us take the most obvious suggestion: That the Commission by rule specify that a certain amount of time be set aside for presentation of political broadcasts on a sustaining basis. See Section 303(b). There are a number of difficult policy issues that would have to be resolved in any such undertaking. But there is, we believe, again an overriding consideration here -- namely, that this is truly a matter for Congressional resolution. Congress is aware of the high expense of running for political office, particularly in view of mounting broadcast costs. It has considered a number of worthwhile suggestions here -- for example the subsidy plan in the Presidential Campaign Fund Act of 1966 (the now inoperative Long Act) to supply Federal funds to the national party candidates for the Presidency; the Voters Time proposal (see Hearings Before the Senate Communications Subcommittee, on S. 2876, 91st Cong., 1st Sess., pp. 24-34). Its response to this problem has been the Federal Election Campaign Act of 1971 (Public Law 92-225), with its limitations o spending, and requirement for reasonable access for those running for Federal office and reduced rates for all political candidates. We do not see how we can sweep aside this scheme, and substitute our own. Indeed, we could not in any event be truly effective in any such agency action. Take the most important office -- the Presidency. Were we to require free time for that office, we would run afoul of the equal time provision; we would find that we had required the broadcaster to devote hours of prime time not just to the significant candidates but also to as many as 15 fringe party candidates (e.g., Socialist Labor, Socialist Worker, Vegetarian). 15/ Our point is obvious: Reform here is needed, we believe, but it must come from the Congress because that is the only way it can be effectively accomplished.

14/ Thus, we do not extend Zapple to the situation involving ballot issues.

15/ To give but one example, in 1960 when Congress acted to suspend the equal opportunities requirement for the President and Vice President races, there were on the ballots in the several States 14 different candidates for the office of President: C.Benton Coiner, Conservative Party of Virginia; Merrit Curtis, Constitution Party; Lar Daly, Tax Cut Party;

(cont'd)

35. Congress then can do much. We believe that consideration should again be given to the Voters Time concept or to some scheme akin to that used in Great Britain (i.e., blocs of free time to the major political parties). At the least, we propose again to urge Congress to adopt our proposed amendment to Section 315, limiting to major party candidates the applicability of the equal time provision in partisan general election campaigns. We described that legislation in the following terms (see Hearings Before the Communications Subcommittee on S. 2876, 91st Cong., 1st Sess., p. 48):

> In any general election, other than non-partisan ones, the draft legislation would make the equal opportunities requirement, as to free time, applicable only to major party candidates, leaving fringe candidates coming under the general fairness requirement. It would define major candidates very liberally so as to include any significant candidates - such as Henry Wallace as the candidate of the Progressive Party 1948, Strom Thurmond of the Dixiecrats 1948, or George Wallace in the last election. The figures in the draft legislation are set forth only as possible guidelines - namely, that the candidate's party garnered 2% of the vote in the state in the last election or, if the candidate represents a new party, that petitions be submitted signed by a number of voters equalling 1% of the votes cast in the last election. To obtain time on the national networks as distinguished from individual stations in particular states, there would also be a requirement that the candidate be on the ballot in at least two-thirds of the states.
>
> In short, section 315 in its present operational form is claimed and would appear to inhibit broadcasters from affording free time - and does so, we urge, without any significant practical compensating benefits. The Socialist Labor or Vegetarian candidate does not get free time; rather, no one gets any free time for the political broadcast. Further, and most important, there would appear to be little, if any public benefits from insuring such equal treatment for candidates whose public support is wholly insignificant. We repeat that in defining the major party candidate, we would urge the selection of a numerical figure such as to insure equality to any candidate who did have some significant public support, regardless of what his chances of actually winning might be.

Dr. R. L. Decker, Prohibition Party; Farrell Dobbs, Socialist Workers Party, Farmer Labor Party of Iowa, Socialist Workers and Farmers Party, Utah; Orval E. Faubus, National States Rights Party; Symon Gould, American Vegetarian Party, Minnesota; Clennon King, Afro-American Unity Party; Henry Krajemski, American Third Party; J. Bracken Lee, Conservative Party of New Jersey; Whitley Slocomb, Greenback Party; William Lloyd Smith, American

(cont'd)

This, by itself, will make a marked contribution to facilitating broadcast presentation of important political candidates. 16/

36. As an alternative, we propose an additional exemption to Section 315(a) to cover any joint or back-to-back appearances of candidates. Additionally, consideration should be given, we think, to the further exemption that we urged upon Congress in connection with our 1970 Advocates ruling, 23 FCC 2d 462. We suggested the addition of the following provision to Section 315(a): 17/

> "(5) any other program of a news or journalistic character -
>
> (i) which is regularly scheduled; and
>
> (ii) in which the content, format, and participants are determined by the licensee or network; and
>
> (iii) which explores conflicting views on a current issue of public importance; and
>
> (iv) which is not designed to serve the political advantage of any legally qualified candidate."

Beat Consensus; Charles Sullivan, Constitution Party of Texas. See H. Rept. No. 1928, 90th Cong., 2d Sess., p. 3. Query how effective any agency action in 1960 would have been.

16/ Thus, in the above noted hearings, we stated (supra, at p. 50):

> . . . when freed from the constraints of equal opportunities requirement, there has been no failure on the part of the broadcasters with respect to affording time for the Presidential candidates, and see that that time has been in substantial amounts, and free, not just reduced. Thus, in the one instance where the equal time requirement was suspended (1960), the TV networks afforded 39 hours and 22 minutes of free time, including the four hours for the Great Debates. Further, the audience for these debates totalled 280 million, or an average of 70 million viewers per broadcast. We believe that the networks thus effectively discharged their responsibility to inform the electorate in 1960. They have stated that they stand ready to do so in every Presidential election, if freed from the equal time requirement.

17/ See Hearings Before the Subcommittee on Communications and Power of the House Interstate and Foreign Commerce Committee, on H.R. 8721 and S.3637, 91st Cong., 2d Sess., p. 8.

37. At the least, we had thought that we could make a contribution here by giving the 1959 exemptions a reasonable construction in line with the broad remedial purpose of Congress. Accordingly, we did so in the recent Chisholm ruling, FCC 72-486, decided June 2, 1972. The validity of this construction of Section 315(a) is, however, now in doubt in view of the action of the Court of Appeals in its interim relief Order of June 3, 1972. Until the matter is definitively settled, licensees cannot plan with any certainty, and the area remains confused. This is, we believe, unfortunate. We continue to believe that our construction of the exemption in Section 315(a)(2) is sound, meets the pertinent Congressional criteria, and markedly serves the public interest by allowing broadcasting to make a fuller and more effective contribution to an informed electorate. But unless and until that construction prevails upon appeal -- or is in any event affirmed by Congressional revisions along the above stated lines -- we cannot in good conscience urge licensees to act in this area as if there were no "equal opportunities" pitfalls. There clearly are.

D. Use in bona fide newscasts of film supplied by candidates.

38. One other political broadcast matter which has been brought to our attention merits comment here. Candidates, like many other news sources, have normally issued press releases to the news media containing statements of the candidates, advance copies of their speeches, their future speaking schedules, etc. Media news editors in turn made judgments whether and to what extent to use such material. Increasingly, candidates have been supplying radio and television broadcasters with audio recordings and film excerpts produced by the candidates, e.g., depicting their campaign efforts that day or containing statements of their positions on current issues. Obviously, these excerpts are designed to show the candidate in the best light and, if presented on a newscast, have the added advantage of increased impact or credibility over a paid political presentation. We do not hold that the station cannot exercise its good faith news judgment as to whether and to what extent it wishes to present these tape or film excerpts. If it believes that they are newsworthy, it can appropriately use them in newscasts. But the public should be informed that the tape or film was supplied by the candidate as an inducement to the broadcasting of it.

39. In fact, our rules require such disclosure in these circumstances; that is, "in the case of any political program or any program involving the discussion of public controversial issues for which any films, records, transcriptions, talent, scripts, or other material or services of any kind are furnished, either directly or indirectly, to a station as an inducement to the broadcast of such program . . ." 18/ Disclosure of the furnishing of the tape or film is required to be made whether or not a candidate is involved in these types of programs. Accordingly, we take this opportunity to stress to all licensees their duty to comply with the rules and announce that the tape or film was supplied by the candidate in question. 19/ If it was edited by the licensee, he may, of course, add a suitable phrase such as "and edited by the XXXX news department."

IV. Conclusion

40. Much remains to be done in the fairness area (Parts II -- IV). 20/ We have acted here as best we could for the reasons stated in par. 1. The piecemeal approach is thus regrettable but necessary.

18/ Sections 73.119(d), 73.289(d) and 73.654(d), relating, respectively, to AM, FM and TV. See also Section 317(a)(2) of the Communications Act which specifically authorizes the Commission to require announcements disclosing that such matter was furnished.

19/ In order to avoid possible confusion in interpreting this rule in relation to one interpretative example in House Rept. 1800 (86th Cong., 2d Sess.) dealing with Section 317 of the Act and rules thereunder, we should add that we are not attempting to apply the above disclosure requirement to mere mimeographed news releases or typed advance copies of speeches. Example 11 of the House Report (see FCC Public Notice of May 6, 1963, FCC 63-409) states that no announcement is required when "news releases are furnished to a station by Government, business, labor and civic organizations, and private persons, with respect to their activities, and editorial comment therefrom is used on a program." We believe, however, that with respect to program material dealing with political or other controversial matters, the requirements of our rules must be followed strictly when audio tape or film is furnished.

20/ GE supports the Rosenbush ruling (see par. 24(A)). We have considered this issue generally in our recent Notice (Use of Broadcast and Cablecast Facilities by Candidates for Public Office, 37 Fed. Reg. 5796, 5805; Sec. 8, Q. 8), and will reexamine the matter as we gain experience. We thus may clarify our policies here either in a particular case or in our further reports in this Docket.

As stated, we shall reconsider this most important aspect in light of the conclusions reached in overall proceedings. Our final message is one urging broadcastint to make the maximum possible contribution to the nation's political process. That process is the bedrock of the Republic, and broadcasting is clearly the acknowledged leading medium for communicating political ideas. No area is thus of greater importance ". . . to the public interest in the larger and more effective use of radio." (Section 303(g) of the Communications Act of 1934, as amended).

FEDERAL COMMUNICATIONS COMMISSION *

Ben F.Waple
Secretary

Attachment: Appendix A

* See attached statement of Commissioner Johnson.

APPENDIX A

I. Comments on the applicability of the fairness doctrine to political broadcasts were received from the following parties:

ACLU
American Broadcasting Company
Columbia Broadcasting Company
Democratic National Committee
Evening News Association, et al.
Haley, Bader & Potts
McKenna & Wilkinson
National Association of Broadcasters
National Broadcasting Company
Public Broadcasting Service
Republican National Committee
Storer Broadcasting
United Church of Christ
WGN Continental Broadcasting Company

II. The following parties participated in panel discussion on the applicability of the fairness doctrine to political broadcasts held, before the Commission, on March 29, 1972.

Roger E. Ailes, President, Roger Ailes & Associates, Inc.
Charles A. Wilson, Jr., for the Democratic National Committee
James J. Freeman, Associate Special Counsel, Republican National Committee
Reed J. Irvine, Chairman of the Board, Accuracy in Media, Inc.
Newton N. Minow; Leibman, Williams, Bennett, Baird & Minow, Chicago, Illinois
Harry M. Plotkin, Counsel, Public Broadcasting Service
Paul A. Porter; Arnold & Porter, Washington, D.C.
Allen U. Schwartz, Counsel, Communications Media Committee, ACLU
Rosel Hyde; Wilkinson, Cragun & Barker, Washington, D.C.

III. Oral arguments on all aspects of the fairness proceeding in Docket No. 19260 were made by the following parties on March 30 and 31, 1972:

Michael Valder, on behalf of Urban Law Institute
Bernard Segal, on behalf of National Broadcasting Company
Sam Love, on behalf of Environmental Action
Malin Perkins, on behalf of the American Association of Advertising Agencies
Geoffrey Cowan, on behalf of Friends of the Earth, et al.
Theodore Pierson, on behalf of Combined Communications Corporation, et al.
Joseph A. Califano, Jr., on behalf of the Democratic National Committee
James J. Freeman, on behalf of the Republican National Committee
Edgar F. Czarra, Jr., on behalf of the Corinthian Stations and the Orion Stations
Tracy Weston, on behalf of National Citizens Committee for Broadcasting
J. Roger Wollenberg, on behalf of Columbia Broadcasting System, Inc.
Robert A. Woods, on behalf of National Assn. of Educational Broadcasters
David Lichenstein, on behalf of Accuracy in Media, Inc.

Mrs. Cara Siller, on behalf of Women for the Unborn
Rev. Paul G. Driscoll, Human Life Coordinator of the Rockville Centre (New York) Archdiocese
James A. McKenna, Jr., on behalf of American Broadcasting Companies, Inc.
Ben C. Fisher, on behalf of Commission on Population Growth and the American Future, and Population Education, Inc.
Miles David, on behalf of Radio Advertising Bureau
Absalom Jordan, on behalf of the Black United Front
Peter W. Allport, on behalf of Association of National Advertisers
Dr. Blue Carstenson, on behalf of National Consumer Organizations Ad Hoc Advisory Committee to Virginia Knauer
Leo Perlis, on behalf of Radio and TV Subcommittee of the Ad Hoc National Voluntary Organizations Advisory Committee on Consumer Interests
Warren Zwicky, on behalf of Storer Broadcasting Company
Madalyn Murray O'Hair, on behalf of Society of Separationists
John Summers, on behalf of National Association of Broadcasters
Beverly Moore, on behalf of Corporate Accountability Research Group
Allen J. Potkin, on behalf of Concerned Citizens of West Virginia
Daniel W. Toohey, on behalf of Basic Communications, Inc.
Domingo Nick Reyes, on behalf of National Mexican American Anti-Defamation Committee
Stewart Feldstein, on behalf of National Cable Television Assn.