The Fairness Doctrine: Fair to Whom

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NOTES

THE FAIRNESS DOCTRINE: FAIR TO WHOM?

I. INTRODUCTION

Radio and television stations, unlike newspapers, are licensed by the federal government. The Federal Communications Commission (FCC) has been mandated by Congress to regulate broadcast licensees in the public interest. In turn, the Commission has promulgated rules and regulations to ensure that this public trust standard is met, such as equal time, personal attack and the fairness doctrine. This note will

2 Id. § 303.
3 The statute authorizes issuance of broadcast licenses if the “public interest, convenience, and necessity will be served thereby.” Id. § 307(d).
4 Codified in § 315 which provides in pertinent part: “(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station. . . .” This provision was embodied in the original Communications Act of 1934. Subsequent attempts to exempt bona fide newscasts from this requirement resulted in an amendment in 1954 and included codification of the fairness doctrine. See note 6 infra. Compare equal time requirements for broadcast licensees with Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (state statute requiring newspaper to provide candidate free space to reply to attack on public record held unconstitutional). See generally CBS, Inc., 58 F.C.C.2d 601 (1976) (interviews with candidates on “60 Minutes” qualified as bona fide news interviews for exemption under § 315(a)(2)); Socialist Workers 1968 Nat’l Campaign Comm., 14 F.C.C.2d 858 (1968) (denial of equal time for Presidential candidate because the licensee met the requirement for bona fide news interview).

5 In case of a “personal attack” against “the honesty, character, integrity or like personal qualities of an identified person or group” during the discussion of a controversial issue of public importance, the licensee is required to transmit to the party attacked within seven days after the attack is broadcast “[1] notification of the date, time and identification of the broadcast; [2] a script or tape (or an accurate summary if a script or tape is not available) of the attack; and [3] an offer of a reasonable opportunity to respond over the licensee’s facilities free of charge.” 47 C.F.R. §§ 73.123, 73.300, 73.598, 73.679 (1978). See The Public and Broadcasting—A Procedure Manual, 49 F.C.C.2d 1, 6 (1974) [hereinafter cited as Procedure Manual]; Straus Communications, Inc. v. FCC, 530 F.2d 1001 (D.C. Cir. 1976). The appellate court in Straus rejected the Commission’s finding that the licensee had violated personal attack rules, and criticized the agency for making, in effect, its own de novo judgment. Id. at 1010-11. See also International Brotherhood of Teamsters v. NBC, 59 F.C.C.2d 1317 (1976); Henry Buchanan, 42 F.C.C.2d 430 (1973); John Salchert, 48 F.C.C.2d 346 (1974). Although the personal attack and equal time provisions are closely related to the fairness doctrine and involve similar issues, further discussion of these components will be limited to
critically examine the fairness doctrine, its origin, standards and practical application, to ascertain whether it is fulfilling its intended purpose.

Under the fairness doctrine, a broadcast licensee has two obligations: 1) to devote a reasonable amount of programming time to controversial issues of public importance; and 2) to offer a reasonable opportunity for the presentation of contrasting viewpoints. The Federal Communications Commission, charged with enforcement of this doctrine, attempts to harmonize the first amendment rights of the broadcaster with the

only those situations in which the fairness doctrine is directly implicated. See generally Note, Personal Attack Rule and Professional Occupations: Consistency in FCC Decision-Making, 16 CALIF. W. L. REV. 399 (1980).

Public Media Center v. FCC, 587 F.2d 1322, 1328 (D.C. Cir. 1978). Section 315(a) now reads:

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: Provided, That such licensee shall have no power of censorship over the material broadcast under the provisions under this subsection. No obligation is imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

(1) bona fide newscast,
(2) bona fide news interview,
(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.


Section 303 of the Communications Act of 1934, 47 U.S.C. § 303 (1976), provides that the Commission shall, for public convenience, interest or necessity: "[M]ake such regulations not inconsistent with law as it may deem necessary . . . to carry out the provisions of this chapter. . . ." See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) for a historical account of judicial ratification of FCC rulemaking. See generally National Citizens Comm. for Broadcasting v. FCC, 567 U.S. 926 (1978). The court of appeals recognized the general rulemaking authority of the FCC but held that the Commission acted unreasonably in requiring divestiture of only some owners of newspaper-broadcast combinations. See note 149 infra and accompanying text. But see Accuracy in Media, Inc. v. FCC, 521 F.2d 488 (D.C. Cir. 1975), cert. denied, 425 U.S. 934 (1976) (the FCC has no jurisdiction to enforce the fairness doctrine against educational broadcasting stations).
right of the public to be informed. Although Congress has sanctioned the regulation of broadcasters, restrictions must not take the form of censorship and jeopardize valuable freedoms of speech and press. At the same time, airwaves are considered a scarce resource, and licensees are not permitted to monopolize them to the detriment of the public. A balance is sought to achieve the ultimate goal of diversity in the marketplace of ideas.

To reduce the threat of excessive government interference, the broadcast licensee is accorded broad discretion in programming decisions. Unless personal attack or equal-time claims are raised, the broadcaster must meet only standards of reasonableness and good faith. In further deference to the broadcaster, overall programming is taken into account to determine if there are fairness violations.

In practical application, the fairness doctrine has become a procedural and substantive nightmare to complainants, broadcasters, the Commission and the courts. The doctrine is plagued by a fundamental contradiction: The FCC is strictly prohibited from censorship of content.

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8 Memorandum Opinion and Order on Reconsideration of the Fairness Report, 58 F.C.C.2d 691, 694 (1976) [hereinafter cited as Reconsideration of Fairness Report]. See also Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 102 (1973). It is “the right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter...” Id. at 112-13. The licensee must provide free time if the appropriate spokesperson is unable to pay. Cullman Broadcasting Co., 40 F.C.C. 576 (1963).


10 Fairness Report, supra note 9, at 9. See Accuracy in Media, 42 F.C.C.2d 426 (1973) (the FCC ruling that an interview with Alger Hiss did not, in the licensee’s view, constitute a controversial issue of public importance was a judgment that was reasonable and in good faith).

11 Reconsideration of Fairness Report, supra note 8, at 695. The Commission has consistently ruled that no private individual or group has a right to command the use of broadcast facilities. The licensee, therefore, is not required to provide a forum for any particular person on any particular program or series of programs. Fairness Report, supra note 9, at 8. See, e.g., International Brotherhood of Teamsters, 59 F.C.C.2d 1317 (1976); Michael McKee, 49 F.C.C.2d 1258 (1974); Voice for Innocent Victims of Abortion, 42 F.C.C.2d 335 (1973). See generally Suzuki v. WOW-TV, 59 F.C.C.2d 1122 (1976).


13 “Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals..."
yet examination of content is necessary to determine if there have been fairness violations. The FCC, sensitive to first amendment concerns, has promulgated extremely restrictive procedural requirements for complaints, including a burden of proof that is difficult to overcome.14 Without these procedures, however, the Commission fears that the duty to respond to the excessive number of complaints initiated would be overly burdensome to licensees,15 and as a result, licensees might avoid programming related to controversial issues. Thus, the public interest in diversity in the marketplace of ideas would suffer.16 Under the current system, though, a lack of clearly defined standards has lead to arbitrary decision-making by the FCC. Since the FCC is given broad discretion to administer the doctrine, seven politically appointed Commissioners17 become the standard bearers of the nation's morality. More importantly, the doctrine, because of these ill-defined guidelines, is subject to manipulation in order to further favored political views.

This Note contends that the fairness doctrine, as presently applied, fails to meet its legislative purpose and violates constitutionally protected rights.18 This Note will examine the standards and policies established by the FCC as judicially approved in Red Lion Broadcasting, Inc. v. FCC19 and American Sec. Council Educ. Foundation v. FCC.20 Practical application of these standards and policies will be explored in three categories: 1) controversial issue programming; 2) commercial advertisements; and 3) political messages. Finally, a solution to the arbitrary and discriminatory application of this amorphous doctrine will be suggested.

transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication. 47 U.S.C. § 326 (1976).


15 Fairness Report, supra note 9, at 8. For example, in 1973 the Commission received about 2,400 fairness complaints. After initial screening, only ninety-four of these were forwarded to licensees for response.

16 See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). The Court in Red Lion alluded to this speculative danger, but postponed this issue for future consideration if, indeed, the burden on licensees became too great. Id. at 393.


II. DEVELOPMENT OF THE FAIRNESS DOCTRINE

A. Genesis

Historically, government regulation of the broadcast media was intended to deal with only technological problems, not program content deficiencies. In the 1920's, rapid development of radio communication controlled solely by the private sector led to chaotic use of airwaves. Recognizing the need for a more rational approach to allocation of licenses, assignment of frequencies, and regulation of signal strength, Congress enacted the Radio Act of 1927, creating a five member Radio Commission to regulate in the public interest. Many of the provisions of that Radio Act, including the public interest standard, were incorporated into the Communications Act of 1934, which created the Federal Communications Commission. The FCC instituted rules, regulations, and policy standards for licensees. Authority granted to the FCC by the Communications Act was circumscribed only by a duty to promote the public interest. The scope of this initial grant of authority, however, must be viewed in the context in which it was given. Since airwaves were considered a limited resource and not available to all who

21 For a complete history of the origin and development of broadcast regulation see D. Ginsburg, Regulation of Broadcasting: Law and Policy Towards Radio, Television and Cable Communications (1979).


24 Once again Congress rejected a proposal that would have required equal response time for presentation of views "on a public question to be voted upon at an election. . . ." See H.R. REP. No. 1918, 73d Cong., 2d Sess. 49 (1934).

25 See note 7 supra. See also Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94 (1973). The Commission's responsibility is to determine whether overall performance of a licensee constitutes a sustained good faith effort to fully and fairly inform the public. Id. at 126. Chief Justice Burger, writing for the Court, characterized the FCC as an "overseer," "ultimate arbiter and guardian of the public interest. . . ." Id. at 117. Conversely, the licensee's role was that of "public trustee," whose duty was to fairly and impartially inform the listening and viewing public. Id.

wished to use them, allocation was to be based on the ability to serve
the general public. In fact, the Communications Act expressly prohibits content censorship.

Growth of the FCC's authority over program content has been the result of administrative activism, coupled with legislative ambiguity. For many years following the creation of the FCC, implementation of agency policy and procedures went largely unnoticed by Congress and the courts. In 1943, however, the authority to regulate programming in the public interest was condoned by the Supreme Court in National Broadcasting Co. v. United States. Justice Frankfurter, writing for the Court, affirmed the authority of the FCC to adopt regulations regarding chain broadcasting. He cautioned that "these provisions [of the Act], individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the 'larger and more effective use of radio in the public interest.'" While FCC action was found to be within the authority argue that the limited resource justification for regulation is no longer applicable since cable has expanded access opportunities.

See note 3 supra and accompanying text.

See Hearings on S 2910 before the Senate Comm. on Interstate Commerce, 73d Cong., 2d Sess. 19 (1934). See also note 24 supra. While Secretary of Commerce, Herbert Hoover testified before a House Committee in the early 1920s: "We can not allow any single person or group to place themselves in [a] position where they can censor the material which shall be broadcasted to the public, nor do I believe that the government should ever be placed in the position of censoring this material." Hearing on H.R. 7357 Before the House Comm. on the Merchant Marine and Fisheries, 68th Cong., 1st Sess. 8 (1924), reprinted in Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 104-05 (1973).

See note 13 supra and accompanying text.

One commentator has observed that "the statutory scheme, although little changed by Congress since its inception, is not the product of a clear, full blown theory of how to handle the special problem of broadcasting, but is a curiously ad hoc effort. . . . [O]ver-all the agency is given broad regulatory powers under the vague standard of 'public interest, convenience and necessity.'" Kalven, Broadcasting, Public Policy and the First Amendment, 10 J. OF L. & ECON. 15, 26 (1967). Cf. Commissioner Hooks expressed support of the fundamental precept underlying the fairness doctrine, via reasonably fair coverage of controversial issues, but lamented the "Commission's progressively active interpretations which have unfortunately transfigured a simple tenet of conscientious service into an alleged super-straightjacket structure." Fairness Report, supra note 9, at 52.

319 U.S. 190 (1943).

These regulations restricted network control over local stations by curtailing rates charged by the network for programs, network option time provisions, length of contract term between local stations and the network, and provisions for territorial exclusivity and exclusive affiliation. They focused on antitrust concerns and reflected FCC policy that the station owner should not delegate his responsibility to the public. Id.

Id. at 217. Judicial scrutiny ended with the determination that FCC action was based upon findings supported by evidence, and within the authority
delegated by the Communications Act, the constitutionality of the agency's exercise of authority was upheld only under these narrow facts. The decision addressed the authority of the FCC to regulate business practices, rather than the constitutionality of content control. First amendment rights of broadcasters were not really at issue, yet Justice Frankfurter's broad dicta has been read to confer blanket judicial sanction of FCC regulation.

Following this judicial stamp of approval, the FCC gradually expanded its authority over the content of programming by imposing "fairness" obligations on broadcasters. The Commission justified this exercise of authority as regulation in the public interest. Thus, the concept of the fairness doctrine, which in subsequent years has become increasingly troublesome, developed not in the legislature or the judiciary, but rather through administrative action.

In 1959 Congress amended the Communications Act to exempt bona fide newscasts from equal time requirements. The legislators expressed concern that this exemption might lead to abuses by the news media. To prevent such abuses, the phrase now known as the "fairness doctrine" was added "to serve as a warning . . . that the discretion being granted . . . will be carefully screened." Yet, this fairness doctrine component of the amendment has been interpreted by the courts and the FCC as rendering Congressional approval to prior Commission practices. What began as a warning to exempted newscasters has mushroomed into extensive scrutiny of program content by the FCC.

B. Red Lion Broadcasting Co. v. FCC

The fairness doctrine did not come under direct constitutional attack until Red Lion Broadcasting Co. v. FCC. In that case a licensee refused
an FCC order to provide free time for response to a personal attack, in violation of the fairness doctrine. The licensee challenged the Commission's authority to enforce such orders. In a unanimous decision, the Supreme Court held that, despite the first amendment, the FCC could require licensees to provide time for response to personal attack and political editorials. These FCC rules and regulations were found to be within the delegated authority of the Communications Act and consistent with the first amendment. The Court reasoned that "in adopting the new regulations the Commission was implementing Congressional policy rather than embarking on a frolic of its own."

The Court in Red Lion emphasized the need for government control of the airwaves, because the number of broadcast frequencies were limited. The Court stated that the licensee, using the airwaves as a public trust, had a fiduciary duty to promote the public interest. Rejecting the contention that the FCC ruling abridged freedom of speech and press, the Court reasoned that the characteristic differences between broadcast and print justified application of different first amendment standards. Limitation of available frequencies, the Court explained, precluded application of first amendment rights under these circumstances. The Court noted that every person who wanted to speak, write, or publish could do so, but every person who wanted to broadcast could not. The Court warned that "[n]o one has a First Amendment right to a license or to monopolize a frequency to the exclusion of his fellow citizens." The Court hastened to distinguish this permissible incursion into first amendment rights from prohibited interference: The FCC was free to require licensees to provide a forum for discussion of controversial issues only by "reasonable rules and regulations which fall short of abridgement of the freedom of speech and press, and of the censorship

Justice Douglas took no part in the Court's decision. A subsequent concurring opinion by Justice Douglas in Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973), suggests that had he been available to vote in Red Lion the decision would not have been unanimous: "The Fairness Doctrine has no place in our First Amendment regime. It puts the head of the camel inside the tent and enables administration after administration to toy with TV or radio in order to serve its sordid or its benevolent ends." Id. at 154.

Id. at 385 U.S. at 386-94.

Id. at 375.

Id. at 376.

Id. at 389.

Id. at 386. The goal of the first amendment was to "preserve an uninhibited market place of ideas, . . . rather than to countenance monopolization of that market, whether it be by the government itself or a private licensee." Id. at 390.

Id. at 388-89.

Id. at 389. The Court felt that the fairness doctrine actually enhanced the first amendment by assuring access for differing viewpoints. Id. See also Fairness Report, supra note 9, at 5-6.
proscribed by §326 of the Act.” Unfortunately, the Court failed to establish guidelines to determine when the FCC was exceeding its proper authority.

Although the Court in *Red Lion* expressly limited the decision to the constitutionality of the personal attack and political editorial rules and refrained from giving blanket approval to all FCC action, the ruling has generally been read to confer broad powers upon the Commission. Little reference has been made to the Court’s warning that if future enforcement led to reduced, rather than increased coverage of controversial issues, the constitutionality of the doctrine would need to be re-examined.

It is crucial to note that the Court in *Red Lion* upheld the constitutionality of the fairness doctrine only on its face, not as applied:

There is no question here of the Commission’s refusal to permit the broadcaster to carry a particular program or to publish his own views; of a discriminatory refusal to require the licensee to broadcast certain views which have been denied access to the airwaves; of government censorship of a particular program contrary to §326; or of the official government view dominating public broadcasting. Such questions would raise more serious First Amendment issues.

These very questions have now been raised by the Commission’s arbitrary application of the fairness doctrine. The time has come to test the constitutionality of the application issue left open in *Red Lion*.

Since *Red Lion*, the Commission has intensified its scrutiny of program content “in the public interest” and the courts have continued to defer to this type of administrative expansionism. Interference that would never be tolerated in the print media has come to be accepted in broadcasting, even though the characteristic differences enumerated in *Red Lion* have diminished. While the scope of a court’s review of the

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49 395 U.S. at 382. The right of the viewers, not the broadcaster, was paramount. *Id.* at 390.

50 *Id.* at 396. The Court criticized the Communications Act in general for imprecision in substantive standards. The Court reasoned that if the generalized “public interest” standard had not been held constitutionally infirm in the past, the more definitive standards for personal attack and political editorializing should also sustain attack. *Id.* at 384-85.

51 *Id.* at 393. At that time, the Court felt that the danger of causing a chill on the coverage of controversial issues was remote. *Id.* at 392-93.

52 *Id.* at 396.


54 Chief Judge Bazelon, in dissent, suggested that it was time for “the Commissioner to draw back and consider whether time and technology have so erod-
FCC has been limited to a determination that the Commission's order was reasonable or within statutory purpose, the FCC's application of the fairness doctrine has failed to pass even this minimum test.

C. Complaint Procedure

The fairness doctrine is a double-edged sword. Aside from the threat to the free speech and press rights of the broadcaster, implementation of the doctrine imposes serious infringement upon the due process rights of the complainant. The FCC is forced to play a perpetual tug of war, trying to balance the rights of the licensee with the rights of the viewer or listener.

The licensee has a right to freedom of speech and press, to be free from unreasonable government interference. "In view of profound, unquestioned national commitment embodied in the First Amendment," the FCC recognizes that its goal "must be to foster 'uninhibited, robust, wide-open' debate on public issues." To achieve this goal, the FCC claims to place broad discretion in the licensee's journalistic judgment and limit FCC intervention to incidents in which the necessity for governmental imposition of fairness obligations that the doctrine has come to defeat its purposes in a variety of circumstances." Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16, 80 (D.C. Cir. 1972) (dissenting opinion). See note 26 supra and accompanying text. Cable has expanded access possibilities and newspapers are becoming more of a scarce resource than broadcast stations. The majority in Columbia Broadcasting recognized that there were many more broadcasting stations than daily newspapers. 412 U.S. at 144. But see Fairness Report, supra note 9, at 6. The Commission rejects the view that scarcity is no longer a concern.


(1) the agency acted within bounds of its statutory and constitutional authority;
(2) the agency followed its own procedural rules and regulations;
(3) the agency's findings are reasonably articulated and based on substantial evidence in the record as a whole;
(4) the agency did not substantially deviate from past decisions without sufficient explanation;
(5) in general the agency engaged in reasoned decisionmaking.

The licensee is given broad discretion to determine whether a subject constitutes a controversial issue, the format of the programs devoted to the issue, and which spokesperson to present opposing views. Fairness Doctrine Primer, supra note 9, at 599.

There can be no one all embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues.

...
licensee had acted unreasonably and in bad faith. In order to evaluate the reasonableness of the licensee's action, however, the Commission is compelled to examine program content. Thus despite claims to the contrary, the FCC becomes the sole arbiter of what constitutes reasonable coverage of a controversial issue of public importance and can directly impact its decision on the licensee. In the past the Commission has assured that they "have no intention of becoming involved in the selection of issues to be discussed." The following discussion illustrates that this commitment to neutrality is impossible to achieve under the present system.

The licensee's first amendment freedom is also threatened by the excessive number of fairness complaints filed each year. If no restrictions were imposed, the broadcaster would certainly become overburdened. Responding to the thousands of complaints filed each year could consume the majority of the licensee's time and impair its ability to effectively disseminate information over the airwaves. The FCC has attempted to reduce this burden by imposing stringent procedural requirements for filing fairness complaints in an effort to weed out frivolous claims. The result is that only a small number of complaints ever pass these difficult threshold tests and require licensee response. While few infractions have resulted in serious repercussions for the judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view.


See generally Kalven, Broadcasting, Public Policy and the First Amendment, 10 J. OF L. & ECON. 15 (1967). The author highlights the conflict between regulation of broadcasting and first amendment freedoms: "We have at the moment the worst of all possible worlds. There is official lip service to freedom of the press in broadcasting but no agreement that there is anything the Commission cannot do." Id. at 38.

Fairness Report, supra note 9, at 10.

See Community-Service Broadcasting of Mid-America, Inc. v. FCC, 593 F.2d 1102 (D.C. Cir. 1978), where the court held that an FCC requirement that all non-commercial educational stations which received federal funding make audio recordings of all broadcasts discussing controversial issues was an unconstitutional infringement of first and fifth amendment rights.


See note 15 supra and accompanying text.
licensee,\textsuperscript{64} fairness violations remain an ever-present threat. The FCC can and does wield tremendous power over broadcasters through a "raised eyebrow" approach.\textsuperscript{65} If a licensee has violated fairness obligations, not only can the FCC require immediate compliance, but the FCC may also consider these violations as demerits for license renewal purposes. Since license renewal occurs every three years,\textsuperscript{66} the threat remains very real for the licensee.

The viewers' rights are often in direct conflict with those of the licensee. Under the fairness doctrine the viewer or listener has a right to receive access to balanced coverage of controversial issues of public importance and to expect the licensee to operate in the public interest. When these rights are abridged, there should be recourse through our administrative and judicial process. Legitimate claims should not be bridled with procedural roadblocks. According to the Commission, fairness complaints\textsuperscript{67} must focus on a specific factual issue\textsuperscript{68} and present prima facie evidence sufficient to support the claim.\textsuperscript{69} The following basic requirements must be met:

\textsuperscript{64} E.g., FCC v. WOKO, 329 U.S. 223 (1946); see American Broadcasting Co., 52 F.C.C.2d 98 (1974), aff'd, 555 F.2d 1002 (D.C. Cir. 1977); see also KMAP, Inc., 72 F.C.C.2d 241 (1979) (despite repeated allegations for over ten years, the FCC granted renewal but warned that they would closely scrutinize the next renewal application); Cairo Broadcasting Co., 63 F.C.C.2d 586 (1977); Springfield Television Broadcasting Corp., 59 F.C.C.2d 110 (1976) (complaints were raised by a cable television company competing with the station); Capitol Broadcasting Co., 40 F.C.C. 615 (1964) (the FCC found fairness violations but granted renewal because the licensee had recently adopted new procedures).


\textsuperscript{67} Persons believing that a broadcaster is not meeting fairness obligations must first try reconciliation with the broadcaster. If these attempts fail, complaints may be filed with the FCC. In an interview with the news director of a network owned station, this author was informed that a standard response to callers who lodge fairness complaints with the station is that fairness obligations have been met with overall programming.

\textsuperscript{68} See American Sec. Council Educ. Foundation v. FCC, 607 F.2d 438 (D.C. Cir. 1979), cert. denied, 444 U.S. 1013 (1980); Hakkie S. Tamimie, 42 F.C.C.2d 876, 877 (1973) (complaint that attacked coverage of "Middle East" on educational network dismissed for failure to specify "the particular aspect of the general topic which was discussed.").

\textsuperscript{69} Prima facie evidence is evidence which is sufficient in law to sustain a finding in favor of a claim, but which may be contradicted. See BLACK'S LAW DICTIONARY 1353 (rev. 4th ed. 1968). See generally Columbus Broadcasting Coalition v. FCC, 505 F.2d 320, 323-24, 326-30 (D.C. Cir. 1974) (discussing prima facie evidence requirements for petition to deny a broadcast license under 47 U.S.C. § 309(d) (1976)).
(1) the name of the station or network involved; (2) the controversial issue of public importance on which a view was presented; (3) the date and time of its broadcast; (4) the basis of [the] claim that the issue is controversial and of public importance; (5) an accurate summary of the view [or] views broadcast; (6) the basis of [the] claim that the station or network has not broadcast contrasting views on the issue or issues in its overall programming; and (7) whether the station or network has afforded, or expressed the intention to afford, a reasonable opportunity for the presentation of contrasting viewpoints on that issue.\textsuperscript{70}

While on their face these rules appear reasonable, ambiguous standards and inconsistent enforcement have resulted in arbitrary and capricious decision-making. The FCC relies on an \textit{ad hoc} system of rulemaking which rarely leads to predictable results. It is this very system which has led to expanded regulation of content. It appears that the FCC has become more involved in content regulation than Congress, the courts or the administrators themselves had ever intended.

D. American Security Council Education Foundation v. FCC

Often, the FCC dismisses complaints on procedural rather than on substantive grounds.\textsuperscript{71} \textit{American Sec. Council Educ. Foundation v. FCC}\textsuperscript{72}

\textsuperscript{70} Broadcast Procedural Manual, \textit{supra} note 5, at 5. These requirements were set out with much more specificity than previous policy standards:

Complainant should submit . . .

(1) the particular station involved;
(2) the particular issue of a control nature discussed over the air;
(3) the date and time when the program was carried;
(4) the basis for the claim that the station has presented only one side of the question; and
(5) whether the station had afforded, or has plans to afford, an opportunity for the presentation of contrasting viewpoints.

Fairness Doctrine Primer, \textit{supra} note 9, at 600. The Fairness Doctrine Primer requirements were upheld as "not unreasonable" in Democratic Nat'l Comm. v. FCC, 460 F.2d 891, 907 (D.C. Cir.), \textit{cert. denied}, 409 U.S. 843 (1972).

\textsuperscript{71} See Diocesan Union of Holy Name Societies, 43 F.C.C.2d 548, 549 (1973) (Johnson, Comm'r, dissenting). The FCC has expressly denied responsibility for review of claims that do not adhere to strict procedural requirements: "It is not the proper function of the administering agency to frame the complaints coming before it and it is incumbent upon the complaining party to bring before us a \textit{prima facie} complaint." American Sec. Council Educ. Foundation, 63 F.C.C.2d 366, 368 (1977) (quoting Reconsideration of the Fairness Report, \textit{supra} note 8, at 696). \textit{See also} Robin Ficker, 65 F.C.C.2d 657 (1977) (allegations of lack of news coverage of a political candidate were dismissed because the complainant was not a consistent viewer, and therefore had no proof of overall programming content).

is an example of the procedural straight-jacket that the FCC has devised. In that case the complaint to the FCC, based upon a three-year study, alleged that a television network's news broadcasts were slanted in the presentation of matters relating to "national security." The methodology used in the study consisted of monitoring the Evening News of Columbia Broadcasting System (CBS) for two years, classifying views expressed on the air into one of three categories labeled "Viewpoint A," "Viewpoint B" and "Viewpoint C." Documentation of both the procedure used in the study and the resulting conclusions was extensive. The court of appeals affirmed the FCC ruling which found that the complainant failed to meet prima facie evidence requirements because it failed to focus on a particular, well-defined issue. The finding of the court was based on the grounds that: 1) American Security Council Education Foundation (ASCEF) had failed to sufficiently focus on a topic with which to evaluate the balance of news coverage; and 2) a contrary finding would impose an undue burden on the licensee.

The court stressed the importance of focusing on specific, well-defined issues. If this procedure were not enforced, the court warned, an impermissible burden on the licensee would result, thus producing a "chill" on broadcasting. The court explained that the study was insufficient because the separate issues comprising the general issue of "national security" in the ASCEF complaint had too tangential a relationship to each other.

Ironically, in a footnote the court acknowledged that "there is no doubt that most of the issues aggregated by ASCEF under the umbrella


73 Viewpoint A—the threat to U.S. security is more serious than the government perceives and the U.S. should increase national security.

Viewpoint B—perception of possible threat is essentially correct and the government should maintain the status quo.

Viewpoint C—the threat to U.S. security is less serious than perceived and government security efforts should be decreased.

Data indicated that Viewpoint A was underrepresented and Viewpoint C overrepresented. The court discussed at great length the methodological deficiencies of the study. Placement of views within the three categories was especially conducive to subjective bias.


75 Id. at 448. In reaching this decision the court reiterated that its scope of review was limited to determining the reasonableness and good faith of FCC action. Id. at 447.

76 Id. at 449. The court hastened to add that fairness complaints may be based on a general issue comprised of separately identifiable sub-issues. In this instance, however, the views expressed were divided into artificial categories which made the burden of the licensee's response too great. Id. at 449-50.

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of 'national security' are controversial issues of public importance."77 Despite this finding, the court dismissed the case without exploring the substantive issue of whether or not CBS had engaged in biased news reporting.

The court instead imposed an additional requirement on the complainant: "[T]he broadcaster must have a clear understanding of the issue," and must be able to "recognize the issue 'with precision and accuracy.'"78 It now appears as if the licensee's subjective knowledge is to be added to the list of procedural requirements for the complainant. In the final analysis, the court used a new balancing test, weighing the burden imposed on the licensee against the benefit derived to the public. This result seems very far removed from the initial goal of the fairness doctrine, which is to ensure that the public not be left uninformed and to increase diversity in the marketplace of ideas.

Whatever the deficiencies of the study may have been, the court's analysis failed to address the real issue: whether the fairness doctrine can ever be implemented in a manner that is fundamentally fair to the licensee, the complainant and the viewing public in general. Judge Bazelon in his concurring opinion poignantly stated his answer to that question:

This case vividly illustrates the substantial constitutional perils inherent in the fairness doctrine. Unlike the personal attack and political editorial components of the fairness doctrine upheld in Red Lion, applying the fairness doctrine to daily news coverage poses a serious threat to the independence of the broadcast press.

. . .
I heartily subscribe to the basic principle that underlies the fairness doctrine—"the paramount right of the public in a free society to be informed and to have presented to it for acceptance and rejection the different attitudes and viewpoints [on] vital and often controversial issues. . . ." I harbor grave doubts, however, that the fairness doctrine promotes this goal. Certainly, what benefits it may have generated in diversity have been undercut by the tendency of the fairness doctrine to suppress coverage of controversy altogether.79

77 Id. at 450 n.38.

78 Id. at 451 (quoting from the FCC ruling, 63 F.C.C.2d at 368). The appellate court rejected the notion that the FCC action on a complaint was prohibited whenever additional but unnecessary material was included. Instead, the FCC was to examine the core issue wherever discernible. Contra, Hunger in America, 20 F.C.C.2d 143 (1969).

79 Id. at 459 (concurring opinion). See National Broadcasting Co. v. FCC, 516 F.2d 1101, 1156, 1172-77 (D.C. Cir. 1974) (Bazelon, C.J., dissenting). In that case Judge Bazelon expressed concern regarding the constitutionality of the fairness doctrine.
Most troublesome in this regulatory scheme is the broad discretion given the FCC to apply the fairness doctrine. That agency's mandate to be ideologically neutral in areas so vital to fundamental freedoms of speech and press is endangered by the discrimination inherent in the system. The Commission is comprised of political appointees. In an effort to select persons with expertise in the area, those chosen often come from and ultimately return to the very industry which must be scrutinized. Vague standards disguised as broad discretion only compound the problem. Although the goal of the doctrine was to promote the widest possible diversity of information, the result has been to constrain "fairness" to the limited interpretation of the Commissioners. A closer examination of past FCC rulings will graphically illustrate this anomaly.

III. ELEMENTS OF THE FAIRNESS DOCTRINE

A. Controversial Issue

The first step in raising a fairness violation is to establish that a topic constitutes a controversial issue of public importance. While seemingly simplistic, interpretation of this element by the FCC has led to rather bizarre results. The Commission has repeatedly asserted that the essential basis of the fairness doctrine is that the American public must not be left uninformed. Yet, the Commission usually defers to the licensee's judgment to determine when an issue is controversial, the very same licensee whose original act or omission led to the complaint.

In determining whether an issue is controversial, the FCC claims to consider the following factors: 1) "the degree of attention paid to an issue by government officials, community leaders, and the media," and 2) "whether an issue is the subject of vigorous debate with substantial elements of the community in opposition to one another." In one case, a claim requesting opportunity for contrasting views on what the complainant considered "amoral . . . avant garde thinking about sexual relationships" on a television program was rejected by the Commission. The FCC determined that there was insufficient information to show that the "sexual aspects of relationships between the sexes constituted a controversial issue of public importance." Perhaps the claim might have failed on other grounds, such as, the licensee had met his fairness obligations in overall programming. But to deny that sexual relationships constitute a controversial issue in the 1960's and

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60 See note 17 supra.
62 Fairness Report, supra note 9, at 12.
63 Thomas J. Houser, 52 F.C.C.2d 477 (1975).
64 Id. at 478. See also Anti-Abortion Comm., 31 F.C.C.2d 492 (1971).
1970's era of "free love" seems contradictory to the factors upon which the FCC purports to rely.

Religion is another topic which the Commission has deemed non-controversial, even though the fairness doctrine is based upon society's right to hear and discuss all sides of important issues. In one case, the Commission deferred to the licensee's judgment that atheism did not constitute a controversial issue. The broadcast by the same station of church services, devotionals and prayers failed to alter the Commission's decision. The licensee's judgment was determined to be reasonable and in good faith and the Commission refused to intervene in these types of programming decisions. Commissioner Loevinger, in dissent, cautioned that "good faith alone is not and cannot be a criterion of fairness in action." He pointed out that this decision runs contrary to another FCC ruling in which the exclusive broadcasting of one religious viewpoint was not in the public interest. Loevinger criticized the Commission for only giving support to viewpoints which it shared. He emphasized that the FCC has no jurisdiction over religious matters. "The time is long past due for this Commission to recognize at least the Constitutional limits on its authority." In a similar, more recent case a viewer objected to prayer recital on "Romper Room," a program directed at pre-school children. The licensee rejected the claim and the FCC upheld that decision as reasonable and in good faith. In a strong dissent, Commissioner Johnson emphasized that the Commission has an obligation to remain neutral and is forbidden by the Constitution from participating in the establishment of religion. Citing recent Supreme Court rulings which prohibited

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56 Madalyn Murray, 5 R.R.2d 263 (1965). In a concurring opinion, Chairman William Henry emphasized the licensee's obligation to present opposing viewpoints on controversial issues, regardless of program format involved. Fairness obligations could conceivably arise from paid announcements, official speeches, editorials, or religious broadcasts. In this case, the Commissioner agreed that there was no showing that the religious broadcast contained a view on a controversial issue, even though he acknowledged that differences in belief was a sensitive area.

57 George E. Borst, 4 R.R.2d 697 (1965). See also Trinity Methodist Church v. Federal Radio Commission, 62 F.2d 850 (D.C. Cir. 1932), cert. denied, 288 U.S. 599 (1933) (the Commission denied application for renewal on the ground, inter alia, that the station had been used to attack the Catholic Church).

58 Madalyn Murray, 5 R.R.2d at 270.


60 Id. at 240. Johnson quoted the ruling in Torcaso v. Watkins, 367 U.S. 488, 495 (1961), that "neither a state nor the Federal Government . . . can constitutionally . . . impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in God, as against those religions founded on different beliefs." Id. See also Young Peoples' Ass'n for the Propagation of the Gospel, 6 F.C.C. 178 (1938) (the FCC refused a license to applicants seeking a religious station).
religious prayers in public schools,\textsuperscript{91} Johnson expressed concern that these pre-schoolers were particularly vulnerable. Nonetheless, it appears that the Commission remains willing to defer to the licensee's judgment even when that judgment abridges constitutional freedoms.

B. Public Importance

To pass the threshold test for a valid claim, not only must a claimant establish that a topic discussed on a broadcast is controversial; it must also appear to the licensee that the issue is of public importance. According to the Fairness Report,\textsuperscript{92} factors to consider are the degree of media coverage, the degree of attention the issue has received from governmental officials and other community leaders and, most importantly, the subjective evaluation of the impact that the issue is likely to have on the community at large.\textsuperscript{93} While a Kiwanis Club's proposal for location of a new public park and an investigation of college textbooks by a state committee were deemed controversial issues of public importance,\textsuperscript{94} the conflict in Northern Ireland\textsuperscript{95} and the Middle East crisis\textsuperscript{96} were not.

In one case, the Commission stressed that media coverage and governmental attention were subordinated to the subjective evaluation of impact on the community.\textsuperscript{97} The licensee had determined, and the Commission upheld, that a request by cable operators to counter negative publicity on the licensee's station did not constitute a controversial issue of public importance, even though response in the community had been substantial. This case illustrates another irony in the Commission's regulatory scheme: The licensee was given discretion to determine


\textsuperscript{92} See Fairness Report, supra note 9.

\textsuperscript{93} Id. at 11-12.

\textsuperscript{94} Mid-Florida Television Corp., 40 F.C.C. 620 (1964). The Commission chastised the licensee for failure to present contrasting viewpoints on these issues.

\textsuperscript{95} Los Angeles Irish Coalition for Fairness in the Media, 52 F.C.C.2d 681 (1975).

\textsuperscript{96} Hakki S. Tamimie, 42 F.C.C.2d 876 (1973). Claimant requested an opportunity to respond to the Israeli viewpoint expressed by Abba Eban on a program entitled the "Kup Show." The FCC dismissed the complaint for failure "to specify the particular aspect of the general topic which was discussed." Id. at 877.

\textsuperscript{97} Arkansas Cable Television, 58 F.C.C.2d 192, 196 (1976). The station announced that it would be unable to carry live coverage of a college football game as planned because cable operators were unwilling to honor a request not to broadcast the game. Claimants cited newspaper articles, numerous phone calls, and sixteen minutes of a ninety minute newscast as evidence that the issue was of public importance. The FCC upheld the licensee's judgment that the subject did not constitute a controversial issue of public importance.
whether an issue concerning a competing enterprise rose to the level of public importance and the standard applied was one of subjectivity.

In another complaint a viewer requested contrasting viewpoints to a "60 Minutes" report that presented the private guard industry in an unfavorable light. The FCC ruled that the evidence provided by the claimant was insufficient to establish public importance of the issue. In addition to other requirements to establish prima facie evidence, the complainant would have the further burden of substantiating the following: the degree of attention received by government officials and other community leaders; subjective evaluation of the impact of the issue on the community; and evidence that the issue was "the subject of vigorous debate with substantial elements of the community in opposition to one another." It would appear that if all of these elements were met, there would be no further need to employ the fairness doctrine to insure that the public be informed.

In case after case, complainants failed to meet their burden of proof. One viewer objected to a one hour interview program featuring two spokesmen opposed to a recent United Nations resolution which equated Zionism with racism. That individual was requesting that views in favor of the resolution be aired. The Commission, dismissing the action, explained that the viewer had failed to demonstrate "that there is any substantial ongoing debate in this country as to whether Zionism is a form of racism." The viewer had specified that the controversial issue was whether or not to support the resolution. The FCC, by its response, changed the issue to whether or not Zionism is racism, and then proceeded to fault the complainant for insufficient proof. Usually the FCC discounts the broadcaster's use of airtime as proof of the public importance of a particular topic. In this case, though, the licensee's decision to devote one full hour to the discussion of the U.N. resolution should have been an indicator of the issue's importance.

C. Overall Programming

In addition to establishing that an issue is controversial and of public importance, the viewer must submit proof to the Commission that balanced coverage has not appeared in overall programming. One Commissioner blasted this "procedural straight-jacket":

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89 Id. As evidence the viewer noted that eight states had enacted restrictive and protective legislation, the Law Enforcement Assistance Administration had adopted a model statute, and "60 Minutes" devoted a segment of its program to the issue. Id. at 108-09.
90 Id. at 108.
92 Id. at 182.
Besides being an unreasonable requirement with no legal basis, it is ludicrous for this Commission to sanction a procedural rule requiring members of the public to submit proof of something the licensee has not broadcast. Only the most myopic interpretation of our fairness guidelines would require complainants to set forth with precision what the licensee has not broadcast before we will consider the merits of the complaint.103

The Commission has continued to espouse its policy of encouraging "robust, wide-open debate on issues of public importance,"104 at the same time as it has increased the procedural requirements to bring complaints. For instance, one viewer objected to three separate infractions by a licensee: 1) violation of a sponsorship identification rule; 2) discriminatory practices toward certain candidates for public office; and 3) news censorship.105 The Commission rejected the first count because the announcement complained of was four years old and verification was impossible. Secondly, the FCC dismissed the claim of discriminatory practices toward certain political candidates. That charge was based upon facts collected when the complainant inspected the station's political file and discovered different rate charges for equal time segments, quantitative and qualitative differences in the content of political announcements and station personnel assistance to some candidates but not to others.106 Despite these apparent discrepancies, the FCC dismissed the claim because the complainant failed to prove that there were no other reasonable explanations for the differences. The burden of proof was on the complainant, even though the licensee would have been in a better position to explain. Lastly, the third portion of the complaint alleging news suppression was similarly rejected by the FCC. The viewer had submitted quotes by the station manager that he was directly ordered not to cover particular stories "because the wrong people would look bad."107 The FCC explained that the complainant had failed to show that the licensee's actions were based on private, rather than public interests. Once again, the complainant was saddled with an impossible burden of proof. This proof requirement also ran contrary to previous FCC rulings in which motive was determined irrelevant in the fulfillment of a licensee's obligation to the public.108 The question has become whether the complainant can establish sufficient evidence to re-

106 Id. at 1225-26.
107 Id. at 1226.
quire an inquiry, not whether the licensee was guilty of fairness violations.

The answer directly correlates with the FCC's agreement with the substance of the attack. The FCC approach to cases regarding women's rights illustrates this anomaly. Although a United States Court of Appeals has ruled that the Commission must hold an evidentiary hearing to resolve claims of fairness doctrine violations, the Commission avoided that result in one case by concluding that the petitioners' objection to a license renewal had not raised substantial and material questions of fact. The National Organization for Women (NOW) had insisted that the licensee's overall programming, including entertainment and commercials, had presented an "overwhelmingly one-dimensional portrayal of women as wives, mothers, homemakers and sex objects, valued primarily for their supportive services and their physical attractiveness." The FCC, while acknowledging that fairness violations could arise in the context of entertainment or commercial programming, upheld the licensee's determination that these programs contained no true discussion of that admittedly controversial issue. The Commission reasoned that the entertainment and commercial programming at issue bore only a "'tenuous relationship' to the role of women in society," and therefore did not constitute fairness violations by implication.

D. Licensee Discretion

The FCC reiterates that its function in handling fairness doctrine complaints is to determine whether a licensee has acted reasonably and in good faith. Broad discretion is accorded to the broadcaster to avoid excessive government interference with day-to-day journalistic decision-making. In fact, the Commission has expressly rejected the adoption of guidelines to aid licensees in their task. Enforcement of this par-

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111 Id. at 110.
112 Id. at 116. See also Females Opposed to Equality, 42 F.C.C.2d 434 (1973) (the Commission rejected the contention that presentation of the "Helen Reddy" show presented one side of a controversial issue of public importance, "Women's Lib." Mere allegation failed to establish discussion of the issue); see generally National Organization for Women v. FCC, 555 F.2d 1002 (D.C. Cir. 1977) (the court of appeals upheld the FCC rejection of a claim to deny a license renewal based upon unfair representation of women in licensee's employment practices).
113 In a parallel case, the Commission explained that "petitioners' descriptions of women's roles . . . are too insubstantial or ambiguous for us to determine that the mere playing of the role transmits any clear or singular message demonstrably linked to a controversial issue of public importance." National Broadcasting Co., 52 F.C.C.2d 273, 287 (1975), aff'd, 555 F.2d 1002 (D.C. Cir. 1977).
114 In National Broadcasting Co., 14 F.C.C.2d 713 (1968) the Commission commented, "we do not believe it appropriate for this agency to specify the par-
particularly vague standard has predictably led to incongruous results. For instance, an application for license renewal prompted the Commission to investigate claims of alleged fairness violations. The station had broadcast several in-house editorials in opposition to the enrollment of the first black student at the University of Mississippi. The licensee’s response revealed that no local programming of opposing viewpoints was aired. The licensee, however, considered a national address by President Kennedy carried by the station as sufficient to counter the locally-produced editorials. The Commission acknowledged these “substantial efforts to comply with the ‘fairness doctrine.’” In addition to balanced programming, the Commission questioned the licensee’s motive in appealing to listeners to assemble at the university on a particular day when the station knew that violence was predictable from past events. Ultimately, the FCC declined to “delve further into this sensitive area,” and granted the license renewal for the regular three-year period.

The discretion that the FCC accords the licensee applies also to program selection. According to the Commission, the licensee is required to meet fairness obligations only in its overall programming, rather than within a particular program. In the 1974 Fairness Report the Commission clarified its position:

We do not believe that it is either appropriate or feasible for a governmental agency to make decisions as to what is desirable in each situation. . . . Ordinarily there are a variety of spokesmen and formats which could reasonably be deemed appropriate. We believe that the public is best served by a system which allows broadcasters considerable discretion in selecting the manner of coverage, the appropriate spokesmen, and the techniques of production and presentation."

Id. at 716.


116 The Commission instructed the station to submit “the specific program from whatever source and of any nature, . . . dealing with the issue of racial integration.” Id. at 641 (emphasis added). This was done in spite of prior rulings which limited the burden of proof imposed on the licensee. See note 75 supra.

117 Id. at 642.

118 Id. at 643.

119 Id. at 642-43. Alternatively, the Commission could have granted only a probationary license or a one year renewal.

120 See Fairness Report, supra note 9, at 8. See also note 11 supra and accompanying text.

121 Id.

122 Id. at 16.
In contrast to this stated policy of nonintervention, the licensee's discretion is often circumvented by FCC action. For instance, the Commission stated that it would be "patently unreasonable for a licensee consistently to present one side [of an issue] in prime time and to relegate the contrasting viewpoints to periods outside prime time." In addition, local programming is preferred over national or network offerings to meet community needs, and the Commission frequently finds it necessary to scrutinize the length and frequency of the presentation.

E. The FCC's Role

The FCC has repeatedly disclaimed its role as factfinder. "The Commission is not the national arbiter of the truth.... [I]n this democracy, no Government agency can authenticate the news, or should try to do so." It is ironic that those oft quoted lines originated in the Commission's opinion letter for Hunger in America. In that case, CBS had produced and aired the documentary, "Hunger in America," which showed, in part, an infant alleged to be suffering from malnutrition who was being treated in a hospital. The complaint charged that the facts surrounding the baby's condition and subsequent death were falsely reported. The FCC launched an investigation of the allegations in an effort to ascertain: 1) the identity of the baby shown; 2) his condition at the time of filming; 3) cause of death; and 4) physical condition of the baby's parents. The Commission explained that the facts were needed to determine if the licensee had acted reasonably under the circumstances. The Commission examined hospital records and conducted interviews with the parents, doctors, nurses and hospital social workers. When findings resulted in contradictory evidence, they concluded the following: "The Commission cannot appropriately enter the quagmire of investigating the credibility of the newsman and the interviewed party in such a type case. Rather, the matter should be referred to the licensee for its own investigation and appropriate handling." Few cases exhibit

124 See William C. Zosel v. Station KGHL, 52 F.C.C.2d 644 (1975) (the FCC determined that the licensee had provided balanced coverage of future construction of generating plants).
126 Id. This case is often cited for the proposition that the FCC is not a factfinder, despite an extensive fact-finding investigation by the Commission.
127 The narration which accompanied the hospital scene was as follows: "Hunger is easy to recognize when it looks like this. This baby is dying of starvation. He was an American. Now he is dead." Id. at 143.
128 There was question whether the baby filmed was correctly identified. Id. at 145-46.
129 Id. at 151. See also WBBM/TV, 18 F.C.C.2d 124 (1969). A complaint alleged that the station, through the actions of its reporter, participated in arranging a
greater contradiction between FCC policy statements and their real-life actions. Further, it is precisely the licensee's good faith that is being challenged in fairness complaints. It appears ludicrous to rely on the licensee's good faith judgment to determine whether the licensee has exercised good faith in its past obligations.

While the Commission claims to defer to the licensee's judgment, the Commission may, within its regulatory scheme, arbitrarily choose to closely examine that licensee's decision and determine its reasonableness. Such was the case in *William C. Zosel v. Station KGHL.* A complaint was lodged against the licensee for imbalanced treatment of a utility company's plan to build coalburning generating plants. The FCC proceeded to evaluate the number of spot ads, length of ad time, hour of day for airing and dates of broadcast, and concluded that the licensee had acted reasonably. This action must be compared with the Commission's mandate to remain uninvolved in programming decisions.

Interference with program content is even more apparent in instances where the Commission, within its discretion, determines that the licensee has acted unreasonably. To illustrate, in *Patsy Mink v. Station WHAR,* the complaint alleged that the broadcaster had failed to air any programming on strip-mining, a controversial issue of particular interest to the local community. This charge was precipitated by the licensee's refusal to air a tape which represented a position against strip-mining position. In response to the Commission's inquiry, the licensee indicated that, while he had originated no local programming, he had carried news service stories and network public affairs programs on the issue. He argued that, absent precedent or agency rule to the contrary, the FCC could not require a particular licensee to cover any particular issue. "Any attempt by the government to designate the issues which must be discussed by a licensee 'enfleshes [the] . . . specter of censorship,' and would interfere with the licensee's discretion under the fairness doctrine to determine the nature and amount of coverage to be given to particular subject matter." The Commission, in response, emphasized its duty to ensure that the public be informed. This could

"pot party" at a university for the purpose of filming a special report. The FCC investigated to determine the factual question regarding the reporter's involvement. *Id.* at 125. The inquiry did not end with the finding that management had no knowledge of wrongdoing on the part of the reporter. The Commission held the licensee responsible. The FCC chastised management for failing to contact the participants directly for verification, despite the demand for anonymity. The FCC rejected the notion that such action would infringe on the licensee's freedom of speech and press. *Id.* at 138.

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120 52 F.C.C.2d 644 (1975).
122 *Id.* at 989.
133 *Id.* at 989-90.
best be accomplished, the FCC explained, "through a system in which the individual broadcaster exercises wide journalistic discretion." However, if an issue is "so critical" or of "such great public importance," the FCC may require appropriate licensee compliance. The Commission faulted the licensee for failure to provide any discussion of the local ramifications of the issue. Total reliance on outside programming was considered a derogation of the licensee's duty to inform the public, and the licensee was compelled to meet fairness obligations. Commissioner Robinson, in a concurring statement, expressed grave doubts as to the doctrine's continued viability: "[M]easuring the uncertain benefits of this law against its probable adverse effects on free speech, I believe we would be better off without it, or with some substitute access rule...." Robinson cautioned that the discretion exercised by the FCC in this "critical issues" concept was even more threatening than the discretion accorded the licensee. He concluded, "I shall not be surprised if, as a consequence of our action today, the Commission soon finds itself involved more deeply in program judgments than it presently desires or even foresees.

IV. COMMERCIALS

The arbitrariness of FCC action is particularly evident in application of the fairness doctrine to commercial advertisements. The first case to extend the doctrine to commercials involved cigarette advertisements. In WCBS-TV (Banzhaf), the FCC held, and the appellate court

134 Id. at 994.
135 In its letter to the licensee, the Commission cited Red Lion as authority for remedial action by the FCC under these circumstances. Id. at 994. This reliance may have been misplaced. While a quoted passage from Red Lion noted that the Commission was now powerless to deal with "timorous" licensees, the Court recognized remedial authority in Congress, not the FCC. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 393 (1969).
136 59 F.C.C.2d at 997.
137 Id. at 998.
138 Id.
139 Id. at 999.
141 WCBS-TV, 8 F.C.C.2d 381, upon reconsideration, 9 F.C.C.2d 921 (1967), aff'd sub nom., Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969). Also at issue was whether the FCC action was compatible with the Cigarette Labeling and Advertising Act of 1965, 15 U.S.C. §§ 1331-40 et seq. (1976). Upon reconsideration, Commissioner Loevinger, in concurrence, supported the majority decision based on social and moral grounds but questioned its procedural and substantive efficacy. 9 F.C.C.2d at 952 (concurring opinion).
affirmed, that the fairness doctrine could be applied to commercials that implicated a controversial public health issue. Since cigarettes raised crucial public health concerns, the FCC was within its statutory authority and had an obligation to regulate in the public interest. In the court's view, the licensee's judgment that the ads did not constitute a controversial issue of public importance was unreasonable under the circumstances. The broadcaster was required to provide a significant amount of time to responsible spokespersons with opposing views. Shortly thereafter, the FCC was faced with another claim of imbalanced coverage due to cigarette advertisements. Investigating a petition to revoke the broadcaster's license, the Commission recognized a disparity between the number of smoking and anti-smoking messages, but concluded that overall programming was not deficient. Even though the licensee was clearly violating established guidelines, the petition to revoke was denied. The licensee was merely requested to submit a statement of future policy.

Fearful that invocation of the fairness doctrine for product advertisements could become unwieldy, the Commission sought to limit ap-

Loevinger criticized that "[t]he 'public interest' is a judgment encompassing whatever the person making the judgment deems to be socially desirable." Id. at 953. Loevinger considered extension of the fairness doctrine to commercial advertising particularly troublesome since the 1959 amendment to the Communications Act of 1934, source of FCC authority to enforce the doctrine, referred expressly to "news," not advertising. Loevinger foresaw future difficulties with reverse application, i.e., the cigarette sponsor could demand air-time to respond to public service messages. Id. at 954. The court of appeals, in affirming the FCC ruling, limited the decision to these unique circumstances in which public health measures were at stake. 405 F.2d at 1085.

142 National Broadcasting Co., 16 F.C.C.2d 947 (1969). WNBC-TV, a network owned station, was the subject of the attack. In the Commission's investigation, it discovered an 8.1 to 1 ratio of cigarette advertisements to anti-smoking messages within a two week period.

143 Id. (Johnson, Comm'r, in dissent). Johnson indicated that the disparity was even greater when combined with two additional factors. First, most cigarette commercials were aired during prime time periods with larger numbers of young, susceptible children as viewers. Secondly, these ratios did not include "billboard" announcements in which commercial sponsors would add a short product promotion to the introduction of an entertainment show.

144 Id. Commissioner Johnson criticized the agency's disparate application of sanctions between small stations and large corporate licensees. Time brokerage, false logging, or an abuse of advertisers—such as double billing—may actually result in license revocation. But a network licensee that ignores a Commission ruling on the life and death issues surrounding a controversy of such importance that the Commission has now proposed to outlaw all cigarette advertising entirely , is merely sent an apologetic letter politely requesting the network to do better if it possibly can.

Id. at 949. Commissioner Johnson concluded that the issues raised warranted at least a hearing into the matter.

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plication to the "unique" circumstances of cigarette smoking. This attempt failed, however, when the court of appeals extended the doctrine to require the broadcast of union boycott messages when a licensee provided air time for the picketed store's advertisement. The court chastised the FCC for dismissing the charges without adequate investigation and for failure to follow its own policy statements.

Further attempts by the FCC to confine this ever-expanding doctrine were met with similar resistance. In 1971, the FCC refused to extend the Banzhaf doctrine to gasoline and automobile commercials. A complaint alleged that the broadcaster failed to carry a reasonable amount of information on air pollution resulting from fuel emissions to counter product advertisements. The court of appeals rejected the Commission's distinction between the hazards of cigarette smoking and those of air pollution as unreasonable and ordered that the fairness doctrine be invoked.

During the next few years, confusion over the proper application of the fairness doctrine to product advertisements mounted. Finally, in 1974, the Commission issued a policy statement that "in the future, we will apply the fairness doctrine only to those 'commercials' which are devoted in an obvious and meaningful way to the discussion of public issues." The FCC attempted to classify advertisements into three categories: editorial advertisements, product efficacy messages, and standard product commercials. The fairness doctrine would apply only to editorials that consisted of "direct and substantial commentary on important public issues," not to efficacy claims or standard product

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145 Retail Store Employees Local 880 v. FCC, 436 F.2d 248 (D.C. Cir. 1970).
146 The court noted that the Commission had announced in Banzhaf that frequency of spot ads should play a role in fairness determinations, yet the FCC failed to consider that factor in the instant case.
147 Friends of the Earth v. FCC, 449 F.2d 1164 (D.C. Cir. 1971).
148 Id. at 1169. That same year the FCC ruled that NBC had violated the fairness doctrine by refusing balanced programming on the controversial issue of the Alaskan pipeline which was promoted in gas line company messages. National Broadcasting Co., 30 F.C.C.2d 643 (1971).
150 Fairness Report, supra note 9, at 26.
151 Id. at 22.
152 Id. The Commission considered the Federal Trade Commission more appropriate to deal with claims of false advertising. See also Adoption of Standards Designed to Eliminate Deceptive Advertising from Television, 32 F.C.C.2d 360 (1971).
advertisements.\textsuperscript{153} Unfortunately, these new standards failed to solve the problem of how to determine when a message was an "editorial" containing "obvious and meaningful" discussion of a controversial issue.

Whether or not children's advertising would be within the purview of the new standards was tested in \textit{Council on Children, Media and Merchandising v. ABC and CBS.}\textsuperscript{154} The complaint charged the two networks with failing to cover the controversial issue relating to "children's advertising" in both implicit commercial messages directed at children and explicit news and public affairs programs directed at adults. The complainant urged the regulation of children's advertising on public interest grounds. Both networks denied that product commercials directed at children constituted a controversial issue of public importance.\textsuperscript{155} The FCC, in support of the networks' position, said that the proper focus "is not whether the advertisements in question implicitly address a controversial issue of public importance, but rather, whether such an issue is addressed ... in an obvious and meaningful way.\ldots\)"\textsuperscript{156} Despite express recognition of special concerns about programming directed toward children,\textsuperscript{157} the Commission refused to impose fairness obligations on the licensee. The FCC based its decision on past policy statements that the fairness doctrine would not apply to standard product commercials.\textsuperscript{158} The complaint failed to present a prima facie case that an advertisement addressed a controversial issue of public importance "in an obvious and meaningful way.\ldots\)"\textsuperscript{159}

The inability of the Commission to exercise reasoned, consistent rule-making authority is highlighted in \textit{Public Media Center v. FCC.}\textsuperscript{160} Initially, a complaint was filed with the Commission alleging that thirteen radio stations had violated their fairness doctrine obligations by failing to provide balanced programming on the issue of nuclear power. Each station had broadcast a series of sixty second announcements sponsored by a local utility company. Responses from a majority of the licensees denied

\textsuperscript{153} \textit{Id.} at 24-26.
\textsuperscript{154} 59 F.C.C.2d 448 (1976). \textit{See also} Action for Children's Television, Inc., 32 F.C.C.2d 412 (1971). In that case the FCC concluded that alleged deceptive advertising by two toy manufacturers in commercials directed at children did not constitute a controversial issue or raise fairness obligations.
\textsuperscript{156} 59 F.C.C.2d at 453 (quoting from Fairness Report, \textit{supra} note 9, at 26).
\textsuperscript{157} \textit{Id.} at 450. The Commission enumerated the steps it had taken in the past to regulate children's advertising, such as adoption of limitations on the amount of commercial time during children's programs, and requirement of separation of commercial matter from entertainment portions.
\textsuperscript{158} Fairness Report, \textit{supra} note 9, at 26.
\textsuperscript{159} 59 F.C.C.2d at 453.
\textsuperscript{160} 587 F.2d 1322 (D.C. Cir. 1978).
that the messages constituted a controversial issue of public importance, and the remaining stations asserted that they had provided balanced coverage. The Commission established that the issue was of a sufficiently controversial nature and proceeded to evaluate licensee compliance. Ultimately, the findings were that eight licensees had acted unreasonably in the exercise of their discretion, one was questionable and required further study, and four had met their obligation to inform the public. What remains troublesome about this outcome is the manner in which the Commission reached its conclusion.

The FCC asserted that "there is no mathematical formula or mechanical requirement for achieving fairness," and proceeded to examine the performance of each licensee. In one instance, a violation was found based on the frequency of presentation and a 3:1 ratio. However, in another instance, a licensee with a ratio of 60:27 had met his responsibility absent any frequency data. The court of appeals determined that the FCC findings were inconsistent and remanded for failure of the FCC to clearly and explicitly articulate its standards. Judge Tamm, writing for the court, expanded on the agency's continual lack of consistency:

A survey of Commission precedent reveals that the standard for determining what constitutes a "reasonable opportunity" has yet to be chiseled into stone. While its decisions are in accord with this court's general command that "the essential basis for any fairness doctrine . . . is that the American public must not be left uninformed," the Commission has used differing factors to define a reasonable opportunity. Its decisions have relied upon the amount of time allotted each point of view, the frequency with which points of view are aired, the repetitive, continuous nature of programming, the amount of programming broadcast during prime time, and on occasion, the Commission has acted without explicit reference to any of these factors. As then Commission Chairman Burch stated, "in the fairness area, the bond of theory and implementation has come unstuck and all the principal actors-licensees, public interest advocates, the Commission itself—are in limbo, left to fend for themselves."

Upon remand, the FCC, without further factual information, summarily reversed its original findings and held all of the licensees in violation of the fairness doctrine.
V. POLITICAL MESSAGES

A. Slanted News Coverage

The FCC has repeatedly emphasized that "[r]igging or slanting the news is a heinous act against the public interest—indeed, there is no act more harmful to the public's ability to handle its affairs." In view of the seriousness of the offense, one would assume that this act would carry very severe penalties. This, however, was not the result reached in National Broadcasting Co. In that case the Commission had become aware of a conflict of interest which resulted in biased reporting by Chet Huntley, a nationally known and well-respected newscaster. On several occasions Huntley had attacked recently enacted meat inspection legislation when, in fact, he owned a cattle ranch and had a significant interest in a cattle-feeding firm. In its ruling, the Commission emphasized the need for network's special diligence to ensure that journalistic decisions are not influenced by outside interests. The FCC criticized NBC for inadequate handling of the matter, since NBC knew or should have known of Huntley's involvement. NBC's approval of the anti-inspection editorials constituted "a failure to exercise reasonable diligence or to fulfill the public interest requirements in this important area." Despite this finding and the seriousness of the offense, in effect


166 14 F.C.C.2d 713 (1968). See also James Waller, 57 F.C.C.2d 1281 (1976). Complainant alleged bias in pro-gun control programming, which included an editorial comment by Howard K. Smith. The FCC rejected the claim on three alternative grounds. First, where the complaint alleged bias in episodes of two different series, the FCC dismissed for failure to detail specific situations. Next, the complaint cited omissions in particular programs, but the FCC attributed that to licensee discretion. Finally, the Commission acknowledged that the editorial by Howard K. Smith raised fairness obligations, but the complainant had failed to show that these were not met in overall programming. Id. at 1282-84.

167 Huntley was executive vice-president and a director of Group 21 who sold most of its products to Spencer Packing who in turn sold to Edmund Mayer, Inc. The latter corporation came under federal meat inspection with the Wholesome Meat Act of 1967, the very same legislation that Huntley had attacked. In addition, two of the directors of Edmund Mayer, Inc. were directors and shareholders in Group 21, and one was president.

168 14 F.C.C.2d at 715-16. It is the duty of the licensee to be aware of conflicts of interest and take whatever remedial action is necessary. The Commission suggested that if conflict is minimal or insignificant, no action would be necessary; if it were great, substitution of another reporter might be appropriate. In some circumstances the licensee might choose to allow the reporter to continue but divulge the nature of the conflict to the audience. See Cromwell-Collier Broadcasting Corp., 14 F.C.C.2d 358 (1968). See also Gross Telecasting, Inc., 14 F.C.C.2d 239 (1968).

169 14 F.C.C.2d at 717.
no action was taken against the network. NBC was merely requested to submit a letter with proposed procedure revisions. In dissent, Commissioner Johnson stressed the seriousness of management's complicity and warned of "abuse by conglomerate corporate licensees generally." He cautioned that this type of abuse manifested itself in covert, subtle activity difficult to detect but destructive to the notion of unbiased reporting. In view of the economic corporate structure of the media, he cautioned, there is danger that reporting of events, such as elections, the Vietnam war, or the space program, may be influenced by the network's business concerns rather than its commitment to serve the public interest.

One of the issues raised by Johnson, namely opposition to the Vietnam war, has met with considerable disfavor by the FCC and the courts. For instance, in 1970, at the height of the war, several separate complaints were lodged with the FCC for licensee failure to allow response time to armed forces recruitment messages in order to present information on military deferment. One viewer unsuccessfully argued that due to the controversy surrounding the war, licensees had an obligation to allow presentation of alternatives for discharging one's military obligation. He urged application of the Banzhaf doctrine to the recruit-

170 Id. at 720. He continued:

What appears to be self-interest is often camouflaged by "news judgment." How would one "prove" that RCA/NBC gives more coverage to space shots and NASA news (or the Vietnam war) than it would if it were not a major space and defense contractor? (Defense business was 18 percent of RCA's total sales in 1967). How does one investigate any possible relationship between NBC's coverage of foreign governments and RCA's corporate relations with those governments? (In 1967 alone, RCA established major new investments in Australia, Canada, Italy, Mexico, Puerto Rico, Taiwan, and the United Kingdom.) Even in this case, RCA/NBC asserts, "we . . . will continue to cover news and views on this issue [mec], based on our reasonable, good faith judgment in the particular circumstances." More difficult yet, how does one even know of all the economic interests of a conglomerate corporation like RCA and all its employees?

171 Id. at 732-33. Johnson criticized the Commissioner's failure to impose stronger sanctions in light of the seriousness of the offense and possible implications.

172 See generally Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (the Supreme Court affirmed an FCC ruling that the general policy of a licensee to refuse political "editorial" messages did not violate the Communications Act or the first amendment); Alan Neckritz, 24 F.C.C.2d 175 (1970), aff'd, 446 F.2d 501 (9th Cir. 1971); San Francisco Women For Peace, 24 F.C.C.2d 156 (1970).

173 Alan Neckritz, 24 F.C.C.2d at 175.

174 Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969). The court in Banzhaf applied the fairness doctrine to commercial cigarette
ment ads. This was not persuasive to the Commission, which upheld the licensee's judgment that armed forces recruitment messages did not raise the issue of the war in Vietnam.\textsuperscript{175}

In a similar case\textsuperscript{176} the result was the same. The Commission found that the messages merely asserted the undisputed right of the army to recruit members, similar to recruitment messages for policemen or teachers. Commissioner Johnson, in dissent, ridiculed the majority's reasoning because "it merely illustrates the principle that determined men, if they try hard enough, can define any problem out of existence."\textsuperscript{177} He considered it ludicrous to propose that the subjects, recruitment and anti-draft, were not hopelessly enmeshed. The court of appeals, however, resolved the controversy over recruitment messages in accordance with the FCC's majority position. Reviewing a case with similar facts,\textsuperscript{178} the court sustained the FCC's determination. The licensee had acted reasonably when he denied existence of a controversial issue of public importance through recruitment messages. The court stressed, in dicta, that the essential basis of the fairness doctrine is that "the American public must not be left uninformed."\textsuperscript{179} Since the controversy over the war was so extensive, the court explained, the absence of those views seeking exposure would not leave the public uninformed.\textsuperscript{180}

Commission support of biased treatment of the war issue was most evident in \textit{Student Assoc. of the St. Univ. of N.Y.}.\textsuperscript{181} The complaint alleged improper broadcast censorship by ABC. The network had televised a college football game, but during an anti-war half-time show cameras were focused away from the field.\textsuperscript{182} Prior to the game, ABC had announced its decision to black-out the show because of its "definite

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\item \textsuperscript{175} Contra, car advertisements did raise the issue of air pollution. \textit{See} notes 147-48 \textit{supra} and accompanying text.
\item \textsuperscript{176} San Francisco Women For Peace, 24 F.C.C.2d 156 (1970).
\item \textsuperscript{177} \textit{Id.} at 163.
\item \textsuperscript{178} Green v. FCC, 447 F.2d 323 (D.C. Cir. 1971).
\item \textsuperscript{179} \textit{Id.} at 329.
\item \textsuperscript{180} This reasoning is difficult to reconcile with the procedural requirement of establishing public importance before an issue will be considered. \textit{See} notes 92-100 \textit{supra} and accompanying text.
\item \textsuperscript{181} 40 F.C.C.2d 510 (1973).
\item \textsuperscript{182} \textit{Id.} at 510. Prior to the broadcast, an ABC sports producer had been informed of the intended program by its initiators and according to complainants, "reacted by stressing ABC's concern that the program not alienate 'potential customers' of sponsors that were buying commercial time during the telecast." \textit{Id.}
political implications." 163 Then, less than one month later during the Army-Navy game, ABC telecast the half-time show which attempted to rally support for P.O.W.'s, complete with West Point cadets and other military personnel. In response to the complaint, ABC management attempted to distinguish the two shows by explaining that the latter had no political viewpoint. In addition, the licensee claimed that the decision was within its discretion. The FCC recognized that ABC would be shirking its duty if it "arbitrarily and discriminately refused to broadcast valid ideas which are controversial." 164 In this case, however, it was merely refusing this particular program, a refusal within its discretion.

B. Political Implications

Nowhere is arbitrary application of the fairness doctrine more dangerous than in the political arena. 165 In Network Coverage of the Democratic Nat'l Convention, 166 the Commission had received numerous complaints against all three networks involving the coverage of the Democratic National Convention of 1968. The charges ranged from failure to give views of local city government officials regarding alleged police brutality, to failure to depict violence initiated by anti-war demonstrators. Also included were claims of excessive emphasis on floor activity at the convention to the detriment of podium coverage, and claims of deliberate staging of violence connected with the anti-war demonstrations. All three networks (ABC, CBS, and NBC) responded that although there were difficult circumstances and technological limitations for coverage outside the Convention hall, they had provided a fair and balanced presentation of the issues. CBS also protested the Commission's request for licensee comments as being "in direct contravention to strong and frequently eloquent disavowels by the Commission of supervisory concern over the content of particular programs." 167 Further, the network urged that section 326 of the Communications Act "should be regarded by the Commission as giving it an affirmative obligation to support the independence of broadcast news." 168 In a similar protest, NBC argued:

163 Id. at 510-11.
164 Id. at 516.
165 Justice Douglas observed that "[o]ver and over again, attempts have been made to use the Commission as a political weapon against the opposition, whether to the left or to the right." Columbia Broadcasting Sys. Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 167 (1973) (concurring opinion). He warned that in view of first amendment restrictions, Commission action "must be carefully confined lest broadcasting—now our most powerful media—be used to subdue the minorities or help produce a Nation of people who walk submissively to the executive's notions of the public good." Id. at 167.
167 Id. at 652-53.
168 Id. at 653.
[F]ew spectres can be more frightening to a person concerned with the vitality of a free press than the vision of a television cameraman turning his camera to one aspect of a public event rather than another because of concern that a governmental agency might want him to do so, or fear of Government sanction if he did not.\textsuperscript{189}

In response, the Commission reviewed prevailing FCC policy. The FCC characterized the fairness, equal opportunity, and personal attack doctrines as exceptions to the general rule that the FCC does not "review the broadcaster's news judgment, the quality of his news and public affairs reporting, or his taste."\textsuperscript{190} The Commission further explained that the fairness doctrine did not "in any way prescribe the presentation of a news item or viewpoint nor does it specify any particular manner of presentation."\textsuperscript{191} Ultimately, the Commission rejected all of the claims because there was insufficient evidence to prove that the networks had not provided balanced coverage of the issues. In answer to allegations of "staged" incidents by certain reporters, the Commission responded that "[w]e shall continue our consideration of the above matters."\textsuperscript{192} This appears to be another example of the Commission's "raised eyebrow" approach to regulation. Even though many of the complaints raise serious political implications, the Commission remains helpless to remedy the inherent propensity toward political manipulation of this fragile doctrine.

The Commission's espoused policy of nonintervention into programming decisions must be kept in mind when examining another case, Committee for the Fair Broadcasting of Controversial Issues.\textsuperscript{193} That complainant objected to five Presidential messages broadcast live in their entirety during prime time. The messages presented the administration's views on Southeast Asia. The Commission noted that this was not a question of equal opportunity since the President was not a political candidate, nor was there a question that the networks had not

\textsuperscript{189} Id. at 654.

\textsuperscript{190} Id. In view of the excessive number of complaints that arise out of these three mentioned doctrines it appears as if the exceptions are outnumbering the general rule.

\textsuperscript{191} Id. at 655 (emphasis added).

\textsuperscript{192} Id. at 659. The licensees were called upon to make further inquiry and submit a report.

\textsuperscript{193} 25 F.C.C.2d 283 (1970), rev'd on other grounds sub nom., CBS v. FCC, 454 F.2d 1018 (D.C. Cir. 1971). See also Henry M. Buchanan, 42 F.C.C.2d 430 (1973). The FCC rejected a personal attack claim lodged by a brother of a Presidential aide for a "CBS Evening News" report. The report allegedly associated the complainant with the Watergate scandal, an admittedly controversial issue of public importance. The Commission rejected the claim because "mention of a specific person or group does not itself constitute a controversial issue of public importance unless that person or group is controversial." Id. at 432. Query how any person becomes controversial without association with a controversial issue?
presented contrasting viewpoints in overall programming. Rather, the Commission considered the unique circumstances of an "outstanding spokesman" on one side of an issue, and determined that licensee action would be patently unreasonable unless at least one more uninterrupted opportunity by an appropriate spokesman to respond was provided. This result is completely contrary to the Commission's statement in Democratic Nat'l Convention that the fairness doctrine does not "in any way prescribe the presentation of a news item or viewpoint nor does it specify any particular manner of presentation."

These two cases, Democratic Nat'l Convention and Fair Broadcasting, clearly illustrate the dichotomy of the fairness doctrine as applied. If strictly enforced, impermissible incursion on the free speech and press rights of the licensee results. If not strictly enforced, the doctrine becomes subject to manipulation to support the views of those in control of the media, and the public is mistakenly told that fairness obligations are being met.

VI. SOLUTION: REPEAL

Although the Court in Red Lion upheld the constitutionality of the fairness doctrine on its face, subsequent application could not pass direct constitutional attack. While in theory the fairness doctrine presents an idealistic goal of our democracy, in practice it is fraught with infringement of constitutionally protected rights and should be revoked. Continuation of such an ineffectual and even dangerous doctrine only erodes the framework of our democratic system. The FCC should not insist that the doctrine protects the viewers' right of access to information, or the broadcasters' right to freedom of speech and press, when the opposite is true.196

194 25 F.C.C.2d at 297. Contra, Democratic Nat'l Comm. v. FCC, 481 F.2d 543 (D.C. Cir. 1973) (court of appeals rejected a similar request and supported the FCC's ruling that there was no automatic right of reply to Presidential messages). In Ad Hoc Committee to Defeat the Transportation Bond Issue, 32 F.C.C.2d 458 (1970), the Commission rejected a complaint that alleged qualitative and quantitative differences in the licensee's coverage of a political issue. The FCC summarily dismissed the complainant's plea to examine disparate impact of the messages and concluded that the licensee had acted reasonably. Id. at 459. See generally, Robin Ficker, 65 F.C.C.2d 657 (1977) (coverage of an independent candidate for the U.S. House of Representatives was reasonable in view of the licensee's judgment that he was not a leading candidate); Socialist Workers 1968 Nat'l Campaign Comm., 14 F.C.C.2d 858 (1968) (the FCC held that the appearance of former Governor George Wallace on the program "NET Journal" was exempt from equal time requirements because the program constituted a bona fide news interview).

195 See note 191 supra and accompanying text.

196 Most recently, even the FCC has recommended to Congress that the fairness doctrine be repealed, along with the equal time provisions. FCC Wants To
The original goal of the fairness doctrine—to ensure that viewers and listeners are fully and fairly informed on all issues of public importance—and the rationale behind initial regulation—airwaves as a scarce resource and diversity in the marketplace of ideas—no longer require government intervention. By the time sufficient public importance can be established to qualify an issue for fairness doctrine protection, most of the citizenry have already formulated their personal viewpoints on

_Dump Equal Time Rule_, The Plain Dealer, Sept. 18, 1981, 14-A, Col. 1. This is the first time in the forty-seven history of the agency that it has expressly unequivocally requested the repeal of those statutory requirements. Mark S. Fowler, Chairman of the Federal Communications Commission, stated:

Today, we strike a blow in the cause of freedom. The Constitution specifically chose the press to improve our free society and keep it free. The so-called Fairness Doctrine permits this Commission to act as editor and censor of material broadcast to the people. Someone must edit. Not all material can be broadcast. I would rather have the editor make these choices than the government. Some may abuse their position. But as the Supreme Court stated in 1973 in the _CBS v. D.N.C._ case: "Calculated risks of abuse are taken in order to preserve higher values."

The people, in any event, expect the press to present all sides of controversial issues, and they judge the press accordingly. We must be confident in the people's ability and resourcefulness to make the widest choice possible. President Reagan has said, "In order for the people to respect the government, the government must first respect the people."

We make that choice today. Our system of government, of the people, by the people, and for the people, cannot flourish and improve if governmental regulation or potential regulation of free speech and the press exists, even vestigially.

This is the time to act in the name of free speech. This is the time to strike down government's role in determining what the people shall hear and see.


He further emphasized that "[t]he scarcity-of-media-access argument is a bankrupt one. It is about time that media got the same rights to select material as newspapers, book publishers and others." _F.C.C. Asks End to Fairness, Equal Time Rules_, The New York Times, Friday, Sept. 18, 1981, 13, Col. 1, at col. 2 A spokesperson for a special interest group criticized the legislative proposals:

It's official now. The F.C.C. has become the lobbying arm of the broadcasting industry. The Supreme Court has held in case after case that the fairness doctrine protects the First Amendment rights of the public. Fortunately, we don't think Congress is ready to turn the Constitution on its head.

_Id. at col. 3. In the past, attempts to repeal the fairness doctrine have been unsuccessful. See, e.g., S.2, 94th Cong., 1st Sess., 121 CONG. REC. 211 (1975); S.22, 95th Cong., 1st Sess., 123 CONG. REC. 539 (1977); S.622, 96th Cong., 1st Sess., 125 CONG. REC. S 2525 (Mar. 2, 1979). None of these prior bills, however, had FCC's outright endorsement. See generally Note, The Future of Content Regulation in Broadcasting, 69 CALIF. L. REV. 555 (1981), for a discussion of the ramifications of litigation challenging content selection in the event that the fairness doctrine is repealed._
the subject. Thus, the need for a forum to air diverse views to inform
the public is eliminated.

In addition, the "scarce resource" justification for regulation of broad-
casters, as compared to the nonintervention policy toward the print
media, is no longer valid. Technological advancements, both in the elec-
tronic media and in communications in general, have dramatically
enhanced the public's opportunity to be well informed. In most
localities, the number of outlets for electronic broadcasts, including
radio, television and especially cable, far exceeds the number of daily
newspapers. Yet regulation that has been rejected as unconstitutional
for print has been permitted against broadcast journalists. Such ar-
bitrary application of constitutional protection should be eliminated. As
Justice Douglas cautioned in the past, "TV and radio, as well as the
more conventional methods for disseminating news, are all included in
the concept of 'press' as used in the First Amendment and therefore are
entitled to live under the laissez-faire regime which the First Amend-
ment sanctions." 197

VII. CONCLUSION

The free flow of information is a cornerstone of our democracy,
achieved through freedom of speech and press. When our founding
fathers conceived the first amendment, they envisioned dissemination of
information without government interference. At that time, though, the
print media constituted the public's primary source of news. Today,
broadcasters disseminate information to an overwhelming majority of
our citizens. These citizens should be secure in the knowledge that the
preparation of the news they receive is free from government control.
As long as broadcasters make decisions with one eye toward federal
regulators, broadcast journalists will never be members of the free
press.

LORETTA T. MENKES

197 Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94,
161 (1973) (concurring opinion).