

While the Red Lion case was on its way to the Supreme Court the Radio Television News Directors Association appealed the validity of the "personal attack" rules to the Court of Appeals for the Seventh Circuit. RTNDA petitioned the Supreme Court to grant certiorari before judgment in the Court of Appeals in order to consolidate both cases in the Supreme Court and bring several aspects of the legal issue before the Supreme Court for decision at one time. The Commission opposed this motion. On January 29, 1968, the Supreme Court denied the RTNDA petition to bring up the Seventh Circuit case immediately, but ordered the argument of the Red Lion case postponed until the RTNDA case had been decided by the Seventh Circuit and was ripe for Supreme Court review.

Now the Commission decides that it will petition the Seventh Circuit Court of Appeals to return the "personal attack" rules to the Commission for further revision and clarification. While the Commission has not decided what revision in the rules it will make, the general nature of the proposed revisions have been proposed to the Commission by its counsel. Though it is possible to express only tentative views on tentative proposals, it seems to me that the proposed revisions will involve no improvement in the rules but merely another step away from clarity and precision. In any event, this endless tinkering with the language of the rules cannot affect the governing legal principles and can amount to no more than an attempt to buttress legal arguments on the Commission's behalf. The inferences which the courts, the parties and the public are entitled to draw from the Commission's wavering course are obvious and justified.

But there is a more important consideration for me. At long last the Commission is in court with competent opposing counsel testing the existence and extent of Commission authority to supervise and regulate speech by broadcast licensees and those using broadcasting facilities. The Commission is not true to its promise to litigate or to its avowed desire to secure authoritative decision of the issues when it opposes every attempt to bring these issues before the Supreme Court and then employs such tactics as the present ones, involving inevitable and indefinite delay and confusion of the issues.

The important issues here are not the cleverness, or unskillfulness, of Commission lawyers in drafting rules. Since these rules were issued, serious doubt has been cast on their constitutional validity by authoritative publications. See Harry Kalvan, Jr., *Broadcasting, Public Policy and the First Amendment*, 10 J. Law & Econ. 15 (1967); Glen O. Robinson, *The FCC and the First Amendment*, 52 Minn. Law Rev. 67 (1967); *Legislative History of the Fairness Doctrine*, Staff Study for House Committee on Interstate and Foreign Commerce, 90th Cong. 2nd sess. (Feb. 1968). Regardless of any changes the Commission may now make in its rules, it will be apparent to the courts that sustaining the constitutional power of the Commission to act in this area will be to concede the power and invite the probability of adoption of rules at least as onerous as the ones now in effect. The Commission may now change its rules in an effort to make a better showing in pending litigation, but it cannot expunge the record of having adopted the rules now under attack. Neither Commission counsel nor the entire Commission can give the courts any assurance that the Commission will not adopt rules just like its present rules, or more burdensome, as soon as litigation is concluded if the courts find that the Commission has the power to act at all in this area. For the Commission to rewrite its rules now is obviously merely a cosmetic effort to present a better face in court. It is not complimentary to the courts to suggest that they will be influenced by this.

Certainly the basic legal issues raised in this litigation deserve the most prompt consideration and determination that adequate judicial process will permit. The action of the Commission will simply postpone indefinitely the determination matter serves only its own interest as a litigant, has no public purpose, and falls considerably short of the diligence, promptness and candor which the Commission demands of its own licensees. Consequently I am forced to dissent.

Mr. HYDE. I was asked if I have any other comment on matters under discussion.

I would like to state that I believe the Commission's position on all the matters that have been discussed here, particularly in the document of Professor Robinson, are adequately and fully dealt with in the Commission's rulings in promulgating the Fairness Doctrine, in the Commission's rulemaking in promulgating the regulations appli-