Kay Bailey Hutchison, Chairman
Bill Hughes, Staff Director

347 Russell Senate Office Building
Washington, DC 20510
202-224-2946
http://rpc.senate.gov

SENATE REPUBLICAN POLICY COMMITTEE

July 24, 2007

The Fairness Doctrine: Unfair, Outdated, and Incoherent

Executive Summary

- The Federal Communications Commission (FCC) regulates broadcast airwaves consistent with the "public interest."[1]
- The FCC promulgated the "Fairness Doctrine" in 1949 to ensure that "contrasting viewpoints" would be presented on radio and television.
- In 1987, the FCC repealed the doctrine after determining it failed to serve the public interest because it actually resulted in broadcasters limiting coverage of controversial issues of public importance.
- Recently, Democrats have advocated that the doctrine should be reinstated. They argue that broadcasters, including talk radio, should present both sides of any issue because they use the public airwaves.
- This argument fails to take into account several considerations:

  (1) how the fairness doctrine worked in practice -- it resulted in less, not more, broadcasting content of public interest;

  (2) the dynamic growth in the number of radio and TV stations and the development of newer broadcast mediums such as cable and satellite TV and satellite radio;

  (3) the interchangeability of different mediums, such as radio and the internet, as public sources of information; and

  (4) broadcast content is driven primarily by consumer demand.
- The Fairness Doctrine should not be reinstated.

[1] The Communications Act of 1934, Pub. L. 73-416, 48 Stat. 1064, Sections 307 and 309.

Introduction

Rise and Fall of the "Fairness" Doctrine

Congress created the Federal Radio Commission, and later the Federal Communications Commission (FCC),[2] to oversee the allocation of radio spectrum, issue licenses, and regulate the airwaves as the "public interest" requires. In furtherance of its public interest mandate, the FCC published written guidelines in 1949 to regulate broadcast content. These guidelines, known as the "fairness doctrine",[3] required licensees "(1) to provide coverage of vitally important controversial issues of interest in the community… and (2) to afford a reasonable opportunity for the presentation of contrasting viewpoints on any controversial issue…."[4] Under the fairness doctrine, licensees had the obligation to cover issues of public interest and in a manner that presented both sides.

In the early 1980's, the FCC, led by Chairman Mark Fowler, a Reagan appointee, began a review of the impact of the fairness doctrine on speech and public debate.[5] The FCC's 1985 report concluded that the doctrine did not serve the public interest, in part, because it led broadcasters to restrict coverage of issues of public interest. The FCC stated that "as a result of the asymmetry…the fairness doctrine…encourages broadcasters to air only the minimal amount of controversial issue programming…. Therefore [it] often discourages…controversial issue programming."[6] While the fairness doctrine imposed an absolute demand on licensees to carry public interest content, the "contrasting viewpoint" requirement had a chilling effect which caused broadcasters to shy away from such content. As the FCC concluded, the two prongs of the fairness doctrine operated in direct conflict with each other. After reaching this conclusion, the FCC voted unanimously to repeal the doctrine. This repeal was challenged in federal court and upheld; the court determined that the fairness doctrine was not mandated by statute and that the FCC's decision was not arbitrary and capricious.[7]

Congressional Response

In response to the repeal of the fairness doctrine, Congress passed the "Fairness in Broadcasting Act of 1987" to reinstate the doctrine.[8] This legislation passed the Senate on April 21, 1987 by a vote of 59-31 and passed the House of Representatives by voice vote on June 3, 1987. President Reagan vetoed the bill on June 22, 1987. On June 23, 1987, President Reagan's veto message was referred to the Senate Commerce Committee by a vote of 53-45. Congress adjourned before taking any further action.

---

[2] The Radio Act of 1927, Pub. L. 69-632, February 23, 1927.
[3] FCC Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949).
[4] Federal Respondent's Brief in Opposition, *Syracuse Peace Council v. Federal Communications Commission*, before the United States Supreme Court (Docket 89-312), John G. Roberts, Jr., Acting Solicitor General, on behalf of Respondent. Available at: http://www.usdoj.gov/osg/briefs/1989/sg890390.txt.
[5] Federal Communications Commission Report: General Fairness Doctrine Obligations of Broadcast Licensees, FCC 85-459. Federal Register, Vol. 50, No. 169, Page 35418 (August 30, 1985). 102 F.C.C.2d 143 (1985).
[6] FCC Report (1985).
[7] *Syracuse Peace Council v. Federal Communications Commission*, 867 F.2d 654 at 656 (DC Cir. 1989).
[8] Fairness in Broadcasting Act of 1987, S. 742, was sponsored by Senator Ernest Hollings.

The Fairness Doctrine in the 110th Congress

Why the Fairness Doctrine is an Issue

A senior advisor to House Speaker Pelosi has been quoted as saying, "conservative radio is a huge threat and political advantage for Republicans and we have to find a way to limit it."[9] Air America, a radio network with self-described "progressive" hosts, filed for bankruptcy in October 2006 after two-and-a-half years of broadcasting.[10] Since then, Members of Congress expressed support for reinstating the fairness doctrine. Speaker Pelosi is reported to have assured her caucus that she would "aggressively pursue" reinstatement of the doctrine.[11] Democratic leadership in the Senate has echoed this sentiment; Senator Durbin stated, for example that "it's time to reinstitute the Fairness Doctrine…."[12] Despite these comments, the House of Representatives, on June 28, 2007, voted 309 to 115 to prohibit the FCC from using federal funds to reinstate the fairness doctrine.[13]

The Fairness Doctrine is Bad Public Policy

Supporters of the fairness doctrine ignore how the marketplace operates in practice and also ignore the diversity of information sources that modern technology offers. The fairness doctrine would subject certain broadcast media to content-based regulation at the hands of government bureaucrats. This would undermine, rather than enhance, public education and debate.

Public Airwaves: No Justification for Censorship

The FCC was created to regulate the use of broadcast spectrum. The FCC promulgated the fairness doctrine and later the Supreme Court upheld the doctrine in *Red Lion Broadcasting*[14] in part because broadcast spectrum was a scarce public resource. Those who support reinstating the fairness doctrine often cite the fact that the airwaves belong to the public as a rationale for censorship. The implication of this assertion is that public ownership justifies the imposition of content-based censorship on licensees.

This "public ownership" argument certainly supports the "public interest" requirement of current law but the reinstatement of the fairness doctrine is not a logical policy conclusion based on that fact. In fact, the FCC repealed the fairness doctrine, in no small part because it found that the doctrine *undermined* the public interest. The fairness doctrine promotes less, not more,

---

[9] "Her Royal Fairness," *The American Spectator*, May 14, 2007. See also The Center for American Progress, "Structural Imbalance of Political Talk Radio."
[10] Byron York, "An Unfair Doctrine," *National Review*, July 30, 2007.
[11] *The American Spectator*.
[12] Alexander Bolton, "GOP Preps For Talk Radio Confrontation," *The Hill*, June 27, 2007.
[13] Roll Call Vote 599. June 28, 2007, *Congressional Record,* H7375. Pence introduced separate legislation on June 28, 2007 (H.R. 2905) to prevent the FCC from reinstating the fairness doctrine. This legislation has 111 cosponsors.
[14] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

public interest programming and therefore stands in direct contrast to the suggestion that the doctrine would have the effect of creating an "educated electorate."[15] As a result, opposition to the doctrine is the position that will best protect the public interest because that is the only way to truly foster and encourage public debate and education.

In Practice the Fairness Doctrine was used to Frustrate Political Opposition

In practice, the fairness doctrine was regularly used for political purposes. The FCC's 1985 report noted that the doctrine put government in the intrusive and constitutionally disfavored role of "interjecting the Commission into the editorial decision making process."[16] Placing regulators in this role created the opportunity for partisan abuse.[17] The history of this partisan abuse is well documented. For example, in the mid-1960s, an effort was made to systematically identify "right-wing broadcasting…hostile to [President Kennedy] and his programs" and harass them with letters and telephone calls demanding equal time; Bill Ruder, Assistant Secretary of Commerce in the Kennedy administration, described the strategy as follows: "Our massive strategy was to use the Fairness Doctrine to challenge and harass right-wing broadcasters and hope that the challenges would be so costly to them that they would be inhibited and decide it was too expensive to continue."[18] The history of the political abuse of the fairness doctrine is not limited to Democrats. President Nixon directed his staff to use the fairness doctrine to regularly combat what he considered unfair news coverage concerning Vietnam in 1969.[19] Regardless of party, a reinstatement of the fairness doctrine has the potential to place bureaucrats and political appointees in a position to squelch free speech. The threat of politically motivated censorship is inconsistent with America's deeply held right to free speech.

Scarcity: An Outdated Rationale

From 1949 to 2007: How Availability of Radio and Television has Changed

In 1949, the FCC implemented the fairness doctrine in part because the public airwaves were scarce and had limited content. At the time, AM radio was the broadcast medium of choice; FM radio had just begun broadcasting on a limited basis in 1948. Television was a relatively new technology. Access to public interest content was scarce, because broadcasting itself was scarce.

Scarcity in no way reflects the reality of media availability in America today. Although the landscape has undeniably expanded in just the last few years, the FCC recognized in 1985 that the period from 1974 to 1985 saw "explosive growth in various communications technologies."[20] The 1985 FCC report mentions growth in a variety of technologies, but emphasizes the expansion in radio, TV, and cable availability. In over-the-air broadcasting, for

---

[15] Senator Dick Durbin, *Congressional Record*, July 13, 2007, S9193. Senator Durbin stated, "I would ask the Senator [Coleman] in the interest of an educated electorate, whether he thinks Americans should hear both sides of the story, a kind of fair and balanced approach when it comes to information?"
[16] FCC 1985 Report, "Table of Contents," paragraph 72.
[17] FCC 1985 Report, para. 72 and 74. See also 867 F.2d 654, at 656.
[18] Fred W. Friendly, *The Good Guys, the Bad Guys and the First Amendment,* 1975, pp. 33-35 and 39.
[19] See also Jesse Walker, "Tuning Out Free Speech," *The American Conservative*, April 23, 2007.
[20] FCC Report (1985), paragraph 82.

example, the FCC noted a 48-percent increase in radio stations since 1969.[21] The number of television stations grew by 28 percent from 1974 to 1985.[22] By 1985, the number of cable systems in operation had increased by 111 percent since 1974, by 195 percent since the 1969 *Red Lion* decision, and by an astonishing 975 percent since the inception of the fairness doctrine.[23]

The proliferation of all types of media noted in 1985, almost 22 years ago, continues today. Broadcast radio stations number almost 14,000 today, which is twice as many as were available in 1970[24] and 3,000 more than in 1990.[25] FM educational stations total 2,817, twice as many as in 1990.[26] Because satellite radio did not exist in 1987, there were no subscribers. Today, subscribers total about 13.6 million.[27] Sirius transmits more than 131 channels, while XM offers more than 170 channels to its subscribers.[28]

For cable television, there were 61 cable networks in 1987, including regional programming services.[29] Cable TV networks in 2005 numbered 531, an increase of about 870 percent.[30] Nearly 86 percent of American households subscribe to cable or satellite TV, with each household receiving an average of 100 channels out of nearly 500 channels offered to them.[31] Like satellite radio, satellite TV was not commercially available in 1987. According to the December 31, 2006 Securities and Exchange Commission reports filed by DirecTV and EchoStar Communications, DirecTV had approximately 16 million subscribers in the United States and the DISH network had 13 million subscribers. Predictably, the combined effect of increases in broadcast and cable TV penetration has led to a dramatic increase in the average number of viewable channels in every household. According to Nielsen, the average household received 18.8 channels in 1985. By 2006, the average increased by 554 percent to 104.2 channels.[32]

The evolution of technology since the fairness doctrine was implemented is dramatic. The development of radio and television technology has created many more outlets from which the public can receive public interest content. The radio and television markets have expanded so greatly, and are now so diverse, that the market is able to provide diverse media inputs free from unnecessary regulation. As a result, technology ensures that the fairness doctrine is a 1940's regulation, which has no place in 21st century society.

---

[21] FCC Report (1985), paragraph 94.
[22] FCC Report (1985), paragraph 98.
[23] FCC Report (1985), paragraph 106.
[24] Adam D. Thierer, "The Media Cornucopia," *City Journal*, Spring 2007.
[25] FCC Broadcast Station Totals, released January 7, 1991 and January 26, 2007. See http://www.fcc.gov/mb/audio.
[26] FCC Broadcast Station Totals, released January 7, 1991 and January 26, 2007. See http://www.fcc.gov/mb/audio.
[27] "The State of the News Media 2007," An Annual Report on American Journalism, Chapter X, "Talk Radio."
[28] Plunkett Research, Ltd., "Satellite Radio Fails to Earn a Profit/Traditional Radio Faces Challenges," January 19, 2007.
[29] Appendix C of FCC's 12th Annual Video Competition Report, 2006.
[30] FCC, 12th Annual Video Competition Report, 2006, page 74.
[31] Thierer, "The Media Cornucopia."
[32] Charles B. Goldfarb, CRS Report RL34078, "Retransmission Consent and Other Federal Rules Affecting Programmer-Distributor Negotiations: Issues for Congress," July 9, 2007, page 21, table 5. See also www.nielsenmedia.com.

Paradigm Shift since Repeal of the Fairness Doctrine: Internet & the Digital Revolution

Perhaps the most significant change in how the public obtains information is the advent of the internet. The creation, replication, and transmission of data in digital format has exploded in recent years. In 2006 alone, 161 billion gigabytes of data were created, captured, and replicated.[33] At the same time, internet access and usage has continued to expand rapidly in the United States. Since its inception in 1992, the internet has expanded such that today 210 million Americans, nearly 70 percent of the country's population, make use of the internet.[34] Of these, 55 million have high-speed lines.[35]

It should come as no surprise that availability of content has grown as access has increased. The number of websites expands dramatically every day. YouTube, a website providing people with a forum to post their own videos, now hosts 100 million video streams per day.[36] Blogs, or internet web logs, which provide users the opportunity to publish their own content, are now estimated to total between 50 and 60 million worldwide.[37] Podcasts, which consist of audio or video content that can be downloaded from the internet onto Apple iPods and other MP3 players, have likewise proliferated in recent years. Survey data indicates that in 2004, 30 percent of Americans listened to news, sports, or educational content broadcast over the internet.[38]

Media research confirms that consumers exercise choice among a variety of media sources and that these sources are interchangeable to consumers.[39] An FCC study firmly established that types of media are not separate and distinct when it comes to how consumers use them. Consumers readily substitute between and among media sources. The study concludes, for example, that consumers freely substitute between the internet and broadcast TV as sources for content that just a few short years ago were only available on the public airwaves. The study also notes evidence for substitution between each of the following paired sources of media: cable and daily newspapers; radio and broadcast TV; and the internet and daily newspapers.[40]

The interchangeability of media sources undermines any assertion that the fairness doctrine is necessary to ensure viewpoint parity when it comes to content. Consumers are able to readily receive information that is "fair and balanced"[41] because of both the variety available and how consumers use media sources. In vetoing the 1987 legislation seeking to reestablish the fairness doctrine, President Reagan said:

---

[33] IDC White Paper, "The Expanding Digital Universe," summary.
[34] Plunkett Research, Ltd., E-Commerce & Internet Business Statistics, page 3.
[35] Plunkett Research, Ltd., E-Commerce & Internet Business Statistics, page 5. Plunkett defines high-speed as data transmission exceeding 200 Kbps in one direction, the same definition that the FCC uses. See http://www.fcc.gov/cgb/broadband.html.
[36] IDC White Paper. See also Bob Garfield, "YouTube vs. Boob Tube," Wired Magazine, available at www.wired.com.
[37] David C. Wyld, *The Blogging Revolution*, page 5, figure 15.
[38] Plunkett Research, Ltd, E-Commerce & Internet Business Statistics, pp. 24-25, citing Pew Internet & American Life Project.
[39] Joel Waldfogel, "Consumer Substitution Among Media," Media Ownership Working Group of the FCC (2002).
[40] Waldofogel, page 3.
[41] Senator Durbin, *Congressional Record*.

> "This type of content-based regulation is, in my judgment, antagonistic to the freedom of expression guaranteed by the First Amendment. In any other medium besides broadcasting, such Federal policing of the editorial judgment of journalists would be unthinkable…. We must not ignore the obvious intent of the First Amendment, which is to promote vigorous public debate and a diversity of viewpoints in the public forum as a whole, not in a particular medium, let alone in any particular journalistic outlet."

That statement is even more true today given the convergence and indistinguishability of the sources of content available to consumers.

Media Concentration and Content

Predictably, supporters of the fairness doctrine argue that the proliferation of sources of media and information is not meaningful because large media conglomerates still control too much content. They contend that because single entities control multiple stations, additional stations do not constitute a truly distinct source. This argument is vulnerable on several grounds. First, it ignores the fact that despite recent corporate mergers and consolidations of media stations, a recent FCC report shows that between 1960 and 2000 the number of broadcast outlets increased by 200 percent in the top ten media markets and the number of owners increased by 140 percent in those same markets.[42]

Second, this argument ignores the fact that consumer preference drives programming decisions. Licensees respond to consumer preferences because audience size, or ratings, significantly affects a licensee's advertising revenue. Recent history illustrates the importance of attracting listeners to ensure commercial success and the consequences when consumers fail to tune in. After Bill O'Reilly's syndicated program failed to capture more than 1.2 percent of the audience in Washington, D.C., WJFK (106.7 FM) dropped his program.[43] The same ratings dynamic explains the failure of Air America in New York City. In its first quarter, Air America started with a 2.6 percent rating, peaking at 2.8 percent in the summer of 2004. By late 2005 and early 2006 the ratings fell to 1.8 and 1.9 percent respectively.[44] The ratings for the New York City area channel that carried Air America fell to levels *below* those for their previous format: Caribbean music and talk.[45]

Third, it ignores the fact that consumers of broadcast media are not passive. Instead they are involved in a vibrant, complex market with many sources of media. Variety allows consumers to demand certain types of programming, making it more likely that consumers will exercise the power of substitution by switching the dial, changing the channel, downloading a different website, reading a different newspaper or electronic newsletter, or viewing online audio or video.

---

[42] FCC, "A Comparison of Media Outlets and Owners for Ten Selected Markets," September 2002.
[43] Paul Farhi, "Cool Reception for Conservative Radio," *Washington Post*, July 6, 2007.
[44] Byron York, "A Year After the Hype, Liberal Radio's down in NYC," *The Hill*, April 28, 2005. See also "Why Air America Doesn't Fly," *City Journal*, April 21, 2005.
[45] York.

Conclusion

Any attempt to reinstate the doctrine would result in content-based censorship and should be rejected. The rationale behind this 1940's regulation has no place in today's America. The variety of media sources and the consumers' choice as to how to best utilize sources of information should drive the marketplace of ideas free from interference from politicians and bureaucrats. The public interest is better served with the availability of content consumers enjoy today than it would be if the fairness doctrine were reinstated.