

Many Hope to Bring the Fairness Doctrine Back From the Dead

By Guylyn Cummins

In 1987, the Fairness Doctrine died a natural death. So most of us can barely remember what it was, if we have heard of it at all.

Yet, as late as last month, influential lawmakers like Sens. Tom Harkin and Debbie Stabenow, were joining others like Barbara Boxer, Nancy Pelosi and Hillary Clinton in calling for its return. We can no longer assume it has been safely interred.

In a nutshell, the Fairness Doctrine required radio and television broadcasters to present all contrasting points of view in any coverage of a controversial issue of public importance. While the First Amendment's freedom of speech protections generally *prohibit* the government from telling anyone what they must say, in 1969, the U.S. Supreme Court upheld the constitutionality of the Fairness Doctrine reasoning that, for many years the Federal Communications Commission (and before it, the Federal Radio Commission) imposed on radio and television broadcasters the requirement to discuss public issues and to give each side of those issues fair coverage.

The rationale for the Fairness Doctrine was premised largely on the fact that broadcast frequencies constituted a scarce resource ("spectrum scarcity"), and without government control, the radio medium would be of little use "because of the cacophony of competing voices, none of which could be clearly and predictably heard."

Consequently, in the Radio Act of 1927, the Federal Radio Commission was established to allocate

frequencies among competing applicants "in a manner responsive to the public 'convenience, interest, or necessity.'" This enactment repudiated the rationale of the 1912 act, i.e., that "anyone who will may transmit their message," and in its stead substituted the principle that "the right of the public to service is superior to the right of any individual" or station owner.

Shortly thereafter, the Federal Radio Commission expressed its view that the "public interest requires ample play for the free and fair competition of opposing views." This principle was applied to "all discussions of issues of importance to the public." Through the denial of license renewals and construction permits, the Fairness Doctrine was thereafter enforced.

While the Fairness Doctrine initially required licensees to *refrain* from publishing their own views — a form of government censorship — as of 1969, it required broadcasters only to give adequate coverage to public issues and to fairly reflect opposing views, even at the broadcaster's own expense if sponsorship was unavailable and on its own initiative if no other source was available.

As the Supreme Court explained, "This mandate to the FCC to assure that broadcasters operate in the public interest is a broad one, a power 'not niggardly but expansive.'" Broadcast frequencies are limited and necessarily considered a public trust, so the Fairness Doctrine extends to "all legitimate areas of public importance which are controversial, not just politics."

The Supreme Court concluded, "There is no question here of the Commission's refusal to permit the



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Some liberals believe the Fairness Doctrine's demise has led to talk radio being dominated by conservative hosts, like Rush Limbaugh.

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 ...; or of the official government view dominating public broadcasting. Such questions would raise more serious First Amendment issues. But we do hold that the Congress and the [Federal Communications] Commission do not violate the First Amendment when they require a radio or television station to give reply time to answer personal attacks and editorials."

Notably, the Fairness Doctrine's legislative history contained this important statement: "If the number of radio and television stations were not limited by available frequencies, the committee would

have no hesitation in removing completely the present provision regarding equal time and urge the right of each broadcaster to follow his own conscience."

According to recent news stories, some Democrats and liberals "tired of wrestling with conservative talk radio" have talked of reviving the Fairness Doctrine, as they believe its demise is to blame for talk radio's opinionated yet highly popular form. A Reuters article estimates conservatives on talk radio dominate liberals by a ratio of 10-to-1. Others, like Andrew Schwartzman of the Media Access Project, dub the discussion "entirely a creation of a bunch of right-wing talk show hosts trying to make a ruckus."

While President Obama is not said to favor the return of the Fairness Doctrine, at least for now, he has been said to favor "localism,"

a kind of step-child of the Fairness Doctrine. The Federal Communications Commission is considering whether to require broadcasters to create community advisory boards made up of local officials and other community leaders to tell media executives whether their news coverage is addressing the needs of the community.

Many cases litigated under the Fairness Doctrine reveal its difficult contours, in addition to the taboo that government should not compel speech - sounding a cautionary note for us all. Hundreds of cases show deciding when to apply the Fairness Doctrine was hotly litigated and expensive, and yielded a wide-spectrum of judicial rulings until its demise.

Should a broadcast advertisement urging enlistment in the armed services during the Vietnam war trigger application of the Doctrine? If such an advertisement presents "the attractive, positive and advantageous side of military service," should free air time be given to those who wish to show rows of grave stones of soldiers or to warn young people, "Chances are, the only job you'll learn is how to kill. Chances are, you'll wind up in Vietnam killing and perhaps getting killed, in a war that doesn't make much sense"?

Similarly, should cigarette advertisements showing beautiful people smoking and having fun trigger free air time to discuss the "uniquely serious and well-documented hazards to the public health inherent in cigarette smoking"?

Against the backdrop of expensive cases and industry turmoil, the Federal Communications Commission released a 1985 Fairness

Report dealing a death knell to the doctrine. The commission said the Fairness Doctrine no longer produced its desired effect, and instead caused a "chilling effect" on news coverage that "might" violate the First Amendment. In 1987, the doctrine was abolished.

Clearly, the spectrum scarcity on which the Fairness Doctrine was premised does not exist for the Internet, cable and collectively, the conventional mass media at large. Should it be revived to apply only to broadcasters when true "spectrum scarcity" really does not exist today?

Groups like the National Association of Broadcasters have beat back efforts to resurrect the doctrine, and vow to continue to fight the Federal Communications Commission's localism proposals. David Rehr of the National Association of Broadcasters wrote, "The so-called Fairness Doctrine would stifle the growth of diverse views and, in effect, make free speech less free." Some station owners agree, saying they would simply drop controversial programming if the doctrine returns and air music and entertainment programs like they did until its demise.

It would be folly to ignore the lessons the Fairness Doctrine has already taught us, especially in today's global mass-media world.

This is especially true given that the content of the compelled speech the doctrine requires may not be free from intellectual property and other tort liability.

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