WITHDRAWAL SHEET
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Collection: WHORM Subject File
OA/Box:
File Folder: SP287-20 475192 (1)

Archivist: kdb
FOIA ID: F97-057 Lawson
Date: [withdrawal sheet revised 12/7/01]

DOCUMENT NO. & TYPE	SUBJECT/TITLE	DATE	RESTRICTION
1. memo	Arthur B. Culvahouse to Rhett Dawson, re proposed alternative signing statement, 1p	6/18/87	P5
2. memo	Peter Keisler to Culvahouse, re same topic as item 1, 2p	6/18/87	P5
3. memo	John Carley to R. Dawson, re same topic as item 1, 1p	6/17/87	P5
4. memo	same as item 3, 1p	6/17/87	P5
5. memo	Culvahouse to Dawson, re Fairness in Broadcasting Act of 1987, 1p	6/16/87	P5
6. memo	Keisler to Culvahouse, re same topic as item 5, 3p	6/16/87	P5

RESTRICTIONS

B-1 National security classified information [(b)(1) of the FOIA].
B-2 Release could disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA].
B-3 Release would violate a Federal statute [(b)(3) of the FOIA].
B-4 Release would disclose trade secrets or confidential commercial or financial information [(b)(4) of the FOIA].
B-6 Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA].
B-7 Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA].
B-7a Release could reasonably be expected to interfere with enforcement proceedings [(b)(7)(A) of the FOIA].
B-7b Release would deprive an individual of the right to a fair trial or impartial adjudication [(b)(7)(B) of the FOIA]
B-7c Release could reasonably be expected to cause unwarranted invasion or privacy [(b)(7)(C) of the FOIA].
B-7d Release could reasonably be expected to disclose the identity of a confidential source [(b)(7)(D) of the FOIA].
B-7e Release would disclose techniques or procedures for law enforcement investigations or prosecutions or would disclose guidelines which could reasonably be expected to risk circumvention of the law [(b)(7)(E) of the FOIA].
B-7f Release could reasonably be expected to endanger the life or physical safety of any individual [(b)(7)(F) of the FOIA].
B-8 Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA].
B-9 Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA].

C. Closed in accordance with restrictions contained in donor's deed of gift.

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ID # 475192 CU

SP287-20

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) 1 1

Name of Correspondent: Rhett Dawson

☐ **MI Mail Report** **User Codes: (A)** _____ **(B)** _____ **(C)** _____

Subject: Proposed alternative signing statement for Fairness in Broadcasting Act, S. 742

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Completion Code	Completion Date YY/MM/DD
cuhall	ORIGINATOR	87/06/18		C	87/06/18 RO
	Referral Note:				
cuat31	D	87/06/18		C	87/06/18 RO
	Referral Note:				5PM
cuculver	S	87/06/18		C	87/06/18 RO
	Referral Note:	June 1987 ABC memo to Rhett Dawson			
	_	/ /		_	/ /
	Referral Note:				
	_	/ /		_	/ /
	Referral Note:				

ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
A - Answered
B - Non-Special Referral
C - Completed
S - Suspended

FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments: _____

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

5/81

RECORDS MANAGEMENT ONLY

CLASSIFICATION SECTION

No. of Additional Correspondents:_____ Media: _____ Individual Codes: __.____ __.____ __.____

Prime Subject Code: __ ____-__ Secondary Subject Codes: __ ____-__ __ ____-__

__ ____-__ __ ____-__

__ ____-__ __ ____-__

PRESIDENTIAL REPLY

Code	Date	Comment	Form
C __ __	_____	Time: _____	P- _____
DSP	_____	Time: _____	Media: _____

SIGNATURE CODES:

CPn - Presidential Correspondence
- n - 0 - Unknown
- n - 1 - Ronald Wilson Reagan
- n - 2 - Ronald Reagan
- n - 3 - Ron
- n - 4 - Dutch
- n - 5 - Ron Reagan
- n - 6 - Ronald
- n - 7 - Ronnie

CLn - First Lady's Correspondence
- n - 0 - Unknown
- n - 1 - Nancy Reagan
- n - 2 - Nancy
- n - 3 - Mrs. Ronald Reagan

CBn - Presidential & First Lady's Correspondence
- n - 1 - Ronald Reagan - Nancy Reagan
- n - 2 - Ron - Nancy

MEDIA CODES:

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- G - Message
- H - Handcarried
- L - Letter
- M - Mailgram
- O - Memo
- P - Photo
- R - Report
- S - Sealed
- T - Telegram
- V - Telephone
- X - Miscellaneous
- Y - Study

ID # _____ CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) 1 1

Name of Correspondent: John H. Carley

☐ **MI Mail Report** **User Codes: (A)** _____ **(B)** _____ **(C)** _____

Subject: Signing Statement for Enrolled Bill S. 742, the "Fairness in Broadcasting Act of 1987"

ROUTE TO:	ACTION		DISPOSITION		
Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CU Holland	ORIGINATOR	87/06/17		C	1 1
	Referral Note:				
CUAT 31	A	87/06/18		C	1 1
	Referral Note:				
	_	1 1		_	1 1
	Referral Note:				
	_	1 1		_	1 1
	Referral Note:				
	_	1 1		_	1 1
	Referral Note:				

ACTION CODES:
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CLASSIFICATION SECTION

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Prime Subject Code: __ ____-__ Secondary Subject Codes: __ ____-__ __ ____-__

__ ____-__ __ ____-__

__ ____-__ __ ____-__

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C __ __ _____ Time: _____ P- _____

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- O - Memo
- P - Photo
- R - Report
- S - Sealed
- T - Telegram
- V - Telephone
- X - Miscellaneous
- Y - Study

ABC/PDK:jck
ABCulvahouse
PDKeisler
Chron.

THE WHITE HOUSE

WASHINGTON

June 18, 1987

MEMORANDUM FOR RHETT B. DAWSON
ASSISTANT TO THE PRESIDENT FOR OPERATIONS

FROM: ARTHUR B. CULVAHOUSE, JR.
COUNSEL TO THE PRESIDENT
Original Signed by ABC

SUBJECT: Proposed Alternative Signing Statement for S. 742 (Fairness in Broadcasting Act)

As requested, Counsel's Office has reviewed the proposed alternative signing statement submitted by the Office of Management and Budget. We have previously expressed the view, which we continue to hold, that S. 742 should be vetoed. We agree with OMB that, should S. 742 be approved, no signing statement ought to be issued.

Issuing such a statement would likely be counterproductive. By noting the Administration's prior opposition, the circulated draft makes the President look weak and inconsistent. Furthermore, a Presidential statement in support of the Fairness Doctrine would add his considerable weight to the ongoing legal efforts to affirm the constitutionality of the Fairness Doctrine, thereby undercutting the President's appointees at the FCC who have taken the opposite position. The President's statement would likely be quoted in the legal briefs filed by Fairness Doctrine supporters.

These difficulties would be posed by any signing statement. Consequently, a signing statement should only be issued if the President decides that, in addition to signing the bill, he wishes to give affirmative legal support to those who favor the Fairness Doctrine. Since a signing statement is likely to have that effect, one should not be issued otherwise.

THE WHITE HOUSE
WASHINGTON

June 17, 1987

A.B. CULVAHOUSE:

Attached for your review and comment is a proposed alternative signing statement for the Fairness in Broadcasting Act (S. 742), which OMB has prepared. Would you please have your people provide any comments directly to my office by close of business today.

Rhett Dawson

THE WHITE HOUSE

WASHINGTON

June 18, 1987

MEMORANDUM FOR ARTHUR B. CULVAHOUSE, JR.

FROM: PETER D. KEISLER PDK

SUBJECT: Proposed Alternative Signing Statement for S. 742 (Fairness in Broadcasting Act)

The attached staffing memorandum from Rhett Dawson requests our views on a proposed signing statement circulated by OMB, submitted in the event the President decides to sign S. 742. Jack Carley has attached a cover memo reiterating OMB's recommendation that the bill be vetoed and stating that, should the bill be signed, he believes that no signing statement should be issued.

The draft signing statement would note that the Administration has "consistently expressed its opposition" to the Fairness Doctrine for constitutional and policy reasons, and then observe that a veto is nevertheless "not warranted" because of the "long and well established history" of the Fairness Doctrine and the "widespread support for its retention . . . among individuals and groups of widely divergent political philosophies."

In the event that S. 742 is approved, I see nothing to be gained by issuing this or any other statement. Moreover, much could be lost. By describing our prior position and then abandoning it, the statement makes the President look weak and inconsistent. Furthermore, it would throw the President's considerable weight behind the legal efforts in favor of the Fairness Doctrine, thereby seriously undercutting the efforts of his FCC appointees to forcefully raise the constitutional considerations. (The President's judicial appointees, by and large, have supported the FCC's efforts in this area.)

The only use that could be made of a signing statement of this sort would be by supporters of the Fairness Doctrine, who would quote it in their briefs. Unless the President's decision to sign S. 742, should such a decision be made, is based upon his conclusion that he affirmatively supports retention of the Fairness Doctrine, this statement should not be issued.

Nor can I imagine a constructive alternative statement. Any draft would face the same difficulties. An effort to explain away our prior position would suggest that the President now supports the Fairness Doctrine, while a statement that he opposes the bill but is signing it anyway makes him look ineffective. If the bill is to be signed, I recommend against issuing a statement.

Attached for your review and signature is a draft memorandum so advising Rhett Dawson.

Attachments

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

June 17, 1987

MEMORANDUM FOR RHETT B. DAWSON
ASSISTANT TO THE PRESIDENT FOR OPERATIONS

FROM: JOHN H. CARLEY
GENERAL COUNSEL, OMB

SUBJECT: Signing Statement for Enrolled Bill S. 742, the "Fairness in Broadcasting Act of 1987"

As requested, attached is a draft alternative signing statement for enrolled bill S. 742. I have also attached a copy of the Director's enrolled bill memorandum to the President on this legislation.

As you know, the Administration consistently opposed this measure. On June 3rd, the Director sent letters to several key members of the House stating that he would recommend a veto of S. 742 should it be presented for the President's consideration. Moreover, the Attorney General and the Secretary of Commerce have joined OMB in recommending that the President veto the enrolled bill.

If the President does decide to approve the bill, it is not necessary to issue a signing statement, and I cannot see what would be gained. Given the Administration's unequivocal and demonstrated antipathy toward the Fairness Doctrine, any such statement would likely raise questions rather than answer them. In the event of Presidential approval, I do not think that any signing statement should be issued unless I have overlooked something.

Attachments

c: Joe Wright
A. B. Culvahouse

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

June 17, 1987

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Attachments

c: Joe Wright
A. B. Culvahouse

STATEMENT BY THE PRESIDENT

I have today signed S. 742, the "Fairness in Broadcasting Act of 1987," which would codify the so-called "Fairness Doctrine." This Doctrine -- an administrative regulation developed by the Federal Communications Commission -- imposes two duties upon radio and television broadcasters. First, they must devote adequate time to coverage of issues of public importance. Second, they must fairly reflect differing viewpoints on those issues.

My Administration has consistently expressed its opposition to the Fairness Doctrine. During congressional deliberations on this legislation, the Administration stated that the Fairness Doctrine: (1) is unnecessary, in light of the dramatic increase in the number of information sources in recent years; (2) does not promote, but actually inhibits, free and open discussion of major controversial issues; and (3) may contravene important constitutional principles by restricting the journalistic freedoms of broadcasters.

Having said that, I recognize that the Fairness Doctrine has been applied for nearly four decades, since 1949, and that many see it as a cornerstone of the system of broadcast regulation employed in this country. In view of the long and well established history of the Fairness Doctrine, as well as the widespread support for its retention in its current form among individuals and groups of widely divergent political philosophies, I have concluded that a veto of S. 742 is not warranted.

JUN 12 1987

MEMORANDUM FOR THE PRESIDENT

SUBJECT: Enrolled Bill S. 742 - Fairness in Broadcasting Act of 1987
Sponsors - Sen. Hollings (D) South Carolina and three others

Last Day for Action

June 22, 1987 - Monday

Purpose

To codify the Federal Communications Commission's "Fairness Doctrine."

Agency Recommendations

Office of Management and Budget	Disapproval (Veto message attached)
Department of Commerce	Disapproval (Veto message attached)
Department of Justice	Disapproval (Veto message attached)
Federal Communications Commission	Defers

Discussion

-- Introduction

The so-called "Fairness Doctrine" is an administrative regulation, devised by the Federal Communications Commission (FCC), which imposes two duties upon radio and television broadcasters. First, they must devote adequate time to coverage of issues of public importance. Second, they must fairly reflect differing viewpoints on those issues. The enrolled bill, which passed the Senate by 59-31 and the House by 302-102, would codify the Fairness Doctrine in statute and thereby prevent the FCC from abolishing or revising it.

The Department of Justice views the Fairness Doctrine as misguided and unacceptable -- indeed constitutionally suspect --

interference with the First Amendment ("free speech") rights and journalistic freedoms of broadcasters. The Department of Commerce defers to the Justice Department regarding the constitutionality of the Fairness Doctrine but strongly objects to it as a matter of telecommunications policy. I concur and join both Departments in recommending a veto of S. 742.

The enrolled bill views letter of the Department of Justice (attached) and the reports on this legislation of the House Energy and Commerce Committee and the Senate Committee on Commerce, Science and Transportation outline the history and constitutional background of the Fairness Doctrine in some detail. A brief summary follows.

-- Background

History of the Fairness Doctrine

The Fairness Doctrine was developed by the FCC during the early years of broadcast regulation to promote coverage of issues of public importance. The FCC's 1949 Report of Editorializing by Broadcast Licensees clearly laid the foundation for the Fairness Doctrine as it applies today to radio and television broadcast licensees. In particular, the 1949 Report required broadcast licensees, as part of their obligation to operate in the public "interest, convenience or necessity" -- a standard carried over from the Radio Act of 1927 and included in the Communications Act of 1934 -- to "devote a reasonable percentage of their broadcasting time to the discussion of public issues of interest in the community served by their stations and that such programs be designed so that the public has a reasonable opportunity to hear differing positions. . . ." Under the Doctrine, as currently administered, a licensee may decide what issues to cover; however, once it has done so, it has an obligation to present balanced coverage of those issues.

In 1959, the Congress amended the so-called "equal time" provision of the Communications Act of 1934 in a manner that some have suggested may have codified the Fairness Doctrine. As explained in greater detail below, in 1969 the Supreme Court held that the Fairness Doctrine was constitutional, under the conditions prevailing at that time. In 1981, the FCC recommended to the Congress that the Fairness Doctrine be repealed. In 1985, the FCC determined after a lengthy and comprehensive inquiry that the Fairness Doctrine no longer serves the public interest and is constitutionally suspect, notwithstanding the 1969 Supreme Court decision. For a combination of legal and political reasons, however, the FCC decided not to repeal the Doctrine administratively at that time, preferring to await explicit congressional authorization. Further, the Commission instituted a new administrative proceeding in January 1987 examining the constitutionality of the Fairness Doctrine and is conducting yet

another, separate, study of alternative ways to administer and enforce the Doctrine. (The study was mandated by last year's Continuing Resolution and is due to the Congress no later than September 30, 1987.)

At the same time, the FCC has refused to extend the Fairness Doctrine to other communications outlets. In particular, the Commission decided that the Doctrine is not required by the Communications Act and declined to apply it to the new "teletext" service (which involves the broadcast of certain written material). In September 1986, the United States Court of Appeals for the District of Columbia Circuit, in a strongly-worded opinion by Judge Bork, upheld the FCC's decision. On June 8, 1987, the Supreme Court declined to review the case. As a result of both the court decisions in this case and the FCC's general opposition to the Fairness Doctrine during your Administration, congressional and other supporters want to prevent this or any future FCC from revoking or revising the Fairness Doctrine.

Constitutionality of the Fairness Doctrine

The First Amendment to the Constitution provides, in part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." Serious questions have been raised over the years about whether the Fairness Doctrine, which purports to require a broadcaster to cover both sides of certain important matters, comports with this fundamental right, or whether, by contrast, it constitutes impermissible interference with the broadcaster's freedoms of speech and the press.

The leading case in this area is Red Lion Broadcasting Co. v. FCC, in which the Supreme Court held in 1969 that the Fairness Doctrine does not violate the First Amendment rights of broadcasters. The rationale for the decision was that the inherent scarcity of usable radio frequencies compelled the Government to institute a licensing scheme in order to make the medium available for public use. The Court indicated that, although broadcasters do indeed have certain First Amendment rights, the overriding purposes of the Amendment are to encourage public debate and "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." In the Court's view, the First Amendment "right" of the public audience to be informed about important matters was paramount to the rights of broadcast licensees; the Fairness Doctrine appeared to the Court to operate as a reasonable accommodation of the competing First Amendment interests of broadcasters and the public. (Whether the Fairness Doctrine does in fact promote the goal of an informed public is questionable. Many have argued that broadcasters are often uncertain about how to comply precisely with the requirements of the Fairness Doctrine and, for that reason, are reluctant to provide coverage of major controversial matters. They elect,

instead, to cover minor, unimportant or otherwise predictable issues. This reluctance to take on difficult matters of public policy is said to "chill" public debate.)

In deciding Red Lion, the Supreme Court did not preclude revisiting the Fairness Doctrine at a later date. In particular, the Court stated that "if experience with the administration of [the Doctrine] indicates that [it has] the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications." The Court itself subsequently noted that the scarcity rationale underlying the Fairness Doctrine has become increasingly suspect since 1969, and that Red Lion remains subject to reconsideration. (FCC v. League of Women Voters, 468 U.S. 364 (1984).) Consequently, although Red Lion remains definitive, the Court has not closed the door on the matter.

-- Description of the Enrolled Bill

The enrolled bill would codify the Fairness Doctrine by amending the Communications Act of 1934 to require a broadcast licensee to "afford reasonable opportunity for the discussion of conflicting views on issues of public importance." Enforcement and application would have to be consistent with the rules and policies of the FCC in effect on January 1, 1987. As noted previously, the enrolled bill, by making the Fairness Doctrine statutory law, would resolve the concern of its supporters that the FCC may act to repeal it administratively.

-- Reasons for Supporting the Fairness Doctrine

The Fairness Doctrine has a wide variety of supporters, of various political philosophies, who view the Doctrine as a cornerstone of broadcast regulation in the United States. Their reasons for supporting the Fairness Doctrine are well explained in the report of the Senate Committee on Commerce, Science and Transportation on S. 742 and are summarized below.

According to the Committee's report, the Fairness Doctrine and its codification are based on four basic conclusions, as follows:

- A valuable public resource, the electromagnetic spectrum, remains scarce.

- The Communications Act authorizes the FCC to select a few licensees to use the electromagnetic spectrum in exchange for a commitment to operate in the public interest as public trustees for the communities in which they broadcast.

- The Fairness Doctrine has offered those who do not own broadcast stations an opportunity to participate in public debate and has provided the public with a greater range of views with which to make informed decisions.

o The Fairness Doctrine does not "chill" free speech but, rather, merely incorporates good journalistic practice.

The Committee states that in establishing a system of broadcast regulation, the Congress rejected a number of alternatives in favor of a system of a relatively few high-powered stations, necessarily limiting the opportunities of members of the public to own stations and air their views. In return, those upon whom broadcast licenses are conferred must act as public trustees, a responsibility that carries with it a duty -- embodied in the Fairness Doctrine -- to devote a reasonable amount of their broadcasting time to the coverage of public issues of interest to the communities served by their stations. In essence, the Fairness Doctrine "serves as a surrogate for other methods of licensing that would have permitted more people to own stations" and "permits non-owners to become temporary licensees and the public to receive additional views."

Supporters of the Fairness Doctrine believe without merit any suggestion that the Doctrine interferes impermissibly with the exercise of First Amendment rights of broadcast licensees. In this view, the basis and rationale of Red Lion were correct when articulated by the Supreme Court in 1969 and remain so today. In particular, the Committee asserts that the electromagnetic spectrum is just as scarce now as it was eighteen years ago and that, as then, spectrum scarcity relative to demand for broadcast licenses requires the Government to impose reasonable conditions on the use of broadcast frequencies, such as the Fairness Doctrine. Supporters believe that the Fairness Doctrine, far from inhibiting free expression, instead promotes and enhances it.

-- Agency Views

The Department of Justice recommends a veto of S. 742. In its enrolled bill views letter, Justice notes that the Supreme Court's approach in Red Lion with respect to content-based restrictions on broadcast licensees stands in sharp contrast to the Court's analysis in other "free speech" cases. In particular, Justice cites a 1974 decision of the Court, Miami Herald Publishing Co. v. Tornillo, in which the Court struck down a Florida statute that purported to require a newspaper to offer political candidates space in which to reply to criticisms published by the newspaper. In so doing, the Court rejected a scarcity argument similar to the one it embraced in Red Lion and stated that a "[g]overnment-enforced right of access inescapably dampens the vigor and limits the variety of public debate." Justice notes that this difference in treatment between the broadcast and print media stems from the supposed scarcity of broadcast outlets and speculates that the increase in the number of such outlets since Red Lion would very likely lead to a different result under the criteria applied in that decision

(i.e., that the Fairness Docrine is an unconstitutional abridgment of the First Amendment rights of broadcasters).

With respect to the so-called "scarcity" issue, it should be noted that, according to the minority views filed in connection with the Report of the House Committee on Energy and Commerce on the enrolled bill, there are now 400 percent more commercial television and radio stations than there were when the Fairness Doctrine was first formally adopted in 1949. In addition, various television news services not in existence at the time of the Red Lion decision (e.g., C-Span with over 25 million subscribers on 2,300 cable systems and Cable Network Headline News with over 22.5 million subscribers on 3,730 cable systems) provide viewers with diverse and comprehensive coverage of important and controversial issues. Other sources of electronic media (e.g., low power television stations and teletext) have begun operations recently and more will undoubtedly do so in the future.

Quite aside from the changes that have occurred in the electronic media over the years, and notwithstanding the possibility that the Fairness Doctrine might pass muster today under Red Lion, Justice opposes the Fairness Doctrine (and thus this enrolled bill), because the Department views Red Lion as incorrectly decided. According to Justice, the language of the First Amendment unequivocally mandates a virtually absolute prohibition on the regulation by the Government of the content of public debate, whatever the forum, a prohibition the Fairness Doctrine appears to violate on its face. Moreover, even if one assumes, as the Court did in Red Lion, that one purpose of the First Amendment is to assure that the people are informed in an "adequate" and "balanced" fashion, Justice says that there is no basis for a further assumption that the broadcast media or broadcast licensees must individually provide "adequate" or "balanced" information. In essence, Justice suggests that the Supreme Court erroneously focused its attention on broadcast stations and ignored the wide variety of other communications media available to the public (e.g., newspapers and other printed periodicals) that assure the presentation of all shades of opinion on important issues. In Justice's view, the editorial discretion and judgment of broadcasters represent no greater threat to the purposes and objectives of the First Amendment than the discretion and judgment of others who control "scarce" resources, such as newspaper publishers, and who could not permissibly be subjected to content-based restrictions, such as the Fairness Doctrine.

The Department of Commerce defers to the Justice Department regarding the constitutionality of the Fairness Doctrine but nonetheless recommends a veto as a matter of telecommunications policy. First, Commerce rejects the requirement of the Fairness Doctrine that Government regulators should be in the business of telling broadcasters what to broadcast and judging how well they

do it. Second, Commerce states that the "scarcity" rationale for the Fairness Doctrine is outdated and estimates, by way of example, that by the end of 1987 one-half of the Nation's 88 million households will be hooked up to cable television systems, which frequently offer access to as many as 30 news, information, and entertainment channels. Finally, Commerce asserts that the Fairness Doctrine does indeed have a "chilling" effect on the coverage of important and controversial issues by broadcasters, an effect that is directly contrary to the stated purpose of the Doctrine.

The FCC, although a consistent and vocal critic of the Fairness Doctrine over the past several years, defers to others with respect to approval or disapproval of S. 742.

-- Proponents and Opponents

With respect to the enrolled bill's proponents and opponents, Senators Hollings, Inouye, Wirth, and Danforth are the Senate sponsors. Principal opponents were Senators Packwood, Proxmire, and Stevens. In the House, Chairman Dingell (who had 71 cosponsors on the House companion bill) is a very strong supporter. Key House opponents were Representatives Oxley, Barton, Coats, Tauke, and Whittaker. Many interest groups support codification of the Fairness Doctrine. Some of these include: Accuracy in Media, the AFL-CIO, the American Civil Liberties Union, the Americans for Democratic Action, Common Cause, Consumers Union, the Eagle Forum, the National Conservative Political Action Committee, and the National Rifle Association. Opponents include: the Radio-Television News Directors Association, the major broadcast networks, the National Association of Broadcasters, and the Washington Post (in a June 10, 1987, editorial advocating a veto).

-- Administration Position

The Administration has opposed S. 742 in both the House and Senate. Statements of Administration Policy opposing S. 742 (but not explicitly threatening a veto) were sent to both Houses before floor action on the bill. Those policy statements said that the Fairness Doctrine: (1) is unnecessary, in light of the dramatic increase in the number of information sources in recent years; (2) does not promote, but actually inhibits, free and open discussion of important controversial issues; and (3) may contravene important constitutional principles by restricting the First Amendment rights of broadcasters. In addition, the Justice Department sent letters to both the House and Senate strongly opposing this measure on constitutional grounds, and the Commerce Department testified in opposition in the House. Finally, I sent letters to Representatives Michel, Dingell, Lent, Foley, Lott, and Rinaldo on June 3, 1987, stating that I would recommend a veto of S. 742, should it be presented for your consideration.

-- Conclusion and Recommendation

I concur in the assessment of the Department of Justice that the Fairness Doctrine and its codification are objectionable on legal grounds. I also agree with the Commerce Department that the Doctrine constitutes bad telecommunications policy. In summary, the Fairness Doctrine does not serve any legitimate constitutional purpose, restricts free and open debate, impermissibly interferes with the First Amendment rights of radio and television broadcasters, is predicated upon obsolete notions of scarcity, and injects the Federal Government unacceptably in the editorial discretion and judgment of broadcast journalists. I join Justice and Commerce, therefore, in recommending a veto of S. 742.

Although a veto of S. 742 would not by itself overturn the Fairness Doctrine, it would at the very least ensure that the FCC's hands are not needlessly tied and would send a strong message regarding your position on this important matter.

I have attached a draft veto message for your consideration. It is essentially identical to the draft message prepared by the Justice Department, except for format changes, technical edits, and a change to incorporate one of the points made by the Commerce Department in its draft veto message. The Department of Justice agrees with these changes.

JAMES C. MILLER III

James C. Miller III
Director

Enclosures

6/11/87

LRD/G. Jones/so 6/11/87

OK
GC - J. Carley
EE - K. Schmatz acting for C. Crawford

TCJ - Flynn / Adkins / Schwartz

GC - Carley

TO THE SENATE OF THE UNITED STATES:

I am today returning without my approval S. 742, the "Fairness in Broadcasting Act of 1987," which would codify the so-called "fairness doctrine." This doctrine, which has evolved through the decisional process of the Federal Communications Commission (FCC), requires Federal officials to supervise the editorial practices of broadcasters in an effort to ensure that they provide coverage of controversial issues and a reasonable opportunity for the airing of contrasting viewpoints on those issues. This type of content-based regulation by the Federal Government is, in my judgment, antagonistic to the freedom of expression guaranteed by the First Amendment.

In any other medium besides broadcasting, such Federal policing of the editorial judgment of journalists would be unthinkable. The framers of the First Amendment, confident that public debate would be freer and healthier without the kind of interference represented by the "fairness doctrine," chose to forbid such regulation in the clearest terms: "Congress shall make no law . . . abridging the freedom of speech, or of the press." More recently, the United States Supreme Court, in striking down a right-of-access statute that applied to newspapers, spoke of the statute's intrusion into the function of the editorial process and concluded that "[i]t has yet to be demonstrated how governmental regulation of this crucial process

can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974).

I recognize that 18 years ago, the Supreme Court indicated that the fairness doctrine as then applied to a far less technologically advanced broadcast industry did not contravene the First Amendment. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). The Red Lion decision was based on the theory that usable broadcast frequencies were then so inherently scarce that Government regulation of broadcasters was inevitable and the FCC's "fairness doctrine" seemed to be a reasonable means of promoting diverse and vigorous debate of controversial issues.

The Supreme Court indicated in Red Lion a willingness to reconsider the appropriateness of the fairness doctrine if it reduced rather than enhanced broadcast coverage. In a later case, the Court acknowledged the changes in the technological and economic environment in which broadcasters operate. It may now be fairly concluded that the growth in the number of available media outlets does indeed outweigh whatever justifications may have seemed to exist at the period during which the doctrine was developed. The FCC itself has concluded that the doctrine is an unnecessary and detrimental regulatory mechanism. After a massive study of the effects of its own rule, the FCC found in 1985 that the recent explosion in the number of new information sources such as cable television has clearly made the "fairness doctrine" unnecessary. Furthermore, the FCC found that the

doctrine in fact inhibits broadcasters from presenting controversial issues of public importance, and thus defeats its own purpose.

Quite apart from these technological advances, we must not ignore the obvious intent of the First Amendment, which is to promote vigorous public debate and a diversity of viewpoints in the public forum as a whole, not in any particular medium, let alone in any particular journalistic outlet. History has shown that the dangers of an overly timid or biased press cannot be averted through bureaucratic regulation but only through the freedom and competition that the First Amendment sought to guarantee.

Without regard to the the constitutionality of the fairness doctrine, I cannot as a matter of communications policy countenance any measure, such as S. 742, that puts the Federal Government in the business of telling broadcast journalists what they must broadcast and judging how well they do it. Accordingly, I am compelled to disapprove this measure.

THE WHITE HOUSE

RO

ID # 475192 CU

SP287-20

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) 1 1

Name of Correspondent: Rhett Dawson

☐ **MI Mail Report** **User Codes: (A)** _____ **(B)** _____ **(C)** _____

Subject: Enrolled Bill S.742 - Fairness in Broadcasting Act of 1987 and Veto Message

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Completion Code	Completion Date YY/MM/DD	
cuhill	ORIGINATOR	870612		C	870616	RO
	Referral Note:					
cmat31	D	870612		C	870616	RO
	Referral Note:					
cmcnulty	S	870616		C	870616	RO
	Referral Note:	June 16 87 AAC memo to Rhett Dawson				
		1 1			1 1	
	Referral Note:					
		1 1			1 1	
	Referral Note:					

ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
A - Answered
B - Non-Special Referral
C - Completed
S - Suspended

FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
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PRESIDENTIAL REPLY

Code	Date	Comment	Form

C __ __ _____ Time: _____ P- _____

DSP _____ Time: _____ Media: _____

SIGNATURE CODES:

CPn - Presidential Correspondence
- n - 0 - Unknown
- n - 1 - Ronald Wilson Reagan
- n - 2 - Ronald Reagan
- n - 3 - Ron
- n - 4 - Dutch
- n - 5 - Ron Reagan
- n - 6 - Ronald
- n - 7 - Ronnie

CLn - First Lady's Correspondence
- n - 0 - Unknown
- n - 1 - Nancy Reagan
- n - 2 - Nancy
- n - 3 - Mrs. Ronald Reagan

CBn - Presidential & First Lady's Correspondence
- n - 1 - Ronald Reagan - Nancy Reagan
- n - 2 - Ron - Nancy

MEDIA CODES:

- B - Box/package
- C - Copy
- D - Official document
- G - Message
- H - Handcarried
- L - Letter
- M - Mailgram
- O - Memo
- P - Photo
- R - Report
- S - Sealed
- T - Telegram
- V - Telephone
- X - Miscellaneous
- Y - Study

ABC/PDK:jck
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THE WHITE HOUSE

WASHINGTON

June 16, 1987

MEMORANDUM FOR RHETT B. DAWSON
ASSISTANT TO THE PRESIDENT FOR OPERATIONS

FROM: ARTHUR B. CULVAHOUSE, JR. Original Signed by ABC
COUNSEL TO THE PRESIDENT

SUBJECT: Enrolled Bill S. 742 -- Fairness in Broadcasting Act of 1987

As requested by your staffing memorandum of June 12, 1987, Counsel's Office has reviewed the above-referenced enrolled bill, which would codify the Fairness Doctrine into statutory law. For the reasons outlined by the Departments of Justice and Commerce and the Office of Management and Budget, we recommend that the bill be vetoed.

We propose one revision to the proposed veto statement. As currently drafted, it focuses almost entirely on the constitutional arguments against the bill, but at no point does it expressly state that the bill is unconstitutional. Indeed, following this extensive legal discussion, the draft concludes with the President disapproving S. 742 "without regard" to the issue of its constitutionality, the action being taken purely "as a matter of communications policy."

We believe the veto message should explicitly characterize the Fairness Doctrine as unconstitutional. This would strengthen the argument in favor of sustaining the veto, and it would provide further encouragement to the Federal Communications Commission to administratively repeal its own Fairness Doctrine regulations. Moreover, it would unambiguously communicate the Administration's legal position for future litigation.

Accordingly, we recommend that the final paragraph be revised to read as follows:

> S. 742 simply cannot be reconciled with the freedom of speech and the press secured by our Constitution. It is, in my judgment, unconstitutional. I cannot countenance any measure that puts the Federal Government in the business of telling journalists what they must broadcast and judging how well they do it. Accordingly, I am compelled to disapprove this measure.

Thank you for bringing this matter to our attention.

THE WHITE HOUSE

WASHINGTON

June 16, 1987

MEMORANDUM FOR ARTHUR B. CULVAHOUSE, JR.

FROM: PETER D. KEISLER PDK

SUBJECT: Enrolled Bill S. 742 -- Fairness in Broadcasting Act of 1987

The attached staffing memorandum from Rhett Dawson requests our views on the above-referenced enrolled bill, which would codify the Fairness Doctrine into statutory law. The Fairness Doctrine, as you know, imposes requirements upon radio and television broadcast licensees to devote time to coverage of public issues and to reflect differing viewpoints thereof. The Office of Management and Budget and the Departments of Justice and Commerce recommend that the bill be vetoed.

The passage of this bill was sparked by the growing recognition that, in the absence of congressional action, administrative repeal of the Fairness Doctrine was becoming increasingly likely. The Fairness Doctrine was first established in regulations promulgated by the FCC in 1949. It was referenced in a statute enacted in 1959, and some took the view that this reference constituted a statutory codification. Whether it did or not long remained a matter of academic interest only, since the FCC continued to support its own regulations. The Reagan-appointed FCC, however, is considering their repeal. Last year, the United States Court of Appeals for the District of Columbia Circuit held that the Fairness Doctrine had not been codified by the 1959 statute, Telecommunications Research and Action Center v. FCC, 801 F.2d 501 (D.C. Cir. 1986), and this bill represents Congress' attempt to save the Fairness Doctrine from a deregulating FCC.

The constitutional arguments against the Fairness Doctrine, in my judgment, have considerable force. It is generally accepted that no similar regulation could constitutionally be imposed upon print journalism. See Miami Herald Publishing Company v. Tornillo, 418 U.S. 241 (1974) (striking down a state's newspaper right-of-reply statute). For such regulations to be permissible in the broadcasting context, there must be some constitutionally relevant principle which distinguishes the two media.

When the Supreme Court upheld the constitutionality of the Fairness Doctrine in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), it sought to identify such a principle: the scarcity of broadcast frequencies, in the Court's view, necessitated that they be licensed in the public interest, which meant in ways that would promote the public political debate. But the scarcity

rationale is a non-starter, both theoretically and practically. It is a theoretically insufficient principle because all economic resources, including those used to make newspapers, are to some degree scarce. More significantly, it is a practically insufficient principle because, particularly with the growth of cable, the opportunities for people with differing interests and viewpoints to be heard on the air and the resulting diversity of programming have grown enormously. Few American would claim that they have a wider choice in selecting newspapers than they do when they turn on their television or radio.

Consequently, whether or not one believes that Red Lion was correctly decided in its time -- and I do not -- its analysis is difficult to square with the nature of the modern media. Moreover, the Court has itself recognized the possibility of reconsidering its analysis in light of changed circumstances or new information. In Red Lion, it noted that "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 [i.e., through avoidance of controversial issues by licensees reluctant to face demands for additional airtime], there will be time enough to reconsider the constitutional implications." 395 U.S. at 393. Many observers believe this is precisely what has occurred. And three years ago, the Court stated in a footnote:

> The prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years. Critics, including the incumbent Chairman of the FCC, charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete. See, e.g., Fowler & Brenner, A Marketplace Approach to Broadcast Regulation, 60 Texas L. Rev. 207, 221-226 (1982). We are not prepared, however, to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required.

FCC v. League of Women Voters of California, 468 U.S. 364, 376 n. 11 (1984). This is an opportune moment for the Administration to send such a signal. Regardless of whether general, content-neutral regulation of broadcasting has become constitutionally suspect, the sort of content-based editorial regulation embodied by the Fairness Doctrine has certainly become difficult to justify.

This is a thumbnail sketch of a much more extensive constitutional argument. I review it here because it provides a sound legal basis for the President's veto.

The proposed veto statement prepared by OLC is on the whole quite good. There is, however, one omission. The draft characterizes

the Fairness Doctrine as "antagonistic" to the First Amendment; it notes that similar regulation of other media would be "unthinkable," and proceeds to argue that broadcasting does not merit special treatment; and it contrasts the theory underlying the Fairness Doctrine with the "obvious intent" of the Framers. Nevertheless, at no point does the draft expressly state that the bill would be unconstitutional. Indeed, after two pages of constitutional arguments, the draft concludes:

> Without regard to the constitutionality of the Fairness Doctrine, I cannot as a matter of communications policy countenance any measure, such as S. 742, that puts the Federal Government in the business of telling broadcast journalists what they must broadcast and judging how well they do it. Accordingly, I am compelled to disapprove this measure.

Given the extensive legal discussion that precedes this conclusion, the failure of the draft statement to call the bill unconstitutional is quite conspicuous. It is the legal equivalent of the dog that didn't bark.

I recommend that the veto statement be revised to include an explicit statement that the bill is unconstitutional. I do so for three reasons.

First, I believe it strengthens the case for the veto, and provides us with a stronger argument in urging that the veto be sustained.

Second, such a statement would make the Administration's legal position crystal clear to the FCC, and further encourage the Commission to effectuate an administrative repeal in the event the veto is sustained. The FCC was heading in that direction under Mark Fowler's leadership, but I do not know precisely where things stand following his departure.

Third, such a veto statement would set forth the Administration's legal position for future litigation. It would communicate that should the veto be overridden and the statute challenged in court, the Solicitor General would not defend its constitutionality.

I have attached for your review and signature a draft memorandum to Rhett Dawson incorporating this advice.

Attachment

Document No. 475192

WHITE HOUSE STAFFING MEMORANDUM

DATE: 6/12/87 ACTION/CONCURRENCE/COMMENT DUE BY: June 16th

SUBJECT: S. 742 -- FAIRNESS IN BROADCASTING ACT OF 1987

(AND VETO MESSAGE)

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☐	FITZWATER	☐	☑
BAKER	☐	☑	GRISCOM	☑	☐
DUBERSTEIN	☐	☑	HENKEL	☐	☐
MILLER - OMB	☐	☐	HOBBS	☐	☐
BALL	☑	☐	KING	☐	☐
BAUER	☐	☐	MASENG	☐	☐
CARLUCCI	☐	☐	RISQUE	☑	☐
CRIBB	☑	☐	RYAN	☐	☐
CRIPPEN	☐	☐	SPRINKEL	☐	☐
CULVAHOUSE	☑	☐	TUTTLE	☐	☐
DAWSON	☐P	☑SS	Clerk	☐	☑
DONATELLI	☑	☐	_____	☐	☐

REMARKS:

Please give your recommendations to my office by Tuesday, June 16th. Thanks.

RESPONSE:

Rhett Dawson
Ext. 2702

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

12 JUN 1987

MEMORANDUM FOR THE PRESIDENT

SUBJECT: Enrolled Bill S. 742 - Fairness in Broadcasting Act of 1987
Sponsors - Sen. Hollings (D) South Carolina and three others

Last Day for Action

June 22, 1987 - Monday

Purpose

To codify the Federal Communications Commission's "Fairness Doctrine."

Agency Recommendations

Office of Management and Budget	Disapproval (Veto message attached)
Department of Commerce	Disapproval (Veto message attached)
Department of Justice	Disapproval (Veto message attached)
Federal Communications Commission	Defers (informally)

Discussion

-- Introduction

The so-called "Fairness Doctrine" is an administrative regulation, devised by the Federal Communications Commission (FCC), which imposes two duties upon radio and television broadcasters. First, they must devote adequate time to coverage of issues of public importance. Second, they must fairly reflect differing viewpoints on those issues. The enrolled bill, which passed the Senate by 59-31 and the House by 302-102, would codify the Fairness Doctrine in statute and thereby prevent the FCC from abolishing or revising it.

The Department of Justice views the Fairness Doctrine as misguided and unacceptable -- indeed constitutionally suspect --

interference with the First Amendment ("free speech") rights and journalistic freedoms of broadcasters. The Department of Commerce defers to the Justice Department regarding the constitutionality of the Fairness Doctrine but strongly objects to it as a matter of telecommunications policy. I concur and join both Departments in recommending a veto of S. 742.

The enrolled bill views letter of the Department of Justice (attached) and the reports on this legislation of the House Energy and Commerce Committee and the Senate Committee on Commerce, Science and Transportation outline the history and constitutional background of the Fairness Doctrine in some detail. A brief summary follows.

-- Background

History of the Fairness Doctrine

The Fairness Doctrine was developed by the FCC during the early years of broadcast regulation to promote coverage of issues of public importance. The FCC's 1949 Report of Editorializing by Broadcast Licensees clearly laid the foundation for the Fairness Doctrine as it applies today to radio and television broadcast licensees. In particular, the 1949 Report required broadcast licensees, as part of their obligation to operate in the public "interest, convenience or necessity" -- a standard carried over from the Radio Act of 1927 and included in the Communications Act of 1934 -- to "devote a reasonable percentage of their broadcasting time to the discussion of public issues of interest in the community served by their stations and that such programs be designed so that the public has a reasonable opportunity to hear differing positions. . . ." Under the Doctrine, as currently administered, a licensee may decide what issues to cover; however, once it has done so, it has an obligation to present balanced coverage of those issues.

In 1959, the Congress amended the so-called "equal time" provision of the Communications Act of 1934 in a manner that some have suggested may have codified the Fairness Doctrine. As explained in greater detail below, in 1969 the Supreme Court held that the Fairness Doctrine was constitutional, under the conditions prevailing at that time. In 1981, the FCC recommended to the Congress that the Fairness Doctrine be repealed. In 1985, the FCC determined after a lengthy and comprehensive inquiry that the Fairness Doctrine no longer serves the public interest and is constitutionally suspect, notwithstanding the 1969 Supreme Court decision. For a combination of legal and political reasons, however, the FCC decided not to repeal the Doctrine administratively at that time, preferring to await explicit congressional authorization. Further, the Commission instituted a new administrative proceeding in January 1987 examining the constitutionality of the Fairness Doctrine and is conducting yet

another, separate, study of alternative ways to administer and enforce the Doctrine. (The study was mandated by last year's Continuing Resolution and is due to the Congress no later than September 30, 1987.)

At the same time, the FCC has refused to extend the Fairness Doctrine to other communications outlets. In particular, the Commission decided that the Doctrine is not required by the Communications Act and declined to apply it to the new "teletext" service (which involves the broadcast of certain written material). In September 1986, the United States Court of Appeals for the District of Columbia Circuit, in a strongly-worded opinion by Judge Bork, upheld the FCC's decision. On June 8, 1987, the Supreme Court declined to review the case. As a result of both the court decisions in this case and the FCC's general opposition to the Fairness Doctrine during your Administration, congressional and other supporters want to prevent this or any future FCC from revoking or revising the Fairness Doctrine.

Constitutionality of the Fairness Doctrine

The First Amendment to the Constitution provides, in part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." Serious questions have been raised over the years about whether the Fairness Doctrine, which purports to require a broadcaster to cover both sides of certain important matters, comports with this fundamental right, or whether, by contrast, it constitutes impermissible interference with the broadcaster's freedoms of speech and the press.

The leading case in this area is Red Lion Broadcasting Co. v. FCC, in which the Supreme Court held in 1969 that the Fairness Doctrine does not violate the First Amendment rights of broadcasters. The rationale for the decision was that the inherent scarcity of usable radio frequencies compelled the Government to institute a licensing scheme in order to make the medium available for public use. The Court indicated that, although broadcasters do indeed have certain First Amendment rights, the overriding purposes of the Amendment are to encourage public debate and "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." In the Court's view, the First Amendment "right" of the public audience to be informed about important matters was paramount to the rights of broadcast licensees; the Fairness Doctrine appeared to the Court to operate as a reasonable accommodation of the competing First Amendment interests of broadcasters and the public. (Whether the Fairness Doctrine does in fact promote the goal of an informed public is questionable. Many have argued that broadcasters are often uncertain about how to comply precisely with the requirements of the Fairness Doctrine and, for that reason, are reluctant to provide coverage of major controversial matters. They elect,

instead, to cover minor, unimportant or otherwise predictable issues. This reluctance to take on difficult matters of public policy is said to "chill" public debate.)

In deciding Red Lion, the Supreme Court did not preclude revisiting the Fairness Doctrine at a later date. In particular, the Court stated that "if experience with the administration of [the Doctrine] indicates that [it has] the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications." The Court itself subsequently noted that the scarcity rationale underlying the Fairness Doctrine has become increasingly suspect since 1969, and that Red Lion remains subject to reconsideration. (FCC v. League of Women Voters, 468 U.S. 364 (1984).) Consequently, although Red Lion remains definitive, the Court has not closed the door on the matter.

-- Description of the Enrolled Bill

The enrolled bill would codify the Fairness Doctrine by amending the Communications Act of 1934 to require a broadcast licensee to "afford reasonable opportunity for the discussion of conflicting views on issues of public importance." Enforcement and application would have to be consistent with the rules and policies of the FCC in effect on January 1, 1987. As noted previously, the enrolled bill, by making the Fairness Doctrine statutory law, would resolve the concern of its supporters that the FCC may act to repeal it administratively.

-- Reasons for Supporting the Fairness Doctrine

The Fairness Doctrine has a wide variety of supporters, of various political philosophies, who view the Doctrine as a cornerstone of broadcast regulation in the United States. Their reasons for supporting the Fairness Doctrine are well explained in the report of the Senate Committee on Commerce, Science and Transportation on S. 742 and are summarized below.

According to the Committee's report, the Fairness Doctrine and its codification are based on four basic conclusions, as follows:

- A valuable public resource, the electromagnetic spectrum, remains scarce.

- The Communications Act authorizes the FCC to select a few licensees to use the electromagnetic spectrum in exchange for a commitment to operate in the public interest as public trustees for the communities in which they broadcast.

- The Fairness Doctrine has offered those who do not own broadcast stations an opportunity to participate in public debate and has provided the public with a greater range of views with which to make informed decisions.

o The Fairness Doctrine does not "chill" free speech but, rather, merely incorporates good journalistic practice.

The Committee states that in establishing a system of broadcast regulation, the Congress rejected a number of alternatives in favor of a system of a relatively few high-powered stations, necessarily limiting the opportunities of members of the public to own stations and air their views. In return, those upon whom broadcast licenses are conferred must act as public trustees, a responsibility that carries with it a duty -- embodied in the Fairness Doctrine -- to devote a reasonable amount of their broadcasting time to the coverage of public issues of interest to the communities served by their stations. In essence, the Fairness Doctrine "serves as a surrogate for other methods of licensing that would have permitted more people to own stations" and "permits non-owners to become temporary licensees and the public to receive additional views."

Supporters of the Fairness Doctrine believe without merit any suggestion that the Doctrine interferes impermissibly with the exercise of First Amendment rights of broadcast licensees. In this view, the basis and rationale of Red Lion were correct when articulated by the Supreme Court in 1969 and remain so today. In particular, the Committee asserts that the electromagnetic spectrum is just as scarce now as it was eighteen years ago and that, as then, spectrum scarcity relative to demand for broadcast licenses requires the Government to impose reasonable conditions on the use of broadcast frequencies, such as the Fairness Doctrine. Supporters believe that the Fairness Doctrine, far from inhibiting free expression, instead promotes and enhances it.

-- Agency Views

The Department of Justice recommends a veto of S. 742. In its enrolled bill views letter, Justice notes that the Supreme Court's approach in Red Lion with respect to content-based restrictions on broadcast licensees stands in sharp contrast to the Court's analysis in other "free speech" cases. In particular, Justice cites a 1974 decision of the Court, Miami Herald Publishing Co. v. Tornillo, in which the Court struck down a Florida statute that purported to require a newspaper to offer political candidates space in which to reply to criticisms published by the newspaper. In so doing, the Court rejected a scarcity argument similar to the one it embraced in Red Lion and stated that a "[g]overnment-enforced right of access inescapably dampens the vigor and limits the variety of public debate." Justice notes that this difference in treatment between the broadcast and print media stems from the supposed scarcity of broadcast outlets and speculates that the increase in the number of such outlets since Red Lion would very likely lead to a different result under the criteria applied in that decision

(i.e., that the Fairness Docrine is an unconstitutional abridgment of the First Amendment rights of broadcasters).

With respect to the so-called "scarcity" issue, it should be noted that, according to the minority views filed in connection with the Report of the House Committee on Energy and Commerce on the enrolled bill, there are now 400 percent more commercial television and radio stations than there were when the Fairness Doctrine was first formally adopted in 1949. In addition, various television news services not in existence at the time of the Red Lion decision (e.g., C-Span with over 25 million subscribers on 2,300 cable systems and Cable Network Headline News with over 22.5 million subscribers on 3,730 cable systems) provide viewers with diverse and comprehensive coverage of important and controversial issues. Other sources of electronic media (e.g., low power television stations and teletext) have begun operations recently and more will undoubtedly do so in the future.

Quite aside from the changes that have occurred in the electronic media over the years, and notwithstanding the possibility that the Fairness Doctrine might pass muster today under Red Lion, Justice opposes the Fairness Doctrine (and thus this enrolled bill), because the Department views Red Lion as incorrectly decided. According to Justice, the language of the First Amendment unequivocally mandates a virtually absolute prohibition on the regulation by the Government of the content of public debate, whatever the forum, a prohibition the Fairness Doctrine appears to violate on its face. Moreover, even if one assumes, as the Court did in Red Lion, that one purpose of the First Amendment is to assure that the people are informed in an "adequate" and "balanced" fashion, Justice says that there is no basis for a further assumption that the broadcast media or broadcast licensees must individually provide "adequate" or "balanced" information. In essence, Justice suggests that the Supreme Court erroneously focused its attention on broadcast stations and ignored the wide variety of other communications media available to the public (e.g., newspapers and other printed periodicals) that assure the presentation of all shades of opinion on important issues. In Justice's view, the editorial discretion and judgment of broadcasters represent no greater threat to the purposes and objectives of the First Amendment than the discretion and judgment of others who control "scarce" resources, such as newspaper publishers, and who could not permissibly be subjected to content-based restrictions, such as the Fairness Doctrine.

The Department of Commerce defers to the Justice Department regarding the constitutionality of the Fairness Doctrine but nonetheless recommends a veto as a matter of telecommunications policy. First, Commerce rejects the requirement of the Fairness Doctrine that Government regulators should be in the business of telling broadcasters what to broadcast and judging how well they

do it. Second, Commerce states that the "scarcity" rationale for the Fairness Doctrine is outdated and estimates, by way of example, that by the end of 1987 one-half of the Nation's 88 million households will be hooked up to cable television systems, which frequently offer access to as many as 30 news, information, and entertainment channels. Finally, Commerce asserts that the Fairness Doctrine does indeed have a "chilling" effect on the coverage of important and controversial issues by broadcasters, an effect that is directly contrary to the stated purpose of the Doctrine.

The FCC, although a consistent and vocal critic of the Fairness Doctrine over the past several years, defers to others with respect to approval or disapproval of S. 742.

-- Proponents and Opponents

With respect to the enrolled bill's proponents and opponents, Senators Hollings, Inouye, Wirth, and Danforth are the Senate sponsors. Principal opponents were Senators Packwood, Proxmire, and Stevens. In the House, Chairman Dingell (who had 71 cosponsors on the House companion bill) is a very strong supporter. Key House opponents were Representatives Oxley, Barton, Coats, Tauke, and Whittaker. Many interest groups support codification of the Fairness Doctrine. Some of these include: Accuracy in Media, the AFL-CIO, the American Civil Liberties Union, the Americans for Democratic Action, Common Cause, Consumers Union, the Eagle Forum, the National Conservative Political Action Committee, and the National Rifle Association. Opponents include: the Radio-Television News Directors Association, the major broadcast networks, the National Association of Broadcasters, and the Washington Post (in a June 10, 1987, editorial advocating a veto).

-- Administration Position

The Administration has opposed S. 742 in both the House and Senate. Statements of Administration Policy opposing S. 742 (but not explicitly threatening a veto) were sent to both Houses before floor action on the bill. Those policy statements said that the Fairness Doctrine: (1) is unnecessary, in light of the dramatic increase in the number of information sources in recent years; (2) does not promote, but actually inhibits, free and open discussion of important controversial issues; and (3) may contravene important constitutional principles by restricting the First Amendment rights of broadcasters. In addition, the Justice Department sent letters to both the House and Senate strongly opposing this measure on constitutional grounds, and the Commerce Department testified in opposition in the House. Finally, I sent letters to Representatives Michel, Dingell, Lent, Foley, Lott, and Rinaldo on June 3, 1987, stating that I would recommend a veto of S. 742, should it be presented for your consideration.

-- Conclusion and Recommendation

I concur in the assessment of the Department of Justice that the Fairness Doctrine and its codification are objectionable on legal grounds. I also agree with the Commerce Department that the Doctrine constitutes bad telecommunications policy. In summary, the Fairness Doctrine does not serve any legitimate constitutional purpose, restricts free and open debate, impermissibly interferes with the First Amendment rights of radio and television broadcasters, is predicated upon obsolete notions of scarcity, and injects the Federal Government unacceptably in the editorial discretion and judgment of broadcast journalists. I join Justice and Commerce, therefore, in recommending a veto of S. 742.

Although a veto of S. 742 would not by itself overturn the Fairness Doctrine, it would at the very least ensure that the FCC's hands are not needlessly tied and would send a strong message regarding your position on this important matter.

I have attached a draft veto message for your consideration. It is essentially identical to the draft message prepared by the Justice Department, except for format changes, technical edits, and a change to incorporate one of the points made by the Commerce Department in its draft veto message. The Department of Justice agrees with these changes.

James C. Miller III
Director

Enclosures

TO THE SENATE OF THE UNITED STATES:

I am today returning without my approval S. 742, the "Fairness in Broadcasting Act of 1987," which would codify the so-called "fairness doctrine." This doctrine, which has evolved through the decisional process of the Federal Communications Commission (FCC), requires Federal officials to supervise the editorial practices of broadcasters in an effort to ensure that they provide coverage of controversial issues and a reasonable opportunity for the airing of contrasting viewpoints on those issues. This type of content-based regulation by the Federal Government is, in my judgment, antagonistic to the freedom of expression guaranteed by the First Amendment.

In any other medium besides broadcasting, such Federal policing of the editorial judgment of journalists would be unthinkable. The framers of the First Amendment, confident that public debate would be freer and healthier without the kind of interference represented by the "fairness doctrine," chose to forbid such regulation in the clearest terms: "Congress shall make no law . . . abridging the freedom of speech, or of the press." More recently, the United States Supreme Court, in striking down a right-of-access statute that applied to newspapers, spoke of the statute's intrusion into the function of the editorial process and concluded that "[i]t has yet to be demonstrated how governmental regulation of this crucial process

can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974).

I recognize that 18 years ago, the Supreme Court indicated that the fairness doctrine as then applied to a far less technologically advanced broadcast industry did not contravene the First Amendment. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). The Red Lion decision was based on the theory that usable broadcast frequencies were then so inherently scarce that Government regulation of broadcasters was inevitable and the FCC's "fairness doctrine" seemed to be a reasonable means of promoting diverse and vigorous debate of controversial issues.

The Supreme Court indicated in Red Lion a willingness to reconsider the appropriateness of the fairness doctrine if it reduced rather than enhanced broadcast coverage. In a later case, the Court acknowledged the changes in the technological and economic environment in which broadcasters operate. It may now be fairly concluded that the growth in the number of available media outlets does indeed outweigh whatever justifications may have seemed to exist at the period during which the doctrine was developed. The FCC itself has concluded that the doctrine is an unnecessary and detrimental regulatory mechanism. After a massive study of the effects of its own rule, the FCC found in 1985 that the recent explosion in the number of new information sources such as cable television has clearly made the "fairness doctrine" unnecessary. Furthermore, the FCC found that the

doctrine in fact inhibits broadcasters from presenting controversial issues of public importance, and thus defeats its own purpose.

Quite apart from these technological advances, we must not ignore the obvious intent of the First Amendment, which is to promote vigorous public debate and a diversity of viewpoints in the public forum as a whole, not in any particular medium, let alone in any particular journalistic outlet. History has shown that the dangers of an overly timid or biased press cannot be averted through bureaucratic regulation but only through the freedom and competition that the First Amendment sought to guarantee.

Without regard to the the constitutionality of the fairness doctrine, I cannot as a matter of communications policy countenance any measure, such as S. 742, that puts the Federal Government in the business of telling broadcast journalists what they must broadcast and judging how well they do it. Accordingly, I am compelled to disapprove this measure.

THE WHITE HOUSE

S. 742

One Hundredth Congress of the United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Tuesday, the sixth day of January, one thousand nine hundred and eighty-seven

An Act

To clarify the congressional intent concerning, and to codify, certain requirements of the Communications Act of 1934 that ensure that broadcasters afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fairness in Broadcasting Act of 1987".

SEC. 2. FINDINGS.

The Congress finds that—

(1) despite technological advances, the electromagnetic spectrum remains a scarce and valuable public resource;

(2) there are still substantially more people who want to broadcast than there are frequencies to allocate;

(3) a broadcast license confers the right to use a valuable public resource and a broadcaster is therefore required to utilize that resource as a trustee for the American people;

(4) there is a substantial governmental interest in conditioning the award or renewal of a broadcast license on the requirement that the licensee ensure the widest possible dissemination of information from diverse and antagonistic sources by presenting a reasonable opportunity for the discussion of conflicting views on issues of public importance;

(5) while new video and audio services have been proposed and introduced, many have not succeeded, and even those that are operating reach a far smaller audience than broadcast stations;

(6) even when and where new video and audio services are available, they do not provide meaningful alternatives to broadcast stations for the dissemination of news and public affairs;

(7) for more than thirty years, the Fairness Doctrine and its corollaries, as developed by the Federal Communications Commission on the basis of the provisions of the Communications Act of 1934, have enhanced free speech by securing the paramount right of the broadcast audience to robust debate on issues of public importance; and

(8) the Fairness Doctrine (A) fairly reflects the statutory obligations of broadcasters under that Act to operate in the public interest, (B) was given statutory approval by the Congress in making certain amendments to that Act in 1959, and (C) strikes a reasonable balance among the first amendment rights of the public, broadcast licensees, and speakers other than owners of broadcast facilities.

SEC. 3. AMENDMENT TO THE COMMUNICATIONS ACT OF 1934.

(a) Section 315 of the Communications Act of 1934 (47 U.S.C. 315) is amended—

(1) by redesignating subsections (a) through (d) as subsections (b) through (e), respectively; and

(2) by inserting before subsection (b) the following new subsection:

"(a)(1) A broadcast licensee shall afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

"(2) The enforcement and application of the requirement imposed by this subsection shall be consistent with the rules and policies of the Commission in effect on January 1, 1987.".

SEC. 4. EFFECTIVE DATE.

This Act and the amendment to the Communications Act of 1934 added by this Act shall take effect upon the date of enactment.

Speaker of the House of Representatives.

Vice President of the United States and
President of the Senate.

Name	Date
Janeen	5/2/88