

New Federal Initiatives Project

Fairness Doctrine

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History

The Fairness Doctrine did not arise with the re-birth of AM talk radio. The Federal Communications Commission (FCC) adopted the Fairness Doctrine as a formal rule in 1949 in its "Report on Editorializing by Broadcast Licensees." 13 F.C.C. 1246 (1949). In 1959, Congress amended the Communications Act of 1934 to formalize the Fairness Doctrine into law. Congress rewrote 315(a) to read: "A broadcast licensee shall afford reasonable opportunity for discussion of conflicting views on matters of public importance." In essence, the Fairness Doctrine had two components. First, it required that each broadcast licensee carry some coverage of controversial issues of public importance. Second, it required what was commonly known as a "reasonable balance" in the coverage of those issues in a station's overall programming.

The U.S. Supreme Court addressed the Fairness Doctrine in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). The Court noted that the FCC had imposed the Fairness Doctrine on broadcasters for many years, which required that broadcasters present public issues and that the broadcasters give "fair coverage" to each side of those issues. The Court rooted its reasoning in what some refer to as the "Scarcity Doctrine," stating that "[b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." The Court, however, cautioned that the Fairness Doctrine should be reconsidered if it ever began to restrain speech.

The Supreme Court distinguished between print and broadcast media in *Miami Herald v. Tornillo*, 418 U.S. 241 (1974). There, the Court held that a state-imposed right of reply to personal attack violated the First Amendment, and that a government-enforced right of access dampened the vigor and limited the variety of public debate.

The Supreme Court held in *FCC v. League of Women Voters of Calif.*, 468 U.S. 364 (1984) that Congress could not forbid non-profit stations which received grants from the Corporation for Public Broadcasting from editorializing. The Court struck down the Public Broadcasting Act of 1967's ban on editorializing as offensive to the First Amendment because it was not narrowly tailored. Interestingly, the Court noted that its "Scarcity Doctrine" from *Red Lion Broadcasting* had been critiqued.

In 1985 the FCC, under Chairman Mark S. Fowler, began repealing parts of the Fairness Doctrine, stating that it harmed the public interest and violated the First Amendment. (Report on the Fairness Doctrine, 102 F.C.C.2d 145 (1985)). In 1986 Judges Robert Bork and Antonin Scalia concluded that the Fairness Doctrine applied to teletext, but was not a binding statutory obligation and thus the FCC was not required to apply it. *Telecomms. Research and Action Ctr. v. FCC*, 801 F.2d 501 (D.C. Cir. 1986). In June of 1987, Congress responded by attempting to write the Fairness Doctrine into law, but President Reagan vetoed the legislation. The FCC abolished the Fairness Doctrine after the D.C. Circuit decided *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1987). The FCC stated that "the intrusion by government into the content of programming occasioned by the enforcement of the fairness doctrine restricts the journalistic freedom of broadcasters and actually inhibits the presentation of controversial issues of public concern to the detriment of the public and the degradation of the editorial prerogative of the broadcast journalist."

In 1991 Congress once again tried to write the Fairness Doctrine into law, but President George H.W. Bush vetoed the legislation.

Recent Developments

In February 2005, Congresswoman Louise Slaughter and 23 co-sponsors introduced the "Fairness and Accountability in Broadcasting Act" (H.R. 501), which did not become law. The Bill would have required, among other things, that a FCC license holder cover important issues "fairly." In the same session, Congressman Maurice Hinchey introduced legislation "to restore the Fairness Doctrine" in H.R. 3302, entitled the "Media Ownership Reform Act of 2005." H.R. 3302 also never became law.

In 2007, Senator Norm Coleman proposed an amendment to a defense appropriations bill that forbade the FCC from "using any funds to adopt a fairness rule." The amendment was blocked in part because the subject matter was purportedly within the Commerce Committee's jurisdiction. Senator Coleman and Senator John Thune, with 43 co-sponsors between them, proposed the Broadcaster Freedom Act of 2007 (S.1748 and S.1742). Congressman Mike Pence along with 208 co-sponsors matched the proposed legislation on the House side (H.R. 2905). Among other things, the proposed legislation stated that the FCC "shall not have the authority to prescribe any rule, regulation, policy, doctrine, standard, or other requirement that has the purpose or effect of reinstating or re-promulgating (in whole or in part) the requirement that broadcasters present opposing viewpoints on controversial issues of public importance, commonly referred to as the 'Fairness Doctrine', as repealed in General Fairness Doctrine Obligations of Broadcast Licensees, 50 Fed. Reg. 35418 (1985)." Neither measure made it to the floor of either house.

In 2007, Congressman Pence formally requested the FCC to state its position on the Fairness Doctrine. Chairman Kevin J. Martin responded, in essence stating that the FCC saw no compelling reason to reinstate the Fairness Doctrine in the current broadcast environment. Chairman Martin's letter stated that

1. The Fairness Doctrine "chilled speech" by providing broadcasters with a powerful incentive not to air controversial programming above a "minimal amount" in order to avoid burdensome litigation over whether it had complied with its obligation to provide contrasting viewpoints;
2. The FCC concluded that the Fairness Doctrine created a climate of timidity and fear, which deterred the coverage of controversial issue programming;
3. The FCC determined that the doctrine inherently provided incentives that are more favorable to the expression of orthodox and well-established opinion with respect to controversial issues compared to less-established viewpoints;
4. The FCC concluded government regulation was not necessary to ensure that the public had access to a wide range of opinion on the controversial issues of the day in light of the multiplicity of information sources available to the public, such as television stations, radio stations, daily newspapers, and cable television services.

As of this writing, there is a real possibility that the Congress will again attempt to formalize the Fairness Doctrine into law. The Broadcaster Freedom Act of 2009 (H.R.226), has been reintroduced, but it is thought to be unlikely that Congressional leaders will allow that bill to

proceed. While President Obama openly expressed his reluctance to support the Fairness Doctrine, powerful Senate Democrats such as Dick Durbin, John Kerry, Debbie Stabenow, Tom Harkin, Jeff Bingaman, Speaker of the House Nancy Pelosi, and former President Bill Clinton have all repeatedly expressed their support of the Fairness Doctrine. Yet, it is unknown how aggressively those leaders will pursue the Fairness Doctrine, given President Obama's expressed reluctance to support it. What does seem relatively certain is that any Fairness Doctrine legislation or administrative rule will be challenged in the courts.

Related Links:

“Broadcast ‘Fairness’ in the Twenty First Century” by Robert Corn-Revere

http://www.fed-soc.org/doclib/20090216_CornRevereEngage101.pdf

“Charting a New Constitutional Jurisprudence for a Digital Age” by Randolph J. May

http://www.fed-soc.org/doclib/20090107_MayEngage93.pdf

Communications Act of 1934, as amended

<http://www.fcc.gov/mb/policy/political/candrul.htm>

Senator Dick Durbin, S. Amendment 591 to S. 160 regarding "encouraging and promoting diversity in communication media ownership.

<http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SP00591>

Senator John Kerry on the Fairness Doctrine

http://www.broadcastingcable.com/article/109418-Kerry_Wants_Fairness_Doctrine_Reimposed.php

Senator Chuck Schumer supports reinstating the Fairness Doctrine

<http://thehill.com/leading-the-news/schumer-defends-fairness-doctrine-as-fair-and-balanced-2008-11-04.html>