In the

Supreme Court of the United States

COLUMBIA BROADCASTING SYSTEM, INC., Petitioner, v. DEMOCRATIC NATIONAL COMMITTEE;	No. 71-863
FEDERAL COMMUNICATIONS COMMISSION ET AL., Petitioners, v. BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE ET AL.;	No. 71-864
POST-NEWSWEEK STATIONS, CAPITAL AREA INC., Petitioner, v. BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE; and	No. 71-865
AMERICAN BROADCASTING COMPANIES, INC., Petitioner, v. DEMOCRATIC NATIONAL COMMITTEE	No. 71-866

Washington, D. C.
October 16, 1972

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HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

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v.	No. 71-863
DEMOCRATIC NATIONAL COMMITTEE;	
FEDERAL COMMUNICATIONS COMMISSION ET AL., Petitioners	
v.	No. 71-864
BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE ET AL.;	
POST-NEWSWEEK STATIONS, CAPITAL AREA, INC., Petitioner	
v.	No. 71-865
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AMERICAN BROADCASTING COMPANIES, INC., Petitioner	
v.	No. 71-866
DEMOCRATIC NATIONAL COMMITTEE	

Washington, D.C.
Monday, October 16, 1972

The above-entitled matters came on for argument at 11:05 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ERWIN N. GRISWOLD, ESQ., Solicitor General of the United States, Department of Justice, Washington, D.C. for F.C.C. et al, Petitioners.

ERNEST W. JENNES, ESQ., 888 Sixteenth Street, N.W., Washington, D.C. 20006, for Post-Newsweek Stations, Capital Area, Inc., Petitioner.

J. ROGER WOLLENBERG, ESQ., 900 - 17th Street, N.W., Washington, D.C. 20006 for Columbia Broadcasting System, Inc., Petitioner.

JOSEPH A. CALIFANO, JR., ESQ., 1000 Hill Building, Washington, D.C. 20006 for the Democratic National Committee, Respondent.

THOMAS R. ASHER, ESQ., 1910 N Street, N.W., Washington, D.C. 20036 for Business Executives' Move for Vietnam Peace, Respondent

VERNON L. WILKINSON, ESQ., 1150 17th Street, N.W., Washington, D.C. 20036 for American Broadcasting Companies, Inc., Petitioner.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 71-863, Columbia Broadcasting against the Democratic National Committee, 864, 865 and 866.

Mr. Solicitor General.

ORAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.,

ON BEHALF OF THE PETITIONER

MR. GRISWOLD: Mr. Chief Justice and may it please the Court:

This is a group of four related cases all here on writs of certiorari to review the same decision of the United States Court of Appeals for the District of Columbia Circuit.

The questions arise out of two proceedings commenced by separate letter communications to the Federal Communications Commission. The first letter of complaint was sent to the Commission on January 22, 1970 by an organization known as Business Executives Move for Vietnam Peace, customarily called "BEM" in these proceedings.

This complaint appears at page 291 of the Appendix. BEM sent an order from the Communications Commission to compel Washington radio station WTOP to run spot announcements against the Vietnam war, either free of charge or for a fee. Although BEM's specific complaint related to advertising time, its arguments were not confined to this. The substance of the complaint appears near the end at page 296 of the Appendix and

I will read the first full paragraph at the top of page 296:

"For the reasons stated above, the Business Executives' Movement for Vietnam Peace requests that the Federal Communications Commission order WTOP to broadcast free of charge BEM one-minute announcements or, in the alternative, that the Commission require WTOP to sell BEM air time for broadcasting of these announcements."

The Respondent in that matter, Post Newsweek stations replied to the complaint by letter and there were further filings by letter which appear in the Appendix.

There was no hearing or any submission in evidence or argument other than these letters.

The other proceeding before the Commission began on May 19th, 1970 when the Democratic National Committee wrote to the Commission requesting a declaratory ruling which would allow it to buy time in order to comment on public issues and solicit funds. This letter begins on page 15 of the Appendix and the essence of it is on the opening page, page 15, and there the Democratic National Committee requested the Commission to issue a declaratory ruling that under the First Amendment to the Constitution and the Communications Act a broadcaster may not as a general policy refuse to sell time to responsible entities such as the DNC for the solicitation of funds and for comment on public issues.

DNC indicated that it wanted the time for the broadcast

of specific programs of varying durations and for spot announcements of varying durations.

DNC said that the primary reason for wanting this time was that it was in debt and it needed the money the television solicitation could bring in. It did not limit its claim to advertising time. It relied on the First Amendment, but it recognized that even under its First Amendment claims broadcasters could limit the use of their facilities to -- and I quote their words: "Responsible spokesmen" and it recognized the broadcasters could adopt procedures to insure that the presentation was in good taste.

The Commission asked for comments from the three broadcasting networks. The National Broadcasting Company responded that it had no policy against selling time to a political party and that it would permit solicitation of funds on such a program. It added that it had offered to sell time to DNC but was advised that the Committee did not wish to proceed with the purchase.

Both the American Broadcasting Companies and the Columbia Broadcasting System responded saying, in substance, that they were buying to comply with the Fairness Doctrine established by the Commission and upheld by this Court in the Red Lion case in 395US but that it was their policy not to accept sponsored discussions of political or controversial issues or to allow solicitation of funds.

The position of CBS may be summarized by referring to page 51 of the Appendix, about two inches from the top of the text. "In adopting this policy we concluded that we could not provide coverage of significant issues with fairness and balance if partisans with strong financial resources could prempt our facilities to present their viewpoints on issues they select. A policy of selling time to partisans would, in our view, necessarily distort the manner in which issues were presented to the listening and viewing putlic.

"CBS has concluded that as a licensee in a medium with a finite amount of time to provide news, information and entertainment we best serve the public by presenting issues and viewpoints within a balanced program schedule utilizing newsworthiness as the sole criterion."

On August 5th, 1970, the Commission denied BEM's complaint. Commissioner Cox made a concurring statement and Commissioner Johnson dissented.

A week later, on August 12th, the Commission issued a memorandum opinion in order denying the request of DNC for declaratory ruling. Again, Commissioner Cox concurred and Commissioner Johnson dissented.

The Commission in its opinions did not really focus on advertising time except in response to Commissioner Johnson's dissent in the DNC case and even there the Commission appears to be talking about both programming and

advertising time.

Similarly, in the BEM opinion, the Commission does not highlight advertising time though that was all that was involved in BEM's complaint.

Following these decisions, BEM and DNC filed separate appeals in the Court of Appeals. The Federal Communications Commission and the United States were the respondents. The two cases were consolidated there. Post Newsweek stations, American Broadcasting Companies and Columbia Broadcasting System intervened.

The Court of Appeals reversed the decision of the Commission in an opinion by Judge White, concurred in by Judge Robinson and Judge McGowan filed a dissenting opinion.

The four cases now here were filed to review this decision according to the varying interests of the seven parties involved. Post Newsweek stations filed a petition with BEM as respondent. Columbia Broadcasting System and American Broadcasting Companies filed a petition -- separate petitions with DNC as respondent and the United States and the Federal Communications Commission filed petitions against both complainants, BEM and DNC.

In many respects, the positions of the United States and the Commission on the one hand are similar to those of the broadcasters on the other. In particular, speaking for the Commission and the United States, however, I should

point out this possible difference. In particular, I am interested in maintaining the proposition that this is an area in which the Commission is properly concerned and where it has authority to act if it should determine that affirmative action on its part is appropriate.

I should let the broadcasters speak for themselves but they would, I gather from their briefs, prefer to have it established that the Commission cannot act at all in this area consistently with their First Amendment rights.

This difference does not seem to me to be essential in the present case as long as it can be determined that the Commission acted properly when it decided not to act in these cases.

Now, there is one more factual situation which I should put before the Court. While this case was pending before the Court of Appeals on June 19th, 1971, the Commission published a notice in the Federal Register initiating a broad study into the efficacy of the Fairness Doctrine. The Commission specifically undertook the study "In the light of current demands for access to the broadcast media to consider issues of public concern." The Commission noted, however, that it could not abandon the Fairness Doctrine since that is ratified by Act of Congress or treat broadcasters as common carriers.

What the Commission said -- sought, it said, was

whether the policies it had developed are the most effective means of fostering uninhibited, robust, wide-open debate on public issues.

When, in January and February of this year, there was a period when the mandate of the Court of Appeals in this case was not stayed, the Commission published a further notice soliciting comments on the procedures and guidelines necessary to carry out the mandate of the Court of Appeals. This latter notice was withdrawn when this Court granted certiorari and stayed the mandate of the Court of Appeals but the Commission has continued its overall inquiry into the Fairness Doctrine and its operation and it has requested comments on what policies, if any, should be adopted with respect to access to the broadcast media.

It has confined its inquiry to the non-constitutional aspects of access because the First Amendment issue was pending before this Court. It added that is final decision may be delayed and made in light of the Supreme Court's decision. I am advised that this inquiry is proceeding actively and that the problems are under current consideration by the Commission.

Q Are these taking the form of hearings --

MR. GRISWOLD: Yes, I understand both hearings and written submissions.

Before going further it is relevant to observe that

the Commission has not here ordered anyone to do anything. What it has done is simply to stay its hand. The ultimate question then is whether there is something in the First Amendment which requires the Commission to order broadcasters to accept editorial advertising regardless of their compliance otherwise with the Fairness Doctrine.

Obviously, there is nothing literally in the First Amendment which leads to this result. It can be found only by a rather broad construction of that amendment, a construction, incidentally, which, if applied to the printed press, namely that they must accept advertising offered to them at least if paid for, would surely be regarded by them as an abridgement of the freedom of the press contrary to the explicit provisions of the First Amendment.

Q Would you suggest, Mr. Solicitor General, that if the Federal Communications Commission had this obligation that is being sought that it would mean that the Commission would also have to step in and put some limits on the amount of advertising time which could be used and at what hours?

MR. GRISWOLD: Yes, Mr. Chief Justice, that was clearly recognized in the opinion of the Court of Appeals which did not decide that either of these complainants was entitled to have its advertising broadcast. It simply decided that the Commission must establish means for working

out who could broadcast and at what times and if there were more people applying than there was time for, how they should be selected. It specifically referred to it as an "abridgeable right to speak" and the abridgeable element in it rose out of the fact that there is inherently a limited amount of time available. So as I will suggest later on, this would put the Commission into deep entanglement with the operation of the actual operation and the editorial judgment of the stations.

Now, Commissioner Johnson in his dissenting opinion intimated -- perhaps I could use a stronger word than that -- that the way you deal with this was to abolish the Fairness Doctrine and do it on a first come, first served basis and when the time was up, established on some basis, then nobody else could get in. That, we think, is something which it is very hard to find in the Constitution and something which is very much an administrative matter which is in the province of Congress through its delegatee, the Commission, to determine.

For that reason I say that Constitutionally I think that this case involves more of the separation of powers than it does of the First Amendment. Of course, we fully agree, as the Court said in Red Lion that the First Amendment is not irrelevant. The underlying problem here is undoubtedly a subtle one. When dealing with a medium to which there is

inherently limited access what is the best way to protect the public's right to hear and see and learn? Basically, in the present state of knowledge and in the absence of any specifically applicable provision in the First Amendment or elsewhere in the Constitution this should be, I submit, a problem to be worked out by Congress and without the rigidity which would result from an extension of the First Amendment well beyond its language.

Congress has exercised its power in the Communications Act and has delegated oversight and rule making to the Communications Commission which has been actively and effectively engaged in the complicated and essentially experimental task for many years.

Q The question of the First Amendment is not applicable at all, is it, unless or until broadcasters can be equated with government, state or federal?

MR. GRISWOLD: Well, certainly that is true, Mr. Justice, literally. In the Red Lion case the argument was made on behalf of the broadcasters that you can't have a Fairness Doctrine.

Q Well, that is right, because they were claiming their right. They were equating themselves to newspapers and they were saying that the Commission had no power to exercise that kind of control over them.

MR. GRISWOLD: I think, Mr. Justice --

Q It is exactly the opposite side of the coin.

MR. GRISWOLD: I think, Mr. Justice, that you get into an argument about the First Amendment when you begin to talk about the First Amendment values. Now, I do not disparage First Amendment values. I think they are very important but the contention is made that in order to protect First Amendment values, you must give these Complainants an opportunity to express their views over this medium which so enormously multiplies their voice. But I agree with you literally that no one is preventing the Complainants from exercising either their freedom to speak or their freedom of the press --

Q Maybe somebody is, but until a relation can show that it is Government that is doing it, the First Amendment is not involved, is it?

MR. GRISWOLD: Unless the Government is under some sort of a duty to help them to protect their First Amendment values. Now, I --

Q In other words, when a newspaper turns down an ad and says, "We are not going to run this ad," there cannot possibly be any claim, can there, that that is a violation of the advertiser's First Amendment right because the Government is not preventing it, it is the newspaper that is asserting its own right under the Constitution.

MR. GRISWOLD: Well, I would have supposed that was

true, Mr. Justice, but Congress, on February 7th, passed a statute giving access to political candidates to the radio and television and included in it to the extent that any person sells space in any newspaper or magazine to a legally-qualified candidate for federal elective office, then they must sell space to other candidates.

Q Well, the Constitutionality of that statement is not of import.

MR. GRISWOLD (Overriding): That is not here but I -- that is one reason I am a little hesitant about making what I think I would otherwise have made as my answer. I think it had always previously been understood that the press was under no obligation whatever to print anything it didn't want to print.

Q In any event, if you get into whether or not that has been understood you would agree, I would suppose, unless I am all off on the wrong track here, that the First Amendment is inapplicable unless and until you equate broadcasters with Government, state or federal. Now, that was done. A company town is equated with government in March and a shopping area was equated with government in another case but until or unless that step can be taken, the First Amendment is simply not implicated.

MR. GRISWOLD: Well, I would be happy to accept that view. There are expressions in some of the opinions, at

least for purposes of this case I would be happy to accept that view. There are expressions in some of the opinions about First Amendment values which seem to indicate that when there is government participation there is a brooding on the presence of the First Amendment in the sky which must be taken into account.

As the Court said in the Red Lion case, "If experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage there will be time enough to consider the Constitutional implications" and I think that is what is making me find difficulty in answering your question.

If it does appear in experience that this does really prevent serious difficulites in the public's opportunity to learn about political candidates then I suspect that there will be those who will raise Constitutional arguments which will have to be answered.

But the use of the word "quality of coverage" in the passage seems particularly relevant here. Under the decision below the broadcaster loses control over the quality of the paid advertisements which he must accept. The present state of experience points strongly to the conclusion that the public is better served by giving scope to the journalistic judgment of the broadcasters subject to the continued

constraint of the Fairness Doctrine.

If real experience to the contrary develops, there will be time enough, as the Court said, to reconsider the Constitutional implications.

As I have indicated, the Commission has the matter now under active reconsideration in the light of experience and of the claims which have been made. The Commission is acting pursuant to powers expressly assigned to it by Congress in the exercise of its commerce power which -- and other powers -- which has set up a system of broadcasting in this country under private ownership and control subject to regulation by the Commission.

Now, Congress has expressly provided, in Section IIIH of the Communications Act that persons engaged in broadcasting shall not be a common carrier. Congress has also provided equal time for political candidates and more recently, for a right of access for political candidates.

Congress has further provided that licensees shall hold their licenses for three years. It has charged the Commission to use the standard of the public interest in renewing licenses and it has provided in Section IIIR,as this Court quoted in the Red Lion opinion, a mandate to the Commission from time to time, as public convenience, interest or necessity requires, to promulgate such rules and regulations and prescribe such restrictions and conditions as

may be necessary to carry out the provisions of this chapter.

In carrying out this charge, the Commission has developed the reply to attack rule and the Fairness Doctrine, both of which were upheld by this Court in Red Lion.

Q Mr. Solicitor General, do you understand the broadcasters' position to rest considerably on the existence of the Fairness Doctrine? In the absence of the Fairness Doctrine I take it their position might be considerably different?

MR. GRISWOLD: I think their position might be different. I think I would rather have them speak for themselves. I am not at all sure, though, that if this Court had held that the Fairness Doctrine was invalid as an undue interference and violation of the First Amendment rights of the broadcasters, that it wouldn't almost be an A Fortiori case to say that they would have no rights here.

Q Well, I'll put it to you this way, then. Does the Commission's position rest at all on the fact that they have promulgated and are enforcing the Fairness Doctrine? That their reluctance to order stations to receive these advertisements rest considerably on the --

MR. GRISWOLD: No, Mr. Justice, I don't think it is that they are reluctant to. I think it is that they feel it is not necessary and the "First Amendment value" involved in the picture is adequately taken care of by the Fairness

Doctrine.

Q The Commission's position is not, then, that if the Committee's position were upheld that the fairness doctrine would be much more difficult to enforce?

MR. GRISWOLD: Well, yes, I think it is, to a very considerable extent. I think that, as Commissioner Johnson said in his dissenting opinion, I think it pretty much involves the abolition of the Fairness Doctrine.

Q So that the existence of the Fairness Doctrine is a very substantial part of the Commission's --

MR. GRISWOLD: It is certainly a very large element in the overall picture.

Now, I don't understand that Red Lion was a constitutional case in the sense that it decided that the Fairness Doctrine was required by the First Amendment. On the contrary, it was, as I see it, an administrative law case holding that the Commission under the authority granted to it by Congress had the power to establish the Fairness Doctrine and Congress had the power to ratify it in 1959.

Q Well, to that extent it was a constitutional case because the --

MR. GRISWOLD (Overriding): And as far as --

Q -- didn't have the power to do it.

MR. GRISWOLD: And as far as the Constitution was involved that there was nothing in the First Amendment which

made the Fairness Doctrine invalid.

Q Right.

MR. GRISWOLD: It seems to me it was a -- it was a --

Q The (inaudible) was a limitation upon the right of the broadcasters. It did not make any effort to --

MR. GRISWOLD (Overriding):--whether Congress was prevented from treating this as an administrative doctrine because of the First Amendment. There is no suggestion that the stations involved in this case do not comply with the Fairness Doctrine. They do present discussions of controversial and political issues. The questions is whether they must nevertheless take spot announcements and perhaps put on programs on public interest issues from anyone who wants to pay for the time and then, very likely pursuant to the Fairness Doctrine, have to allow free time to those who want to present the other side if no one can be found for the presentation of the other point of view.

It is hard to think of anything which more effectively destroys the freedom and control of the broadcasters, often called "the electronic press."

It is likewise hard to think that the public will be well-served by a system which makes access to the airwaves on controversial issues depend in material extent on who has the money to pay for it and perhaps on who has the most money as the price is bid up.

As Judge McGowan said in the court below, "That approach does not seem to me to be a promising one in terms of the public's right to know," and he added, "It is hardly the part of wisdom to scrap our present system of private broadcasting for a system in which money alone determines what items are to be aired and in what format."

Are these not issues of the sort that Congress should determine with the aid of the agency in the light of experience and without premature constitutional restraint?

The Fairness Doctrine has been developing for more than 40 years. This has been done under the watchful eye of this Court and with recognition, as this Court said in the Pottsville Broadcasting case, that the administrative process should possess sufficient flexibility to adjust itself to the rapidly fluctuating factors characteristic of the evolution of broadcasting.

Through the Fairness Doctrine as it has developed, there is a clear duty on the broadcaster but he is still a private businessman as a part of a deliberately adopted system of private broadcasting and he is not only free but obligated to exercise his journalistic discretion.

The considered and experienced judgment of the Commission that this is not a situation in which it should take affirmative action should be upheld and accordingly, the judgment below should be reversed.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

Mr. Jennes.

ORAL ARGUMENT OF ERNEST W. JENNES, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. JENNES: Mr. Chief Justice, and may it please the Court:

Mr. Wollenberg and I have divided the issues we will argue. I will briefly supplement the Solicitor General's description of how the present system works and, assuming but not conceding state action, will treat the First Amendment issues.

Mr. Wollenberg will argue the state action issue which Mr. Justice Stewart has raised, the commercial discrimination equal protection issue and the question of statutory construction.

It would perhaps be helpful if I review briefly some pertinent aspects of broadcasting and their relationship to First Amendment interests.

DNC would have this Court view broadcasting as a virtually monolithic institution in which there are three network presidents who decide what the American people will hear and when and how but this is not the way it works. As the networks briefs show, this is a caricature of how the networks handle news and information but more important, some

7,000 individual broadcasters are entrusted with the responsibility of fairly informing the public and these independent stations and the many individual and often partisan voices that speak through these 7,000 stations provide diverse ideas and opinions to the public.

Q Does the failure of a licensee to observe the Fairness Doctrine to give a balanced picture sometimes become an issue when they come up for renewal of a license?

MR. JENNES: It has indeed and the Commission's refusal to renew a license on that ground was recently sustained by the Court of Appeals. Fairness Doctrine complaints are ever present and the Commission rules on them and the broadcasters are very aware of the problem.

Q You are suggesting that is a sufficient control over balancing as against unbalanced programs?

MR. JENNES: I am suggesting that there is no evidence -- I will show, I believe, that there is no evidence that the system as it exists has been abused and, accordingly, that assuming the First Amendment question that Congress and the Commission have not exercised a choice which serves the interest of the First Amendment through the Fairness Doctrine.

Public exposure to conflicting views in parties and voices is advanced by the Fairness Doctrine and the related requirements of the Communications Act.

Each station is responsible for determining from the

public on a continuing basis what it, the public, and representative groups and organizations regard as public issues needs and interests. There is discretion to present these viewpoints in a variety of ways, including hard news, commentaries, special events coverage, documentaries and the like. But very importantly, for these cases where access is being argued, stations must include, under the Commission's Fairness Doctrine, as part of the mix, representative partisan spokesmen on controversial issues.

Now, subject to these trusteeship obligations, each broadcaster exercises a journalistic function in selecting and balancing subjects, formats, and speakers for the very purpose of assuring that a significant variety of important issues and competing viewpoints is effectively presented.

Some sell time for commercials to partisans. Others do not sell time but provide access to partisan views without charge in their normal programming. How this system works to serve First Amendment purposes is well-demonstrated in the BEM case itself.

The uncontroverted record is that the various aspects of the Vietnam issue were repeatedly covered in WTOP's news, information and public affairs programs. Moreover, numerous partisan spokesmen had access in fact to WTOP without charge to express their varying views in varying ways.

Every viewpoint in the 14 different samples of BEM's

commercials for which BEM sought to buy time on WTOP was, in fact, expressed over that station and, furthermore, several stations in the area with different policies carried BEM's commercials.

It would thus, I submit, be incredible to suggest that WTOP deprived the public of access to the ideas which are advocated by BEM.

Now, this Court has repeatedly stated that the central purpose of the First Amendment is to preserve a market-place of ideas for the American people and it is long-emphasized that the First Amendment must work differently, in different contexts and when this Court defined the First Amendment interest in broadcasting in Red Lion, it was the public's right to receive suitable access to social, political, aesthetic, moral and other ideas and experiences on which the Court focused. In Red Lion, it was the public's right to know, not the individual's right to speak, which controlled.

Because of broadcasting's limited capacity, Congress and the Commission may constitutionally subordinate private claims to paramount public interests, whether those claims are advanced by broadcasters themselves, as in Red Lion or on behalf of individuals who want to speak their views.

There are simply more individuals who want to broadcast than there are frequencies to accommodate them. There are simply more subjects to report on and treat than

time will permit. There must be responsible choice.

Q Aren't there frequencies still not taken up in lots of places in the country?

MR. JENNES: There are in some places in the country and in UHF television; there are many areas in the country where no frequency is available in radio. The situation varies from community to community, area to area.

Q But you think that predicate is generally still true enough to warrant a Commission regulation like --

MR. JENNES (Overriding): Well, Mr. Justice White, I am assuming that -- you mean the Fairness Doctrine? I assume that -- that the -- that the issue of the constitutionality of the Fairness Doctrine was disposed of in Red Lion and I am assuming further for purposes of my argument that there is state action.

Q I know, but you are still asserting here that there is a limited capacity in the television medium.

MR. JENNES: Well, I am asserting that -- that an individual radio or television station has a limited amount of time and responsible choice has to be made as to what is going to be covered in that time.

Q Well, you are also assuming that there is a limited spectrum of frequencies to be licensed by the Federal Government. I presume --

MR. JENNES: That is correct.

Q -- that is the -- that has been the rationale since 1927, the Radio Act, and that has been the rationale of every decision on the subject in this Court, hasn't it?

MR. JENNES: That is correct and that is precisely why the Act has placed the responsibility on the individual broadcaster as a trustee and that -- that term has been repeated and repeated. The obligation of the broadcaster as a trustee, subject to the Fairness Doctrine and subject to other requirements to inform the public clearly about controversial issues of public importance.

Q Well, I understood Mr. Justice White's question as going to unclaimed potential stations. Now, are there any or very many unclaimed in large market areas?

MR. JENNES: There are not very many in large market areas, Mr. Chief Justice and I take it that the -- that the holding of the court below and that the position of the Respondents in this case would not vary from city to city or state to state. What they are claiming is that -- that broadcasters may not, as a matter of policy, refuse to sell time for editorial commercials.

Now, the Respondents -- I suggest that, to the extent there is a constitutional requirement, that that requirement has been served by the system as it operates. Now, the Respondents would have this Court create a new constitutional right without a showing of any abuse

requiring vindication and I think it is very important to emphasize that their arguments depend on factual propositions of dubious validity at best advanced in their briefs for the first time, never submitted to the Commission, that the Fairness Doctrine does not work adequately, that their proposal is fair and efficient and would not have significant adverse effects.

I would suggest that the very heavy burden on those who would establish new constitutional principles was not met by selected examples in Appellate briefs.

On the other hand, the constitutional right urged by BEM and DNC would pose very serious practical and legal problems and would disserve First Amendment interests by increasing the influence of the wealthy and powerful by resulting in distortion and by impairing the broadcasters capacity to provide balanced coverage of issues and by increasing government control over the flow of information.

Such a new constitutional right would greatly advantage the size of the pocketbook in determining what is broadcast. There is a tendency to think of the implications of these cases in terms of organizations like BEM or the Navy League or the ADA or the John Birch Society but this new right, if it were established, would require broadcasters to permit a host of commercial advertisers to spend in the neighborhood of a billion and a half dollars a year on the

networks and another billion dollars a year in national television advertising to use their television and radio commercials for the expression of views on controversial issues that serve their business interests and their other interests rather than to sell their products and services.

Now, it is apparently a common policy of broadcasters not to permit advertisers to do this now.

The court below and all the parties recognize that it would not serve the public interest in free speech if the expression of views in editorial advertising time were dominated by those who can most afford to pay or if the newly asserted constitutional right resulted in imbalanced treatment of public issues and the lower court fell back, as the Solicitor General said, on the Fairness Doctrine for an answer but this would exascerbate the problem. If a broadcaster balance which Judge Wright described as a one-sided flood of editorial advertisements by presenting contrary viewpoints, he would have to divert time from or ignore other subjects which warranted attention. The result, the agenda of news and other information presented to the American people would be determined by the purchasers of editorial advertisements.

Q That is because of the Cullman rule?

MR. JENNES: Not nec -- that is because of the necessity of the Fairness Doctrine itself.

Q And the Cullman rule exascerbates it?

MR. JENNES: Exactly. Exactly. What I am suggesting is that a - that a heavy flight of commercials would create an obligation to respond and then clearly one is left under Cullman.

Q Right.

MR. JENNES: Moreover, increasing involvement of the government cannot be avoided if editorial advertising is made compulsive and innumberable questions would arise as to the permissable subject of advertisements, the content of particular ads and the like.

MR. CHIEF JUSTICE BURGER: Your time is up in a few minutes.

MR. JENNES: Let me conclude by saying that the threat of intimate, direct, and pervasive government regulation of broadcast content would be serious and there is literally nothing before this Court to require it to say that these hazards must be suffered, and irreversibly, because of a constitutional command.

MR. CHIEF JUSTICE BURGER: Mr. Wollenberg.

ORAL ARGUMENT OF J. ROGER WOLLENBURG, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. WOLLENBERG: Mr. Chief Justice, and may it please the Court:

I appear on behalf of the Petitioner, Columbia

Broadcasting System. I think that the able arguments which have preceded have made clear, I hope, what is before this Court and what is not before this Court. As we see it, there is not here today any question of the Commission's power to take affirmative action in the access area if it should, on appropriate basis, determine that such action was necessary. What we have here, as the Solicitor General has made clear, a decision of the Court of Appeals which, through the enunciation of a new constitutional doctrine has, in effect, resulted in the substitution of the judgment of the Court of Appeals for that of the agency on the erroneous premise that the First Amendment requires the government to compel broadcasters to provide paid advertising on demand.

Now, I should like to make clear that, contrary to the impression that the Solicitor General may have had, the broadcast petitioners in this case are not here asking for a ruling by this Court that would limit the powers of the Commission. What we are asking for here is a reversal of the decision below, a decision which creates a constitutional strait jacket that binds the Commission and, indeed, the Congress, for all time.

Q You don't intend to contend that your client's constitutional rights were violated by the decision, though?

MR. WOLLENBERG: No, we have not made that contention, your Honor.

The Solicitor General quoted Judge McGowan and I think what he --

Q That contention would be similar to the contention that was made by the broadcasters in Red Lion. It is not made here.

MR. WOLLENBERG: And let me say, your Honor, that I associate myself with Mr. Jennes' statement that we are -- we accept Red Lion, though we are not here undercutting Red Lion and that, to the contrary, we suggest that the trustee fairness scheme, created by Congress and the Commission and upheld in Red Lion, would be diminished, hampered and frustrated by the holding of the court below.

Q Well, Mr. Wollenberg, I take it from the responses of the broadcasters that they relied on the Fairness Doctrine, to some extent at least, as justification for the refusal of selling advertisement?

MR. WOLLENBERG: I don't know, your Honor, whether I would use the word "justification." I would say this, that the broadcasters having been told, very clearly, in the announcements of the Commission and the announcements of this Court in Red Lion, that they have a responsibility to achieve fairness and that this is a responsibility not only to present the varying sides of issues, to present the individual views of representative spokesmen of issues and not only those two, but also to affirmatively see that they cover important

public issues, that with those three very substantial responsibilities which, as the Chief Justice has pointed out, may lead to a denial of license if you do not carry them out, those very substantial responsibilities, some broadcasters -- not all -- some broadcasters, including Columbia Broadcasting System, have concluded that the best way to effectuate and implement and carry out those responsibilities is not, as Judge McGowan said, to scrap the existing mechanism for a system in which money alone determines what issues are to be aired.

In other words, Columbia Broadcasting System, over a long period of years, has concluded and believes from its experience that it is not the best way to cover issues, to simply sell time to those who desire to and are able to purchase time. This does not mean that everything is filtered through a CBS point of view or that the individual views of representative spokesmen are not given. They are given daily in news broadcasts, regularly on news interview programs, and, as occasion warrants it, extensively and directly, for example, in very extensive coverage of the national political conventions.

So it is not a matter of declining to let people speak through their own mouths, it is a matter of attempting to plan, to organize, so as to achieve these heavy responsibilities of covering the issues, providing information for

the public, of providing balance, of providing the various sides.

Q Well, Mr. Wollenberg, what is your view? Is there a First Amendment problem here or not in the sense of there being or not being some state action or Federal Government action?

MR. WOLLENBERG: It is our position, which I hope to get into at a little greater length --

Q All right, but you can answer now.

MR. WOLLENBERG: -- after the luncheon recess, but it is our position that there is not state action here and that there not being state action, that that is an alternative ground for reversal of the judgment below because the First Amendment question does not arise unless there is state action. It is our view that, for the reasons that we set forth at some length in our opening brief, that even prior to last term that the standards properly applied -- for state action -- before governmental intervention or governmental involvement rises to the constitutional place of state action there must be a compulsion, an inducement, a participation -- those are catch words but they summarize the areas.

We made those points in our opening brief and in our reply brief we pointed out that we think that the attenuated reliance of the court below on some general language in Burton and Wilmington and Public Utilities Commission against

Pollack, but that reliance was misplaced in light of the decision of this Court at the last term in Moose Lodge.

Q Mr. Wollenberg, during lunch maybe you can think fo the answer to this question, do you think there is any difference in a test of state action when you are dealing with the Equal Protection Clause of the Fourteenth Amendment as in Burton from the test applicable when you are dealing with the First Amendment as in Marsh or the Shopping Center case, or should the tests be identical?

MR. WOLLENBERG: Uh --

MR. CHIEF JUSTICE BURGER: I think we will let you respond to that later.

(Whereupon, a recess was taken for luncheon from 11:51 o'clock a.m. to 1:00 o'clock p.m.)

AFTERNOON SESSION 1:00 p.m.

MR. CHIEF JUSTICE BURGER: Mr. Wollenberg, you may proceed.

MR. WOLLENBERG: Before attempting a response to the open book examination question that was left with me at the recess, and concluding my discussion of state action, I would like to emphasize again, lest there be any misunderstanding, what we are not contending.

We are not contending, on the basis of our state action argument, that the lack of state action as we see it takes this area outside of the power of the Federal Communications Commission. We are arguing that there is not the state action that gives rise to a constitutional right in the Respondents to demand the system which Judge McGowan has correctly described as a "constitutional strait jacket."

Now, with respect to Mr. Justice Stewart's question, let me say first that I don't think that any possible shades of difference in standards would be controlling or, indeed, material here because I think by any standards that there is a lack of state action. But on the specific question of the Equal Protection Clause in the State Action Standard versus the First Amendment Standard, I think that if there is a difference, it is not a difference between the two amendments, but is a difference, perhaps, between the Equal Protection Clause as applied in racial discrimination kind of

cases and other cases, whether they be First Amendment or Equal Protection. I think that the long history of the Equal Protection Clause and the enactment of the Fourteenth Amendment to give force to the Civil Rights cases, Civil Rights Acts, in case they should be declared unconstitutional, that the adoption of the Fourteenth Amendment was designed not only to end historic policies of state action to enforce segregation and enforce different treatment, to the blacks, but it was also designed to assure that no private action under color of state law should achieve that effect.

So I think that there is a special consideration that applies in the racial cases.

Now, I said before the luncheon recess that we think that the cases before Moose Lodge established the correctness of our position, that Moose Lodge merely reaffirmed it. We have briefed the question rather extensively in our opening brief and in our reply brief and because of the limitations of time, I should like simply to say why, in this particular situation, we don't think you have any kind of government participation, encouragement, compulsion or approval.

A close reading of the Commission's very thoughtful and very articulate opinion in these cases makes clear that the Commission was not saying that it didn't want broadcasters to sell time for controversial issues, to sell advertising time. It was not saying that it approved broadcasters who

did that and would be more likely to renew their licenses than those who sold such time.

The Commission was not telling broadcasters to do. What the Commission was saying -- and I think very correctly -- was that it would be inappropriate for it to issue an order of compulsion to broadcasters because it would interfere with their ability to carry forth their trustee responsibility of achieving the Fairness Doctrine in their own way and it might indeed impede it and those who wished to sell advertising time may do so but they still have the responsibility of carrying out the Fairness Doctrine and those who wish not to may do so but they still have the responsibility of carrying out the Fairness Doctrine including that portion of the Fairness Doctrine which requires that partisan views be given expression and not be filtered out in the presentation process.

Q Mr. Wollenberg, don't you at least have this difference between Lloyd and Moose Lodge on the one hand and the situation of the broadcaster on the other, that the license which he holds is really a performance proper is made possible only by governmental exclusion of other potential broadcasters whereas my recollection of both Lloyd and Moose was that the private individuals were dealing with their own private property.

MR. WOLLENBERG: Well, of course, in Moose Lodge at

least one dissent argued that the number of liquor licenses were limited in the state but it is perfectly true that you have licensees here and that broadcasters can only broadcast if they hold licenses, but it is also true that the congressional and Commission regime that was upheld in Red Lion answered that scarcity and limited number of licensees by placing on the broadcasters a heavy kind of responsibility that newspapers, for example, do not have and it is that Fairness Doctrine responsibility and that implementation of the public's right to know which is the First Amendment interest that was stressed in Red Lion, not the right of an individual to get on the mike, because there are a limited number of hours, a limited number of days, a limited number of stations but the right of the public to know and this Court unanimously in Red Lion held that the regime adopted by Congress and the Commission of assuring that the public's right to know would be satisfied, was a legitimate and a reasonable scheme.

What we are arguing here is that the decision below, as the Commission said, by compelling a particular type of activity would frustrate and interfere with that responsibility.

I turn now to one of the principal contentions of the Respondents and holding of the court below that there is some kind of a constitutional invidious discrimination involved in the practice that the Commission has declined to

prohibit and whether you call this a First Amendment violation or an Equal Protection violation, the contention is that if you sell time for a commercial advertisement, advertising time, you cannot refuse sale time for controversial speech.

Now, we suggest that that is not a valid contention. We suggest that commercial matter and controversial matter are treated very differently under the Act because of the affirmative responsibility -- under the Fairness Doctrine and Red Lion, as I have mentioned -- to cover controversial issues so that the broadcaster who won't let the controversial issue into his advertising time also keeps the commercial broadcaster out of his program time. The Commission will not allow broadcasters to have program-length commercials so that what actually happens is that under the scheme of the Act and the Commission's rules, controversial speech is given a preferred position as against commercial speech.

This does not mean that any individual has the right to come and demand that he can put on a commercial. No individual has a right to demand that he come and be given time on the air. In both cases, the broadcaster exercises discretion.

The cases which have been relied upon by the Respondents in the court below, we submit, are not controlling their lower court cases dealing with busses where

you have no system of information other than the advertising space and state-supported or state-partially-supported newspapers and in the newspaper cases there is a conflict with the Avins and Rutgers case in the Third Circuit which says that there is no right of access to a journalistic medium even where it is supported by the state.

We think that those cases are not in point here. What is in point here is that there is a reasonable classification -- if you will, a reasonable determination that has been made by the broadcasters in which the agency charged with expertise in the field has found to be not unreasonable, if the broadcaster wants to do it that way, as a method of achieving his Fairness obligations.

One final point: Mr. Jennes emphasized some of the dangers of an unrestricted right of purchase of time and he pointed out that it is not just the organizations that are interested in getting on but we also have commercial advertisers.

Now, there is about a billion and a half dollars of network, television, commercial advertising sale during the course of a year and if you say that there is a constitutional right put into your advertisement, controversial issue matter, then presumably that billion and a half dollars of commercial advertising can include as much as any given commercial advertiser desires to do. Most broadcasters today

make an effort not to include, in their commercial advertising, such materials.

Now, we have pointed to examples of cases where broadcasters have not complied with that or cases where the line has been crossed in what appeared to be a product commercial slopped over into an advocacy of a position and in that case the Fairness Doctrine applies but most broadcasters today make the effort to make that distinction. I think it is a very important distinction because I think that an agenda would indeed, as the Commission said, be set by the affluence if we set up a constitutional principle of this kind and I don't think that any amount of balancing by the broadcaster could unskew what had been skewed in that fashion.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Wollenberg.

Mr. Califano.

ORAL ARGUMENT OF JOSEPH A. CALIFANO, JR., ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. CALIFANO: Mr. Chief Justice and may it please the Court:

I will deal with the DNC case and my colleague, Mr. Asher, will deal with the BEM case.

As far as the Democratic National Committee is concerned, the issue before this Court, the central question, is the same central question we began dealing with with the networks in March and April of 1970 and with the FCC in the

late spring of that year. It is, are the public airwaves, which are the most powerful and forceful means of communication in our democratic society, the greatest democracy in the world, are these airwaves to be used to promote the sale of soap, deodorants, mouthwashes and brassieres and not to promote the exchange of ideas and the legal issue is whether the Federal Communications Commission, consistent with the Communications Act and the First Amendment to the Constitution, can permit the three major networks and the 7,000 broadcasters of this nation to impose an absolute ban on all radio and television broadcasts paid for by the major political parties if they discuss controversial issues of public importance?

The rule we asked for is a very simple rule. It simply requested the Commission, and I quote "That a broadcaster may not, as a general policy, refuse to sell time to responsible entities such as the Democratic National Committee for the solicitation of funds and for comment on public issues." The --

Q Mr. Califano, would you care to define "responsible entities?"

MR. CALIFANO: Your Honor, we use that -- Mr. Justice, we use that phrase in the rule because it is the phrase used by the communications industry and the FCC under the Fairness Doctrine and where they present an editorial

view on one side and say that responsible spokesmen are invited to answer that editorial on the other side.

Q That is certainly not the concept we have of many of the developments to the First Amendment, is it?

MR. CALIFANO: I think the relevance --

Q It doesn't allow government to control the speech of their responsible people, does it?

MR. CALIFANO: No, Mr. Justice, it does not and as far as we are concerned, the only possible difference between the -- well, let me put it this way -- I suppose the point of using that phrase and not simply asking that the DNC or the two major political parties be granted a time was that we recognized that the FCC will have to establish some reasonable regulations along the lines.

Q Mr. Califano, while we have stopped at this, would it be reasonable and appropriate for the Federal Communications Commission under your formulation to say, yes, the network or the station must make that time available on those terms provided that they make an equal amount of time available within the same five-minute span for the contrary, the 45 seconds against something and then that they must allow 45 seconds plug right afterward contraryminded.

MR. CALIFANO: Well, the -- you know, Mr. Chief Justice, we have uh -- the Fairness Doctrine would still operate, as we see our rule, it would operate alongside of it

and to the extent that issues were not covered or that other spokesmen wanted to deal with the very same issue, we would think the networks should indeed permit them to do so.

In response to the question of whether they should go back-to-back with it, we have argued in a whole series of other matters that, with the networks and with the Communications Commission, about that right, and the only time -- the only time we have ever been granted that was when Senator Muskie and President Nixon spoke back-to-back in 1970 on Election Eve.

Aside from that, we have never been able to establish that as a right and I would have to say that I don't think it is recognized as a right by the FCC or most people in the communications area.

Q Well, wouldn't this hypothetical situation I just suggested be an implementation in a precise way of what the Fairness Doctrine is driving at?

MR. CALIFANO: Well, Mr. Chief Justice, yes. That -- that is certainly one way to do it. I think what I am saying is that it is not the only way. There are probably any number of reasonable solutions. The Commission has found any number of reasonable solutions to deal with the Fairness Doctrine.

Q Well, first of all, would this be a reasonable solution?

MR. CALIFANO: Yes, your Honor.

The Solicitor General stated the proceedings below and I will not repeat them but with one exception. I think it is important to note that the Federal Communications Commission granted part of the DNC request. The Federal Communications Commission said that a broadcaster could not refuse, as a general policy, to accept spot announcements for the solicitation of funds. It denied the rule we requested insofar as that rule involved the discussion of controversial issues of public importance and the Commission opinion below in no way attempted to tell us how to make that distinction, even in a 60-second spot soliciting funds for a political party.

The Court of Appeals affirmed the Federal Communications Commission insofar as it granted us the right to purchase spot announcements and solicit funds and reversed the Federal Communications Commission holding that an absolute ban, which is what we are talking about -- an absolute ban by the broadcasters and the networks violated the Communications Act and the First Amendment to the Constitution.

Q Is it that clear that the court's holding was statutory as well as constitutional?

MR. CALIFANO: They specifically state, Mr. Justice Rehnquist, in the opinion that whether the opinion is

considered based on the Communications Act or the First Amendment is a matter of little import since the Communications Act, as the Court of Appeals read it, incorporates the same First Amendment values.

The broadcasters and the FCC opinion blesses their attitude in this case. The broadcasters, in a sense, and precisely are saying that they have the right to impose an absolute ban, that they can explain to the American people what the views of the Democratic Party are, what the views of the Republican Party are or what the views of any individual spokesman for them are, better than that spokesman can do it themselves and in the age of double-think and euphemistic doubletalk that we live in, they call it "journalistic intervention." They say that --

Q Well, let's assume that -- just dealing with the First Amendment plain out, now -- forget the Communications Act -- if these broadcasters were newspapers, surely they would be wholly correct in that point of view, wouldn't they?

MR. CALIFANO: Yes, Mr. Justice, they would be, but they are not newsapers.

Q They would be in their absolute right under the First Amendment, wouldn't they?

MR. CALIFANO: Newspapers? As --

Q Just answer that question.

MR. CALIFANO: Yes, it would be their right and --

Q Just to make sure I understand.

MR. CALIFANO: -- privately-owned newspapers would have that right. I note that that is precisely a point that the Solicitor General made in the argument he made on the Red Lion case; he distinguished broadcasters from newspapers.

Q Certainly they are different, but I just want to be sure that you go at least that far under the First Amendment that if these were ordinary, if these were newspapers, they would have an absolute right to print what they wanted and to refuse to print what anybody wanted them to, government or private individual. Wouldn't that be true?

MR. CALIFANO: That is correct.

Q And that would be a First Amendment right.

MR. CALIFANO: That is their First Amendment right.

Q That would be the reason they had that right.

MR. CALIFANO: That is correct, Mr. Justice Stewart.

Q Right.

MR. CALIFANO: The Communications Act, I might note, on that point specifically notes in Section 301 that the FCC, which grants licenses to broadcasters to provide for the use of such channels may not provide for the ownership of those channels. Specifically dealing with that point, newspapers are privately owned. The channels of broadcasting -- broadcasting is about as regulated as any industry in this country and I guess the point -- we might as well deal for a

moment deal with the questions on state action.

As far as we are concerned, as we have laid out in our brief, we think there is clearly state action in the action of a broadcaster. There is a federal statute involved with a public interest standard. The federal statute preserves the public ownership of the airways, permitting licenses for relatively short and temporary periods of time.

We are dealing in this case with an order of a federal regulatory agency, the Federal Communications Commission, which in turn is dealing with rights of exercise over public property. The government cannot avoid responsibility -- the Federal Government -- for what is at issue simply because it puts them in permissive terms and, to sum it up in the words of one commentator cited in our brief,"the federal regulatory system is an much responsible for the existence of the broadcasting medium as the Bureau of Engraving is responsible for the existence of U.S. currency."

Q Well, I have always been under the impression, Mr. Califano, that the legislative history of the Act negates the idea of governmental control of the content.

Is that not true?

MR. CALIFANO: Yes, your Honor, the Section 326 of the Act prohibits the Commission from interfering with the right of free speech by means of radio-communication but what we are asking for is not that the broadcaster or the

Commission -- that the Commission start saying what the content of any broadcasting program might be. What we are asking for is that the broadcaster be required to recognize our First Amendment right to have some access -- we don't ask for every minute of every day -- and experience in this area would indicate that nobody is going to take anything -- any large, enormous amounts of time.

Something, I might say, in the legislative history -- some of the legislative history on this very point -- is laid out in our brief. The FCC already, in effect, regulates something about spokesmen in the Fairness Doctrine.

This Court in Red Lion has recognized that some spokesmen, at least when they are personally attacked, have a right to appear on television and what we are asking for is not inconsistent with what the FCC said a generation ago and in 1945, for example, in the United Broadcasting case which involved the right of a cooperative or a labor union to have some access to television, I quote one sentence from the Commission's opinion: "The Commission is of the opinion that the operation of any station under the extreme principles that no time shall be sold for the discussion of controversial public issues and that only charitable organizations and certain commercial interests may solicit memberships is inconsistent with the concept of public interest established by the Communications Act as the criterion for radio

regulation."

We are not asking for anything new in this case. There are other cases subsequent to that which, in effect, agree with it. We believe, as we indicate in our brief, that this case can be decided on the basis of the Communications Act and it is not necessary for this Court to go to the First Amendment issue.

We lay out our analysis of the legislative history of the early communications opinions, of Section 326 of the Communications Act and of Section 301.

As far as the common carrier point, which is made only briefly here in oral argument by the broadcasters, is concerned, we would note simply that our view of that provision is that it was designed to distinguish telegraph and telephone companies which are handled by Title II of the Communications Act from broadcasters which are handled by Title III and, moreover, the rule we asked for is not a right to automatic access for the Democratic Party or any particular individual. It recognizes that judgments must be made. But we believe that the broadcasters and the FCC can make a judgment short of absolutely banning us from the air.

With respect to the constitutional points --

Q Insofar as your argument does rely on the First Amendment, that seems to me an extraordinary thing to say, that Government can make judgments as to what it will

suppress and what it won't. That is exactly what the First Amendment does not permit, isn't it?

MR. CALIFANO: Judgment today -- we do recognize that there are a limited number of hours in the day. We recognize that there are only three networks in this country.

Q Yes.

MR. CALIFANO: We recognize that most communities only have a certain number, a relatively certain number --

Q Well, we have a finite spectrum.

MR. CALIFANO: So we have a --

Q Then you say that the broadcasters, which you equate to Government, can say -- must say, we'll let you speak because you are responsible, but may say we won't let you speak because you are irresponsible. Now, that is an extraordinary limitation of the First Amendment of the United States Constitution, it seems to me.

MR. CALIFANO: What -- what -- Mr. Justice Stewart, I am not saying it in those terms. What I am saying is this, that recognizing we have a finite resource, recognizing as this Court did in Red Lion that we are talking about because of that, in some sense, an abridgeable First Amendment right --

Q That is a contradiction in terms, isn't it?

MR. CALIFANO: Well, that is the language of the unanimous opinion of the Court.

Q That language of the First Amendment says,

"Congress shall not abridge," doesn't it?

MR. CALIFANO: Yes, it does, but the -- but the writers of the First Amendment -- uh -- well, let me put it this way, I think we have to deal with the realities of a medium that we now have; the realities of that medium are that it is limited.

What is happening today is that the broadcasters are simply saying that if you are peddling commercial items you have a right to buy time. If you want to peddle political ideas or political parties, you have no right to buy time and we say that there is something less than that kind of outrageous discrimination and less than an absolute ban that the broadcasters can operate under. I think that it -- you know, to say the whole broadcasting system will collapse if this Court or anyone opens up the airwaves to people or political parties to discuss controversial issues is contrary to all the experience that we have.

The newspapers and the magazines of this country are not filled with political advertisements. Corporations that advertise their television sets and their automobiles and their department stores and their grocery items in the newspapers of this country have not taken the billions and billions of dollars they spent in newspapers and simply turned it over to the discussion of public issues. I don't think there is -- I think the wealthy man is a straw man of

very thin proportions and I think that anyone that has attempted to find these wealthy men to buy television time for the discussion of controversial issues by the major political parties, at least -- and I would daresay it would be more difficult for others -- has found out that there is not a barrel of money out there waiting to be spent.

We are not going to face this problem. We do have to recognize, however, the broadcast medium is a limited medium.

As far as -- we believe that the Red Lion, in its language -- we believe our First Amendment right for direct communication is strong and involves the right of direct communication. We think there is no substitute for that. I don't think anyone in this chamber could believe that it is the same thing to have Walter Cronkite or John Chancellor or Roger Mudd explain what President Nixon said as it is to have President Nixon make his direct appeal. Would anyone assert that if Walter Cronkite had laid out the reasons why President Nixon invaded Cambodia the American support for that would have gone from 5 percent to 70 percent? Can anyone assert that there is some journalistic intervention that could have made the case for the Gulf of Tonkin Resolution of President Johnson more effectively than he could have made it? Should the broadcasters or Mr. Wollenberg or Mr. Jennes, would they like to have Frank Reynolds or

Frank Reynolds or Walter Cronkite come up here and explain what they are trying to tell the Court? The point is that this is the medium of communication in this country. It has a greater impact on our political dialog and our electoral system than any other form available to any person or party in this country and we simply want to write -- we want a rule that simply says to the broadcasters, "You cannot say that no political party can purchase time on television for the discussion of controversial issues."

Q You are not suggesting, Mr. Califano, that all networks and all stations are now exercising such a limitation, are you?

MR. CALIFANO: Well, your Honor, we have been through a whole series of rules on that. There are a variety of rules in that area right now. Some networks and stations have policy which says that during election periods time can be purchased by candidates or people on behalf of candidates.

Q And spot announcements, too.

MR. CALIFANO: And spot announcements may be purchased during this period. But outside of those periods you may not do that.

Q In other words, when there is no campaign -- election campaign on. That is what you are complaining about.

MR. CALIFANO: That is correct. That is correct. The rules, indeed, of the networks in this case changed at various points of this proceedings. CBS initially took the position, for example, that they would not sell time except during election periods and then only to candidates, either spot time or programming time, and they denied us programming time.

Three months later when the FCC -- after they filed our case, CBS said they would change the rule and they would permit spot announcements simply to raise funds but not to discuss controversial issues.

Eight months later when we were in the Court of Appeals, CBS said that it would now permit spot announcements for us to discuss controversial issues, announcements of 60 seconds or less and to raise funds, but no more and in part, I might say, it seems to us that it is not -- you know, we should not have to depend on how CBS executives feel on any given morning at any given stage of the legal proceedings as to what our rights are to express our views to the American people over the medium that 95 percent of the American homes find as their greatest source of information and news in this country.

I have made the discrimination point in terms of spot announcements. I believe the same kind of discrimination exists in the programming area as we wait out below and here.

It seems to me that -- that all programming -- people can buy programming. Religious organizations can buy programming but the two major political parties cannot buy programming.

Q Well, they can buy it if the networks sell it.

MR. CALIFANO: If the networks sell it.

Q There is no rule, is there, of the Commission that requires the networks to sell it to religious organizations?

MR. CALIFANO: Not to my knowledge. Not to my knowledge.

Q The question is here the freedom of the networks to -- or the stations, the broadcasters, to sell or not to sell, isn't it?

MR. CALIFANO: Well, no, Mr. Justice Stewart, they are right to absolutely prohibit this kind of discussion.

Q Yes, they are right on the general rule that we will not sell time for this purpose.

MR. CALIFANO: That is correct.

Q Their freedom not to sell time for this purpose. That is the issue, isn't it?

MR. CALIFANO: That is correct, Mr. Justice.

Q We have a different question here also, that you would show that a particular network would sell spot announcements and some of the others that you want to one political party but not to any other political party.

MR. CALIFANO: Oh, you have a much, much more grievous situation --

Q That is not the situation you have here, is it?

MR. CALIFANO: No, that is not, Mr. Chief Justice.

Q That the classification made by the licenscees and approved -- or at least not disapproved by the Commission.

MR. CALIFANO: That is correct, Mr. Chief Justice.

There are, I might note, according to the Census Bureau, about 100 religions in this country. Two or three of them have a purchase time on Sunday mornings for religious shows and it hasn't destroyed television on Sunday. The other 95 haven't come bouncing in to acquire time.

Some corporations are effectively granted the right to purchase entire announcer time; witness, as we cite in our brief, some of the National Geographic and Xerox shows that have appeared on the air.

The broadcasters set up in their briefs a whole chamber of horrors, the only one of which discussed here this morning was the wealthy man -- straw man -- with which I have dealt briefly.

As far as the remaining points that they raise about administrative difficulties, I would urge the justices of this Court or their clerks to review the briefs in the Red Lion case and the arguments of the broadcasters in the Red Lion case and they will find a neat and remarkable similarity

between the arguments they made there and the arguments they make here today about administrative horror. But today, CBS, in its brief before this Court and before the Commission and the Court of Appeals says their public issue broadcasting has never been better. It improves every year since Red Lion. So I cannot, with all due respect, give -- and I do not think this Court should give, just as the Court of Appeals did not give -- much credence to these administrative horrors.

And the bottom line on that point, I submit, Mr. Justice, is this: In Red Lion, in the unanimous decision, the Court of Appeals, this Court, noted that it would not decide the case on the basis of extreme possibilities or extreme examples. The Solicitor General, indeed, in his argument in Red Lion, urged that particular point upon this Court. In case of doubt, this Court opted to go with the First Amendment values and the right to free speech noting and inviting the broadcasters to go back to the Federal Communications Commission and ultimately come back here if any of the horrors that they envisioned -- any of their nightmares ever came to pass. None of them ever did come to pass and the same kind of doubt, if anyone has it in this room besides the broadcasters, the dangers should be treated in the same kind of way in this case.

We believe that that opting for free speech is

consistent with everything, with a whole host of decisions of this Court. We believe that this Court, in effect, opted for free speech in the Norr case in a situation of dangerous, explosive, dirty and outrageous fighting between truckers and railroads. In Times v. Sullivan, this Court opted for free speech in a situation where a newspaper lied.

In the Pentagon Papers, this Court opted for free speech, even though the national security of this country might have been involved.

In this case, the only inhibition on opting for free speech are a host of impossibles that the networks claim may come to pass and that they may hurt the system of broadcasting. I think that --

Q Well, Mr. Califano, don't you have a further obstacle on that? You have a Communications Commission which says that this is -- in our judgment -- this is the way that the Federal Communications Act should be administered -- interpreted and administered and also this is the way the First Amendment values would best be maximized. It is not just the broadcasters, is it?

MR. CALIFANO: No, but in their opinion they -- they express explicit agreement with several of the problems.

Q We do have a judgment of an administrative agency.

MR. CALIFANO: Yes, we do, Mr. Justice White. We

have a judgment of an administrative agency with which, obviously, we disagree. We do not think that the FCC -- well, we have two judgments. We have a judgment of an administrative agency that says yes, sell them spot announcement time, and that's no problem, to raise funds, but you don't have to sell them time to discuss controversial issues.

That part of the judgment does not make sense to us in the sense that I do not think it is possible for a major political party to advertise to raise funds without saying something about some issue or about what it stands for.

Q Now, what is inconsistent with the Communications Act? What specific provision of the Communications Act is the FCC ignoring in its present ruling?

MR. CALIFANO: Well, I was -- I think that the provisions of the Communications Act that we would say the FCC is not dealing with in its present ruling or, one, the fact that these are publicly-owned airways, Section 301; number two, they have not adequately applied the Public Interest Standard that in connection with the communications area the Public Interest Standard is just imbedded in First Amendment considerations and to the extent that First Amendment considerations are imbedded in that standard, I might say that it is this Court that really is the expert at the First Amendment and not the FCC.

Q Well, I thought that you were addressing

yourself to just the statutary aspect? Are you saying that Section 301 standing alone is enough to support the Court of Appeals' view?

MR. CALIFANO: The -- no, 301, the Public Interest Standard which is involved in half a dozen statutes cited -- half a dozen sections of the Act which are cited in our brief relating to licensing, prescribing service, a whole host of determinations and the fact that in the Federal Communications Act the Public Interest Standard necessarily does involve some First Amendment considerations and does embody some of the public policy considerations that are relevant to consideration of the Free Speech values.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Califano.

Mr. Asher.

ORAL ARGUMENT OF THOMAS R. ASHER, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. ASHER: Mr. Chief Justice, and may it please the Court:

Because I feel that perhaps the argument has taken a path of abstraction I would beg leave to try to focus upon the specific present in the BEM case to illustrate the exact nature of the issue before the Court and the narrowness of that issue as held by the court below.

The issue is one of discrimination. Broadcasters

voluntarily determine that in order to raise revenue they are going to put a certain portion of their time up for sale and market it to others and that those other persons are going to use that time to speak. BEM approached a broadcaster that did just that with 18 out of every 60 minutes it is on the air, WTOP radio station, and sought to purchase time. It was turned down not for any of the reasons suggested by the Petitioners, not because the speech was obscene, indecent, defamatory, or might somehow otherwise be in violation of some specific law, but solely and exclusively on the basis of a policy which is set out at page 297 of the Appendix and I quote, "It is the policy of the Post-Newsweek stations, radio and television stations not to sell spot announcement time to individuals or groups in order to set forth a point of view on any controversial subject of public importance."

Now, that presents the clear, narrow issue that was decided by the court below. That is a flat ban on selling time which is regularly marketed to commercial spokesmen to people who wish to speak about controversial subjects.

In brief, such a policy -- as we view the ruling of the court below and as this case is presented -- involves no question of creating a new constitutional right or "right of access," as it is phrased. Rather, it deals specifically

with the question of whether or not -- assuming, for the moment that I will address state action -- assuming that the action of the broadcaster is either itself state action or because affirmed and approved by the regulatory agency's state action, whether or not this discrimination, barring First Amendment protected speech, in and of itself is violative of the First Amendment doesn't mean that every person has a right to speak but rather a right not to be excluded on such a discriminatory ground.

We would suggest primarily that reading cases like Ballantine against Prestonson and Breard versus Alexandria, the approach taken by the broadcasters in terms of their marketing of time turns constitutional values on their head. The Court has time and again in those cases held that the First Amendment protects political speech, does not protect commercial speech. If somehow or other the commercial speaker, when he wishes to address a particular issue, the merits of his product or otherwise in his own words, may come and buy time on the nation's most powerful communications medium, and when editorial speakers get political parties or voluntary groups like BEM or civil rights organizations as in the case of the New York Times against Sullivan wish to pay the same rate, buy the same time, to address what they regard as the most important issues of the day, they are discriminatorily refused any opportunity to purchase that time.

Q Would you make the same argument with respect to a newspaper?

MR. ASHER: Would I make the same argument with respect to --?

Q If the newspaper sold ads for selling houses but refused to sell ads for controversial views?

MR. ASHER: I think it would present a different issue, Mr. Justice White, that we need not reach in this case. I think the controlling factor would be state action.

Q Well, I know, but you --

MR. ASHER: If it were a governmentally-owned newspaper, the answer would be yes, we would make that argument. If, on the other hand, it is a private newspaper --

Q Like a broadcast station -- or is a broadcast station publicly owned?

MR. ASHER: It is not publicly owned but I think it is so inundated with public values, with license to use public property.

I would, if possible, like to defer the state action argument for a moment, but if you prefer --

Q Go ahead, Mr. Asher.

MR. ASHER: The Petitioners seek to justify the exclusion of editorial advertisements on two distinct grounds and I think this should be kept in mind. One is that somehow or other the Fariness Doctrine offers an alternative to

letting people speak and therefore there is no real First Amendment interest left over on the part of people who want to buy advertising time to say what they wish to say. The Fairness Doctrine has taken care of all that. The broadcaster has, in an alternative manner, told the public all that it needs to hear.

Any individual who wishes to speak can rest assured that if his speech was worthwhile it would have been communicated by the broadcaster already.

The second is the parade of horrors which we regard as purely speculative and totally undocumented on the record in this case.

Now, to address the first question, whether or not the Fairness Doctrine constitutes a substitute for or a justification for excluding constitutionally-protected speech from the marketplace of advertising -- and I perhaps ought to digress for a moment to indicate that the court below limited its holding to that time which a broadcaster voluntarily elects to market to others. The court characterized that as "advertising time." It said when a broadcaster voluntarily elects to market time, at that time it cannot invidiously discriminate between controversial speech and others.

Q You are, you said, going to get to the question of whether or not a broadcaster can be equated with a government, aren't you? Because there is nothing to your

arguments unless that preliminary threshold is covered.

MR. ASHER: Well, perhaps since Mr. Justice White and yourself have both expressed interest in my doing it sooner, I should -- I will address it at this moment.

If I can refer back to a 1966 opinion written by the Chief Justice when he sat on the court of appeals, Office of Communication of the United Church of Christ v FCC, the very question of whether or not a broadcaster can be equated with a newspaper in terms of First Amendment rights was the question raised by Justice Stewart earlier. It was discussed.

Q Well, now, I didn't -- I said, if you were dealing with a newspaper. I know that Red Lion could not have been decided the way it was if a broadcaster is the same as a newspaper because, clearly, government, under the First Amendment, doesn't have power to tell newspapers to be fair and balance their reporting or anything else. Newspapers have an absolute right to be unfair and we held that in Red Lion that broadcasters do not so, obviously, they are not the equivalent, and I didn't say that they were.

MR. ASHER: No, I didn't suggest that you did, Mr. Justice Stewart, only that you had addressed the question of is there analogy here between the papers and the broadcasters --

Q If there were.

MR. ASHER: -- have quite clearly suggested that there is an analogy and I will not burden the Court with -- with all of the analysis that Mr. Chief Justice Burger went through in the Church of Christ case except to point out that it was clearly rejected that there is any analogy between the freedom of the broadcaster to make arbitrary decisions and that of the newspaper, which in the Church of Christ case was characterized as a purely private enterprise.

Q When you say that, the newspaper was characterized, was it not?

MR. ASHER: Yes, the newspaper was characterized as --

Q This is the same distinction Justice Stewart has been making.

MR. ASHER: That's right. And in emphasizing the difference between broadcasters and newspapers, Mr. Chief Justice, you use the following language, "A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain." When he accepts that franchise, it is burdened by enforceable public interest obligations. A newspaper can be operated at the whim or caprice of its owner. A broadcast station cannot.

On essence, what we are addressed with here is whether or not/the whim or caprice of a broadcaster it can market its advertising time so as to draw what we think has been clearly established by this Court at its last term in

Moseley as the most recent example as an invidiously discriminatory policy that somehow or other the controversiality of the speech which someone wishes to offer and time that he seeks to buy determines whether or not he can utter it and, in fact, if it is controversial, he cannot purchase the time. He is flatly banned. If it is not controversial and therefore not protected by the First Amendment, then he can't.

Q Mr. Asher, the language following the quoted portion that you referred to in the United Church of Christ case went on to say, in effect, that when they come to the renewal of their license they are held to an accounting of their stewardship in terms of whether they have been operating on whim and caprice or whether they have been operating on public interest. It is quite a different matter from the inverse of prior restraint or prior compulsion that you are talking about here now.

MR. ASHER: I think that is -- you may be quite right, Mr. Chief Justice, but what the Commission has established in this case is a policy that when a broadcaster's license comes up for renewal -- and every three years each broadcaster's license comes up -- that whether or not they engage in this invidious discrimination; in other words, whether or not they employ flat ban, this will not be regarded as a negative factor on the side of determining

whether they have served the public interest.

In fact, the Deomcratic National Committee asked for alternative relief from the Commission. They asked, one, that flat bans be prohibited or, two, alternatively, that the Commission declare that it will be regarded as a negative aspect in terms of serving the public interest at renewal time that broadcasters do discriminate against controversial speech in the sale of their advertising time.

The Commission rejected both of those approaches.

So what the Commission, in essence, has done here is it has given the broadcasters carte blanche to employ a discriminatory policy and when a broadcaster comes up for renewal, this policy will not be held against him. In fact, in the pleadings in the BEM case, WTOP specifically stated that it was employing a policy that had been approved by the government.

Now, this approval goes to the very core of whether or not his license is going to be renewed and it makes no difference whether the Commission in a specific proceedings such as BEM's complaint or in the general request for declaratory ruling as in the case of the Democratic National Committee states that a particular discriminatory policy will be regarded as an adverse factor in license renewal. The question is, what has the Commission done here? It has said we will not regard it as an adverse factor. We will regard it

as, at best, a totally neutral factor. You are free to go on discriminating and your licenses will be renewed as usual.

Q Mr. Asher, supposing that your clients claim they have been rejected by a network which had a policy of selling no time for any sort of advertising? Would you still claim a First Amendment denial and that your client has a right of access to these public airwaves?

MR. ASHER: Not on the facts of this case, Mr. Justice Rehnquist. The First Amendment right I think is a sort of abstraction that we all walk around garbed with, and the question is, where can we exercise it and under what terms can it be denied? The facts here are rather narrow ones and the court below made of it rather narrow ruling. It said when a broadcaster holds forth time for sale, then within that time it cannot discriminate invidiously between controversial and commercial speech.

That is the sole ruling that we are seeking affirmance on here and the facts of this case need not get beyond that and over to the question of a broadcaster which is a noncommercial broadcaster which does not hold out time for sale and thereby make a discrimination within that time.

Some mention was made of the Moose Lodge case and that somehow or other it is dispositive of the facts before the Court here. Of course, Moose Lodge involved a private

club which had been licensed by the state to sell liquor. Here we are talking about what has been time and again characterized as a publicly-engaged industry licensed to exercise control over what is perhaps the most important form of communications in the country. There is no constitutional value protected in terms of a person's right to drink and the regulation in the liquor area was focused primarily upon keeping drunks and minors out of bars, a legitimate state interest but clearly in no way relevant to determining whether or not, when the government owns the airwaves, owns the form of communication, as it did in Burton against Wilmington Parking Authority and, on top of it, licenses it out to others to utilize whether or not, at least for the purposes of applying the First Amendment to the way in which those airwaves are allocated, there is not sufficient action to call a state interest -- or not sufficient interest to call a state action -- and if one compares the analysis engaged by this Court in Moose Lodge, where one was not concerned with the vital First Amendment values, with Lloyd against Hammer where there was no licensing whatever, there was a privately-owned shopping center which was not licensed by the state, yet nonetheless, the Court -- the Court's majority -- felt obliged to go to great lengths to point out that First Amendment values are so important that reaching that shopping center's clientele as an audience are

so important that there are alternative ways of reaching that audience without getting inside the shopping center, notably, distributing the leaflets at the entranceways.

Now, whether one agrees or not with the result reached in Lloyd, I think Lloyd demonstrates that when dealing with First Amendment values in a form that may be appropriate to the communication of speech, this Court goes to great lengths to try to determine whether or not speech is being unduly curtailed.

Here we are dealing with a form unlike in Lloyd which is dedicated solely and exclusively for the purposes of communication. There is no purpose whatever other than communicating information.

Q Have you said all you are going to say addressed to the point that broadcasters are government?

MR. ASHER: No. Well, I -- I think -- I would like, perhaps, to address the Court's attention to page 72 of our brief. We set out the language of Section 301 which may perhaps be a good place to start in analyzing the question of the degree of governmental involvement in the operation of the broadcaster.

It is the purpose of this act 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 by persons for

limited periods of time under licenses granted by federal authority and no such license should be construed to create any right beyond the terms, conditions and periods of the license.

Now, starting from that proposition, we are dealing with a valuable public resource that the government has maintained very, very stringent ownership of and the statute requires that it maintain control over. This differs from virtually every other state action case that this court has ever been approached with including, in fact, the Burton against Wilmington Parking Authority where there was no specific statutory requirement that the Parking Authority maintain control over each and every square foot of the parking lot that it built.

Time and again, this Court, when faced with the question of the way in which the government regulates broadcasting, has expressed, in the broadest of possible terms, the manner in which the government exercises this control. For example, in Pottsville Broadcasting, which was quoted in Red Lion, this Court used the term that the government maintains a grip on the dynamic aspects of radio transmission and, again in Red Lion, this Court stated that broadcasters have been given a preferred position -- a preferred position conferred by government.

We figured, when we blend all of these factors

together, I think it is extremely difficult not to find at the very least that the way in which broadcasters operate in terms of allocating their air time -- and we are talking here about having voluntarily made a decision to market their air time, must be held up to governmental standards, the same First Amendment standards that would be applied if the government were operating these stations themselves.

We are not talking now about that portion of the broadcaster's time which he is not holding out to others.

Q But can you really make that sort of a distinction between a marketing or commercial time and the other aspects of the broadcasting business when you are trying to decide whether or not this is state or governmental action?

MR. ASHER: I think you can make the distinction, Mr. Justice Rehnquist only as follows: The Fairness Doctrine sweeps across the entire board of broadcasters dealing with controversial issues and so, presumably, the government has asserted an interest in the whole manner in which it is done.

From our point of view, the right that we are asserting is not an absolute right for all of the broadcasters' air time. It is simply a right not to be discriminated against when the broadcaster elects to sell something. It will be a different case if it ever comes up when someone asserts a right to a broadcaster's time when the broadcaster has not

determined he is going to market to others.

Q But in order to decide whether or not it is governmental action, the Court would have to adopt some general principle and not just say that in these two particular cases it is governmental action and we will worry about others when they come here. I am wondering whether any general principle could be applied that would find it governmental action here that wouldn't require it to be found governmental action in almost every other facet of the business?

MR. ASHER: Well, yes, I think so. Certainly, if in a broadcast station's offices an employee tripped and would hurt himself, he wouldn't have to assert his rights under the Federal Torts Claims Act. Notably, the distinction is that the airwaves are what are licensed out by the government and it is the utilization of those airwaves which bring the broadcaster within the ambit of state action.

Other aspects of the broadcaster operation would be the employee practices or otherwise would be judged on different grounds but, again, the focus here is primarily upon the utilization of air time, the allocation of air time, and the essence --

Q If that is true, then I don't see how a broadcaster would have any power whatsoever to limit or desnor anythin on his station.

MR. ASHER: Well, limitation and censorship may

perhaps be the same, Mr. Justice Stewart. All that we are asserting here is that certainly no one has an absolute right to speak on the airwaves and the NBC case made this clear. What we are saying is that a broadcaster has not got a right to be unreasonable.

Q Well, that is an equal protection argument.

MR. ASHER: That's right.

Q That is very much what it sounds like.

MR. ASHER: That is right and I --

Q That is an equal protection argument and that, too, depends first of all upon equating the broadcaster with government, but equal protection is something else and that is really what you would agree, I think, that the Court of Appeals' opinion was heavily larded with protection rhetoric.

MR. ASHER: Oh, quite. I am trying to make my argument in accord with that. I think that in stressing the element of discrimination rather than the element of absolute rights, we were focusing on whether or not there has been invidious discrimination which I think in decidiing Mosely last term this Court acknowledged that the First Amendment interests and the equal protection interests were entwined but nonetheless came down on equal protection grounds. I think what we find ourselves faced with here is largely the same factor.

The government can limit speech. It limits speech

all the time. The question is, is it doing it on a reasonable basis? And that I believe to be the fundamental question here.

Q You say the government can limit speech and it does it all the time?

MR. ASHER: Oh, I think there is no doubt about it. It closes this courtroom at a certain time and only allows certain people to speak in the courtroom. Courts are closed. Time, place and manner are perfectly permissable. While one may have a right to speak in the Capitol Building during the hours --

Q Time and place, not by the contents.

MR. ASHER: Certainly not on the basis of the content and if on content at all, certainly not on the basis of the fact that controversial speech will be excluded.

Q What about responsible speech, speech by responsible people as contrasted with irresponsible people? Is there any power of government under the First Amendment to make that kind of distinction?

MR. ASHER: It is a very, very difficult distinction to make, Mr. Justice Stewart and certainly this Court has in many, many cases suggested that regardless of whether or not one is responsible, one has a right to speak, the answer to the question is if the forum is unlimited, then probably you cannot distinguish on the grounds that this

man is irresponsible and that man is responsible. However, if the forum is limited, it may be a reasonable ground to suggest that one man is speaking for a broader audience than another. We constantly face allocative problems. When two people want a parade permit to go on the same street at the same time, the government has to make a allocative decision and there are numerous reasonable grounds on which you could do it.

Now, responsibility may be one of them, although I find it the most troublesome simply because it is the kind of judgment that is most attached with censorship.

Q Well, now, let's take that last hypothetical you gave. Suppose a city had an ordinance that it would grant licenses and permits for parades to people in non-commercial categories? That is, to advertise their views on war or public health or whatever, that they would not allow any parade permits to advertise soap and beer and whatnot. Would that be a reasonable classification of the use of a public area?

MR. ASHER: Well, this Court has certainly suggested that in cases such as Ballantine and Breard.

Q Hasn't the FCC made classification here?

MR. ASHER: Yes, but it is an inverse classification.

Q Yes, I know it is.

MR. ASHER: Instead of saying --

Q They have made the classification and once you have hurdled whether this is governmental action, you still have to demonstrate this is an unreasonable and impermissable classification, do you not?

MR. ASHER: I think we do and I think that the classification is unreasonable and impermissable on its face unless this Court is prepared to state that somehow or other it is permissable for a governmentally-operated forum to say commercial speech will be permitted and political speech will not.

And every single time this Court has been addressed with that question it has answered it in the negative.

Q Well, it hasn't done quite that, though, has it? It has -- the governmentally-licensed entity here has merely said that the political speech will be allowed just during political campaigns, so you have another classification.

MR. ASHER: Oh, we have numerous classifications, that we will allow political speech by political parties to raise money, but we won't allow it for other purposes, which in a way touches upon another unreasonable aspect of the entire scheme that seems to be evolving here.

In another way, we start out with what presumably would be a neutral approach to let's say marketing advertising time and immediately the neutrality is removed by saying,

controversial speech is going to be let out. It is going to be excluded.

So we split from neutrality of time, place and manner -- at least, which has been held permissable in numerous cases, into an un-neutral area which is invidious. It excludes political speech and permits commercial speech free rein within that air time. And it's not prearranged. Some controls are exercised but at least an opportunity to speak and that is all that we seek here, nothing more.

Q Mr. Asher, when a state is involved they put up the old blue army state interests. What do the broadcasters and agencies put as their overwhelming interests?

MR. ASHER: Well, we have been hard-pressed to try to find any of the interests that have been asserted by the broadcasters that could be regarded as overwhelming.

One is the danger that perhaps the rich who buy up the time and somehow set the agenda of debate --

Q They are just regulating their own time.

MR. ASHER: I beg your pardon?

Q They are regulating their own time.

MR. ASHER: The broadcasters regulating their own time?

Q Yes, they only have 24 hours of the day.

MR. ASHER: That's right.

Q Yes.

MR. ASHER: And no one is questioning the broadcaster's right to regulate it in terms of saying, we are going to market so much to sell to others and keep so much for ourselves to say what we want to. We are just talking about that time they are selling.

Q Then your only point is that you are restricted because it is controversial?

MR. ASHER: That is right. That is the only ground on which we were kept out. If you look at the policy of WTOP radio stations on which the Business Executives group was excluded, the only ground on which it was excluded was the controversiality of its message, no other ground whatever. It is strictly that narrow discrimination that we are talking about. Now, a number of what I would regard as false horrors have been paraded to the Court as to what might happen if it were acknowledged that there is no right not to discriminate. Or, I'm sorry, a right to discriminate or a right to be required not to discriminate. One, somehow or other that the rich might buy up all the time. I think that that is at best a speculative danger because if we look at the nature of editorial advertising in newspapers we find that for the most part editorial advertising is utilized by disadvantaged groups that somehow or other feel that their views have already been excluded.

The rich, on the other hand, are not monolithic by

any means and if General Motors in fact decided that rather than trying to sell cars it was going to use all the time it could buy up to talk about political issues, one, that would run completely counter to the situation we see in the newspaper area where we find very little politicizing by commercial interests.

Secondly, that subject wasn't briefed to this Court but thirdly, even if it were done, even if corporations utilized advertising time to address issues rather than simply the merits of products, is that necessarily an undesirable First Amendment consequence so long as we have the Fairness Doctrine to assure that there is balance?

Now, another one of the danges that has been advanced is that somehow or another the Fairness Doctrine will be wrecked if we have a requirement that editorial speech not be excluded from advertising time. And, again, there is no basis whatever for reaching this conclusion. Numerous stations, as acknowledged by the broadcasters, already carry editorial advertisements. None of them have come forward to say that somehow or other as a result of our doing this we are about to go under. We are being swamped.

The common doctrine which requires that broadcasters give free time for response only comes about in two circumstances. One, where -- three circumstances -- where a controversial issue of public importance has not been dealt

with fairly by the broadcaster, it is imbalanced in the broadcaster's programming and in one of the cigarette cases the FCC has held that an eight-to-one balance of pro-cigarette and anti-cigarette advertisements is reasonable, so the broadcasters have a tremendous latitude in which to determine what is balanced.

Secondly, no one has paid to come forward to put on the other side and, thirdly, the broadcaster in his own programming has not, in one way or another, elected to present the other side.

Only in those circumstances must they give time free to someone to present an alternative viewpoint. Now, remember, we are not talking about every issue in the world. We are talking about issues that are both controversial and of public importance, notably those issues which not only the Fairness Doctrine applies to are specifically excluded under the flat ban policy that we asked this Court to declare unconstitutional.

Now, if an issue is both controversial and of public importance, presumably a broadcaster, if he is fulfilling his Fairness Doctrine obligations, is already going to be covering that issue and it is very unlikely that letting on a particular spokesman is going to throw his programming into imbalance and the facts of the BEM case indicate that. WTOP has argued that it has presented both

sides of the war in extreme balance, keeping in mind the eight-to-one ratio that the Commission has held to be reasonable, selling three or four minutes to one group or another group to express their views on the issue to supplement what the broadcaster has already put on in newstime. It's not going to throw his programming into imbalance. The one place in which you might find a problem of the broadcaster being faced with either an economic burden under the Fairness Doctrine or an incursion upon his discretion as to what issues should be covered is where a new issue comes up. The issue that the broadcaster for one reason or another, even though it is controversial, and even though it is of public importance, a broadcaster has elected not to put on the air and some member of the public feeling that it is so important has gone forth with his money and paid the money and bought time and raised that issue. Then the broadcaster obviously, not having covered it, probably has not been fulfilling his Fairness Dcotrine obligations. He may have overlooked the issue and so that in furtherance of the First Amendment objectives of robust, wide-open debate, the new issue will have been brought to public attention and how the broadcaster deals with it need not impose any great economic burden.

Primarily, the broadcaster will deal with that issue by either dealing with it in news time. Perhaps another member of the public will come forward and buy time to

present the other side but in any event the broadcaster is going to be subjected to no burden that he is not already required to address under the Fairness Doctrine because we are only talking about controversial issues of public importance. We are not talking about those kinds of issues which the broadcasters somehow or other suggest they should exclude.

One of the broadcasters suggested trivial issues might be excludable. Well, if it is trivial, then it is not controversial and of public importance. We are only talking about the burning issues of the day, those very issues that the broadcaster must address in his programming time under the Fairness Doctrine and must address with balance.

I think that I have covered pretty much those areas that were not covered by Mr. Califano except to suggest that the question of programming time, as far as we are concerned in the context of this case, must be looked at very narrowly.

Notably, if a broadcaster regularly markets programming time to others, then again it would be invidious to say, "I'll market it to you if you want to talk about a commercial subject but not about a controversial one."

On the other hand, if a broadcaster markets only spot advertising time, which is the case with a number of broadcasters, then that is what we are talking about and we

are saying that is where he cannot discriminate. But, nonetheless, the basic question is discrimination and the basic judgment is the broadcasters' as to what he is going to subject -- what type of time he is going to put up for sale. When he puts time up for sale, then he is to be held to a requirement that he not discriminate invidiously between that which is controversial and that which is not.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Asher.

Thank you, gentlemen.

Mr. Wilkinson, you have seven and one-half minutes.

REBUTTAL ARGUMENT OF

VERNON L. WILKINSON, ESQ., FOR THE PETITIONERS

MR. WILKINSON: Mr. Chief Justice, and may it please the Court:

Questions were asked of counsel for DNC on what sections of the Communications Act they were relying as being violated by the Commission's decision. In that connection I would like to call to this Court's attention and emphasize that on at least four occasions Congress has had opportunities to prescribe the right of access for the presentation of contrasting views on controversial issues and in each instance has refused to go that far.

First of all, the Radio Act of 1927 with reference to candidates for public office, they did put in a

provision which would carry it over again when the Act was reenacted as the Communications Act of 1934 that if time is made available by the broadcaster to one candidate, he must likewise make available time to other candidates for the same office. But, this statute immediately went on with a sentence to this effect, "No obligation is imposed upon any licensee to allow the use of a station for any such candidate." That was the provisions up until 1959, except for the standard of public interest and the report on editorializing in 1949.

However, in 1959 after the Larr Daily episode, Congress restricted still further this equal time requirement even for candidates by eliminating bona fide newscasts, by eliminating bona fide news interviews, bona fide documentaries and on-th-spot-coverage bona fide news events.

Now we come then next to the Campaign Expenditure Act of 1971 which became effective April 7, 1972 where Congress provided that licenses could be revoked for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by legally-qualified candidates for federal elective office, federal only, not state.

Now, you will notice that they used the word "or," "Either access or permit purchase of reasonable time." It didn't say purchase and purchase of reasonable time.

Congress was perfectly familiar back in 1959 and after this Court's decision in Red Lion that the broadcaster was under an obligation to see that all sides of controversial issues were presented. And, therefore, the stations are under a duty to provide time either free of charge or on a paid basis and that is the policy which most of the three networks, for the most part, have followed.

With reference to controversial issues, we present the time free.

Now, Congress and the Commission have gone further, after the Campaign Expenditure Act was enacted, question was asked by Meredith Publishing Company, which owns several television stations and radio stations, "Can we continue our policy under that statue of making time available free only to candidates and not selling time and thereby keeping a complete balance and not the richest candidate getting more spots and the poorest candidate being able to only buy one spot because on time for sale for candidates for public office, the Fairness Doctrine, as I understand it, is not directly applicable.

The Commission held that Meredith Publishing Company could continue to make time available on a free basis and not be required to sell time for campaign purposes. And that is even and I think therefore that we have an A Fortiori situation when we get into the subject of controversial

issues.

So we do not have here a question of selling time to the commercial advertising and refusing to sell time to the person that wants to espouse ideas. We sell time to the commercial advertiser to advertise his products. We give time for the presentation of controversial issues.

Q Well, you didn't give time here, did you?

MR. WILKINSON: We have given --

Q Did you give time in these cases here?

MR. WILKINSON: That was in response to this particular request but there is no complaint by the DNC --

Q But I can't understand you. Why would you give somebody else time and you didn't give them time?

MR. WILKINSON: We have given DNC time on occasion, on the ABC network, yes. We did not in response to this particular request.

Much emphasis was placed on United Broadcasting Company case in 1945 by the Respondents. The Commission was loaded with its Fairness Doctrine here. It is true there is some mention made of it back in 1929, generalizations, but it was not until the reform of editorializing in 1949 that the Commission finally expounded its Fairness Doctrine in much the same form it is at present except for the additional conditions about personal attack rules and matters of that kind.

We do not consider United Broadcasting Company case therefore as controlling in view of the 1949 reform on editorializing and the Fairness Doctrine itself as announced by the Commission and I would like therefore to call to the Court's attention that the more authoritative pronouncements than the United Broadcasting Company case -- a decision by a different panel of the Circuit Court of Appeals for the District of Columbia both before this case was resolved and after this case was decided where they say, "We believe DNC's position to be fallacious and point to our recent decision in Green v. FCC where we state that no individual or group has the right of access to the air. Licensees may exercise their judgmentas to what material is presented and by whom.

Certiorari was denied on that case a week ago today.

I see that my time has expired. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Wilkinson. Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:25 o'clock p.m., the case was submitted.)