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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 717

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION,

Petitioners,

v.

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT COLUMBIA BROADCASTING SYSTEM, INC.

In most respects, respondent Columbia Broadcasting System, Inc. ("CBS") agrees with and adopts the brief submitted by respondent Radio Television News Directors Association *et al.* ("RTNDA"), insofar as it challenges the constitutional and statutory authority of the Federal Communications Commission (the "Commission") to issue the personal attack and political editorial rules. CBS submits this separate brief for two purposes:

(a) To demonstrate by specific examples from CBS news-related programs that the rules, if upheld,[1] would

[1] As discussed *infra*, pp. 12-13, CBS has not to date abided by the personal attack rules because of its belief that they are unconstitutional.

deter the broadcast of views on controversial issues of public importance, and that this chilling effect would defeat rather than serve the public interest in being fully informed.

(b) To show that this case does not involve the constitutionality of the Commission's general fairness doctrine, and that the issues raised by the general fairness doctrine differ distinctively from those presented by the personal attack rules.

To comply with the briefing rules of this Court and at the same time avoid duplicative material, CBS adopts the following sections of the brief submitted on behalf of RTNDA: Opinions Below, Jurisdiction, Statutes and Regulations Involved, and Statement.

QUESTIONS PRESENTED

1. Whether the First Amendment and the Communications Act permit the Federal Communications Commission to require that if a television or radio station—during the presentation of views on a controversial issue of public importance—broadcasts an "attack" upon the "honesty, character, integrity or like personal qualities" of any person or group, it must notify such person or group, furnish full information as to the "attack" and make available broadcast time to reply.

2. Whether the First Amendment and the Communications Act permit the Federal Communications Commission to require that if a television or radio station broadcasts editorials supporting or opposing a political candidate, it must give notice, furnish a copy of the editorial and afford broadcast time to reply.

SUMMARY OF ARGUMENT

This case presents critical questions as to the power of the Federal Communications Commission to restrict the freedom of broadcast journalism—perhaps the most important First Amendment questions yet raised with respect to the broadcast medium of expression. The Commission has adopted categorical rules requiring that when, during presentation of views on a controversial issue of public importance on a broadcast station, an "attack" is made on the "honesty, character, integrity or like personal qualities" of any identified person or group, the station must notify the person or group attacked of the "date, time and identification of the broadcast," must furnish a script or tape of the broadcast (or an accurate summary if a script or tape is not available) and must offer a "reasonable opportunity" to respond over the station's facilities. Some types of programs are nominally exempted from the full sweep of the rules, but when an "attack" occurs in an "exempt" program, the station must ascertain and broadcast the views of the person or group attacked. A similar notification and reply time requirement is imposed in connection with station editorials supporting or opposing political candidates.

I.

The Commission agrees that broadcasters, like other publishers, are protected by the First Amendment, and has disclaimed any intention of deterring the broadcast of "personal attacks." The Government has conceded that "official action designed to prevent such attacks would not only exceed . . . [the Commission's] proper function but would also defeat the basic purpose of encouraging free speech." (Govt. Br. 61-62) Accordingly, the central question before this

Court is whether the rules do create a substantial likelihood of deterring the broadcast of statements falling within the Commission's definition of a "personal attack."

The personal attack rules will impose precisely such a deterrent effect upon CBS and the journalists who present some of its most highly regarded and informative public affairs broadcasts. The rules do not in terms forbid such programs, but, as Volume II of the record illustrates, the inhibitory effect of the rules would have an insidious, if not totally destructive, effect upon many of these programs and the public confidence now enjoyed by the journalists who present them.

The broadcast medium has several characteristics not shared by the printed press. These include the finite nature of broadcast time, the fact that any additional material broadcast necessarily displaces other material, the unpredictable content of unrehearsed interviews or discussions and the practical problems of network program scheduling and station clearance. For these reasons, the burdens imposed upon broadcasters by the personal attack rules are at least as severe as the burdens of the damage remedy for defamation which this Court has held unconstitutional as applied to nonmalicious statements concerning public figures.

Volume II of the record contains a large number of statements from Eric Sevareid's commentaries, *Face the Nation, CBS Reports* and other news documentaries. All of these statements are plainly or at least arguably "personal attacks" under the new rules. The practical burdens of arranging and clearing reply time (perhaps at different times from the original programs) on the 400-odd stations that make up the CBS radio and television networks are so onerous that they would often make it impractical for the journalists who present these programs to continue to

broadcast statements that fall plainly within the definition of personal attack or come close to the "danger zone."

The vagueness of the rules—the boundless limits of such terms as "attack," "character" and "like personal qualities," and the difficulty of identifying a "group" and its appropriate spokesman—will add to the pressure on broadcast journalists to forego making statements that may possibly come within the scope of the rules. The Government concedes that questions of interpretation will arise, and the Commission suggests that journalists can resolve them by consulting the Commission staff. But a journalist preparing a program would hardly have time to telephone someone at the Commission to learn whether a particular phrase falls within the rules, and in any event he could not get an authoritative answer in time to be relevant. As the Seventh Circuit held, the Commission's announced willingness to interpret the rules immediately before or after broadcast does not make them less objectionable; it makes them more so. This Court's decisions have long condemned the delegation to administrative agencies of vaguely defined discretion to influence the free exercise of First Amendment rights.

The Commission has recognized the deterrent effect of the rules by progressively widening the range of programs purportedly exempted. (The "exemptions" now include newscasts, regularly scheduled news interviews and commentary appearing within such programs). But in its latest order, the Commisison effectively recaptured the exempted programs by a new requirement. Unless the licensee obtains and broadcasts the views of the person or group attacked, the program loses its exemption from the rules. The burdens thus imposed as a consequence of broadcasting a personal attack in an "exempt" program are almost as onerous as those applicable to non-exempt programs and would have a comparable deterrent effect.

II.

Restraints on the free exercise of journalistic judgment can be justified, if at all, only by some public need of a magnitude that warrants curtailment of free speech, and then only if the restraints are reasonably adapted to meet that public need. The restraints imposed by the personal attack rules are particularly vulnerable because the public interest they are meant to serve can be and is being protected by the Commission's general fairness doctrine, which is far less inhibiting.

The Government devotes a major portion of its brief to defending the validity of the Commission's general fairness doctrine and to claiming that the new rules are merely a "facet" of that doctrine. But the general fairness doctrine and the personal attack rules differ critically in their origin, operation and inhibitory effect.

The general fairness doctrine has been Commission policy for over 40 years. It requires that over a period of time the licensee present both sides of any important public issue it chooses to cover in its programs. The personal attack rules seek to convert every "personal attack" occurring in these programs into an additional public issue which must be covered. They atomize the original issue being covered into many smaller issues, each of which sets off its own chain reaction requiring coverage of both sides.

The crucial difference between the general fairness doctrine and the new personal attack rules is that the former permits each station broad discretion to decide which of its broadcasts require balancing and to achieve balance in its own way. Under the general fairness doctrine, the broadcaster is not told whom to put on, what format to use, how much time to allow or what degree of control over subject matter he may exercise. The basic principles of general

fairness sought to be enforced by the doctrine comport with CBS's own standards of journalistic responsibility and have not significantly inhibited its journalistic freedom. Compliance with the particularized personal attack rules, on the other hand, would require CBS to make basic changes in the present content of its news-related programs.

For these reasons, as the Seventh Circuit held, the general fairness doctrine presents significantly different constitutional considerations from the personal attack rules that are here under review. The rules do not purport to codify the general fairness doctrine, and its validity ought not to be decided in this case.

III.

The political editorial rules violate the First Amendment and the Communications Act for the same reasons that the personal attack rules do. The editorial rules also interfere with the journalistic freedom of broadcast licensees in a manner that goes far beyond the fairness doctrine or any restraint on speech which might reasonably be thought to be in the public interest. And, since the editorial rules relate specifically to elections to political office, the rules enter upon a field that it was the purpose of Congress to preempt in Section 315 of the Act.

Congress has consistently refused to expand the narrowly drawn, specific equal time opportunity requirements for candidates into the very areas which are sought to be covered in the Commission's rules. The editorial rules not only intrude on the congressionally reserved area, but also introduce arbitrary and anomalous discriminations among opposing candidates.

ARGUMENT

INTRODUCTION

This is a landmark case in the history of American journalism. It has been more than a quarter of a century since this Court issued a major opinion considering the validity under the First Amendment of governmental restrictions on broadcast licensees. *National Broadcasting Co.* v. *United States,* 319 U. S. 190 (1943). During that period, broadcast journalism has become a major source of information for our entire population. Critical decisions of foreign and domestic policy, elections to the highest and lowest of public offices, are profoundly affected by what is seen and heard over the air.[2] The freedoms and responsibilities of broadcast journalists pose vital questions for the future of our society.

One of these vital questions has now reached this Court. It requires us to reexamine the reasons for our historic commitment to free expression and their continuing validity even in this electronic, complex and volatile age. But it also calls for surgical precision in identifying the particular dangers to free expression presented by the particular rules at issue here, measured against the particular public interest they are intended to serve, and against less burdensome means of achieving this objective.

The Government urges the Court to take the opposite course. It draws attention away from the precise impact of the particular rules on the treatment of controversial issues by broadcasters; it has chosen to depreciate or ignore

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[2]According to a survey published in 1967, the American public relies far more on the broadcast medium as a news source than on all other media combined. Roper Research Associates, Emerging Profiles of Television and Other Mass Media: Public Attitudes 1959-1967 (April 5, 1967), p. 7.

the many specific examples from actual broadcasts presented by CBS to the court below. It suggests instead that to reject the personal attack rules would be to reject the concept of regulatory power to require licensed broadcasters to operate in the public interest, and to challenge the validity of the Commission's general fairness doctrine.

In this brief, we seek in Part I to focus on the precise impact of the particular rules on CBS news-related programs, in Part II to demonstrate that the broader issues raised by the Government need not and should not be decided at this time, and in Part III to demonstrate the invalidity of the political editorial rules.

I. THE RULES WOULD SUBSTANTIALLY INHIBIT THE BROADCAST OF VIEWS ON CONTROVERSIAL ISSUES OF PUBLIC IMPORTANCE IN VIOLATION OF THE FIRST AMENDMENT.

A. Effective News Reporting Would Be Materially Burdened by the Rules.

The personal attack rules impose substantial restraints because their requirements conflict with the standards of good journalism. Good journalists often find it newsworthy and important to broadcast a statement that constitutes a "personal attack" under the rules, even though a prompt reply would neither be newsworthy nor feasible.

When an important and controversial public issue is being reported, inclusion of an attack upon a person's "honesty, character, integrity or like personal qualities" is not an unnecessary injection of personalities. Reports and analyses by journalists of personal attacks concerning these qualities of men in the public eye should not be thought of as aberrational but rather as directly in the public interest. The publication of personal attacks is

often important. It may be of critical importance when, as has happened on occasion during the history of this nation, publication occurs in an atmosphere of official suppression or private fear that has inhibited some media of expression. For this very reason—because of the inhibitory effect on the vigor of comment on public events—this Court in *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964), and *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130 (1967), barred libel actions based on false but nonmalicious attacks on public figures. See RTNDA Br., pp. 28-29.[3]

When it first adopted the personal attack rules, the Commission appeared to doubt whether the public interest is served by reports of personal attacks; it stated that the restraints of the rules would apply only when a broadcaster "chooses" to make a personal attack, implying that the Commission would deem the public interest equally well served if the public heard neither the attack nor the reply.[4] While the Commission's latest memorandum opinion and order and the Government's brief refer to the Commission's

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[3]The broadcast press is of course fully subject to the laws of libel, to the same extent as newspapers. Under the rule of *New York Times Co.* v. *Sullivan, supra,* broadcasters remain legally responsible in damages for any libelous comment about private persons and any maliciously libelous comment about public figures. See *St. Amant* v. *Thompson,* 390 U. S. 727 (1968). The news rules, however, impose an additional private administrative remedy for defamatory comment about public figures or private persons, even when it is true, and (contrary to *New York Times*) even when, if untrue, it is made in good faith.

The Commission, however, has no statutory power to create a merely private remedy for broadcast defamation. *Cf. Scripps-Howard Radio* v. *FCC,* 316 U. S. 4, 14 (1942). See also *Daly* v. *Columbia Broadcasting System, Inc.,* 309 F. 2d 83, 85 (7th Cir. 1962) (no private remedy for damages for failure to give candidate equal time).

[4]July 5, 1967, Memorandum Opinion and Order, ¶5, A. 212a. "A. " references are to the record appendix containing the court of appeals' certified record.

policy of encouraging robust debate,[5] it is not clear that the inclination to discourage personal attacks has been entirely abandoned. The Government's brief in this Court, for example, refers to the Commission's judgment that "the broadcasting of personal attacks presents a serious problem requiring some kind of regulatory remedy." (Govt. Br. 75-76)

But whatever the underlying motive, neither the Commission in its final memorandum opinion and order nor the Government in its brief now claims any Commission power to inhibit the broadcast of personal attacks. The Commission's amendments to the rules in the course of this proceeding purported to remove any possibility of inhibition. See *infra,* pp. 18-19. In the Seventh Circuit the Government conceded that if the "rules were shown to have a seriously adverse effect upon the workings of a free press or the free expression of views, it might be said that they go beyond" the Commission's power. (Govt. Br. below 48) And the Government now asserts that the Commission "has long recognized that official action designed to prevent such [personal] attacks would not only exceed its proper function but would also defeat the basic purpose of encouraging free speech." (Govt. Br. 61-62)

These Government concessions are well advised. While broadcasting, like the motion picture, is not "necessarily subject to the precise rules governing any other particular method of expression," *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495, 503 (1952), the "basic principles of freedom of speech and the press, like the First Amendment's command, do not vary."[6] *Ibid.* One of the basic tenets of the First Amendment is that free, open and robust debate on

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[5]March 27, 1968, Memorandum Opinion and Order, ¶3, A. 229a; Govt. Br. 38, 75.

[6]"The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell* v. *Griffin,* 303 U. S. 444, 452 (1938).

public matters must not be inhibited. As this Court said in *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 270 (1964), there is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."

The Commission itself has recognized that "[t]he issue with which we are concerned here is the alleged inhibiting effects of the rules on the discharge of the journalistic functions of broadcast licensees." (A. 229a) Apparently, therefore, the only point of difference between the Government and CBS is whether the Commission's rules, as last revised, do substantially inhibit speech by deterring the broadcast of statements that plainly or arguably fall within the definition of personal attack.

The Seventh Circuit found the Government's treatment of this question to be wholly inadequate. It noted: "[n]either the Commission's three memorandum opinions nor its brief . . . [in the court of appeals] are altogether responsive" to respondents' contentions as to probable inhibition. (A. 355a) The court concluded:

> "Despite the Commission's disclaimers to the contrary, we agree . . . that the rules pose a substantial likehood of inhibiting a broadcast licensee's dissemination of views on political candidates and controversial issues of public importance." (A. 357a)

We submit that the Seventh Circuit was clearly correct.

At present CBS journalists are free to report and interpret the news as they see it, subject only to the high standards of journalistic objectivity and integrity that they

and the CBS News Division maintain.[7] Since they adhere to these standards, they presently need have no serious concern that their broadcasts may subject them or CBS to a damage judgment or any other form of punishment or sanction.

The men who gather the news and prepare and edit these broadcasts have above-average endowments of skill,

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[7]An October 23, 1967, memorandum from Mr. Leon Brooks, late CBS Vice President and General Counsel, to Mr. Richard Salant, President of the CBS News Division, outlines the policy being followed by CBS pending adjudication of this case:

> "Meanwhile the question arises as to how the CBS News Division should conduct itself while our substantial constitutional and statutory claims are being considered by the courts. After careful study of the matter, the Law Department recommends that the CBS News Division not change its policies and procedures pending resolution of the issues in the present judicial proceedings. We believe the disruption of schedules required to accommodate replies to the numerous broadcast statements that may reflect upon the 'honesty, character, integrity or like personal qualities' of an individual or group might be such as to induce CBS newsmen and editorial personnel to avoid such statements even when they may be highly newsworthy and critical to a public understanding of the issues involved. CBS newsmen and editorial personnel should not be placed under such restrictions unless and until they are finally and irrevocably required by law.
>
> "Pending the outcome of the litigation concerning the new rules, you should continue your past policy of fairly treating all sides of controversial public issues. CBS newsmen should continue to exercise their own conscientious news judgment, and, where they believe appropriate in the interest of fairness, to continue to interview various parties to a controversy before broadcast or to solicit the appearance of responsible spokesmen of opposing points of view. However the news staff should not, as the new rules would apparently require, routinely notify and grant reply rights to all individuals or groups whose 'honesty, character, integrity or like personal qualities' are referred to on our public affairs programs.
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> "We believe that present news policies and procedures should be continued until the validity of the new rules is adjudicated. This course of action is not without legal risk, but it is believed that CBS is justified in assuming those risks to maintain its journalistic standards."

intelligence and wit. But these attributes alone do not fully explain the value of the broadcasts. The quintessential added ingredient is the freedom these journalists possess. The manner in which they exercise that freedom is what gains or loses them the public trust. And the public trust these particular broadcasts enjoy is based on the public confidence that the men who prepare them will probe for the truth and report events as they see them.

If the personal attack rules are upheld, however, these journalists must then have a very serious concern about what they broadcast. When a CBS newsman covers his subject and chooses the significant material to report, he will have to bear in mind the Commission's admonition that "where he chooses to make such presentations [statements defined as personal attacks]" the stations carrying his commentary "must take appropriate notification steps and make an offer for reasonable opportunity for response. . . ." (July 5, 1967, Memorandum Opinion and Order, ¶ 5, A. 212a). Failure to do so is punishable by cease and desist orders, loss of license, forfeitures and criminal penalties.

The journalists must also bear in mind the practical problems presented by the nature of the broadcast medium and the impact of the rules' requirements. Among these problems are the following:

> 1. Unlike a newspaper, which has few practical limitations on the number of pages and columns that it can publish, a broadcast station is sharply limited by the finite nature of broadcast time. As the Government necessarily recognizes (Govt. Br. 46), there are a limited number of hours in the broadcast day. Any broadcast material presented forecloses the broadcast of other program material. This means that the broadcast of replies necessarily requires the broadcaster to delete other pro-

gram material which in his judgment is of greater interest to the public.

2. The rules apply to all personal attacks, whether made or reported by a CBS journalist or by a person in the news who appears on the program. They apply whether the "attack" is true or false. They apply whether the substance of the attack is itself an issue of public importance or whether it arises incidentally in the course of discussing such an issue.[8] And, as the Seventh Circuit found (A. 362a-363a), the vague terms of the Commission's rules add materially to the burden they impose. The Government itself concedes (Govt. Br. 71-72) that the definition of "personal attack" (an attack "upon the honesty, character, integrity or like personal qualities of an identified person or group") is so expansive that it is "subject to diverse interpretations and applications."[9]

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[8]For example, the Commission has ruled that a news account of an arrest for subversive activities, containing a statement that the home of the arrested couple was littered, entitles the couple to "deny the disorderly characterization of their home and claim that the arresting officers themselves improperly littered it." *Cumberland Publishing Co.*, 13 F. C. C. 2d 897 (1968).

See also *Letter to KGEE*, September 11, 1967, where the Commission ruled that a personal attack had occurred during the discussion of a controversial issue of public importance. Although controversial public issues had been discussed earlier in the program, the issue under discussion at the time of the attack was the right of a listener to call the station and have her views broadcast. This issue had arisen because of a dispute between the station's moderator and the listener.

[9]The Government suggests that licensees are capable of making reasoned judgments as to the meaning of the rules, even though "in a given instance, reasonable men may . . . differ as to whether an attack covered by the rule has occurred." (Govt. Br. 73) But whatever the ability of lawyers to determine precisely what is covered by the rules, the critical point is that the rules must be interpreted by journalists who must do so shortly before they go on the air or while they are on the air.

3. The rules require more than "equal time." Indeed, they may require far more than equal time for the person or group presenting a reply. On at least one occasion the Commission has explicitly ruled that the licensee is required to give more time for the reply than for the original attack.[10]

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[10] *Garrett Broadcasting, Inc.*, 1 F. C. C. 2d 929-30 (1965) ("Thus in a particular case involving a personal attack of a few seconds duration, fairness may require that an amount of time appropriate to make a sufficient answer be afforded, rather than precisely the same few seconds.") See also *Springfield Broadcasting Corp.*, 10 F. C. C. 2d 328 (1967).

In connection with the political editorializing rules the Commission has noted (July 5, 1967, Memorandum Opinion and Order, ¶15, A. 219a):

> "The phrase 'reasonable opportunity' to respond is used here and in the personal attack subsection because such an opportunity may vary with the circumstances. In many instances a comparable opportunity in time and scheduling will be clearly appropriate; in others such as where the endorsement of a candidate is one of many and involves just a few seconds, a 'reasonable opportunity' may require more than a few seconds if there is to be a meaningful response."

See also *Complaint of Clarence F. Massart* (FCC, Sept. 14, 1967); *Complaint of George E. Cooley* (FCC, Oct. 27, 1967), where unendorsed candidates complained to the Commission that King Broadcasting Co. had not offered reasonable opportunity to respond to the station's editorial endorsements of candidates in the primary and general elections, respectively, for the Seattle City Council. In the primary, King had offered each of the 23 unendorsed candidates two one-minute replies to answer a total of 10 minutes of editorials. The Commission ruled that this was not sufficient and that King had made no showing that the replies would be carried in periods of comparable audience potential, or broadcast with comparable frequency. A settlement was negotiated under which the complaining candidate was allowed six 20-second replies. In the general election, although King offered a total of six 20-second replies to each of the four unendorsed candidates, the Commission again ruled that this was not sufficient because it had not been shown that a greater number of responses could not be afforded such as twelve 10-second announcements "oft-times used in political campaigns." The Commission stated that the frequency of response was to be separately negotiated with each candidate. FCC Public Notice-B, No. 8519, at 2 (Nov. 2, 1967). Thereafter it was agreed that the complaining candidate would be allowed an additional 20-second response during prime time on election eve. See *Letter to KING Broadcasting Co.*, 11 Pike & Fischer, R. R. 2d 628 (1967).

4. Where a network broadcast is involved, each affiliate carrying the original broadcast is individually obligated to carry the reply.[11] There may be substantial practical problems in scheduling the reply for broadcast over the same stations that carried the original attack. Network lineups vary substantially from program series to program series.[12] For example, in 30 of the top markets in the United States the clearance for CBS broadcast series during a selected week in September 1968 varied from a high of 30 stations clearing to a low of 16 stations clearing. Considering all CBS affiliates the problems are even more formidable, and clearance during the same selected week varied from a high of 192 stations, the full lineup, to a low of 122 stations.

Because of these practical broadcasting problems, every time an offending statement is made in a CBS news or public affairs program a burdensome sequence of events will be set in motion. The CBS News Division will have to decide whether the statement is subject to the personal attack rules and may have to consult with the CBS Law Department. If the decision is that the rules apply, the person or group attacked must be identified, located, given a tape, script or summary of the attack, and offered time to reply.

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[11]As the Commission stated in its July 5, 1967, Memorandum Opinion and Order, ¶ 8, A. 214a:

> "Where a personal attack or editorial as to a candidate on a network program is carried by the licensee, the licensee may not avoid compliance with rules merely because the attack or editorial occurred on a network program. Of course, if the network provides appropriate notice and opportunity for response and the licensee carries such response, its obligation would be satisfied."

[12]The problem posed by the rules is thus particularly acute in so-called "specials," *i.e.*, once-only broadcasts which are not part of a series. Replies to personal attacks occurring in these programs must necessarily be broadcast in another program series or in another special for which clearance may be significantly different.

The offer is likely to involve protracted negotiations as to the amount of time to be afforded, the format of the broadcast, limitations on subject matter, and a variety of other questions. Either CBS or the person or group affected may refer one or more of these questions to the Commission; and extended pleadings, conferences and delays may result.

Under the Commission's rules, the number and length of the replies that must legally be invited if "personal attacks" are broadcast, and the many difficult practical problems involved in arranging and clearing the necessary time, are so burdensome that CBS and other broadcasters will as a practical matter find it necessary to regard the reply requirement like the threat of damages for libel—a risk to be avoided even at the cost of abstaining from publishing statements that engender the oppressive sanction. Thus, the rules will adversely affect the quality of news and news-related broadcasts and make participation in them less attractive to the best journalists.

B. After Recognizing the Deterrent Effect of the Rules by Progressively Widening the Scope of the Exemptions, the Commission Effectively Recaptured the Exempted Programs by a New Requirement.

In the course of this rule making proceeding, the Commission itself has recognized the deterrent effect of a right of reply requirement. Even in its initial ruling, the Commission recognized that the rules would inhibit journalists who preferred not to present replies.[13] And before the appeals from the original rules could be heard, amendments were adopted, as the Government puts it, "upon further consideration, to insure that interference with broadcasters'

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[13]July 5, 1967, Memorandum Opinion and Order, ¶ 9, A. 216a.

news functions is avoided, a concern of the Commission throughout." [14]

The Commission first amended the rules in August 1967. It exempted personal attacks occurring in "bona fide newscasts" and "on-the-spot coverage of bona fide news events." The announced reason for taking this action was that the presentation of such programs might be impeded if the rules were applicable to them. (A. 223a-224a)[15] The March 1968 amendments, prompted by a letter from Assistant Attorney General Turner to Chairman Hyde,[16] broadened the category of exemptions to include personal attacks occurring in some (but not all) types of interviews and commentary, again in order to reduce the possibility of inhibition.[17]

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[14]Govt. Br. 77.

[15]"To import the concept of notification within a week period, with the presentation of the person attacked on some later newscast when other news might normally be broadcast, is impractical and might impede the effective execution of the important news functions of licensees or networks." August 2, 1967, Memorandum Opinion and Order, ¶ 2, A. 223a-224a.

[16]The letter stated that the Department of Justice has "some concern that the rule, as drafted, raises possible problems that might be minimized by appropriate revisions in the rule without materially interfering with the public interest objectives that the rule is intended to serve." (A. 311a)

[17]The Commission's memorandum opinion and order begins by asserting that:

> "Even on the basis of the materials presented by the Columbia Broadcasting System (CBS) to the Court for the first time, the showing as to inhibiting effects remains speculative." (A. 229a)

But the Commission also argues that its "action avoids *any* possibility of inhibition in these important areas of broadcast journalism . . ." (A. 230a), and that "[t]here is no factor of even *possible* inhibition in the case of a documentary, which is assembled over a period of time." (A. 232a) The Commission goes on to state that it is "exempting these news-type programs from the precise requirements of the personal attack rules so as to eliminate *any* possibility of inhibitory effects." (A. 233a) Finally, the Commission notes that:

> ". . . it is important to bear in mind that the action is taken as a precautionary step, to eliminate any possibility of in-

But what the Commission has purported to free, it has in fact recaptured. In the same March 1968 amendments, all "exemptions" are largely vitiated by a new special "fairness" requirement made expressly applicable to exempt programs. (A. 232a-233a)

The recapture is neatly accomplished by paragraph 5 of the Commission's March 27, 1968, Memorandum Opinion and Order. (A. 232a)[18] It states that the licensee's normal discretion to discharge his general fairness obligations in ways and at times of his own choosing does not apply to the broadcast of personal attacks. Whenever a licensee

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hibiting effects in these areas which were singled out by the Congress. We have found no such effects, and therefore stress that we are not saying or indicating that inhibition of robust, wide-open debate is appropriate or likely in areas other than those exempted here." (A. 234a n. 5)

[18]Paragraph 5 provides:

"5. As stated, the fairness doctrine is applicable to these exempt categories. Under that doctrine, the licensee has an affirmative duty generally to encourage and implement the broadcast of contrasting viewpoints (par. 9, *Report on Editorializing by Broadcast Licensees,* 13 F.C.C. at p. 1251). The licensee has considerable discretion in choosing ways to discharge that affirmative duty. See *Letter to Capital Broadcasting Co., Inc.* (WRAL), July 29, 1964, FCC 64-774. In the case of the personal attack there is not the same latitude. Under our revision with respect to the exempt categories, the licensee may choose fairly to present the viewpoint of the person or group attacked on the attack facet of the issue; in that event, and assuming that the licensee has acted reasonably and fairly, the doctrine is satisfied. But if the licensee has not done so or made plans to do so, the affirmative duty referred to above comes into play. And here it obviously is not appropriate for the licensee to make general offers of time for contrasting viewpoints, either over the air or in other ways in his community. There is a clear and appropriate spokesman to present the other side of the attack issue—the person or group attacked. 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 of fairly presenting the contrasting viewpoint on the attack issue or by notifying and allowing the person or group attacked a reasonable opportunity to respond." (A. 232a-233a)

broadcasts a personal attack on an exempt program, he may "choose fairly to present the viewpoint of the person or group attacked on the attack facet of the issue . . . ." (A. 232a) Presumably this means that he must obtain the views of the person attacked, and must present them, albeit he may do so through a spokesman of his own choosing.[19] But "if the licensee has not done so or made plans to do so," the specific personal attack rules apply. (A. 232a)

The Commission has thus elevated every personal attack on news-related programs dealing with controversial public issues to the level of a separate controversial public issue. The other side of that separate issue must be covered within a brief time frame by presenting "the viewpoint of the person or group attacked."[20] The licensee is deprived of the discretion allowed under the general fairness doctrine to determine whether the attack raises a controversial issue of public importance, whether balancing comment is needed, what views should be presented in opposition, and when they should be carried.

The paragraph 5 variant has narrowed the exemptions to the point where they have little, if any value. Virtually all personal attacks made in news-related programs are related to some underlying controversial public issue, as the Government conceded before the Seventh Circuit. (Govt. Br. below 49 n. 35)[21] Virtually all personal attacks, therefore, now require a response. For example, a newscast routinely reporting a criminal indictment of a public figure would require a prompt response fairly stating the accused's views on the charges. The same is true of a news report of a legis-

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[19]The statement or views must be complete, and the broadcast of a simple denial is not sufficient. *Cf. Springfield Broadcasting Corp.*, 10 F.C.C. 2d 328 (1967) (broadcast of denial under the circumstances held to constitute a personal attack).

[20]A. 232a.

[21]See also p. 15, *supra.*

lator's attack on another legislator, and of an attack on an official of the executive or judicial branch or a private citizen.

To be sure, paragraph 5 does not require licensees to permit personal appearances by those attacked on "exempt" programs; the journalist conducting such programs may "choose fairly to present" the response himself, with the Commission looking over his shoulder every time a complaint about the exercise of that choice is made. But even with such limited freedom of action, the new duty to present responses to every "personal attack" in "exempt" newscasts, on-the-spot coverage of bona fide news events, regularly scheduled news interviews and news commentaries will impose a substantial burden on those who prepare such programs. And if the licensee fails to satisfy this stringent new requirement, the full reach of the personal attack rules comes "into play." (A. 232a)

As the Seventh Circuit correctly concluded:

> "The Commission's so-called exemptions from the requirements of the personal attack rules, which were contained in the August, 1967 and March, 1968 amendments, are illusory. Our reading of the latest amendment indicates that unless the response of the person attacked is fairly presented by the licensee on the 'attack issue' of the 'exempt' broadcast, the licensee must adhere to the explicit requirements of the rules." (A. 357a n.27)

C. Examples from Actual CBS Programs Illustrate the Probable Deterrent Effect of the Rules.

The burdens of the personal attack requirements on programs subject to the rules—and on programs nominally "exempted" from the rules—are illustrated by the way the requirements bear on some of the more highly regarded CBS programs. Most of the examples set forth below are

transcript excerpts contained in Volume II of the record in this Court.[22]

The excerpts are limited to CBS Television Network broadcasts; they do not include the many personal attacks appearing in separate broadcasts of the CBS Radio Network or in non-network broadcasts on the CBS owned radio and television stations. Even as to the CBS Television Network, the list of statements that are actual or debatable personal attacks is far from complete. Nevertheless, the list includes sufficient examples to prove beyond debate that (a) statements which are or may be "personal attacks," as defined in the Commission's rules, occur with substantial frequency in public affairs broadcasts, (b) their occurrence is essential to the journalistic integrity and public value of the broadcasts, and (c) the burdens of following the rules (or the paragraph 5 variant (see pp. 18-22 above)) are so great that many of the offending statements—if not entire broadcasts—would probably have to be eliminated.

1. News Commentary.

CBS broadcasts the Eric Sevareid commentaries in the course of the *CBS Evening News,* and it broadcasts other news commentaries not included in "exempt" programs.[23]

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[22]The suggestion of the Government below that these examples are not part of the record is discussed below, pp. 48-50.

[23]CBS carries a substantial amount of news commentary outside of its newscasts and other exempt programs. Throughout the day the CBS Radio Network carries many news commentary programs. The following are examples: *First Line Report; Walter Cronkite Reporting; The Reasoner Report; News Analysis With Marvin Kalb.* Most CBS affiliates broadcast these programs outside their regular newscasts.

Moreover, many of the more informative and important news analysis programs on the CBS Television Network would remain subject to the rules, including "CBS News Correspondents Report, Part I, America and the World" (a year-end analytic report broadcast December 31, 1968), and "Part II, The Nation" (January 1, 1969). On January 14, 1969, following the broadcast of President Johnson's State of the Union message, CBS broadcast a 10-minute analysis of the President's speech.

The rules "exempt" the Sevareid commentaries (leaving them to the tender mercies of paragraph 5) but not the latter.

Mr. Sevareid's daily commentaries have achieved more than transient recognition. Collections of them have been published in book form,[24] and have received wide critical acclaim.[25] In the year ending October 12, 1967, CBS broadcast 134 of these commentaries. All were carried by the CBS Television Network; many were also carried by the CBS Radio Network. Volume II of the record contains the full text of 31 such commentaries containing statements that are at least arguably covered by the Commission's personal attack requirement. (A. II (E. 1) 2-43)[26] The 31 programs contained more than 50 "personal attacks" concerning identified individuals or groups. Some examples are listed below:

> "On the surface, at least, either the irresistible force, Mr. Kennedy, or the immovable object, Mr. Hoover, is telling less than the truth.[27] (A. II (E. 1) 5)
>
> There is a "popular notion that congressmen are natural crooks . . . ." (A. II (E. 1) 26)
>
> "Much of . . . [Lord Russell's writing] is the work of a tense, humorless young American expatriate named Ralph Schoenman, one of a small band of far left Americans, some of them committed Commu-

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[24]SEVAREID, SMALL SOUNDS IN THE NIGHT (1956); SEVAREID, IN ONE EAR (1952).

[25]Among the awards received by Eric Sevareid are ones from the *Saturday Review* (1965) and the Washington Press Corps (1962), as well as a Peabody Award (1964), which stated: "We respect the network for the latitude it has allowed Mr. Sevareid, and we admire him for the directness with which he engages his listeners and for the concise and penetrating way in which he goes to the heart of the more troublesome issues."

[26]Volume II of the record appendix contains the two CBS exhibits filed with the Seventh Circuit. "A. II (E. 1) " references are to the first CBS exhibit, filed with the Seventh Circuit on November 21, 1967. (A. 292a) "A. II (E. 2) " references are to the second CBS exhibit, filed April 17, 1968. (A. 343a)

[27]A comparable statement was held to constitute a personal attack in *Capitol Broadcasting Co.*, 8 F. C. C. 2d 975 (1967).

> nists, who have operated in England for several years."[28] (A. II (E. 1) 28)
>
> "The alleged misdeeds at issue [in the Dodd case] are in the realm of carelessness, but on a scale beyond normal proportions . . . . [T]he offense Mr. Dodd is charged with by the Ethics Committee is damage to the repute of the institution." (A. II (E. 1) 30)
>
> "The remarkable young man known as Muhammed Ali or Cassius Clay had an unconvincing case for refusing military service, and apparently expected to be found guilty." (A. II (E. 1) 31)
>
> ". . . H. Rapspierre Brown teaches guillotine building in New York schools." (A. II (E. 1) 39)[29]

The average Sevareid commentary occupies approximately two minutes of broadcast time. Any meaningful reply or statement of views of the person or group involved would have to be at least one or two minutes in length. By broadcasting these 31 Sevareid commentaries in the course of a year, occupying some 62 broadcast minutes, CBS would have been required under the "paragraph 5" procedure promptly to ascertain and present the views of 50 identified individuals or groups. The amount of time that would have to be devoted to their replies would be substantially greater than the time required to broadcast the 31 "offending" commentaries.

This duty to present reply views would have applied to every person or group attacked even if in Mr. Sevareid's and CBS' best judgment no further discussion of the matter would have been newsworthy. Moreover, if any individual (or group) was dissatisfied with CBS' summary of his

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[28]The Commission has held that statements describing someone as a Communist are clearly personal attacks. See pp. 52-53, *infra*.

[29]During the same period, CBS had broadcast appearances by Mr. Hoover, Senator Kennedy, Senator Dodd, Muhammed Ali and H. Rap Brown. However, under the rules an additional appearance or statement in response to the attack would have been required.

views, he would be free to contend that the paragraph 5 procedure had not been met and to ask the Commission to direct CBS to comply in full with the personal appearance provision of the new rules. In confronting the "choice" of presenting replies or deleting the attacks, Mr. Sevareid as a practical matter would have to follow the latter course.

Even the dubious advantages of the paragraph 5 variant available for Eric Sevareid's commentaries on the *CBS Evening News* would be denied to the many commentaries broadcast by Walter Cronkite and others outside of newscasts. Although the Commission has conceded that "commentary or analysis is an integral and important part of the news process involved in the category 'bona fide newscast'," (A. 231a), it has never explained why this type of broadcast journalism is any less an "integral and imporant part of the news process" when it appears outside a "bona fide newscast." There is no rational basis for "exempting" the former and covering the latter. Commentary is commentary, whether included within a newscast or not so included. In either form commentary is often likely to contain what the Commission defines as personal attacks. Under the current version of the Commission's rules, the journalists who prepare such programs would be strongly impelled to delete the offending remarks from their commentaries.

Examination of the March 27, 1968, Memorandum Opinion and Order points to one possible explanation as to why the Commission created this patchwork of "exemption" and nonexemption. The Commission notes that in the case of "syndicated programming" it has found "some flagrant failures by licensees to follow the requirements of the fairness doctrine with respect to personal attacks . . .," while "no similar pattern of abuses" has been found in newscasts, on-the-spot coverage of bona fide news events and news interviews. (A. 230a)

The memorandum opinion and order does not clarify what it means by "syndicated programming." Presumably, however, it refers to commentary programs that are distributed not by networks to their affiliates but by other program sources. A number of these syndicated commentary programs happen to feature commentators with "extreme" views, a typical example being Reverend Billy James Hargis, who broadcast the commentary at issue in *Red Lion Broadcasting Co.* v. *FCC,* 127 U. S. App. D. C. 129, 381 F. 2d 908, *certiorari granted,* 389 U. S. 968 (1967) (No. 2, this Term), Commissioner Loevinger's dissent suggests that one Commission purpose in covering news commentary outside of a newscast was to reach commentary of this nature while "exempting" commentary such as that of Eric Sevareid. (A. 245a-246a)[30]

If so, the Commission has twice missed the mark. First, as we have shown, the net it casts for "extreme" commentary happens to cover a good deal of the "responsible" commentary broadcast by the networks and by many "responsible" stations outside of newscasts. Second, a line drawn so as to free "responsible" comment while restricting "extreme" comment is patently repugnant to the First Amendment. See, *e.g., New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964); *NAACP* v. *Button,* 371 U. S. 415, 444-45 (1963); *Terminiello* v. *Chicago,* 337 U. S. 1 (1949); *Cantwell* v. *Connecticut,* 310 U. S. 296, 310 (1940).

We recognize that occasionally false and malicious personal attacks may be broadcast to a public which may never

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[30]On the other hand, Commissioner Cox disclaims any such discriminatory purpose on the part of the Commission (A. 258a-260a). While we accept this statement as made in entire good faith, we do not find in the Commission memorandum opinion and order, the separate statement of Commissioner Cox, or petitioners' brief any other rational explanation for the line the Commission decided to draw between news commentary which happens to be scheduled in the context of a newscast and news commentary which is contained in a separate program.

see or hear a reply. But the legal remedies for malicious defamation are available to deal with such cases. The vice of the additional measures now sought to be imposed by the Commission is that they so seriously inhibit free discussion as to be far worse than the malady they are designed to cure.

2. News Interviews.

CBS broadcasts two kinds of news interviews—regularly scheduled news interviews such as the *Face the Nation* series and non-regularly scheduled news interviews such as the Eric Hoffer interview discussed below. In all relevant respects these two kinds of interviews are indistinguishable. Under the Commission's rules, however, *Face the Nation* is nominally "exempt" (but still caught under the paragraph 5 variant) because it is regularly scheduled, while occasional news interviews, including some of equal or greater journalistic importance, are subject to the full impact of the rules.

Face the Nation interviews not only illuminate the news; they frequently make news as well. Fifty-eight of the 85 weekly *Face the Nation* programs broadcast from April 1966 to November 1967 resulted in news stories that appeared in the *New York Times* or the *Washington Post* or both, the following day. Nineteen of these programs resulted in front-page stories in the *Times* or the *Post* or both.

The inhibiting effect of the Commission's action on *Face the Nation* would significantly damage the integrity and purpose of that program. The central idea of *Face the Nation* and similar news interview programs is to question an important public figure about the important public issues in which he is currently involved. The essence of good interviewing is to ask provocative questions, questions

that relate not merely to abstract issues of public policy, but also to the "honesty, character, integrity or like personal qualities" of individuals or groups which figure in such public issues. The bite of the rules on news interviews is therefore especially sharp. The interviewers cannot judge whether the requirement will be brought into play solely by what they themselves may say; before saying it, they must also take into account the many possible answers their questions may produce.[31]

In a high proportion of *Face the Nation* programs, the interviewers ask questions that either contain a statement the Commission now defines as a personal attack or may result in a reply containing such a statement. Thirty-four of the programs from March 1966 to October 1967 contained 75 or more statements, collected in Volume II of the record (A. II (E. 1) 44-88) that at least arguably fall within the Commission's definition of personal attack.

To illustrate the problem, we invite the Court's attention to another *Face the Nation* interview with Mr. Adam Clayton Powell, Jr., carried on the CBS television and radio networks on Sunday, January 14, 1968, reprinted in Volume II of the record. (A. II (E. 2) 55-74) It contains numerous personal attacks by Mr. Powell on such varied individuals and groups as Senator Dodd, John Conyers, Claude Pepper, Edith Green, Judge Matthew Levy, the Harlem Police, and eleven members of Congress who introduced a resolution concerning Mr. Powell's office.

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[31]It is no answer to the journalist's problem to say (Govt. Br. 71 n. 37) that counsel for the Government now believe "many" of these statements (without specification) are not attacks. A journalist cannot function with counsel at his elbow. If the broadcast of "personal attacks" requires him constantly to subordinate his editorial judgment to the legal judgments of others, he will have a strong incentive to avoid such attacks. In the resulting atmosphere, it would be extraordinarily difficult for the broadcasting medium to provide a forum for robust debate, or indeed to continue to attract and retain journalistic talent of any quality.

It would have been journalistically impossible for the moderator of the interview to interrupt it on the occasion of each such attack to present the response of the person or group attacked or a statement of the views of such person or group. It would have taken another half-hour broadcast —and perhaps more—for CBS to compile and carry a subsequent collection of the views of those attacked. The necessarily disjointed nature of any such program would have sharply limited its quality and ability to interest the listening public. As a practical matter the only choice left to CBS under the Commission's latest refinement of the rules (including the paragraph 5 variant) would have been to give up the idea of an interview with Mr. Powell.

Non-regularly scheduled news interviews continue to be subject to the full personal reply requirement of the rules.[32] CBS broadcasts many such interviews that are of substantial public interest. As an example of a personal attack occurring in a non-regularly scheduled news interview, we presented in our brief to the court of appeals, and quote below, an incident occurring during the CBS news special "Eric Hoffer: The Passionate State of Mind," an interview or conversation between Eric Sevareid and Eric Hoffer, broadcast on September 19, 1967. The broadcast attracted wide public interest and was repeated over the CBS Television Network on a second occasion. In the course of the program, Mr. Hoffer expressed colorful and critical views about many leading personalities. The following exchange occurred with reference to Stokely Carmichael:

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[32]The rules defined the scope of the news interview exemption by reference to the 1959 amendments to Section 315 of the Communications Act, 47 U.S.C. § 315. Those amendments appear to exempt only news interviews in regularly scheduled program series (such as *Face the Nation*). See H. R. REP. No. 1069, 86th Cong., 1st Sess. (1959), p. 4, cited in the Commission's March 27, 1968, Memorandum Opinion and Order (A. 231a n. 3). See also *McCarthy* v. *FCC*, 121 U. S. App. D. C. 56, 390 F. 2d 471 (1968).

> "SEVAREID: Well now, what about some of these new young Negro leaders, like Stokely Carmichael? They—they sound as though they're racist.
>
> "HOFFER: Oh, they just sound. They just sound. There's nothing. They're all phonies.
>
> "SEVAREID: But it's race hatred they're preaching.
>
> "HOFFER: Yeah, but who—who's going to listen to them. Maybe a few—They—they are not going to get anywhere because they have this—these naive conceptions of power. They say: 'Power. Power. Give me power.' Nobody can give you power. Power doesn't come in cans. When I hear Carmichael, he's always asking: 'Give me the can opener so I'll open the cans of power and eat them,' see. And they're all phony, these people. They—they do not realize that it's the long-term projects, things that you go about patiently and quietly that will achieve results. Listen once you have realized that, see, you are not going to waste your energies on hatred. You are not going to waste your energies on anything except building."

This was plainly a personal attack on Stokely Carmichael. Although the interview was taped before broadcast, it would have been stultifying from a journalistic viewpoint to delete this portion of the conversation. It would have destroyed the mood of the program—a wide-ranging conversation between a journalist and a philosopher—to insert a reply by Mr. Carmichael, an opportunity he would doubtless have accepted with alacrity. And for reasons discussed elsewhere in this brief it would have been impracticable to schedule a reply by Mr. Carmichael at some later time. Yet,

under the personal attack rules, Mr. Sevareid and CBS would have had to make one of these choices.[33]

This year another conversation between Eric Sevareid and Eric Hoffer was broadcast on January 28, 1969. ("The Savage Heart—A Conversation with Eric Hoffer.") In the course of that broadcast, as in the earlier interview, Mr. Hoffer expressed critical views concerning leading personalities. He made statements constituting "personal attacks" on intellectuals as a group, and specifically on Arthur Schlesinger, Jr., Senator Eugene J. McCarthy, the faculty and students of San Francisco State College, a federal judge, the Negro leadership, Eldridge Cleaver, the San Francisco Barristers Club, George Wallace and the Department of Mathematics at the University of California. The problems which Mr. Sevareid and CBS would confront in broadcasting replies to the many "personal attacks" in this program, as with the earlier program, would have been too formidable to permit the broadcast of the statements in the first instance.[34]

3. News Documentaries.

In intrinsic quality and the contribution they make to the level of public information, news documentary programs

[33]Mr. Carmichael has appeared in several CBS newscasts and public affairs broadcasts before and after this broadcast, and was himself interviewed on *Face the Nation* on June 19, 1966. (A. II (E. 1) 54-57) Yet none of these appearances satisfies the requirements of the rules or paragraph 5.

[34]In the interest of general fairness CBS a week later broadcast on "60 Minutes" a panel discussion among four individuals of varying philosophies (none of whom had been "attacked" on the Hoffer program) to comment on Mr. Hoffer's views. While those making the comments were not responding to Mr. Hoffer's "personal attacks" but rather to his expression of views, the comments themselves included a number of additional personal attacks covered by the rules. For example, Grover Hall, the *Chicago Daily News* syndicated columnist, attacked not only Mr. Hoffer, but also Arthur Schlesinger, Jr. In addition, William F. Buckley, Jr. attacked Eldrige Cleaver, H. Rap Brown and Stokely Carmichael as a "Hitlerite phenomenon."

are among the most important broadcast by CBS.[35] CBS has made journalistic history with many of its documentaries, notable recent examples being "Hunger in America" and "Of Black America." All documentaries are subject to the full sweep of the rules, not even the paragraph 5 variant being available.

Each CBS documentary consists of a distillation of what its authors believe to be the most significant aspects of the subject under discussion. In accordance with their own standards and those of the CBS News Division, they make every effort to present the principal sides of the controversial issue being examined. In so doing, they necessarily must be free to select from among alternative methods and spokesmen to present each side. Substantial difficulty in scheduling, continuity and clearance would be posed if the editors were required to broadcast a personal reply to every statement falling within the rules' broad definition of a "personal attack." With these substantial prospective burdens before them, and with numerous other items of filmed and recorded material to select from in editing the final broadcast, the authors would be induced by the new rules to discard particular items of material which, no matter how fairly and objectively treated in the program itself, might create a duty to broadcast a personal reply by the individual or group attacked.

Apparently the Commission's primary reason for refusing to exempt documentaries is a "practical" one.[36] It be-

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[35]Among the awards received by *CBS Reports* in recent years are the George Foster Peabody Award for four consecutive years (1964-1967). The series or individual programs have also received awards from the Academy of Television Arts and Sciences (1966), the National Association for Better Radio and Television (1962 and 1964), the Thomas Alva Edison Foundation (1962 and 1964) and the American Bar Association (1963, 1964, 1965 and 1966).

[36]The Commission mistakenly suggests as an added reason that it is following the line drawn by Congress in Section 315 in declining to exempt news documentaries. However, Congress in 1959 exempted most documentaries (those in which the particular candidate was not the "predominant" subject of the program) from Section 315. See H. R. REP. No. 1069, 86th Cong., 1st Sess. (1959), p. 4. Moreover, the Section 315 exemptions were adopted for an entirely different purpose. See below, p. 62.

lieves that while broadcasting replies to personal attacks might pose practical problems in newscasts and on-the-spot coverage of bona fide news events, no such practical considerations exist with respect to news documentaries. It states (A. 232a):

> "There is no factor of even *possible* inhibition in the case of a documentary, which is assembled over a period of time. Rather, the matter is one where the person's response can be readily obtained. . . ."[37]

The suggestion apparently is that in news documentary broadcasts, unlike newscasts and on-the-spot coverage of bona fide news events, it is feasible to include a reply in the original broadcast itself. In the realities of the preparation process, however, there is little practical difference between "newscasts" and "documentaries."

A few years ago documentaries might have been defined as retrospective, overall views of past events as opposed to the reporting of events as they happen. But in recent years the only generalization that satisfactorily distinguishes between a documentary and a newscast inheres in the greater depth, perspective and duration of the documentary. A particular event may indeed be both the subject of a five-minute segment in the *CBS Evening News* (which might be called a "mini-documentary") and the subject of a one-half-hour documentary later on the same or a subsequent evening.[38] There is no other practical difference between

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[37]The Government's brief for the first time suggests that "[a] program prepared very quickly to cover a fast-breaking development might very well be an exempt special newscast." (Govt. Br. 68 n. 35) Since even "exempt" newscasts are still caught by paragraph 5, the point is academic.

[38]As Professor William Wood has pointed out:

> "Brief documentary background pieces have been finding their way into the body of the expanded network and local station news programs. Running three, four, or five minutes,

"newscasts" and "news documentaries." Both are equally newsworthy. Both are produced under severe time pressures.[39]

Documentary programs dealing with controversial issues are frequently prepared in a short period of time. In 1968, for example, "CBS News Special Reports" were prepared in a matter of days—in some cases only hours—on such subjects as the careers and assassinations of Robert Kennedy and Martin Luther King, the Poor People's Rally, the Riot Commission Report and the Walker Report on the violence at the Democratic National Convention. Many such broadcasts contain statements which the Commission

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these consist of capsulized versions of in-depth treatments, which sounds like a contradiction in terms. But whatever they may lose in the condensation, their advocates point out they gain a considerably larger audience than they would as full-length programs of their own. If the story is worth it, it may be treated in three-to-five-minute segments over a period of days within the news program. This has the advantage of coming back to a topic again and again instead of treating it only once." ELECTRONIC JOURNALISM (1967), p. 52.

Mr. Wood is a professor at the Columbia University School of Journalism. Although he conducts a periodic review of the press over radio station WCBS in New York, he is not an employee of CBS, and his book reflects his own views.

At times it is almost impossible to distinguish between "newscasts" and "news documentaries." Often a single event will be the subject of a short special broadcast early in the evening, and will be treated in a longer format later in the evening. For example, the capsule fire death of the Apollo astronauts was the subject of seven separate CBS programs on January 27, 1967. News bulletins were broadcast at 8:16 p. m., 8:35 p. m., 8:46 p. m., and 9:05 p. m. An eight-minute special report was broadcast from 9:46 to 9:54 p. m.; a thirty-minute report was broadcast from 11:00 to 11:30 p. m.; and a nine-minute report was broadcast from 12:28 to 12:37 a. m. It is obviously difficult to draw any sensible distinction among these seven programs, even in terms of length.

[39]The time pressures involved are well illustrated by a discussion appearing in Professor William Wood's book ELECTRONIC JOURNALISM (1967). An accurate study of the preparation process, Professor Wood's description (quoted at length in Appendix A to this brief) merits detailed examination.

defines to be "personal attacks." For example, as we pointed out in the court below, "Killer on the Campus" (the program dealing with the Charles Whitman murders) on August 1, 1966, was prepared for broadcast that same evening. It contains statements that are unquestionably "personal attacks" on two alleged murderers, Howard Unruh and Richard Speck, on the "gun lobby" and on the National Rifle Association.[40] Under the rules the producers would have been required to give notice to each of these individuals and groups and solicit a reply. Within the time frame for producing the program, it would have been impossible to afford notice and include the reply in the same program. (See the discussion in Appendix A.) Since replies on some later program were also impracticable, the only feasible way of obeying the personal attack rules would have been to delete the offending statements.

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[40]Walter Cronkite stated that:

> "Seventeen years ago Howard Unruh, a man who read the Bible, a World War II veteran, shot and killed the first thirteen people he saw on several neighborhood streets in Camden, New Jersey. Unruh remains to this day in a New Jersey mental institution."

and that:

> "[I]n Chicago just three weeks ago a mass murder of eight young nurses shocked the nation. Richard Speck, a 24-year-old drifter, has been arraigned on all eight murder indictments."

Mr. Bakal, the author of THE RIGHT TO BEAR ARMS (1966), made the following statements:

> "The opposition comes from a lobby led by the National Rifle Association, which I should say is subsidized by the gun manufacturers and in part by the taxpayers, by the government, and this lobby feels there should be no restrictions whatever on the sale of guns, and as a result mental defectives like Whitman, criminals, anyone can buy a gun anywhere in this country with no questions asked.
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> * * *
>
> "But they [the people and government officials] are overruled by this lobby which is highly organized and has won their point by distorting the facts of the bill, deceiving their members, and deceiving the members of the American public."

Similar time pressures exist even for documentaries that are prepared over a more extended period. No matter when the authors begin, the same time pressures that become apparent in the last few days of writing a brief also exist in the last few days before completing a documentary. As air time grows near, and the final few hundred feet of film are edited from the thousands of feet available, there is simply no time left to seek replies to whatever attacks may be contained in the footage finally selected. The practical impact of enforcing the rules would be to force the journalist to delete the statements that bring the rules into play, and to substitute less controversial footage.

The following examples of CBS news documentary broadcasts that were prepared over relatively long periods of time will illustrate the practical impossibility of including in a documentary the replies to every personal attack it contains.[41]

First, we refer the Court to the text of the *CBS Reports* program entitled "Ku Klux Klan: The Invisible Empire," broadcast over the CBS network at 10:00 p.m., EDT, on September 21, 1965, and contained in Volume II of the record. (A. II (E. 2) 1-28) This broadcast was in preparation for more than three months. The final version was "locked in" two days before broadcast; of the 46,700 feet of film shot or taken from libraries, only 2,500 feet survived to become the final product. The broadcast contains approximately 25 statements that are plainly or arguably personal attacks under the definition set forth in the Commission's latest rules. Virtually all of these attacks are directly related to the basic controversial issues and would be covered by the rules. While the broadcast displayed fundamental fairness through inclusion of interviews with

[41]Other examples of personal attacks appearing in CBS news documentary broadcasts are set forth in Volume II of the record. (A. II (E. 1) 89-130)

officials and members of the Klan as well as its victims and critics, no attempt was made to track down the subject of every personal attack. As we show below, it would have been impossible to do so.

1. At the beginning of the program, 13 alleged members of the Ku Klux Klan are charged with the murders of Mrs. Viola Liuzzo, Michael Schwerner, Andrew Goodman, James Chaney and Lemuel Penn (A. II (E. 2) 1). Of the 13, several subsequently are filmed on the program (while attending Klan rallies) (A. II (E. 2) 15). Neither those who appear nor the others are asked to comment on the charges, and none does so.

2. Klan officials are shown making bigoted personal attacks on Catholics, Jews and "niggers" (E.g., A. II (E. 2) 4-5). No representative of any of these identified groups appears to reply.

3. A Klansman says "We got a dictator in the White House a-dictating" (A. II (E. 2) 6). The President does not appear to reply.

4. A named Klan official is accused of turning funds over to George Lincoln Rockwell of the American Nazi Party. (A. II (E. 2) 8-9) Neither the official nor Rockwell (who was then living) appears to reply.

5. The narrator states that in the small community of Gray, Georgia, Klan intimidation stopped the only movie theater from permitting Negroes to sit in the balcony (A. II (E. 2) 18). No Klan representative appears to comment on this charge.[42]

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[42]Similar statements that the John Birch Society engaged in intimidation campaigns were recently held to be personal attacks within the meaning of the rules. See *University of Houston,* 11 F. C. C. 2d 790, 791 (1968).

6. The narrator states that the Bogalusa Klan intimidated local advertisers into cancelling commercials on a radio station owned by a white moderate (A. II (E. 2) 18). No representative of the Bogalusa Klan appears to reply.

7. A victim describes being castrated by a Klan group in Birmingham, Alabama. He concludes by stating: "I don't believe they're human." (A. II (E. 2) 19) No representative of the Klan appears to reply.

Even on the questionable assumption of a legal duty to "balance" an entirely truthful report on the Klan, CBS certainly took sufficient steps to provide Klan officials with an opportunity to explain their side to the viewing public. In the case of one direct accusation—that Reverend Connie Lynch was responsible for the violence in St. Augustine, Florida—Reverend Lynch himself appears on the broadcast and proudly accepts responsibility. (A. II (E. 2) 20-21) But it would obviously have been impracticable for CBS to have inserted into the program replies by every one of the persons and groups "attacked." Even if it had been practicable, the inclusion of their replies would have required the deletion of other material the producers regarded as having greater importance. To have sought and included the replies—or to have deleted either the offending material or the material displaced by the replies—would have seriously impaired the journalistic impact and integrity of the program.

Similar difficulties would have arisen if the rules had been applied to the *CBS Reports* program entitled "Biography of a Bookie Joint," carried on November 30, 1961, and also reprinted in Volume II of the record. (A. II (E. 2) 29-54) In this program CBS filmed the comings and goings of numerous persons into a bookmaking establishment in Boston, conducted in a store known as the Swartz Key Shop.

In the course of the program a number of shop employees and customers are shown. Policemen are filmed entering and leaving without making arrests. Numerous charges of illegal activity are made against named or photographed individuals.

It would have been impossible for CBS reporters to accost each individual who was being photographed and ask him if he would like to make a reply statement for inclusion in the program. As soon as the first man was approached, knowledge of the filming would have become general and the entire project would have come to an end. It would have been equally impossible to identify, locate and approach all individuals after the broadcast and to devote a second program or portion of a broadcast to any replies that might be made.

"Biography of a Bookie Joint" was a responsible and important piece of broadcast journalism. It directly resulted in a Treasury raid on the Swartz Key Shop and in a subsequent raid by the Boston police, the first on a gambling establishment in twenty years. It also led to a number of indictments and extensive state legislative inquiries. Its general fairness can be judged by anyone who reads the script.[43] But as a practical matter, application of the personal attack rules to a program such as "Biography of a Bookie Joint" would confront CBS with a dilemma that could only be resolved by scrapping the program.[44]

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[43]Indeed, the Commission specifically rejected a charge of unfairness leveled against the program by Speaker John F. Thompson of the Massachusetts House of Representatives. The Commission's ruling, issued five days after the landmark personal attack opinion in the *Billings Broadcasting Co.* case (23 Pike & Fischer, R. R. 951 (1962) see below p. 56), is silent on the numerous personal attacks contained in the program or any duty to grant time for reply. *Honorable John F. Thompson,* 23 Pike & Fischer, R. R. 955 (1962).

[44]It is interesting that in *United States* v. *Dubrow,* 201 F. Supp. 101, 103 (D. Mass. 1962), a case involving an indictment resulting di-

The Commission is therefore factually mistaken in its conclusions that "there is no factor of even *possible* inhibition in the case of a documentary, which is assembled over a period of time," and that "the matter is one where the person's response can be readily obtained . . . ." (A. 232a)

There is strong reason to doubt that journalists with the qualities of the men who prepare CBS documentary programs will be able to "choose" between the alternatives imposed by the rules. They will find that to continue broadcasting "personal attacks" is impracticable and that to "steer far wider of the unlawful zone" is unacceptable. Thus, under the new rules, news documentary programs as we now know them could not continue, and "only the wholly inoffensive, the bland, could gain access to the radio microphone or TV camera." *Pacifica Foundation,* 36 F. C. C. 147, 149 (1964).

4. Newscasts.

CBS news broadcasts, including newscasts and on-the-spot coverage of news events, would be particularly burdened by the personal attack requirement as set forth in the paragraph 5 variant. Each time a CBS journalist broadcasts a report of unlawful conduct, arrest, indictment, trial, conviction or sentencing, the journalist would be required to ascertain the views of the individual "attacked" and present his response. Each time the journalist reported an unfavorable comment by one public figure about another,

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rectly from the broadcast of this program, Judge Wyzanski had occasion to note:

> "The First Amendment's policy of a free press and a free reporting by television are always factors to be emphasized. And in this country the virtually unanimous view is that the executive not only lacks constitutional power to suppress a television documentary accurately reporting events, but also ought never be given this power if freedom is to be maintained."

the views of the person "attacked" would have to be ascertained and presented. This would be a particular problem in local news broadcasts which regularly contain a report of local law enforcement activities and arguments among local officials and other local public figures. Even the network television news, which deals only with events of national importance, contains numerous reports that constitute "personal attacks" within the definition of the rules.

For example, in the month following the Commission's latest memorandum opinion and order (April 1968), the *CBS Evening News* (network television news) reported that federal agents were investigating Stokely Carmichael's activities in connection with the Washington riots; that a named Marine Corps officer was being court-martialed for disobeying orders (and later that she was discharged from the Marine Corps); that a court had ordered Timothy Leary to begin serving his 30-year sentence for narcotics charges; that students at Columbia University had held three university officials prisoner for 24 hours and wrecked the office of President Grayson Kirk; and that Reverend William Sloane Coffin, Jr., Dr. Benjamin Spock and three other defendants were awaiting trial on charges of conspiring to help young men resist the draft. The network also reported many other attacks including an attack on Vice President (then Governor) Spiro Agnew,[45] a declaration by a caucus of Negro priests in Detroit that the Catholic Church in America is "primarily a white, racist institution," and a statement by a hospital director attacking organized medicine.[46] In covering a campaign by the Southern Christian Leadership Conference to recruit members

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[45]"Negro leaders who walked out of a session with Maryland Governor Spiro Agnew have accused him of 'tongue-lashing, condescension and paternalism.'" (April 12, 1968)

[46]"Across this land, the capacity that medicine has to provide good care is not equaled by the performance, for rich and poor. The leadership of organized medicine in the country in the last 20 years

for the 1968 Poor People's march on Washington, D. C., CBS News broadcast part of one recruiter's appeal that contained attacks on four individuals or groups.[47]

CBS journalists, of course, often do obtain and present as part of the same news item the response of a person attacked, but only if in their judgment this is feasible and newsworthy. Paragraph 5, however, leaves no room for the exercise of such discretion.

Long before the paragraph 5 variant was announced, the broad discretionary principles of the general fairness doctrine had effectively maintained the public interest in being fully informed about all sides of controversial news events. Thus, even though CBS did not broadcast responses to the specific "attacks" listed above, CBS has carried appearances by Stokely Carmichael, Timothy Leary, Columbia students, Dr. Coffin and Dr. Spock, Governor Agnew, officials of the Catholic Church, representatives of organized medicine, members of the Rockefeller family, George Wallace and President Johnson. These appearances were not made in response to the particular attacks mentioned; yet they informed the public as to the positions of these individuals and groups on major controversial public issues. These appearances fully satisfied the broad principles of the general fairness doctrine, but they do not satisfy the personal attack rules or paragraph 5.

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has spent most of their time and their efforts protecting the economic interests of the doctors rather than concerning themselves about the state of health of the nation—a very disgraceful chapter." (April 22, 1968)

[47]"A sick white man didn't kill Martin Luther King. The Rockefellers killed Martin Luther King. The George Wallaces killed Martin Luther King. The Lyndon Baines Johnsons killed Martin Luther King. This is what we were telling the Kennedys. This is what we were telling the Johnsons. This is what we were telling the Rockefellers. Now, you got all this money; you robbed our fathers, our mothers, our great grandfathers, our great grandmothers. Now we want you to take that money and divide it among the poor." (April 29, 1968)

It is hard to believe that the Commission meant to work so fundamental a change in the fairness doctrine by the almost parenthetical observations contained in paragraph 5. The language of this paragraph, however, leaves no room for any different interpretation.

5. Other News-Related Programs.

Several other types of CBS programs would be subject to the rules and would be similarly inhibited.[48] For example, inhibitory problems would arise in discussions and debates. The *At Random* discussion series, appearing on the CBS owned television station in Chicago (WBBM-TV), has carried such guests as Governor George Wallace, Mayor Richard Hatcher, Senator Charles Percy and Dr. Benjamin Spock. It has discussed such issues as civil disorders, the Vietnam War, church and state, racial prejudice and unionization. Other CBS stations frequently present debates on public issues. The *Lester Kinsolving Program* on KCBS Radio, San Francisco, last year presented debates or discussions on such subjects as capital punishment, fair housing, censorship, and the John Birch Society. Both panel discussions and debates frequently contain personal attacks upon persons other than those participating in the discussion

[48]For example, panel discussions, debates and news conferences are clearly not within the news interview exception (the scope of which is defined by the comparable exemptions in the 1959 amendments to Section 315 of the Communications Act, 47 U. S. C. § 315). An exemption for panel discussions was eliminated from the 1959 bill by the Senate. 105 CONG. REC. 14453 (1959). In 1960 Congress thought it necessary to suspend the equal time requirements for the 1960 Presidential elections in order to encourage broadcast of debates, non-regularly scheduled news interviews and various types of discussion programs including appearances by candidates. See S. J. Res. 207, 86th Cong., 2d Sess. (1960); S. REP. No. 1539, 86th Cong., 2d Sess. (1960); 106 CONG. REC. 14472-77, 17035-41 (1960). The legistlative history with respect to news conferences is discussed in *Letter to CBS,* 3 Pike & Fischer, R. R. 2d 623 (1964), where the Commission held that news conferences did not come within the news interview exemption to Section 315.

or debate. The rules, by requiring notice and opportunity to reply, would substantially inhibit these broadcasts.

D. The Government Has Failed to Meet Respondents' Showing of Inhibition.

In the Government's view, respondents have failed to show "that the personal attack policy was burdensome to licensees (or stifled broadcast debate) during the years when it was in effect prior to the adoption of the rule; surely it can be assumed that most licensees have been conscientious enough to observe the policy even in the absence of the direct sanctions that the rule now imposes." (Footnote omitted) (Govt. Br. 70-71) The only reason the personal attack rules have not deterred CBS from broadcasting discussions containing personal attacks is that CBS has instructed its journalists not to follow the rules until their constitutionality has been finally adjudicated. See pp. 12-13, above.

Moreover, if the Government's view were correct, one might fairly ask what need exists for the new rules. According to the Commission, the new rules were specifically designed to change a situation in which the earlier case by case rulings were being disregarded, and to achieve compliance by bringing to bear a whole new range of sanctions.[49] As the Government admits, a recent survey, quoted

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[49] In its original Memorandum Opinion and Order of July 5, 1967, the Commission specifically stated that a major reason for adopting the rules was that "[d]espite . . . [the Commission's public notices] and the Commission's rulings, the [personal attack] procedures . . . have not always been followed, even when flagrant personal attacks have occurred in the context of a program dealing with a controversial issue. It is for this reason that we now codify the procedures which licensees are required to follow in personal attack situations." (A. 213a-214a)

The Government itself admits in its brief that: "although all the components of the licensees' personal attack responsibilities had been spelled out previously in public statements, the Commission's experience indicated widespread uncertainty regarding, or simply disregard of, those duties." (Govt. Br. 65)

in footnote 39 on pages 71-72 of the Government's brief, shows that over 1500 broadcaster comments characterized the rules as either discouraging "broadcast of controversial issues," "[violating] the first amendment," "[leading] to government control of programming," "[lacking] sufficient flexibility," being "too vague" or "burdensome."

The Government has almost totally ignored the numerous specific CBS examples of the problems posed by the rules as set forth above. Its response is buried in a footnote (Govt. Br. 71 n. 37) stating that "CBS has made no specific showing of any actual inhibition" and that the CBS examples are "simply inapposite under the rules as later amended in March 1968."

The first statement is wholly beside the point. First Amendment rights do not depend upon proof that a governmental restraint has actually suppressed speech that would otherwise have occurred; it is sufficient to demonstrate that the restraint, if enforced, would be likely to suppress.[50]

As for the reply that the CBS examples are "simply inapposite," it is unclear whether the Government means that some of the examples are taken from what are now so-called "exempt" programs or whether the statements which CBS cited as examples are not personal attacks. In either event the suggestion is incorrect. As discussed above, pp. 18-22, so-called "exempt" programs have been

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[50]"It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments. . . . [thus] the freedoms of expression must be ringed about with adequate bulwarks." *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 66 (1963). See *NAACP* v. *Button*, 371 U. S. 415, 432-33 (1963); *Smith* v. *California*, 361 U. S. 147, 150-51 (1959). See also, *Dombrowski* v. *Pfister*, 380 U. S. 479, 486-87 (1965).

effectively recaptured by the paragraph 5 variant which includes most of the burdens of the rules; in any event many examples are taken from documentaries and other programs that remain fully subject to the rules.

We respectfully invite the Court to examine Volume II of the record in detail. We submit that more than one-third of the examples cited are plainly personal attacks subject to the rules (including paragraph 5) and that the balance are sufficiently debatable to raise a substantial doubt in a journalist's mind.[51]

Such doubts would be amply justified by recent Commission rulings which define the following statements to be personal attacks:

> 1) "The irresponsible, immoderate acts of Martin Luther King, Jr. have done so much damage in Albany that it will take years for the wounds to heal." *Radio Albany, Inc.*, 4 Pike & Fischer, R.R. 2d 277 (1965).
>
> 2) A Congressman "and his friends are knowingly tampering with the truth." *Capitol Broadcasting Co.*, 8 F.C.C. 2d 975 (1967).
>
> 3) The Attorney General of Massachusetts received political contributions from friends "whether or not they're from the crime syndicate in Revere as . . .

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[51]For the first time in its brief to this Court, the Government suggests that "an 'attack' is something quite different from mere mention, comment, or even criticism." (Govt. Br. 72) But this does not comport with dictionary definitions of "attack" (*e.g.*, "to direct unfavorable criticism against," THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (1966 ed.) p. 95) or with the Commission's definitions set forth in the text.

[the Attorney General] says his are not . . . ." *Springfield Broadcasting Corp.*, 10 F. C. C. 2d 328 (1967).

4) "In Visalia, California the Birch Society mounted a campaign, under a front group of course, to remove a standard reference book from the library." *University of Houston,* 11 F. C. C. 2d 790 (1968).

5) When a Pike County, Kentucky couple was arrested on a charge of sedition, the arresting officers found their home to be "littered with books, newspapers, literature, [and] clothing."[52]

The Government may suggest, as it did below, that the examples cited in the CBS exhibits are not properly before the Court. If so, this suggestion is wholly unwarranted. The exhibits were ordered to be filed as part of the record by the court of appeals (A. 292a, 343a), and are printed in Volume II of the record appendix. They were taken from the transcripts of actual CBS broadcasts seen and heard by millions of people. The Government does not, indeed it could not, question their accuracy in any relevant respect.[53]

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[52]*Cumberland Publishing Co.,* 13 F. C. C. 2d 897 (1968). The Commission commented that since the arrested couple clearly denied the disorderly characterization of their home and claimed that the arresting officers themselves improperly littered it, the quoted statement was a "personal attack." In this case, the Commission also found some additional personal attacks relating to "a truckload of seditious material" and "Communist literature and films." However, the opinion may be fairly read as ruling that the statement about litter itself constituted a separate personal attack.

[53]As reports of statements that were in fact made, the transcripts are as legitimate an object of judicial notice as daily newspapers or other documentary material. *United States* v. *Louisiana,* 363 U. S. 1, 12-13 (1960); *Mamiye Bros.* v. *Barber S. S. Lines, Inc.,* 241 F. Supp. 99, 116 (S. D. N. Y. 1965), *affirmed,* 360 F. 2d 774 (2d Cir.), *certiorari denied,* 385 U. S. 835 (1966).

Moreover, the Commission's last action amending the rules was prompted in substantial part by the material in the first CBS exhibit (which had already been filed with the court of appeals), and the Commission's last memorandum opinion and order refers specifically to these materials.[54] The Commission has thus had ample opportunity to pass judgment upon these materials before they were considered by the court of appeals. In both the Seventh Circuit and in this Court the Government has studiously failed to indicate which of the excerpts in the record would, in its view, be neither plain nor arguable personal attacks.

In any event, where First Amendment rights are involved, the courts do not defer to agency expertise, but make independent judgments on such issues as the likelihood of inhibitory effect.[55] And in *New York Times Co.* v. *Sulli-*

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[54]"Even on the basis of the materials presented by the Columbia Broadcasting System (CBS) to the Court for the first time, the showing as to inhibiting effects remains speculative." (A. 229a) Commissioner Loevinger, however, found the exhibit persuasive. "The CBS brief and accompanying exhibit convinced some of the Commissioners and legal staff that the rules would burden and inhibit news programs and commentary and that it was necessary to amend the rules in order to defend them successfully in the pending litigation." (A. 240a)

[55]See *Manual Enterprises, Inc.* v. *Day,* 370 U. S. 478, 488 (1962) (opinion of Mr. Justice Harlan):

> "We come then to what we consider the dispositive question on this phase of the case. Are these magazines offensive on their face? Whether this question be deemed one of fact or of mixed fact and law, . . . we see no need of remanding the case for initial consideration by the Post Office Department or the Court of Appeals of this missing factor in their determinations. That issue, involving factual matters entangled in a constitutional claim, . . . is ultimately one for this Court. The relevant materials being before us, we determine the issue for ourselves.";

Jacobellis v. *Ohio,* 378 U.S. 184, 188-89 (1964) (opinion of Mr. Justice Brennan):

> "Since it is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work

van, 376 U.S. 254 (1964), where the Court found that the possibility of suits against newspapers for nonmalicious libel of public figures would have a chilling effect on robust debate, the Court relied on its own experience and judgment rather than on any evidence as to chilling effect developed in the record.

The Government also suggests that in many instances of personal attacks covered by the rules, the "person attacked will decline to exercise the right of response." (Govt. Br. 69) The problem with this line of defense is twofold.

First, given the appetite of persons involved in public controversy for personal radio and television exposure, a high proportion of those invited to reply may be expected to accept. Second, even assuming *arguendo* that some unknown number of those invited to reply might decline, the journalist who prepares the broadcast containing any particular personal attack has no way of predicting in advance whether the particular subject may in fact accept the opportunity offered. At the moment of preparation when the deterrent operates, the journalist must take into account the substantial risk of inviting a reply.

The Government also argues that the many open questions as to the coverage and meaning of the rules do not have an inhibitory impact. (Govt. Br. 71-74) In its initial

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is obscene necessarily implicates an issue of constitutional law. . . . Such an issue, we think, must ultimately be decided by this Court. . . .

"In other areas involving constitutional rights under the Due Process Clause, the Court has consistently recognized its duty to apply the applicable rules of law upon the basis of an independent review of the facts of each case. . . . And this has been particularly true where rights have been asserted under the First Amendment guarantees of free expression."

See also *Watkins* v. *United States,* 354 U.S. 178, 198-99 (1957) (Court does not defer to Congress on whether investigation is unduly inhibiting).

memorandum opinion and order the Commission said that these open questions raise no problem because it stands ready to answer inquiries as to the meaning of the rules. (A. 215a n. 6)[56] However, the Government does not and could not suggest that such interpretations could be available in advance of broadcast.[57] When Eric Sevareid prepares a commentary during the day for delivery the same evening, he cannot stop to ask the Commission whether a particular phrase falls within the rules, and if he were to ask, he could not get an authoritative answer in time to be relevant. When a journalist is about to ask a question in a *Face the Nation* interview, he cannot ask the guest and

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[56]In promulgating the rules the Commission stated:

> "[W]e recognize that in some circumstances there may be uncertainty or legitimate dispute concerning some aspects of the personal attack principle, such as whether a personal attack has occurred in the context of a discussion of a controversial issue of public importance, or whether the group or person attacked is 'identified' sufficiently in the context to come within the rule. *The rules are not designed to answer such questions.*"

(Emphasis added.) July 5, 1967, Memorandum Opinion and Order, ¶ 9, A. 215a. Several examples of such uncertainties, taken from actual CBS broadcasts reproduced in Volume II, are set forth in the RTNDA brief, pp. 59-62.

After taking note of the uncertainties licensees face in determining their responsibilities under the rules, the Commission added, by way of footnote: "In appropriate cases, licensees can and should promptly consult the Commisssion for interpretation of our rules and policies." July 5, 1967, Memorandum Opinion and Order, ¶ 9, n. 6, A. 215a.

[57]Many Commission personal attack rulings are left unpublished, and these unpublished personal attack rulings are not generally available for public inspection. Rulings which are more than three years old are stored in the Archives at Suitland, Maryland, and must be specially ordered before they can be reviewed. Even those rulings less than three years old are not generally available. In the course of this proceeding, although counsel for CBS enjoyed the full cooperation of the Commission's staff in securing access to these rulings, it was necessary for an FCC employee laboriously to sort through the Commission's fairness files (personal attack files are not kept separately) in order to separate "confidential" Commission documents from public rulings.

the television audience to wait while he telephones someone in Washington. When the guest answers, the journalist cannot ask him to stop in mid-sentence until the legal effect of the answer is officially interpreted under the rules.

As the Seventh Circuit held, the Commission's announced willingness to interpret the rules—even if interpretation could be obtained before a broadcast—does not make the rules less objectionable. It makes them more so.[58] It casts the Commission in the role of a censor, possessed of discretion to determine in advance which statements, if made, will invoke the reply requirement. It enhances the likelihood of self-censorship and "play-it-safe" journalism. Whether or not the Commission would act arbitrarily in making these judgments,[59] this Court's decisions have long

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[58]"[A]llowing the Commission selectively to enforce the rules so as to prevent the expression of those views it believes to be contrary to the best interests of the American public would cast the Commission in the role of a censor, contrary to the express provisions of the Communications Act.

"An even greater threat of Commission censorship arises due to the lack of specificity in the rules. The Commission has invited a licensee to seek its advice whenever he is unsure of his obligations under the rules. In fact, the Commission itself has recognized the possibility that such situations will arise. But if the rules are so unclear that a licensee needs to obtain advisory interpretations from the Commission, it follows that the Commission, through interpretation of its own vague rules, has the power to effectively preclude the expression of views, whether by a licensee or a respondent, with which it does not agree." (Footnotes omitted.) A. 360a.

[59]In the past the Commission has not always applied the personal attack doctrine evenhandedly to all persons holding all shades of political opinion. For example, it has ruled that statements made by Governor George Wallace to the effect that Messrs. Braden and Dombrowski were Communists were not personal attacks within the Commission's personal attack doctrine. Letter to James A. Dombrowski, October 21, 1963 (FCC 8424); Letter to Carl Braden, January 21, 1964 (FCC 8424). See also the Commission's 1964 Fairness Primer: it "is not the Commission's intention to require licensees to make time available to Communists or the Communist view point." *Applicability of the Fairness Doctrine in the Handling*

condemned the delegation to administrative organs of vaguely defined discretion to control or burden the free exercise of First Amendment rights.[60]

Finally, the Government makes the remarkable suggestion that the Seventh Circuit erred in judging the rule "on its face."[61] It urges that "[t]he sensible course, and one consistent with the First Amendment, would be to allow the rule to operate for a time to see whether the fears and concerns of the broadcasters are justified." (Govt. Br. 78) Presumably, after this trial period, the Government would point with pride to the fact that broadcasters were still presenting news and public affairs programs and conclude from this that the rules are not inhibitory. But because it is not possible to demonstrate with precision what speech would have taken place had there been no inhibition, this Court has entertained challenges to statutes claimed to inhibit First Amendment

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of Controversial Issues of Public Importance, 29 Fed. Reg. 10416, 10417-18, 2 Pike & Fischer, R. R. 2d 1901, 1908. These rulings are apparently repudiated by the July 5, 1967, Memorandum Opinion and Order, ¶ 9,A.216a, but the Commission's views may change again.

[60]See *Shuttlesworth* v. *Birmingham,* 37 U. S. L. Week 4203 (Mar. 11, 1969); *Cox* v. *Louisiana,* 379 U. S. 536, 556-57 (1965). See also *Ashton* v. *Kentucky,* 384 U. S. 195, 199 (1966); *Gelling* v. *Texas,* 343 U. S. 960 (1952); *Kunz* v. *New York,* 340 U. S. 290 (1951); *Saia* v. *New York,* 334 U. S. 558 (1948); *Schneider* v. *State,* 308 U. S. 147, 164 (1939). *Cf. Freedman* v. *Maryland,* 380 U. S. 51 (1965); *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58 (1963).

As the Department of Justice has observed in its brief in an unrelated proceeding:

> "[A] continual process of demanding explanations as to why particular news items or programs were or were not shown would come dangerously close to the kind of program censorship which is barred by the First Amendment and Section 326 of the Communications Act. The Commission has not been given 'supervisory control of programs, business or policy' (*FCC* v. *Sanders Bros.,* 309 U. S. at 475)." Brief for appellant United States of America in No. 21147, D. C. Cir., *United States* v. *FCC* (*appeal dismissed,* Jan. 23, 1968.) p. 108.

rights not only as applied to particular circumstances but also "on their face." *Thornhill* v. *Alabama,* 310 U. S. 88 (1940); *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965). See also *Shuttlesworth* v. *Birmingham,* 37 U.S.L. Week 4203 (Mar. 11, 1969); *Aptheker* v. *Secretary of State,* 378 U. S. 500 (1964).

The Government argues that agency rules are somehow different because subject to reinterpretation in the light of changed circumstances. This possibility, of course, makes the rules no less inhibitory until the agency changes its mind or revises its rules. To await case by case enforcement and amendment of the personal attack rules would thus be to invite the very inhibition which makes the rules unconstitutional. *NAACP* v. *Button,* 371 U. S. 415 (1963); *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58 (1963). See *Zwickler* v. *Koota,* 389 U. S. 241, 252 (1967). *Cf. Freedman* v. *Maryland,* 380 U. S. 51, 56 (1965). Moreover, Congress has deliberately authorized judicial review of agency rules without awaiting their application to a particular case. 47 U. S. C. § 402(a); *Abbott Laboratories* v. *Gardner,* 387 U. S. 136 (1967); *United States* v. *Storer Broadcasting Co.,* 351 U. S. 192 (1956); *Columbia Broadcasting System, Inc.* v. *United States,* 316 U.S. 407 (1942).

II. BECAUSE THE GENERAL FAIRNESS DOCTRINE AND THE PERSONAL ATTACK RULES DIFFER CRITICALLY IN THEIR ORIGIN, OPERATION AND INHIBITORY EFFECT, THE VALIDITY OF THE FAIRNESS DOCTRINE NEED NOT BE DECIDED IN THIS CASE.

The Government devotes a major part of its brief (pp. 41-58) to defending its regulatory power to adopt the general fairness doctrine. But this case does not, as the Government claims, call into question either the Commission's regulatory power over the conduct of broadcast

licensees[62] or the exercise of that power represented by the Commission's general fairness doctrine.

Contrary to the Government's implication, the general fairness doctrine and the personal attack requirement did not have a common origin. The general fairness doctrine has been Commission policy for over 40 years. *Great Lakes Broadcasting Co.,* 3 F. R. C. Annual Rep. 32, 33 (1929), *reversed on other grounds,* 59 App. D. C. 197, 37 F. 2d 993, *certiorari dismissed,* 281 U. S. 706 (1930). Its most authoritative statement appeared in the Commission's 1949 *Report on Editorializing by Broadcast Licensees,* 13 F. C. C. 1246.[63] In 1959 Congress also adverted to a general fairness requirement in connection with the amendments to Section 315 of the Communications Act, 47 U. S. C. § 315, exempting news and news-related programs from the statutory requirement of equal time for political candidates. 73 Stat. 557. At that time, Congress provided that the exemptions were not to be construed as relieving broadcasters "from the obligation imposed upon them . . . to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."[64]

The personal attack requirement is of much more recent origin. It postdates the 1959 amendments quoted above. The Commission itself has recognized that it was "during the last 7 years when the personal attack principle was being developed. . . ." *Storer Broadcasting Co.,* 11 F. C. C.

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[62]We do not dispute, for example, that the Commission has a limited power to consider, at the time of license application or renewal, the overall programming record or plans of a station as one measure of service to the community. *Henry* v. *FCC,* 112 U. S. App. D. C. 257, 302 F. 2d 191, *certiorari denied,* 371 U. S. 821 (1962); *Johnston Broadcasting Co.* v. *FCC,* 85 U. S. App. D. C. 40, 175 F. 2d 351 (1949); *Bay State Beacon, Inc.* v. *FCC,* 84 U. S. App. D. C. 216, 171 F. 2d 826 (1948). Even here the Commission is forbidden "to choose among applicants upon the basis of their political, economic or social views. . . ." *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 226 (1943).

[63]Hereinafter cited as *Report on Editorializing.*

[64]See the discussion of Section 315 below, pp. 62-63.

2d 678, 680, *affirmed,* 12 F. C. C. 2d 601 (1968). The genesis of the present personal attack rules lies in three 1962 rulings of the Commission in individual cases decided some three years after the 1959 amendments.[65] In the particular circumstances of each case, the Commission ruled that particular individuals or groups *repeatedly* "attacked" in one-sided programming were entitled to be furnished information as to the nature of the attacks and time for reply. In 1963 the Commission indicated for the first time that licensees generally were subject to the automatic duty to afford reply time in the "personal attack" situation. Public Notice of July 25, 1963, 25 Pike & Fischer, R. R. 1899.

Nothing like the personal attack requirement was discussed or referred to in the legislative history of the 1959 amendments to Section 315. The Government suggests that "Congress was informed on several occasions of the Commission's policies in the personal attack area" (Govt. Br. 25, n. 13), but points to no instance where this was done before 1963.[66] As the RTNDA brief (pp. 64-76) shows in

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[65]*Clayton W. Mapoles,* 23 Pike & Fischer, R. R. 586 (1962); *Billings Broadcasting Co.,* 23 Pike & Fisher, R. R. 951 (1962); *Times-Mirror Broadcasting Co.,* 24 Pike & Fischer, R. R. 404 (1962). (In the earlier *Report on Editorializing* (p. 1252) the Commission did include language to the effect that personal involvment in a controversy might be a factor to be considered along with other factors in determining whether to honor specific requests for discussion time on matters of public interest. But this language plainly recognized that station licensees had discretion to determine the circumstances in which a reply to an attack would be appropriate.)

Remarkably, not one of these three rulings is cited, much less discussed, in the Government's statement of the history of the fairness and personal attack doctrines. (The Government does include a quotation from its Public Notice of July 25, 1963 which, in passing, cites these cases. (Govt. Br. 23))

These landmark rulings are given only scant attention elsewhere in the petitioners' brief. The *Times-Mirror* ruling is mentioned in connection with the discussion of the political editorial rules (Govt. Br. 33) and all other rulings are cited without description in a long footnote at pages 63-64 together with 15 other rulings as a "further indication of the Commission's experience with personal attack problems. . . ."

[66]When the Government did inform Congress of its views, it relied on the *Mapoles, Billings* and *Times-Mirror* decisions as expressing the Commission's personal attack policy. See Hearings before the Senate Subcommittee on Communications of the Committee on Com-

detail, the legislative history of the 1959 amendments contradicts the notion that Congress knowingly approved or authorized the Commission to adopt a personal attack doctrine.[67]

The differences between the general fairness doctrine and the personal attack rules are not merely historical. They also differ in operation and effect. The general fairness doctrine requires that over a period of time the licensee present both sides of any important public issue it chooses to cover in its programs. On the other hand, the rules elevate every "personal attack" into an assumed public issue to which response time must be devoted. The fairness doctrine emphasizes public issues while the personal attack rules emphasize the vindication of personal interests and reputations.[68] They atomize the original issue being covered into

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merce on S. 251, S. 252, S. 1696 and H. J. Res. 247, 88th Cong., 1st Sess., pp. 97-98 (1963); Hearings before the House Subcommittee on Communications and Power of the Interstate and Foreign Commerce Committee on Broadcast Editorializing Practices, 88th Cong., 1st Sess., pp. 88-89, 140-41, 156-66 (1963). Indeed, these decisions were incorporated into the House Hearings at the suggestion of Commissioner Ford. House Hearings, *supra,* pp. 156-66.

[67]There were no suggestions in the hearings, committee reports or debates that anything resembling the personal attack requirement was part of the Communications Act or of the Commission's fairness doctrine. In fact, the personal attack requirement is directly contrary to the spirit of the fairness requirements as conceived by Congress in enacting the 1959 amendments, which had their genesis with the Commission ruling in the *Lar Daly* case.

In the course of the debates on the "fairness" amendment to the bill, it was made clear that, as the fairness requirement was understood, it imposed only a general obligation on broadcasters to exercise their programming judgment in good faith, and was not a back door method of depriving broadcasters of discretion. 105 CONG. REC. 14457 (1959) (remarks of Senators Pastore, Proxmire and Hartke); 105 CONG. REC. 16231 (1959) (comments of Chairman Harris in response to Congressman Jones of Missouri); 105 CONG. REC. 16227 (1959) (comments of Congressman Celler).

Congress has several times since 1959 declined to adopt measures embodying the personal attack principle. H. R. 11851, 87th Cong., 2d Sess. (1962); H. R. 7612, 88th Cong., 1st Sess. (1963); H. R. 5415, 89th Cong., 1st Sess. (1965).

[68]Indeed, the rules do not even apply in two areas where full treatment of controversial issues is most important—discussion of political figures by their campaign opponents and discussion of the qualities of "foreign groups or foreign public figures." A. 226a.

many smaller issues, each of which sets off its own chain reaction requiring compliance with the rules.

Under the fairness doctrine, the licensee has considerable discretion in determining which issues are of public importance and the amount of the time which should be allocated to opposing views. Opposing views may be presented either through the station's own journalist or by some other spokesman chosen by the station. Opposing views need not be presented covering every minute detail of the views advanced on the other side; a general opposing view on the underlying public issue will suffice.[69] The licensee is left free to exercise the responsibility he was found to possess when he received his license or license renewal. Even if the Commission were later to determine after the fact that he failed to satisfy its standards of fairness in a particular case, it does not condemn and punish for that one transgression but judges the issue of subsequent license renewal on the overall manner in which he has discharged his stewardship.[70]

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[69]In *Honorable John F. Thompson,* 23 Pike & Fischer, R. R. 955 (1962) the Commission commented "[W]here the comments of a participant are subject to differing interpretations and emphases it cannot be expected that licensees will anticipate every possible interpretation and emphasis and provide counterbalancing program material." 23 Pike & Fischer, R. R. at 958. See also *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance,* 29 Fed. Reg. 10416 (1964) "[T]he licensee, in applying the fairness doctrine, is called upon to make reasonable judgments in good faith on the facts of each situation—as to whether a controversial issue of public importance is involved, as to what viewpoints have been or should be presented, as to the format and spokesmen to present the viewpoints, and all the other facets of such programming."

[70]See *Report on Editorializing,* p. 1255 ("The action of the station in carrying or refusing to carry any particular program is of relevance only as the station's action with respect to such programs fits into its overall pattern of broadcast service, and must be considered in the light of its other program activities.") Thus, not only is there no potential criminal penalty involved but, in any event, license renewal is not denied because of an isolated failure by the licensee to comply with the fairness doctrine. *Golden West Broadcasters,* 10 Pike & Fischer, R. R. 2d 523 (1967); *Capitol Broadcasting Co.,* 8 F.C.C. 2d 975 (1967); *Anti-Defamation League of B'nai B'rith,* 6 F.C.C.

The crucial difference between the general fairness doctrine and the new personal attack rules is that the former permits each station broad discretion to decide which of its broadcasts require balancing and to achieve balance in its own way.[71] The Commission does not attempt, and could not constitutionally attempt to substitute its judgment for the judgments of thousands of station licensees by deciding which broadcast statements require balance and how this is to be achieved. One of the doctrine's cardinal principles has been that no group or individual has a vested interest in being the spokesman to present a side of an issue.[72] Under the general fairness doctrine, the broadcaster is not told whom to put on, what format to use, how much time to allow or what degree of control over subject matter may be exercised by the licensee.

The discretion permitted under the general fairness doctrine but eliminated under the personal attack rules is of immense practical importance. Under the general fairness doctrine, when a critical comment concerning a person or group is broadcast on a CBS program discussing a controversial issue, CBS can decide whether in its judgment the comment has an important bearing on the underlying public issue and whether a reply would further public understanding of that issue. If so, it selects the appropriate spokesman, program format and time for the response.

Because it permits this discretion, the general fairness doctrine has not to date significantly deterred CBS from

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2d 385 (1967), *affirmed, Anti-Defamation League of B'nai B'rith* v. *FCC,* 403 F.2d 169 (D.C. Cir. 1968), *petition for certiorari docketed,* Jan. 29, 1969, No. 990, this Term, 37 U.S.L. Week 3285 (Feb. 4, 1969). See also Cahill, *"Fairness" and the FCC,* 21 FED. COMM. B. J. 17, 19-20 (1967). Of course, the Commission does issue declaratory rulings at times other than license renewal. *Letter to Oren Harris,* 3 Pike & Fischer, R. R. 2d 163 (1963).

[71]See *Cullman Broadcasting Co.,* 25 Pike & Fischer, R. R. 895, 896 (1963); *Report on Editorializing,* p. 1251.

[72]Cahill, *"Fairness" and the FCC, supra* at 23; *Lar Daly,* 19 Pike & Fischer, R.R. 1103 (1960), *affirmed, Daly* v. *United States,* 286 F.2d 146 (7th Cir.), *certiorari denied,* 368 U. S. 381 (1961); *Report on Editorializing,* p. 1251.

broadcasting discussions of important public issues or from permitting the inclusion in such broadcasts of statements falling within the Commission's definiton of a personal attack. The basic principles of general fairness sought to be enforced by the doctrine comport with CBS' own standards of journalistic responsibility and have not significantly inhibited its journalistic freedom.

Compliance with the particularized personal attack rules, on the other hand, would require CBS to make basic changes in the present content of its news-related programs. As we show in Part I of this brief, CBS journalists would be impelled either to delete the many "personal attacks" that are now contained in such programs, or to abandon the broadcasts altogether because such deletions would impair the programs' integrity.

For these reasons, as the Seventh Circuit specifically ruled, the general fairness doctrine presents significantly different constitutional considerations from the personal attack rules.[73] That court's decision invalidating the per-

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[73]The court stated (A. 357a-359a):

> ". . . there are two crucial differences between the specific rules we are reviewing and that doctrine. A major premise underlying the Fairness Doctrine is the Commission's trust in the good faith and sensible judgment of a broadcast licensee in dealing with personal attacks and political editorials in a fair and reasonable manner. Under the rules here in question, however, much of the licensees' discretion is replaced by mandatory requirements applicable to each broadcast. The other difference between the rules and the Fairness Doctrine is that the only sanction for noncompliance with the Fairness Doctrine is the possibility that a license will not be renewed if the Commission determines that granting a renewal will not serve the 'public interest, convenience, and necessity.' This determination and the accompanying sanction would be based on the licensee's overall performance during the preceding three years. Under the rules here in issue, however, the question whether a licensee would be subjected to the Commission's broad range of enforcement powers could be determined on the basis of a single broad-

sonal attack rules implies nothing as to the fate of the general fairness doctrine. Indeed, the very existence of the general fairness doctrine, assuming *arguendo* its constitutionality, helps to demonstrate the unconstitutionality of the personal attack rules. According to the Government, the doctrine and the rules serve the same basic purpose—assurance that whenever any views on controversial public issues are broadcast, the public will hear both sides. (Govt. Br. 8-9) As the Supreme Court said long ago "the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Cantwell* v. *Connecticut,* 310 U. S. 296, 304 (1940). Even though a measure burdening the freedom of expression serves a valid end, it must be tested by "close analysis and critical judgment" (*Speiser* v. *Randall,* 357 U. S. 513, 520

> cast by the licensee. As a consequence, whatever discretion is still reposed in a licensee under the new rules with respect to his handling of personal attacks and political editorials must be exercised in the face of the omnipresent threat of suffering severe and immediate penalties." (Footnotes omitted.)

At this point the court noted:

> "In its first memorandum opinion, the Commission said, 'the *only* new requirement in these rules are the time limits'. (Emphasis added.) A crucial difference between the rules and the Fairness Doctrine, however, is the fact that the licensee's obligations are incorporated in specific rules with which he must comply in every instance under the threat of severe sanctions." (A. 359a, n. 30)

Elsewhere it stated:

> "First, we draw a distinction between the personal attack rules, whether incorporated in an *ad hoc* ruling such as occurred in *Red Lion* or in formal rules such as have now been promulgated by the Commission, and the Fairness Doctrine as referred to in section 315. With that distinction in mind, we are not prepared to hold that the Fairness Doctrine is unconstitutional. Moreover, we do not believe that it is necessary to decide that question in this review." (Footnotes omitted.) (A. 365a)

(1958)) and "viewed in the light of less drastic means for achieving the same basic purpose."[74]

If there be an overriding public interest in requiring that every broadcast licensee balance its discussions of controversial public issues, the general fairness doctrine accomplishes that purpose with far less inhibitory effect than the personal attack rules. The personal attack rules being significantly more burdensome than necessary to achieve the desired end, they are therefore unconstitutional.

Similarly, this case is not affected by the constitutionality or unconstitutionality of Section 315 of the Communications Act. That provision, requiring equal time for political candidates, deals with the unique problems presented by the use of broadcast facilities for political campaigns. Arguably Congress may have power to place reasonable restrictions upon the direct involvement of federally licensed broadcast stations in political campaigns, including a requirement that opposing candidates be treated in an even-handed manner. *Cf. United Public Workers* v. *Mitchell,* 330 U. S. 75 (1947). Moreover, the candidates' rights to reply to one another are carefully limited by Section 315, and do not extend either to statements by non-candidates or, in general, to statements on documentary programs—two areas in which the personal attack doctrine applies.

For these reasons, the Seventh Circuit's decision deals with different issues than those involved in the constitutionality of Section 315. In deciding the constitutionality of the personal attack rules, this Court need not—and on the present record should not—consider the validity of

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[74] *Shelton* v. *Tucker,* 364 U. S. 479, 488 (1960). See also, *e.g., United States* v. *Robel,* 389 U. S. 258, 265-68 (1967); *Keyishian* v. *Board of Regents,* 385 U. S. 589, 602-04 (1967); *Sherbert* v. *Verner,* 374 U. S. 398, 406-09 (1963); *NAACP* v. *Button,* 371 U. S. 415, 470 (1963).

either Section 315 or the Commission's general fairness doctrine.

III. THE COMMISSION'S RULES ON EDITORIALIZING IN POLITICAL CONTESTS ARE VIOLATIVE OF THE FIRST AMENDMENT AND THE COMMUNICATIONS ACT.

The rules requiring reply time for political candidates who have been opposed in a station editorial, and for opponents of a candidate who have been endorsed in a station editorial, are subject to the same basic infirmities as the personal attack rules. In the same way as the personal attack rules, the election editorial rules deter free expression of licensee opinion, with the force of the deterrent increasing in proportion to the number of candidates in a particular election.[75] And just as do the personal attack rules, the election editorial rules interfere with the journalistic freedom of a broadcast licensee in a way that goes far beyond the fairness doctrine or any restraint on speech which might reasonably be thought to be in the public interest.

The Government makes no separate argument as to the statutory authorization for the political editorial rules; in fact it would be difficult for it to do so. Congress has manifested an intention that automatic reply requirements, such as those in Section 315, not be applied in the editorial area.

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[75]If the rules were limited to major candidates, CBS would have less difficulty with the rules. CBS stations as a matter of policy regularly permit major candidates full opportunity to answer CBS station editorials unfavorable to their candidacy. This does not mean that CBS stations mechanically limit reply time to candidates of the two major parties. In multi-candidate races CBS stations may make judgments that certain legally qualified candidates of minor parties are serious contenders, and warrant equal treatment. The CBS radio and television networks, as distinguished from the CBS owned stations, have not as a matter of practice presented editorials in political races.

Since 1927, when the Radio Act, 44 Stat. 1162, was adopted, Congress has seen fit to provide its own explicit rules for political campaign broadcasts. Over the years Congress has repeatedly rejected bills designed to broaden the very limited "equal time" rights which Section 315 gives to candidates when an opposing candidate has been afforded personal exposure on a broadcast station.[76]

The only modifications ever adopted to the Section 315 equal time rights were the 1959 amendments, which liberalized the section to except certain kinds of programs from the equal time requirements, and the 1960 joint resolution, which exempted the 1960 presidential and vice presidential races from the equal time requirement.[77] In 1934, and again in 1959, Congress specifically rejected a proposal which would have extended Section 315 to cover appearances by spokesmen for candidates in addition to covering appearances by candidates themselves.[78] Since Congress believed it inappropriate to extend the equal time requirement to spokesmen for candidates, there is no reason to suppose it would favor such a requirement where the broad-

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[76]See RTNDA brief, pp. 70-71.

[77]74 Stat. 554 (1960). It is of interest that in the recent Public Broadcasting Act, Congress once again reserved to itself regulation of election broadcasts. 81 Stat. 365 (1967). Because of concern about the independence of subsidized noncommercial stations, Congress forbade (Section 399) such stations to take editorial positions in election contests. Ordinary commercial broadcasters are not affected by this limitation, and the Commission was given no new powers over programming. Whether constitutional or not, this provision is one more illustration of the steadfast refusal by Congress to confer discretionary power on the Commission in this area.

[78]The 1934 proposal was carried over from H. R. 7716, 72nd Cong., 1st Sess. (1931), which passed both Houses of Congress but was pocket vetoed. In the 73rd Congress this proposal was introduced in the House, though not adopted. H. R. 1735, 73rd Cong., 1st Sess. (1933). The proposal actually passed the Senate but was eliminated in conference. *Compare* S. REP. No. 781, 72nd Cong., 2nd Sess. (1934), p. 8 *with* H. R. REP. No. 1918, 73rd Cong., 2nd Sess. (1934), p. 49. The 1959 proposal was introduced on the floor of the House and defeated there. See 105 CONG. REC. 16245-46 (1959).

caster is the spokesman, that is, where the broadcaster editorializes in favor of a candidate.[79]

Thus, Congress has deliberately decided to leave the broadcaster a broad sphere in which he is free to use his own judgment (subject to Congress' conception of the general requirement of fairness) in determining how to provide his public with balanced coverage of political campaigns. The fundamental thrust of this policy is to avoid the inhibitory effects of a mechanical "equal time" rule on broadcast coverage of political figures and public issues. It is inconceivable that Congress could have meant the Commission to have power to broaden the carefully limited "equal time" rights and impose a mechanical "right of reply" to political editorials, with equally inhibitory effects. It is particularly ironic that the Commission seeks to draw sustenance for its claimed power from the 1959 amendments to Section 315 which were designed to *narrow* the application of the equal opportunities requirements of the section to reduce the inhibitory effect of the section on broadcast expression.

The editorial rules also make it likely in many situations that the objective of fairness actually will be frustrated. A few illustrations make this clear.

Suppose in a multi-candidate race a station broadcasts an editorial stating that all candidates are well qualified but indicates a slight preference for candidate A. All opposing candidates (but not candidate A) are given rights of reply

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[79]To be sure, in the debates on the 1959 amendments, Congressman Harris expressed his personal opinion that compliance with the fairness requirement should compel a right of reply to political endorsements. 105 CONG. REC. 16231, 17781 (1959). He did not focus on the problem of minor candidates. And even if his statements could be read as supporting a right of reply for minor candidates, there is no basis for a suggestion that Congress, in enacting the 1959 amendments, intended to impose such a right of reply or to allow the Commission to do so. It was not until 1962 in the *Times-Mirror* case that the Commission gave the first hint of a political editorial requirement, and even then it was viewed as part of the emerging "personal attack" requirement.

by the rules through spokesmen who will certainly state overwhelming preferences for their respective principals. Thus candidate A may end up worse off because of the station's endorsement than without it. The station has in effect been treated as his spokesman although not designated by him as such.

Again, suppose a station opposes candidate B but expresses no views as to his opponents. Only candidate B is given a right of reply by the rule. If the opposition of that station to candidate B is pallid and the reply vigorous and effective, the double publicity exposure may be most helpful to candidate B and harmful to his opponents.

And again, suppose a station provides a balanced view in a two-candidate contest by broadcasting a station editorial for candidate A and also by broadcasting the remarks of an outside independent commentator who speaks in favor of candidate B. Complete fairness and complete compliance with the Commission's fairness doctrine may have been achieved and no violation of the equal opportunities rights under Section 315 would have occurred because neither candidate appeared personally. Yet, under the Commission's ill-considered rules, the station must now offer reply time to candidate B's spokesman, thus unbalancing the presentation.[80]

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[80]While CBS, on its own initiative, has followed a policy of refraining from election-eve or "last minute" editorials, and is therefore not now aggrieved by the 72-hour section of the political editorial rules, the constitutionality of this section seems difficult to reconcile with *Mills* v. *Alabama,* 384 U. S. 214 (1966). Apart from this basic infirmity, one can conceive of cases in which a statement (*e.g.,* a candidate making a racist remark) or disclosure (*e.g.*, documentary evidence of corruption) made on the eve of election might be so important as to justify the broadcasting of an editorial urging the public to vote against a particular candidate, even one the station may previously have endorsed. Although the last pre-election newspaper deadline may already have passed, the rules would appear to deter broadcast stations—the only journalistic medium still able to advise the public—from expressing their editorial views.

CONCLUSION

The judgment of the United States Court of Appeals for the Seventh Circuit should be affirmed.

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APPENDIX A

SELECTED EXCERPTS FROM WOOD, ELECTRONIC JOURNALISM (1967)

"The major news story which breaks suddenly or undergoes a new turn, or an important story continually in the news, prompt the topical special. This may be a single program—to look into the meaning behind a Harlem riot or the reasons back of an unexpected legislative action on a tax bill. Or it may be a regular weekly program to provide a continuing examination of a story like the war in Vietnam.

"Regardless of the form of the program, it is distinct from other in-depth treatments because it is prepared in a limited time. A television news team which is experienced and doesn't have to worry too much about budgets can put together a news special in short order. This may cost it the perspective that more time would permit, but it does give the audience additional dimension to the story while it is still fresh. Here is the chronology of the development of one—or rather two—network news specials.

"The big news on Sunday, July 31, 1966, was the rejection by the machinists union of a White House-endorsed settlement of a 24-day strike against five major U. S. airlines. About noon the next day, CBS News officials decided to produce a special hour on the strike story for broadcast Tuesday night at 10:00. At the moment this decision was being made, a demented student named Charles Whitman went on a shooting rampage on the campus of the University of Texas, the outcome of which was death for fifteen people including Whitman himself. This was to mean—although the CBS men did not know it then—that the news department would be involved in the production of two fast-deadline news specials at the same time.

Appendix A

"For the special on the airline strike, producer Les Midgley assembled his fifteen-man news team very early Monday afternoon, outlined plans for the hour-long show, and dispatched them to their appointed tasks. In New York the job began of selecting, screening, and editing news film and videotape of the 25-day television news coverage of the strike story. The CBS Washington Bureau got the job of lining up interviews with relevant spokesmen: William J. Curtin, principal negotiator for the airlines; P. L. Siemiller, President of the union; union members who voted for rejection of the settlement; Senator Wayne Morse, who had headed President Johnson's committee which earlier had recommended a solution to the dispute; and Secretary of Labor W. Willard Wirtz.

"New York writers began marshaling the information and factual material necessary to fill out the picture story for the program. The writing of the show began on Monday, was not finished until late Tuesday, the broadcast day. The writing, needed to tie in the new interviews and statements, was assigned to the Washington staff. Walter Cronkite was cleared for anchor man duties; a total of four Washington correspondents participated in the filming and taping of interviews.

"Just after 7:30 p.m. on Monday—while the strike special was beginning to take form—came the decision to do a crash, half-hour special on the Texas massacre. Cronkite's Evening News had just aired the story nationally, and everything pointed to an in-depth version as added elements turned up. The time of 11:30—less than four hours away—was selected as airtime, and CBS stations across the country were immediately alerted, since that hour is one during which stations normally do local programming.

"Midgley, his regular staff tied up with the strike special, had to round up additional manpower—writers, film editors, a director, and studio crew—for the new assignment. He reached Walter Cronkite, whose work seems never done, and put him on the anchor job. Carl Bakal, author of a new book on a pertinent subject—*The Right to Bear Arms*—was located and persuaded to appear on the program. In the meantime, the CBS crew in Austin, who had covered the Whitman story for the *Evening News,* was put back to work.

"CBS correspondent David Schoumacher and his camera team were asked to find new material to supplement what New York had received from them earlier, and 10:30 was set as the time for them to feed it so it could be taped in New York for incorporation into the air show. Technical difficulties ensued, and it was 11:25 before the last of the Austin part of the story reached headquarters. With a rough spot here and there, the sniper special got on the air and concluded with a thoughtful and thought-provoking interview of author Bakal, by Cronkite.

"Producer Midgley had little time to relax; for him it was back to the airline strike program, now less than 24 hours away. By the middle of Tuesday, the broad outline of the show had been generally determined. However, it was to undergo changes until the last moment. Facts were collected, writing was progressing, and interviews were taped or scheduled. The Washington Bureau had a new angle—a statement from an official of an electrician's union that if the machinists' settlement should exceed the President's non-inflationary guidelines, then all bets were off for adherence by other unions. Washington reported that they could not promise to deliver Willard Wirtz; it would be

late if at all. Midgley decided to insert the Washington portion of the hour by means of a switch and a direct, live feed during the broadcast instead of trying to preassemble all the ingredients in New York.

"Evaluation of the content of spokemen's statements already recorded prompted the production team to allocate the most airtime to Curtin and to Siemiller. Others were edited down to shorter time segments. Senator Wayne Morse and the electrician's spokesmen were scheduled, and a hole saved for the Labor Secretary, which was finally filled; his statement was taped in the Washington studio at 5:30 p. m.

"Only now, a few hours before deadline, was it possible to turn out a final line-up sheet, detailing all show segments in their order and the time allotted to each. Editing and final writing went on almost to airtime. Cronkite himself wrote the two-minute summation for the close of the show. At ten o'clock CBS viewers saw a three-and-a-half-minute introduction depicting the impact on the country of 26 days of interrupted commercial airline service and 'The Airline Strike: What Price Settlement?'

"How was it possible to bring off two such programs on such short notice? Newsman Midgley says the basic reason is that everyone on the team knew what to do."