# Supreme Court of the United States

October Term, 1968

In the Matter of:

RED LION BROADCASTING CO., INC., et al.,

Petitioners;

vs.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

Docket No. 2



Pt. 1



Place Washington, D. C.

Date April 2, 1969

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S



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IN THE SUPREME COURT OF THE UNITED STATES

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| RED LION BROADCASTING CO., INC., et al., Petitioners; | : | |
| vs. | : | No. 2 |
| FEDERAL COMMUNICATIONS COMMISSION, Respondent. | : | |

Washington, D. C.
Wednesday, April 2, 1969

The above-entitled matter came on for argument at 1:28 p.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

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P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: No. 2, Red Lion Broadcasting Co., Inc., et al., petitioners; versus Federal Communications Commission.

Mr. Robb?

ARGUMENT OF ROGER ROBB, ESQ.

ON BEHALF OF THE PETITIONERS

MR. ROBB: May it please the Court, Mr. Chief Justice:

The facts in this case may be briefly stated.

In 1964, the petitioner Red Lion broadcast a 15-minute program by one Billy James Hargis in which Mr. Hargis attacked Mr. Fred J. Cook in connection with a book that Mr. Cook had written. The Hargis talk was part of a series and was carried on a number of other radio stations and Red Lion was paid for the time.

Having learned of the attack, Mr. Cook wrote to Red Lion, invoking the so-called "personal attack doctrine" of the Federal Communications Commission, and demanding that he be given time to reply.

In response, Red Lion offered to make time available to Mr. Cook at the station's regular rate, or to give Mr. Cook free time if he stated that he could not pay for time. Mr. Cook rejected the offer of time on a paid basis and refused to state that he could not pay for time, and he complained to the Federal Communications Commission that Red Lion was in violation of the

so-called personal attack doctrine.

The Commission ruled that, having presented a personal attack on an individual, and his honesty, character or integrity in connection with a controversial matter of public importance, Red Lion was bound by the personal attack rule and doctrine to inform Mr. Cook, the individual involved, of the attack, to send him a tape or a transcript or a summary of the broadcast, and upon his demand, to afford him free time to reply.

The Commission held that Mr. Cook was under no obligation to make any showing of inability to pay. Red Lion was directed to comply with this ruling. Red Lion appealed to the Court of Appeals of this circuit, which sustained the Commission's ruling, and this Court thereafter granted certiorari.

I might interpolate that, as this Court has recognized, this case is a companion case and closely involved with the next case, No. 717, but the Red Lion situation involved a specific application of the rule involved in No. 717.

In the interest of clarity, it might be helpful at the outset to suggest certain matters which I conceive are not in issue here.

First, there is no question but that the Hargis broadcast contained a personal attack on Mr. Cook within the meaning of the definition of the FCC.

Second, there is no issue as to the truth or falsity of the Hargis broadcast or the good faith of Hargis in making it

or the good faith of Red Lion in broadcasting it.

The ruling of the Commission and the opinion of the court below make it clear that these matters were held to be immaterial. In other words, Red Lion was bound to comply with the Commission's order whether the broadcast was true or false, and whether the broadcaster carried it believing it to be true or not.

Third, and obviously, there is no issue here as to whether Mr. Hargis and his philosophy, or Mr. Cook and his, are worthy or unworthy. The issue is simply one of law, without regard to the personal beliefs or philosophies of the individuals involved. Were it otherwise, I might not be here.

Fourth, it is conceded, I believe, by the Government, perhaps with some qualifications, that radio and television are part of the press protected by the First Amendment.

I am informed that Mr. Cox, in No. 717, will discuss rather fully the statutory questions involved here. I would like, if I might, to focus briefly upon the constitutional question.

Simply stated, the issue here, I suggest, is whether or not the order of the Federal Communications Commission to Red Lion imposes a burden of previous restraint upon free speech and the press which is forbidden by the First Amendment. Does this order impose on Red Lion a burden?

We submit that obviously it does. The burden consists of the cost of preparing a tape or a transcript, of sending it

to the individual attacked, and providing free time, and perhaps, and I emphasize this, perhaps providing free time by displacing some other program which is paid for.

This, as I understand the Government's brief, they concede, that a burden is imposed. But they assert, somewhat blandly I think, that the cost is not substantial and the burden is not undue; and likewise, Judge Tamm thought that such a burden was not unreasonable.

Now, in general, we challenge the proposition, but the exercise of First Amendment rights may be burdened with a financial penalty so long as the Government or the Federal Communications Commission thinks the amount of the penalty is reasonable.

We ask: What standard does the Government apply to determine what is reasonable and what is not? Would the Government say that a large Chicago television station, which is required to donate 15 minutes of time for which a commercial sponsor would be charged $2,000, would the Government say that that station is not subjected to an unreasonable and onerous burden?

We submit that the commandment of the First Amendment is simply: Thou shalt not abridge. And it is not "you may abridge, but please try to keep it reasonable." In any event, the impact of a financial penalty and the threat of future penalties are serious matters for Red Lion Broadcasting Company. This station is located in the City of Red Lion, Pennsylvania,

which is a small town having a population of less than 6,000. As the record discloses, it is a daytime-only station, which must compete for revenues with two full-time and one daytime station located in York, Pennsylvania, and a full-time station in Hanover, Pennsylvania.

York, the County Seat, with a population of some 55,000, is only six miles away. Hanover is 18 miles away. Now, for a small station facing such competition, any donation of free time, as a practical matter, is not a trivial concern, and repeated donations might very well drive the station out of existence.

Q Does your burden argument turn entirely on the financial aspects of this? I know you mentioned the other burden, but --

A Does Your Honor refer, by "the other burden," to --

Q Interruption of other programs, and so forth?

A Yes, indeed.

Q But initially you started off to comply with the Commission's regulation on the condition that they would pay you or prove indigency, so to speak.

A Yes, sir. But I think we have to consider, in analyzing the effect of this order of regulation, consider the entire impact of it on the station, and the disruption of programming for a station is a very serious matter.

Q Mr. Robb, is there any possibility of putting it

on the public time? The station has a certain amount of that; is that right?

A Yes, sir. The record shows, Mr. Justice Marshall, that this station carries one hour a day called "Free Speech," and on this program anyone who wishes to appear may appear. I don't know whether Mr. Cook would insist the station pay his expenses to get there or not. That might be a possibility.

I mentioned the possibility of repeated requests for donations. There is no doubt that the rule of the FCC in this case would expose the station to repeated demands for free time unless the station steered clear of the dangerous zone of personal attack.

This very broadcast is a good illustration of this proposition. The broadcast is printed at pages 60 and 61 of the appendix, and it appears therein that this one broadcast contained attacks not only on Mr. Cook, but on three other people or groups. Mr. Hargis attacked a man named Eugene Gleason, whom he identified as Mr. Cook's pal. He attacked a manazine, The Nation. He attacked Mr. Carey McWilliams, the editor of The Nation.

Now, if Red Lion were obliged to devote time for a reply to each of these attacks, would the Government then say that the cost and the disruption of the station's business were insubstantial?

Now, I suggest that this broadcast, furthermore, is a striking example of the fact that the personal attack doctrine,

as applied by the Commission, fragments every discussion of a controversial matter of public interest and importance into as many separate controversies and issues as there happen to be individuals or groups who happen to be attacked in the course of the broadcast, and if the speaker happens to speak critically of a dozen individuals, each of them thereby becomes instantly a controversial matter or issue of public importance and the broadcaster may be required to provide free time for a dozen answers, which would be an onerous burden, indeed.

We think this threat is substantial. We think of the words of this Court in Cantwell against Connecticut, in which the Court said this:

> "It is not merely the sporadic abuse of power by the censor, but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion."

We ask, can it be said that the financial penalties and the other burdens -- and the penalties, incidentally, have the effect of a fine -- and the pervasive threat of similar penalties in the future do not and could not have a chilling and deterrent effect upon the exercise by Red Lion of its First Amendment rights?

Do these penalties and burdens, and this threat for the future, constitute an inhibition and a deterrent less substantial than the ones that were struck down by this Court in Talley against California and Speiser against Randall?

We submit that the answer must be no. We submit that common sense tells us plainly that the application of the Commission's ruling and the threat of future applications abound to make Red Lion in the future more reluctant to broadcast any material that involves a criticism of any individual or group.

Undoubtedly, we submit, Red Lion in the future will tread more cautiously, steering wider of the dangerous zone of criticism. The result will be self-censorship, nonetheless virulent for having been self-imposed.

Now, 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 unhibited debate, the rule will tend to choke it off at the source. To prevent the introduction of any alleged impurity into the strain, the Government proposes to dry it up at its source.

Now, the Government argues further that a person attacked on a number of radio stations may be financially unable to pay for time on them all; therefore, says the Government, it is right that he should be given free time.

One answer to this argument may be found, we think, in

the language of this Court in Cantwell against Connecticut, where the Court said, and I quote:

> "To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been or who are prominent in church or state, and even to false statement. But the people of this Nation have ordained, in the light of history, that in spite of the probability of excesses and abuses, these liberties are, in the long run, essential to enlightenopinion and right conduct on the part of the citizens of a democracy."

We submit in this case that the possibility of isolated abuses and individual cases of such abuses cannot justify the imposition of a stifling blanket of restraint on the First Amendment rights of all broadcasting stations.

The Government's argument, when analyzed, rests on the premise that those who listened, and who listen, to the programs of Red Lion, have no other source of information, no access to a wide diversity of opinion. The facts destroy the underpinning of the argument.

According to the Broadcasting Yearbook and TV Digest Fact Book for 1969, the residents of the City of Red Lion have access to radio programs broadcast from nine towns or cities, which are Hanover, Pennsylvania; Harrisburg, Carlisle, Elizabethtown, Lancaster, Lebanon, York, Philadelphia, and Baltimore.

They have access to television programs from five different cities, namely, Lancaster, Lebanon, Harrisburg, York, and Baltimore.

It is inconceivable that the listening audience in Red Lion remains glued to that station's frequency, isolated and insulated from all other sources of information and opinion. The possibility of a failure of diversity of tongues and diversity of opinions, we submit, is most remote.

Again, the Government relies upon the fact that this Court held, in the National Broadcasting Company case, that radio broadcasting is subject to regulation. We agree. It did hold that. But it does not follow from that decision that the Government may dictate the content of radio programs or impose burdens on the exercise of First Amendment rights.

The Government may assign frequencies and channels, giving consideration to the character and the financial standing and ability of an applicant. It may evaluate the total performance of a broadcaster during the term of his license. It may supervise the methods of competition adopted by broadcasters.

But all such regulation, we submit, is a far cry from the order to Red Lion, which dictates what the content of a particular program shall be, and who the speaker shall be. Even though Red Lion may have been fair, may have broadcast other points of view, Red Lion is told by the Commission, "You must put on Mr. Cook. You must give him time."

An order of this sort, we submit, is precisely the kind of censorship and abridgement that the First Amendment condemns.

Now, as this Court has consistently held, when First Amendment rights are tangled with conduct which the Government may regulate, the First Amendment rights must be preserved, and they must not be curtailed by regulation directed at the abuses which are subject to Government control. Were it not so, then freedom of speech and the press would always be subject to abridgements and control by the subtle and indirect method of associating them and their exercise with other conduct which might be controlled.

Finally, the Government seeks comfort from the fact that the number of radio frequencies is limited. It follows, we are told, that broadcasters hold these frequencies in trust for the public and they must, therefore, bow to the interest of the public as that may be interpreted and defined by the Commission.

But the public streets, the public parks, the public buildings are likewise held in trust for the public; yet this Court has not permitted that fact to justify restraints upon the exercise therein of First Amendment rights.

In any event, we submit, the First Amendment rights of radio broadcasters should not be conditioned on the number of radio stations in existence. Whether there be few or many should not determine whether they should enjoy the protection

and the full protection, of the First Amendment.

Finally, if the number and diversity of tongues are factors to be considered, we point to the fact that there are more than 6,000 commercial radio stations in this country today, 3-1/2 times as many radio stations as there are daily newspapers, and we venture to say that the circulation and the listening public of those radio stations far exceeds the circulation and the reading public of daily newspapers.

Now, a word as to the Government argument that the personal attack doctrine is authorized by statute, specifically, Section 315 and other sections of the Communications Act.

Mr. Cox, as I am reliably informed, will discuss this matter in his argument. We have mentioned it in our brief. We support and adopt Mr. Cox's argument. We make these points very briefly stated:

In the first place, the statute defining the functions, powers and duties of the Federal Communications Commission certainly does not in terms authorize the personal attack rule. Certainly, we say, that meddling with the control of the programs or the content of programs is no part of the Federal Communications Commission's function.

We suggest, furthermore, that a statute which purports or is claimed to authorize impingement upon First Amendment rights must be strictly construed and carefully examined. It should not be broadly construed.

With respect to the argument that the 1959 amendment to Section 315(a) authorized the personal attack rule, we point out that that amendment was adopted three years before the personal attack rule was articulated by the Federal Communications Commission and, therefore, it seems somewhat difficult to conclude that the Congress intended in terms to refer to that rule and to authorize it.

We point out and suggest also that the purpose of the 1959 amendment was to cure a blackout which had been caused by a free-time requirement and, therefore, it seems somewhat anomalous to argue that Congress intended by this curative amendment to authorize a similar blackout caused by a free-time requirement.

Of course, we say also that if the statute does purport to authorize any such action by the Commission, the statute is pro tanto unconstitutional.

In conclusion, we submit that this case plainly demonstrates the wisdom of what this Court said in Roth against the United States, and repeated in Smith against California. The Court said, and I quote:

> "The fundamental freedoms of speech and press have contributed greatly to the development and well being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring

Federal and State intrusion into this area cannot be left ajar. It must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests."

Q Mr. Robb, under the current rules of the Commission, if the station had broadcast this attack in the course of a regular news program, would there have to be a reply, a right to reply afforded?

A Mr. Justice White, I read those new rules, and to tell you the truth, I am not sure what the answer would be, because I know those rules exclude regular news programs from the coverage of the personal attack doctrine, but whether this could be construed as a news program, I really don't know, sir.

Q Well, assuming for the moment that the station could do this, I suppose you would still be here making this same argument.

A Yes, sir.

Q Because you think you should be protected in selling the right to others to make these personal attacks.

A Yes, sir.

Q If the station itself wants to put out its own views, sponsor it, it has ample opportunity within the present rules to make personal attacks or anything it wants to, without affording an opportunity for a response, doesn't it?

A Well, that I think involves the so-called

editorializing rule, which is involved in 717. I prefer to leave that question to the experts. But I suppose so. But, of course, it wouldn't get paid for that broadcast.

Q I suppose it bears on your constitutional argument, though, to some extent.

A Yes, sir.

Q At least insofar as your argument rests on some suggestion that it is the degree of the seriousness of the invasion that is the element here.

A Yes, sir.

Q And you are asserting station rights, not anybody else's, aren't you?

A Yes, sir.

We submit, in conclusion, that the personal attack doctrine applied here is an attempt to pry open the door barring intrusions on First Amendment rights.

Q May I ask how you consider that quotation aids your cause? Open just the slightest bit ajar?

A Yes, sir.

Q Maybe they might argue this was just a slight opening of the door.

A I don't think it is, Your Honor. I think it is a very serious one.

Q That is what it gets you into a discussion of.

A I think it is a very serious one. I think this

is an attempt --

Q That is a beautiful metaphor, a beautiful speech, but I am not sure it is quite precise.

A My feeling was, when I read that, Your Honor, that we have before us here an attempt to pry this door wide open and I think we should stop it.

Q And we have to determine whether this is trying to pry it wide open or leave it just partially open.

A 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. I think Your Honor has written some opinions taking that position, if I am not mistaken.

Q Yes, but I didn't think that quite fitted that position. Maybe it does.

A I hope so.

I would like to reserve the balance of my time, if I may, Mr. Chief Justice.

MR. CHIEF JUSTICE WARREN: You may.

Mr. Solicitor General?

ARGUMENT OF HON. ERWIN N. GRISWOLD, ESQ.
THE SOLICITOR GENERAL
ON BEHALF OF THE RESPONDENT

THE SOLICITOR GENERAL: Mr. Chief Justice, and may it please the Court:

This is the first of two cases presenting related questions, but in different circumstances. In this case, we have specific facts, but no formally announced rule or regulation. In the next case, United States and Federal Communications Commission against the Radio and Television News Directors Association, et al., No. 717, we have a formal regulation, but no facts.

I will try to keep my argument separated as far as the two cases are concerned, but much of the argument is necessarily applicable to both cases.

In the first place, I would like to make it plain that this is not a sudden determination of the Federal Communications Commission that it will be righteous and seek to enforce some kind of arbitrary standards on the broadcasting industry. On the contrary, the problem is one of long standing. It goes back for close to 50 years. The first traces of it that I have seen are found in an address of the then Secretary of Commerce, Herbert Hoover, in 1924, when the Commerce Department was charged with the licensing of radio stations, and he pointed out that there were great problems in the handling of this new medium, and that problems of seeing that all points of view were properly expressed

were among them.

In its foundation, the problem is inherent in communication through electromagnetic waves. From the very beginning, Congress and the Federal Communications Commission, and I think it fair to say the broadcast industry, have been groping for a sound and workable solution. I am sure we have not found the final answer. There is still room for improvement through more thought and more experience.

But I feel that substantial progress has been made in dealing with a fundamental and important issue.

Let me start by referring to some reflections of the problem which are found in the basic statute. I am going to quote a few passages from the Communications Act of 1934, but I would point out that virtually all of these were also in the Federal Radio Act of 1927. The very opening sentence says, in Section 301 of Title 47:

> "It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission, and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, and no license granted under this section shall be construed to create any right beyond the terms, conditions, and period of the license."

In Section 303, there is an express provision that

a license may be revoked if the licensee has transmitted superfluous radio communications or signals, or communications containing profane or obscene words, language or meaning, and I suppose it is reasonably plain that a station's license could be revoked under that section, even though the language used was such that it could not have been enjoined from being used because of the First Amendment.

Then there are provisions for licensing, under which the Commission, if public convenience, interest or necessity will be served thereby, may grant licenses for periods of three years.

There are provisions for revocation of licenses in case the station does not serve the public interest, convenience and necessity.

There are provisions for revocation of licenses in cases of willful and repeated violations of or willful or repeated failure to observe any provision of this chapter, or any rule or regulation of the Commission authorized by this chapter.

Then there is Section 315, the equal-time provision, and I point out that that was included in the Federal Radio Act of 1927. It is, thus, 42 years old. In its particular field it is an expression of the fairness doctrine under which, if a station gives time to a political candidate, it must give equal time to other political candidates, with qualifications which were put in in 1959 and to which I will refer a little later.

In 1929, in a brief which the Commission filed in the Great Lakes case, you find something of a beginning of an articulation of the fairness doctrine. Over the next two decades, the Commission, in a series of individual rulings, undertook to express the obligation of then radio stations to meet the requirements of the fairness doctrine, this being an interpretation by the Commission of the standard included by Congress in the statute that these stations must operate in the public interest.

In 1960, -- well, let me wait before 1959 and 1960.

In 1940, in the ruling in the Mayflower Broadcasting case, the Commission instructed radio stations that they could not engage in editorializing. This may or may not have been the right thing to do. It was an articulation of the fairness doctrine.

There was concern that the stations with the great power they have, could constantly reiterate one point of view and shut off all others, and the Commission's approach in 1940 was to say "You cannot editorialize."

But in 1949, after experience with that, the Commission issued its report on editorializing in which it changed its rule and it said, "You can editorialize, but you must allow an opportunity for response by responsible people."

That was the situation in 1949. Ten years later we come to 1959, when after the Lar Daly case which arose under Section 315 involving equal time, there was great concern because

the Commission and a Court of Appeals had held that every candidate was entitled to equal time, even though he had only a miniscule support. Congress amended Section 315 in 1959 to provide that appearances on a bona fide newscast, a bona fide news interview, a bona fide news documentary, and on-the-spot coverage of news events, need not be taken into account in determining the long-established Congressional mandate, an expression, I believe, of the notion of the fairness doctrine of equal time for political candidates.

Then it is very significant, I think, that as a part of that amendment, Congress enacted these words:

> "Nothing in the foregoing sentence" -- that is, the exception of bona fide news broadcasts -- "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 chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

The statute also provided, in paragraoh (c):

> "The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section."

Since our brief was filed, I came across another related matter. In 1960, Congress suspended the equal-time

provision for the 1960 Presidential campaign only. In that statute, which was a temporary statute and, therefore, isn't included in the U.S. Code, there was this additional sentence:

"Nothing in the foregoing shall be construed as relieving broadcasters from the obligation imposed upon them under this Act to operate in the public interest."

Now, that is merely cumulative. It adds nothing to the provision that is in Section 315, but it does show the continuing concern of Congress to maintain the requirement of operation in the public interest not as a mere private venture, which is the heart of the fairness doctrine.

Finally, some four years later, the Commission put out a report which is called "The Fairness Primer." As it appears in the Federal Register, it looks like this. It is, in essence, a digest of the decisions which the Commission had reached in this area, followed by two appendices which are reports of the Commission. One of them is a report of the Commission on editorializing by broadcast licensees. The other is a rather full and comprehensive history of the fairness doctrine.

In putting this out, the Commission said:

"It is the purpose of this public notice to advise broadcast licensees and members of the public of the rights, obligations, and responsibilities of such licensees under the Commission's fairness doctrine, which is applicable in any case in which broadcast facilities are used for the

discussion of a controversial issue of public importance."

Now, there is included in the Fairness Primer digests of several cases which involve personal attacks, and that is the source, not the chronological origin, but the place where there is contained in an official publication the then statement of the Commission's views with respect to the particular application of the Fairness Doctrine which has come to be known as the personal-attack doctrine.

Q When did you say the primer was published?

A 1964, Mr. Justice. July 25, 1964. I believe it has been put out in a different format as a pamphlet, but this is the way in which it appeared in the Federal Register for July 25, 1964.

Mr. Robb has stated the facts of the Red Lion case accurately, and I have no supplement to make. The Red Lion station did broadcast a personal attack on Mr. Cook. Mr. Cook sought an opportunity to reply. He was told he could have it if he would pay for it or if he would certify that he was unable to pay for it. Mr. Cook then wrote to the Commission and there was an exchange of letters between the station and the Commission.

But the first question that arises in my mind on this is whether the case is really properly before the courts. What is the order here?

In the record, one will find two letters. Incidentally, they both appear at least twice in the record. The letter of

October 6, 1965, appears on page 9, and also on page 37. That letter ends:

"Accordingly, you are requested to advise the Commission of your plans to comply with the Fairness Doctrine applicable to the situation."

The station then wrote back to the Commission, and on December 9th the Commission wrote a rather long letter discussing the legal questions, and I have the greatest difficulty finding that there was any order of any kind in there. There may have been some indication that if the station didn't comply with this, that when the time came for their license to be renewed, this would be a factor to be taken into account, but there was no order within any understanding that I have had with respect to the reviewability of administrative orders.

Indeed, the Court of Appeals panel first held that there was nothing reviewable here, but this was overturned by the Court of Appeals en banc without any opinion. I would point out that this was in March 1967, a few months before this Court's decision in the Abbott Laboratories case, but I would mention in connection with that particularly, before this Court's decision in the Toilet Goods Association against Gardner, which was decided at the same time, and it is very hard for me to see that this is the sort of order that should be reviewed.

Let me simply interject here that after the Fairness Primer was put out, the Commission did have a formal rule-

making proceeding and did make rules on personal attack and political editorializing. Those rules are not involved in this case, but they are the subject matter of the next case, No. 717.

In their brief in the next case, counsel for the Radio Television News Directors Association say: "New York Times v. Sullivan governs this case." Just as simple as that. If the New York Times case governs that case, I suppose it governs this one as well, so I would like to start with a consideration of the New York Times case and the differences between the problem there and here.

The New York Times case was a newspaper case, a press case in the literal sense. Now, we do not have a Federal Press Commission. We do have a Federal Communications Commission. We do not license newspapers, nor other elements of the printed media. We do license radio and television stations.

It is inconceivable that we would undertake to enjoin a newspaper from publishing. We can and would enjoin a radio or television station from operating if it did not have a license from the Federal Communications Commission, so there must be some difference. It obviously lies in the fact that radio and television exercise a privilege which is not utilized by the printed press.

Radio and television use a portion of the public domain. They have and require exclusive use of a portion of the radio spectrum. Without their license, they would not be

entitled to use it. With their license, they are entitled to use it to the exclusion of everyone else. They not only have a grant of a portion of the public domain; they have a considerable measure of protection from competition. In many communities there is only one radio station or one television station. Even when there are more, as in the big cities, the protection from competition is substantial, as is evidenced, indeed, by the prices in the tens of millions of dollars which are paid for radio and television stations.

There can only be a limited number of Very High Frequency television stations, and UHF, or Ultra High Frequency, is not yet very effective in competition. Similarly, the number of AM radio stations is limited.

Does the fact that radio and television can operate only when they are privileged to use a limited public facility mean that they are outside the protection of the First Amendment? Of course that is not our position. We are all guardians of the First Amendment, Government as well as broadcasters.

The question to be determined is the application of the amendment in this particular situation. There is a great effort here, and in the following case, to put us in the position of attacking the First Amendment, and seeking to restrict its scope. We do not accept such a position. We rely on the First Amendment and contend that our position is the one that makes it effective, as against the narrow, and I may say selfish

interest of the broadcasters.

The personal attack rules do not forbid anything. The broadcaster can still put on whatever he wants to put on. The personal attack rules do not control the response. They merely provide that there must be an opportunity for response, in order that the listener may have the benefit of robust debate as a consequence of the publicly owned radio spectrum being used in the public interest, not merely as the exclusive, private fief of the broadcaster.

In one of the briefs in the next case, Professor Harry Calvin is quoted. In this article, Professor Calvin says:

"Think of a town meeting where the Chair would rule that each speaker must be fair to both sides."

Now, I like the town meeting analogy. I have taken part in a good many of them and they are a remarkable example of democracy in action. But I think that Professor Calvin has misapplied the analogy. He has misapprehended the function and the opportunity and the responsibility of the moderator.

Let me put it this way: Think of a town meeting where the moderator did not see to it that both sides had full and fair and equal opportunity to speak. Can you imagine a moderator who, after one side had spoken in strong and biting attack, would then tell the opposition speaker, "No, you can't speak here. Perhaps you can get a hearing in some other town, but not here." He would not last long as a moderator. The very essence of his

post is to run the meeting in a fair manner, giving all relevant viewpoints a reasonable opportunity to be heard. He does not control one side or the other. He does not censor. He does not force anyone to speak. When someone wants to speak, he does not tell him what to say. He keeps the channels of communication open. He assures full debate, as robust as the citizens want to make it. He sets the ground rules. But he does not control or take part or censor.

Is this not a good analogy for the present case? It is the Commission which is in the position of the moderator. The Commission does not control or take part or forbid or censor. But it does represent the public interest in assuring that the public facility is used for the public benefit.

The personal attack rules do not rest on protection for the person attacked. They are for the benefit of the public as a part of the overall Fairness Doctrine, which is designed to make the First Amendment effective and which derives directly from the public ownership of the radio spectrum and the enactment of Congress that radio and television stations must operate for the public interest, convenience, and necessity.

This leads directly to the next portion of the argument. It is said that application of the personal attack rules will inhibit radio and television operators, and that they will prefer not to put on controversial programs because they will lose money if time has to be made available for a reply.

This, it seems to me, begs the question. As in many legal arguments, we are in this case, I think, very much at the risk of the tyranny of labels. I have already referred to one aspect of this which might be put in a syllogism. The major premise: The press cannot be required to adhere to a fairness rule; the minor premise, radio and television are part of the press; conclusion, therefore, radio and television cannot be subjected to the fairness rule.

As I have argued, the label is not applicable. Now, on this point, we are subjected to the pressure of another label. It is said that freedom of the press cannot be inhibited. It would be inhibited if there were a personal attack rule. Therefore, the personal attack rule must fall under the First Amendment.

This, I submit, is in part pure assertion, and in remaining part false reasoning. There is no evidence whatever in this record that the Red Lion station was or would be inhibited by the application of the personal attack doctrine. In this very case, it went ahead and broadcast the attack after the Commission had published the Fairness Primer in 1964 and it knew just what was expected of it by the Commission.

But beyond that, as I have said, the argument is based on faulty analysis, for it assumes that every minute of the time available to a broadcast licensee is his to use as he sees fit for his own personal financial profit. But he is and remains a

licensee. He is using a public facility. His license expressly provides that it must be used for the public convenience and interest. If he does not meet the standard of the public interest, the Commission may fail to renew his license. It can even cancel it.

I will continue tomorrow.

MR. CHIEF JUSTICE WARREN: We will recess now.

(Whereupon, at 2:30 p.m. the argument in the above-entitled matter was recessed, to reconvene at 10:00 a.m., Thursday, April 3, 1969.)