

Mr. VAN DEERLIN. Would you rather do that at the end of your formal statement?

Mr. ROBINSON. Yes. I will save it until the end of my paper.

(The material referred to appears on p. 66.)

The constitutional implications of the fairness doctrine have come to the forefront in connection with recent court challenges to the "personal attack" rules. While the personal attack rules have called down far more criticism than the general fairness doctrine as applied to editorializing and expression on controversial issues, in some respects, at least, these rules are arguably more defensible than the general fairness doctrine itself.

A case might be made for the right to reply to a personal attack, at least where the attack is defamatory, on the ground stated by Professor Chafee that, in such cases, a legislative requirement imposing a duty to permit a reply to such statements may be preferable to punishing or inhibiting defamation through libel suits.³²

It must be conceded, however, that things have changed since Chafee wrote. In fact the very kinship between the personal attack rules and the law of libel may be its ultimate undoing considering what appears to be the clear trend of constitutional law as set forth in the *New York Times*,³³ *Butts*,³⁴ and *Hill*³⁵ cases. This vulnerability of the personal attack rules to constitutional challenge is made more critical by the fact that, whereas in libel suits truth is a defense, the Commission has ruled that truth or falsity is irrelevant to the duty of a licensee under the personal attack rule. But this entire issue is one which the Supreme Court is being asked to decide in the *Red Lion* case and one can only speculate how it will rule.

I think it should be emphasized, however, that even if the constitutionality of the personal attack rules be sustained, on grounds similar to those advanced, or other grounds, this would not necessarily vindicate the fairness doctrine as it is applied generally to controversial issues.

If one might find that the right to reply to personal attacks is justified by analogy to the long tradition of remedying libel (which within the limits set by *New York Times* and its progeny, I take to be still a constitutionally permissible tradition), no such tradition affords a right to reply to the expression of opinion on a controversial issue: no such tradition compels one always to give all sides of the story.

In the end analysis it seems clear in fact that, outside the field of broadcasting, neither the courts nor the public would long stand for the kind of interference with free speech that inheres in the fairness doctrine. Attempts to tell newspapers, for example, that they have to treat all controversial issues "fairly"—as judged by a Government agency—and there would be a hue and cry which would fairly rock the foundations of Capitol Hill.

But, it will be asserted that whatever may be, the rules for newspapers, radio, and television are "unique" and such restraints, including but not limited to, the obligation to be "fair," are justified in these unique media. Precisely what is meant by "unique" has never been made very clear. There are various explanations which have had a place

³² 1. Chafee, *Government and Mass Communications Media*, 172, 184-90 (1947).

³³ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

³⁴ *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

³⁵ *Time, Inc. v. Hill*, 385 U.S. 374 (1967).