

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re
FORMULATION OF APPROPRIATE FURTHER REGULATORY POLICIES CONCERNING CIGARETTE ADVERTISING AND ANTISMOKING PRESENTATIONS } Docket No. 19050

REPORT AND ORDER

(Adopted December 15, 1970; Released December 16, 1970)

BY THE COMMISSION: COMMISSIONER BARTLEY CONCURRING AND ISSUING A STATEMENT; COMMISSIONER JOHNSON CONCURRING IN PART AND DISSENTING IN PART AND ISSUING A STATEMENT; COMMISSIONER H. REX LEE CONCURRING IN THE RESULT.

1. On October 15, 1970, the Commission issued a notice to interested persons that comments may be submitted on appropriate further regulatory policies to be adopted with respect to two issues: (1) the possible fairness doctrine obligations, if any, in the situation where a broadcast licensee, which does not present cigarette commercials, broadcasts announcements to the general effect that cigarette smoking is hazardous to health and persons should therefore not commence or continue smoking (see complaint of Michael Handley, dated August 25, 1970), and (2) the public interest obligations of the broadcast licensee after January 1, 1971, when all cigarette advertising on broadcast media will cease (see petition for rule making filed October 13, 1970, by Action on Smoking and Health (ASH)). Comments were submitted by the Tobacco Institute, the Surgeon General, the American Cancer Society, National Tuberculosis & Respiratory Disease Assoc., Mr. Warren Braren, and several broadcasters or broadcast associations (see Appendix A for a list of these broadcasters). We shall briefly sketch the basic thrust of the comments, and then turn to our treatment of the issues.

2. The main thrust of the broadcasters' comments is that, after termination of the cigarette commercials, the Commission should not, and cannot properly, require licensees to present anti-smoking presentations, including the prescription of amounts of time to be devoted to such presentations. The comments rely on Commission reports such as the *Report on Editorializing by Broadcast Licensees*, 13 FCC 1246 (1949), and *1960 Programming Statement*, 20 Pike & Fischer, Radio Regulation, 1902, 1915, to the effect that it is up to individual licensees to make judgments as to what issues or programming is to be presented. On the question as to whether, if a licensee did present messages pointing up the health hazard in smoking, it was required under the fairness doctrine to afford time for spokesmen to urge the opposite (i.e., that

smoking is not hazardous), the licensees split on their comments. Some, pointing to prior Commission precedents, stated their belief that fairness would require the presentation of pro-smoking viewpoints. Several others, however, stated their judgment and belief that in view of developments leading to Public Law 91-222, the general issue of cigarettes being a health hazard can reasonably now be regarded as no longer a controversial one.

3. ASH urges the adoption of a rule providing that "the obligation of a licensee to devote a significant amount of time to the presentation of views and information on the health hazards of cigarette smoking continues notwithstanding that it has discontinued the broadcasting of cigarette commercials sponsored by tobacco companies." It asserts that there is support for such a rule in the legislative history of the 1969 Cigarette Labeling and Advertising Act, and cites three grounds for the rule: (1) the strong public interest, in view of the health hazards involved; (2) the fact that "since the inception of commercial television, the viewing public has been bombarded by cigarette commercials," and the proposed rule is thus necessary to make up for the "decade of one-sided presentations and their lingering remnants . . ." (Pet. p. 7); and (3) that broadcasts presenting smoking in a favorable light (e.g., the hero smoking in some movie) ". . . will continue even after the Congressional ban on sponsored cigarette advertisements, as will so-called 'hidden commercials' now being promoted by the tobacco industry" (Pet. p. 10). ASH avers that smoking is still a controversial issue of the greatest importance.

4. The Tobacco Institute, on the other hand, urges that the present specific obligations of broadcast licensees to devote a significant amount of time each week to materials expressing the view that smoking is hazardous to health will not be applicable after January 1, 1971, because cigarette advertising on broadcast media will cease as a result of the Public Health Cigarette Smoking Act of 1969. It disputes ASH's supporting grounds, pointing out that broadcasters for almost three years have been informing the public concerning the health hazards involved. It further states that there is not the slightest basis for the "reckless" charge that the tobacco industry "is now taking steps to get hidden commercials on the air in violation of the spirit of the 1969 cigarette act." (ASH Pet. p. 10). The Institute argues that it would be wholly improper for the Commission to scrutinize programming content to ". . . search out broadcasts ostensibly presenting smoking in a 'favorable light.'" (p. 20). It argues that after January 1, 1971, the public interest obligations of licensees with respect to the issue of cigarette smoking will be the same as with respect to all other matters of public concern; that licensees have discretion to determine that matters of public interest should be broadcast from among the multitude of such matters competing for broadcast time. Finally, it states that if licensees decide to exercise their discretion to carry anti-smoking materials, they will have an obligation under the fairness doctrine to provide reasonable opportunity for the presentation of materials expressing the view that smoking may not be hazardous to health. It urges that this is also the case in the period until January 2, 1971, if a licensee does not carry cigarette commercials but does carry anti-smoking messages.

DISCUSSION

5. We shall discuss the first question set out in paragraph 1 and then turn to the second question. However, the two questions are closely related, and thus the discussion here is also necessarily pertinent to our disposition of the second issue.

6. The first issue is the possible fairness doctrine obligations, if any, in the situation where a broadcast licensee, which does not present cigarette commercials, broadcasts announcements to the general effect that cigarette smoking is hazardous to health and persons should therefore not commence or continue smoking. As shown by the complaint of Mr. Michael Handley, that issue is presented today, since several stations have already dropped cigarette commercials but have continued to present general anti-smoking messages. Clearly, the issue becomes even more important after January 1, 1971, when all stations will cease carrying cigarette commercials.

7. We believe that this issue is to be disposed of under the accepted, long established principle in the general fairness area—namely, that it is up to the licensee to make a reasonable, good faith judgment on the basis of the particular facts before him as to the possible application of the fairness doctrine, and specifically whether he has presented one side of a controversial issue of public importance. Thus, we believe that little is gained here by citation of previous Commission rulings¹ or by references to past testimony before the Congress. The critical issue here is the licensee's judgment *today*—directed to the circumstances before him.

8. The Tobacco Institute argues that the licensee's judgment is constrained—that we should hold that if a licensee presents messages going to the general health hazard (e.g., earlier mortality; lung cancer; emphysema), with a call to stop smoking or not to begin, the broadcaster must provide a reasonable opportunity for the view that smoking may not be hazardous to health. Of course, broadcasters may, if they wish, present such a view, in light of their wide discretion.² But as stated, a number of broadcasters who filed comments in this proceeding have set forth their judgment that in light of developments, the general issue of smoking being a health hazard is no longer controversial. We decline to upset that judgment as unreasonable.

9. For, clearly, there have been most significant developments since the Surgeon General's 1964 Report which touched off a substantial controversy. Continuing massive studies have been made or completed in the ensuing years. The results of these studies were reported by HEW to the Congress pursuant to its direction in the 1965 Federal Cigarette Labeling and Advertising Act. Senate Report No. 91-566, 91st Cong., 1st Sess., p. 3, on the Public Health Cigarette Smoking Act of 1969, sets forth the significant conclusions from the HEW reports ("The Health Consequences of Smoking, 1967, 1968 and 1969"). These reports constitute overwhelming evidence on the general public

¹ E.g., *Cigarette Advertising*, 9 FCC 2d 921 (1967); *Metromedia, Inc.*, 10 FCC 2d 16 (1967); *Letter to Mr. Larry Jones*, November 2, 1967, 8330-S; C9-1304; *Letter to the Tobacco Institute, Inc.*, December 21, 1967, Ref. 3300.

² Further, as we stated in our Notice of Proposed Rule Making in Docket No. 18434, 24 F.R. 1959, 1962, n. 30, the existence of governmental reports does not bar dissent thereto or the presentation of contrary views.

health aspect of cigarette smoking.³ We note further, as did the broadcasters referred to above, that Congress has acted on the basis of the reports. It has changed the labeling requirement from the phrasing, "Caution: Cigarette Smoking May Be Hazardous To Your Health" to the much stronger one: "Warning: the Surgeon General Has Determined That Cigarette Smoking Is Dangerous To Your Health." It has barred all cigarette advertising on electronic media. And, both the cigarette industry and the broadcasting industry (the latter with a different phase-out period) agreed to such a bar during the legislative process leading to the 1969 Act. See Senate Report, *supra*, at pp. 9, 11. It is difficult to reconcile the cigarette industry's acquiescence in the 1969 ban, with its contention here that the broadcaster, who presents a general announcement that smoking constitutes a health hazard and therefore people should not begin smoking or should stop, cannot reasonably reach the judgment that the matter is not controversial—that he need not present offsetting material to the effect that smoking is no health hazard and people should commence or continue to smoke.

10. We wish to make clear that we are not issuing any blanket ruling covering every existing or future anti-smoking announcement, and could not properly do so, outside the context of a specific complaint. Our holding is directed to only one *general* aspect, albeit a most important one—that cigarette smoking is a hazard to public health (i.e., the main cause of lung cancer; the most important cause of chronic bronchitis or pulmonary emphysema, etc.). While that facet may now be adjudged by the broadcaster no longer to be a controversial issue, there can clearly be most substantial controversies as to other aspects (e.g., particular studies or statistics; what remedial actions should be taken). As to such aspects, the fairness doctrine would be applicable, and we concur with CBS' comments in this respect (p. 4, CBS Comments):

The Commission should leave to the judgment of licensees whether announcements dealing with the health hazards of cigarettes, which are broadcast after January 1, 1971, raise obligations under the fairness doctrine such as to require presentation of opposing views. These judgments must rest on the content and frequency of the announcements broadcast as well as the licensee's overall programming. In any event, it should be the licensee's initial responsibility to identify any issues raised and choose the appropriate reply spokesman where necessary. Those opposing any such announcements or seeking opportunities to respond would have available to them the Commission's normal procedures by which to seek redress.

11. The Tobacco Institute argues (p. 31) that refusal by the Commission to require licensees to afford time to spokesmen to present the viewpoint that smoking may not be hazardous would raise grave constitutional questions under *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969), since it would involve "the official government view dominating public broadcasting" and a discriminatory refusal to require the licensee to broadcast certain views which have been denied access to the airways" (*Red Lion*, at p. 396). The argument is, we believe, specious. If broadcasters presented a Public Health Service

³ Thus, in his comment in this proceeding, the Surgeon General stated it "... is the view of the Public Health Service that cigarette smoking, beyond controversy, is indeed hazardous to health."

bulletin urging that aspirin be kept out of the reach of children and citing statistics as to deaths caused in this way, such broadcasters would not be violating the Constitution if they rejected a request to present the viewpoint that aspirin poses no hazard in this respect. We realize that the example is far-fetched; our point is that the broadcaster can make judgments in this area and that if the judgments are reasonable, they do not constitute a violation of either the Act (Section 315(a)) or the Constitution.

12. The Tobacco Institute also cites (p. 34) *Banzhaf v. F.C.C.*, 405 F. 2d 1082 (C.A.D.C. 1968), *certiorari denied*, 396 U.S. 842 (1969), in support of its argument. But that case holds squarely against the Institute's position. The Court there noted (*id.* at pp. 1091-93) that the Commission's holding was based really on the public interest standard rather than the fairness doctrine, and that that standard clearly comprehended a public health consideration such as this. See also *Retail Store Employees Union v. F.C.C.*, F. 2d (C.A.D.C., 1970, S1.Op., p. 18, n. 58. In the latter respect, the Court stated (405 F. 2d at p. 1097) :

... The danger cigarettes may pose to health is, among others, a danger to life itself. As the Commission emphasized, it is a danger inherent in the normal use of the product, not one merely associated with its abuse or dependent on intervening fortuitous events. It threatens a substantial body of the population, not merely a peculiarly susceptible fringe group. Moreover, the danger, though not established beyond all doubt, is documented by a compelling cumulation of statistical evidence. The only member of the Commission to express doubts about the validity of its ruling had no doubts about the validity of its premise that, in all probability, cigarettes are dangerous to health. [Footnote omitted] ⁴

The Court thus described the Commission's ruling as "... a public health measure addressed to a unique danger authenticated by official and congressional action . . ." (*id.* at p. 1099).

13. Most significantly, the Tobacco Institute argued in that case (Br. pp. 61-63) that the Commission had erred in holding that a licensee who has carried the cigarette commercials has covered one side of the issue on the behalf of the cigarette companies and is thus under no obligation to present further pro-smoking materials. It argued that the commercials do not discuss the health hazard and indeed could not in view of FTC policies; that in any event they "certainly do not contain the explicit and detailed discussion of the issue which the FCC contemplates will be presented on behalf of the anti-smoking point of view"; and that therefore the FCC had no right to weight the scales in this fashion. The Court rejected this argument on the basis of its above-described public health rationale (*id.* at p. 1103).

... the Commission did not abuse its discretion in refusing to require rebuttal time for the cigarette manufacturers. The public health rationale which sup-

⁴The Court then quoted the following statement of this member (*id.* at p. 1098) : Cigarette smoking is a substantial hazard to the health of those who smoke which increases both with the number of cigarettes smoked and with the youthfulness when smoking is started. Cigarette smoking increases both the likelihood of the occurrence and the seriousness of the consequences of various types of cancer, of cardiovascular failures and of numerous other pathologies of smokers. These conclusions are established by overwhelming scientific evidence, by the findings of Government agencies, and by Congressional reports and statute. . . . The evidence on this subject is not conclusive, but scientific evidence is never conclusive. All scientific conclusions are probabilistic. . . . Furthermore, law does not and cannot demand conclusive proof. Even in a capital case, the law requires only proof beyond a reasonable doubt. . . . The evidence as to the dangers of cigarette smoking to the smoker is clearly beyond a mere preponderance and approaches proof beyond a reasonable doubt.

ports the principal ruling would hardly justify compelling broadcasters to inform the public that smoking might *not* be dangerous. . . .

14. We turn now to the second issue in our inquiry—the public interest obligations of the licensee after January 1, 1971. The initial consideration is the request of ASH that broadcasters be required by rule to devote a significant amount of time to the presentation of views and information on the health hazards of cigarette smoking. We find no basis for such a rule in any of the grounds advanced by petitioner. Thus, as to the argument that there have been decades of cigarette commercials, we note that during the last three years anti-smoking material has been presented by licensees on a virtually daily basis, including during periods of maximum listening and in reasonable ratio to the commercials (see *NBC, Inc.*, 16 FCC 2d 956 (1969)). There is no showing before us that this has not served to inform the public to a substantial degree of the health hazards of smoking—that prior decades of cigarette advertising call for something beyond this recent, three-years substantial effort. Similarly, there is no showing or basis before us to act upon the ASH's bare claim that the tobacco industry is planning to present "hidden commercials."⁵ Nor do we believe that we should act to require anti-smoking presentations because the stars on some TV shows or in some movies carried on television smoke cigarettes. This would involve intensive scrutiny by the Commission of entertainment programs to determine whether smoking was presented "in a very favorable light" (ASH Pet., p. 10): in the case of movies particularly, it would involve a balancing of whether the hero or "heavy" is shown smoking, and to what extent. Were we to adopt this approach, we would be examining a multitude of drama and other entertainment programming with respect to a variety of every-day occurrences (e.g., a person taking a drink; driving a high-powered automobile).

15. Finally, ASH urges that the health hazard in smoking is so great that the public interest requires adoption of the rule which it urges. In support, it cites the legislative history of the 1969 Act; we have examined that legislative history and find that it does not support petitioner's position (see, e.g., testimony of Chairman Hyde, Hearings Before the House Committee on Interstate and Foreign Commerce, on H.R. 643, 91st Cong., 1st Sess., pp. 209, 226). In any event, the law in this area is well established. There are a number of pressing, important matters to which the licensee as a public trustee could direct its attention—deaths caused by drunken driving; the health consequences of various forms of pollution; the Indo-China War; racial strife, etc. With the cessation of the cigarette commercials, it would be inappropriate to single out this one matter as the basis for a rule such as proposed by ASH.

16. While no rule is thus appropriate, we do not believe that our decision should end without further treatment of the licensee's responsibility in this general area. Indeed, in view of the comments filed

⁵ If such abuses do occur, there will be a clear need for immediate and prompt remedial action. See *Letter of Chairman Maguason to FTC Chairman Kirkpatrick*, *Broadcasting Magazine*, November 23, 1970, p. 46. However, the appropriate action in such an eventuality would be to secure full and effective compliance with the 1969 law, and not to deal with it by offsetting anti-smoking messages.

by the broadcasters and our prior holdings (e.g., *Letter to Mr. Soucie (Friends of the Earth)*, 24 FCC 2d 743, 750-51 (1970)), further discussion is warranted.

17. As we made clear in *Letter to Mr. Soucie (Friends of the Earth)*, 24 FCC 2d at 751, n. 9, we agree that this is an area committed to the licensee's discretion—that the Commission cannot properly compile any priority list. We have not done so, and have no intention of issuing a list of "must" issues. At the same time, it is simply not correct that the broadcaster has unlimited discretion to use his faculties as he wishes. As the *Red Line* case stresses (*supra*, at p. 394), the licensee is ". . . given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern." See *In re Democratic National Committee*, 25 FCC 2d 216, 221-223 (1970); *Report on Editorializing*, 13 FCC 1246, 1249 (1949). The broadcaster is of course confronted with a host of issues; must make judgments as to which to cover and in what way; and clearly has very great discretion in making judgments in this area. But, as a matter of common sense and knowledge, there do emerge issues of overriding public concern. Such issues should become readily apparent to a licensee in the course of his "diligent, positive and continuing effort" to discover and serve the needs and interests of his community. In short, the licensee cannot ignore such matters and claim at renewal time that it is meeting the needs and interests of its area—that it is fulfilling its "crucial" duty spelled out in *Red Lion*. We have held in the *Democratic National Committee* ruling, *supra*, that it is the broadcaster as public trustee—not the affluent or powerful interest—who determines the great issues on which the public must be informed; but that means that *Red Lion*, with its concept of public trustee, is controlling, and that "matters of great public concern" are given suitable time and attention. See par. 18, *infra*.

18. A few broadcasters and the Tobacco Institute, in effect, urge that cigarette smoking is no longer a matter "of great public concern." See p. 15, Tobacco Institute comments (smoking does not have the "same prominence" as other national problems). We note that this contention runs counter to the reports on which Congress has acted (see para. 9, *supra*) and indeed the very fact that Congress has acted in the forceful manner of Public Law 91-222. See also the following portion of our Notice in Docket No. 18934:

It is estimated that ". . . within ten years the death toll from these two diseases [emphysema and chronic bronchitis], which doubles every five years, could be well over 80,000." (The Dark Side of the Marketplace, 1968, by Senator Warren G. Magnuson and Jean Carper, p. 187). The annual number of deaths in the United States from cancer of the lung increased from 18,313 deaths in 1950 to 48,483 in 1965. [footnote omitted]. It is stated that "by 1976, unless the epidemic is checked, twice that number or 80,000 yearly, will die of the disease" (*ibid*). The 1967 Report indicates that cigarette smoking is associated with as much as one-third of all deaths among men between 35 and 60 years of age

to give but one further example, the comments of the Surgeon General state:

There is nothing, in our opinion, which offers a greater or more immediate opportunity of reducing illness and premature death in this country than a national effort to reduce cigarette smoking. Radio and television can make an

important contribution to this effort through their acceptance of public service announcements from Government and the voluntary agencies. If everyone were to give up cigarettes, be it remembered, early deaths from lung cancer would virtually disappear; there would be a substantial decrease in early deaths from chronic bronchopulmonary disease and a decrease in early deaths of cardiovascular origin⁶

Further, the question whether the licensee who fails to treat this subject has served the public is one which can be definitively assessed only at renewal time when the licensee's *overall* public service performance effort is evaluated. We also note our full agreement with the proposition that which public service subjects are to be covered and how is for the licensee's judgment, based on its evaluation in light of the competing public service demands.

CONCLUSION

19. We have afforded general guidance to the extent reflected above. We dismiss the ASH petition for rulemaking and deny the relief requested by the Tobacco Institute. The proceeding is herewith terminated with adoption of this Report. **IT IS THEREFORE ORDERED, That the petition filed by ASH IS DISMISSED, and the proceeding IS TERMINATED.**

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

APPENDIX A

BROADCASTERS OF BROADCAST ASSOCIATIONS SUBMITTING COMMENTS IN DOCKET No. 19050

American Broadcasting Companies, Inc.
Columbia Broadcasting System, Inc.
Corinthian Broadcasting Corp.
Gill Industries
Idaho Broadcasting Company

Joint comments:

Leake TV Inc.
Hubbard Broadcasting, Inc.
Rust Craft Broadcasting of New York, Inc.
WMFS, Inc.
Johnny Appleseed Broadcasting Co.
Independent Music Broadcasters
WJAG, Inc.
Capitol Broadcasting Co.
National Association of Broadcasters
National Association of Educational Broadcasters
Metromedia, Inc.
Orion Broadcasting Company, Inc.
Joint comments:
Newhouse Broadcasting Corporation
Columbus Broadcasting Co., Inc.
Palmer Broadcasting Co.
WOC Broadcasting Co.

⁶The American Cancer Society comment noted that the Clearinghouse on Smoking and Health estimates "that 1,200,000 youngsters will become cigarette smokers in 1970." The comments of the National Tuberculosis and Respiratory Disease Association notes that ". . . a recent study by the PHS indicates that there has been a recent rise in the number of teenagers who smoke."

North Carolina Association of Broadcasters

Joint comments:

Reams Broadcasting Corporation
Reams Communications Corporation
Time-Life Broadcast, Inc.
WKY-TV Systems, Inc.

Sandia Broadcasting Corp.
Sonderling Broadcasting Corp.
Storer Broadcasting Company
Tobacco Institute, Inc.
Van Curler Broadcasting Corporation & WLKY-TV
WGAL, Tv, Inc.
WJAC, Inc.
Westinghouse Broadcasting Co.

CONCURRING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I concur to the extent that after the effective date of the law (January 1, 1971), a licensee may well determine that serving the public interest requires that it continue the presentation of matter regarding the health hazards involved in cigarette smoking, and that it is likewise within the discretion of a licensee to adjudge that controversial issues of public importance exist on the subject, requiring the presentation of contrasting views in whatever forms of programming he deems most appropriate.

SEPARATE STATEMENT OF COMMISSIONER NICHOLAS JOHNSON,
CONCURRING IN PART AND DISSENTING IN PART

Cigarette commercials have been used on radio and television for years. Many people—including representatives of the broadcasting and tobacco industries—believe these commercials bear a major share of the responsibility for the increase in cigarette consumption from 138 cigarettes per person in 1913 to over 4,000 cigarettes per person per year during the 1960's!

Following action by the U.S. Surgeon General¹ and the Federal Trade Commission,² the Federal Communications Commission—in response to the insistence of a dedicated single citizen, John Banzhaf—held that the "Fairness Doctrine" required broadcasters to present information about the health hazards of cigarette smoking. *Cigarette Advertising*, 9 F.C.C. 2d 921 (1967). This information was generally presented in the form of public service announcements that have come

¹ *Report of the Surgeon General's Advisory Committee*, Jan. 11, 1964.

The most recent Surgeon General studies in animals and humans show that the nicotine in cigarettes increases the work of the heart and that smoking thus increases the risk of fatal heart attacks. *The Surgeon General's Report on The Health Consequences of Smoking* (1971): see, *Cigarettes Linked to Heart Ills*, Washington Post, Jan. 26, 1971, at A-3, col. 5. The report said that while other factors (including diet, obesity and high levels of blood fats) are closely linked to heart attacks, the Surgeon General concluded that cigarette smoking is an independent cause that can accelerate other risks. The Report also concludes that pregnant women who smoke have more unsuccessful pregnancies than women who do not smoke. *Id.*

Britain's Royal College of Physicians reports that the typical cigarette smoker pays for his habit by forfeiting 5½ years of his life. The College of Physicians is demanding new laws to make smoking illegal in airliners, buses, trains and most public places. In an extensive report held up a year for double-checking of facts, figures and conclusions, the College said cigarettes killed at least 20,000 a year in Britain. The report said cigarette smoking now is as big a cause of death as typhoid, cholera and tuberculosis were to earlier generations. The most important challenge to preventive medicine is to get people to stop smoking, the report said. United Press International Report No. 66, London Jan. 5, 1971.

² 29 Fed. Reg. 8325, 15, 570 (1964).

to be known as "anti-smoking commercials." These spot announcements—like the cigarette commercials themselves—have been found to be very effective. Indeed, while they were being run tobacco consumption actually declined—for one of the first times in our nation's history.³

Then, with the mounting evidence of the epidemic proportions of cigarette-related deaths, and the intensifying involvement of Congress, the Congress finally decreed that all cigarette commercials be banned from television and radio after January 1, 1971. Public Health Cigarette Smoking Act of 1969. P.L. 89-92, 15 U.S.C. §§ 1331-1339 (1969).

The band, however, still leaves the question of the broadcasters responsibility to continue to carry the anti-smoking spots. That is the principal question the FCC majority has addressed in today's action.

I

The main thrust of the majority's opinion, in which I concur, plainly establishes that the public must continue to be adequately alerted to the proven hazards of smoking.

Senator Frank E. Moss, chairman of the Senate Commerce Committee's consumer subcommittee, has stated that "Our deep concern in Congress has primarily focused upon the utilization of the airwaves—a public resource—for the massive promotion of a condemned product." Hearings Before the Consumer Subcomm. of the Senate Commerce Comm., on H.R. 6543, 91st Cong., 1st Sess., p. 76.

I believe it is essential to study Senator Moss' statements and the rest of the legislative history if we are to understand the Congressional intent behind the policy this Commission is charged with implementing. In opening hearings that eventually led to the Public Health Cigarette Smoking Act of 1959, Senator Moss set forth (at 76) the grim task this Commission faces now:

There can be no joy on this occasion. This is tragedy—tragedy, first, in the death and debilitation of millions of Americans struck down by what they assumed was a harmless, but tenacious, habit.

Secondly, tragedy, in the serious health threat to millions who know they should, but cannot quit.

And tragedy, finally, in the misdirection given young people by the ubiquitous commercials which drown out the urgent pleas of the public health community.

This "tobacco issue" cannot fairly be separated, I think, from the general drug scare now sweeping the land.

The nation is turning sharp attention to the corporate interests that feed, and feed upon, the artificially-induced thirst for a chemical solution to all life's problems: pep pills, tranquilizers, alcohol, sleeping pills, headache remedies, stomach settlers, cigarettes, and other contemporary commercial panaceas.

It is in the context of this general drug problem that the Commission's meek action today appears somewhat curious. The very highest echelons of government are going so far as to influence broadcast programming, including attempts to persuade entertainment shows to support the Administration's ideological position on marijuana.

³ See Note 6, *infra*.

Broadcasters and record industry executives have been called to the White House—with the F.C.C. Chairman in attendance—and urged to get “drug lyrics” off the air. The White House Director of Communications proposed that Hollywood writers and producers even insert anti-drug sketches into regular entertainment shows. N.Y. Times, April 8, 1970, at 87.

In light of the current concern over drug abuse—and the overwhelming condemnation of smoking as a cancer hazard—I find the Commission’s action today unfortunately limp and half-hearted.

Accordingly, I concur in part and dissent in part.

II

The majority has been much less frank than it might have been. Its opinion comes close to smacking of what Chief Justice Burger, then a judge of the U.S. Court of Appeals (D.C. Cir.), has condemned as this Commission’s “curious neutrality-in-favor-of-the licensee.” *United Church of Christ v. F.C.C.*, 425 F. 2d 543 (D.C. Cir. 1969).

I find the majority opinion inadequate for two major reasons:

1. Because of the industry’s usual reluctance to air any speech other than paid speech, and because of the Commission’s lack of enforcement mechanisms beyond very occasional citizen monitoring, today’s decision probably will reduce substantially the very effective anti-smoking spot advertisements now heard over our airwaves. I do not believe Congress ever envisioned that its ban on cigarette commercials on radio and television would have the consequence of actually *increasing* cigarette consumption by removing from radio and television the most effective device yet discovered for reducing cigarette consumption.

2. The vague duty the majority does set forth is unfair to the industry, in that a reasonable broadcaster has little idea of how much is expected of him lest his license renewal be in jeopardy. The Commission would have done a more commendable job of law-making if more precise reasonable guidelines had been developed.

The Commission probably appears to some observers to be retreating from its earlier courageous efforts in dealing with a deadly serious public health question. The Commission may well not intend this impression. But the net result is that the Commission has put itself in the sadly amusing stance of the well-meaning but clumsy tuba player who is curiously out of step with the well-orchestrated efforts of the rest of the Federal array in warning the American public of the smoking peril.

This Commission could, as it has in the past, rely on the expertise of the Surgeon General’s Advisory Committee, *Report of the Surgeon General’s Advisory Committee*, Jan. 11, 1964, whose findings have been adopted in substance by the Department of Health, Education and Welfare, the Federal Trade Commission, 29 Fed. Reg. 8325, 15,570 (1964), the Federal courts, e.g., *Banzhaf v. F.C.C.*, 405 F. 2d 1082 (D.C. Cir. 1968), *cert denied*, 396 U.S. 842 (1969), and the Senate Commerce Committee, Senate Report No. 91-566, 91st Cong., 1st Sess. (1969). And of course the Congress itself has recognized and acted on the danger in the Public Health Cigarette Smoking Act of 1969.

III

In order for the legal argument to have full meaning, one must bear in mind the enormity of the cigarette problem for the national health, and television's vivid potential to create—or cure—this problem.

The public health community has long been aware of the hazards smoking holds for our health. As long ago as 1650, an English physician, Dr. Tobias Venner of Bathe, was summarily reciting for his patients "the hurts that tobacco infereth":

I will summarily rehearse the hurts that tobacco infereth. . . . It drieth the brain, diminisheth the sight, vitieth the smell, dullieth and dejecteth both the appetite and the stomach, destroyeth the decoction, disturbeth the humours and the spirits, corrupteth the breath, induceth a trembling of the limbs, exsiccathe the windpipe, lungs, and liver, annoyeth the milt and scorseth the heart.

Dr. Tobias Venner, *quoted* in Wegman, *Cigarettes and Health: A Legal Analysis*, 51 Cornell L. Q. 678 (1966).

Today the ever accumulating evidence amounts to an overwhelming indictment of even the normal consumption of cigarettes. Consider some simple statistics. In 1969, some 59,000 Americans (49,000 men and 10,000 women) died of lung cancer, and over 90 percent of these deaths are reputedly linked to cigarette smoking. *Smoking and Lung Cancer*, Public Health Service booklet (1970). This means that of the 70,000,000 Americans who consume tobacco in one form or another, approximately 53,100—or one out of 1,300—died of lung cancer in 1969. (If one accepts the higher figure of 300,000 for all smoking-related deaths per year, the ratio becomes one out of 233).⁴

The enormity of this problem in part led the FCC several years ago to apply the Fairness Doctrine to cigarette commercials. *Cigarette Advertising*, 9 F. C. C. 2d 921 (1967).

We cannot fairly ignore the incredible impact of advertising, especially broadcast advertising, over the past decades. Tobacco did not become a mass product in America, in the modern sense at least, until the development of the modern machine-rolled cigarette around the turn of the century. The popularity of cigarette smoking was firmly established in 1913 with the introduction of the Camel brand manufactured by R. J. Reynolds Tobacco Co. Wide public acceptance of cigarette smoking came with the return of the veterans just after World War I. *See*, Nicholls, *Price Policies in the Cigarette Industry* 35-44 (1951).

About the same time, the American tobacco industry began perhaps the most concentrated and effective advertising campaign of all time.

⁴ Senator Moss has summed up the scientific indictment:

Let us look once more at the enormity of the indictment lodged against the cigarette. The Public Health Service reports concerning the effects of smoking on human life and health have been increasingly ominous. Who, among us, is not familiar with the first of these reports, the Surgeon General's Report on Smoking and Health which came out in 1964. This was the first time the Federal Government had come out vigorously against a national habit—one that had become deeply ingrained in the fabric of our lives by practice and by the sheer force of advertising.

The evidence is damning: All cigarette smokers have a 70-percent higher death rate than nonsmokers; they have a 70-percent higher death rate from coronary heart disease; a 500-percent higher death rate from bronchitis and emphysema; and a 1,000-percent higher death rate from lung cancer.

We know today that one-third of all deaths among men in the age group 35 to 59—in the very prime of life—are excess deaths which would not have occurred if it were not for cigarette smoking.

Senate Report No. 91-566, Public Health Cigarette Smoking Act of 1969, 91st Cong., 1st Sess., at 21-22.

Annals of Advertising, The New Yorker, Dec. 19, 1970, at 42. This unprecedented advertising campaign eventually helped make smoking socially acceptable for men and women alike.⁵ A second aim for many years, of course, was to reassure smokers that there were no health hazards in the normal use of tobacco products. The most blatant claims appeared in the 1930's. A 1932 Lucky Strike ad asked: "What's there to be afraid of?" Old Gold developed a familiar slogan: "Not a Cough in a Carload!" And Americans were repeatedly told that "More Doctors Smoke Camels." Wegman, *supra* at 678-688.

The campaign achieved striking success. Annual cigarette consumption per person (for those over 18 years old) rose from 138 cigarettes in 1910 to more than 1,800 in 1940, peaking at more than 4,200 in 1963. Newsweek, Jan. 18, 1965, *quoted* in Wegman, *supra*, at 679.

This spiraling consumption was spurred on by the effective use of the most devastating merchandising tool ever fashioned by man—the television spot advertisement.

We must recognize the unusually powerful impact of spot advertising as compared to normal television programming. Prepared spot announcements should be placed in a class by themselves, a proposition acknowledged by F.C.C. Chairman Dean Burch with respect to political advertising. *Voters' Time*, Twentieth Century Fund Commission on Campaign Costs in the Electronic Era, p. 15 (New York 1969); *Statement of Chairman Dean Burch*, Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce, June 2, 1970; H.R. No. 91-57, 89th Cong., 2nd Sess. 7-8 (1970).

With the advent of the Surgeon General's report in 1964 and with the coming of the so-called "anti-commercial commercial" to our television screens, carrying the alert that smoking may kill you, per capita cigarette consumption actually declined for the first time since the earliest part of the century. Per capita consumption for 1968, the latest year for which statistics are available, dipped to 4,145. *Report to Congress*, Federal Trade Commission, Pursuant to the Federal Cigarette Labeling and Advertising Act, June 30, 1969, at 4.⁶ Indeed, the Federal Trade Commission said the decline during 1967 and 1968 "may be attributable to anti-smoking messages which appeared on the broadcast media" beginning in 1967, as well as "to youth education and the publication in the news media of information advising of the health consequences of smoking." *Id.*

There is little question, then, that this public education through television had an impact on smoking. Some 40 per cent of the nation's adult smokers, according to the Gallup Poll, say they smoke less than they previously did. N. Y. Times, Sept. 4, 1969, at 4. The Gallup Poll

⁵ "The emphasis on controlling the content of cigarette advertising rather than the sale of cigarettes themselves is an indication of the power that advertising has attained in American society, particularly advertising for products that, like cigarettes, have no useful external function but that come under the merchandisers' category of 'pleasure products,' the need for which is essentially subjective. Such subjective needs are capable of being aroused and maintained on a socially acceptable scale with the help of advertising. Fifty years ago in this country advertising was a mere adjunct to the selling of consumer goods; nowadays it lies at the core of the whole merchandising and consuming process." *Annals of Advertising*, The New Yorker, Dec. 19, 1970, at 42.

⁶ Per capita consumption of cigarettes, *Report to Congress*, Federal Trade Commission, Pursuant to the Federal Cigarette Labeling and Advertising Act, June 30, 1969:
Year: 1963, 4,286; 1964, 4,196; 1965, 4,196; 1966, 4,197; 1967, 4,175; 1968, 4,145.

also reported that 71 per cent of adults think smoking is a cause of lung cancer. Far fewer, 44 per cent, held this view in the last survey on the subject in 1958. *Id.*

If the effect of the health messages in the past few years is any guide, whether anti-smoking spots continue to be broadcast will significantly affect the sale and consumption of billions of cigarettes and the smoking habits of millions of Americans (particularly young people) over the next few years.

Even so, for an industry that is widely thought to be in trouble, tobacco manufacturers today are showing remarkable strength.⁷ Tobacco profits have been climbing, despite the health controversy. Total sale of cigarettes in the U. S. in 1970 have been rising somewhat after three years of decline, and a tobacco analyst for a Wall Street brokerage house predicts a "new surge of growth" for the cigarette business in the 1970's. U. S. News & World Report, Nov. 30, 1970, at 68.

Given these facts about the public health hazard of smoking and television's role in molding public acceptance and awareness, Congress and the courts appear to have imposed a duty on broadcasting to treat smoking akin to a public epidemic—comparable, perhaps, to the plagues of ancient times. In fact, this awareness of the public epidemic proportions of the problem spreads well beyond broadcasting. *E.g.*, *Cigarette Ads May Soon Begin Fading Away In Papers, Magazines as Well as on TV*, Wall St. J., Sept. 5, 1970, at 4, col. 1; *Nixon Backs Move to End TV, Radio Cigarette Ads*, Wash. Post, Oct. 10, 1969, at 3, col. 2; *Some Eye U.S. Building Smoking Ban*, Washington Post, Jan. 19, 1971 at D-13, col. 5.

IV

The affirmative duty of the broadcaster to continue airing health alerts on smoking well after the Jan. 2, 1971, cut-off date for cigarette advertising rests firmly on a public interest rationale which has been well articulated in previous commission and court precedent and in the Congressional intent undergirding the 1969 Public Health Cigarette Smoking Act.

My main intent here is to set out this public interest rationale in all its detail for the record. Furthermore, I want to develop two supporting considerations that substantially buttress this affirmative obligation: (1) the decades of blatantly one-sided, pro-smoking presentations, which I have already alluded to above; and (2) the danger "hidden commercials" on television hold for subverting the public health community's attempt to spread the warning.

A. Public Interest Rationale.—While the majority goes to some length to set out the public interest rationale, I do not believe the language of the precedents has been given the dynamic interpretation it deserves.

We are used to discussing the cigarette issue in the context of the

⁷ In late 1970, the first time since 1967, when the FCC first required the presentation of American Cancer Society spots under the Fairness Doctrine, cigarette sales increased over the previous year. An unprecedented advertising push on the eve of the Congressionally ordered television ban on cigarette advertising helped end a two-year sales slump for the tobacco manufacturers. *A Bright Spark for Cigarette Makers*, Business Week, Dec. 26, 1970, at 64.

Fairness Doctrine. Nevertheless, a close inspection of the applicable precedents shows that the issue we decide today goes substantially beyond any Fairness Doctrine questions to what is appropriate, quite aside from the Fairness Doctrine, under the public interest scheme of our governing statute.

The best example is the language the Commission itself used in the Conclusion section of the 1967 opinion, 9 F.C.C. 2d at 949, affirming the station's obligation to provide time for the anti-smoking point of view:

There is, we believe, some tendency to miss the main point at issue by concentration on labels such as the specifics of the Fairness Doctrine or by conjuring up a parade of 'horrible' extensions of the ruling. The ruling is really a simple and practical one, required by the public interest.

In affirming this Commission action, the U.S. Court of Appeals (D.C. Cir.) clearly noted that its decision was grounded on a public interest standard and *not* the Fairness Doctrine. *Banzhaf v. F.C.C.*, 405 F. 2d 1082 (D.C. Cir. 1968). The Court said the Commission itself "asserted that it 'clearly had the authority to make this public interest ruling' under the public interest standard of the Communications Act and relied upon 'the licensee's statutory obligation to operate in the public interest.'" *Id.* at 1091.

The Court of Appeals used unusually strong language in articulating "a kind of basic law" in the public interest (at 1096-1097):

Whatever else it may mean, however, we think the public interest indisputably includes the public health. There is perhaps a broader public consensus on that value, and also on its core meaning, that on *any* other likely component of the public interest. The power to protect the public health lies at the heart of the states' police power. It has sustained many of the most drastic exercises of that power, including quarantines, condemnations, civil commitments, and compulsory vaccinations. Likewise, public health concerns now support a sizable portion of the civilian federal bureaucracy. The public health has in effect become a kind of basic law, both justifying new extensions of old powers and evoking the legitimate concern of government wherever its regulatory power otherwise extends.

Despite argument of industry alarmists to the contrary, this basic public health principle is fully consistent with the dictates of the First Amendment. "Because of the scarcity of radio frequencies," the U.S. Supreme Court said in *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969), "the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. . . . *It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.*" *Red Lion, supra*, at 390 (emphasis supplied).

The Supreme Court has drawn a distinction between two types of speech: the first, political or social speech, is entitled to the fullest constitutional protection. Indeed, Professor Harry Kalven believes the "central meaning of the first amendment" is to preserve the citizen's right to criticize those who govern for him. Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment"* 1964 Sup. Ct. Rev. 191, 208-09; see Meiklejohn, *The First Amendment Is An Absolute*, 1961 Sup. Ct. Rev. 245, 256.

The second type of speech, "commercial" speech, however, has not been viewed as worthy of much deference. "In the quarter century

since *Valentine v. Chrestensen* [316 U.S. 52 (1942)], the notion that commercial advertising is not protected by the first amendment has been enshrined among the commonplaces of constitutional law." Note, *Development in the Law: Deceptive Advertising*, 80 Harv. L. Rev. 1005, 1027 (1967); see, e.g., *Ginzberg v. United States*, 383 U.S. 463, 474n, 17 (1966); *Polak v. Public Util. Comm'n.*, 181 F. 2d 450, 456-57 (D.C. Cir. 1951) (dictum), *reversed on other grounds*, 343 U.S. 451 (1952); see also, Note, *Freedom of Expression in a Commercial Context*, 78 Harv. L. Rev. 1191 (1965). In *Valentine v. Chrestensen*, *supra*, the Court upheld a municipal ban on the distribution of commercial pamphlets on city streets. The Court simply observed that "the Constitution imposes no . . . restraint on government as respects purely commercial advertising." *Valentine v. Chrestensen*, 316 U.S. at 54.

Indeed, the Court in *Red Lion* (*id.* at 389) appeared to contemplate strong public interest obligations inherent in the broadcasters' fiduciary trust quite aside from any First Amendment or Fairness Doctrine considerations:

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.

Although this language is most relevant to the newly evolving concept of "access," it is supportive of the broadcasters' obligation to present public health information as well.

B. Failure in Balancing Views.—The majority has not adequately dealt with the residual effects of more than half a century of cigarette advertising, much of it over television during the past 20 years. The familiar Madison Avenue pitch for cigarettes has been a permanent fixture on the American scene. The consumer has been deluged for decades with the enticements of glamour and excitement, the promise of sexual prowess, the allure of social acceptability, the invocation of the ethic of masculinity, and the reassuring appearance of well-known celebrities to intone the blandishments prepared by public relations specialists.

This inculcation has taken its toll. Cigarette advertising, as it has developed since 1913, has succeeded in addicting the American public on a mass scale—and the public simply has not been educated in any balanced sense on the dangers inherent in the *normal* use of the product.

The Commission majority fails to recognize the residual harm of this advertising barrage. The majority believes there is "no showing" that "prior decades of cigarette advertising call for something beyond this recent, three-years substantial effort."

In actuality, the public health warnings over the nation's broadcast media have come nowhere near parity with the ubiquitous pro-smoking view. First, there have been only three years of concerted health alerts to counter nearly three decades of cigarette broadcasting advertisements. Second, these health alerts have been aired nowhere nearly as often as the industry sales pitches. During January 1969, for instance, each American saw on the average 4.4 network cigarette advertisements for each single anti-smoking message that he saw on network television. Teenagers were exposed on the average

of 4.1 network cigarette advertisements for each network health alert to which they were exposed. *Report to Congress*, Federal Trade Commission, *supra*, at p. 31.

What's more, once broadcast cigarette advertisements cease, the pro-smoking view will hardly disappear from sight. There is ample reason to believe that the advertising assault will continue unabated in magazines, newspapers, billboards, and an infinite variety of other commercial display techniques, including so-called "hidden ads" on television itself.⁸

Little wonder the Court of Appeals in *Banzhaf v. F.C.C.*, *supra*, at 1099, went out of its way to stress the importance of broadcasting in effectively spreading the cigarette health warnings:

In these circumstances, the Commission could reasonably determine that news broadcasts, private and governmental educational programs, the information provided by other media . . . inadequately inform the public of the extent to which its life and health are most probably in jeopardy. *The mere fact that information is available, or even that it is actually heard or read, does not mean that it is effectively understood.* A man who hears a hundred "yeses" for each "no," when the actual odds lies heavily the other way, cannot be realistically deemed adequately informed. (Emphasis supplied.)

The Court clearly contemplated a consistent, concerted, long-term effort on the part of the trustees of our airwaves to effectively bring the public health warnings on cigarette smoking into the consciousness of the general public. Only radio and television can truly accomplish this public education goal, and the Court obviously recognized these essential facts of life.

Furthermore, Congress itself recognized these same essential facts of life. The prime purpose behind the Public Health Cigarette Smoking Act of 1969 is "to provide adequate warning to the public on the hazards of cigarette smoking. . . ." Senate Report No. 91-566, 91st Cong., *supra*, at 1.

A close study of the legislative history of the Act as reflected in the testimony, deliberations, and report of both houses of Congress reveals that there was no intent in Congress to terminate or lessen the obligation of the broadcaster to provide substantial free time for the airing of the smoking health messages.

In fact, the Federal Communications Commission in a letter to the Senate Commerce Committee dated September 17, 1969, see F.C.C. 69-1011 and Hearings on H.R. 6543, *supra*, at 143, advised the Congress of this Commission's belief that "the public interest in view of the HEW findings is served by a policy of proscribing commercial promotion of this product [cigarettes] *while at the same time informing the public of its hazards through educational efforts or campaigns.*" (Emphasis supplied.)

⁸ One tobacco company executive believes good marketing programs, coupled with less anti-smoking announcements, will help the cigarette industry offset the ban on cigarette advertising on radio and television. Milton B. Harrington, president of Liggett and Myers, Inc., told securities analysts: "The ban on broadcast advertising is not likely to have a major impact on cigarette sales, with the probability of many less anti-smoking messages on radio and TV, good marketing programs should enable the industry to overcome this setback. A case in point is the alcoholic beverage industry, which has never advertised on television but nevertheless continues to grow substantially while introducing new brands and opening new markets." United Press International Report No. 164, Boston, Jan. 25, 1971.

Much of the \$225 million the cigarette industry spent annually on broadcast advertising is expected to go into wider newspaper, magazine, billboard, and sports advertising. 116 Cong. Rec. S21606-S21607 (Daily Ed. Dec. 31, 1970).

Thus, this Commission clearly represented to the Senate committee that health warnings would continue after any general cut-off of general cigarette promotion over the air. In addition, Senators Moss and Cotton made frequent favorable references to the anti-smoking spot announcements, assuming that the massive educational campaign under way over the broadcast media would not be terminated. *See, e.g.*, Hearings on H.R. 6543, *supra*, at 132-133, 159-160, 164-165. What's more, nine Senators on the Senate Commerce Committee (Senators Magnuson, Pastore, Hart, Cannon, Moss, Long, Inouye, Tydings, and Goodell) clearly believed the Act did not go *far enough* to effectively inform the public of the cigarette health hazard. "The committee's warning would thus be adequate only if the public generally understood that *all* cigarette smoking is excessive," these Senators wrote. "But because the public has not yet arrived at such a level of sophistication, the committee's warning will necessarily function as a misleading half-truth." Senate Report No. 91-566, *supra*, at 19-20.

Finally, Congress clearly intends to keep itself fully informed on the broadcasters' efforts to keep on informing the public of the smoking peril. In section 8(b) of the 1969 Act, Congress has instructed the Trade Commission to provide continuing reports on how the broadcasters are effectively educating the public. Specifically, the F.T.C. report to Congress will include "(1) the effectiveness of public service smoking education campaigns in broadcast and nonbroadcast media; . . . and (6) an analysis of public opinion polls and other relevant information indicating the extent to which the American public, especially young people, have been made fully aware of the hazards of smoking. . . ." Senate Report No. 91-566, *supra*, at 11.

In short, Congress specifically contemplates the continued broadcast of smoking alerts in sufficient volume to keep the general public, and the generations of young coming of age every day, fully appraised of the national smoking epidemic. And the implication seems clear that if the broadcasting industry does not heed the Congressional intent or ignore its *Red Lion* obligations, Congress may consider specific legislation to see that the public continues to be adequately informed. *Cf., id.* at 11-12.

C. The Hidden Commercial.—The majority argues that there is no showing of the "bare claim" that tobacco and smoking will continue to show up in "hidden advertising."

Nevertheless, the simple fact remains that despite the January 2, 1971, cut-off smoking will continue to be shown on American television in thousands of subtle, flattering ways. The star in the white hat will continue to draw contentedly on his cigarette, and for the millions of American youngsters tuned in there will be no Surgeon General's warning—"Caution: Cigarette Smoking May Be Hazardous to Your Health"—to counter this latent but potent power to mold tender attitudes. *Ads on TV May Vanish, But Not Cigarettes*, N.Y. Times, Dec. 31, 1970, at 41, col. 4.

Chairman Magnuson of the Senate Commerce Committee is already worrying about the television ploys the tobacco industry may try after the cut-off. In a letter to the Federal Trade Commission, *see*, Letter of Chairman Magnuson to FTC Chairman Kirkpatrick, Broadcasting magazine, Nov. 23, 1970, at 46, the Senator noted that American

Tobacco Co. is marketing three pipe tobaccos named interestingly enough Pall Mall, Silva Thin, and Tareyton, which also just happen to be the names of three cigarette brands American Tobacco merchandises. "I would hope, without confidence," the Senator wrote, "that there is no intention of promoting these packages on television."
Id.

The advertising and tobacco fraternities are not well known for their high ethical standards.⁹ I share Senator Magnuson's lack of confidence that the industry will walk the final mile to ensure the complete integrity of the public health. After all, the pressures on tobacco men sometimes lead to something more than the simple desire to market a completely acceptable product. Late last year, for example, the business press reported that one tobacco company "boosted the nicotine of most of its brands." The idea was to "hook" smokers so that if advertising were to be banned entirely, the "need for a smoke" would keep people puffing. *Business Week*, Dec. 13, 1969, at 84. Cf., *N.Y. Times*, Dec. 14, 1969, at 43.

V

Finally, there is a pernicious argument abroad in the debate here, one implicit in the majority's language though not expressly dealt with, which needs to be put to rest once and for all. The unstated premise from which the majority proceeds might be called the "Hit Parade" argument. It goes like this. If the Commission decrees that all licensees must carry warnings dealing with the smoking hazard, persons holding strong views on many other issues inevitably will seek access to the Commission's "Hit Parade," and the Commission will find itself in the unfortunate position of deciding which issues are important and which are not, thus assuming the very role of arbiter of programming which the Commission has always disclaimed.

This argument is raised, but not really addressed, again in this case. "The Commission cannot properly compile any priority list," the majority argues. "We have not done so, and have no intention of issuing a list of 'must' issues." See Majority Opinion at para. 17, *supra*. This is the customary and familiar boilerplate recitation that this Commission will defer to the licensee's judgment so long as it is "reasonable."

Yet obviously, at some point, this Commission must decide that a licensee is wrong in his determination of what the public interest requires, and I do not see how we can do this unless we substitute our judgment for the licensee's. Whatever may be the initial responsibility of the licensee, some agency must arbitrate competing uses of our scarce national airwaves—and that task has been assigned to the Federal Communications Commission, with review by the courts.

In any case, the majority treats this "throwaway" language precisely for what it is—a useless appendage inserted routinely in Commission opinions—and proceeds to make its own, independent determination anyway: "We also note our full agreement with the proposition that which public service subjects are to be covered and how is for the li-

⁹ Chairman Dean Burch had to summon the tobacco manufacturers as well as the broadcasters to his office to get assurances that the industries would comply with the spirit as well as the letter of the Congressional ban. *Cig-Makers Tell FCC They Won't Use Smokescreen To Get Around Ban*, *Variety*, Jan. 13, 1971, at 40.

censee's judgment, based on its evaluation in light of the competing public service demands."

Despite this Commission's denials, nevertheless there does indeed exist a Hit Parade list—and cigarette smoking is firmly entrenched at the very top.

Who has created the list—and put cigarettes at the top? It is important to recognize that what issues gain access to this list and why is basically beyond the licensee's and this Commission's powers in some cases. This is uniquely so in regards to smoking.

The President, the Congress, and numerous public studies and bodies have defined cigarette consumption as an addictive menace to the national health—a menace of epidemic proportions. The majority itself cites much of this evidence.

It is curious, to say the least, that this Commission on occasion sometimes embraces and at other times denies the "unique" problem cigarettes present. The majority today appears to deny the unique demands the smoking epidemic makes on a broadcaster. On other occasions, *e.g.*, *Friends of the Earth*, 24 F.C.C. 2d 743, 746 (1970), the majority has relied heavily on cigarettes "uniqueness" to escape what it considers bothersome public interest requirements regarding other commercial products. In addition, the Commission's denial today that the unique problem cigarettes presents requires unique treatment by the broadcasters cuts squarely against contrary language in *Banzhaf v. F.C.C.*, *supra*, at 1099.

Unlike the majority, I do not fear that a firm Commission precedent on the cigarette problem will stampede the industry or the Commission onto a slippery slide leading to the application of the anti-commercial concept across the board to the whole range of mass merchandised products. Right now the overwhelming scientific indictment of the cigarette has no parallels save for a handful of possible exceptions. *E.g.*, *Friends of the Earth*, *supra* at 752.

As the broadcasting industry itself has acknowledged, *Broadcast Cigarette Advertising Report*, unpublished report of The Code Authority, National Association of Broadcasters, September 1966, and *Statement of Warren Braren*, Draft Report of Proceedings, Hearings of the Comm. on Interstate and Foreign Commerce, House of Representatives, Cigarette Labeling and Advertising, June 10, 1969, at 11:

Cigarettes, and the advertising thereof, present a unique situation. . . .

The argument that automobiles or other products likewise are capable of causing serious injury appears to be an invalid comparison. In the case of automobiles, there exist recognized standards of safety for driving which minimize the risk of accidental injury. As for smoking, no such clear cut standards exist, and potential harm to health is not accidental.

VI

For the reasons outlined above, I believe the basic principles are deeply engrained in the public health-public interest standard, which has been recognized by the Congress and affirmed by the Federal courts. They require the fiduciaries of our public airwaves to exercise their public trust in an affirmative way that ensures the American listener and viewer timely reminders and continuing education on the perils of the smoking epidemic.