

LEGISLATIVE HISTORY—FAIRNESS DOCTRINE

I. INTRODUCTION

A. SCOPE OF MEMORANDUM

The FCC's Fairness Doctrine has been the subject of steady and longstanding controversy. This controversy can be subdivided under three headings:

1. Conformity of the doctrine with the first amendment to the Constitution and section 326 of the Communications Act.
2. Desirability of the doctrine as a matter of communications policy.
3. Conformity of the doctrine to the legislative intent of the Congress.

The purpose of this memorandum is to review the legislative history relevant to the doctrine. Questions of policy and of the constitutional limitations on the power of the Congress to legislate in the area of broadcast program content (i.e., the first two subheadings set forth above) are beyond the scope of this memorandum except insofar as they may impinge on the question of congressional intent.

1967 was a year of great activity with respect to judicial and administrative action affecting the Fairness Doctrine. Despite its long history as an administrative policy, the doctrine did not receive its first judicial challenge until 1967, in the case of *Red Lion Broadcasting Co. v. F.C.C.*, 381 F.2d 908 (D.C. Cir. 1967) opinion dated June 13, 1967. The Fairness Doctrine was upheld by the Circuit Court and *certiorari* has been granted by the Supreme Court.

Two other actions by the FCC during 1967 precipitated legal challenges to the doctrine. One was the so-called "cigarette" decision in which the FCC held that the presentation of cigarette commercials constitutes an exposition of one side of a "controversial issue of public importance," and therefore gives rise to an affirmative obligation to present other points of view.¹ By this the Commission had reference to statements explaining that smoking, however enjoyable, may be hazardous to health. This ruling has been challenged as beyond the scope of the FCC's authority. These legal actions have been consolidated for consideration by the Circuit Court of Appeals for the District of Columbia.

Another series of legal challenges was occasioned by the FCC's promulgation of rules to cover personal attack situations and political endorsements.² These cases are being considered by the Court of Appeals for the Seventh Circuit.

The Supreme Court has decided to delay its consideration of the *Red Lion* case pending the outcome of the "personal attack" cases in the

¹ Station WCBS, 11 R.R. 2d 1901 (1967). The citation "R.R." used in this memorandum refers to Pike and Fisher, *Radio Regulation*.

² *Fairness Doctrine Rules*, 10 R.R. 2d 1901 (1967), hereafter referred to simply as FCC "personal attack" rules.