Supreme Court of the United States

October Term, 1968

In the Matter of:

UNITED STATES et al.,

Petitioners,

vs

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, et al.,

Respondents.

Docket No. 717

Place Washington, D. C.

Date April 3, 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

October Term, 1968

United States et al., Petitioners,	:	
v.	:	No. 717
Radio Television News Directors Association, et al., Respondents.	:	

Washington, D. C.
Thursday, April 3, 1969.

The above-entitled matter came on for argument at 10:40 a.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
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. 717, United States et al., Petitioners, versus Radio Television News Directors Association et al.

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE WARREN: Mr. Solicitor General.

ORAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.

ON BEHALF OF PETITIONERS

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

Referring for a moment to the previous case and Mr. Justice Stewart's question, I would call attention to ruling No. 17 in the Fairness Primer which deals specifically with the question of paid sponsorship and advises the station through recounting the ruling in a case of the Coleman Broadcasting Company and says that it is not sufficient if you simply offer sponsored time.

Q I lose track of the chronology here, the Fairness Primer was published when?

A The Fairness Primer was published July 1, 1964, and not only was published in the Federal Register but it appears in the record that it was distributed to each broadcasting facility in the country.

Q And the Hargis broadcast was a little later that year, wasn't it?

A The Hargis was in 1965, following this event.

Now turning to No. 717, the Radio Television News Directors Association case, in which there are a considerable number of other respondents, a number of whom have filed briefs, I think I might say at this point that I take a certain satisfaction from the fact that in this case the American Civil Liberties Union is on my side and also the United Church of Christ has filed a brief amicus curiae which is a very excellent brief, if the Court should find our brief too long I would hope they would read that because it is a very fine presentation of our position.

This case is the sequel to the one just argued but it is quite different. It fits in chronologically but it comes with a very different setting. There are no facts in this case but there is a formal regulation which is attacked with a widely scattering shotgun.

The Federal Communications Commission wrote its final Red Lion letter on December 10, 1965; shortly thereafter, on April 6, 1966, the Commission issued a notice of proposed rule-making, complying fully with all of the requirements of the Administrative Procedure Act.

This indicated the Commision' purpose to adopt rules with respect to two matters, personal attacks and political editorials. The text of the proposed rule was set forth and in accordance with the Administrative Procedure Act comments

were invited and many were received. The comments, however, took the form of arguments. There were some representations but nothing in the form of evidence was presented. There were no affidavits or depositions, nor was any testimony of witnesses offered or invited at the hearing. That isn't the practice with respect to hearings on proposed rule-making.

More than a year later, on July 5, 1967, and in that connection with respect to findings I would like to call attention to Justice Brandeis in Pacific States Company against White there is a lot of talk in this case to the effect that the Commission didn't make findings to supports its regulation, but Justice Brandeis in that well-known case said here there is added reason for applying the presumption of validity for the regulation now challenged was adopted after notice of public hearing as the statute required, it is contended that the order is void because the administrative body made no special findings of fact but the statute did not require special findings, doubtless because the regulation authorized was general legislation, not an administrative order in the nature of a judgment, directed against an individual concern.

In 1967, the Commission formally adopted the rules which it had proposed with only slight changes. In doing so, the Commission issued a statement saying that it was simply a codification intended to clarify a portion of the obligation under the Fairness Doctrine, which as I have indicated in the

previous case, finds its origin more than 40 years ago and has been slowly developing over all of the intervening years.

With the equal time provision in the statute going back to 1927 as the first exemplification of it. We think it finds specific statutory recognition in the amendment which Congress adopted to Section 315 in 1959, as well as in Section 315 itself which is the equal time provision.

Which, after all, is simply a specification of one application of the general fairness concept which is implicit in the very fact of Federal regulation of radio communications. The regulation which the Commission adopted in 1967, has been twice amended. Both times to narrow it. Both times, I think, an exercise of care and caution by the Commission.

On August 7, 1967, it was amended to exempt bona fide news casts and on-the-spot coverage of bona fide news events and then after review was sought in the Court of Appeals it was amended again, this time to exempt bona fide news interviews and commentary or analysis in the course of bona fide newscasts.

The regulation as finally amended is set out on pages 7 and 8, the very last line on page 6, but on page 7 and 8 of the Government's brief and I think it is desirable to put its terms before the Court by reading it.

It starts with the heading, "Personal Attacks, Political Editorials."

"When during the presentation of views on a controversial issue of public importance an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall within, A reasonable time and in no event later than one week after the attack, transmit to the person or group attacked; one, notification of the date, time and identification of the broadcast; two, a script or tape or an accurate summary if a script or tape is not available, of the attack; and three, an offer of a reasonable opportunity to respond over licensee's facilities.

"B. The provisions of this paragraph A of this section shall not be applicable, one, to attacks on foreign groups or foreign public figures; two, to personal attacks which are made by legally qualified candidates, their authorized spokesman or those associated with them in the campaign on other such candidates, their authorized spokesman or persons associated with the candidates in the campaign; and three, to bona fide newscasts, bona fide news interviews, and on the spot coverage of a bona fide news event including commentary or analysis contained in the foregoing programs, but the provisions of paragraph A shall be applicable to editorials of the licensee."

And then there is a note, the Fairness Doctrine is applicable to situations coming within three above and in a specific factual situation may be applicable in the general area

of political broadcasts.

And then paragraph C turns to a new topic. Personal attack is closed now. This is the editorializing portion of the regulation. Where a licensee in an editorial, one, endorses, or two, opposes a legally qualified candidate or candidates the licensee shall within 24 hours after the editorial transmit to respectively, one, the other qualified candidate or candidates for the same office or, two, candidate opposed in the editorial, one, notification of the date and the time of the editorial, two a script or tape of the editorial, and three an offer of a reasonable opportunity for a candidate or spokesman of the candidate to respond over the licensee's facilities, provided, however, that where such editorials are broadcast within 72 hours prior to the day of the election the licensee shall comply with the provisions of this subsection sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in timely fashion.

Now I think that that shows that the Commission great care in formulating the regulation and making its requirements clear to the broadcasters who are involved.

Before I leave the question of the text of the regulation, I should refer to one other matter. When the final amendment of the regulation was issued there was also an accompanying memorandum and this is set out at page 228 of

Volume I of the Appendix.

Both the Radio News Television, Radio Television News Directors Association -- I never can keep those initials straight -- RTNDA --, and the Columbia Broadcasting System, make much in their briefs of paragraph 5 of this memorandum which is set out beginning on page 232.

And it is repeatedly said and particularly in the Columbia Broadcasting brief, that though the Commission in its regulation exempted those several categories of news broadcasts, bona fide news casts, bona fide news interviews and on-the-spot coverage of a bona fide news event, including commentary or analysis contained in the foregoing programs, that they took it all back by paragraph 5 of this memorandum.

And I suggest without reading paragraph 5 now, that what paragraph 5 does is simply to remind the stations that everything they do is subject to the Fairness Doctrine and even though these items in the news programs are exempted, that if overall they have done a job which is not in the public interest, that is a matter which is relevant in consideration with the regulation of the stations.

We think that the suggestion in the Columbia Broadcasting brief that this takes back everything is not an accurate summary of it. All that paragraph 5 does it to say that the news programs like everything else a broadcaster does remains subject to the Fairness Doctrine which is inherent

in the very concept of public regulation of broadcasting and is implicit in the grant of a temporary license to a broadcaster on the basis of public convenience interest and necessity.

And so we have the rules which were adopted by the Commission in 1967, with the two later modifications. Without anything more, the respondents here filed petitioners for review of the orders of the Commission; some of these were filed in the Seventh Circuit, others in the Second, but they were all consolidated by transfer in the Seventh Circuit and that is the one decision which is before the Court.

For a record, the parties filed the comments which had been filed before the Commission and the orders and memoranda of the Commission. There is a second volume of the Appendix, Appendix Volume II, which counsel on the other side assures us is a part of the record but I wonder. It is at least an odd sort of record.

It consists of factual material not otherwise in the record which was included in a brief which was filed before the Court of Appeals.

There was a motion for leave to file this brief as an exhibit, and this motion was granted by a judge of the Court. I don't suppose that makes it a part of the record. Then there was insistence that we include it in the record here and we did not think it worth making an issue of it.

Whatever this material is I would point out that it

was never submitted to the Commission. The Commission did not have the benefit of whatever value it may have. In any event, almost without exception, it is irrelevant here for the several broadcasts recounted would all or nearly all be excepted from the personal attack rules by the exceptions which the Commission has included in those rules in an effort to be sure that the burden on broadcasters and the spontaneity of their handling of news programs and commentary should be as great as possible.

And I would mention, too, that the footnotes in the several briefs contain references to programs which have appeared since the rules were promulgated and with no indication that the rules are applicable to these or that anyone is seeking to apply the rules to them.

The whole proceeding puzzles me. No one has yet been ordered to do anything. No penalties or forfeitures have been imposed, there are no specific concrete facts before the Court. The facts just float around and this morning about five minutes before the argument I was handed a transcript of a broadcast of January 28, 1969, and told that it would be referred to in the argument. I haven't had a chance to read it.

Q Mr. Solicitor General, would it change your argument at all if the Commission did think that all of these broadcasts contained in that Appendix were subject to the rules?

A Mr. Justice, it is perfectly plain that almost

without exception nothing in the appendix is subject to the rules.

Q Let us assume that it was, you say it is perfectly plain, I guess the parties claim to the contrary?

A I would like to know the facts of a concrete, specific case.

Q But the parties do, the parties present it as representative of the kind of things that would be covered I take it?

A But ---

Q I know you disagree that it would but there is certainly some ---

A They don't contend now, Mr. Justice, that these things would be covered by the present rule.

Q There is some discussion, a good deal of discussion that the Sevareid broadcast would be covered by the rule?

A The Sevareid broadcast would not be covered by the rule if they were included in a bona fide news program as most of them are.

Q I know that but otherwise if they weren't they would be covered, you agree with that?

A The Sevareid interview program would be covered and the one that was handed to me this morning is a Sevareid interview program, but even there I would like to know what the

Commission does about it.

Q Well, the real point of asking was whether or not it would change your argument any if it appeared that large numbers of the regular, or a large amount of the regular content of television broadcasts were covered by these rules.

Do you think the volume, the burden, the extent of the burden, is really a matter for ---

A Why, yes, of course, Mr. Justice. The extent of the burden would be a matter for consideration and I think we ought to have facts about that and I think we ought to know what the types of programs are, what the nature of the response required is, what the burden is of meeting it. We have nothing of that sort here.

The thing that gives me great concern about the way this case has come up is that it makes this great rule, this bona fide effort to deal with a problem that people have been wrestling with for 40 years, it makes it subject to a parade of horrors.

Q Yes, but I suppose that people are entitled to review rule-making proceedings, aren't they?

A They are entitled to do it a good deal more than they use to be entitled to.

[Laughter]

A It still seems to me ---

Q Well, the law provides for it, I suppose. I

guess it doesn't require the Court to deal, to speculate or ---

A I think this is a nice example of the reason why in cases of this type, and I repeat I think this is rather different from Abbott Laboratories which is a pretty narrow specific thing.

In cases of this type where the validity of a regulation should not be determined with respect to any conceivable facts which is in effect what is sought to be done by this and by bringing in the January Sevareid broadcast but should be determined on the basis of specific facts.

We ought not to have to consider the validity of this regulation in terms of the worst that can happen but rather in terms of what does happen in a particular case.

Q Don't you think it is relevant as to how the people subject to them might understand this language?

A Why, yes, Mr. Justice, I think it is an element but even so I would like to have that developed in terms of specific facts. At the very least it seems to me, that a rule of this sort shouldn't be simply stricken down as the Seventh Circuit did without any specific facts and simply because the fears that can be aroused by a parade of the most difficult cases makes it apparent that there are serious problems here.

This is an area in which thoughtful people have been groping for answers for nearly 40 years, with some slow but steady growth and development over that period.

First, it was very general the Fairness Doctrine. Then it was spelled out in more detail in the Fairness Primer, which is involved in the Red Lion case. Now the Commissinn has thought it wise to put it into a formal rule, not because it is cracking the whip but because that is good administration.

That is the way to let the broadcasters know just what the Commission understands their responsibilities to be. And I repeat they have responsibilities which they do not always seem to recognize in their briefs.

It may be that experience and concrete cases will show that the rule needs to be modified in this detail or that. The lines have been narrowed but the Commission is still active and alert. It will watch the situation and will administer the rule with care and with skill based on its experience and with its devotion to the public interest.

If in some particular case the Commission reaches a conclusion that goes too far, there will always be opportunity for judicial review, of that case based on those facts, and with the Commission's specific ruling on those facts, before the Court.

This is not our petition for review. We do not seek a declaratory judgment that this rule is good no matter what. But equally we do not think that it should be held bad no matter what.

Without any specific facts, and without any ruling

or interpretation of the rule by the Commission, based on those facts.

Q May I ask you if your argument boils down to the fact that you think the rules should not be judged as to its validity on its face?

A Should not be judged as to its validity?

Q Validity on its face.

A Yes, I think that is true, Mr. Justice. I think that this is peculiarly the kind of a rule and a situation where it obviously is not careless or thoughtless or arbitrary, it is obviously been carefully formulated and where its validity should be determined in terms of what actually happens under it, rather than in terms of what somebody might suppose could happen taking the worse possible circumstances which come up.

Q But, I suppose the most fundamental argument on the other side is that this is really promotes self-censorship, just the very words and breadth of the rule will cause licensees to resort just to a bland diet.

A Well, that is the nature of the issue and if that were the way the rule operated it would certainly be a serious matter. Our position is just to the contrary that what the rule does is to promote the opportunity of the public to hear all sides and to have a vigorous robust debate which they will not have if the station can put out personal attacks and then

shut up and say no you can't do anything about it whether you pay or not.

Q I take it the Commission has expressed the judgment that you have just stated?

A Yes, Mr. Justice.

Q And in its experience or in its judgment this kind of a rule will not prevent stations in the first place from putting out or from discussing controversial issues?

A That has been the experience under the Fairness Doctrine. It has been the experience under the Fairness Primer with only a minor number of problems. I can't say that we really have any experience under the rules because among other things ---

Q At least that was the Commission's prediction?

A That was the Commission's prediction, hope and expectation and I think that experience over a long period shows at least the major broadcasters are energetic, debate and discussion is a part of what helps them in the competition situation, and I find it difficult to think that this rule should not have a chance to show that it can promote public discussion and understanding, merely because in some special circumstances it is thought that it may present some problems.

This is not the first time that the broadcasting industry has raised great threats. I have referred already to the brief filed by the Office of Communication of the United Church of Christ and in the appendix to that brief there is

set out the introduction to a pamphlet which was put out by the Columbia Broadcasting System at the time the chain broadcasting rules were before the Court and they then put in the strongest terms that if the chain broadcasting rules were adopted the public would lose all the benefits of radio and so on, and it is perfectly plain that since those rules were adopted and approved by this Court that the industry and the public have both benefited greatly from them.

Q Mr. Solicitor General, are you going to talk specifically about the editorializing?

A Yes, if I have time when I get through the rest, that is certainly a part of our argument.

There has never been a case like this before the Court. There are other cases and both sides can find some useful quotations in the other cases all of which, however, are concerned with a problem somewhat different from that involved here.

We get considerable comfort from portions of this Court's decisions in Nelson Brothers, University of Georgia, Pottsville Broadcasting and particularly National Broadcasting Company against the United States and these are set out on pages 42 and 44 of our brief.

The other side finds comfort in Mills against Alabama and Near against Minnesota. Both of those cases were newspaper cases. I have already tried to argue that it does

not follow that the broadcast regulation is exactly the same. Mills involved absolute restraint on publication, said you can't print it. It is inot involved here. And Near involved restraint in substance and a large measure of control over future publication in any event.

But I would particularly rely on the fact that both cases involved newspapers and did not involve any aspect of the development of the consequences of the Fairness Doctrine which in inherent and implicit in a medium which uses a public facility and is licensed to do so under standards of public interest, convenience and necessity.

It is true that the broadcasters are not a public utility and Congress made that decision and I think rightly in 1927. But they are a public facility and need and have public protection and they have responsibilities arising from those facts which are not shared by newspapers or others who communicate through print.

The Columbia Broadcasting System in their brief say that the Fairness Doctrine is not involved in this case. But we think it lies behind the whole problem. It is an aspect of the fact that the broadcaster must serve the public interest, if he is to have and retain a license.

Let us suppose for example a station which obtains a license and simply does not operate. Surely its license will be revoked. Does that violate the First Amendment? Isn't

there a freedom not to speak as well as a freedom to speak? Not, I venture to think if you are a radio or television licensee.

Or suppose that a station decides that it will broadcast only obscenity or only readings from books such Fanny Hill which have been held to be protected in print by the First Amendment. Would such a station serve the public interest within the Federal Communications Act and would it violate the First Amendment to say that it did not and to revoke its license or to refuse to renew it when it is expired?

It may be said that these illustrations deal with the public interest but not with fairness. Let me move on then to such cases as the Office of Communication of the United Church of Christ against the Federal Communications Commission which was decided not long ago by the Court of Appeals of the District of Columbia in a careful and thoughtful opinion.

That case involved television station in Jackson, Mississippi, which it was alleged discriminated in many ways against the nearly 50 percent of the persons in its listening area who were Negroes. I need not detail the discriminations, they can be readily imagined, anyone at Tougaloo College in the Jackson area was surely aware of them.

The Office of Communications of the United Church of Christ to its credit produced a considerable amount of money and energy which was required to do something about it. The

Commission held that they couldn't intervene but the Commission did renew the station's license for one year only, specifically stated to be a trial period to see if they had mended their ways.

On appeal to the Court of Appeals for the District of Columbia, everything was reversed. The Court held that the Office of Communications was entitled to intervene, that it had a viewpoint and interest which was relevant in determining the question whether the station was being operated in the public interest, and the Court also held that the question of the renewal of the license should be decided on the basis of a full hearing and not on the basis of what was done during a trial renewal of one year.

Q What are the terms of these licenses?

A Three years is the normal term. The Commission can make it shorter; it cannot make it longer and ithemust be reconsidered at least every three years.

This hearing has now been held and the Commission has granted a full renewal after a full hearing and the case is once more on its way to the Court of Appeals.

It is also clear that there has been a great change in the program practices of this station. I find it hard to believe that this has violated the First Amendment. It has rather been a step foward the effectation of the First Amendment, a recognition of the obligation which a licensee undertakes

when he is granted an exclusive right to utilize a valuable public facility. The problem involved in that case is, I submit, not different in last analysis from that involved here.

In the development of the personal attack rules, as a direct outgrowth and development from the Fairness Doctrine which is implicit in the concept of public regulation off broadcasters.

Now I would like to point out and I think this is of great importance here.

The regulation involved in this case is entirely neutral with respect to the content of speech. It applies in exactly the same way and requires exactly the same action from the broadcaster regardless of what views are expressed in the broadcast giving the right to the reply.

Q This regulation has identical application to both radio and television?

A Yes, Mr. Justice.

Q There are no differences?

A There is no difference between radio and television.

Q Television is so much more local, isn't it, as a generality?

A Well, television is much more dominated by the networks --

Q By the chains.

A -- which tend to give it a broader outlook.

Q Except for CATV each particular station has a television ---

A Television.

Q Less diameter.

A A particular television station has a limited service area but that is exactly the same or substantially the same as the limit of F-M radio stations. A-M radio stations can have a very wide range and with satellite communication and cable television and so on the television stations are not as clearly to be distinguished as they used to be.

The Government does not by this regulation support any point of view except, of course, the central idea of the First Amendment that there should be an opportunity for all points of view to be heard.

An important corollary of these regulations is that they strongly reduce the incentive for the Government to select its broadcast licensees in ways that might be difficult to detect on the basis of the political or other views that they are likely to express or favor in their broadcasting.

This, too, serves the policies of the First Amendment.

An analogy may be found in arguments in this Court. It has been my observation that when one counsel speaks there is always an opportunity for one to speak on the other side. And exactly the same amount of time made available. And if

as happened in this case, counsel seek to have the case taken off the summary docket and put on the regular docket so that they may have an hour on a side then an hour is given to the other side.

This might be regarded as an inhibition upon his asking for additional time for himself. An inhibition quite comparable to that complained of by our opponent in these cases except that it is the Court's time rather than the broadcaster's time which is being consumed.

But the inhibition is obviously justified on the basis of consideration of fairness and of values reflected in the First Amendment which favor an opportunity for both sides of controversies to be heard.

As I contended in the argument in the Red Lion case, our opponents in these cases seek to put us in opposition to the First Amendment and we do not accept that position. I suggest that on analysis it is the Government and the Federal Communications Commission which are the real champions of the First Amendment here.

The Commission's regulations serve to foster important First Amendment values which our opponents would have the Court sacrifice in the guise of upholding the narrow and financially motivated claim to unfettered control of air waves that had been licensed to their custody.

This argument is I submit fully supported by this

Court's recent decision in the Citizens Publishing Company case, decided on March 10th, the Court there quoted from the Associated Press opinion in explaining the beneficial effects of free speech in the application of anti-trust laws to the communications media and I was quite struck when this case came down with the closeness of the application of that quotation utilized by this Court only three weeks ago.

It would be strange, indeed, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the Government was without power to protect that freedom. The First Amendment far from providing an argument against application of the Sherman Act, and here s would simply read it, the personal attack rules, here provides powerful reasons to the contrary.

That amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public that a free press is a condition of a free society. And there is more of the quotation, much of which is relevant.

This view is also supported by the venerated concurring opinion of Mr. Justice Brandeis in Whitney against California which emphasizes the great reliance upon the value of counter argument that is implicit in our protection of free speech in the first place.

The realities of the broadcasting industry have led

the Federal Communications Commission entirely properly in our view to take the steps needed in these regulations to make the opportunities for counter argument a reality in this important communications media.

In the Associated Press case, the applicability of the anti-trust laws to the news services and its members in no way depended on the content of their news stories. This was also true in the Citizens Publishing Case this term to which I have just referred.

The restraints of trade in those cases would have been equally unlawful if all the editorials and news stories being published had taken the other point of view. The Court in those cases upheld the Government's right to regulate these news media in the interest of legitimate anti-trust objectives in a context in which the regulation was entirely neutral with respecto the content of what was being published.

And in which no one was being forbidden from publishing anything. While the application of the anti-trust laws may have reduced profits, this is also true of the application of the Fair Labor Standards Act or the income tax to newspapers and broadcasters.

In this case, another communications media is being regulated in pursuit of an equally valid Government objective and again in a way that does not favor or disfavor any particular content of speech, and which doesnot forbid the

saying of anything.

The policies of the First Amendment not only favor access to the media of perveyors of all points of view, but the Court has specifically recognized a First Amendment right in the recipient or listener not to have the channels of communication to him stacked so as to favor or disfavor a particular point of view.

This was established in the case of Lamont against the Postmaster General, cited at page 75 of our brief in which I am inclined to think on reflection in preparing this argument is perhaps one of the most important cases which lead in support of our position here.

It is true that the Court has stricken down regulations in some cases which were superficially neutral. For example, the complete banning of methods of communication such as sound trucks or hand bills tend to discriminate against those espousing unpopular ideas and who do not have easy access to the commercial communications media.

Similarly, requirements of associational disclosure tend to bring about burdens on those associated with groups that are unpopular in the community, and thus to discourage association with such groups.

Much the same can be said about Tally against California where the Court upheld a right to anonymity in the dissemination of political literature. There is also an

important element of this in the New York Times against Sullivan line of cases. Because a large libel verdict tends to indicate that the plaintiff and his views are held in high esteem in the community and the contrary about the defendant while it is difficult for a truly unpopular plaintiff to win much of a libel verdict against a popular defendant.

Yet the main office of the courts under the First Amendment is to protect the right to express views that are not already popular and accepted in the community and I suggest that that is the fundamental basis behind New York Times against Sullivan.

Now we come to the editorializing aspect of the rules which is discussed on pages 78 to 82 of our brief. Here again I am a little puzzled because some of the principal briefs filed in the case are filed by the networks and the networks do not editorialize.

Whether the Radio Television News Directors Association engages in televising I don't know. Here again we have no facts, nothing to indicate that they do or they do not. But in essence the editorializing rules are much the same as the personal attack rules, they call for opportunity to reply and they are an exemplification of the Fairness Doctrine.

They are a means of keeping open the channels of communication of facilitating the objective of the First Amendment which is to provide an opportunity for the public

to hear and to learn.

Q They apply, Mr. Solicitor General, the rule applies as I read it here only with respect to a candidate, not with respect to an issue like a bond issue or a tax levy?

A They apply only with respect to a candidate. That is right. They do, it does not apply to a public issue --

Q Whether or not an election is involved.

A Safe streets, other things that people might want to discuss about. It does relate simply to candidates and does provide an opportunity for candidates to reply if one or another is endorsed in a ---

Q How does it work? How would it work in an election like was held this week in Los Angeles where I think there were about ten candidates?

A I think it might be very difficult.

Q If the station endorses a candidate, the result would be that nine other people would get on the air free to attack him so I think the station would endorse its enemy.

A I am not sure ---

[Laughter]

A Well, I think it is a problem when there are multiple candidates. I am -- we do not know what the Commission's position would be as to the amount of time which would be available for other candidates. And there are sometimes -- I thought it was 17 candidates --

Q Maybe there were. I don't know.

A -- in Los Angeles all told and I think it is a very serious problem and it may well be that the Commission ought to give further consideration to that sort of thing.

What I am really ---

Q It doesn't explicitly specify equal time does it?

A No, it does not. Very specifically it does not specify.

Q Neither one of these do?

A It is whatever is required by the overall scope of the Fairness Doctrine.

Q A reasonable opportunity?

A A reasonable opportunity to respond.

Q May I ask you one question.

In 1927 Act, its successor I believe it was 1930, that was similar provision in the statute? Do you know?

A The statute of ---

Q Of radio control.

A The Radio Act of 1927 and the Federal Communications of 1934, do have the equal time provision which allows the candidate, which provides that if the station sells time or gives time to a candidate, it must give equal time on the same terms to every other candidate. And that is the equal time provision which was then amended in 1959, to exclude

bona fide news broadcast essentially the same exclusion which are made in this regulation.

It was suspended in the 1960 campaign but was in force and followed in 1964 and in 1968. It is it seems to us the fundamental recognition by Congress in a most sensitive are of the applicability of the Fairness Doctrine to radio and television broadcasting, and it is with respect to the amendment in 1959, which excepted news programs, that Congress expressly included a provision saying thatnothing there should protect radio and television stations from their obligation to operate in the public interest, which we contend is a legislative, congressional recognition of the validity and the application of the Fairness Doctrine.

Q Did those Acts disclaim any purpose to allow censorship of any kind?

A No, Mr. Justice. On the contrary, as is our position here it is to free up, it is to open the channels of communication rather than to control them or dominate them or direct them.

Q I was of the opinion that either that passed in one of those laws or there was offered provisions to the effect that there should be no censorship exercised.

A There is such a provision in the Federal Communications Act today. And we don't for the moment concede that we are seeking to employ censorship.

Q And there was then?

A There was then. There has been from the beginning.

Q I would assume that indicated probably that the Congress didn't consider it was requiring equal time for censorship.

A I think it is quite plain that the Congress for more than 40 years has not regarded a requirement of equal time as censorship; quite to the contrary it is a freeing of the channels of communication.

We are fighting for the First Amendment here. I hate to yield that to the broadcasters whose interest may not be as broad as ours.

I would like to reserve my time for reply.

MR. CHIEF JUSTICE WARREN: You may.

General Cox.

ORAL ARGUMENT OF ARCHIBALD COX, ESQ.

ON BEHALF OF RESPONDENTS

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

At the outset of my argument there are three semantic differences, perhaps I could add a fourth now, between the point of view expressed by the Solicitor General and the point of view that we submit to the Court.

The first is that this case involves the personal

attack and political editorial rules that does not involve a general attack on the Fairness Doctrine.

The rules are very precise. They provide that if a broadcaster expresses a particular kind of idea, if he criticizes a public official in a way that may be regarded as an attack upon his honesty, character, integrity, or like personal qualities, whatever that may mean, then certain obligations attach to it and we submit to the Court and I will try to show in more detail in my argument that those obligations attach to the expression of a particular idea or kind of idea, one that constitutionally protected, are much more onerous than any obligations imposed by the Fairness Doctrine.

And I may say that this is true of those kinds of programs that are characterized as exempt under the regulation. That the Commission has a special brand of the Fairness Doctrine and one that the Solicitor General in the statement the Solicitor General would have read if he had troubled to read paragraph 5 to the Court, said unlike the Fairness Doctrine in general there are special obligations where there is something that can be characterized as a person attack even in a news program.

The second semantic difference goes to our reading of history. In fact the other two go to our reading of history.

We agree that there are certain expressions of

regulation of the content of broadcast to be found in the Commission's administration of the Communications Act but I think when you come to read those carefully you will find that they are based upon a view of the First Amendment's application to the broadcasting which is simply out of keeping with modern interpretation in the constitutional doctrine of the First Amendment and out of keeping with the current facts.

The best example is the Mayflower rule which prohibited a broadcast journalist from taking an editorial position on anything. A position which surely would not be sustained by this Court today.

Indeed Judge Bazelon recently observed in the Court of Appeals of the District of Columbia that it may very well be that some venerable FCC policies cannot withstand constitutional scrutiny in the light of contemporary understanding of the First Amendment and mthe modern proliferation of broadcasting -- but the third theme which I would mention now simply to draw to the Court's attention and I shall develop it at more length later is that although the Congress and this Court have, of course, sustained certain regulation of broadcasting and although Congress has spoken in the broad terms of public interest that the Solicitor General emphasizes, both Congress and this Court have been very careful to distinguish between regulation that has to do with avoiding interference, securing competent licencees, dealing with the structure of

the industry as in the chain broadcasting cases on the one side and regulation that lays whole of what is said on the other side.

That is not always a clear line but I would emphasize that in the history both sides of the line come through and not just the side mentioned by the Solicitor General.

The clearest expression is by Congress itself for it declared in Section 326 nothing in this act shall be understood or construed to give the Commission the power of censorship and no regulation or condition shall be promulgated by the Commission which shall interfere with the right of free speech by broadcast communication.

Q When did that appear in the first act?

A I ---

Q When was that first in the act?

A I am not sure whether that was in the Radio Act of 1927. It certainly came in in the Communications Act of 1934. This Court in the Saunders Brothers case noted the licensing power on the one hand but said that on the other hand the Commission was given no control over the programs.

And I would mention now, too, although I shall elaborate it and give you the language later, that Congress on three occasions, the Congress on two and the President on one occasion, rejected in the legislative process attempts to put broadcasters subject to the duties essentially the same

kind of duties that the Commission now seeks to impose in these regulations.

My other semantic difference with the Solicitor General is one mentioned by Mr. Justice White and that is that nothing has come to better settled than that regulation of speech are to be judged on their face, by their tendency and that the Court will not require the nation to wait until a test case arises before it examines and if they are unconstitutional strikes down such regulation.

That proposition is so well settled that I don't stop to develop it.

Q That still leaves the question though of what the -- even if you examine them on their face ---

A We must, of course, go ahead and do so and show what the tendency will be and I propose to do that.

Q And under what circumstances or from what evidence you conclude ---

A Well, I think we can show the Court that the tendency is bound to be highly restrictive especially in terms of self-censorship it is a burden that I, at least in a formal sense, have to go forward and carry.

Q And you have to overturn the FCC in that respect, too, don't you?

A I would think this was a question on which the Court would make up its own mind.

Q Well, I would think so, too.

A There was no presumption in favor of the FCC ruling. We have to persuade the Court to reach a different conclusion but I think there is no presumption in its favor. Now we submit that these regulations are invalid upon two primary grounds.

First, we say that they unconstitutionally abridge the freedom of speech of the press guaranteed by the First Amendment and second that they are invalid because they are beyond the statutory authority of the Communications Commission.

I shall deal with the constitutional issue first, even though the Court may never reach it, because it can and I am inclined to think should decide the case on the statutory ground but I deal with it first because the seriousness of the constitutional question is in our judgment an important element in resolving the issue of statutory interpretation.

Our constitutional argument proceeds in a series of propositions, the early ones of which seem to me not seriously controversial.

But first, we say this case involves freedom of the press. The electronic media are not simply carriers as they have evolved in this country and that may be one difference between what President Hoover was thinking of in 1924 and the situation as it exists today.

Broadcast activities in the field of public affairs

are virtually indistinguishable from those of newspapers. They have editors, producers, reporters, their own news services which add to the news services of UPI and the AP. Their functions, I submit, make them one of the very instruments which this court characterized in Mills and Alabama as agencies which the framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free.

Second, I would point out that the challenged regulations lay hold of speech itself. This is a fact which distinguishes every other case involving broadcasting that has come before this Court because they all had to do with the economic regulation of the industry.

We are not talking about fair labor standards or labor relations or the anti-trust laws here. We are talking about a regulation which says as I indicated earlier, that if you express ideas for certain character, ideas which can be described as an attack on somebody's integrity or honesty or other personal qualities, or if you put someone on the air who may engage in those attacks, then you run the risk of having to carry certain obligations which are onerous, but if you steer clear of those ideas, if you prefer blandness to biting criticism of the shabbier self-seeking, then you are safe. You don't have to worry and we think that this is fairly characterized as a regulation of speech itself.

Not only that, but, of course, the speech that this regulation lays hold of is the kind of speech which this Court characterized in the New York Times case, as lying at the very center of the constitutionally protected area of free expression.

By its own terms, this regulation applies only when one is discussing questions of public importance. The speech in the Red Lion case was certainly within the New York Times case. And this is true under all the other Commission rulings under the Fairness Doctrine or the personal attack rule which deal with criticisms of public officials for the most part or people engaged in controversy upon public issues.

My third proposition is that the challenged regulations abridge the freedom of speech in ways which unless justified violate the First Amendment.

Inhibition as well as prohibition of protected expression is forbidden by the First Amendment. That is perfectly clear from cases like Talley in California, Thomas and Collins, Lamont and Postmaster General.

Here the Commission, as I said before, says you may not criticize in a way that we would call a personal attack unless you are prepared to scrutinize what has gone out of over the air and see whether it contains any personal attacks, to give notice and a transcript to offer free time for reply, and then engage in the negotiations necessary to arrange the

reply, disrupting your other program clearing time on a nationwide hookup, if that is necessary.

Now, we submit that attaching these burdens inhibits the broadcast criticism and political editorial in four ways. I am going to state them and then I am going to turn to some concrete examples in an effort to show exactly how they would work.

First, attaching this condition deprives the broadcaster of his freedom of journalistic judgment. Even the most fair-minded manager of a radio or television station will think twice about offering criticism of this kind if the price he must pay is surrendering his judgment as to what is in the public interest.

Q I take it you think it is critical for your case to establish this effect on the content of the program in the first place?

A Well, we think that it is an essential part of these regulations if I understand your Honor that they let hold of the content of the program.

Q I understand that. I understand that, but I think it is critical if it didn't affect the content of the program because it affected them but if it didn't really change, have the effect of changing the content of the program, would you still be making a ---

A There would still be burdens that we were made

to carry.

Q Exactly, but would they violate the First Amendment?

A I think it would. But I don't think I need stand on that because I think the problem of self-censorship is very real. I suppose that had it been a fact in the New York Times case, that the New York Times would have paid that judgment rather than suppress the advertisement that was bought, that there would still have been held to be a violation of free speech but we do stress and we think that it is fairly clear this will have an effect on the content but I would assert that I can stand on both grounds.

Again, remember that the time taken to complying with this Government order is necessarily taken from the time that the broadcaster might think and might reasonably think and even rightly think it was more in the public interest in which it was more in the public interest to broadcast something else.

Next, I would emphasize that there are very considerable administrative burdens and troubles to which these regulations put the broadcaster. He must scrutinize his scripts and see whether they contain personal attacks, consult with lawyers, probably more lawyers, in order to find out what duties arise out of a particular program.

There is the sending out of the notice and the tape

which isn't a big thing for a large outfit but this regulation applies to little stations, too. There is the matter of clearing time for reply which may vary from no problem at all to a really very troublesome and serious problem, including an effect on the good will of the audience.

And then there is the matter of negotiating the reply and finally the matter of often defending one's self before a Commission and its staff which has a life and death power over the broadcaster through its control of licenses.

The financial cost of giving the risk that you must give time whenever you put a free swinging controversialist on the air is not inconsiderable and most of all there is the pressure for self-censorship which these things create.

Now I would like to take a few concrete illustrations to show how as we see the regulations are bound to work. Let me call your attention first to a broadcast of Eric Sevareid's which appears beginning on page 15 and runs over to page 16 of the record in the second volume, the one that the Solicitor General objects to.

We offer these simply as examples of how these regulations would work out. I could make up examples but it is more persuasive to use real ones and that is the reason we bring them into court.

Mr. Eric Sevareid gave what I think you would agree was an impartial and fair presentation of Henry Luce's

contributions to American journalism. Toward the end he said -- it is on the bottom of page 16. He referred to Time. And said that Time strained in every sentence to avoid dullness which often meant straining truth.

Many journalists have always distrusted it, nearly all have always read it. Now I suppose that that is an attack on an identified group. The Time editors. And it raises a question about their intellectual integrity and if it were directed at me I would think that was an attack upon my personal character.

At the time Eric Sevareid said this he was not subject to any inhibitions but considering today if he were confronted with the same situation preparing his evening broadcast at 4 o'clock in the afternoon, what does he do? Is this a personal attack? Or isn't it?

Well, he might answer that it is. Then he subjects every station that carried his program to all these burdens. Should he do that or should he trim his sales a bit or maybe he doesn't know so does he call up his lawyer?

The result all too often is likely to be that Mr. Sevareid will decide well I had better not say what I think. I had better find something that is a little safer, a little more bland, or he may and, of course, this is of great concern, he may decide to transfer it to a medium where he would not be subject to this kind of inhibition.

Q Mr. Solicitor General, would it bother you -- you have just stated an instance which is an illustration of why you object to the rule. Now would you, would it bother you any to get to that rule where it is printed and tell us the part of it which puts on the burden that you say is censorship?

A Not at all.

Page 6a of the Appendix to the RTND brief.

Q Which brief?

A RTNDA. Yes, my brief.

Q Page 6 what?

A Page 6a in the very back. The next to the last page of the brief.

Q This, I think, will be the core of your argument against the rules?

A It is certainly a very important part.

(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the -- it would seem to me that the editors of a magazine are an identified group and that saying that they strain truth and that many reporters have always distrusted them, attacks, because attack means only adversely criticized their integrity or like personal qualities, whatever that may mean. I don't see how -- I would have thought this was clearly a personal attack but

its enough for my purposes to suggest that it raises terribly serious questions and that because he couldn't be sure Eric Sevareid would then be put under pressure to trim.

Q Except that it wasn't made during the presentation of views on a controversial issue of public importance. It was made on the occasion of the death of Henry Luce. There is nothing controversial about that.

[Laughter]

A I would think a discussion of one of our great national magazines, and its reliability was an issue of public importance. I would be amazed if the Commission drew this distinction. But let me ---

Q Is that all of it now?

A That is all of this instance, Mr. Justice. There are many ---

Q What I mean is the core of your objection.

A That is the core of what I have to say with respect to this Sevareid broadcast.

Q May I ask you one other question.

Now let us assume that is the core of all of them practically -- that the Board, the Commission has seen fit to provide that when a public attack attacking an individual's integrity, integrity of a group has been allowed to take place over the television, is it your argument that it is beyond the power of Congress or of its acting subsidiary you might

say, the Commission, to provide any kind of protection such as this for the man?

A We say that this regulation is beyond the power of Congress and further, that Congress hasn't authorized the Commission to issue it, yes.

Q That is the real basis of this argument?

A Yes. Both parties I would emphasize.

Q So that there would be no relief that the man could get from the radio station that permitted him to be personally attacked his integrity or character?

A Well, I wouldn't want to say that no one could think of any other kind of remedy and, of course, if the attack were not the kind of criticism that is privileged under the New York Times case, if it were wilfully false, then we would have an entirely different situation.

But this applies when it is true and a fortiorari -- when it is just the result in the state, when every word is true. Let me give another illustration.

Q How should he get that to the public?

A How what?

Q How could the man attacked have any chance to get any statement to the public that it is false or that it is not true?

A Well he has access, if he is a public figure and this is an issue, he has access to a number of media and

frequently he will have had an opportunity to present his views on these questions, in all kinds of ways. And on many occasions.

Q And in your example I suppose it is perfectly obvious how the editor of Time Magazine?

A Yes, yes, but I would emphasize that nearly all of these, I would emphasize, Mr. Justice, I don't mean to rush over what you say, I agree with you completely but I would emphasize that in nearly all of these cases, the other person has ample opportunity to present his views and may have presented them but the Commission automatically comes along and applies this requirement.

Now let me take a somewhat different aspect of the matter. In the second half of this document, quite toward the end, the page that is numbered 55, is this transcript of an appearance of Adam Clayton Powell on "Face The Nation," a panel show like Meet The Press.

It begins at 55 and I see no very troublesome passage although there are some that might be thought troublesome until page 59 when Mr. Powell says that "...anyone that has an estranged wife is automatically inherited a liar."

I would suppose that was a person attack upon his wife, and Mr. Powell was certainly discussing questions of public importance at the time of this appearance.

Q What page?

A It is hard to identify because -- yes, the thinner one, towards the end, and I am on page 59. Much farther along in the second volume. The second 59. There are two 59's printed unfortunately.

[Laughter]

A I am very sorry.

Q Well, there are two networks?

[Laughter]

A I am pointing out that the first personal attack is on Mr. Powell's wife. Now over on page 53, 63, one of the reporters questioning Mr. Powell says "But does that answer the question whether you advocate what -- it is italicized -- Rap Brown and Stokely Carmichael have been advocating, guerrilla-type warfare in the cities of our country?"

That would seem to be a personal attack by Mr. Dean on Stokely Carmichael and Rap Brown. Now, of course, both Rap Brown and Stokely Carmichael have ample access to the press, both indeed had been on CBS shows. I don't think there is any question of fairness in getting their views before the public but nevertheless under these regulations there would be a very real question whether CBS did not have to go through all this machinery of giving them time for reply.

Over on page 66, toward the bottom you will see a reference to Representative Conyers of Detroit, who was referred to as a black Judas. I would think that that was

calling a man a Communist is a person attack as the Commission said in its opinion on this matter, calling one a black Judas would seem to me to be a personal attack.

Over on page 67 Mr. Powell says that Calude Pepper was one of the No. 1 racists on Manny Celler's committee against him. This again I should suppose though I can't say with any assurance because the Government persists in ignoring these questions, I should suppose was a personal attack.

If it is a personal attack as the Commissioner ruled to say the John Burch Society attempted through a front organization to have a standard reference book removed from the library in Visalia, California, then I would suppose this kind of thing was rather clearly a personal attack.

And then there is a reference to Judge Matthew Levy for issuing an indecent, obscene, illegal, unilateral order. I would think that that, too, might well be a person attack.

Now the point I am trying to make, is that after this program which was a free live discussion, the work would begin of going through it and going over these things, of such questtions as Justice Stewart raised as to whether it really was a personal attack or in many instances might have to be taken into account and maybe decided that it wasn't, Mr. Justice. I agree.

But the thing is that nobody knows for sure and some of my colleagues think there are many more personal attacks

but there would be at least six or eight of them in that single Face The Nation program and all those instances in which the obligation would fall upon the network and all CBS stations to carry out the duty of upsetting its programming, substituting offers of free time for reply and the replies, in the place of what matters in its editorial judgment it thought were more important.

MR. CHIEF JUSTICE WARREN: We will recess now.

(Whereupon, at 12 o'clock noon the Court recessed, to reconvene at 12:30 p.m. the same day.)

AFTERNOON SESSION

(The oral argument in the above-entitled matter was resumed at 12:30 p.m.)

MR. CHIEF JUSTICE WARREN: General Cox, you may continue with your argument.

ORAL ARGUMENT OF ARCHIBALD COX, ESQ. (continued)

ON BEHALF OF RESPONDENTS

MR. COX: Thank you, Mr. Chief Justice, and may it please the Court.

In using concrete illustrations before the luncheon recess, the point aht I was trying to make was that these regulations, have, I think, an obvious tendency to induce a broadcaster and remember, we are dealing with local programs as well as the nationwide programs that I used as illustrations, to press a broadcaster to prefer the bland pundit to the biting critic of the shabby or self-seeking, to avoid putting on programs like Face The Nation, or their local equivalent, round-up of reporters on a radio show, free swinging controvercialist and to use as moderators people who would steer the discussion away from the criticism of Government officials and other public figures rather than tortand we think that a regulation which has that kind of impact on the actual conduct of broadcast journalist, both because of the burdens and even more because of the pressure toward self-censorship is a violation of the First Amendment unless it is justified by

some overriding public interest.

Q General, would you mind telling us how far you think the Commission can go in determining whether there has been fairness or not by rules?

A Well, we would draw a sharp distinction, and I intend to elaborate this a little later, between the Fairness Doctrine itself and the personal attack and political editorial regulation.

I am going to explain in just a moment, it comes a little better a step farther on, the differences in our position on this.

Q Yes.

A Because to be quite candid, Mr. Chief Justice, I am speaking for a number of parties here. They take somewhat different positions and they have asked me to state their respective positions on that question as carefully as I can and I can do it better just one step farther along the line.

Q All right, on your own time.

A As I was saying, we come to the question of justification. The justification advanced by the Government in its brief is that restrictions upon the normal liberty of the press, normal freedom of expression here, are necessary in broadcasting because in order to assure the public access to what the Government defines as a fair or balanced presentation, in oral argument the Solicitor General added as

further justification that the Government owns the air waves and what it gives is a privilege.

The addition of those labels or concepts it seems to me don't really advance the argument where the Government gives a privilege such as the second class mail privilege, it still has a duty to administer it in ways that don't inhibit expression or inhibit the press, one couldn't use the second class mail privilege as a way of discouraging magazines from criticizing public officials or other public figures.

As Justice Brennan said in the Lamont case, if the Government wishes to withdraw subsidy or privilege it must do so by means and on terms which do not endanger First Amendment rights and I come back here to the question ---

Q What if the Government gave a franchise, for instance, to a private party, would the Government say let us make sure you give everybody access to the mails?

Or just because somebody was operating a communications mechanism could he say I am going to send in the mails what I want to and that is the end of it?

A I make two points, Mr. Justice.

First, and this is one I tried to emphasize earlier in my argument, that broadcasters are not merely carriers. Broadcasters as the industry has grown up, and as they are treated by the Communications Act, are themselves journalists and they have views to express and I would think it very questionable ---

Q Well, could the Communications Commission make them, I mean could the Congress make them ---

A I think that would raise a very different question in this case.

Q You don't think this is even a step along the way of making them carriers?

A Well, I think first they haven't competed as carriers. I would emphasize that we deal with the case in this context. Second, I come back to another point that I attach great importance to and that is that this isn't like say taking two hours of time, which must be given in the morning to a certain kind of programs that would be established in some way.

This says that the amount of time we take from you depends on what you say in conducting your own journalistic functions. It is not like saying we will take the use of your lower field so many days a week for public purpose. It says we will take it a day for every time you criticize the Government or any other public figure.

This is attached to the expression of particular ideas and I think that distinguishes completely the cases of whether the Government could take two hours a day and say that this shall be available for certain kinds of public interest programs which will be prescribed in some nondiscriminatory and constitutional way.

I really don't think that case need bother us here because of the length between the two.

Q You don't object to the Fairness Doctrine generally which tells the broadcaster that if you are going to talk about controversial issues overall you must ---

A No, no, I am afraid I have mislead your Honors, if I have given the impression that is my position.

Now let me come, because I think the argument about public ownership really falls out and we are back to the constitutional problem. And there is a question of whether this justification, we are trying to provide the public with a fair and balanced opinion, is sufficient.

Now there are two answers to the argument, the desire to provide fairness and balance. In the case of the press is a justification for these regulations.

One, attacks the adequacy of the alleged justification. This an argument which is advanced in its strongest form by the National Broadcasting Company. The National Broadcasting Company says the imposition by an arm of Government of its standard of fairness on the press, and the enforcement of that obligation by Governmentally imposed sanctions is contrary to the Constitutional guarantee of freedom of the press.

This is an argument which might be put a little less absolutely and indeed in my brief I have put much the same

argument a little less absolutely. We assert that the basic postulate of the First Amendment is that the public interest in access to a variety of ideas, is to be secured by relying on the diversity and multiplicity of expression, developing in the absence of the restraint and that the Government is unable to show anything here that would justify departing from that basic postulate.

Now I come to your question, Mr. Chief Justice, and in a sense to where I said I was afraid I had mislead Mr. Justice White.

The logic of that argument does put in question the Fairness Doctrine. I don't want to mislead you. And indeed the logic of my argument that if you do this, then you must do that, puts in question to some extent the Fairness Doctrine because that essentially is a part of the doctrine.

Now, I am going to have because of the passage of time going tohave to leave the development of this constitutional argument to our briefs. But theessence of it is the Government notions of fairness, of impartiality, are a violation of the First Amendment, that if in some circumstances that may be conjured up there is sufficient factual justifiction for Government intervention, there is no such condition in the broadcasting industry today.

Partly because of the proliferation of stations which are ten times what they were in the early 1940's, partly

because broadcasting is only one of many media, and indeed it adds to the access people otherwise would have to opinion and if, I am not going through it, but if when you think about the Red Lion case you notice how the dialogue developed across media, it is a very good indication that this notion of the insulated listener that the Commission hypothesizes, is not realistic.

The argument that I just mentioned which I say I do refer your Honors to our briefs on, is not made by CBS. CBS' position which all of us join except that we make the other argument, too, emphasizes the peculiarly restrictive character of the challenged regulation and it asserts that even if we suppose that there is a justification for Government regulation of the Fairness of broadcasting, in order to assure the public access to a diversity of opinion, still these regulations with their peculiarly restrictive character cannot be sustained because they impose much heavier and more burdensome restrictions than are necessary, Mr. Chief Justice, to secure fairness and, therefore, they fall under the least restrictive alternative doctrine.

I hope that that answers your question as you put it earlier.

Q As I understood the Chief Justice's question, it does not suggest an answer but it doesn't give an explicit answer, as I understood his question it was, would you concede,

what would CBS argument concede?

A The CBS argument would concede the Fairness Doctrine.

Q That Government could do?

A The CBS argument would conceive the Fairness Doctrine.

Q Just a general fairness on that balance, that determination of the license period on the renewal you look to see how generally fair they have been?

A That is as I understand it, yes. Whether there can be some mid-term scrutiny I am not sure they have addressed themselves to that, it isn't involved.

The more precise scrutiny you put the more it becomes an inhibition on saying particular things and that is an important part of our argument.

Q General, I would like to ask you the same question I asked Mr. Robb then, how do you differentiate the two situations in principle, not in degree, but in principle?

A Well, I think, I wouldn't -- as Justice Holmes once said all constitutional differences in the end come down to differences in degree. I think the difference is in principle, and I would submit that they are matters of principle, are these, Mr. Chief Justice:

Between the Fairness Doctrine nd the personal attack rule, and let me try and develop them and see if they

don't really answer your question.

And then I am going to again with concrete illustrations attempt to show at least once how they work out.

The principal differences and I think they are differences in principle are these. The Fairness Doctrine looks at overall performance. Thepersonal attack rule calls virtually for a line-by-line item-by-item scrutiny.

Second, the Fairness Doctrine left discretion to the broadcaster in deciding what views deserve presentation and it holds him only to a reasonable judgment. The personal attack rules apply an automatic rule and they leave the broadcaster no room for judgment in determining what is a personal attack and when he must give reply although they do give him the benefit of acting in good faith with respect to imposing any fine for having failed to give notice.

The Fairness Doctrine leaves discretion as to whether a reply is needed to achieve fairness. If so, who may most appropriately make the reply. But the personal attack rule is absolutely automatic. You must give time, adequate time, you must give it to a particular individual.

And where the generality of the Fairness Doctrine makes it less restrictive when it is coupled with the ideas of reasonableness and good faith, the vagueness of the term and character, honesty or other personal qualities, personal attack, identified group, when you apply them item by item

increase the pressures toward self-censorship because if you are wrong these consequences all fall in, and the pressure is to steer clear of the dividing line.

Now I think perhaps a very good illustration, Mr. Chief Justice ---

Q Well, General, before you get to that, I was just wondering if it couldn't be said that there is a greater inhibition on free speech where a station is permitted to go along for three years for the length of its franchise, to say what it wants, do what it wants, and then at the end of the three years risk the loss of the franchise because in the opinion of the Federal Communications Commission it had not been fair with people throughout because that would actually be perhaps a censorship because of what they thought and how they acted in connection with their First Amendment rights where in the specific instance, all they would have to do would be to grant the equal time and they would be free of that obligation.

A That is true, but the granting the equal time I suggest, and the determining whether equal time must be granted and the arranging to give it, are far more burdensome than simply saying grant the equal time suggests.

And it is the elements of discretion in the Fairness Doctrine, and simply the requirement that you act in good faith, and being left judgment as to how you present the

opposing points of view, which give that a flexibility and make it much easier to comply with.

Let me take as an illustration if I may the handling of a program that appeared on January 27, January 28, an interview which would be in the nonexempt category, between Eric Sevareid and Hoeffer.

Q This is the one the Solicitor General told us you were going to ---

A Yes. I didn't want to disappoint him.

Q You told him you were going to talk about?

[Laughter]

A This Hoeffer is a controversial character. And he speaks in a controversial manner. Following this program, in order to comply with the notion of fairness, CBS a week later had four columnists comment on Hoeffer and his program. Gave each I would judge two or three minutes.

One of them called him a garrulous old wall frat and went on to criticise him. Another was ---

Q This is Eric Hoeffer?

A Yes. And Eric Sevareid was interviewing him.

Q Not James Hoffa?

[Laughter]

A No, excuse me. I have fallen into mixing my r's and a's. I am sorry.

The four were columnists of different points of view.

Mario Mannis who said he would be dangerous if he were young, William Buckley who said he was fine, a representative of CORE, Roy Innis, who said that he was a racist but he was an honest man and he would like the opportunity to converse.

So there were a variety of appraisals of Hoeffer. Now that would seem to me to cover the notion of fairness. But under this regulation, one would after the tape was made or if it were a live broadcast, it wasn't it was taped, if it were a live broadcast you would have to go over the whole thing but it gets off to a start where I can't find very many doubts.

Pretty soon one finds Eric Sevareid saying we had an intellectual running for President last spring and summer in Senator McCarthy. He doesn't think much of you as a philosopher. What do you think about him?

And Hoeffer said, "Well, I didn't read what he said. I will tell you one thing, I have always thought the country is lucky, we would have been, we were lucky when that so and so didn't get elected President. You would have a Yogi sitting in the White House bumbling under his God damn nose there."

And he referred to Senator McCarthy as a so and so and a Yogi mumbling. Perhaps a personal attack, perhaps not and then he went on and referred to him as vain and un-American.

I would think one would have to mark that up as a

personal attack on Senator McCarthy time for reply.

Then comes a rather interesting and puzzling one where Hoeffer referred to these young McCarthyites as the most treacherous people in the world. Is that an identified group? To whom do you give notice? If I were the lawyer and they consulted me I think I would say, "Well, let us go on and we will come back to that one later."

Q Well, General, what happens in the rules if the person is given the time and in defending himself he maligns the maligner, does the original man get more time?

A If it is in a new way, I assume that the original man now has to have an opportunity to reply and certainly any third person that is attacked in the reply has to have time to reply and that actually happened in this instance.

Some of the commentators on Hoeffer maligned third persons. So if we live up to the personal attack rule we have to give them time for reply.

Now, in this instance, I go on, it gets on a little farther with nothing that would seem to me to be seriously questionable but somewhat later Eric Sevareid said, do you see any of these young Negroe leaders coming up that strikes you as something important?

"Hoeffer: Phony, phony. Look at that mess they have in Cleveland, a sour rat if there ever was one, talking about soul on ice, soul on manure if you ask me."

Mark him up for personal attack and a right to reply if they can find him.

(Laughter)

A Then, although Cleaver has had plenty of opportunity to state his view and also then it goes on and criticizes the Barrister Club of San Francisco, for being cowardly in accepting Cleaver's address to them and applauding him and I suppose the Barristers Club of San Francisco would be entitled to come in and then toward the end there is a reference to Arthur M. Schlesinger, Jr. saying that the trouble with him is that he has had to live with Schlesinger all his life.

Whether that is a personal attack I don't know.

Q Would it change your argument if the Commission had just said in its rules if anybody slanders anyone?

A Well, then I would have a much different case to deal with.

Q You would have a harder case?

A I would have a harder case. I would have the problem then which I take it is really not in this case if we take seriously what the Commission says and that is whether what the Commission is trying to do is provide a private remedy but the Commission says it isn't doing that. It denies any purpose to do that.

Q But it has that effect?

A Yes, but, of course, it is a remedy for even telling the truth.

Q A necessary thing, yes.

A It is unnecessarily broad and its labeled the truth. Now I should say just one thing more.

Q You would have a different case but you would still be making the argument?

A Well, I can't tell you whether I would be asked to make the argument in another case.

[Laughter]

Q But would you think the same argument would be sound?

A That case would be distinguishable and I would then have to argue ---

Q Even though unsound?

A I would have a much harder time. I would then have to argue whether th New York Times case excludes a private remedy for what use to be a tort in the form of a right of reply as distinguished from one of damages and that would be a much harder case than I have here.

I don't think I would be ashamed to argue that New York Times should be extended in that situation.

I do want to say just a word about the supposedly exempt categories of cases.

Of course, in news documentary, like the Klu Klux

Klan illustration in our exhibit, or the Eric Sevareid broadcast that I referred to and I commend to you his broadcast on the death of Jack Ruby which was certainly a matter of public importance -- as another illustration.

Those today would be what the Commission calls exempt. But look what the Commission says on page 232 of the fat record.

Q Exempt because they are part of a news program?

A Because they are part of a news program. Of course, it is an incredible distinction because it makes Eric Sevareid exemptttion depend on whether he broadcasts within a certain time limits or outside those limits.

It makes the Face the Nation exempt because it comes Sunday afternoon but if you had a special program on Wednesday morning or Wednesday evening it is not exempt. It passes my understanding why those mechanical things should make so much difference.

But the Commission itself said in paragraph 5 on page 232 that the Fairness Doctrine is applicable to these exempt categories. Then skipping a few lines to after the -- he stresses the considerable discretion the licensee has, but says in the case of the personal attack there is not the same latitude as there is in other examples of the Fairness Doctrine and over on the top of page 233, "Thus, our revision..." requires that fairness be met either by the licensee's action

action of fairly presenting the contrasting viewpoint on the attack issue; in other words, in the case of the Powell broadcast, you must run around and get Congressman Conyers, Congressman Pepper, his wife and Judge Levey and the others and read what they have to say or otherwise state what their position is or else you must allow that particular group the person, the opportunity to respond.

So really this is not really very much different. The sum total difference in the case of the Powell broadcast is that instead of having to offer the time to the particular individual, you may present what they have to say on the issue that Powell raised by the attacks.

I think that the Seventh Circuit was quite right in saying that that is an illusory exemption.

Now might I take just a minute to address myself to the point which though I have slighted it by misjudging my time, we do regard as being of very great importance and that is the point that these regulations are not authorized by the statute.

There are three things which I would particularly emphasize to the Court. First, while the statute uses the broad language public interest convenience and necessity, those words must be read in the light of Section 326 which speaks in a statutory way of the broadcaster's freedom of speech and limitation on the Commission.

And also in the light of the fact that not once, not twice, but three times the legislative process rejected proposals to put broadcasters under duties which really can't be distinguished from the duties that the Commission has now sought to put them under.

The proposal in 1927 at one time was that there should be an allowance of equal treatment for the discussion of any question affecting the public and the Senate cut that down to equal time for political candidates.

In 1933, the Senate passed and the House passed a requirement requiring that those speaking in support of or in opposition to any candidate for public office or in the presentation of views on public questions, be given equal time. And that was killed by veto and failed to become law.

That is really indistinguishable from the political editorial regulation.

And then in 1933, when the Communications Act was before Congress, there was a proposal to broaden Section 315 to allow equal time on any public question to be voted on in any election or by a Government agency and that was killed.

And the point that we make is that in this area which does trespass on journalistic freedom, freedom of speech and the press, that a Commission should not be found entitled in the very general words of this legislation to impose this kind of restriction until and quoting Justice Roberts in Cantwell

and Connecticut the policy making body has given the real central issue careful and purposeful consideration and all we know about what Congress did is that it rejected essentially similar proposals.

The last point I would make is with reference to the consideration of the Fairness Doctrine in 1959. At that time as the Government's brief points out, the Congress amended Section 315, the equal time provision for political candidates, so as to exempt certain kinds of news programs, at the same time it said nothing in the exemption shall have the effect of freeing any broadcaster from the duty of fairness.

And it is argued that this was a ratification of the Fairness Doctrine but I ---

Might I just take two minutes to finish this line of thought?

MR. CHIEF JUSTICE WARREN: You may.

MR. COX: Thank you, sir.

We don't have to resolve that question here. Because in explaining the Fairness Doctrine to the Congressional committees, at that very time, the representatives of the Commission emphasized two limitations that these regulations override and ignore this gradual increase in censorship that brings us here.

One of them was the explanation that the broadcaster has full and complete authority subject only to later review

of his whole operation. As I say that was stressed to the Congressional committees that consider this subject.

And the second statement was that when it comes to the application of the overall fairness standard, a licensee can exercise discretion as to which viewpoints are entitled to be expressed and which spokesmen are entitled to be heard with the exception of qualified candidates for public office.

Now neither of those remains the case under the challenged regulation and we think, therefore, that this certainly doesn't meet the test of the most explicit statutory authorization and that there certainly has been no careful and purposeful consideration of this kind of abridgement of the freedom of the press by the policy making body and consequently we think under even if this question of statutory interpretation were otherwise fairly balanced, as maybe it is, the cases like Greene and McElroy, United States and Robel and others of this kind and the policy of requiring the legislative body to face up to these questions before the Court has to decide them require holding that these regulations are not authorized by the statute.

Thank you.

MR. CHIEF JUSTICE WARREN: Mr. Solicitor General.

REBUTTAL ORAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.

ON BEHALF OF PETITIONERS

MR. GRISWOLD: May it please the Court.

My friend, Professor Cox, if I may call him what I have known him long as, brought before you as I knew he would the extracts from Eric Sevareid's broadcast which are in the Volume II of the Appendix and the excerpt from Face the Nation.

After the luncheon recess he has pointed out to you that neither one would be affected in any way by this regulation. They are both expressly exempted by the terms of the regulation.

The first one relating to the death of Henry Luce did not strike me as being an attack but rather as fair comment but it would be exempt in any event because it came in a bona fide newscast and the Face the Nation program is exempt because it was a bona fide interview.

Now those terms are words of art in the broadcasting industry. The members of the industry know what they mean. These terms are exactly the same as those under Section 315, and there is a Section 315 Primer which spells them out.

I might point out that under ---

Q A news interview you say is a term of art and that would include ---

A Face the Nation program would be covered by the news interview exception. The Hoeffer program is not.

Q Not.

A And that is a conversation not apart of what comes within a bona fide news interview. Mr. Cox said that he

couldn't understand the distinction, but the distinction which the Commission endeavored to work out was one with respect to timing. When you have to move fast and have to get in on the news program, including commentary, you are free from this although you are subject to the fairness rules.

In documentaries and in a program like the interview with Hoeffer which after all was taped and probably done days before it was broadcast, there is plenty of opportunity to consider thoughtfully and rationally what should be done about it.

Q Well, but do I understand that the program like Face the Nation is a news interview?

A That is a news interview and is exempt under the regulation.

Q Although that is planned in advance. It is not spot news, is it?

A No, but it is the type of thing where you bring in somebody and it is spontaneous and the station can't plan in advance and doesn't know what is going to appear. At any rate it is exempt under this regulation and there is no question about that.

Q Are there definitions of "news interview"? Is there a definition?

A They are not in this regulation but I understand that they are in the Section 315 Primer which does summarize

the Commission rules with respect to the meaning of that terminology and I don't understand that the other side questions that.

Q Aren't they left though with the obligation of presenting the other side anyway if they don't have to get in those people themselves?

A Yes, Mr. Justice.

Q This is what I understood Professor Cox to say.

A Not quite. They are subject to the Fairness Doctrine which requires that overall they must have a balanced program.

Q There seems to be a difference of opinion as to the meaning of these rules between you and Professor Cox because he said that in this respect even if they were exempt, they would have to go around to those people, find out what their views were and then had the affirmative obligation themselves to present that broadcast.

A I didn't understand Mr. Cox saying that and if he did it goes beyond anything that I understand the regulations to require.

Q It is paragraph 5 of the memorandum, I think.

A Paragraph 5 does impose the standard of the Fairness Doctrine but does not require the personal attack rule.

Q Well, Mr. Solicitor General, I take it, would

you distinguish for constitutional purposes or purposes of this argument or even for the purposes of the Commission's authority under the statute between the situation where the Commission requires in certain situations that it give the opportunity for certain people to come on the air and say what they want to and the situation where the broadcaster himself is required in a specific situation to broadcast a certain kind of material.

A Yes, I think that is the ---

Q Would you distinguish between those two situations for the purpose of your argument?

A The personal attack rule does require the particular person attacked to have an opportunity.

Q That is right. I understand you to say that that is wholly acceptable constitutionally and under the statute but now what if the rule were that if you make a personal attack or you put out a political editorial, you must go out and ascertain what the other side of the story is and then you yourself present it.

What if that were the rule?

A Well, there is something close to that in this paragraph 5 but it is not what was said before. At the top of page 233 of the record -- "Thus, our revision affords the licensee considerable leeway in these news-type programs but it still requires that fairness be met, either by the licensee's

action or fairly presenting the contrasting viewpoint on the attack issue" -- which he can do in any way he wants to but he must be fair -- "or by notifying and allowing the person or group attacked a reasonable opportunity to respond."

Q Again ---

A The latter is an alternative one of two ways he can do it.

Q Well, again I ask you what if the licensee were required himself to broadcast information of a certain kind?

A Well, I think that is a harder question.

Q Mr. Cox said he would have a tougher case.

A He is, we come close to it under the Fairness Doctrine. He is required to be fair and if he doesn't provide fairness through some other spokesman I think he is under some obligation to provide the fairness himself.

But I find it and I shrink somewhat obviously this is a subtle and slippery case all the way through and I shrink from being caught in a place where I say that he must say something.

Q Well, your inference, your real escape hatch on that I take it is that he has an alternative. He has the alternative of calling in the people themselves or giving them the opportunity themselves.

A That is certainly one of the escape hatches. Or at least there is nothing in the regulation now which requires

that action.

Q In any circumstance, in any specific circumstance the licensee is never required himself to draft and broadcast information of a certain kind?

A He is never so required and he is never required to broadcast a Government release which is prepared for him. There is no requirement as to the specific speech.

Q Mr. Solicitor General, it seems to me like the argument perhaps for the past three-quarters of an hour has been devoted to an attack on the rules as ambiguous and not because of lack of authority of power of the Board to issue some kind of rule.

What do you say about that? That seems to me to be an attack on the language of these rules.

A At one time we were told that the rules are vague and we don't know how to comply with them and another time we are told they are arbitrary, there is only one thing you can do, you must have the person attacked in to respond.

The Commission has said that the rule will not be used as a basis for sanctions against those licensees who in good faith seek to comply with the personal attack principle and in a case decided within the past year, arising under the rules, the Commission said that there was no question of imposing a forfeiture in the circumstances of this case where the station has made a good faith judgment and its action do

not reflect the flagrant clear-cut case of violation for which we stated we would consider imposition of a forfeiture.

Incidentally, the Commission has also stated in a case decided within the past few months, that the Commission's experience over the years of operation in this area, that there has been no indication of inhibition of robust debate by our fairness policies.

Indeed, such debate has been increasing not declining, during the last seven years when the personal attack principle was being developed and brought specifically to the notice of all licensees.

That is the Storer Broadcasting case.

And I would like to close simply with a reference to the anti-deformation league case which is cited in the brief and to which reference was made by Mr. Cox, that is the case where a station broadcast anti-Semitic material, the fact was that on complaint the station offered the anti-Semitic League an opportunity to comply and they declined that opportunity.

They said we don't want to reply, we want your license revoked and the proceeding was heard before the Commission and the Commission determined that on overall balance they had given an opportunity for response and by other things they had done they had complied with the fairness rule and that was sustained by the Court of Appeals and this Court denied certiorari just recently.

Q I want to ask you one other question.

Do you think that the issues here are sufficiently precise, sufficiently clear, that we can pass on whether or not we should pass on whether or not the Board does have power to issue some kind of regulation in the nature of this one in a case of a personal attack. Are the issues that sharply drawn?

A I think, Mr. Justice, you can pass on the question whether the Commission has power to issue some kind of a regulation. I would think it would be very unfortunate for the Court to hold in this case, on this record, that the Commission has no such power.

I can well understand the Court's holding that we don't think this necessarily is the last word and that as cases come up we may need to consider it. We have a parallel with respect to unfair labor practice which I think is no more vague than the statement in this personal attack rule.

Unfair labor practice occasionally impinges in the area of freedom of speech and the fact that what a person says may be an unfair labor practice undoubtedly has some inhibitory effect but the way that has been worked out is through the years cases come up in which particular facts appeared, and somebody said something under certain circumstances the Court decided whether or not it was an unfair labor practice and it seems to me that that is what ought to be done here, that it ought to be left for the working out of the

minds through the process of gradual adjudication and which it will be determined, whether under certain circumstances certain statements were personal attacks and whether the action of the Commission in response thereto was an appropriate action under those circumstances.

MR. CHIEF JUSTICE WARREN: Very well.

(Whereupon, at 1:20 p.m. the oral argument in the above-entitled matter was concluded, the Court recessing.)