



**LET BROADCASTER FREEDOM RING:
FIGHTING UNCONSTITUTIONAL EFFORTS TO “RATION FREE SPEECH”**

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INTRODUCTION

Dating back to the 1940s and a time when broadcast frequencies were scarce, the so-called Fairness Doctrine required television and radio broadcast stations to provide “fair” coverage of controversial issues of public importance.¹ Nearly four decades later, however, the Federal Communications Commission (FCC) found that the doctrine actually chilled broadcast television and radio programming rather than enhancing it. Indeed, when it was in effect, the Fairness Doctrine forced broadcasters to self-censor and limit their coverage of controversial issues. That fact notwithstanding, a handful of Democratic leaders in Congress, in Orwellian fashion, are calling for the reinstatement of the Draconian measure known as the Fairness Doctrine.

THE FAIRNESS DOCTRINE

In the early part of the twentieth century, the demand for broadcast frequencies exceeded the supply. Through legislation, the federal government created a regulatory scheme to “allocate frequencies among competing applicants in a manner responsive to the public ‘convenience, interest, or necessity.’”² The government specifically sought to solve the problem created by spectrum scarcity by imposing on broadcasters the “equal time” and “fair coverage” requirements of what came to be known as the Fairness Doctrine.³ The Fairness Doctrine, which was formally adopted in 1949, specifically required broadcasters to ensure that “discussion of public issues be presented on broadcast stations, and that each side of those issues [] be given fair coverage.”⁴ By enforcing the Fairness Doctrine, the government sought to guarantee that, despite spectrum scarcity, the American people would have reasonable access to reliable information and all sides of controversial public debates.⁵ As such, the doctrine was based on the theory that it would “enhance rather than abridge the freedoms of speech and press protected by the First Amendment.”⁶

¹ *In re Inquiry into Section 73.1910 of the Commission’s Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 145 (F.C.C. 1985), at ¶ 3 [hereinafter “1985 Fairness Report”].

² *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 377 (1969).

³ *Id.* at 381.

⁴ *Id.* at 370.

⁵ *See id.*

⁶ *Id.* at 375.

When the Supreme Court reviewed the Fairness Doctrine in 1969 in *Red Lion Broadcasting Company v. FCC*, 395 U.S. 367 (1969), it considered the argument that “broadcasters will be irresistibly forced to self-censorship and their coverage of controversial public issues will be eliminated or at least rendered wholly ineffective.”⁷ The Court declared that “[s]uch a result would indeed be a serious matter, for should licensees actually eliminate their coverage of controversial issues, *the purposes of the doctrine would be stifled.*”⁸ The Court then observed:

At this point, however, as the Federal Communications Commission has indicated, that possibility is at best speculative. . . . [I]f experience with the administration of these doctrines indicates that they have *the net effect of reducing rather than enhancing the volume and quality of coverage*, there will be time enough to reconsider the constitutional implications. . . .⁹

Thus, finding that the Fairness Doctrine had constitutional footing at the time, the Court upheld the doctrine based on the “scarcity of broadcast frequencies, the Government’s role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views.”¹⁰

Just four years after *Red Lion* was decided, the Fairness Doctrine’s “net effect of reducing rather than enhancing the volume and quality of coverage” became readily apparent. In his concurring opinion in *Columbia Broadcasting System, Inc. v. Democratic National Committee*,¹¹ Justice Douglas eloquently explained why the “censorship or editing or the screening by the Government of what licensees may broadcast”—through the Fairness Doctrine or otherwise—“goes against the grain of the First Amendment.”¹² Justice Douglas declared that

*[t]he 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. In 1973—as in other years—there is clamoring to make TV and radio emit the messages that console certain groups. There are charges that these mass media are too slanted, too partisan, too hostile in their approach to candidates and the issues.*¹³

Justice Douglas then put the Fairness Doctrine in the larger context of the First Amendment’s prohibition against government censorship of political and other speech:

[T]he prospect of putting Government in a position of control over publishers is to me an appalling one, even to the extent of the Fairness Doctrine. The struggle for liberty has been a struggle against the Government. The essential scheme of our

⁷ *Id.* at 393.

⁸ *Id.* (emphasis added).

⁹ *Id.* (emphasis added).

¹⁰ *Id.* at 400.

¹¹ 412 U.S. 94 (1973).

¹² *Id.* at 158 (Douglas, J., concurring).

¹³ *Id.* at 154 (Douglas, J., concurring) (emphasis added).

Constitution and the Bill of Rights was to take the Government off the backs of people. . . . [I]t is anathema to the First Amendment to allow Government any role of censorship over newspapers, magazines, books, art, music, TV, radio, or any other aspect of the press. . . .¹⁴

In 1984, the Court noted in *FCC v. League of Women Voters of California* that if the Fairness Doctrine were having “‘the net effect of reducing rather than enhancing speech,’ [the Court] would then be forced to reconsider the constitutional basis” of *Red Lion*.¹⁵ Additionally, while the Court had upheld the Fairness Doctrine in *Red Lion* based on the assumption that it “advanced the substantial governmental interest in ensuring balanced presentation of views,”¹⁶ the FCC tentatively concluded in 1983 that “the [Fairness Doctrine] rules, by effectively chilling speech, do not serve the public interest.”¹⁷

In 1985, the FCC explained in a detailed report that the Fairness Doctrine greatly inhibited the free speech of broadcasters and limited the amount of coverage given to the controversial issues of public importance.¹⁸ The report explained that

in the intervening sixteen years [since *Red Lion*], the information services marketplace has expanded markedly, thereby making it unnecessary to rely upon intrusive government regulation in order to assure that the public has access to the marketplace of ideas. In addition, . . . compelling evidence . . . demonstrates that the fairness doctrine, in operation, inhibits the presentation of controversial issues of public importance . . . impedes the public’s access to the marketplace of ideas and poses an unwarranted intrusion upon the journalistic freedom of broadcasters.¹⁹

The FCC concluded that “[a]fter careful evaluation of the evidence of record, our experience in enforcing the fairness doctrine, and fundamental constitutional principles, we find that the fairness doctrine *disserves the public interest*.”²⁰ In light of these findings, the FCC formally repealed the Fairness Doctrine in 1987.²¹

CURRENT STATUS

Since the Fairness Doctrine’s formal repeal in 1987, there have been several Congressional attempts to revive it. To date, however, not one has succeeded.²² That fact notwithstanding, there

¹⁴ *Id.* at 162 (Douglas, J., concurring) (emphasis added).

¹⁵ 468 U.S. 364, 380 n.12 (1984).

¹⁶ *Id.* at 378.

¹⁷ *Id.* at 380 (quoting *Red Lion Broad. Co.*, 395 U.S. at 393).

¹⁸ 1985 Fairness Report at ¶ 6.

¹⁹ *Id.*

²⁰ *Id.* at ¶ 175 (emphasis added).

²¹ See *Syracuse Peace Council v. FCC*, 867 F.2d 654, 669 (D.C. Cir. 1989); *In re Complaint of Syracuse Peace Council Against Television Station WTVH Syracuse, New York*, 2 F.C.C.R. 5043, 5043 (1987).

²² Adam Thierer, *Why the Fairness Doctrine is Anything But Fair*, HERITAGE.ORG, Oct. 29, 1993, <http://www.heritage.org/Research/Regulation/EM368.cfm>; see also James L. Gattuso, *Back to Muzak? Congress and the Un-Fairness Doctrine*, HERITAGE.ORG, May 23, 2007, <http://www.heritage.org/research/regulation/wm1472.cfm>.

has been a renewed effort of late amongst some House and Senate Democrats to reinstitute the Fairness Doctrine. Last year, Speaker of the House Nancy Pelosi (D-CA) expressly acknowledged that efforts to revive the doctrine had long been underway by Congresswoman Louise Slaughter (D-NY). She further explained that the interest of her party was to block legislation intended to prohibit reinstatement of the Fairness Doctrine.²³

On the Senate side, Senate Majority Whip Dick Durbin (D-IL), Senate Rules Committee Chairwoman Dianne Feinstein (D-CA), and Senator Charles Schumer (D-NY) have all taken up the Fairness Doctrine crusade. *The Hill* reports that, last year, Senator Feinstein asserted that “there is a responsibility to see that both sides and not just one side of the big public questions of debate of the day are aired and are aired with some modicum of fairness.”²⁴ As a staunch supporter of the Fairness Doctrine, Feinstein presumably believes that such a responsibility belongs to the government. In a November 2008 interview with Fox News Channel’s (FNC) Bill Hemmer, Senator Schumer defended the need for the Fairness Doctrine by parroting FNC itself: When asked whether he was “a supporter of telling radio stations in America what content they should have on their radio station,” Schumer said, “I think we should all try to be fair and balanced, don’t you?”²⁵ In that same interview, Senator Schumer analogized conservative opinion to pornography suggesting, perhaps inadvertently, that their presence on the airwaves be similarly regulated.²⁶

In light of the threat to broadcaster freedom posed by the efforts of these particular House and Senate Democrats, in June 2007, Congressman Mike Pence (R-IN) successfully amended an appropriations bill to place a one-year moratorium on the use of federal funds for implementing the Fairness Doctrine, thus effectively banning it on a short-term basis.²⁷ The so-called “Pence Amendment” passed the House with an overwhelmingly bipartisan vote of 309 to 115.²⁸ Out of the 309 members of Congress voting in favor of the amendment, 113 were Democrats.²⁹ Later that month, Pence introduced the Broadcaster Freedom Act of 2007, which sought to permanently ban the FCC or any future administration from restoring the Fairness Doctrine.³⁰ Unlike the Pence Amendment, however, the Broadcaster Freedom Act of 2007 was held up in Committee ever since it was first introduced. In an attempt to force the bill out of Committee and onto the House floor for an up-or-down vote, Pence filed a Discharge Petition in October 2007.³¹

²³ John Gizzi, *Pelosi supports ‘Fairness Doctrine,’* HUMAN EVENTS, June 25, 2008, <http://www.humanevents.com/article.php?id=27185>.

²⁴ Bob Cusack, *Schumer on Fox: Fairness Doctrine ‘fair and balanced,’* <http://thehill.com/leading-the-news/schumer-defends-fairness-doctrine-as-fair-and-balanced-2008-11-04.html>

²⁵ *Id.*; Michelle Malkin, *Fairness Doctrine Watch: Schumer likens conservative opinion to pornography,* <http://michellemalkin.com/2008/11/04/fairness-doctrine-watch-schumer-likes-conservative-opinion-to-pornography/> (last visited Jan. 27, 2009).

²⁶ See Rush Limbaugh, *Schumer on Fairness Doctrine,* http://www.rushlimbaugh.com/home/daily/site_110408/content/01125108.guest.html (last visited Jan. 27, 2009); see also Malkin, *supra* note 25.

²⁷ WorldNetDaily, ‘Hush Rush bill’ – gone not forgotten, http://www.wnd.com/news/article.asp?ARTICLE_ID=56509 (last visited Jan. 27, 2009).

²⁸ United States House of Representatives, Final Vote Results for Roll Call 599, <http://clerk.house.gov/evs/2007/roll599.xml> (last visited Jan. 27, 2009).

²⁹ *Id.*

³⁰ The John Birch Society, JBS Alert: Support House Discharge Petition 110-3 for H.R. 2095, The Broadcaster Freedom Act of 2007, <http://www.jbs.org/node/7618> (last visited June 25, 2008).

³¹ *Id.*

When asked whether she would permit a vote on the bill if the Discharge Petition failed, Speaker Pelosi explained, quite simply, that she would not, pointing out that the “interest of [her] caucus was in the reverse.”³² Unfortunately, the Discharge Petition failed by only a handful of the needed 218 signatures.³³ Efforts by Senate Republicans to ban the Fairness Doctrine were met with similar resistance. In July 2007, Senator Norm Coleman (R-MN) introduced his own version of the Broadcaster Freedom Act. Senate Democrats, however, voted it down 49 to 48 when it was proposed as an amendment to a defense authorization bill.³⁴ As a result, the Senate version of the Broadcaster Freedom Act failed before ever reaching the Senate floor for debate.³⁵

It is important to note that Congress is not the only governmental body possessed of the power to reinstate the Fairness Doctrine. Indeed, the FCC, the very agency responsible for eliminating the doctrine in 1987, could itself reinstitute the Fairness Doctrine by regulatory fiat. With the recent administration change, broadcasters are beginning to fear that such a result is not beyond the realm of possibility. In 2007, former FCC Chairman Kevin Martin stated that the agency had no intention of revisiting its 1987 decision to jettison the regulation. He explained that “with the continued proliferation of additional sources of information and programming, including satellite broadcasting and the Internet, the need for the Fairness Doctrine has lessened even further since 1987.”³⁶ Recent changes at the FCC, however, indicate that Obama’s FCC is not likely to share the former Chairman’s sentiments against reinstating the Fairness Doctrine.

On January 22, 2009, President Obama designated Democratic Commissioner Michael Copps to serve as acting Chairman of the Commission pending the formal nomination and confirmation of a new FCC Chairman. Copps, a known friend of the Fairness Doctrine, made the following remarks about broadcaster freedom during a 2007 conference in Memphis, Tennessee:

Half a trillion dollars. That’s a conservative valuation of the airwaves that our country lets TV and radio broadcasters use – for free . . . And what do the American people – who own the public airwaves, by the way – get in return? Too little news, too much baloney passed off as news, too little quality entertainment, too many people eating bugs on reality TV, too little local and regional music, too much brain-numbing national playlists, too little of America, too much of Wall Street and Madison Avenue. That’s what we get for half a trillion dollars. It’s one h--- of a bad bargain, don’t you think?³⁷

In 2008, Chairman Copps further opined that the FCC ought to “make sure our airwaves are open and covering a lot of local events, covering local political races, making sure viewers and

³² Gizzi, *supra* note 23.

³³ United States House of Representatives, Discharge Petition 0003, <http://clerk.house.gov/110/lrc/pd/petitions/Dis3.htm>.

³⁴ The Washington Times, Senate Democrats foil attempt to bar ‘Fairness Doctrine,’ <http://www.washingtontimes.com/news/2007/jul/20/senate-democrats-foil-attempt-to-bar-fairness-doct/> (last visited Jan. 27, 2009).

³⁵ Save Talk Radio, Coleman Press Release – Failed Fairness Doctrine, <http://www.savetalkradio.org/2007/07/14/coleman-press-release-failed-fairness-doctrine-amendment/> (last visited Jan. 27, 2009).

³⁶ Jim Abrams, *FCC Chair: Fairness Doctrine Not Needed*, BREITBART, July 26, 2007, http://www.breitbart.com/article.php?id=D8QKB7000&show_article=1.

³⁷ Jim Puzanghera, *Copps, a liberal voice on the FCC, knows how to get his message out*, LATIMES.COM, Nov. 5, 2007, <http://articles.latimes.com/2007/nov/05/business/fi-copps5>.

listeners both can benefit from a clash of antagonistic ideas and issues being covered. . . . We need to have debate about how you keep these airwaves serving the public interest and nourishing the public dialogue our democracy depends on.”³⁸

While Copps is currently serving as acting Chairman of the Commission, reports indicate that, should his nomination clear the Senate Commerce Committee, Julius Genachowski will head the FCC as the new Chairman under President Obama.³⁹ Unfortunately for those who fear the chilling effect of the Fairness Doctrine on free speech, Genachowski has given few hints as to where he stands on the doctrine.⁴⁰ While he has neither expressly embraced nor rejected the Fairness Doctrine, Genachowski has exhibited support for “media ownership rules that promote a diversity of voices on the airwaves.”⁴¹ Interestingly, he also served as a former aide to pro-Fairness Doctrine stalwart, Senator Schumer.⁴²

While President Obama reportedly does not support repromulgation of the Fairness Doctrine,⁴³ the current refitting of the FCC could represent the President’s backhanded effort to revive the doctrine. Furthermore, President Obama’s recent advice to GOP leaders to stop listening to conservative talk radio host Rush Limbaugh⁴⁴ has given broadcasters yet another reason to fear that they will soon see an end to their First Amendment rights on the airwaves.

THE BROADCASTER FREEDOM ACT OF 2009 (S. 34, H.R. 226)

As the fate of broadcaster freedom continues to hang in the balance, Republican members of both the House and Senate have renewed their efforts to permanently ban the FCC from reinstating the Fairness Doctrine. On January 6, 2009, Senator Jim DeMint (R-SC), along with 28 co-sponsors, introduced S. 34, the Broadcaster Freedom Act (BFA) of 2009. The following day, Congressman Pence, along with 164 co-sponsors, introduced H.R. 226, the House version of the BFA. Section 2 of both bills expressly prohibits the promulgation of the Fairness Doctrine by amending Title III of the Communications Act of 1934 to state the following:

Notwithstanding section 303 or any other provision of this Act or any other Act authorizing the Commission to prescribe rules, regulations, policies, doctrines, standards, or other requirements, the Commission shall not have the authority to prescribe any rule, regulation, policy, doctrine, standard, or other requirement that

³⁸ United States Congressman Greg Walden, *Walden Fighting Again for Broadcasters’ Right to Free Speech*, Jan. 7, 2009, available at http://www.house.gov/apps/list/press/or02_walden/pr090107.shtml (quoting acting Chairman Michael Copps, *R&R*, Oct. 28, 2008).

³⁹ Kim Dixon, *Obama’s FCC choice faces long list of issues*, REUTERS.COM, Jan. 13, 2009, <http://www.reuters.com/article/politicsNews/idUSTRE50C0V220090113>.

⁴⁰ See Jim Geraghty, *I Guess the Fairness Doctrine Just Didn’t Cross Their Minds*, National Review Online, Jan. 13, 2009, <http://campaignspot.nationalreview.com/post/?q=OThiZTBiYTNjMjEyODczMDIiODNiZTNjZWFiZDgxMWI=>.

⁴¹ Radio Magazine, *New FCC Chairman Signals Major Change*, RADIO MAGAZINE, Jan. 19, 2009, <http://radiomagonline.com/currents/news/fcc-chairman-signals-change/>.

⁴² *Id.*

⁴³ John Eggerton, *Obama Does Not Support Return of Fairness Doctrine*, BROADCASTING & CABLE, June 25, 2008, http://www.broadcastingcable.com/article/114322-Obama_Does_Not_Support_Return_of_Fairness_Doctrine.php.

⁴⁴ NY Post, *Obama: Quit Listening to Rush Limbaugh if You Want to Get Things Done*, available at <http://www.foxnews.com/politics/2009/01/23/obama-quit-listening-rush-limbaugh-want-things/> (last visited Jan. 27, 2009).

has the purpose or effect of reinstating or repromulgating (in whole or in part) the requirement that broadcasters present opposing viewpoints on controversial issues of public importance, commonly referred to as the 'Fairness Doctrine' . . .

During a press conference following the introduction of the BFA in both the House and Senate, Congressman Pence stated that “bringing back the Fairness Doctrine today would amount to government control over political views expressed on the public airways.”⁴⁵ The government, he explained, simply should not be in the business of “rationing free speech.”⁴⁶ Of his prior efforts to forestall the return of the Fairness Doctrine, Pence said the following:

In 2007 I introduced an amendment that would ban re-implementation of the Fairness Doctrine for simply one year and we are prepared to do so again.

At that time over 300 Republicans and Democrats voted to ban the reimposition of the Fairness Doctrine for that fiscal year. I truly believe if the Broadcaster Freedom Act is brought to the floor before the House of Representatives that it would pass. It would pass because of that previous vote, the evidence that we've seen, but I also believe it would pass because *whenever freedom gets an up or down vote on the floor of the people's House, freedom always wins.*⁴⁷

CONCLUSION

The Washington Times reports that the current battle between liberals and conservatives over the fate of the Fairness Doctrine was sparked by a June 2007 report by the Center for American Progress. In its report, the liberal think tank found that “political talk radio is ‘dominated’ by conservatives 9-to-1,” and that the “talk-radio landscape does not serve all Americans.”⁴⁸ That being the case, it appears that the recent effort to breathe new life into this antiquated FCC rule is nothing more than a thinly-veiled attempt by some liberal members of Congress to silence the conservatives who oppose them.⁴⁹ Such unconstitutional attempts to stifle free speech must themselves be stifled. Support the Broadcaster Freedom Act of 2009, and let broadcaster freedom ring.

⁴⁵ U.S. Congressman Mike Pence, *Pence Introduces Broadcaster Freedom Act of 2009*, <http://mikepence.house.gov/News/DocumentSingle.aspx?DocumentID=108295> (last visited Jan. 27, 2009).

⁴⁶ *Id.*

⁴⁷ *Id.* (emphasis added).

⁴⁸ The Washington Times, *Senate Democrats foil attempt to bar 'Fairness Doctrine'*, <http://www.washingtontimes.com/news/2007/jul/20/senate-democrats-foil-attempt-to-bar-fairness-doct/>. (last visited Jan. 28, 2009).

⁴⁹ Jeff Kosseff, *To Balance the Airwaves, Liberals Seek Revival of Fairness Doctrine*, NEWHOUSE NEWS SERVICE, July 9, 2007.