Broadcast "Fairness" in the Twenty-First Century

*By Robert Corn-Revere**

The broadcast Fairness Doctrine, which formally existed from 1949 to 1987, required broadcast licensees to air "controversial issues of public importance" and to do so in a "balanced" way. The FCC eliminated most aspects of the policy in 1987 during the heyday of Reagan administration deregulation. At least in spirit, the Fairness Doctrine has remained an article of faith among those who believe that freedom of expression is far too precious a commodity to be left in the clutches of private hands. "Fairness" enthusiasts have tended the glowing embers of a philosophy of the First Amendment and broadcast regulation that once was at full flame in the 1969 Supreme Court decision *Red Lion Broadcasting Co. v. FCC*.[1] They have nurtured the fervent hope that, one day, a more regulatory-minded Congress and FCC would reaffirm the government's authority to oversee news and public affairs programming. Some believe that with the Obama administration their day has come.

During the presidential campaign, and particularly since the election, conservative talk radio and the blogosphere has been abuzz with rumors that the Democratic agenda would include reviving the Fairness Doctrine. These concerns were echoed by established pundits: George Will warned that an effort to restore the doctrine would be a product of "reactionary liberalism,"[2] while former FCC General Counsel Bruce Fein has written that "[t]he Democratic Party intends to brandish the Fairness Doctrine to marginalize the influence of conservative talk show hosts by making expression of their controversial views cost-prohibitive."[3] A *Wall Street Journal* editorial similarly predicted that the Fairness Doctrine was "likely to be re-imposed" under a Democratically-controlled Congress as part of an effort "to shut down talk radio and other voices of political opposition."[4]

Such warnings have triggered an intense debate that is not so much about the merits of the Fairness Doctrine as it is about whether the threat of the doctrine's return is real. Craig Aaron, communications director of the advocacy group Free Press has described concern over the Fairness Doctrine being revived as being "completely imaginary," comparing the danger to that presented by Bigfoot, killer bees, and fluoride in the drinking water.[5] Likewise, Steve Benen wrote in the *Washington Monthly's* "Political Animal" column that such concerns are "ridiculous," and "*no one is seriously trying to reinstate the Fairness Doctrine*."[6] A similar claim was articulated by Marin Cogan of *The New Republic*, who wrote that the Fairness Doctrine "has almost no support from media-reform advocates."[7]

It is true that evidence of efforts to restore the Fairness Doctrine as it existed before 1987 is quite thin. No bills have yet been introduced to bring back the policy, and most of the concerns appear to have been triggered by comments attributed to House Speaker Nancy Pelosi, Senator Jeff Bingaman, and others.[8] Also, much has been made of the fact that Senator Charles Schumer tweaked Fox News during an interview when he quipped, "I think we should all be fair and balanced, don't you?"[9] Despite such tidbits suggesting support for the doctrine, an aide to Barack Obama wrote to the trade magazine *Broadcasting & Cable* last summer to say that Obama does not support reviving the Fairness Doctrine.[10] This, however, was not enough to dissuade Representatives Mike Pence and Greg Walden, along with 148 co-sponsors, from introducing a bill to block the return of the Fairness Doctrine.[11] A corresponding bill in the Senate had 28 sponsors.[12]

The identical language of the two bills is simple and direct. It would prohibit the FCC from re-imposing any "requirement that has the purpose or effect of reinstating or repromulgating (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*."[13] The bills' introduction prompted a number of Democratic legislators to deny that there was any move afoot to reinstate the doctrine.[14]

But focusing on the specific set of rules and policies once known as the Fairness Doctrine misses the essential point. Framed in this narrow way, the current debate is a false one, and it would be a mistake to assume that the dispute represents a core difference of principle between liberals and conservatives. To begin with, the debate is not really about the Fairness Doctrine *per se*, since it was entirely ineffectual, and many (if not most) serious observers doubt that a re-codified rule that imposed the same or similar requirements would survive a judicial challenge. Moreover, there is no dispute about the fact that prominent advocates among both liberals and conservatives, Republicans and Democrats, are proposing various regulations that would perpetuate the philosophy underlying *Red Lion Broadcasting Co.*, as well as that set forth in *FCC v. Pacifica Foundation, Inc.*,[15] that radio and television content, and perhaps other media, must be subject to government control.

A Vast Bipartisan Conspiracy?

Given the recent vocal opposition to the Fairness Doctrine in the interest of preserving conservative talk radio, it is easy to forget that many prominent conservatives championed the doctrine before its demise. Phyllis Schlafly was a vocal proponent of the Fairness Doctrine because of what she described as "the outrageous and blatant anti-Reagan bias of the TV network newscasts," and she testified at the FCC in the 1980s in support of the policy "to serve as a small restraint on the monopoly power wielded by Big TV Media."[16] Senator Jesse Helms was another long-time advocate of the Fairness Doctrine, and conservative groups Accuracy in Media and the American Legal Foundation actively pursued fairness complaints at the FCC against network newscasts.[17] More recently, a Republican-

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controlled FCC under Kevin Martin has advocated far more extensive controls over broadcast and cable programming, including news and public affairs. These proposed regulations include requirements governing local programming, restrictions on the use of video news releases, and other new rules that would extend content controls beyond broadcasting. These initiatives have been embraced by liberal media activists, who have said they will seek to ensure that the FCC under the Democrats will adopt and enforce the proposals of the Martin Commission.

The common denominator of the liberal and conservative factions is the overriding belief that traditional First Amendment protections should not be applied to broadcasting or other electronic media. Professor Cass Sunstein, for example, has written in support of a host of regulations, including the Fairness Doctrine, not only for broadcasting but for newspapers as well.[18] In supporting such rules, he has acknowledged that, "it will be necessary to abandon or at least qualify the basic principles that have dominated judicial, academic, and popular thinking about speech in the last generation." His position is that press autonomy "may itself be an abridgement of the free speech right."[19] In this counterintuitive view, the First Amendment's command that "Congress shall make no law... abridging the freedom of speech, or of the press" should be read as a constitutional mandate for media regulation by the government.

Professor Angela Campbell, a frequent advocate of media regulation, similarly acknowledges that existing and proposed content controls on broadcasting are incompatible with traditional First Amendment principles. In a recent essay entitled "The Legacy of *Red Lion*," she writes that "[i]n both *Red Lion* and *Pacifica*, the Court upheld regulations that would have been found unconstitutional if applied to other media." She advocates a wide range of broadcast regulations based on a simple balancing of interests, and criticizes traditional First Amendment analysis because it "only balances the government interests served by the regulation against the free speech interests of the regulated party."[20] However, "program producers want to create and distribute programming, advertisers want to create and distribute advertisements, and many regular people want to express their views and share their ideas and creations." Traditional First Amendment analysis, she observes, "often fails to take into account all of the relevant interests."[21] Based on this balancing approach, Professor Campbell takes issue with a number of bedrock First Amendment principles, such as the command that "the Government may not 'reduc[e] the adult population... to... only what is fit for children.'"[22] She concludes that "we are not well-served by the mechanical application of the traditional [First Amendment] approach to broadcast media, *or to any media*." [23]

Professor Campbell put this sentiment in more concrete terms in an amicus brief filed in *FCC v. Fox Television Stations, Inc*. on behalf of a number of child advocacy organizations. The case involves the FCC's regulation of "fleeting expletives" as part of the FCC's broadcast indecency policy, and the amicus brief, filed "in support of neither party," urges the Court to preserve the government's authority to regulate broadcast content. "[W]hatever the outcome in this case, Campbell writes, it is of "great importance to *Amici*" that "the Court continues to recognize the constitutional legitimacy of the FCC's statutory public interest oversight of television broadcasters." The brief urges the Court not to use the *Fox* case as a vehicle to revisit the constitutional findings in *Red Lion*, which involved the Fairness Doctrine. [24]

Whether or not the agenda for the new administration includes any plans for restoring the Fairness Doctrine, there appears to be a clear interest among regulatory activists to perpetuate and expand the government's control over media content in ways that would have the same, or perhaps an even more significant impact on news and public affairs programming. Mark Cooper of the Consumer Federation of America has written that broadcasters "should continue to be subject to public interest obligations and oversight," and that "[a]t this moment, when we are implementing 'change we can believe in,' we must locate the debate over communications and media policy within the broader debate over failure of market fundamentalism."[25] He suggests that "[t]he most important thing we can do to reform the FCC is to force it to take seriously its obligation to protect and promote the public interest as defined in the Communications Act and restore the pragmatic, progressive principles of the New Deal." Among other things, Cooper advocates reinvigorating "the commitment to diversity and localism in the broadcast media."[26]

Other proponents of a more regulatory FCC similarly discount any intention of bringing back the Fairness Doctrine while at the same time advocating different means to achieve the same end. Thus, Professor Marvin Ammori, counsel to the advocacy group Free Press, describes the controversy about the Fairness Doctrine as "largely manufactured" by "right-wing radio hosts and bloggers" while at the same time argues that "Congress and the FCC should focus on more effective means of fostering local and national public information and diversity of viewpoints, primarily by fostering responsiveness to local tastes and diverse and antagonistic sources of information."[27]

What such regulations might entail was spelled out in a joint report of Free Press and the Center for American Progress entitled *The Structural Imbalance of Political Talk Radio*. It advocates imposing new national and local ownership caps on radio stations, reducing license terms from eight to three years, requiring licensees to use a standardized form "to provide information on how the station serves the public interest," and imposing a spectrum fee of between $100 and $250 million "[i]f commercial radio broadcasters are unwilling to abide by these regulatory standards."[28] In short, advocates of new regulations are shunning the Fairness Doctrine not because it is incompatible with the First Amendment, but because it does not go far enough. As Professor Ammori writes, lack of current support for the Fairness Doctrine is best explained by its ineffectiveness—it was "easy to avoid, difficult to enforce, and is at most a second-best solution."[29]

The Free Press/Center for American Progress report on talk radio similarly concludes that the Fairness Doctrine is an inadequate policy solution, but it maintains that "the Fairness Doctrine was never formally repealed."[30] It explains that "the public obligations inherent in the Fairness Doctrine are still in existence and operative," and its proposal for "structural" regulations are simply another way of implementing "fairness"

principles in order to address "the imbalance in talk radio programming." [31] A Heritage Foundation blog describes this strategy—denying that anyone wants to re-impose the Fairness Doctrine while simultaneously advocating even more intrusive regulations on broadcast speech—as a "Jedi mind trick." Paraphrasing Obi Wan in the first *Star Wars* movie, it is like saying "this is not the 'Fairness Doctrine' you're looking for." [32]

"Localism" is the New Fairness

Speaking of misdirection, those who express concern that an Obama-appointed FCC might adopt a "stealth" Fairness Doctrine in the guise of other rules ignore the recent past. The Bush Administration's FCC under Kevin Martin has already issued rulings that would extend government control over newscasts based on *Red Lion*, and it laid the groundwork for the supposedly "structural" controls advocated by Free Press. Not only would these initiatives impose unprecedented levels of FCC oversight with respect to news and public affairs programming, they would expand these regulations beyond broadcasting to include cable television and potentially other media. In that respect, part of the Bush legacy is a movement to perpetuate and extend the restrictive view of the First Amendment set forth in *Red Lion*.

This is evident in the list of accomplishments Chairman Martin issued to the press when he announced his resignation to make way for the new administration.[33] In a thirteen-page attachment listing the "principal achievements of the FCC under Chairman Kevin J. Martin," the press release states that under his tenure "the FCC made clear that it takes seriously the public interest obligations of broadcasters." Accomplishments highlighted in support of this claim include imposing merger conditions to enforce children's television rules, enforcing broadcast indecency rules, proposing that Congress adopt new regulations to restrict televised violence, and advocating a la carte requirements for the sale of video programming. Additionally, the release states that the Commission under Chairman Martin "completed a longstanding initiative to study localism in broadcasting and made proposals to ensure that local stations air programming responsive to the needs of their service communities." [34]

New Enhanced Disclosure Requirements and Proposed Localism Mandates

The FCC's "achievement" of a new rule mandating "enhanced disclosure" of broadcast programming, and a proposed regulation to enforce "localism" requirements would give the federal government far greater power over editorial autonomy that was ever imposed using the Fairness Doctrine. The FCC released the texts of two rulemaking orders in early 2008 with the purpose of codifying localism mandates.[35] The Report and Order on enhanced disclosure requires stations to file quarterly reports detailing their programming in granular detail. A standardized form requires stations to identify programming by specific program categories, provide explanations of its editorial choices, and to certify that the station has complied with a number of FCC programming rules.[36]

The degree of detail required is more substantial than that ever required of broadcasters—far more detailed than the information broadcasters were required to gather prior to the deregulation of the 1980s. The new form requires television stations to report, for both analog and digital programming streams, the average number of programming hours devoted each week in eleven specified categories, including national news, local news produced by the station, local news produced by some other entity (who must be identified), programming devoted to "local civic affairs," coverage of local elections, public service announcements, and paid public service announcements. To comply with this requirement, every day's programming must be timed, classified, and recorded so that the weekly averages to be reported can be computed.[37] For each programming category, licensees must describe how it determined that the programming met community needs.[38] This will require a minute-by-minute review of station operations, and daily updates to be able to provide the necessary reports when they are due.

In adopting the new reporting requirements the FCC disclaimed "altering in any way broadcasters' substantive public interest obligations."[39] Specifically, it stated that its decision "does not adopt quantitative programming requirements or guidelines" and it "does not require broadcasters to air any particular category of programming or mix of programming types."[40] But even without the adoption of any new public interest mandates, the entire point of the new reporting requirements is to subject the editorial decisions of licensees to greater oversight. More importantly, however, the enhanced disclosure requirements were adopted in anticipation of other new public interest requirements that will be enforced using the newly compiled information. Thus, while this order adopting the reporting form may not mandate "quantitative programming requirements or guidelines," it acknowledges that such mandates "are being considered and addressed in other proceedings."[41] The main vehicle for such mandates is the Commission's rulemaking on broadcast localism, which proposes both substantive programming requirements and procedural changes that will significantly increase government authority over broadcast content.

Thus, the same day the FCC issued the Report and Order on enhanced disclosure, it also released the text of its *Report on Broadcast Localism and Notice of Proposed Rulemaking* in which it proposed new programming requirements that dovetail with the new reporting forms.[42] The FCC proposed a number of measures that would subject editorial decisions to greater governmental scrutiny. Most notably, the Commission tentatively concluded that it "should reintroduce specific procedural guidelines for the processing of renewal applications for stations based on their localism programming performance."[43] Stations that fail to meet the minimum quantitative "guidelines" would be subjected to further scrutiny at license renewal time.

Not surprisingly, the reporting requirements embodied in the enhanced disclosure form were woven into the fabric of the Commission's proposals to enhance local programming. The FCC observed that the forms "will help licensees document the kind of responsive programming that they have broadcast in a manner that is both understandable to the

public and of use in the Commission's review of license renewal applications." The disclosure forms were among the measures the Commission adopted "to increase the public awareness of, and participation in our license renewal proceedings," and to provide "listeners and viewers a meaningful opportunity to provide their input through the filing of a complaint, comment, informal objection, or petition to deny a renewal application." [44]

Because of the possibility that "watchdog" organizations might not participate spontaneously, the Commission also proposed that "licensees should convene permanent advisory boards comprised of local officials and other community leaders, to periodically advise them of local needs and issues."[45] If this plan ultimately is adopted, such advisory boards would become "an integral component of the Commission's localism efforts."[46] In the rulemaking proceeding, the Commission asked how to identify the relevant community organizations that should participate, whether members should be selected or elected, and how frequently licensees should be required to meet with the advisory boards. The Commission also suggested that other community outreach efforts should be considered as possible mandates for broadcasters. In this regard, it asked whether these requirements should be imposed using rules or guidelines, and noted how the recently adopted standardized disclosure form "will require broadcasters to describe any public outreach efforts undertaken during the reporting period." [47]

Given the level of federal oversight that would be provided by localism guidelines coupled with enhanced disclosure requirements, it is small wonder that there is little interest in reviving the Fairness Doctrine. The localism regime would permit review of *all* news and public affairs programs—not just the few "unbalanced" reports that may happen to draw complaints. And, unlike the Fairness Doctrine, which resulted in protracted administrative proceedings to determine whether a given broadcast had been "fair," the localism requirements would be tied automatically into the license renewal process. Thus, rather than wait for a disaffected individual or organization to file a complaint, the proposed regulations would incorporate "permanent advisory boards" into a bureaucracy designed to ensure that broadcasters' editorial choices serve the "public interest," however that term may be defined by a particular administration.

FCC Inquiry and Enforcement Actions Regarding Video News Releases

The Commission under Kevin Martin also engaged in significant oversight of specific editorial decisions in news programming in recent decisions involving "video news releases." Like traditional press releases often used as the starting point for a story by print journalists, video news releases provide video footage that is picked up by television stations and incorporated, in whole or in part, into broadcast news stories. The extent to which print and television journalists rely on such releases to the exclusion of independent reporting no doubt presents an issue of journalistic ethics.[48] But it also has raised significant questions about the extent of FCC authority over news judgment.

The Commission exerted jurisdiction over the use of video news releases under its rules governing sponsorship identification. Those rules, adopted pursuant to Sections 317 and 507 of the Communications Act, generally require that broadcast stations and cable systems must disclose when payment has been received or promised for the airing of program material.[49] Although the disclosure rules generally apply only to situations where compensation is offered or provided in exchange for programming, the FCC's rules also require such identification where programming material from outside sources is aired during presentations of a controversial issue.[50] This long-dormant vestige of the Fairness Doctrine was not eliminated when the FCC terminated other corollaries of the policy, and has not yet been tested by judicial review.

Nevertheless, it was revived by the FCC in a series of Commission actions beginning in 2005. Starting with a Public Notice, the FCC sent a strong message that it intended to enforce the disclosure rules on newscasts that included material from video news releases even when no compensation was promised or paid for the broadcasts.[51] This was followed by the issuance by the Commission of forty-two Letters of Inquiry to seventy-seven broadcast licensees to investigate possible rule violations.[52] The Commission's Enforcement Bureau later issued Notices of Apparent Liability against Comcast alleging violations of the sponsorship identification rules and imposing potential fines of $20,000.[53] Comcast filed oppositions to the findings.

The FCC's actions with respect to video news releases raise a number of significant constitutional questions. To begin with, they implement a philosophy of governmental oversight of news judgment that the Commission previously had rejected when it first "declar[ed] the doctrine obsolete and no longer in the public interest" based on findings that "the fairness doctrine chilled speech on controversial subjects, and… interfered too greatly with journalistic freedom."[54] The FCC had found that the doctrine "was inconsistent with both the public interest and the First Amendment" because it imposed substantial burdens on the editorial choices of broadcasters.[55] While it would be unthinkable for the government to impose fines on print reporters for failing to disclose when they quote a portion of a press release, the Commission's decisions on video news releases expand the premise of *Red Lion*, that the government has a much freer hand to regulate broadcast journalists. More importantly, the proposed fines imposed on Comcast assume that the FCC may penalize *a cable operator* for making such an editorial choice, thus extending *Red Lion* beyond the broadcast medium. This is a step the Supreme Court has been unwilling to take. [56]

Constitutional Questions Ahead

Whether or not Congress or the FCC in the Obama administration seeks to resurrect the Fairness Doctrine, there will be significant First Amendment questions to be resolved about the government's ability to regulate broadcast news and public affairs programs. These issues will come to a head sooner if the new administration seeks to perpetuate or expand on regulatory initiatives that were begun under its Republican predecessors. The threshold question will not be whether

the doctrine of *Red Lion* may be extended to newer media, but whether this exception to traditional First Amendment jurisprudence is still valid in the new media environment.

It has been forty years since the Supreme Court decided *Red Lion*, based on "'the present state of commercially acceptable technology' as of 1969."[57] Since then, both Congress and the FCC have found that the media marketplace has undergone vast changes. For example, the legislative history to the Telecommunications Act of 1996 suggested that the historical justifications for the FCC's regulation of broadcasting require reconsideration. The Senate Report noted that "[c]hanges in technology and consumer preferences have made the 1934 [Communications] Act a historical anachronism." It explained that "the [Communications] Act was not prepared to handle the growth of cable television" and that "[t]he growth of cable programming has raised questions about the rules that govern broadcasters" among others.[58] The House of Representatives' legislative findings were even more direct. The House Commerce Committee pointed out that the audio and video marketplace has undergone significant changes over the past 50 years "and the scarcity rationale for government regulation no longer applies."[59]

The FCC has reached similar conclusions over the years. When it ended enforcement of the Fairness Doctrine in the mid-1980s, for example, the Commission "found that the 'scarcity rationale,' which historically justified content regulation of broadcasting... is no longer valid."[60] More recently, in complying with the congressional mandate to conduct a biennial review of broadcast regulations, the FCC again found that the media landscape has been transformed.[61] It concluded that "the modern media marketplace is far different than just a decade ago," finding that traditional media "have greatly evolved" and "new modes of media have transformed the landscape, providing more choice, greater flexibility, and more control than at any other time in history."[62]

Since then, a 2005 FCC staff report picked up where the 1987 Fairness Doctrine decision left off and concluded that the spectrum scarcity rationale "no longer serves as a valid justification for the government's intrusive regulation of traditional broadcasting."[63] It criticized the logic of the scarcity rationale for content regulation and added that "[p]erhaps most damaging to The Scarcity Rationale is the recent accessibility of all the content on the Internet, including eight million blogs, via licensed spectrum and WiFi and WiMax devices." Content regulation "based on the scarcity of channels, has been severely undermined by plentiful channels."[64] People coming of age in this environment enjoy an "extraordinary level of abundance in today's media marketplace" and thus "have come to expect immediate and continuous access to news, information, and entertainment."[65]

In this context, it is far from a foregone conclusion that the Supreme Court (or, for that matter, other reviewing courts) would accept the technological assumptions upon which *Red Lion* is based. It has been a long time since the Court has directly confronted the constitutional status of broadcasting, and where the issue has come up in dictum, its endorsement of *Red Lion* has been lukewarm at best. In *Turner Broadcasting System v. FCC*, for example, the Court rejected the government's bid to extend the principles of *Red Lion* to the regulation of cable television. After noting the Commission's "minimal" authority over broadcast content, the Court pointed out that "the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, *whatever its validity in the cases elaborating it*, does not apply in the context of cable television."[66] The judicial environment does not seem as if it will be hospitable to new efforts to reinvigorate or expand broadcast-type content controls.

Conclusion

Much ink has been spilt in a false debate over whether a new Democratic administration and a supermajority in Congress will try to bring back the Fairness Doctrine as a tool to muzzle the vociferous opposition of talk radio. But such tools were fashioned by the recently departed Republican administration and by an FCC chairman who claimed to be a conservative. The real issue in the debate over "fairness" in the twenty-first century is not about which regulation will be employed, or who is its primary champion. It is whether the legal fiction of *Red Lion* will continue to permit broadcasters or others to be excluded from well-established First Amendment protections traditionally applied to mass media.

Endnotes

1 395 U.S. 367 (1969).

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3 Bruce Fein, *Exhuming the Fairness Doctrine*, Wash. Times, Dec. 16, 2008.

4 *A Liberal Supermajority*, Wall St. J., Oct. 22, 2008, at A12.

5 Craig Aaron, Fairness Doctrine: Secret Republican Agenda Exposed!, www.huffingtonpost.com/craig-aaron/fairness-doctrine-secret_b_156227.html (Jan. 8, 2009).

6 Steve Benen, Political Animal, The Washington Monthly, http://www.washingtonmonthly.com/archives/individual/2008_12/015956.php (Dec. 7, 2008) (emphasis in original).

7 Marin Cogan, Bum Rush, The New Republic, http://www.tnr.com/politics/story.html?id=68d07041-7dbc-451d-a18a-7525671456l0&p=2 (Dec. 3, 2008).

8 *See*, *e.g.*, Jesse Walker, Beyond the Fairness Doctrine, Reason, Nov. 2008; Brian Maloney, Dem Senator Outlines Vindictive Plan to Eliminate Talk Radio, http://radioequalizer.blogspot.com/2008/10/new-mexico-democrat-will-push-to.html (Oct. 22, 2008).

9 Bob Cusack, Schumer on Fox: Fairness Doctrine 'fair and balanced,' The Hill.com, http://thehill.com/leading-the-news/schumer-defends-fairness-doctrine-as-fair-and-balanced-2008-11-04.html (Nov. 4, 2008).

10 John Eggerton, Obama Does Not Support Return of Fairness Doctrine, Broadcasting & Cable, June 25, 2008 (citing an e-mail from candidate Obama's press secretary, Michael Ortiz).

11 Broadcaster Freedom Act of 2009, H.R. 226, 111th Cong., 1st Sess. (introduced Jan. 7, 2009). In the 110th Congress, Rep. Pence similarly sponsored H.R. 2905, the Broadcaster Freedom Act of 2007. He also filed a discharge petition to require a vote on H.R. 2905 once the petition was signed by 218 members, but it fell just short of that number.

12 Broadcaster Freedom Act of 2009, S.34, 111th Cong., 1st Sess. (introduced Jan. 6, 2009). In the 110th Congress, Sen. Thune (R – SD) introduced S. 1742 to block re-imposition of the Fairness Doctrine.

13 H.R. 226; S.34.

14 *See* John Eggerton, Republicans Introduce Bills Opposing Fairness

Doctrine, Broadcasting & Cable, Jan. 8, 2009; Ira Teinowitz, Bills Would Block FCC on Fairness Doctrine, TV Week, http://www.tvweek.com/news/2009/01/bills_would_block_fcc_on_fairn.php (Jan. 7, 2009).

15 438 U.S. 726 (1978).

16 *See* Robert L. Corn, *Broadcasters in Bondage*, Reason (Sept. 1985) at 31, 32.

17 *Id*. at 31, 33-34.

18 Cass Sunstein, Democracy and the Problem of Free Speech 16, 35, 108-114 (1993).

19 *Id*. at xix-xx.

20 Angela J. Campbell, *The Legacy of Red Lion*, 60 Admin. L. Rev. 783, 788 (Fall 2008).

21 *Id*.

22 *Id*. (quoting Reno v. ACLU, 521 U.S. 844, 875 (1997) (other citations omitted)).

23 *Id*. at 790 (emphasis added).

24 Brief of Amicus Curiae American Academy of Pediatrics, Benton Foundation, Children Now, National Institute on Media and the Family, Parent Teacher Association, *and* United Church of Christ, Office of Communications, Inc., in Support of Neither Party, FCC v. Fox Television Stations, Inc., No. 07-582 (Sup. Ct., June 9, 2008) at 3.

25 Mark Cooper, Focus on the Public Interest and Restore the Pragmatic, Progressive Principles of the Communications Act of 1934, presented at the Conference on Reforming the Federal Communications Commission, Silicon Flatirons and Public Knowledge, Jan. 5, 2009.

26 *Id*.

27 Marvin Ammori, *The Fairness Doctrine: A Flawed Means to Attain a Noble Goal*, 60 Admin. L. Rev. 881, 883 (Fall 2008).

28 Center for American Progress and Free Press, The Structural Imbalance of Political Talk Radio (June 21, 2007) at 9-11 ("The Structural Imbalance of Political Talk Radio").

29 Ammori, *supra* note 25 at 883.

30 The Structural Imbalance of Political Talk Radio, *supra* note 28 at 6.

31 *Id*. at 6-7, 9-11.

32 Conn Carroll, This is Not the 'Fairness Doctrine' You're Looking For, http://blog.heritage.org/2008/12/08/this-is-not-the-fairness-doctrine-youre-looking-for (Dec. 8, 2008).

33 FCC News Release, Chairman Kevin J. Martin Announces Resignation Effective January 20, Jan. 15, 2009.

34 *Id*. at 6, 12.

35 The Report and Order on enhanced disclosure forms was the subject of several petitions for reconsideration and multiple judicial challenges. Additionally, the OMB did not approve the new standardized form. Accordingly, the rules have not yet gone into effect and the appeals have been held in abeyance pending further administrative proceedings.

36 *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, 23 FCC Rcd. 1274 (2008) ("*Standardized and Enhanced Disclosure Requirements*").

37 *Id*. at 1300 (Appendix B).

38 *Id*.

39 *Id.* at 1275, 1287, 1292.

40 *Id.* at 1287.

41 *Id.* at 1275, 1287. *See also id*. at n.96 ("As noted above, broadcasters' substantive public interest obligations are being considered in other proceedings.").

42 *Report on Broadcast Localism and Notice of Proposed Rulemaking*, 23FCC Rcd. 1324 (2008).

43 *Id.* at 1373.

44 *Id*. at 1335, 1357.

45 *Id*. at 1344.

46 *Id*. at 1336.

47 *Id*. at 1336-37.

48 *See* Clay Calvert, *What is News?: The FCC and the Battle Over the Regulation of Video News Releases*, 16 CommLaw Conspectus 361, 372-374 (2008).

49 47 U.S.C. §§ 317, 508.

50 47 C.F.R. §§ 73.1212(d), 76.1615(c).

51 *See* Public Notice, Commission Reminds Broadcast Licensees, Cable Operators and Others of Requirements Applicable to Video News Releases and Seeks Comment on the Use of Video News Releases by Broadcast Licensees and Cable Operators, 20 FCC Rcd. 8593 (2005).

52 *See* FCC News Release, FCC Launches Unprecedented Video News Release Probe, August 14, 2006.

53 *See* In re Comcast Corp., 22 FCC Rcd. 17,030 (Enf. Bur. 2007); In re Comcast Corp., 22 FCC Rcd. 17,474 (Enf. Bur. 2007).

54 Radio-Television News Directors Ass'n v. FCC, 184 F.3d 872, 876 (D.C. Cir. 1999) ("RTNDA") (quoting Fairness Report, 102 FCC2d 142, 246 (1985)) (internal quotes and edits omitted). *See also* Syracuse Peace Council, 2 FCC Rcd 5043, 5052 (1987), *recon. denied*, 3 FCC2d 2035 (1988), *aff'd*, Syracuse Peace Council, 867 F.2d 654 (D.C. Cir. 1989) (fairness doctrine's "chilling effect thwarts its intended purpose, and… results in excessive and unnecessary government intervention into the editorial processes of broadcast journalists).

55 RTNDA, 184 F.3d at 876. *See also* Syracuse Peace Council v. FCC, 867 F.2d at 658 ("Commission declared that the fairness doctrine chills speech and is not narrowly tailored to achieve a substantial government interest" and "consequently… under… Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969), and its progeny… the fairness doctrine contravenes the First Amendment"). *See also id*. at 668 ("in its discussion of the fairness doctrine as a whole the Commission relied heavily on its view that government involvement in the editorial process was offensive") (citing Fairness Report, 102 FCC2d at 190-94; Syracuse Peace Council, 2 FCC Rcd at 5050-52, 5055-57).

56 Turner Broadcasting System v. FCC, 512 U.S. 622, 637 (1994) (because of "fundamental technological differences between broadcast and cable transmission" the application of "the more relaxed standard of scrutiny adopted in Red Lion and the other broadcast cases is inapt when determining the First Amendment validity of cable regulation"); United States v. Playboy Entmt. Group, Inc., 529 U.S. 803, 815 (2000) (citing "key difference" between cable and broadcasting in striking down indecency regulations imposed on cable operators).

57 News America Publishing, Inc. v. FCC, 844 F.2d 800, 811 (D.C. Cir. 1988) (quoting Red Lion, 395 U.S. at 388). *See* Meredith Corp. v. FCC, 809 F.2d 863, 867 (D.C. Cir. 1987) ("the Court reemphasized that the rationale of Red Lion is not immutable").

58 Telecommunications Competition and Deregulation Act of 1995, S. Rpt. 104-23, 104th Cong. 1st Sess. 2-3 (Mar. 30, 1995).

59 Communications Act of 1995, H. Rpt. 104-204, 104th Cong. 1st Sess. 54 (July 24, 1995).

60 Meredith Corp., 809 F.2d at 867, citing Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees, 102 FCC2d 143 (1985) ("*1985 Fairness Doctrine Report")*. *See* Syracuse Peace Council, 867 F.2d at 660-666 (discussing *1985 Fairness Doctrine Report* and upholding FCC's decision to repeal the fairness doctrine).

61 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 18 FCC Rcd. 13620, 13623 (2003) ("Biennial Regulatory Review").

62 *Id*. at 13647-48.

63 John W. Berresford, *The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed* (Media Bureau Staff Research Paper, March 2005) at 8. FCC staff research papers are unofficial studies

and do not necessarily reflect the position of the Media Bureau or the Commission.

64 *Id*. at 11. The report also concludes that alternative rationales for broadcast content regulations are similarly flawed. *Id*. at 18-28. For a more comprehensive discussion of various justifications for broadcast content regulation, *see* Robert Corn-Revere, ed., Rationales and Rationalizations (Media Institute 1997).

65 *Biennial Regulatory Review*, 18 FCC Rcd. at 13648.

66 *Turner I*, 512 U.S. at 637 (emphasis added).