THE REVEREND CARL D. MCINTIRE

V. THE FAIRNESS DOCTRINE

THESIS

Presented to the Graduate Council of the University of North Texas in Partial Fulfillment of the Requirements

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by

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This study explored the development of the Federal Communications Commission's Fairness Doctrine policy from its beginnings in the 1920's until the FCC eliminated most of its requirements in 1987. The chapters discuss the Reverend Carl D. McIntire's battle with the FCC concerning the policy's impact on free speech in broadcasting. McIntire lost his battle with the FCC and became the first broadcaster to lose his license for Fairness Doctrine violations. The problem in this study focused on the difficulty of reconciling government regulation of broadcasting with the rights of licensees to speak freely and be heard by their listeners.

The study concluded that today the FCC advocates First Amendment protection for broadcasters but it remains questionable whether present policy will continue.
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CHAPTER I

INTRODUCTION

Traditionally, the Federal Communications Commission (FCC) has been under fire from broadcasters for its regulatory role in the industry. Many broadcasters have expressed concern that the federal government is dangerously involved with the daily operation of broadcast stations. Some have challenged the government's right to regulate the industry beyond the mere licensing of stations. One man, in particular, sacrificed his livelihood in radio battling the FCC for First Amendment rights for broadcasters.

Reverend Carl McIntire began his right-wing fundamentalist approach to broadcasting as pastor of the Bible Presbyterian Church in Collingswood, New Jersey. He founded the Christian Beacon, a weekly religious newspaper, and from there his holdings continued to grow. The springboard that launched McIntire's broadcasting career was radio station WXUR in Media, Pennsylvania, which he purchased in 1965. The station syndicated McIntire's 20th Century Reformation Hour radio program to 610 stations. McIntire's fiery attacks against liberals in church and society were heard by ten million people who contributed $30 million a year to
support his fundamentalist ministry and related financial interests.¹

Dissatisfaction with McIntire's conservatism began to grow nevertheless, and nineteen opposing groups raised $30,000 to drive him off the air. In a petition to the FCC, they contended that WXUR's programming was inflammatory, racist, anti-Catholic, anti-Semitic and weighted toward right-wing conservatism. After a nine-month hearing, H. Gifford Irion, an FCC examiner, found that conservative WXUR views had been balanced by other opinions. He recommended that the general public be allowed its constitutional rights to hear these views. He said the public could cope with the controversy the views aroused, because the American scene has always been characterized by rough and tumble rhetoric. On review, however, the Commission rejected Irion's recommendation and ordered WXUR off the air. The FCC said WXUR had been broadcasting right-wing views to the virtual exclusion of others. Such programming violated the FCC's Fairness Doctrine policy, which requires stations to air all sides of a controversial public issue it presents and to broadcast replies by those it has attacked.²

McIntire appealed the decision and lost, but not on the grounds that he violated the Fairness Doctrine. The Federal Circuit Court of Appeals ruled that the FCC action was justified because of programming misrepresentation. The
court said that McIntire never intended to air opposing views when he got the license in 1965.3

McIntire then carried out his plans to convert a 140-foot World War II minesweeper, the Oceanic, into a floating broadcast station. He renamed the ship Columbus, because he said the ship's mission was to rediscover First Amendment rights in America. Contending that freedom of speech should apply equally to broadcasting as it does in the press, McIntire called the station "Radio Free America." McIntire said the FCC would have no power to stop the transmission because the ship would be anchored in international waters where the FCC had no jurisdiction.4 McIntire began broadcasting without a license at 1160 kHz in the AM band at 12:23 p.m. on September 19, 1973. The ship was loaded with a cache of rifles intended to ward off potential intruders.5

After only one day on the air, McIntire voluntarily shut down the broadcasts when he learned they interfered with the signals of other stations, specifically, WHLW in Lakewood, New Jersey, and KSL of Salt Lake City, Utah.6 He intended to resume broadcasting as soon as his engineers readjusted the equipment to broadcast nearer the top of the AM band where no other stations were operating.7 Before this was accomplished, however, the FCC obtained a temporary injunction halting further broadcasts from the Columbus.

McIntire quickly challenged the injunction accusing the government of sponsoring its own unlicensed broadcasts.
He said the CIA and other government agencies constantly made unauthorized use of international airwaves, citing Radio Free Europe as an example. McIntire argued that, since the government aired unlicensed broadcasts, it had no right to sit in judgment. This "unclean hands" argument became his central defense in the case. He also accused the government of creating a "chilling effect" among broadcasters who wish to exercise free speech but feared the FCC would revoke their licenses.  

As the court battle continued, McIntire began to win favor with some Congressmen. North Carolina Democratic Senator Sam J. Ervin, Jr. called for legislation to kill the Fairness Doctrine. No such legislation was passed, however, and a decision making the injunction permanent was handed down in District Court by Chief Judge Mitchell H. Cohen on February 20, 1974. Cohen ruled that the argument of "unclean hands" was unavailable to the defense due to the overriding national interest in maintaining orderly use of the nation's airwaves. He cited also the adverse effects of the defendant's unlicensed broadcasts on the public interest. The permanent injunction ended McIntire's pirate contingency plans and no further broadcasts ensued.  

Statement of the Problem  

The problem of this thesis was the difficulty of reconciling government regulation of the broadcast industry
with the rights of licensees to speak freely and be heard by their listeners. This study focused on the issue of whether broadcasters should have the same full First Amendment rights enjoyed by the print media.

Purpose of the Study

The purposes of this study were to: (1) trace the evolution of the Fairness Doctrine, and (2) to study its impact on the broadcasting career of Reverend Carl D. McIntire.

Review of Literature

Most of the material for the discussion of the development of the Fairness Doctrine was obtained from the following books: The Fairness Doctrine and the Media; The Good Guys, The Bad Guys And The First Amendment; and Media Law: A Legal Handbook For The Working Journalist. The information regarding the Reverend McIntire was derived from contemporary sources such as The New York Times and The Christian Beacon.

Justification

With the seizure of a radio pirate ship off the Long Island coast during the summer of 1987 by FCC authorities and the recent abolition of the Fairness Doctrine, questions raised by the McIntire case deserved fresh examination.
Indeed, the issue of government regulation has noisily resurfaced again. Some lawmakers such as Senator Ernest F. Hollings, Democrat of South Carolina, have called for legislation that would codify the doctrine into law.\(^\text{10}\)

**Scope and Limitations of the Study**

This study presented background on the evolution of the Fairness Doctrine as it related to the McIntire case. The core of the research centered on Reverend Carl D. McIntire and the events that led to his excursion into radio piracy.

**Methodology**

This was an historical study. The research material was composed of books, newspaper articles, and periodicals.

**Organization of the Thesis**

The discussion was organized into the following chapters:

I. Introduction

II. History of the Fairness Doctrine

III. Reverend Carl D. McIntire: Pirate For God

IV. Conclusion
NOTES


2. 24 FCC 2nd 18, 27 FCC 2nd 16.

3. Sec 473 F 2d 16.


7. Ibid.


CHAPTER II

DEVELOPMENT OF THE FAIRNESS DOCTRINE

One particular government policy that has drawn heated criticism from broadcasters is the Fairness Doctrine, which was mandated in 1949 when the Federal Communications Commission issued its Report on Editorializing by Broadcast Licensees.\(^1\) The doctrine places two requirements on broadcasters. The first, called part one, demands that broadcasters devote a reasonable amount of programming to controversial issues of public importance. The second, part two, requires that when these issues are presented, contrasting views regarding them must also be aired.

The doctrine also obligates broadcast licensees to adhere to additional fairness conditions:

1. The presentation of points of view on any controversial subject of public importance must be balanced in the context of the station's or network's overall programming.

2. The Fairness Doctrine extends to all programming and not just to editorials.

3. A reasonable opportunity for the presentation of any contrasting viewpoint must be provided.
4. If the station or network cannot find sponsors willing to pay for the expression of opposing views, it must sponsor such expression itself.

5. The format for the program balance is left to the broadcaster's discretion.²

Another aspect of the Fairness Doctrine is the Personal Attack Rule. This rule provides to anyone who has been personally attacked on the air, free access to the station's facilities to reply. Unlike other doctrine provisions this rule is very precise. If any attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group during the discussion of controversial public issues, the broadcaster must promptly notify the attacked party and issue him a transcript, tape or summary of the attack along with an offer of reply time. The rule does not apply to:

1. Attacks on foreign groups or foreign public figures
2. Personal attacks made by legally qualified candidates, their authorized spokespeople, or persons associated with them
3. Attacks arising in the course of bona fide news casts, news interviews, or on-the-spot coverage of news events³

At first glance, the doctrine sounds appealing. Broadcasters are privileged, by government fiat, to use a
scarce airwave frequency to the exclusion of others. Therefore, it seems reasonable that they should devote programming time toward the public interest fairly and objectively.⁴

On closer examination, however, the doctrine raises difficult questions: Who will determine whether a broadcaster is being fair? What is a controversial public issue and which ones must a broadcaster cover? What is a reasonable balance between contrasting views? How can all groups be guaranteed an opportunity to present their views over the airwaves? And if the government provides answers to these questions, is this an appropriate role for government to play?

Broadcasters maintain that in a country that values a free press, licensees should have First Amendment rights to determine the content and format of their public issue programming. They argue that government intervention to balance public issues programming inhibits broadcasters from doing such programming and can create the very information distortion it is designed to prevent. They believe, therefore, that the people are better off in a system that minimizes government intervention in the broadcast media.

In recent years the doctrine has come under such intense opposition that it was abolished by the FCC in August, 1987.⁵ However, a variety of public interest groups and legislators just as vehemently urge that the doctrine
should not only be reinstated but codified into law and vigorously enforced. A bill introduced by South Carolina Democratic Senator Ernest F. Hollings, now pending before Congress, would do exactly that.

The Fairness Doctrine evolved over many years; its roots can be traced back to the infancy of radio broadcasting. A discussion of its early history will provide a better perspective on why debate over the doctrine continues today.

The Legislative History

The Wireless Ship Act of 1910 was the nation's first radio legislation, but it was exclusively concerned with the use of radio aboard ships at sea. The 1910 law was strengthened when Congress passed the Radio Act of 1912, which required that all radio stations be licensed by the Secretary of Commerce and Labor. However, there was nothing in the Act that gave the Secretary discretionary power to regulate stations in the public interest or to require balanced content in public affairs programs.

The Act provided no basis for regulating the growth of commercial radio in the 1920's. In 1920, there were three radio stations broadcasting regularly in the United States. By late 1925 that number had mushroomed to 578. By 1927, there were two national networks with 64 affiliated stations providing regular service from coast to coast.
During most of the 1920's, the primary disruptive feature of radio broadcasting was the interference of one station's signal by that of another station. Each of the ninety channels in the broadcasting band was occupied by two or more stations. In crowded urban areas, stations installed complicated time sharing arrangements, but new stations went on the air using any frequency they desired, regardless of the interference they caused. Some 200 new stations clamored to get a license and previously established stations jumped from wavelength to wavelength, changing power and operating hours at will.

There was not enough airspace for all stations to operate unrestrained. Unlike the print media, which could distribute countless variations of printed material on any single newstand, there could be only one radio station broadcasting successfully on a given wavelength at one time in the same area. To the United States Supreme Court "... it quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the government. Without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard."\(^8\)

The growing chaos prompted complaints from people throughout the country for the Secretary of Commerce, Herbert Hoover, to bring order to the airwaves. The
inadequacy of existing legislation prompted President Harding to ask Secretary Hoover to call a meeting of government and civilian experts to discuss the problems of radio in 1922. This was the first of four national radio conferences, held annually between 1922 and 1925 that eventually led to the adoption of the Radio Act of 1927.9

At the opening session, Secretary Hoover stressed two themes that would play a key role in justifying future Fairness Doctrine regulation. First, the airwaves should be considered a public resource, not private property. He said some government control was necessary to establish a "public right over the ether roads." Second, their use should not be dominated by powerful monopolies or large numbers of small stations pushing their private viewpoints over the air. He was concerned that "there may be no national regret that we have parted with a great national asset into uncontrolled hands."10

The only universal agreement that came out of the first Conference, however, was the need to reduce radio interference. The Conference's technical recommendations to decrease interference were not accepted by the Department of Commerce, although Congressman Wallace White of Maine introduced a bill based on them. He said it was as difficult for "... two stations in the same locality to simultaneously transmit on the same wavelength as it is for two trains to
pass each other upon the same track."\textsuperscript{11} The bill passed in the House but died in the Senate.

The Second National Radio Conference, held in 1923, made several recommendations including suggesting reassignment of frequencies for various radio stations, urging discretion in the granting of licenses "due to the limited number of channels available for broadcasting."\textsuperscript{12} and calling for public support of local radio stations. A second radio bill introduced by Congressman White based on the Conference was never reported from House Committee. This time, however, the Department of Commerce adopted the frequency recommendations, which somewhat alleviated the interference problem.

President Coolidge addressed the Third National Radio Conference in 1924 and he stressed the danger of a few private interests dominating radio. He said, "... one of the benefits of increased governmental regulation is that it would permit the Department of Commerce to better insure against the danger of a few organizations gaining control of the airwaves."\textsuperscript{13} The potential for radio networks was of particular concern to the President, and he stressed, "It would be unfortunate ... if such an important function as the distribution of information should ever fall into the hands of the Government."\textsuperscript{14} The Conference recommendations included a strong stance against monopolistic practices in the industry and government censorship of radio program
content. The recommendations, however, spawned no Congressional legislation.

Secretary Hoover addressed the Fourth National Radio Conference in 1925 and repeated the scarcity basis for government regulation: "We can no longer deal on the basis that there is room for everybody on the radio highways. There are more vehicles on the roads than can get by, and if they continue to jam in, all will be stopped." He also emphasized a key concept that was later used by the FCC and the Supreme Court in supporting the Fairness Doctrine: "We hear a great deal about freedom of the air, but there are two parties to freedom of the air, and to freedom of speech for that matter. Certainly in radio I believe in freedom for the listener." Secretary Hoover further stressed the public interest theme: "...the ether is a public medium and its use must be for public benefit...there is no proper line of conflict between the broadcaster and the listener...their interests are mutual."

The Conference recommended extensive legislation to bolster existing federal law. In addition to technical recommendations, increased authority for the Secretary of Commerce was proposed. The Conference supported awarding licenses based on the public interest but rejected the idea that broadcasting should be considered a public utility. The Conference also opposed government censorship and private monopoly in the industry. The recommendations were
used by Representative White in drafting the bill that led to the Radio Act of 1927.

The Radio Act of 1927 repealed the 1912 law and created a five-member Federal Radio Commission (FRC) with the power to grant and revoke licenses, assign frequencies, and specify station power and location. Congress had created a federal "traffic cop" to minimize radio interference. The airwaves were established as a public resource that could be licensed to be used but not owned. Of particular importance to the development of the Fairness Doctrine was that the Act empowered the FRC to grant licenses if the "public convenience, interest, or necessity" would be served. The Act also prohibited FRC interference "with the right of free speech by means of radio communications" and adopted the "equal opportunities" provision for legally qualified political candidates.17

Congressional debate on the Act reflected concerns that were voiced throughout the 1920's regarding fairness type regulation. Senator Dill, sponsor of the Senate bill, posed the Fairness Doctrine issue still debated today. Radio broadcasters were free from government restraint he stated, and "it is our desire and purpose to keep them free so far as it is possible to do so in conformity with the general public interest and the social welfare of the great masses of our people."18 Senator Heflin spoke of the danger of only wealthy persons controlling radio for their own
purposes, and Senator Watson said he believed the agency regulating radio could have tremendous influence on public opinion.

The voice most fervently urging Fairness Doctrine type legislation was that of Senator Howell of Nebraska. He said, "to perpetuate in the hands of comparatively few interests the opportunity of reaching the public by radio and allowing them alone to determine what the public shall and shall not hear is a tremendously dangerous course for Congress to pursue. . . . If any public question is to be discussed over the radio, if the affirmative is to be offered the negative should be presented; and if such privilege were not to be granted, then there should be no such forum whatever." In effect, he was proposing what later became part two of the Fairness Doctrine.

A provision to the bill calling for equal opportunities for candidates and discussion of public issues was proposed in the Senate but there was strong opposition to the public issues language. Many believed there was no doubt that any issue discussed would prompt the other side to demand time. It was thought that a radio station would have to give all its air time for discussion of the issues raised or deny all such discussion. The amended legislation, excluding the public issues requirement, was passed by the Senate and embodied in Section 18 of the bill.
Therefore, the Radio Act of 1927 emerged containing the fairness concept with respect to legally qualified political candidates but without any provision for balanced treatment of public issues. Clearly, Congress in 1927 did not want to legislate any provision requiring fair treatment of public issues. It was considered more prudent to "await development, and to get (the FRC) to functioning"; the bill could be amended later. The bill granted no authority whatever to the Secretary of Commerce to interfere with freedom of speech. Furthermore, the prevailing opinion in Congress concerning personal and political attacks over radio was that such attacks fell within the domain of the common law of the states.

In 1932, a bill to amend the Radio Act, including a fairness-type provision, was passed by Congress. The bill stated that "it shall be deemed in the public interest for a licensee, so far as possible, to permit equal opportunity for the presentation of both sides of public questions." But Congress considered the bill to be only a clarification of existing license obligation and not a change of substantive law. The bill was pocket vetoed by President Hoover but demonstrated Congressional conviction that the FRC was authorized to impose a requirement of fair treatment of public issues under the public interest standard.

The Communications Act of 1934 created a seven-person Federal Communications Commission, which replaced the FRC
and possessed increased regulatory powers. The new agency's enhanced authority is what primarily distinguishes the 1934 law from the 1927 legislation. A fairness type provision similar to the one Congress approved in 1932, however, was eliminated in conference, demonstrating continuing reluctance to tamper with Radio Act provisions. Congress still held the desire "to go ahead and formulate this Commission and let them study all these questions and make their recommendation in light of their study." Their "study" would consist of a series of legislative and judicial cases which occurred before and after passage of the 1934 Act. Armed with the decision in these cases the FCC would slowly begin to flex its regulatory muscles.

The Case History

The Federal Radio Commission's 1929 Second Annual Report contained a concept essential to the Fairness Doctrine. The Commission declared that the number of persons wishing to broadcast was far greater than the number of channels available. The Commission stressed that channel allocation must be based on the interest, convenience, and necessity of the listening public and not on the interest, convenience, or necessity of the individual broadcaster. The questionnaire for all license applicants demanded an explanation of how the station would operate in the public
interest. Also required was a description of the types of programs to be broadcast.

The Third Annual Report in 1930 contained the case of Great Lakes Broadcasting, which outlined the elements and basis for part two of the Fairness Doctrine:

The emphasis is on the listening public. Insofar as a program consists of discussion of public questions, public interest requires ample play for the free and fair competition of opposing views, and the Commission believes that the principle applies not only to addresses by political candidates but to all discussion of issues of importance to the public.

There is no room for the operation of broadcasting stations exclusively by or in the private interests of individuals or groups so far as the nature of the programs is concerned. There is not room in the broadcast band for every school of thought, religious, political, social, and economic, each to have its separate broadcasting station, its mouthpiece in the ether. If franchises are extended to some it gives them an unfair advantage over others, and results in a corresponding cutting down of general public service stations. It favors the interests and desires of a portion of the listening public at the expense of the rest. Propaganda stations are not consistent with the most beneficial sort of discussion of public questions. As a general rule, postulated on the laws of nature as well as on the standard of public interest, convenience, or necessity, particular doctrines, creeds, and beliefs must find their way into the market of ideas by the existing public-service stations and if they are of sufficient importance to the listening public, the microphone will undoubtedly be available. If it is not, a well founded complaint will receive the careful consideration of the Commission in its future action with reference to the station complained of.

In Great Lakes, the FCC made it clear that the Commission expected broadcasters to provide fair discussion of opposing views and that their performance in this capacity would be considered at license renewal time. This
requirement of balanced discussion of issues later became part two of the Fairness Doctrine. Furthermore, the demand that "particular doctrines, creeds, and beliefs must find their way into the market of ideas" has been interpreted by some to mean that broadcasters must affirmatively broadcast public issues. Though not specifically stated, it does foreshadow part one of the Fairness Doctrine.

Although the affirmative part of the doctrine was not yet articulated, the FRC in Trinity Methodist Church left no doubt that the road to the market of ideas was not to be blocked. In Trinity, the FRC denied renewal of KGEF, a Los Angeles radio station owned by Reverend Dr. Shuler. The content of KGEF's programming was the basis for nonrenewal. FRC examinations revealed that the station had made unfounded charges against several individuals and organizations and hurled disparaging remarks at Catholics and Jews. When questioned on these matters, Shuler responded that the statements expressed his personal views. The Court of Appeals ruled that the station's First Amendment rights had not been violated because punishment for breaking FRC regulations was not unconstitutional. The FRC was assured that it possessed the undoubted right to review past conduct.

The Federal Communications Commission continued to build on the FRC's fairness concept under the public interest, convenience, and necessity standard. In 1938, in Young People's Association the FCC refused to grant a license to
an applicant who stated that its station's use would be primarily to preach fundamentalist interpretation of the Bible. Although some nonpartisan views would be presented, the applicant maintained that religious broadcasts would be allowed only in accordance with its own beliefs.

The FCC's denial stated that "the interests of the listening public are paramount to the interests of the individual applicant in determining whether public interest would be best served by granting an application." By refusing the license the FCC made it clear that a one-sided presentation of views was unacceptable.

In 1940 the FCC made its most direct statement to date of licensee responsibility under the fairness concept. In that year's Annual Report, the Commission said that "stations are required to furnish well-rounded rather than one-sided discussions of public questions." The statement meant that the FCC did not consider fairness requirements as censorship or an infringement of broadcasters' First Amendment rights.

The following year the FCC affirmed licensee obligation to air balanced broadcasts in the Mayflower case. WAAB, an affiliate of Yankee Network, was applying for renewal of its license. The license was renewed but not without some hesitancy from the FCC. Review showed that WAAB's past record revealed the station's news service had broadcast editorials favoring various political candidates
and had made no effort toward objective or impartial reporting. The station had openly failed to present differing sides of public issues.

The Mayflower decision is most known for its policy statement that stations should not endorse political candidates or positions, subsequently dubbed the "Mayflower Doctrine." However, the decision clearly established part two of the Fairness Doctrine, obligating a licensee to present different sides of public issues fairly. The decision, moreover, appeared to embrace the part one fairness requirement. It said a licensee "has assumed the obligation of presenting all sides of important public questions." This can be interpreted to mean that licensees have an obligation to present public issues as part of their programming.

Four years after Mayflower, in United Broadcasting, the FCC made the first definitive statement that broadcasters have an affirmative obligation to present important public issues. Several labor groups in Columbus, Ohio petitioned against the license renewal of WHKC, the local radio station. The petition alleged that the station had a policy of refusing to sell air time to those it disagreed with. However, the station reached an agreement with the labor groups in which they would broadcast controversial issues and maintain a fair balance among various viewpoints on an overall basis.
The FCC accepted the agreement and the petition was withdrawn. The Commission explicitly stated that it was the duty of each licensee to be sensitive to issues of public concern and to provide air time for balanced discussion of those issues. Thus, the firm roots of part one of the Fairness Doctrine sprang from United Broadcasting in 1945. Additionally, United Broadcasting reflects another major concept of fairness requirements, which is the consideration of a licensee's overall programming when reviewing a station's fairness record.

In 1946 the FCC made the part one requirement even more explicit in a publication entitled Public Service Responsibility of Broadcast Licensees, which became known as the "Blue Book." The Commission was alarmed by a study which revealed that, out of 842 stations during a five month period in 1941, only 288 originated programs concerning major foreign policy issues facing the nation. The Commission warned that adequate time for discussion of public issues must be made available and, in determining whether a station has served the public interest, will consider the amount of time a station has set aside for that purpose. The Blue Book firmly entrenched part one of the Fairness Doctrine.

The Commission handed down another significant fairness decision four months after the Blue Book was released. Robert Harold Scott, an atheist, petitioned the FCC to
revoke the licenses of three San Francisco stations who had refused to grant him time to broadcast views opposing their religious programming. He asserted that the programming directly and indirectly attacked atheism.

The FCC refused to rule on the complaint because the broad scope of the issue involved far more than just the three stations. However, the Commission's statement on the matter established three important rules. First, it expressed in one statement two of the fairness concepts that had been developing. It said a licensee has a "duty to make time available for the presentation of opposing views on current controversial issues of public importance." The statement also defined public issues to be covered as "controversial issues of public importance."

Second, the FCC stated that freedom of speech over radio "must be extended as readily to ideas which we disapprove or abhor as to ideas we approve." The Commission said that unpopular views could not be denied access to the airwaves.

Third, the FCC indicated that an organization or idea could become a controversial public issue worthy of air time if it was attacked by others.

By this time the rationale underlying the Fairness Doctrine had been substantially developed. Confusion remained, however, particularly regarding licensee editorializing. The Mayflower decision drew universal demands for
clarification of what the decision specifically meant. In 1948 the Commission held eight days of hearings which led to the issuance of a definitive and comprehensive statement on fairness requirements. In 1949 the Report on Editorializing by Broadcast Licensees was issued and the Fairness Doctrine was born.

The Report on Editorializing contained four major elements. First, it set forth the need for the Fairness Doctrine. Second, it defined both parts of the doctrine. Third, it sanctioned editorializing by broadcast licensees. And fourth, it specified how the doctrine would be implemented.

The following excerpt from the Report cites the need for the Fairness Doctrine:

It is axiomatic that one of the most vital questions of mass communication in a democracy is the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day. Basically, it is in recognition of the great contribution which radio can make in the advancement of this purpose that the portions of the radio spectrum are allocated to that form of radio communication known as radiobroadcasting. Unquestionably then, the standard of public interest, convenience and necessity as applied to radiobroadcasting must be interpreted in the light of this basic purpose. The Commission has consequently recognized the necessity for licensees to devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community served by the particular station. And we have recognized . . . the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning these vital and often controversial issues which are held by the various groups which make up the commun-
ity. It is the right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting.34

The right of the public to be informed on vital public issues is the primary reason for the Fairness Doctrine. The "paramount right" of the public supersedes the rights of any government, licensee, or group for access to express their views. The Commission acknowledged that broadcast licensees had First Amendment protection, but believed that some interference with this right was necessary. Indeed, they believed this action would further First Amendment guarantees.

The second major aspect of the Report on Editorializing was the articulation of both parts of the Fairness Doctrine. The Report directly called for a reasonable amount of time to be devoted to affirmative presentation of news and public issues programs. Broadcasters may not refuse to air opposing views on public issues but must instead play an active and conscious role in presenting opposing views on public issues.

Part two of the doctrine just as pointedly stated: "The Commission has made clear that in such presentation of news and comment the public interest requires that the licensee must operate on a basis of overall fairness, making his facilities available for the expression of the
contrasting views of all responsible elements in the community on the various issues which arise."

The third major element of the Report was the reversal of the Mayflower decision. Licensee editorials were considered public issue presentation and, along with other public affairs programming, had to be balanced according to fairness guidelines.

The fourth major element of the Report on Editorializing was its instructions concerning licensee enforcement of the doctrine. Many licensees complained that they were confused over how to interpret the instructions to determine what they could and could not do in day to day operations. Some guidelines, however, were specific: a licensee cannot delegate his fairness requirements to a network or other entity; the licensee will decide what issues will be presented, who will present them, and the format in which they will appear; fairness balancing must be reflected in a station's overall programming as opposed to any single show; any broadcast discussion which arouses opposition may require balancing; a broadcast attack on any individual or group may require response time for the attacked party; a licensee cannot favor the spokesman of one view at the expense of another, the news cannot be slanted or distorted; and public issues must be recognized as "controversial," "public," and "of interest and importance to the community."
The Commission admitted that there was no absolute formula for ensuring fairness compliance, but that licensees would be judged by a "reasonableness" standard. Further details would again have to await case-by-case developments. Also, the Commission once again failed to address either the statutory validity of the Fairness Doctrine or the First Amendment implications. They simply asserted that the doctrine was authorized under the "public interest, convenience, or necessity" standard of the Communications Act.

In 1959, however, Congress amended Section 315 of the Communications Act and essentially codified the Fairness Doctrine into law, although that was not the intention. Congress viewed the legislation as "a restatement of the basic policy of the standard of fairness which is imposed on broadcasters under the Communications Act of 1934."74 It was meant to explicitly define existing law.

The 1959 amendment was prompted by the FCC's ruling in the Lar Daly case.37 Lar Daly was a legally qualified candidate for mayor of Chicago opposing incumbent Mayor Richard Daley. The challenger claimed that a Chicago television station had allowed Mayor Dailey use of its facilities by airing news footage of the Mayor greeting the President of Argentina at the Chicago airport. Daly demanded equal time under Section 315 and the FCC, upon reviewing the complaint, ordered the station to comply. The ruling implied that broadcast stations might have to cease
news coverage of political candidates during campaign periods or face an administrative nightmare.

Senate hearings on the ruling produced a bill exempting some kinds of news programs, such as the one in question, from equal time requirements. However, the Senate also wanted to make it clear that the bill did not release broadcasters from their fairness obligations. Senator William Proxmire introduced an amendment to the bill to make binding the fairness standards embodied in the Communications Act. The amended bill, which became part of Section 315, stated:

Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for discussion of conflicting views on issues of public importance. 38

The reason for the 1959 fairness provision was to tell broadcasters that the new equal time exemptions did not release them from their fairness obligations, but in so doing Congress "ratified and codified" the Fairness Doctrine. The legislation left no doubt that licensees must reasonably present contrasting sides of controversial public issues according to statute.

The effect of the 1959 amendment was realized in the case of Red Lion Broadcasting v. FCC. 39 The case focused on the Fairness Doctrine's personal attack and political
editorial rules. The two cases which culminated in the Red Lion decision tested the new statutory framework for the doctrine and its component provisions. Prior to Red Lion, however, a series of alleged abuses by radio stations in Florida and Montana spurred the FCC to further define its still vague fairness requirements.

In the Mapoles case, station WEBY in Milton, Florida was charged with misuse of daily newscasts by transmitting "false and malicious statements that attacked the personal character" of public officials. The FCC denied the petition to revoke the station's license "because [the persons] knew of the attacks, were apprised of their nature, and were aware of the opportunities afforded them to respond." But along with the licensee's victory came a headnote from the FCC that stated:

A broadcast licensee has an affirmative obligation to broadcast programs devoted to discussion and consideration of public issues, and may engage in editorializing. However, the licensee also has an obligation to see that persons holding opposing viewpoints are afforded a reasonable opportunity for the presentation of their views. Where attacks of a highly personal nature have been made on local political officials, the licensee has an affirmative duty to take all appropriate steps to see to it that the persons attacked are afforded the fullest opportunity to respond.

In the KBMY case, the Billings, Montana, radio station attacked the general manager of the National Rural Electric Cooperative through daily editorials opposing the creation of public-utility districts in Montana. The FCC
scolded KBMY for its actions and reiterated what was expected of licensees:

We conclude that in failing to supply copies of the editorial promptly (to the general manager of the NREC) and delaying in affording him the opportunity to reply . . . you have not fully met the requirements of the commission's Fairness Doctrine.43

As in the Mapoles case, no disciplinary action was taken against KBMY, but the findings in the two cases provided the basis of what became the FCC's Fairness Primer, which was adopted on July 1, 1964. In effect, the Primer served notice to the broadcast industry that violations of the Commission's fairness policies would not be tolerated. Five months later an event occurred which would begin the enshrinement of the Fairness Doctrine and put the FCC on a collision course with the First Amendment. It began with a personal attack broadcast over a small radio station in Red Lion, Pennsylvania.

WGCB in Red Lion, licensed to the Reverend John M. Norris, was designated by the FCC as a religious commercial station. As with hundreds of similar stations throughout the Bible belts of Pennsylvania, Texas, and Oklahoma, the station espoused radical right-wing politics. On November 25, 1964, Reverend Billy James Hargis unleashed a stinging personal attack over WGCB on Fred J. Cook. Cook's book, Goldwater: Extremist on the Right, was highly critical of the Republican presidential candidate, Barry Goldwater, whom Hargis strongly supported. Hargis also ridiculed The
Nation, publisher of several of Cook's articles, as a "scurrilous magazine which has championed many Communist causes." 44

Twenty-four days later Fred Cook wrote a letter to WGCB, and the more than two hundred stations that had broadcast the tape, demanding free air time to reply to the attack. Most stations, including WGCB, responded to Cook's letter but refused to provide free air time for his reply. Cook turned to the FCC for redress and, after an eleven-month study, the Commission determined that fairness standards applied in the complaint and ordered WGCB to furnish Cook free reply time.

Norris rejected the order and, stating that "the devil was loose in the FCC corridors," 45 determined it was his sworn duty to drive him out. Norris decided to challenge the FCC directive in Court, but he needed partners to share the expense of litigation. The National Association of Broadcasters had been waiting for a test case to challenge the FCC's "growing appetite to regulate fairness" and joined with Red Lion in the suit.

The Court of Appeals for the District of Columbia heard arguments in the case in June 1967. The court ruled in favor of the FCC and upheld the validity of the Fairness Doctrine. The court decided that "the American people own the broadcast frequencies," that Norris' constitutional
rights as a broadcaster had not been abridged, and that Fred Cook was entitled to reasonable reply time.

In handing down the Court's opinion, Judge Edward A. Tamm wrote:

The Fairness Doctrine is not unconstitutionally vague, indefinite or uncertain. . . . I find in the Fairness Doctrine a vehicle completely legal in its origin which implements by the use of modern technology the free and general discussion of public matters [which] seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.46

Norris, determined to seek final review in the Supreme Court, immediately asked the Court to grant certiorari, which it did. Meanwhile the FCC, confident of being upheld, drafted new personal attack and editorial rules. The Notice of Proposed Rulemaking, issued in April, 1966, was designed to promote enforcement of the Fairness Doctrine and make licensee obligations regarding personal attacks and political editorials more precise.

The new rules were particularly distasteful to broadcasters because, whereas the Fairness Doctrine afforded some discretion as to whether a reply is needed, the personal-attack rule called for virtual "line-by-line, item-by-item" government scrutiny of broadcasts and required that certain individuals must be given time. The broadcast industry, doubtful of Red Lion's chances in the Supreme Court, was now more concerned than ever about FCC interference.

The Radio-Television News Directors Association (RTNDA) devised a plan to attack the Fairness Doctrine
separate from the vulnerabilities of Red Lion. They would build a case challenging the legality of the new personal attack rules and file the suit in the Chicago Seventh Circuit Court of Appeals, which was known for its anti-Washington bias.

The plan was to keep the "fat cats" out and appeal the FCC's ruling in the name of professional broadcast journalists who were being inhibited by fairness regulations. The RTNDA maintained that not only were the FCC's new rules unconstitutional, but that the Fairness Doctrine itself violated the First Amendment. The NAB liked the plan as did the executives at CBS and NBC. The RTNDA, however, did not want to include the networks, fearing that the case would be viewed by the Court as big business resisting regulation.

The networks were determined to enlist in the "crusade against the Fairness Doctrine," however, and each filed separate suits in New York soon after the RTNDA filed in Chicago. The Court of Appeals consolidated all three cases into one on October 24, 1967. It became known as RTNDA et al. v. the FCC and the Seventh Circuit Court was awarded jurisdiction, since the first suit was filed in Chicago.

Although the RTNDA plan failed to exclude its network partners the broadcaster's overall strategy proved successful in Chicago. The court struck down the FCC's personal
attack rules as colliding "with free speech and free press guarantees contained in the First Amendment." Most satisfying for the broadcasters was the Court's rejection of the FCC's distinction between broadcast journalism and the printed press as the constitutional basis for the rules:

The characteristic most frequently advanced by the Commission to distinguish the printed press from the broadcast press is that radio and television broadcasting frequencies are not available to all. Data comparing the broadcast press and the printed press, however, shows that there are more commercial radio and television stations in this country than there are general circulation daily newspapers. In most major metropolitan areas there are several times as many radio and television stations as there are newspapers.47

The court stopped short, however, of categorically opposing the Red Lion decision:

First . . . we are not prepared to hold that the Fairness Doctrine is unconstitutional. . . . Second, we are in disagreement with the District of Columbia Circuit's holding in Red Lion, sustaining the Commission's order, inasmuch as we think that the order was essentially an anticipation of an aspect of the personal attack rules which are here being challenged.48

When WGCGB petitioned the Supreme Court for judicial review of Red Lion immediately upon losing in the District of Columbia Circuit Court, the Supreme Court agreed to hear the case but then postponed it, pending the outcome of RTNDA. As anticipated by the Supreme Court, the FCC appealed the Seventh Circuit decision, and on January 13, 1969, the Court granted certiorari. Red Lion and RTNDA were now a single proceeding to be heard in the nation's highest court.
Although the two cases were combined, the FCC still faced a two-pronged attack. Red Lion's position focused on the Constitutional issue while the RTNDA concentrated on statutory questions raised by the personal-attack rules. Roger Robb, attorney for Red Lion, maintained that the First Amendment prohibits any government regulation of broadcasting:

The Government argues that the personal-attack rule is necessary in order that the public may have both sides of controversial issues, and specifically so the public may hear both the attack and the answer. The argument, we suggest, overlooks the fact that if the personal-attack rule is sustained, the public is likely to hear neither the attack nor the answer, for the reason that the attack may never be broadcast at all. Instead of stimulating wide-open, robust, and uninhibited debate, the rule will tend to choke it off... to dry it up at its source.

My personal opinion, Your Honor, is that you don't balance First Amendment rights. You either have them or you do not. As I say, I don't think the First Amendment says you can abridge just a little bit, or reasonably. I think the First Amendment says you can't abridge, and I think that this is an attempt to abridge...

To Archibald Cox, representing the RTNDA, electronic speech controlled by the government was a fundamental breach of the First Amendment:

I would point out that the challenged regulations lay hold of speech itself. This is a fact which distinguishes every other case involving broadcasting that has come before this Court because they all had to do with the economic regulation of the industry. We are not talking about a regulation which says... that if you express ideas... which can be described as an attack on somebody's integrity or honesty or other personal qualities, or if you put someone on the air who may engage in those attacks, then you run the risk of having to carry certain obligations which are onerous. But if you steer clear of those ideas, if you prefer blandness
to biting criticism . . . then you are safe, you don't have to worry. We think that this is fairly characterized as a regulation of speech itself.50

Representing the FCC, Solicitor General Erwin N. Griswold, took the position that:

... our opponents in these cases seek to put us in opposition to the First Amendment, and we do not accept that position. I suggest that on analysis it is the Government and the Federal Communications Commission which are the real champions of the First Amendment here. The Commission's regulations serve to foster important First Amendment values which our opponents would have the Court sacrifice in the guise of upholding the narrow and financially motivated claim to unfettered control of airwaves that had been licensed to their custody.51

The broadcast lawyers had undergone intense questioning by the Justices throughout the hearing and were not optimistic about the outcome, but they did not expect a categorical rejection of their positions. Not only was the District of Columbia Court of Appeals upheld in its ruling that the FCC could order Red Lion Broadcasting to give reply time to Fred Cook, but the High Court also reversed the Chicago Seventh Circuit decision that the personal-attack rules violated the First Amendment. The Court's unanimous opinion, written by Justice Byron White, stated:

There was nothing vague about the FCC's specific ruling in Red Lion that Fred Cook should be provided an opportunity to reply. The regulations at issue in RTNDA could be employed in precisely the same way as the fairness doctrine was in Red Lion. . . . There is no question here of the Commission's refusal to permit the broadcaster to carry a particular program or to publish [his] own views. . . . Such questions would raise more serious First Amendment issues. But we do hold that Congress and the Commission do not violate the First Amendment when they require a radio or television
station to give reply time to answer personal attacks and political editorials.\textsuperscript{52}

The Supreme Court also rejected the broadcasters' contention that because broadcast stations far outnumber daily newspapers, FCC regulation was no longer needed. Justice White wrote: "Scarcity is not entirely a thing of the past. Advances in technology... have led to more efficient utilization of the frequency spectrum, but uses of that spectrum have also grown apace."\textsuperscript{53} The Court ruled that the FCC had a responsibility to ensure fairness as long as it was necessary for the government to license some applicants to the exclusion of others.

Regarding the proxy designation of licensees which so offended Norris, the Supreme Court solidly reinforced the FCC's position:

\ldots as far as the First Amendment is concerned those who are licensed stand no better than those whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license as to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.\textsuperscript{54}

The decision concluded: "The judgment of the Court of Appeals in \textit{Red Lion} is affirmed and that in \textit{RTNDA} reversed and the causes remanded for proceedings consistent with this opinion. It is so ordered."\textsuperscript{55}
So ended the broadcasters' long awaited assault on the Fairness Doctrine, which they had envisioned as a crusade to restrict regulation of the industry. Reverend Billy James Hargis, whose attack on Fred Cook set the entire process in motion, was bitter about the decision. He said,

"What are we left with? The Fairness Doctrine, which the left-inclined use to keep the right wing off the air, and which the right wing uses to silence the left. What good is that? It can be used to keep everybody off the air . . . the fallout from Red Lion hurt everyone."56

Archibald Cox, who later won fame as Watergate prosecutor, was asked about the case some years later. He responded that it might have fared better "if we'd had only one client."

"You mean just the RTNDA?"

"No, I mean Red Lion," replied Cox. "In freedom-of-speech cases, the most effective kind of client is an unpopular cause, or just some S.O.B. who has the right to be heard."57

Cox's words were prophetic. His battle against the Fairness Doctrine had ended disasterously for the broadcast industry, but another would be fought. It would be waged by a resolute firebrand named Reverend Carl D. McIntire, and would erupt in a small Pennsylvania town ironically called Media.
NOTES


3. Ibid.


11. Ibid., 20.


13. Ibid., 195.


15. Ibid., 197.

16. Ibid.


18. Ibid., 23.

20. Ibid.
21. Ibid., 27.
22. Ibid., 28.
25. Trinity Methodist Church, FRC, (1933), citing Simmons, The Fairness Doctrine and the Media, 33.
27. Simmons, The Fairness Doctrine and the Media, 36.
28. Ibid., 38.
32. Simmons, The Fairness Doctrine and the Media, 40.
33. Ibid.
34. Ibid., 42.
35. Ibid., 43.
36. Ibid., 49.
37. Lar Daly, 6 FCC, 147 (1959), citing Simmons, The Fairness Doctrine and the Media, 47.
42. KMBY, 9 FCC, 183 (1963), citing Friendly, The Good Guys, The Bad Guys, 34.
44. Ibid., 48.
45. Ibid., 50.
46. Ibid., 58.
47. Ibid., 57.
48. Ibid.
49. Ibid., 69-70.
50. Ibid., 70.
51. Ibid., 71.
52. Ibid.
53. Ibid., 73.
54. Ibid., 74.
55. Ibid.
56. Ibid.
57. Ibid.
CHAPTER III

THE REVEREND CARL D. McINTIRE: PIRATE FOR GOD

Reverend Carl D. McIntire, a right-wing fundamentalist preacher, was the first maritime radio pirate in the United States.¹ McIntire believed the broadcast industry should enjoy the same First Amendment rights as the print media and he was as fundamental in his approach to those rights as he was in his approach to religion.²

McIntire's purist philosophy and strong personal convictions prompted him to defy the law over constitutional rights for broadcasters. His unyielding battle against federal regulation culminated with verbal broadsides launched at the government and the Federal Communications Commission from a "pirate" ship on the high seas. McIntire's protracted confrontation with the United States government was costly to his livelihood in radio, but it also catapulted him into broadcast history.

McIntire was born on May 17, 1906, in Ypsilanti, Michigan, the son of strict Bible-reading Presbyterian missionary parents. He grew up in Durant, Oklahoma, where his family moved when he was a boy. His father had been a missionary in China³ and his mother was the first woman
missionary to the Indians in Oklahoma. She reared him on sayings such as "you must always be ready to die for Christ and your country" and filled him with stern quotations from the Book of Proverbs on punishing the wicked. McIntire recalled, "I went barefoot until I was twelve years of age in Oklahoma. We never had anything; . . . nobody ever told us we were poor. We never got any welfare or relief—we had to take care of ourselves. Welfare and relief completely demoralize people's character and destroy their responsibility. It's the politicians who benefit."

McIntire's upbringing was not lost on him, and by age twenty-five he was hurling invectives from the pulpit. He attended Southeastern State Teachers College in Durant but transferred to Park College in Parkville, Missouri, where he received his B.A. degree. Later, he attended Princeton Seminary in New Jersey, where he encountered his first confrontation between modernists and traditionalists in theology. He left the school in 1929 with fundamentalist theologian J. Gresham Machen and completed his studies at Machen's newly established seminary in Philadelphia, Pennsylvania. Upon graduating, he was called to a church in Atlantic City, New Jersey, but two years later he went to Collingswood, New Jersey, where he led traditionalists in subsequent splits in Presbyterianism.

In 1933, he established his own Bible Presbyterian denomination, but in 1936 he broke with the United
Presbyterian Church. He was defrocked after a trial by the General Assembly which considered the message he was delivering as a member of the foreign mission board as "too conservative." McIntire maintained, "I must obey God rather than the General Assembly where their orders conflict with my conscience." The 1,200 members of his Collingswood Bible Presbyterian Church followed their pastor and worshipped in a tent. Within five years he helped establish the American Council of Churches (ACC) and, in 1948, the International Council of Christian Churches, which he served as president.

The springboard that launched McIntire's multi-million dollar right-wing empire, however, was radio. His "Twentieth Century Reformation Hour" first aired in 1955 and was syndicated on more than 600 small radio stations scattered across the country. He used the daily half-hour program to espouse his religious and political views and to raise funds for his various enterprises.

He acquired Faith Theological Seminary in Elkins Park near Philadelphia and established the Carl McIntire Foundation, which owned four of the largest hotels in Cape May, New Jersey. Other holdings included a college, a convention center, and 280 acres of undeveloped land in Cape Kennedy, Florida. He also founded the Christian Beacon, a weekly religious newspaper.
McIntire's accomplishments sprang not only from organizational skill and energy but also from traditional hell-fire and damnation preaching that permitted no ambiguities about right and wrong, whether religious or political in nature. Through radio, McIntire discovered, "We found a way we could reach the public under the liberty we have in our Constitution. I found we could not get our story before the public through the networks, and the press was generally blocked against us." Describing most Americans as "prisoners of the left-wing media," McIntire realized "that by use of little radio stations spread around the country, we could get on and talk about those matters in the free exercise of religion . . . and reach millions of people." 

McIntire and WXUR

McIntire never seriously considered owning a radio station until 1964, when a few stations began canceling his program under pressure from the FCC to observe the Fairness Doctrine. When WVCH in Chester, Pennsylvania, terminated its contract after the station's attorney had warned that carrying the program could jeopardize its license, McIntire was blacked out in his home territory. Philadelphia and southern New Jersey were fertile McIntire country and he soon made the decision to purchase his own radio station.
McIntire learned that station WXUR AM-FM in Media, Pennsylvania, was in financial trouble and up for sale. Media is a Philadelphia suburb between Bryn Mawr and Swarthmore with a population of 7,000. McIntire requested permission from the FCC to purchase Brandywine-Main Line Radio, Inc.; owner of WXUR. The price was $450,000. To acquire the station, he mortgaged Faith Theological Seminary for $425,000 and paid $25,000 in cash.\textsuperscript{19}

In his petition to the FCC, McIntire promised, like most broadcasters, to comply with the Radio Code of Good Practices of the National Association of Broadcasters; although he was not a member of that organization. Of more consequence for the future, however, was his promise to adhere to the Fairness Doctrine, as all licensees were required to do.\textsuperscript{20}

When his enemies became aware of McIntire's bid for his own station, they urged the FCC to block the transfer.\textsuperscript{21} Offended by his broadcasts on WVCH, eighteen Philadelphia organizations beseeched the Commission to deny McIntire's license because of his background of "intemperate attacks on other religious denominations, various organizations and government agencies, and political figures."\textsuperscript{22} They asserted that McIntire used the public air to "create a climate of fear, prejudice and distrust of democratic institutions."\textsuperscript{23}
Their efforts were not successful, however, and the FCC approved the sale of WXUR to McIntire on March 17, 1965. FCC Commissioner Kenneth Cox voted against it because he questioned the preacher's qualifications, but the majority of the Commission voted their approval because McIntire promised to uphold the Fairness Doctrine.24

That promise later became paramount to the FCC, but it was not McIntire's primary concern. He wanted a radio station to broadcast his message, and WXUR promptly syndicated the "Twentieth Century Reformation Hour." During the peak of his popularity, McIntire's fiery attacks against liberals in church and state were heard on 610 radio stations whose listeners contributed $3 million a year to support his fundamentalist ministry and related financial interests.25

Meanwhile, the group opposing McIntire had raised $30,000 to drive him off the air.26 The organizations were the Greater Philadelphia Council of Churches; American Baptist Convention, Division of Evangelism; American Jewish Congress, Delaware Valley Council; Anti-Defamation League of B'nai B'rith, Pa., W. Va., Delaware Region; Board of Social Ministry, Lutheran Synod of Eastern Pennsylvania; Brith Shalom; Catholic Community Relations Council; Catholic Star Herald; The Reverend Donald G. Huston, Pastor of First Presbyterian Church of Lower Merion; Jewish Community Relations Council of Greater Philadelphia; Jewish Labor Committee,
Media Fellowship House; NAACP; New Jersey Council of Churches; Philadelphia Urban League; Women's International League for Peace and Freedom, U. S. Section; American Jewish Committee, Pa. - Delaware Area; Fellowship Commission; and AFL-CIO of Pennsylvania.27

The organizations monitored WXUR, and when the station filed for a three-year license renewal one year after obtaining its license, the groups had gathered specific charges. In a petition to the FCC, they contended that WXUR's programming was "one-sided, unbalanced, and weighted on the side of extreme right-wing radicalism. On most controversial public issues, the station has represented only one side--the extreme right radical viewpoint--and has failed to apply to those issues a 'reasonable standard of fairness and impartiality.'"28 They cited numerous examples of attacks on the Supreme Court, the United Nations, and major news media. Many Jewish leaders charged that McIntire was anti-Semitic even though he raised $5,000 for Israel during the Six-Day Middle East War.29

Not every organization opposed renewal of the station's license, however, Spencer Cox, Executive Director of the Greater Philadelphia branch of the American Civil Liberties Union (ACLU), said that the ACLU would not oppose WXUR's license renewal because it "had serious reservations about the use of government power to silence any medium of communication on the basis of the content of its message."30
The petitioners who were opposing renewal of WXUR's license were most offended by statements that had occurred during call-in programs conducted by Tom Livezey, who attracted late night listeners who worried about Jews, blacks, left-wing radicals, and Billy Graham. For instance:

Woman Listener: About this B'nai B'rith Anti-Defamation League... why don't they get upset at all the smut and filth that's going through the mails?
Livezey: And who do you think is behind all this obscenity that daily floods our mails, my dear?
Listener: Well, frankly, Tom, I think it is the Jewish people.
Livezey: You bet your life it is.

Another occasion cited was when Livezey prompted a listener to read a poem which expressed his desire to be a dog so he could desecrate the graves of Franklin D. Roosevelt and Martin Luther King, Jr. with impunity.

The programs McIntire conducted were also controversial. He often praised Reverend Ian Paisley, zealot of the Evangelical Irish Protestant Movement. Paisley often described Billy Graham and his followers as "cowardly appeasers, liberal teasers and Communist pleasers." And McIntire regularly aired the views of arch conservatives such as the Reverend Billy James Hargis and Dan Smoot, who were accused by their opponents of promoting "hate clubs of the air." The petition to deny renewal of WXUR's license stated: "In one program alone, [WXUR broadcaster] Dan Smoot decried unemployment compensation laws, birth control legislation, firearms control legislation, District of Columbia
home rule, and restoration of trade with Soviet bloc nations. No views contrasting with any of the above views were presented during the monitored weeks. The Pennsylvania House of Representatives passed a resolution demanding an FCC investigation of WXUR for its "extremist views" and a hearing followed.

The hearing began on October 2, 1967, and after nine months of scrutiny, FCC Examiner H. Gifford Irion found that WXUR's overall programming was balanced. He emphasized that the Fairness Doctrine requires "an honest and good faith effort by the licensee to air contrasting, conflicting and varying attitudes towards subjects of important controversy. In the broad perspective of this record, it is almost inconceivable that any station could have broadcast more variegated opinions upon so many issues than WXUR."

Irion noted that the main cause of the station's difficulties was "not that it was narrowly partisan but that it sought and received too much controversy." While he conceded that the station had a poor record of handling personal attacks, the examiner stated that the purpose of a renewal hearing was to consider the entire record "rather than dwell upon some singular deficiency." He said WXUR had "a creditable record of serving local needs and interests, of balancing its own viewpoint with viewpoints in contrast, in declaring its main purposes to the Commission"
before the transfer of control and in giving vent to positions sharply opposed to its own.  

Irion recommended that the public be allowed their constitutional rights to hear the views WXUR aired. He believed the public could cope with the controversy the views aroused because:

The American scene has always been characterized by rough-and-tumble and fervent rhetoric but of such stuff is free robust controversy fabricated . . . if the licenses of WXUR and WXUR-FM were to be denied on the grounds that a number of isolated infractions really did occur, it could very conceivably result in silencing all controversial discussion on American radio and television. Or, as an alternative, it could mean that discussion would henceforth be a diluted parlor chat in which such restraint was exercised that the outcome would be insufferably dull and totally unenlightening.  

In determining that WXUR should be granted renewal of its license, Irion stressed that his decision was based on "ultimate objectives rather than isolated instances of error,"  and because there were penalties available for failures to observe the rules "Draconian justice" was inadvisable.

When the full Commission reviewed the ruling, it reversed WXUR's license renewal. The FCC determined "that [WXUR] failed to provide reasonable opportunities for the presentation of contrasting views on controversial issues of public importance, that it ignored the personal-attack principle of the Fairness Doctrine, that the applicants' representations as to the manner in which the station would be operated were not adhered to."  The FCC contended that
upon receiving a license in 1965, WXUR immediately began broadcasting right-wing programs to the virtual exclusion of others. Listeners who called to challenge the programming views of the station were consistently scoffed at, hung-up on or otherwise denied access to WXUR's air to express their views.48

On August 6, 1970, McIntire filed a motion for the Commission to reconsider, on the basis that the decision extended the Fairness Doctrine to an unconstitutional brink, but the FCC refused.49 Benjamin Cottone, WXUR's attorney and former Chief Counsel of the FCC for seven years,50 appealed the decision. He said, "The FCC was not just asking a station to grant reply time, but was issuing a lethal order to put a station off the air forever."51

On September 25, 1972, the Second Circuit Court of Appeals of Washington ruled that the FCC action was justified because of programming misrepresentation.52 The three federal judges each wrote a separate opinion.

Judge Edward A. Tamm's majority opinion stated:

The record of Brandywine-Main Line Radio is bleak in the area of good faith. At best, Brandywine's record is indicative of a lack of regard for fairness principles; at worst, it shows an utter disdain for Commission rulings and ignores its own responsibilities as a broadcaster and its representations to the Commission ... These men, with their hearts bent toward deliberate and premeditated deception, cannot be said to have dealt fairly with the Commission or the people of the Philadelphia area. Their statements constitute a series of heinous misrepresentations which, even without the other
factors in the case, would be ample justification for the Commission to refuse to renew the broadcast license.\textsuperscript{53}

Chief Judge David L. Bazelon's preliminary opinion concurred with Tamm's,\textsuperscript{54} but when he issued his full statement it turned out a complete reversal:

In this case I am faced with a prima facie violation of the First Amendment. The Federal Communications Commission has subjected Brandywine to the supreme penalty; it may no longer operate as a radio broadcast station. In silencing WXUR, the Commission has dealt a death blow to the licensee's freedom of speech and press. Furthermore, it has denied the listening public access to the expression of many controversial issues. Yet the Commission would have us approve this action in the name of the fairness doctrine, the constitutional validity of which is premised on the argument that its enforcement will enhance public access to a marketplace of ideas without serious infringement of the First Amendment rights of individual broadcasters.\textsuperscript{55}

Bazelon said the Fairness Doctrine applied a double standard to broadcast and print journalism and that "the great weight of First Amendment consideration cannot rest on so narrow a ledge"\textsuperscript{56} as WXUR's misrepresentations. He continued, "In the context of broadcasting today, our democratic reliance on a truly informed American public is threatened if the overall effect of the fairness doctrine is the very censorship of controversy which it was promulgated to overcome."\textsuperscript{57}

Bazelon, a liberal, found WXUR's programming offensive and disruptive, but he was more concerned about government strangulation of the public's right to hear McIntire's brand of robust debate.\textsuperscript{58} He warned, "It is beyond dispute
that the public has lost access to information and ideas. 

... If we are to go after gnats with a sledgehammer like the Fairness Doctrine, we ought to at least look at what else is smashed beneath our blow."59 Bazelon concluded by suggesting that the FCC reconsider their termination of WXUR's license.

Defending the majority decision, Judge J. Skelly Wright explained that WXUR's license was not removed for Fairness Doctrine abuses. He said deception was the sole reason for nonrenewal, which is ample justification for such drastic action.60 Wright admitted, however, that the Fairness Doctrine was a "tortured" area of the law creating a "constitutional thicket."61

The Brandywine ruling did nothing to clear that thicket.62 The Commission's action was upheld and the Fairness Doctrine was retained as a regulatory tool. Judges Tamm and Wright, outvoting Bazelon, supported the Commission's decision on grounds of misrepresentation, side-stepping the fairness issue altogether.63

With the demise of WXUR apparently imminent, opposition to the FCC order began to mount. Even some who despised McIntire were alarmed by his small station being stamped out by federal mandate.64

The News of Delaware County published an editorial that warned against silencing unpopular voices. The newspaper was wary of the federal government's "deciding who is
prejudiced and who isn't and duly licensing only those it judges to be without prejudice. The editorial declared, "We haven't heard . . . Rev. McIntire say anything yet that we agree with, but our racists, bigots and 13th Century minds should be encouraged to speak out at every opportunity . . . we'd rather have them all out in the open and up on their soapboxes every day. That way we can keep an eye on them."66

An article in the Ardmore, Pa., Mainline Times confessed:

We do not subscribe to many, if any, of the minister's views. However, as the saying goes we defend his right to hold them and to broadcast them.

Leaving the 'fairness doctrine' and the issue of 'misrepresentation' aside, it is obvious that WXUR got the axe because too many established and powerful people didn't like what Rev. McIntire was saying.

Ironically, many of his detractors would be, and often have been, in the vanguard of those opposed to the erosion of Constitutional rights. Yet this time they have been instrumental in affecting . . . a broadcast station's license revocation on the basis of the fairness doctrine. . . .

There are many stations who argue from the other end of the political spectrum and 'afford little reasonable opportunity for the presentation of contrasting views.'

We think this case is . . . important because of the precedent set in law . . . At best, the doctrine should be employed as a switch and not a sledgehammer. Such was not the case in the pounding of WXUR.67

McIntire and his followers were outraged. WXUR listeners variously described themselves as "lost," "helpless," "repressed," "stunned," "indignant," "killed,"68
etc. One devout listener, Mrs. Cleo M. Smith, filed an injunction against the FCC's order to remove the station from the air. She asserted that her civil rights had been violated by the FCC's not permitting her to listen to WXUR. She testified that she had been a listener since 1965, and "to be deprived of this privilege in this blessed America is wrong." U. S. District Court Judge Clifford S. Green refused to grant the injunction, however, ruling that "Mrs. Smith would not suffer irreparable harm between now and any final hearing because the station is off the air."

The Christian Beacon denounced the Second Circuit decision as "preposterous" and "astounding beyond words." Although the paper praised Judge Bazelon for addressing the fairness issue in his dissent, it assailed Tamm and Wright on every aspect of their majority ruling.

The Beacon pointed out that the court did not uphold the FCC on Fairness Doctrine grounds or the personal attack issue. The ruling was based on WXUR's "heinous misrepresentations" which the FCC never specifically charged. The paper said Tamm and Wright "sandbagged the station" with their charges of deception even looking into the hearts of men:

How (Judge Tamm) could read the hearts of the men of Faith Theological Seminary's board of directors . . . is impossible to understand. Here are two . . . judges talking about what was in the hearts, unseen and unknown to them, of those who had to do with WXUR . . . This
constitutes a great injustice at the hands of two Federal judges.\textsuperscript{74}

The paper launched a letter writing campaign urging support for a congressional bill to relieve WXUR. Meanwhile, McIntire raised $340,000 in contributions to bring the issue before the Supreme Court. "This time we thought we had a chance," said WXUR attorney Ben Cottone. "We had Bazelon's dissent, and we had the facts that in this case the Commission had departed from its promise to the Congress and the Supreme Court that it would not apply the ultimate sanction of taking away licenses without due warning."\textsuperscript{75} But the Supreme Court refused to hear the case, although not by unanimous vote. Justice William O. Douglas urged the Court to take another look at the Fairness Doctrine.

With all legal alternatives exhausted, McIntire prepared to obey the FCC's order to cease operations at midnight July 5, 1973. Declaring that "WXUR will become the number one Christian martyr in the nation,"\textsuperscript{76} he conducted funeral services for the station on July 4, 1973.

McIntire led a funeral procession of several hundred mourners around Independence Hall to a "cemetery" on Independence Square. Eight Continental-dressed pall-bearers carried a white casket with "Religious Freedom" inscribed on one side, "Freedom of Speech" on the other and "WXUR" on each end. McIntire portrayed John Witherspoon, Presbyterian
minister who signed the Declaration of Independence, and was accompanied by followers dressed as Betsy Ross, Thomas Jefferson, George Washington and other founders of American freedom.

Several speakers addressed the gathering, and afterwards all participated in singing patriotic and gospel songs. Then McIntire symbolically interred that portion of the First Amendment dealing with free speech together with a replica of WXUR's transmitter tower. He closed the services warning that American freedoms were disappearing and that Christians should lead in resisting this challenge.

The following day was WXUR's last. All regular programming was cancelled to receive testimony from the station's supporters. That evening, as time drew near for the station to close, McIntire read a statement to his listeners: "There is one issue," he said, "Freedom of speech--free exercise of religion. My religious and liberal opponents were successful in securing the aid of the federal government to silence a voice of a religious minority." He also quoted from John Stuart Mill's 1859 Essay on Liberty: "If all mankind, minus one, were of one opinion, and only one person was of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind."

At ten minutes before midnight, McIntire stopped taking calls, gave a prayer and played "Nearer My God, To
Thee"--the hymn the Titanic's orchestra allegedly played as the great ship sank. With only seconds left McIntire issued a warning:

It is a government which designs to take care of our speech for us that has become the tyrant of old which our fathers resisted unto death. . . . But we pray for them folks, we pray for them for they know not what they do. Because the next time they will lose theirs. These same bonds of tyranny will be put around them. . . . And if you lose free speech and a free press, you are no longer a free people.80

Those were the last words spoken on WXUR. It fell silent at 12:01 AM on July 6, 1973, and became the first radio station in United States history to lose its license because of Fairness Doctrine violations.81

Radio Free America

The end of WXUR was not the end of McIntire who was undaunted and determined. He proceeded with plans to obtain a ship and convert it into a floating radio station.82 He set up headquarters in the Christian Admiral Hotel, an elegant Victorian-era mansion owned by his Faith Theological Seminary; it was located on the Cape May, New Jersey shoreline.83 There he mapped strategy for a naval invasion of U. S. Government regulated airwaves.

Two previous attempts to acquire a ship failed. On one occasion, a 160-foot merchant ship was placed in dry dock for final preparation in Trinidad. However, it flew the Saint Kitts flag, and fear of consequences from the U. S. State Department caused the effort to collapse.84
Then, a McIntire follower in Cape Canaveral, Florida, spotted a World War II Navy minesweeper being used for scuba diving, and helped negotiate its purchase for $40,000. The ship was the Oceanic. It was twenty-eight years old, 140 feet long, contained 41 berths, and was equipped with radar and ship-to-shore radio.

McIntire quietly prepared the ship in Cape Canaveral. He sent cannibalized WXUR equipment and a 10,000-watt RCA transmitter from Philadelphia to the Cape and installed them aboard the ship. The transmitter was purchased for $6,000 and the entire cost to outfit the ship totaled $70,000. All the money came from "gifts of God's people," McIntire said.

The ship was named Columbus because, McIntire said, the ship's mission was to rediscover First Amendment rights in America. Contending that freedom of speech should apply equally in broadcasting as the printed press, McIntire called his shipboard station "Radio Free America." The ship would operate in international waters, McIntire said, where no federal law or regulation that he knew of could affect her broadcasts.

Once the equipment was secured aboard ship in Cape Canaveral, it sailed for New Jersey. The Columbus arrived off Cape May on August 23, 1973, amid fanfare from McIntire and his welcoming delegation. McIntire and dozens of his followers shouted greetings from the porch of the Christian
Admiral Hotel as the ship sailed to within a half-mile of the mansion.

"Here she come, folks," McIntire said over his bullhorn. "It's 4:46 P.M. and there she is. The shackles of government tyranny have been broken. Oh, I'm so overcome with emotion! Praise the Lord." "Praise the Lord," responded his followers who began singing "Praise God from whom all blessings flow."

The ship tipped the American flag atop its mast in salute to the crowd, then anchored three and a half miles from the Cape May shore outside U. S. territorial waters. Instead of a skull and crossbones, the ship displayed a blue and white international Christian flag; nevertheless, McIntire meant to wage verbal battle with the FCC over First Amendment rights.

Although McIntire had been secretive about his naval operation, he allowed a reporter aboard the ship for a closer look soon after its arrival. The ship's skipper, Paul Hemmerle, said in an interview on the vessel that the ship left Cape Canaveral on Friday, August 24, and secretly anchored at a commercial dock in Cape May harbor on Monday, August 27. He described the ship as basically functional. It had a small transmitting room, a small kitchen and dining area, and a small motor dinghy aboard to bring in supplies. He said there were enough supplies already on board to "stay out here a month." The ship's regular crew consisted of
himself, his wife and three others, including two radio technicians. "The crew knows how to do a little bit of everything," Hemmerle said.

When asked why he accepted the captaincy of the Columbus, Hemmerle replied that he had met McIntire in Cape Canaveral two years before and "I've always admired Dr. McIntire and I've taken on this job for principles. . . . I believe in what he's doing. . . . He's the admiral and we're his navy. . . . we'll stay as long as we have to." McIntire was now ready to implement his attack plan. He would hold a formal dedication ceremony aboard the ship, preceded by a press conference at the Christian Admiral Hotel. The press conference began at 10:30 A.M. on August 30, 1973, in a meeting hall inside the hotel where McIntire publicly revealed details about the Columbus and "Radio Free America" for the first time.

McIntire described the Columbus as a "refugee" ship, not a "pirate" ship:

A pirate ship goes in and takes something. I am not destroying anything. I'm just fighting for my freedom. . . . I should be as free as the Old Testament prophets who denounced the wickedness of the political leaders of their day. . . .

The bureaucrats should have no power over radio and TV stations. The licensing should be nonpolitical. We're asking that the FCC be fully investigated by the Congress. We're asking that the so-called fairness doctrine be completely abandoned and that all (radio and TV stations) in the country be given the same standing as newspapers. . . .
Free speech was guaranteed by our forefathers, but the politicians deprive us of another freedom every day... My freedom's been denied by a repressive government. So I'm taking to the high seas to preach the word of the Lord. The real irony of it is my calling—I'm a preacher, a man of God, but the politicians have made me the villain...

I am going into 'Radio Free America' to back my Government down, and if need be, I'll be happy to go to jail for freedom from... the terrible, monstrous tyranny of the FCC and the Federal Government... I'm prepared to give my life for this cause.

The Christian Beacon also addressed the "refugee" rationale:

It has been necessary to flee the mainland as a refugee in order to exercise the guarantee of the First Amendment without government harassment, intimidation, and repression...

The operation is perfectly legal. The ship is not going to be engaged in any form of activity that is illegal... it will not smuggle or handle contraband. Its one and only commodity for export will be speech, and if there is not free speech any longer on the radio in the United States it is still possible to have free speech out on the Atlantic Ocean.

McIntire said the new station would allow him "to really speak my mind... no more worries about offending anyone, no more worries about the FCC and no more worries about the Fairness Doctrine." He said that, while the ship was flying the international Christian banner, the flag of final registry would not be hoisted until the station began broadcasting—a strategy designed to keep the FCC off balance. He added that the wavelength used would not be disclosed until then either because he suspected that the FCC planned to jam the broadcasts. He vowed that if the FCC
tried to shut down his operation he would challenge them in court. 101

"We'll question the constitutionality of their very licensing system," said McIntire. "We'll take them on with the help of God and the American people." 102

He included a considerably stronger message for others bent on disrupting the station's operation. Citing reports of Russian trawlers in the area, he issued the startling revelation that the ship was stocked with a cache of rifles. He said the weapons would not be used against U.S. authorities, but were intended to defend "against the Russian Communists and anybody else trying to tinker with our broadcasting." 103

McIntire also pledged that he would not interfere with any other signal: "I don't want to damage the other stations. I'm fighting for their freedom too." 104 He said that if jamming or interference occurred, his frequency location could "be easily and frequently changed." 105

McIntire said the ship was positioned three and one half miles off Cape May, but when broadcasting commenced the ship could transmit while sailing up and down the coastline and from farther out to sea. He said the ship would never come to port, and refueling would take place at sea with crew and guests being shuttled to and from the ship on small boats. He reported that the station would broadcast around the clock providing American listeners "from Maine to North
Carolina and as far west as Ohio a completely unregulated exhibition of freedom of speech as the founding fathers intended it.\textsuperscript{106}

To demonstrate "fairness without a Fairness Doctrine," he invited Jane Fonda, George McGovern, and FCC Chairman Dean Burch to confront him on the ship. McIntire asserted that "the station programming will be open to all viewpoints,"\textsuperscript{107} but insisted that "it will be anti-Communist and pro-American and it will stand for the historic Christian faith."\textsuperscript{108} Besides live broadcasts, McIntire said other programs would be taped on the mainland and brought to the ship.

After the press conference, McIntire led a motorcade of journalists and nearly one-hundred followers to a dock where he had chartered a boat, the \textit{Wild Goose}, to ferry them to the \textit{Columbus} for the dedication ceremony. He intended to tape his first broadcast during the proceedings, but almost immediately his plans began to go awry.

Upon boarding the excursion craft, McIntire learned that the cooler on board contained no soft drinks, only beer. McIntire quickly voiced his disapproval, and the cooler was removed. Another problem arose when the small boat was fifteen minutes on its way, and it was discovered that there were nine persons over the legal limit aboard. The boat returned to the dock, where the bewildered McIntire
used his bullhorn to persuade some of his followers to disembark.

By 3:30 P.M. the *Wild Goose* finally arrived at the *Columbus* and began circling the pirate vessel when things completely unraveled. McIntire ordered the skipper and owner of the *Wild Goose*, Ronald Lasky, to go alongside the radio ship so he and his entourage could go aboard.

"No way man," said the twenty-two-year-old captain. "My deal with your people was to come out here and look at your ship. I can't let anybody off. These are international waters and marine law says I can't discharge passengers without customs clearance, quarantine and all that stuff. You may be a reverend, but you don't know anything about boats and marine law. I'm a captain and I don't know anything about religion, but I know about boats and ships." 109

Angry passengers chided the young skipper, asking, "What did you think we came out here for—to turn around and go back?" 110

A vehement McIntire threatened to swim to the *Columbus*, and was removing his jacket when Lasky turned his boat around and headed for the dock. Thwarted in his first attempt to dedicate the ship, McIntire led his faithful in singing "Onward Christian Soldiers" as they returned to port.

McIntire was not long deterred, however. The dedication took place on Labor Day, September 3, 1973. The
pulpit he used to hold church services in a tent in 1936 was removed from the Bible Presbyterian Church in Collingswood and mounted on the ship's stern for the ceremony. A delegation of followers and press representatives gathered on the ship, but transportation problems and limited space restricted the size of the on board audience. Most of McIntire's flock waited ashore anticipating his maiden broadcast scheduled for 11:30 A.M.

McIntire announced that he would broadcast at 69.2 kilocycles on AM, virtually the same wavelength as the former WXUR signal. He also revealed that the ship would fly the American flag because "we decided that if we are going to have a battle with the government we'd rather have it under a U S. flag."

The ship was of U. S. registry, as Coast Guard officials discovered when they boarded the ship on August 31, 1973, while investigating a report of an oil slick in the area. The ship was not leaking oil, however, and McIntire complained that the story was just a pretext to board the ship. The officials searched the ship thoroughly and demanded to see the registry, which they copied. They explained that they were sending a report to Washington.

The disclosure of the ship's registry did not interfere with McIntire's strategy. His plan all along was to use the pirate station as a test case challenging the FCC's authority.
"We'll challenge the entire licensing system," he said. "They are getting into rule-making concerning speech. We've got a clear case of free speech." 116

As his engineers struggled below deck to get the transmitter functioning, McIntire proceeded with the ceremony. He dedicated the ship to Louis Cassels, religion editor and senior editor of United Press International. Cassels' ten-dollar check was the first contribution to "Radio Free America." 117

McIntire and Cassels had been feuding for twenty years over their divergent beliefs, and McIntire periodical-ly exhorted his followers to flood UPI with letters de-manding that Cassels be fired. With free speech at issue, however, both men were in complete agreement. When McIntire said, "We believe in freedom. We want to tell the govern-ment what to do instead of having the government try to tell us what to think and say," 118 Cassels responded:

That may sound, on the surface, like a one-sided ar-angement. But it happens to be exactly the system which the authors of the U. S. Constitution seem to have had in mind.

I'm going to send Dr. Mac a small personal check to help finance 'Radio Free America'--even though I strongly suspect that one of his first broadcasts from that offshore ship will be a fresh demand that I be fired. I believe in freedom, too, Dr. McIntire--for you AND me, and even for people who disagree with both of us. 119

Far from another demand for Cassels' dismissal, McIntire heaped praise on his old adversary: "Now Mr.
Cassels and I have found a common platform in which to save freedom for everybody and the development of mutual respect and personal responsibility."

Meanwhile, the station's technical difficulties stubbornly persisted and the ship's first broadcast was delayed a fourth time. The ceremony continued as planned, however. McIntire recited his Manifesto of Freedom, calling for radio and television stations to be delivered from government repression and control:

'In God We Trust.' Amen. On the occasion of the dedication of Radio Free America outside the Continental United States in the international waters of the broad Atlantic in the pursuit of liberty, this Manifesto is made for the glory of God. God is the author of liberty. He created man to serve Him. He made the earth to be used by man and has declared, 'Where the Spirit of the Lord is, there is liberty' (2 Cor. 3:17). Jesus Christ, His only begotten Son, declared, 'If the Son therefore shall make you free, ye shall be free indeed' (John 8:36). The faith which He gave and His commandment to go into all the world to preach the Gospel require freedom. The exhortation, therefore, of the Scripture has always been, 'Standfast therefore in the liberty wherewith Christ hath made us free' (Gal. 5:1). From the Mayflower Compact, drafted upon the high seas before the Pilgrims landed which bears the words, 'In the name of God. Amen,' to the Declaration of Independence at the birth of the United States of America which declared that all men were 'endowed by their creator with certain unalienable rights' to the Bill of Rights itself, whose First Amendment guarantees to all the people the free exercise of religion, the ideals of freedom have been the highest and noblest concepts for the securing of truth and justice and peace.

Without free speech, free religion, a free press it is impossible to have free government, a free people, or to resist the shackles of slavery and tyranny. Freedom is everybody's business. It is more precious than life—a gift of God and more valuable than all the treasures of a nation. The good ship Columbus rides the high seas under the protection of the Almighty God and
as a rebuke to a people who esteem lightly both their heritage of freedom and the blessings of liberty.120

As the ceremony concluded, a group of women followers representing McIntire's female radio listeners, presented him with an embossed plaque inscribed with the Mayflower Declaration. Throughout the rest of the day McIntire addressed journalists as they visited the Columbus in rotating shifts.

McIntire told reporters that government harassment would not prevent him from broadcasting his brand of religious programs. "We've got First Amendment rights on the seas," he said. "We thank God for the freedom we have on the Atlantic."121 He said his programs would involve a wide range of discussion, and he pledged to initiate "all the confrontations we possibly can. . . . We'll invite anybody who'll come out."122

Although McIntire avoided discussing specifics of his station's "technical difficulties"123 he indicated that the transmitter, which was hauled by truck from Philadelphia, may have been damaged in transit. Additional problems arose with overheating and with installation of proper grounding. The ship was also buffeted by a squall which was severe enough to dislodge the anchor. He said that the problems were not serious, however, and he would be on the air in a few days. He pointed out that it normally takes from nine months to a year and a half to start a new
station, but "Radio Free America" was accomplished in two months including acquisition of the ship. "We'll hear him soon," said one lady peering across the ocean from shore, "We've got faith in the reverend."124

McIntire would soon make believers out of FCC officials as well. They had balked when learning of his pirate ship plans, secure in the belief that the issue had died with the Supreme Court's refusal to review the case. But, as Louis Cassels said, "If the FCC thought that would end the matter, they don't know Carl McIntire."125

With the first broadcast due at any time, McIntire had his arch enemies "roasting nicely on a low flame."150 The FCC was clearly baffled over how to stop unlicensed broadcasts in international waters.

"If there's anything a bureaucrat despises it is novelty," wrote Sandy Grady of the Philadelphia Sunday Bulletin, "especially a situation not in the rulebook."126 Grady called an FCC official who admitted that he did not know how to counter McIntire's naval invasion:

"Is he on the air yet?" inquired Sam Saady of the FCC.

"Well no . . . but Rev. McIntire's spokesman says the ship is being prepared for operation off New Jersey very soon," reported Grady.

"Oh well, then," replied Saady, "We don't have any precedent for this. There were pirate ships off the coast of England, commercial stations, which were shut
down legally. And there are international rules about using radio frequencies at sea. But the Commission's policy isn't established... Maybe we should call the navy and declare his ship a down-range target."

Saady may have sounded frivolous, but the government was dead serious about stopping the pirate broadcasts. FCC attorney Daniel Ohlbaum said that if McIntire broadcasts from the ship the government would seek a court injunction, but "any action the agency takes depends on the facts and we don't have any." Ohlbaum added that if McIntire's ship was a registered U. S. vessel it would have to have a license to operate any radio equipment, as mandated by the Communications Act of 1934, no matter where it anchored. He said "a United States ship is part of United States territory and the laws of the United States apply to it." While McIntire's engineers ironed out the kinks in Columbus' transmitter, FCC agents maintained a two-week vigil awaiting the first peep from "Radio Free America." When the ship was finally ready to broadcast, McIntire ordered it moved twelve miles from shore because of confusion over where the U. S. territorial limit actually was. Before transmission began, McIntire led followers aboard in prayer from the ship's forecastle, "Our Father, may the transmitter be operating. And God, give us WXUR back." Then, at 12:23 P.M. on Wednesday, September 19, 1973, the first pirate radio broadcast in United States history crackled through the airwaves. "This is 'Radio Free
America,'" McIntire boomed, "The silence of the sea is broken at 1160 on the AM dial."\textsuperscript{131} McIntire told his listeners he would cruise up and down the coast toward New York, then down toward Washington so his signal could be clearly heard in the nation's capital. To make sure his signal was coming through, he asked his listeners to call in if they were receiving him. They flooded the Christian Admiral Hotel with calls from as distant as Cape Cod to report that they could hear him loud and clear.

With hot television lights beating down on his admiral's cap in the cramped radio room, he urged listeners to send money to support the new station and its determined mission "to get out from under FCC jurisdiction." He told his listeners:

Mr. FCC, we want the same kind of freedom as the printed press. You administered the supreme Draconian penalty to a little religious station because some of the established religious community didn't like our views. [Your] action squelches diversity and violates constitutional guarantees of free speech and press. The scarcity justification for licensing has long since vanished.

Imagine the day arriving when it's necessary for a preacher to leave the mainland of the United States of America and go out to sea to preach the word of God. We're not lawbreakers. We put our love for the Constitution first, our love for the First Amendment, our love for God, the author of liberty.\textsuperscript{132}

While Bishop V. J. Stephens of Kerala, India, took over the microphone, McIntire went out on deck for a breath of fresh ocean air.
"We did it!" he exclaimed, "It's going. It's working. We got our spiritual emphasis in, and our freedom emphasis. The Lord is giving us the opportunity we wanted. I've got a platform out here where we can really tear this country apart."133

Shortly after McIntire began transmitting, a Coast Guard cutter with an FCC agent aboard knifed through the water toward Columbus for easy monitoring of the pirate broadcasts.

"We have no jurisdiction in those waters," said Commander Laurence C. Kindbom of the Cape May station. "But we are authorized to aid other government agencies."134

But the FCC agent did not need a close approach of Columbus for good reception. McIntire's broadcasts penetrated U. S. airwaves from Maine to North Carolina and as far west as Utah.135 The broadcasts continued throughout the day along WXUR's traditional gospel programming lines.

McIntire intended to spend the night aboard ship, broadcasting around the clock, until he was informed by WHLW in Lakewood, New Jersey, that his transmission was interfering with its signal. He voluntarily closed down "Radio Free America" after a ten-hour stand.

WHLW, located at 1170 kHz AM, also contacted the FCC and demanded that the agency take action against McIntire. The transmissions also interfered with the signal of
station KSL in Salt Lake City, Utah, which broadcast at 1100 kHz. KSL also complained to the FCC.

McIntire planned a temporary shutdown until his engineers could readjust the equipment nearer the top of the AM band.

"There is no dearth of wavelengths, and we do not want to interfere with any other station," said McIntire.

He proposed to shift his broadcast frequency from 1160 to 1613. "That's way up at the top of the band," he stated, "There's nobody up there." 136

McIntire said readjusting the frequency would involve getting a new crystal, tuning the transmitter, and adjusting the antenna. He intended to resume broadcasting within a week; however, before the adjustments were completed, the FCC obtained a temporary restraining order blocking further transmissions.

In a complaint filed with the U. S. District Court in Camden, New Jersey, the FCC charged that the broadcasts violated Section 301 of the Communications Act of 1934, which specifies that "no person shall use or operate any apparatus for the transmission of energy or communications or signals by radio upon any vessel or aircraft of the United States" 137 without a license.

The FCC also cited a 1959 international agreement made in Geneva and ratified by the U. S. Congress in 1961. Article 7, Section 1 of the International Telecommunications
Convention prohibits unlicensed broadcasts by American ships anywhere.

Chief Judge Mitchell H. Cohen issued the restraining order on September 21, 1973. Judge Cohen also scheduled a hearing for November 1, 1973, on an FCC motion to make the order permanent.

McIntire immediately filed a motion to lift the order, asserting that he voluntarily stopped broadcasting before the order was issued.

"We closed the station so we would not interfere with the (other) stations," he said. "We are now in the process of readjusting the radio station so that we can get a wavelength where nobody will be interfered with."  

McIntire said the speedy action by the FCC demonstrated that the government was primarily opposed to what he says on the air.

"Imagine the government getting an injunction against me, when I'm not doing anybody any harm," protested McIntire. "You don't hurt anybody talking and preaching out on the ocean. ... I'm not importing dope or contraband."  

McIntire pointed out that ships used for illegal endeavors like gambling and prostitution constantly operate out of New York and Miami:
They come in and resupply and go out with another party. They've been doing it for years. Here I am engaged in speaking and singing and they (the government) are trying to stop me. My crime is that I want to talk. I represent the silenced people who want patriotism and love of God to be heard again. I'm being attacked because of what I preach. I have a message that I believe America needs, and I'm a preacher. I'm a defender of the free press. Freedom should extend to people with opposition views.

We're not afraid of ideas,
We're not afraid of freedom,
We're not afraid of men.

McIntire and his supporters circulated 500,000 petitions to restore the silenced radio ship; aiming for one and a half million signatures. He vowed that if the court did not remove the restraining order his lawyers would subpoena FCC Chairman Dean Burch, and take depositions from CIA officials to prove that the government also engaged in unlicensed broadcasts on the high seas. He said he would introduce the depositions as evidence against the government in the November 1 hearing.

He also considered acquiring another ship to further frustrate the government's efforts to silence him, but decided against the idea: "We could get another boat that was not registered in the U.S. but then they'd come at us from another angle."

He revived the possibility, however, when Judge Cohen denied his motion to lift the restraining order and indicated that the November 1 hearing might be postponed.
"I will not be silenced," proclaimed McIntire. "If we get tied up in court, I will get a foreign ship and park it out there and broadcast and the FCC won't be able to do a thing about it. We'll have two ships and they'll have two cases on their hands."\(^{143}\)

There was no need for another ship, however. The **Columbus** had accomplished her mission. McIntire's main objective to oppose the FCC in court had been achieved.

"The issue will be the Constitutional right of the people to know and the right of a preacher like myself to preach fully to the nation,"\(^{144}\) he declared.

His goal was to get the existing FCC licensing system" questioned and thrown out" so radio and TV stations could operate without licenses like the printed press.

"Newspapers have no licenses," he noted. "I operated for ten hours out there [at sea] without a license, and I felt as free as the Atlantic City Press. I felt as free as the newspapers."\(^{145}\)

McIntire accused the government's "unelected bureaucrats" of using their licensing power "to destroy free speech and First Amendment rights." He said FCC intimidation "has produced a general censorship over the land in television and radio."\(^{146}\) He proposed that Congress not only reduce the agency's power but also issue permanent wavelength assignments to broadcasters.
When the case of the United States of America and the Federal Communications Commission v. Reverend Carl McIntire et al. was heard on February 20, 1974, McIntire was again represented by Ben Cottone along with three other attorneys. His defense centered on the argument that the U.S. Government "has not come into court with clean hands," since "Radio Free Europe" and "Voice of America" are unlicensed broadcasts sponsored by the government.

"We're giving a million dollars a week to finance 'Radio Free Europe' from our tax funds," observed McIntire. "The government and the FCC have been involved in various violations in this field. Their hands are not clean at all." However, McIntire's "unclean hands" argument was quickly dismissed by Judge Cohen. His decision making the injunction permanent concluded:

"... It must be noted that the answer filed by the defendants does not deny any of the factual averments of the Complaint. Thus... the court must take these facts as admitted. Further... the equitable doctrine of 'unclean hands' will not be permitted to frustrate or thwart the purposes and policies of the laws of the United States. The overriding national interest in maintaining the orderly use of the nation's airwaves... as well as the adverse effects of defendant's unlicensed broadcasts upon the public interest... is such as to render the defense of 'unclean hands' unavailable to defendants. The temporary restraining order shall be and hereby is made permanent."

Thus, the case never provided McIntire an opportunity to dispute the FCC's licensing authority. The permanent
injunction ended McIntire's pirate contingency campaign and no further broadcasts ensued.

It appeared that McIntire's empire might rapidly sink after the injunction was issued. He relinquished the Columbus and its equipment in the face of a tax suit by Cape May, New Jersey, officials on his beachfront Bible Conference facilities and other properties. The city billed him for nearly $550,000 in taxes and interest. The loss of WXUR had already cost him $450,000 and his legal expenses surpassed $350,000. Fearing FCC action, many stations dropped his "Twentieth Century Reformation Hour," threatening McIntire with financial ruin.

When New Jersey State Tax Appeals Judge Carmine F. Savina, Jr., ruled that the Christian Admiral Hotel and its holdings were exempt from real estate taxes, however, a ray of hope appeared for McIntire. When the smoke finally cleared, McIntire and his organization had managed to survive. Today, the "Twentieth Century Reformation Hour" remains syndicated on radio; the Christian Beacon newspaper continues in circulation; and McIntire, now eighty-two, still makes regular appearances on radio and television.

But he never got a showdown with the FCC over the Fairness Doctrine, which was the real issue in the whole affair. The primary reason McIntire and his fervent flock chose the path to piracy through the Columbus and "Radio Free America" was specifically to challenge the doctrine.
While his efforts to do so were defeated, he never relented in his condemnation of the despised policy, exemplified in his hymn, "Song of the Fairness Doctrine":

Have you heard of the Fairness Doctrine
The Song of the FCC?
It's designed to protect opposing views
To prove that speech is free
But the song of the Fairness Doctrine
We regretfully contrue
Is out of tune entirely
With the Christian point of view

In the Song of the Fairness Doctrine
Discordant notes are heard
Because of raucous foreign sounds
Our heritage is blurred
Yes this Song of the Fairness Doctrine
Is pitched in a minor key
It gives full voice to the liberals
But leaves out you and me

Oh fellow Christian patriots
Let's raise our voice in song
Let's herald forth the word of God
And thus correct the wrong
We have a song of victory
To broadcast far and wide
Come on you Christian warriors
And join the winning side.
NOTES


5. Ibid.

6. Ibid.

7. Ibid., 13.

8. Ibid., 11.


14. Friendly, Good Guys, Bad Guys, 79.

15. Ibid.

16. Ibid.

17. Ibid.

18. Ibid.

19. Ibid.

20. Newsweek, 93.
21. Ibid.
23. Ibid.
24. Ibid.
26. Ibid.
28. Ibid.
32. Ibid.
33. Ibid.
34. Ibid.
35. Ibid.
40. Ibid.
41. Ibid.
42. Ibid., 2.
43. Ibid.
44. Ibid.
45. Ibid., 1.
46. Ibid.
47. Friendly, Good Guys, Bad Guys, 82.
49. Ibid.
50. Friendly, Good Guys, Bad Guys, 83.
51. Ibid.
52. Ibid.
53. Ibid.
54. Ibid., 84.
55. Ibid.
56. Ibid., 85.
57. Ibid.
58. Ibid.
59. Ibid., 78.
61. Ibid.
62. Friendly, Good Guys, Bad Guys, 85.
63. Ibid.
64. Ibid., 65.
65. Ibid.
66. Ibid., 86.


70. Ibid.

71. Ibid.


73. Ibid.

74. Ibid.

75. Friendly, Good Guys, Bad Guys, 88.


80. Ibid.

81. Friendly, Good Guys, Bad Guys, 82.


87. Friendly, Good Guys, Bad Guys, 86.
89. Witcover, Christian Beacon, 2.
94. Newsweek, 93.
96. Ibid., 3.
102. Ibid.
104. Tom Fax, Christian Beacon, 4.


127. Ibid.


131. Ibid.

132. Ibid.

133. Ibid.


137. Janson, Christian Beacon, 3.


140. Roak, Christian Beacon, 4.


144. Roak, Christian Beacon, 3.

145. Ibid.

146. Ibid.


149. Ibid.


152. Friendly, Good Guys, Bad Buys, 87.
CHAPTER IV

CONCLUSION

Although McIntire lost his battle with the FCC, support for his cause advocating constitutional rights for broadcasters continued to mount. He won favor among some members of Congress. Representative John E. Hunt, Republican of New Jersey and Representative John R. Rarick, Democrat of Louisiana, introduced bills to compel the FCC to renew WXUR's license. Several Congressmen backed them and North Carolina Senator Sam J. Ervin, Jr. rose to the Senate floor with a 6,000 word speech on November 14, 1974. Ervin denounced the revocation of WXUR's license as unconstitutional and declared that "it is high time broadcasting be afforded the benefits of the first amendment." The bills were never approved or voted on but Senator Ervin's impassioned speech heightened Congressional awareness of broadcasters' struggle for First Amendment protection.

Press attention also increased, though more out of a sense of self-preservation than a desire to rally around McIntire. The minister welcomed their support but berated their tardiness. The Christian Beacon observed: "The newspapers will speak up after (WXUR) is dead, but not before,
when they could have influenced public opinion for the welfare of the station."³

McIntire often expressed frustration at the printed press's lack of concern regarding broadcasters' struggle against government regulation. However, as one lawyer for a large metropolitan newspaper observed, broadcasters and newspapermen are natural competitors "and it's a little hard to get exercised about the competition getting gored."⁴

The print media felt secure, cloaked within the First Amendment, but broadcasters realized that government control of speech in any medium of communication was a universal danger. During a lecture at Columbia University in 1970, Eric Sevareid warned that the nonfreedom of the airwaves could be visited upon the newspapers. He said he could not understand why the newspapers were so unconcerned about government interference in broadcasting and how First Amendment freedoms were denied him and his colleagues in the broadcast press. He said the printed press's reaction was like saying, "your end of the boat is sinking."⁵

In 1972, the Miami Herald published two editorials attacking Patrick Tornillo, Jr., who was running for the Florida state legislature. Tornillo demanded reply space which the paper was legally obliged to grant under a never before invoked 1913 law. The legislation gave political candidates the right of free reply space to a newspaper's attack on his character or record. Tornillo delivered his
demand in person with statute in hand and accompanied by his lawyer. The Herald turned down Tornillo because in its journalistic judgment the candidate did not lack access and, in its legal opinion, the statute was a violation of the First Amendment.6

Tornillo lost the election decisively and brought suit against the Herald under the statute, which had never been challenged in court. The case attracted national attention because the Florida Supreme Court upheld the statute six to one and the U. S. Supreme Court review was perceived as a Fairness Doctrine test case for newspapers.

The Supreme Court heard Miami Herald v. Tornillo on April 24, 1974. The issue centered on whether the Florida statute was consistent with the First Amendment protection of the press. Professor Jerome A. Barron of George Washington University, representing Tornillo, argued that regulation of the press was permissible if it served the overriding public interest. He claimed that the Florida statute did not impair free expression but enhanced it. Barron's assertions were interchangeable with Solicitor General Erwin Griswald's language in Red Lion.

Attorney Daniel Paul, representing the Miami Herald, countered that Tornillo had not been censored by the newspaper and, as a public figure, did not need to rely on a paragraph in the Herald to answer attacks on him. Paul reasoned that compulsion to print equalled censorship under the
First Amendment. The ultimate issue, he argued, is who decides what goes into a newspaper, the editors of the Miami Herald or the Florida legislature.

The Supreme Court's position was evident before its decision was published when Justice Harry Blackmun made a comment during oral arguments: "I want to ask a question--No, I guess I want to make a statement--for better or for worse we have opted in this country for a free press, not fair debate."\(^7\)

Not surprisingly, Tornillo lost the case. In the Court's unanimous decision, Chief Justice Burger stated: "It has yet to be demonstrated how governmental regulation of this crucial process (the choice of material to go into a newspaper) can be exercised consistent with First Amendment guarantees of a free press."\(^8\) Newspapers throughout the nation breathed a sigh of relief, and finally became aware of the Fairness Doctrine's threat. Tornillo demonstrated why "you can't have a First Amendment and a fairness doctrine."\(^9\)

Broadcasters, interpreting the Tornillo case as a mirror image of Red Lion pointed to the contrasting language of the latter: "But . . . we hold that Congress and the [Federal Communications] Commission do not violate the First Amendment when they require a radio or television station to give reply time to answer personal attacks and political editorials."\(^10\) Broadcasters perceived a stunning
contradiction between the two cases, and communications
lawyers poured over the Tornillo decision in a futile search
for a Red Lion citation.

The omission was no accident. Several justices
wanted to explain why Red Lion and the broadcast industry
were not entitled to the Miami Herald's First Amendment pro-	ection. The explanation would have separated the two cases
because of the scarcity factor. Any language in Tornillo
reaffirming the Red Lion decision, however, would have cost
the votes of Justices Douglas and Stewart. Douglas, who
strongly supported the Herald, made it clear that he would
not vote for an opinion that reinforced the Fairness Doc-
trine.

The focal point in the contradiction between the two
cases is scarcity. The reasoning is based on the premise
that because of frequency limitations, radio and television
can only operate with government approval, whereas print is
open to all. This rationale, however, was destined to col-
lide with reality, since there are far more radio and tele-
vision stations throughout the country than newspapers. By
the early 1980's that collision was imminent.

In 1982, WTVH in Syracuse, New York, aired a series
of editorials advocating the construction of the Nine Mile
Point II nuclear plant as a sound investment for New York.
The Syracuse Peace Council filed a complaint against the
Meredith Corporation, owner of WTVH, accusing the station of
violating the Fairness Doctrine by not presenting opposing views. The Commission determined that the station had presented a controversial issue of public importance and had failed to air any contrasting viewpoints. In 1984, the FCC concluded that WTVH had not met its obligations under the Fairness Doctrine.

The Meredith Corporation petitioned the Commission to reconsider its decision. Meredith asserted that it had aired balanced programming on the issue and questioned whether it was a controversial issue in the first place at the time it was aired. Meredith accused the FCC of violating its constitutional rights by its application of the Fairness Doctrine in this case. Citing the numerous broadcast outlets available in the Syracuse market, Meredith maintained that the scarcity rationale did not apply and the FCC's invocation of the doctrine "had a distinct and chilling effect on its freedom of speech."¹¹

Indeed, the 1984 Supreme Court ruling in FCC v. League of Women Voters determined that scarcity no longer applies in modern broadcasting.¹² The Court sided with people like former FCC Chairman Mark Fowler who "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."¹³

The Court indicated that it may be willing to re-assess its traditional reliance on spectrum scarcity upon
a "signal" from the Congress or the Commission "that technological developments have advanced so far that some revision of the system of broadcast regulation may be required."14 That signal came with the FCC's 1985 Fairness Report. The Commission's comprehensive report found that in recent years there had been explosive growth in both the number and types of outlets providing information to the public. Hence, the Supreme Court's concern that listeners and viewers have access to diverse information sources was relieved.

The Commission demonstrated that in 1985 there were 9,766 radio stations nationwide, a 48% increase since the date of the Supreme Court's decision in Red Lion. The number now stands at 10,128; a 54% increase since the 1969 decision. The Commission also found that the growth in FM stations had been particularly dramatic. They found that FM service had increased 113% since Red Lion. The Commission further noted that the number of radio voices in each local market had grown. The Commission predicted that technological advances in spectrum efficiency would allow the number of radio outlets to continue to increase.

Regarding television stations the Commission documented that in 1985 the overall total number was 1,208; an increase of 44% since Red Lion. Today that number has increased to 1,315; a 57% increase since 1969. The Commission determined that UHF stations had grown considerably faster. They increased 113% since Red Lion. The FCC also
found that cable television had "increased exponentially during the period 1969 to 1985," and had significantly enhanced the amount of information available to the public. The Commission demonstrated that since 1974 the number of cable subscribers had increased by 345% and the number of cable systems increased 111%.

Based upon its assessment of the marketplace, the Commission predicted that cable television expansion would continue. It further determined that there had been a significant change in the nature of cable service as the number of channels available to individual subscribers had increased dramatically. In 1969, only one percent of all cable systems were capable of carrying more than twelve channels. By 1987, 69% of all cable systems and 92% of cable subscribers had this capacity. Additionally, the Commission concluded that the amount of information available to an individual viewer on a single cable system had increased. The statistical evidence suggests that cable television is "the most dynamic video medium today;" that by 1990, 90% of television households will have access to cable; and that 54% will be subscribers.

The FCC report noted that the present telecommunications market offers individuals numerous information outlets accessible daily, and that the market is actually more varied than the print media. While there are 11,443 broadcast stations nationwide, recent evidence indicates that
there are only 1,657 daily newspapers overall. On a local level, 96% of the public has access to five or more television stations while only 125 cities have two or more local newspapers.

Moreover, the Commission evaluated the contribution of new electronic technologies unavailable when *Red Lion* was decided. These include low power television, video cassette recorders and satellite master antenna systems (SMATV). The Commission found that each of these new services were significantly contributing to the diversity of information available to the public. Additional electronic services such as direct home to satellite technology, satellite news gathering, FM radio subcarriers, teletext, videotext, and home computers "have the potential of becoming substitute information sources in the marketplace of ideas." Some of these technologies, such as teletext and videotext, are beginning to merge characteristics of electronic media with those of print media, further blurring the lines between them.

Based upon the compelling evidence of the record, the FCC in its *1985 Fairness Report* found that the Fairness Doctrine did not serve the public interest. Evaluating the explosive growth in the number and types of available information services in the marketplace, the Commission noted that the public has "access to a multitude of viewpoints without the need or danger of regulatory
intervention." The Commission also determined that the Fairness Doctrine "chills" speech, finding that "in stark contravention of its purpose, (the doctrine) operates as a pervasive and significant impediment to the broadcasting of controversial issues of public importance." The agency decided that enforcement of the doctrine acts to inhibit the expression of unpopular opinion; places the government in the intrusive role of scrutinizing program content; creates the opportunity for abuse for partisan political purposes; and imposes unnecessary costs upon both broadcasters and the Commission. The report concluded that "there is no longer a scarcity in the number of broadcast outlets" and, therefore, no longer any need for the Fairness Doctrine. The Commission stated:

We believe that the fairness doctrine can no longer be justified on the grounds that it is necessary to promote the First Amendment rights of the listening and viewing public. Indeed, the chilling effect on the presentation of controversial issues of public importance resulting from our regulatory policies affirmatively disserves the interest of the public in obtaining access to diverse viewpoints. In addition, we believe that the fairness doctrine, as a regulation which directly affects the content of speech aired over broadcast frequencies, significantly impairs the journalistic freedom of broadcasters.

While the 1985 Fairness Report dispelled the scarcity justification for the Fairness Doctrine and questioned its constitutionality, the report fell short of abolishing the policy. The Commission decided to continue enforcing the doctrine pending judicial or Congressional determination.
on whether the policy was codified in law. Therefore, the FCC denied Meredith's request for reconsideration and stood by its decision that WTVH had violated the Fairness Doctrine.

Meredith appealed the decision in the District of Columbia U. S. Circuit Court of Appeals. The Court rejected Meredith's contention that the Commission had erred in determining that WTVH had violated the doctrine. However, it asserted that the Commission had acted improperly in holding that "Meredith violated the doctrine without responding to the broadcaster's constitutional arguments. The Court stated that the Commission, in its 1985 Fairness Report:

... has already largely undermined the legitimacy of its own rule. The FCC has issued a formal report that eviscerates the rationale for its existing regulations. The agency has deliberately cast grave legal doubt on the fairness doctrine ... (in) a formal fashion.22

The court pointed out that it had recently determined in Telecommunications Research and Action Center v. FCC that the Fairness Doctrine was not codified in Section 315 of the 1934 Communications Act or anywhere else, and the Commission can no longer avoid the constitutional issues in the Meredith case. The Court remanded the proceedings and directed the Commission to consider the constitutional and public interest challenges to the doctrine. After seven months of further study, the FCC abolished the Fairness Doctrine on August 4, 1987. The Commission concluded:
The court in Meredith Corp. v. FCC 'remanded the case to the FCC with instructions to consider (Meredith's) constitutional arguments.' In response to the Court's directive, we find that the fairness doctrine chills speech and is not narrowly tailored to achieve a substantial government interest. We therefore conclude ... that the fairness doctrine contravenes the First Amendment and thereby disserves the public interest ... As a consequence, we determine that the editorial decision of station WTVH to broadcast the editorial advertisements at issue in this adjudication is an action protected by the First Amendment from government interference. Accordingly, we reconsider our prior determinations in this matter and conclude that the Constitution bars us from enforcing the fairness doctrine against station WTVH.

We further believe, as the Supreme Court indicated in FCC v. League of Women Voters of California, that the dramatic transformation in the telecommunications marketplace provides a basis for the Court to reconsider its application of diminished First Amendment protection to the electronic media. Despite the physical differences between the electronic and print media, their roles in our society are identical, and we believe that the same First Amendment principles should be equally applicable to both. This is the method set forth in our Constitution for maximizing the public interest; and furthering the public interest is likewise our mandate under the Communications Act. It is, therefore, to advance the public interest that we advocate these rights for broadcasters.

ACCORDINGLY IT IS ORDERED that the motion for Leave to File Comments Out-of-Time of the American Civil Liberties Union and the Motion to Submit Late-Filed Comments filed by the Safe Energy Communication Council ARE GRANTED.

IT IS FURTHER ORDERED, that the Motion for Leave to File Supplement of Meredith Corporation IS GRANTED and the supplement IS ACCEPTED.

IT IS FURTHER ORDERED, that the Petition for Reconsideration filed by Meredith Corporation IS GRANTED to the extent indicated herein, and the Order adopted October 26, 1984, is VACATED.

IT IS FURTHER ORDERED, that the Complaint of the Syracuse Peace Council IS DENIED.
IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.23

In a separate statement filed on the same day the Memorandum was issued, FCC Chairman Dennis R. Patrick declared:

Our action today should be cause for celebration. By it, we introduce the First Amendment into the Twentieth Century. Because we believe it will serve the public interest, we seek to extend to the electronic press the same First Amendment guarantees that the print media have enjoyed since our country's inception. That is a step of fundamental significance—and long overdue.24

Patrick said the argument that the founding fathers did not intend for First Amendment guarantees to extend to the electronic press "flies in the face of the First Amendment itself," He said the reason the Constitution has survived is because it is a "living document" with the capability to adapt to changing conditions. The Constitution, Patrick said, is as relevant today as it was 200 years ago because it focuses attention on "fundamental principles of freedom, not upon detailed proscriptions bounded by historical circumstance."25

Patrick also addressed the scarcity argument saying that with over 11,000 broadcasters operating, the chances of biased views not being countered are small and that the principles of sound journalism would "preclude the abuse of freedom in the vast majority of cases."26 Patrick noted that when the founding fathers gambled the future of the
Republic on the First Amendment in 1791 there were only eight daily newspapers being published in the United States. He said our democracy requires faith in a free marketplace of ideas which will sustain political wisdom and virtue without government intervention. The Chairman concluded:

Today, we reaffirm our faith in the American people—our faith in their ability to distinguish between fact and fiction without any help from the government. Yes, there are risks, but we as a people have elected to bear the risks of freedom, rather than the greater risks which attend government control of the press. Today, we reaffirm that election.27

The Commission's sweeping decision, however, did not resolve the Fairness Doctrine dispute. Congress attached a provision to the 1988 federal budget that would have made the doctrine law. President Reagan, who had previously vetoed a Fairness Doctrine bill in 1987, refused to approve the budget until the provision was dropped.28 Proponents of the doctrine are just as determined to codify the doctrine into law. A bill sponsored by Senator Hollings of South Carolina, now pending before Congress, would accomplish that aim. Meanwhile, the incoming Bush Administration has not addressed the issue and it remains questionable whether the new administration will endorse the Reagan stance.
NOTES


5. Ibid.


7. Ibid., 194.

8. Ibid.


10. Friendly, Good Guys, Bad Guys, 194.


13. Ibid.

14. Ibid.

15. Ibid., 52.

16. Ibid., 53.

17. Ibid., 53.

18. Ibid., 55.
19. Ibid.
20. Ibid.
22. Ibid., 10.
23. Ibid., 73-74.
25. Ibid.
26. Ibid.
27. Ibid., 2.
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