

However, I doubt whether resort to the arcane subtleties of libel law would really advance the cause. And I doubt in any event that the Commission itself will look in this direction for guidance. It has, for example, recently ruled that the right to reply to personal attack exists whether or not the personal attack is true.²⁹ If truth is not a defense, presumably none of the other defenses or privileges of the law of defamation apply here.

I think it would not be fruitful at this point to attempt to explore further the reach of the fairness doctrine. I think that we have not yet begun to see its fullest potential. I would, however, like to turn to some of the legal problems which are raised—most especially the free speech issues which are now being thrashed out in the courts.

Without intending to preempt the discussion of our next panelists who will tell us more about the impact of the fairness doctrine, I would just note preliminarily that it seems difficult to deny that the fairness doctrine does constitute a restraint on broadcaster free speech—a restraint sufficient to raise serious constitutional problems, and one which is no less real by virtue of the fact that it does not directly seek to inhibit free speech but merely place burdens or restrictions upon its exercise.

The restraining effect of the fairness doctrine is compounded for the broadcaster by its vague and indefinite standards. The vagueness and uncertainty is inherent, first in the definition of what constitutes a controversial public issue and second as to what “fairness” requires the licensee to do in the particular circumstances.

Uncertainty as to the elements of the doctrine and what it requires must inevitably cause a greater restraint on broadcaster discretion than would otherwise be the case. It is just such vague and indefinite restraints on conduct, and particularly speech, which the Supreme Court has condemned as unconstitutional,³⁰ particularly where, as here, the vagueness of the restraint is compounded by unrestricted administrative discretion.³¹

Mr. VAN DEERLIN. In the interest of maintaining a perfect attendance record for the committee members on the House floor, we will have to recess for about 15 minutes.

(Brief recess.)

Mr. VAN DEERLIN. The subcommittee will be in order, please.

Mr. Robinson, do you wish to proceed?

Mr. ROBINSON. Mr. Chairman, I wonder if I might clarify a statement on the basis of some information I have just received.

I mentioned in passing that the *Radio-Television News Directors Association* case was pending in the seventh circuit and the Supreme Court had held the *Red Lion* case in abeyance.

I have a motion which was filed by the FCC in the seventh circuit case, to hold the case in abeyance. In effect, the FCC is asking the seventh circuit not to rule pending further rulemaking proceedings, either to clarify or augment or revise their personal attack regulations.

I would like at this time, if I may, to ask that it be inserted in the record for such clarification as it adds.

²⁹ *Ibid.*

³⁰ E.g., *Herndon v. Lowry*, 301 U.S. 242 (1937).

³¹ E.g., *Hague v. C.I.O.*, 307 U.S. 496, 516 (1939).