

CONSTITUTIONAL TEST OF FEDERAL COMMUNICATIONS COMMISSION'S FAIRNESS DOCTRINE. Red-Lion Broadcasting Co. v. F.C.C., 381 F. 2d 908 (D.C. Cir. 1967)

Red Lion is the first direct constitutional test of the Federal Communications Commission's fairness doctrine. When a personal attack is "aired", the doctrine requires the victim be given equal time to reply. Since its inception over forty years ago this nebulous doctrine has caused much dispute and confusion as to the obligations it imposes upon broadcasters. Red Lion seems to finally define these obligations; unfortunately, upon closer scrutiny, it creates more problems than it solves.

During the summer of 1964, Fred Cook wrote an article for The Nation in which he attacked the Reverend Billy Hargis and his Christian Crusade Organization. In November, 1964, Hargis retaliated by assailing Cook's character on a paid broadcast over petitioner's radio station, WGCB.<sup>1</sup> Subsequently, Cook requested petitioner grant him equal time to reply, without charge.

---

1. "Now who is Cook? Cook was fired from the New York World Telegram after he made a false charge publicly on television against an unnamed official of the New York City government. New York publishers and Newsweek magazine for December 7, 1959, showed that Fred Cook and his pal Eugene Gleason had made up the whole story and this confession was made to the District Attorney, Frank Hogan. After losing his job, Cook went to work for the leftwing publication The Nation\*\*\* Now among other things Fred Cook wrote, for The Nation was an article absolving Alger Hiss of any wrong doing \*\*\* there was a two hundred and eight page attack on the F.B.I. and J. Edgar Hoover; another attack by Mr. Cook was on the C.I.A. \*\*\* now this is the man who wrote the book to smear and destroy Barry Goldwater, called, Barry Goldwater --- Extremist of the Right." 381 F. 2d 908, 910.

Petitioner stated it would provide free air time only after receipt of a statement by Cook that he was financially unable to pay for such broadcast. On Complaint, the Federal Communications Commission held that the fairness doctrine requires that a broadcast licensee, which allowed its station to be used for a personal attack upon the character or integrity of another, must provide equal air time for the victim of the attack; and that, though the licensee may inquire about payment for such time, it cannot require payment or even a showing of financial inability on the part of the one attacked. Petitioner appealed. The United States Court of Appeals held that the declaratory rulings of the Commission were not orders from which an appeal may be taken. The United States and the Commission then petitioned for a re-hearing on the merits, which was granted.

Affirming the decision of the FCC, the Court upheld the constitutionally of the fairness doctrine. It concluded that the doctrine was not unduly vague, indefinite, or uncertain; therefore, it did not violate the Fifth Amendment's guarantee of due process. The Court also held that the fairness doctrine protects the right of free speech by affording the victim an opportunity to respond. Finally, it held valid the requirement that a broadcast licensee cannot insist upon financial payment, nor a showing of financial inability to pay by a party responding to a personal attack.

Basically, the fairness doctrine imposes an affirmative duty upon broadcast licensees to offer their facilities for a reasonable opportunity to respond where only one side of a controversial issue of public importance has been

broadcast. To appreciate the public policy underlying this doctrine, its historical foundation must be considered.

The Radio Act of 1927, the first significant step in federal regulation of radio, expressed a Congressional intent that the broadcast license was to be used in the interest of the general public.<sup>2</sup> It is the licensee's responsibility to serve the public's interest, convenience and needs.<sup>3</sup> Early decisions by the Federal Radio Commission extended this responsibility to include all discussions of important public issues.<sup>4</sup> The Communications Act of 1934, which regulates interstate radio communications,<sup>5</sup> left the Radio Act of 1927 substantially unaltered.<sup>6</sup> The legislative history of both these acts clearly demonstrate the intent of Congress that licensees, as trustees for the public interest, owe a duty to expose to the public all aspects of important current issues.<sup>7</sup>

Until 1959, the fairness doctrine was directed primarily at granting equal time to political candidates during political campaigns. However, in 1959,

---

2. KFKB Broadcasting Assoc. v. F.R.C., 47 F. 2d 670 (D.C. Cir. 1931).

3. Radio Act of 1927, Ch. 169 §§ 4, 18, 44 Stat. 1162 (1927). Repealed, Ch. 652 § 602, 48 Stat. 1102 (1934). See also, F.R.C. v. Nelson Bros. 289 U.S. 266, 53 S. Ct. 627 (1932); Chicago Federation of Labor v. F.R.C., 3 F.R.C. Ann. Rep. 36 (1929), aff'd, 41 F. 2d 422 (1930).

4. Great Lakes Broadcasting Co. v. F.R.C., 3 F.R.C. Ann. Rep. 32 (1929).

5. N.B.C. v. U.S., 319 U.S. 190, 63 S. Ct. 997 (1943).

6. F.C.C. v. Pottsville Broadcasting, 309 U.S. 134, 60 S. Ct. 437 (1940).

7. 1949 Report, 13 F.C.C. 1246 (1949). See also, Fairness Primer, 29 Fed. Reg. 10415 (1964).

Congress amended Section 315 of the Communications Act of 1934, stating that radio licensees have "the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."<sup>8</sup> (Emphasis added). This amendment includes what the Commission referred to as the "personal attack" principle. This principle provides that a licensee is required to afford an opportunity of reply to any person, who, as a result of a licensee's broadcast, is subjected to a personal attack upon his honesty, character, integrity or the like personal quality in connection with a controversial issue of public importance.<sup>9</sup>

In its 1949 Report, the Commission expressed the rationale of the fairness doctrine in the following terms: In the presentation of news and comment, the public interest requires that the licensee of a radio station "operate on a basis of overall fairness, making his facilities available for the expression of the contrasting views of all responsible elements in the community on the various issues which might arise."<sup>10</sup> The Report pointed out that the constitutional guarantee of freedom of speech does not extend to governmental licensees in that such licensees do not have the right to exclude from the public, expressions of opinions and ideas with which the licensee disagrees. Red Lion echoed this reasoning by pointing out that government regulation, through the fairness doctrine, assures the public of varying opinions on subjects of public interest and

---

8. Communications Act, Ch. 652 § 315, 73 Stat. 557, 47 U.S.C. § 315 (1962), amending 48 Stat. 1088 (1934).

9. Fairness Primer, supra, note 7.

10. 1949 Report, supra, note 7.

therefore preserves the right of freedom of expression.

Red Lion finally establishes the constitutionality of the fairness doctrine and attempts to formulate a guideline for other courts and more importantly, for broadcast licensees and the public. The guideline is more explicitly set forth in the Commission's recent regulations concerning the fairness doctrine.<sup>11</sup> It provides, within one week after an attack upon a named person or group, the licensee, upon whose station the attack took place, must transmit to that person or group; (1) notification of the date, time and identification of the broadcast, (2) a script of the attack, and (3) an offer of a reasonable opportunity to respond over the licensee's facilities. The victim of a personal attack in the discussion of a controversial issue of public importance must also be allowed time to reply without regard to his ability to pay. While the case sub judice seems to have settled one important issue concerning the validity and applicability of the fairness doctrine, it gives rise to other problems. For instance, it puts the burden on both the individual radio stations and the F.C.C. to administer its guidelines. The guidelines are not detailed; i.e., the radio station will be forced to determine the meaning of such concepts as "personal attack", "reasonable opportunity to respond", and "controversial issues of public importance". Yet, Red Lion held that the fairness doctrine is not unconstitutionally vague!

There is no doubt that the purpose of Hargis' attack was to assail the character of Cook, but was it out of malice or an effort to discredit Cook's

---

11. 36 U.S.L. Week 2047 (U.S. July 18, 1967).

ideas only? Thus, hypothetically, would any broadcast of a criticism of a mayor and the manner in which he administers a city necessarily constitute a "personal attack" or an issue of "public importance" and thus be subject to reply? The purpose of the broadcast might be merely a plea for a more efficient administration. Further, is an attack on someone's public life a personal attack? Do such distinctions determine what should or should not warrant time for reply? Is a radio station capable of, and must it be forced to assume the responsibility of making these determinations? Moreover, it is questionable that the function of the F.C.C. includes the arbitration or determinations of such distinctions.

The basic assumption underlying Red Lion is that the fairness doctrine preserves the right of freedom of expression. This seems somewhat dubious. The duty now imposed on broadcasters may tend to stifle free speech rather than foster it. Red Lion states that through enforcement of the fairness doctrine the public is assured of receiving varying opinions on subjects of public interest. Yet the broadcaster may simply choose to pre-censor its programs to exclude all controversial opinion which might force it to give, without cost, time for reply. Instead of a presentation of varying opinions, no opinions at all will be broadcast. Such a result would fly in the face of *New York Times Co. v. Sullivan*<sup>12</sup> and related cases whose purpose was to insure an open arena in which issues of public interest may be freely aired.

---

12. 376 U.S. 254, 84 S. Ct. 710 (1964).

It is questionable whether the enforcement of the fairness doctrine in cases similar to the one in question is actually that important. The Radio Act imposes upon the licensee the duty of exposing to the public all aspects of important issues, and the purpose of the fairness doctrine is to afford reasonable opportunity for the discussion of conflicting views on the issues, and yet, almost all issues of public importance are not personal attacks. It is really necessary that the public be advised that Cook's character might not be as black as Hargis believes? When balanced against predictable negative results, the ruling may have less social significance than it seems at first.