

The FCC's Fairness Doctrine

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Government intervention in the publication and dissemination of news is inconsistent with the notion of a free press. However, the government has a responsibility to ensure fairness in the dissemination of information on matters of community interest. These two obligations often conflict. Until recently, a U.S. government mechanism of media accountability known as the Fairness Doctrine existed. The doctrine attempted to mediate between broadcasters' First Amendment rights and those of the public by requiring broadcasters to provide balanced coverage of important public issues.

The Fairness Doctrine originated in congressional and Federal Communications Commission (FCC) legislation. The FCC's 1949 "Report on Editorializing by Broadcasters" outlined the doctrine and stressed the importance of the development, through broadcasting, of an informed public opinion in a democracy. It affirmed the "right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning these vital and often controversial issues." In 1959 Congress amended the Communications Act of 1934 to impose, in section 315(a), a statutory "obligation upon [broadcasters] to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

The Fairness Doctrine did not require broadcasters to give equal time to contrasting views. However, if "during the presentation of views on a controversial issue, an attack [was] made upon the honesty, character, integrity, or like personal qualities of an identified person or group," that person or group had to be given an opportunity to respond on the air. The broadcasting company had to bear all presentation costs.

The policy was traditionally confined to broadcast rather than print media, based on a principle of scarce resource allocation. There is a relative scarcity of broadcasting possibilities, because the number of people who want to broadcast exceeds the number of available broadcast licenses. The government allocates this limited resource through a licensing system, designed to protect the public interest through the enforcement of various regulations.

In 1969 the U.S. Supreme Court held the Fairness Doctrine to be constitutional and consistent with the First Amendment's intent in *Red Lion Broadcasting Co. v. Federal Communications Commission*. The Court ruled that the scarcity of available frequencies justifies the imposition of a government regulatory system intended to ensure that broadcasters, as fiduciaries, act in the public interest. The Court declared the public's First Amendment rights to hear differing viewpoints "paramount" to broadcasters' rights. Justice Byron White expressed the Court's opinion as follows:

Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish. ...A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.

The Court reaffirmed the scarcity of the radio airwaves and the responsibility of broadcasters as public trustees in subsequent cases. Similar reasoning served to justify the Fairness Doctrine's application to cable programming.

The Fairness Doctrine was neither strictly enforced nor widely applied. From January 1980 through August 1987, the FCC received over 50,000 complaints of alleged Fairness Doctrine violations. The FCC dismissed the vast majority of the charges. The Fairness Doctrine was primarily invoked to restrict virulent racism and other use of the airwaves to intimidate and attack persons and institutions. The FCC also used the doctrine in 1967 to require broadcasters to give significant time to antismoking messages. It was almost never used to enforce accountability for claims made in documentaries, no matter how hard-hitting or speculative. Although the National Association of Broadcasters (NAB) has reported several cases in which documentaries were accused of violating the Fairness Doctrine, the FCC upheld only one complaint, later overturned in federal court.

The doctrine was usually applied to ensure that the licensed station owners' political preferences would not control the presentation of candidates for public office. However, these regulations were also loosened over the years. For example, the FCC held that any station endorsing or criticizing a candidate on the air had to give the opposing or criticized candidate air time to respond. In 1983 FCC Chairman Mark Fowler revised the commission's

policy on televised political debates. He announced that broadcasters could schedule political debates with the candidates of their choice without being required to provide air time to excluded candidates. Broadcasters could cover debates as bona fide news events without having to make time available to those who did not participate.

THE CURRENT LEGAL SITUATION

The Fairness Doctrine has come under fire from both sides of the political spectrum. Conservatives oppose it as an expendable form of government intervention, while some liberals support it as a means of intimidating or even silencing journalists. In October 1981 the FCC recommended that the Fairness Doctrine be repealed. The commission issued a detailed study of the doctrine in 1985. It concluded that the doctrine was "an unnecessary and detrimental regulatory mechanism [that] disserves the public interest." The FCC did not at that point repeal the doctrine because it believed that Congress had already codified it. However a September 1986 ruling by the U.S. Court of Appeals held that the Fairness Doctrine was not a statutory requirement. According to the ruling, written by Judge Robert Bork and supported by then Appeals Court Judge Antonin Scalia, Congress had merely ratified the doctrine in amending section 315(a) of the 1934 Communications Act. The decision permitted the FCC to modify or to abolish the doctrine. The commission then did abolish the doctrine's chief measures in August 1987 claiming that they violated First Amendment rights and stifled controversial programming.

The court of appeals ruling spurred controversy in Congress, where some members have consistently voiced support for the doctrine. There have been several legislative proposals to codify the doctrine and make it an explicit requirement of the Communications Act. Rep. John Dingell (D-MI), chairman of the House Committee on Energy and Commerce introduced an amendment to the Communications Act that would "require expressly that licensees of broadcast stations present discussion of conflicting views on issues of public importance." President Reagan vetoed the measure, and Congress lacked the two-thirds majority needed to override the veto. In November 1987 Sen. Ernest Hollings (D-SC) chairman of the Senate Commerce Committee, deftly steered a bill through the committee that would have restored the Fairness Doctrine. Although Hollings argued vigorously for the bill, congressional deficit-reduction negotiations eliminated it. Still more recent bills introduced by Senator Hollings and Representative Dingell have either failed to clear their respective committees or died on chamber floors.

THE CURRENT DEBATE

On August 4, 1987, the FCC voted unanimously to eliminate the Fairness Doctrine. In a letter to Representative Dingell, then FCC Chairman Dennis

Patrick emphasized that although the FCC had abolished the doctrine's major clauses, several of the doctrine's regulations remained in force: the political editorial rule, the personal attack rule, the Zapple Doctrine, and the "application of the Fairness Doctrine to ballot issues."

As stated by the FCC, "The rules on political editorials and personal attacks do not forbid the broadcast of either. Instead, they require broadcasters who carry such editorials or attacks to offer the persons adversely affected by them a chance to state their side of the case in person or through a spokesman." The political editorial clause currently mandates that TV and radio stations offer political candidates whose opponents have been endorsed by the involved station "a reasonable opportunity to respond" on air to the endorsement. The FCC requires that the opposing candidate be furnished with an editorial transcript within 24 hours of a broadcast. If a station broadcasts a political editorial within three days of the election, the station must provide the transcript and a response-time offer prior to the editorial's airing.

Personal attacks also require response time. However, attacks "occurring during uses by legally qualified candidates" are not covered by the Fairness Doctrine. Attacks made on "foreign groups or foreign public figures" are also immune from the doctrine's "personal attack" claims.

Like the political editorial clause, the Zapple Doctrine also involves political campaigning. Should a TV or radio station run an advertisement during a formal campaign period in which political supporters endorse a candidate, an opponent's supporters have the right to a reasonable opportunity to respond. The Zapple Doctrine may only apply to legally qualified candidates during formal campaign periods. The restrictions "reflect the intent of Congress to confine special treatment of political discussion to distinct, identifiable periods."

The ballot-issue exception requires broadcasters to permit opposing sides equal air time to discuss and advertise for or against ballot propositions. However, "The [Federal Communications] Commission will not intervene in cases alleging false and misleading statements regarding controversial issues of public importance."

Although these clauses remain in force, an FCC employee declared that these exceptions "are not vigorously enforced" and have not seen frequent use in recent years. Overall, the FCC has moved away from even the spirit of the Fairness Doctrine, firm in the belief that the doctrine stifled rather than promoted discussion and debate on public issues.

Doctrine opponents have challenged the Supreme Court's *Red Lion* decision, claiming that it is based on the mistaken premise of airwaves

scarcity and need for improved communication of information, which are no longer valid. From this perspective, the Fairness Doctrine is now an unfair restraint on free market trade; technological advances since the *Red Lion* case have eliminated the former scarcity. The 1985 FCC report noted a dramatic increase to more than 10,000 radio and television broadcasting stations, a 400 percent growth since 1949. Commercial broadcasters opposed to the doctrine point out that in many cities listeners and viewers can pick up dozens of radio and television stations and have access to only one significant newspaper. The FCC also observed that the growth of cable television, satellite television, and new telecommunications services offer an almost unlimited number of broadcast options.

The 1985 FCC report noted that the "fairness doctrine in operation thwarts the laudatory purpose it is designed to promote. Instead of furthering the discussion of public issues, the fairness doctrine inhibits broadcasters from presenting controversial issues of public importance." Broadcasters sometimes hesitate to air controversial materials for fear that they will be forced to use expensive air time to present another side of the issue. For some broadcasters, the loss of advertising time alone prevents them from making room in their broadcast schedule for these materials. For example, there may be as many as 15 candidates running in a presidential primary, which makes the provision of equal time burdensome for many stations.

Doctrine supporters claim that the relative scarcity of usable airwaves persists. The "scarcity of frequencies should not be measured by the number of stations allowed to broadcast, but by the number of individuals or groups who wish to use the facilities, or would use them if they were more readily available." They point to the economic value of government licenses as a measure of the relative demand. Independent VHF licenses have sold for as much as \$700 million in New York. Also, the number of stations has not increased in isolation, but in proportion to the nation's population growth. The broadcast medium continues to be more inaccessible to the private citizen than the print medium because the government must allocate the use of airwaves. Finally, the increase in stations does not necessarily correspond to any local increase in availability of diverse views on issues.

The Fairness Doctrine has been the only significant mechanism of control. The House Committee on Energy and Commerce Report on the Fairness Doctrine points out that "numerous case histories demonstrate that the Fairness Doctrine promotes carriage of views that would otherwise not be available to the American public." Former FCC Chairman Charles Ferris testified before the Subcommittee on Telecommunications and Finance that "in 1979, during [his] watch, the Commission explicitly found that the Fairness Doctrine enhanced, not reduced, speech." The congressional committee questioned the authority of the 1985 FCC report because it relied solely on broadcasters' accounts of the doctrine's effects.

Opponents argue that the Fairness Doctrine violates constitutional principles by allowing the government to intervene and to define how freedom of expression is to be used and practiced. The doctrine, they say, provides a dangerous potential for government abuse. They point to the FCC's statement that federal law permits government agencies to file Fairness Doctrine complaints against the media. This ruling (in July 1985) resulted in a complaint filed by the CIA charging that ABC's "World News Tonight" had three times distorted the news in broadcasting allegations that the CIA had tried to arrange the assassination of Ronald Rewald, a Honolulu businessman who was under indictment for several crimes. These CIA complaints would reverse past precedents and require greater accountability of the media to the government.

Fairness Doctrine supporters face an uphill battle in the judiciary and Congress. A Media Action Project (a DC public interest law firm) employee said that when the Supreme Court declined in 1989 to review the 1986 DC Court of Appeals ruling, a legal review of the case became "extremely difficult." If the firm decides to re-file a Fairness Doctrine case, it will certainly "seek a more sympathetic court."

Legislative attempts to codify the Fairness Doctrine appear equally unlikely. Although Congressman Dingell and Senator Hollings have repeatedly introduced bills in Congress to resurrect the doctrine, they have all failed. A House legislative aide maintains that "hearings on [Representative Dingell's bill] aren't even likely to be held in this congressional session." Although chairs of powerful House and Senate committees, neither Dingell nor Hollings has yet managed to convince their colleagues to codify the Fairness Doctrine. Furthermore, the executive branch publicly supports the doctrine's abolition. If Congress did attempt to override a presidential veto of any doctrine measure, it probably could not muster the two-thirds support needed for legislative approval.

U.S. citizens continue to be wary of government intervention in the private sector. But the Fairness Doctrine has, until recently, been considered a justified exception. Although it is a measure that often intrudes upon broadcasters' freedoms, the doctrine was traditionally designed to protect the individual's moral and political right to the presentation of differing views on important issues.

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