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# FCC REGULATION OF BROADCAST NEWS: FIRST AMENDMENT PERILS OF CONFLICTING STANDARDS OF REVIEW

## INTRODUCTION

In regulating broadcast news reporting,<sup>1</sup> the Federal Communications Commission (FCC)<sup>2</sup> distinguishes viewer or listener complaints alleging “unfair” or “imbalanced” news reporting<sup>3</sup> from complaints alleging “distorted” or “slanted” news reporting.<sup>4</sup> The FCC applies the “fairness doctrine”<sup>5</sup> to complaints of unfair or imbalanced news reporting and evaluates whether a broadcaster has acted “unreasonably” and in “bad faith” in its presentation of contrasting viewpoints on controversial issues of public importance.<sup>6</sup> In

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1. This Note refers to “broadcast news reporting” to include only “[b]ona fide newscasts, bona fide news interviews, and on-the-spot coverage of bona fide news events.” 47 C.F.R. § 73.1920(b)(4) (1979); see note 42 *infra*. The FCC has ruled that interviews that are broadcast on regularly scheduled programs, use a “news interview format,” and select interviewees because of their “public significance . . . and their news interests,” will be considered bona fide news interviews. Socialist Workers 1968 Nat’l Campaign Comm., 14 F.C.C.2d 858, 858 (1968) (“NET Journal”); accord, CBS, Inc., 58 F.C.C.2d 601, 601-02 (1976) (“60 Minutes”). The FCC has also ruled that coverage of a presidential candidate’s announcement of his running mate, Republican Nat’l Comm., 37 F.C.C.2d 799, 806 (1972), and broadcast of the President’s State of the Union Message, Lar Daly v. CBS, 59 F.C.C.2d 97, 97-98 (1976), constitute on-the-spot coverage of a bona fide news event.

2. The FCC derives its authority to regulate news broadcasting from the Communications Act of 1934 § 303(r), 47 U.S.C. § 303(r) (1976): “Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall . . . [m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter . . .” *Id.*; see The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 48 F.C.C.2d 1, 21 (1974) [hereinafter cited as Fairness Report]; Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1254-55 (1949) [hereinafter cited as Report on Editorializing]. See generally FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 795 (1978); CBS, Inc. v. Democratic Nat’l Comm., 412 U.S. 94, 109-12 (1973); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 379-80 (1969).

3. See notes 102-07 *infra* and accompanying text.

4. See pt. II *infra*.

5. See pt. I *infra*. See generally F. Friendly, The Good Guys, The Bad Guys and The First Amendment (1977); B. Schmidt, Freedom of the Press vs. Public Access (1976); S. Simmons, The Fairness Doctrine and the Media (1978); Bazelon, *The First Amendment and the “New Media”—New Directions in Regulating Telecommunications*, 31 Fed. Com. L.J. 201 (1979); Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 Duke L.J. 213; Goldberg & Couzens, “Peculiar Characteristics”: An Analysis of the First Amendment Implications of Broadcast Regulation, 31 Fed. Com. L.J. 1 (1978); Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 Harv. L. Rev. 768 (1972); Rosenfeld, *The Jurisprudence of Fairness: Freedom Through Regulation in the Marketplace of Ideas*, 44 Fordham L. Rev. 877 (1976); Van Alstyne, *The Möbius Strip of the First Amendment: Perspectives on Red Lion*, 29 S.C.L. Rev. 539 (1978).

6. E.g., International Bhd. of Teamsters v. NBC, 59 F.C.C.2d 1317, 1317-19 (1976); W.C. Ponder v. NBC, 58 F.C.C.2d 1222, 1222-23 (1976); Hall-Tyner Election Campaign Comm., 37 F.C.C.2d 942, 943 (1972); J. Allen Carr, 30 F.C.C.2d 894, 896 (1971); NBC, 25 F.C.C.2d 735, 735-37 (1970); see pts. I(B)-(C) *infra*.

contrast, when a complainant alleges distorted or slanted news reporting, the FCC applies a more stringent standard and will take action only when the complainant has presented "extrinsic evidence" that the broadcaster deliberately distorted or slanted news.<sup>7</sup>

Although the FCC purports to adhere to different standards of proof, the distinction between complaints of imbalance and complaints of distortion has become blurred, creating uncertainty as to the proper standard to apply to a particular complaint.<sup>8</sup> Furthermore, the lack of a clear demarcation between the two types of complaints poses the likelihood that complainants seeking FCC review of broadcast news judgments may frame their complaints in terms of a fairness doctrine violation in an attempt to proceed under a less onerous standard of proof. This eventuality creates the threat of excessive government regulation of the reasonableness of news broadcasters' editorial discretion and may affect the delicate balance between viewers' and listeners' first amendment rights of access<sup>9</sup> and broadcasters' freedoms of speech and press.<sup>10</sup> The potential for these consequences has been recently demonstrated by *American Security Council Education Foundation v. FCC*,<sup>11</sup> in which the District of Columbia Circuit ruled that a prima facie fairness doctrine violation is not stated if the issue allegedly given imbalanced news coverage is vague and ambiguous.<sup>12</sup> Although the court recognized that the prima facie case requirement restricts government oversight of broadcaster's journalistic discretion,<sup>13</sup> it is arguable that the prima facie case requirement is an

7. *E.g.*, *KMAP, Inc.*, 72 F.C.C.2d 241, 244 (1979); *Jim Myers*, 69 F.C.C.2d 963, 965 (1978); *Pulley v. Station WBFN*, 58 F.C.C.2d 1224, 1226-27 (1976); *Northwestern Ind. Broadcasting Corp.*, 57 F.C.C.2d 686, 694 (1975); *Mrs. J. R. Paul*, 26 F.C.C.2d 591, 591-93 (1969), *see pt. II infra*.

8. *See pt. III infra*.

9. *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 101-03 (1973); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

10. The principal first amendment concern underlying government regulation of broadcast media is promoting open and complete dissemination of information concerning public affairs. *See CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 121-27 (1973) (upholding FCC determination that regulatory policy of requiring broadcaster to accept editorial advertisements would frustrate rather than further first amendment goals). *See also FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 795 (1978); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389-90 (1969); *Black Producer's Ass'n*, 70 F.C.C.2d 1920, 1930 (1979); *National Citizens Comm. for Broadcasting*, 32 F.C.C.2d 824, 825 (1971); *Mrs. J. R. Paul*, 26 F.C.C.2d 591, 592 (1969).

One of the Carter Administration's goals is to reduce limitations on broadcasters' rights of expression by eliminating certain fairness doctrine requirements and by promoting pay-cable television systems, public broadcasting organizations, and creation of more radio stations. Steven J. Simmons, a communications specialist on the White House staff, has stated that "broadcast news shows should not be required to focus on news issue[s] . . . with Big Brother looking over their shoulders." *U.S. Ready to Relax F.C.C. Fairness Doctrine*, *N.Y. Times*, Feb. 4, 1980, § C, at 13, col. 5. The Carter administration expects, however, that its proposed changes will face criticism from public interest groups. *Id.*

11. 607 F.2d 438 (D.C. Cir. 1979) (en banc), *cert. denied*, 100 S. Ct. 662 (1980).

12. *Id.* at 448-49.

13. *See id.* at 445-46; pt. I(C) *infra*.

inadequate means of protecting the first amendment goal of "robust, wide-open debate on issues of public importance."<sup>14</sup>

This Note contends that the inconsistency characterizing FCC regulation of news broadcasting is the result of analyzing similar behavior under different standards. Despite a semantic distinction, at the core of either a complaint of news imbalance or news distortion is the assertion that a broadcaster has improperly exercised its editorial judgment. Therefore, in deference to the solicitude with which Congress, the federal courts, and the FCC have generally regarded broadcast journalists' editorial judgment, it is submitted that all regulation of broadcast news should be governed by the FCC's extrinsic evidence standard rather than by the lesser good faith and reasonableness standard now used to effectuate the fairness doctrine.

## I. REGULATION OF BROADCAST NEWS UNDER THE FAIRNESS DOCTRINE

### A. *Background and Purpose*

The central premise of the fairness doctrine is that the limited number of available broadcast frequencies<sup>15</sup> renders the airwaves "a scarce resource whose use could be regulated and rationalized only by the Government."<sup>16</sup>

14. *Id.* at 446 (quoting *Allen C. Phelps*, 21 F.C.C.2d 12, 13 (1969)); see *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); pt. III *infra*.

15. Fairness Report, *supra* note 2, at 4; see, e.g., *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 101 (1973); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 376 (1969). Broadcasters are said to act as "public trustees" who must "present representative community views and voices on controversial issues which are of importance to [their] listeners." *Democratic Nat'l Comm.*, 25 F.C.C.2d 216, 222-23 (1970) (citing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 389-90, 394), *rev'd sub nom.* *Business Executives' Move for Peace v. FCC*, 450 F.2d 642 (D.C. Cir. 1971), *rev'd sub nom.* *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973). Furthermore, "no private individual or group has a right to command the use of broadcast facilities." *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. at 113 (footnote and citations omitted). The Supreme Court has remarked, however, that assigning to broadcasters the role of "proxy" or "fiduciary" of the public does "not resolve the sensitive constitutional issues inherent in deciding whether a particular licensee action is subject to First Amendment restraints." *Id.* at 115 (footnote omitted).

16. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 376 (1969); see Fairness Report, *supra* note 2, at 3-4. Government regulation of the airwaves developed in the late 1920's in response to the chaos produced by lack of control and rapid growth in the number of operating broadcast stations. *Id.* Congress sought to restore order by enacting the Radio Act of 1927, ch. 169, §§ 1-29, 44 Stat. 1162 (1927) (current version at 47 U.S.C. §§ 315-29 (1976)), which created the Federal Radio Commission, charged with regulating frequencies in accordance with "public convenience, interest or necessity." *Id.* at § 4, 44 Stat. at 1163. The chief concern underlying passage of the Radio Act of 1927 was a recognition of the danger in allowing a valuable resource to fall under the domination of entrenched private interests or government hegemony. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 375-76, nn. 4-5; S. Simmons, *supra* note 5, at 22-23; Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 *Geo. Wash. L. Rev.* 487, 502-09 (1969). The legislative history of the Radio Act of 1927 and its successor, the Communications Act of 1934, 47 U.S.C. §§ 301-609 (1976), reveals various attempts by Congress to incorporate a "fairness" requirement as part of radio regulation. See F. Friendly, *supra* note 5, at 19-31; S. Simmons, *supra* note 5, at 23-29. In 1959, Congress amended § 315(a) of the Communications Act of 1934, Pub. L. No. 86-274, 73 Stat. 557 (codified at 47 U.S.C. § 315(a) (1976)), specifically recognizing "the obligation imposed upon [broadcasters] . . . to operate in the public interest and

Although the first amendment prohibits government regulation of speech and press,<sup>17</sup> the fairness doctrine furthers "the paramount first amendment right of viewers and listeners to receive 'suitable access to . . . ideas and experiences.'"<sup>18</sup> Thus, as part of the FCC's regulation of broadcasting "as public convenience, interest, or necessity requires,"<sup>19</sup> under the fairness doctrine licensees must present news programs "devoted to the consideration and discussion of public issues of interest."<sup>20</sup> This obligation is imposed because the "foundation stone of the American system of broadcasting"<sup>21</sup> 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."<sup>22</sup> Nevertheless, overly rigorous enforcement of the fairness doctrine could impair a broadcaster's ability or inclination to inform the public about important issues through vigorous and open reporting.<sup>23</sup> Thus, the government and licensees must constantly "walk a 'tightrope'" to maintain the delicate balance of first amendment interests.<sup>24</sup>

### B. Elements of the Fairness Doctrine

Under the fairness doctrine, the FCC imposes a two-fold obligation on broadcast licensees. First, the broadcaster has an "affirmative responsibility" to devote a reasonable percentage of broadcast time to coverage of controver-

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to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." *Id.*; S. Rep. No. 562, 86th Cong., 1st Sess. (1959), reprinted in [1959] U.S. Code Cong. & Ad. News 2564. The Supreme Court construed the 1959 amendment as a ratification of the fairness doctrine by "positive legislation," *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 381-82, and upheld the constitutionality of the fairness doctrine because of the first amendment goal "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 (citations omitted). The Court warned, however, that overly ambitious enforcement of the fairness doctrine could reduce, rather than improve coverage of public issues, thus acknowledging the necessity to reconsider the constitutionality of the fairness doctrine from time to time. *Id.* at 393. See also *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256-57 (1974) (holding unconstitutional a state statute that required newspapers to print for free a reply by a candidate for public office whose character or public record was attacked in the newspaper).

17. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

18. *American Security Council Educ. Foundation v. FCC*, 607 F.2d 438, 444 (D.C. Cir. 1979) (en banc) (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969)), cert. denied, 100 S. Ct. 662 (1980).

19. 47 U.S.C. § 303 (1976); see *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 379-80 (1969).

20. Report on Editorializing, *supra* note 2, at 1249.

21. *Id.*

22. *Id.*; see *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

23. See *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 127-32 (1973); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 393 (1969); *American Security Council Educ. Foundation v. FCC*, 607 F.2d 438, 444 (D.C. Cir. 1979) (en banc), cert. denied, 100 S. Ct. 662 (1980). See also *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975).

24. *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 117 (1973).

sial issues of public importance.<sup>25</sup> In fulfilling this responsibility, the broadcaster is afforded a large degree of discretion in deciding which issues to cover,<sup>26</sup> and is only required to act with "reasonableness" in deciding how to meet its public interest obligation.<sup>27</sup>

The second part of the fairness doctrine charges the broadcaster with "an affirmative duty to encourage and implement the broadcast of contrasting views in its overall programming."<sup>28</sup> This requirement generally presents three factors for the FCC to consider: (1) the specific issues that have been raised in a particular broadcast; (2) whether such issues are controversial and of public importance; and, (3) whether the licensee provided a reasonable opportunity for the presentation of contrasting viewpoints as part of the overall programming.<sup>29</sup>

The first consideration presents "[o]ne of the most difficult problems involved in the administration of the fairness doctrine."<sup>30</sup> The difficulty arises most often when the FCC must determine whether a program "implicitly" raised a controversial issue of public importance or whether a certain broadcast gave imbalanced treatment to various "subissues."<sup>31</sup> Recognizing the

25. Inquiry Regarding The Handling of Public Issues Under the Fairness Doctrine and Public Interest Standards of the Communications Act, 74 F.C.C.2d 163, 168 (1979) [hereinafter cited as Fairness Inquiry]; see Reconsideration of The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 58 F.C.C.2d 691, 693 (1976) [hereinafter cited as Reconsideration of the Fairness Report]; S. Simmons, *supra* note 5, at 9.

26. "In the critical area of informing the public as to important issues, the public interest is well served by the current system in which the licensee in the exercise of its good faith journalistic discretion determines what controversial issues of public importance exist, what issues to cover, and how best to present contrasting viewpoints." Fairness Inquiry, *supra* note 25, at 171.

27. Fairness Report, *supra* note 2, at 10. Although a broadcaster is not required "to cover each and every important issue which may arise in his community," the FCC has warned "that some issues are so critical or of such great public importance that it would be unreasonable for a licensee to ignore them completely." *Id.* In one instance, the FCC determined that a broadcaster acted unreasonably by failing to broadcast a program concerning the issue of strip mining to an area in which the issue had an "enormous" environmental and economic impact. Representative Patsy Mink, 59 F.C.C.2d 987 (1976).

28. Fairness Inquiry, *supra* note 25, at 169. The second part of the fairness doctrine engenders the vast majority of fairness regulation and litigation. See Fairness Report, *supra* note 2, at 10; S. Simmons, *supra* note 5, at 146, 166-73; Comment, *Enforcing The Obligation To Present Controversial Issues: The Forgotten Half of the Fairness Doctrine*, 10 Harv. C.R.-C.L. L. Rev. 137, 154 (1975).

29. Fairness Report, *supra* note 2, at 10-17; see S. Simmons, *supra* note 5, at 146.

30. Fairness Report, *supra* note 2, at 12.

31. S. Simmons, *supra* note 5, at 147; see, e.g., Robin Ficker, 65 F.C.C.2d 657, 658 (1977); Anti-Abortion Comm., 31 F.C.C.2d 492, 493 (1971); Norman Zafman, 26 F.C.C.2d 297, 298 (1970); A. Burton White, M.D., 18 F.C.C.2d 658, 658-59 (1969); Mid-Florida Television Corp., 40 F.C.C. 620, 620-22 (1964). In NBC, 25 F.C.C.2d 735 (1970) (en banc), the FCC reversed a ruling of its Broadcast Bureau that a broadcast raised the issue of whether private pilots constitute a hazard to air traffic because the broadcaster's judgment that it actually presented the issue of air traffic congestion around large airports was not unreasonable. *Id.* at 737; cf. Green v. FCC, 447 F.2d 323, 329-31 (D.C. Cir. 1971) (military recruitment advertisements raised five distinct issues for fairness consideration: (1) military manpower recruitment; (2) the draft; (3) the Vietnam War; (4) the morality of participation in any war; and, (5) the appeal of military service).

complexity of analyzing the issues of a news report, the FCC will usually defer to a broadcaster's good faith judgment as to what issues were raised by a particular broadcast and only determine whether the broadcaster's evaluation is reasonable.<sup>32</sup>

To resolve the second question, the FCC has suggested various factors that the broadcaster should consider when deciding if an issue is controversial and of public importance.<sup>33</sup> For example, the FCC urges the broadcaster to determine "whether an issue is the subject of vigorous debate with substantial elements of the community."<sup>34</sup> Similarly, the broadcaster should consider the amount of media coverage given an issue, the amount of attention accorded the issue by local leaders, and most important, the effect the issue is likely to have on the broadcaster's audience.<sup>35</sup>

The third issue, determining whether a broadcaster has afforded a "reasonable opportunity" for presentation of contrasting viewpoints, "has yet to be chiseled into stone."<sup>36</sup> Thus, the FCC may consider many different factors in evaluating a licensee's compliance with this element of the fairness doctrine,<sup>37</sup>

32. Reconsideration of the Fairness Report, *supra* note 25, at 697; Fairness Report, *supra* note 2, at 13; see *NBC*, 25 F.C.C.2d 735, 736-37 (1970). Although the FCC usually defers to the broadcaster's good faith judgment, broadcasters are urged to consider whether a program presents viewpoints that "so obviously and substantially" relate to a controversial issue of public importance "as to amount to advocacy of a position on that question." Fairness Report, *supra* note 2, at 13. The FCC, however, will not take action when the statements complained of are "offhand or insubstantial." *Id.*

33. Fairness Inquiry, *supra* note 25, at 169; Fairness Report, *supra* note 2, at 11; e.g., *Suzuki v. WOW-TV*, 59 F.C.C.2d 1122, 1123 (1976) ("The question of whether such . . . issues are controversial and of public importance is left to the judgment of the licensee."); *Accuracy in media, Inc. v. WNET*, 51 F.C.C.2d 219, 220 (1974) ("It is the responsibility of the broadcast licensee to determine whether a controversial issue of public importance has been presented. . . .").

34. Fairness Report, *supra* note 2, at 12; see, e.g., *Public Media Center*, 59 F.C.C.2d 494, 514-15 (1976) (nuclear power), *remanded on other grounds*, 587 F.2d 1322 (D.C. Cir. 1978); *Council on Children, Media & Advertising v. ABC*, 59 F.C.C.2d 448, 452 (1976) (children's exposure to commercial advertisements); *Females Opposed to Equality*, 42 F.C.C.2d 434, 435 (1973) (women's rights).

35. Fairness Report, *supra* note 2, at 11-12; e.g., *William Albaugh*, 70 F.C.C.2d 1739, 1741-42 (1979) (status of District of Columbia as a federal enclave or legally part of Maryland found not to be an issue of public controversy to anyone other than the complainant, and thus not an issue of public importance); *Mrs. J. C. Crampton*, 56 F.C.C.2d 854, 855 (1975) (broadcast of Maharishi Mahesh Yogi discussing Transcendental Meditation ruled not to present a controversial issue of public importance). See also *S. Simmons*, *supra* note 5, at 154-57.

36. *Public Media Center v. FCC*, 587 F.2d 1322, 1328 (D.C. Cir. 1978). In *Wilderness Soc'y*, 31 F.C.C.2d 729 (1971), it was recognized that "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." *Id.* at 734 (Burch, Ch., concurring).

37. E.g., *Media Access Project*, 44 F.C.C.2d 755, 762 (1973) (amount of time allotted each point of view); *Committee for the Fair Broadcasting of Controversial Issues*, 25 F.C.C.2d 283, 293 (1970) (amount of programming broadcast during prime time); *WCBS-TV*, 9 F.C.C.2d 921, 941 (1967) (the frequency with which points of view are aired), *aff'd sub nom. Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

although the basic requirement "is that the American public must not be left uninformed."<sup>38</sup> If the broadcaster has acted reasonably and in good faith,<sup>39</sup> the FCC will defer to the broadcaster's discretion "to choose an appropriate method"<sup>40</sup> of aiding and encouraging expression of contrasting viewpoints. If the broadcaster is found to have acted unreasonably and in bad faith, however, it may either be denied license renewal,<sup>41</sup> or be ordered to supplement its news coverage to satisfy fairness obligations.<sup>42</sup>

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38. *Green v. FCC*, 447 F.2d 323, 329 (D.C. Cir. 1971) (emphasis deleted); *accord*, *Public Media Center v. FCC*, 587 F.2d 1322, 1328 (D.C. Cir. 1978); *Jim Myers*, 69 F.C.C.2d 963, 964-65 (1978); *see Robin Ficker*, 65 F.C.C.2d 657, 658 (1977); *International Bhd. of Teamsters v. NBC*, 59 F.C.C.2d 1317, 1319-20 (1976); *Mid-Florida Television Corp.*, 40 F.C.C. 620, 621 (1964).

39. Fairness Report, *supra* note 2, at 13. The FCC is prohibited from censoring broadcast media: "Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals 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). As a result, the FCC has been constrained not to "attempt to direct broadcasters in the selection or presentation of specific programming." *International Bhd. of Teamsters v. NBC*, 59 F.C.C.2d 1317, 1318 (1976). Rather, the FCC has determined that its "role is not to substitute its judgment for that of the licensee as to . . . programming decisions, but rather to determine whether the licensee can be said to have acted reasonably and in good faith." *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 F.C.C. 598, 599 (1964) [hereinafter cited as *Fairness Primer*]; *see Reconsideration of the Fairness Report*, *supra*, note 25, at 697.

40. *Mid-Florida Television Corp.*, 40 F.C.C. 620, 621 (1964); *see Dr. Michael Kielty*, 69 F.C.C.2d 960, 961 (1978); *International Bhd. of Teamsters v. NBC*, 59 F.C.C.2d 1317, 1318 (1976); *Fairness Inquiry*, *supra* note 25, at 169.

41. *E.g.*, *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16, 61-62 (D.C. Cir. 1972) (radio broadcaster denied license renewal for fairness doctrine violations and misrepresentation of programming format), *cert. denied*, 412 U.S. 922 (1973); *see* 47 U.S.C. § 307(a)-(e) (1976).

42. Fairness Report, *supra* note 2, at 17; *see, e.g.*, *Public Media Center*, 59 F.C.C.2d 494, 523 (1976) (radio broadcasters required to inform FCC of method for correcting programming imbalance), *remanded*, 587 F.2d 1322 (D.C. Cir. 1978), *on remand*, 72 F.C.C.2d 776 (1979). The FCC regards the reasonable opportunity requirement as an affirmative obligation that cannot be met merely by adopting a general policy that opposing views will be broadcast only when "a demand is made of the station for broadcast time." Report on Editorializing, *supra* note 2, at 1251. A licensee may be required to undertake "a diligent, good-faith effort" to communicate to potential spokesmen his willingness to present contrasting viewpoints on the issue or issues presented by a broadcast. Fairness Report, *supra* note 2, at 14; *see CBS, Inc.*, 34 F.C.C.2d 773, 777-78 (1972) (cautioning against "selection of spokesmen . . . based upon what licensees believe to be the personal motives of parties seeking an opportunity to respond"). The broadcaster is also required to make a good faith effort "to identify the *major* viewpoints and shades of opinion being debated in the community," in order to cover contrasting views adequately. Fairness Report, *supra* note 2, at 15 (emphasis in original). The broadcaster, however, is not required to present "every possible viewpoint or shade of opinion regardless of its significance." *Id.* at n.16; *see Robin Ficker*, 65 F.C.C.2d 657, 658 (1977). Although a broadcaster is afforded "wide discretion" in determining the spokesman and format for presentation of contrasting views, Fairness Report, *supra* note 2, at 15; *see Dr. Michael Kielty*, 69 F.C.C.2d 960, 961 (1978), it may not deliberately



### C. Procedure of Fairness Doctrine Review

When a viewer or listener believes that a broadcaster has presented only one side of an issue, he must first complain to the broadcaster.<sup>43</sup> If the complainant and broadcaster are unable to resolve their differences privately, the complainant may then file a formal complaint with the FCC.<sup>44</sup> Such a complaint must present prima facie evidence of a fairness doctrine violation.<sup>45</sup>

The FCC's rationale for imposing the prima facie case requirement is to prevent "broadcasters from being burdened with the task of answering idle or capricious complaints"<sup>46</sup> and to safeguard a broadcaster's exercise of its select spokesmen for opposing points of view in order to favor one viewpoint at the expense of underrepresenting another. Fairness Report, *supra* note 2, at 15. Furthermore, although the FCC has declined to establish fixed ratios for determining the fairness of a broadcaster's time allocations, it has warned that a finding of unreasonableness may be predicated on "imbalance from the sheer weight of one side as against the other." *Id.* at 17 (citation omitted). Thus, if a broadcaster presents one viewpoint during prime time, while relegating coverage of contrasting viewpoints to less popular viewing time periods, he may be found to have acted unreasonably. *Id.*; Mark J. Freeman, 66 F.C.C.2d 1049, 1050 (1976); Norman Zafman, 26 F.C.C.2d 297, 298 (1970). The "equal opportunities" requirements of 47 U.S.C. § 315 (1976), covering broadcasts by political candidates do not apply to the fairness doctrine. Fairness Primer, *supra* note 39, at 599; see 44 Fed. Reg. 45,951-56 (1979). In addition to the fairness doctrine, the FCC imposes two other obligations on broadcasters pursuant to its authority to regulate in the public interest. See 47 U.S.C. § 303(r) (1976). Under its Personal Attack and Political Editorial Rules, 47 C.F.R. §§ 73.1920-30 (1979), the FCC requires broadcasters to offer reasonable opportunities for response whenever an attack is made on the "honesty, character, integrity or like personal qualities of an identified person or group" as part of "the presentation of views on a controversial issue of public importance," *id.* § 73.1920, or when a broadcaster endorses or opposes a legally qualified candidate. *Id.* § 73.1930. These rules differ from the general fairness doctrine principles because the broadcaster is not afforded discretion in choosing a spokesman for the presentation of contrasting views. Rather, under the Personal Attack Rule, the broadcaster must offer the person attacked a chance to reply. *Id.* § 73.1920. The FCC has chosen not to exempt "bona fide news documentar[ies]" from the Personal Attack Rule, compare 47 U.S.C. § 315(a)(3) (1976) with 47 C.F.R. § 73.1920(b)(4) (1979), because it is unlikely that editorial discretion would be inhibited "in the case of a documentary, which is assembled over a period of time." 33 Fed. Reg. 5,362-63 (1968). The FCC also regulates broadcasters under the "equal opportunities" requirement of 47 U.S.C. § 315(a) (1976). Under this section, a broadcaster that permits a legally qualified candidate for public office to use the broadcaster's facilities must afford competing candidates "equal opportunities . . . in the use of such broadcasting station." *Id.* Fairness doctrine obligations are "not applicable to [§ 315] uses by candidates." Gloria W. Sage, 62 F.C.C.2d 135, 136 (1976); see 44 Fed. Reg. 45,955 (1979).

43. Broadcast Procedure Manual, 49 F.C.C.2d 1, 5 (1974).

44. *Id.*; e.g., American Security Council Educ. Foundation v. FCC, 607 F.2d 438, 445 (D.C. Cir. 1979) (en banc), cert. denied, 100 S. Ct. 662 (1980); Anthony R. Martin-Trigona, 39 F.C.C.2d 25, 26 (1973).

45. To state a prima facie case, the FCC requires that a complaint: "Submit specific information indicating (1) the particular station involved; (2) the particular issue of a controversial 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 Primer, *supra* note 39, at 600; Reconsideration of the Fairness Report, *supra* note 25, at 696; Fairness Report, *supra* note 2, at 8.

46. Reconsideration of the Fairness Report, *supra* note 25, at 696. By placing itself between

journalistic judgment.<sup>47</sup> Therefore, when a complaint fails to establish a prima facie case, the FCC will not require a response from the broadcaster;<sup>48</sup> when a complaint does satisfy the prima facie requirements, however, the complaint is forwarded to the broadcaster who is afforded a "full opportunity" to demonstrate that it has met its fairness obligations.<sup>49</sup>

Once a complainant has satisfied the prima facie case requirements<sup>50</sup> and the broadcaster has offered rebuttal evidence, the FCC determines whether the circumstances of a particular case show that a broadcaster acted "reasonably" and in "good faith" to meet its fairness doctrine obligations.<sup>51</sup> The FCC attempts to evaluate the fairness of overall programming,<sup>52</sup> but claims not to "substitute [its] judgment for that of the licensee."<sup>53</sup> In practice,

complainants and broadcasters, the FCC seeks to "weed out those complaints that would burden broadcasters without sufficient likelihood that a countervailing benefit will be gained." American Security Council Educ. Foundation v. FCC, 607 F.2d 438, 452 (D.C. Cir. 1979) (en banc), cert. denied, 100 S. Ct. 662 (1980). "Absent detailed and specific evidence of failure to comply with . . . the fairness doctrine, it would be unreasonable to require licensees specifically to disprove allegations [of fairness doctrine violations]. The Commission's policy of encouraging robust, wide-open debate on issues of public importance would in practice be defeated if, on the basis of vague and general charges of unfairness, we should impose upon licensees the burden of proving the contrary by producing recordings or transcripts of all news programs, editorials, commentaries, and discussion of public issues many of which are treated over long periods of time." Allen C. Phelps, 21 F.C.C.2d 12, 13 (1969).

47. *E.g.*, CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 111 (1973); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 389 (1969); see Community-Serv. Broadcasting of Mid-America, Inc. v. FCC, 593 F.2d 1102, 1110 (D.C. Cir. 1978) (en banc).

48. Reconsideration of the Fairness Report, *supra* note 75, at 696; Fairness Report, *supra* note 2, at 8; Fairness Primer, *supra* note 39, at 600; see Robert G. Ryan, 25 F.C.C.2d 884, 885 (1970) ("[I]f the Commission were to require stations or networks to come forward with specific evidence such as tapes or transcripts of programs each time someone raised a fairness question . . . the burden so cast on the stations and networks would be most onerous and would substantially discourage the normal day-to-day presentation of broadcasts."). See also Allen C. Phelps, 21 F.C.C.2d 12, 13 (1969).

49. Fairness Primer, *supra* note 39, at 600; see Reconsideration of the Fairness Report, *supra* note 25, at 696; Fairness Report, *supra* note 2, at 8.

50. Relatively few complainants satisfy the prima facie case requirements. In 1975, for example, the FCC received approximately 3,570 fairness doctrine complaints and determined that only 52 required the broadcaster to file a response. S. Simmons, *supra* note 5, at 212; see Fairness Report, *supra* note 2, at 8. See also Pemberton, *The Right of Access to Mass Media*, in *The Rights of Americans* 276, 284-95 (N. Dorsen ed. 1971); 93 Harv. L. Rev. 1028, 1037 & n.69 (1980).

51. *E.g.*, International Bhd. of Teamsters v. NBC, 59 F.C.C.2d 1317, 1318 (1976); see Dr. Michael Kielty, 69 F.C.C.2d 960, 961 (1978); ABC, 56 F.C.C.2d 275, 283 (1975); Rudolph P. Arnold v. Station WKND, 52 F.C.C.2d 405, 406 (1975); Henry M. Buchanan, 42 F.C.C.2d 430, 432 (1973); Bernard T. Callan, 30 F.C.C.2d 758, 760 (1971). Reasonableness is a question of fact, "situational in nature—rooted in the facts which gave rise to the controversy." Reconsideration of the Fairness Report, *supra* note 25, at 697 (citation omitted). It is also a comparative standard, and, therefore, the reasonableness of one broadcaster must be decided by the finder of fact. *Id.*

52. Fairness Report, *supra* note 2, at 8; Allen C. Phelps, 21 F.C.C.2d 12, 13 (1969).

53. Reconsideration of Fairness Report, *supra* note 25, at 697. For example, the FCC found that a broadcaster acted reasonably when as part of a report critical of a particular organization,

however, the FCC often relies on statistical measurements and a cursory survey of the programming format,<sup>54</sup> rather than on evidence of a licensee's actual avoidance of fairness doctrine requirements. Recently, in *Public Media Center v. FCC*,<sup>55</sup> for example, the District of Columbia Circuit found that only one of the criteria of the FCC's reasonableness inquiry supported the finding that eight of the twelve radio stations named in a complaint violated the fairness doctrine.<sup>56</sup> Other criteria, including frequency of broadcast presentations, placement of programming during peak hours, and diligence in ascertaining various viewpoints,<sup>57</sup> did not provide "clear and explicitly articulate . . . standards" sufficient to govern the behavior of licensees.<sup>58</sup> Accordingly, the court remanded the proceeding to the FCC for clarification of the basis for its decision.<sup>59</sup> On remand, the FCC reexamined the frequency of broadcasts and the placement of programming and concluded that in addition to the eight stations that were originally found to have acted unreasonably, four other stations acted unreasonably in meeting fairness obligations.<sup>60</sup>

It seems, therefore, that although the prima facie case requirement and the reasonableness standard are intended to review overall programming and reduce unnecessary interference with broadcasters' journalistic discretion,<sup>61</sup> the test may instead result in application of a "mathematical formula or

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it offered to interview the organization's president. *International Bhd. of Teamsters v. NBC*, 59 F.C.C.2d 1317, 1318-19 (1976). Similarly, when a broadcaster aired views opposing gun control on four programs, and views favoring gun control on only three programs, the broadcaster was still deemed to have acted reasonably. *James L. Waller*, 57 F.C.C.2d 1281, 1283-84 (1976)

54. *See, e.g.*, *James L. Waller*, 57 F.C.C.2d 1281, 1283-84 (1976) (broadcaster found reasonable based on brief review of number of broadcasts expressing opposing views of gun control); *Friends of Animals, Inc.*, 29 F.C.C.2d 804, 805-06 (1971) (broadcaster found reasonable because various statements of those opposed to killing animals were broadcast during program dealing with animal extermination); cases cited note 37 *supra*.

55. 587 F.2d 1322 (D.C. Cir. 1978), *on remand*, 72 F.C.C.2d 776 (1979). Although *Public Media Center* concerned fairness doctrine complaints about public issue advertising, *id.* at 1324-25, the fairness principles would be equally applicable to a complaint alleging unfairness in news reporting. *See, e.g.*, *New York City Transit Auth.*, 45 F.C.C.2d 844, 850 (1974); *Network Coverage of the Democratic Nat'l Convention*, 16 F.C.C.2d 650, 654-55 (1969)

56. 587 F.2d at 1331-32. Complainants alleged that the broadcasters violated the fairness doctrine by giving imbalanced treatment to the issue of the desirability of constructing nuclear power facilities. 59 F.C.C.2d 494, 495-96 (1977). The District of Columbia Circuit found that in evaluating the reasonableness of the broadcasters' programming, the FCC purported to consider such factors as the amount of drive (peak listening) time given favorable and antinuclear spokesmen, the total amount of time allocated each viewpoint, and the broadcasters' diligence in seeking out spokesmen for opposing views. 587 F.2d at 1330. The court concluded that only the evidence of total time allotment supported the result reached by the FCC *id.* at 1332

57. 587 F.2d at 1329-30.

58. *Id.* at 1331.

59. *Id.* at 1332.

60. 72 F.C.C.2d at 779-81. The four stations were found to have acted unreasonably despite evidence that three of the four had devoted more total broadcast time to the viewpoint found to have been given imbalanced treatment. *Id.* at 779-80.

61. *See* Fairness Report, *supra* note 2, at 8-9; Reconsideration of the Fairness Report, *supra* note 25, at 696-97.

mechanical requirement for achieving fairness."<sup>62</sup> Furthermore, if the FCC's ultimate test for evaluating fairness doctrine performance is merely whether the public has been left uninformed,<sup>63</sup> without any examination of evidence extrinsic to the news broadcast, complainants and licensees have no meaningful standards of behavior and courts lack coherent standards of review. These consequences do not comport with the first amendment objective that "broadcasters should have maximum editorial discretion in deciding how to fulfill fairness doctrine obligations."<sup>64</sup>

## II. REGULATION OF BROADCAST NEWS UNDER THE EXTRINSIC EVIDENCE STANDARD

In its Report on Editorializing by Broadcast Licensees,<sup>65</sup> the FCC emphasized the first amendment goal of developing "an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day."<sup>66</sup> Thus, in addition to enforcing the fairness doctrine, the FCC is concerned that the public's right to be informed could be subverted by a broadcaster's distortion,<sup>67</sup> suppression,<sup>68</sup> or staging<sup>69</sup> of news events.<sup>70</sup> Nevertheless, the FCC has consistently refused to take action on

62. *Public Media Center*, 59 F.C.C.2d 494, 517 (1976), *remanded on other grounds*, 587 F.2d 1322 (D.C. Cir. 1978), *on remand*, 72 F.C.C.2d 776 (1979); *accord*, *National Org. for Women v. FCC*, 555 F.2d 1002, 1015 (D.C. Cir. 1977).

63. *Green v. FCC*, 447 F.2d 323, 329 (D.C. Cir. 1971); *accord*, *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973); *American Security Council Educ. Foundation v. FCC*, 607 F.2d 438, 445 (D.C. Cir. 1979) (en banc), *cert. denied*, 100 S. Ct. 662 (1980).

64. *American Security Council Educ. Foundation v. FCC*, 607 F.2d 438, 445 (D.C. Cir. 1979) (en banc), *cert. denied*, 100 S. Ct. 662 (1980). The Supreme Court has stated that if first amendment values are to be preserved the FCC should not be drawn "into a continuing case-by-case determination of who should be heard and when. . . . To sacrifice First Amendment protections for so speculative a gain [in rights of access] is not warranted, and it [is] well within the Commission's discretion to construe the Act so as to avoid such a result." *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 127 (1973) (footnotes omitted). *See also* *W. C. Ponder v. NBC*, 58 F.C.C.2d 1222, 1222-23 (1976); *Vincent P. Dole, M.D. v. WNBC*, 54 F.C.C.2d 508, 513 (1975).

65. Report on Editorializing, *supra* note 2.

66. *Id.* at 1248.

67. *See, e.g.*, *Tri-State Broadcasting Co.*, 59 F.C.C.2d 1240, 1243-45 (1976); *Los Angeles Irish Coalition for Fairness in the Media*, 52 F.C.C.2d 681, 681-83 (1975); *Action Radio Inc.*, 51 F.C.C.2d 803, 807-08 (1975).

68. *See, e.g.*, *Michael D. Bramble*, 58 F.C.C.2d 565, 571 (1976); *Wichita County Human Rel. Comm.*, 50 F.C.C.2d 322, 324 (1974); *WOIC, Inc.*, 39 F.C.C.2d 355, 367 (1973).

69. *See, e.g.*, *Black Producer's Ass'n*, 70 F.C.C.2d 1920, 1920 (1979). The critical factor warranting FCC inquiry or investigation "is the existence or material indication . . . that a licensee has staged news events. Otherwise, the matter would again come down to a judgment as to what was presented, as against what should have been presented—a judgmental area for broadcast journalism which [the FCC] must eschew." *Network Coverage of the Democratic Nat'l Convention*, 16 F.C.C.2d 650, 657-58 (1969).

70. Report on Editorializing, *supra* note 2, at 1254-55. "A licensee would be abusing his position as a public trustee . . . were he to withhold from expression over his facilities relevant news or facts concerning a controversy or to slant or distort the presentation of such news." *Id.*

complaints alleging distortion, suppression, or staging in the absence of "extrinsic evidence" that the broadcaster has deliberately engaged in such conduct.<sup>71</sup>

The FCC has never precisely defined the extrinsic evidence standard, but rather has variously described the requisite proof as "extrinsic evidence,"<sup>72</sup> "significant extrinsic evidence,"<sup>73</sup> and "substantial extrinsic evidence."<sup>74</sup> On occasion, however, the FCC has supplied indications of the requisite standard of proof. The FCC frequently refers to "testimony, in writing or otherwise, from 'insiders' or persons who have direct personal knowledge of an intentional attempt to falsify the news."<sup>75</sup> Specifically, "extrinsic evidence revealing orders from the licensee, its top management, or its news management to falsify the news,"<sup>76</sup> is deemed sufficient to require further action by the FCC. For example, the FCC has stated that extrinsic evidence is not presented when a complainant merely alleges that "Commentator X has given a biased account or analysis of a news event," or that "the true facts of the news event are different from those presented."<sup>77</sup> Rather, the FCC seems to require a complainant to come forward with substantial testimonial or documentary evidence, extraneous to the broadcast itself, demonstrating a willful effort by the broadcaster or its management to slant news reporting.<sup>78</sup> Thus, the

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71. See notes 80-98 *infra* and accompanying text.

72. *E.g.*, Jim Myers, 69 F.C.C.2d 963, 965 (1978); Educational Broadcasting Corp., 59 F.C.C.2d 1136, 1142 (1976); KIRO, Inc., 58 F.C.C.2d 86, 88 (1976).

73. *E.g.*, KMAP, Inc., 72 F.C.C.2d 241, 243 (1979); Northwestern Ind. Broadcasting Corp., 57 F.C.C.2d 686, 694 (1975); Alan Schultz, 53 F.C.C.2d 1215, 1217 (1975); David E. Houskins, 42 F.C.C.2d 1055, 1056 (1973); Shady Wall, 31 F.C.C.2d 484, 485 (1971); Richard B. Kay, 24 F.C.C.2d 426, 428 (1970).

74. KMAP, Inc., 72 F.C.C.2d 241, 243 (1979); Sun Newspapers, Inc., 39 F.C.C.2d 1025, 1025-26 (1973); Bernard T. Callan, 30 F.C.C.2d 758, 760 (1971). The FCC has defined "substantial evidence" as "reliable and probative evidence . . . which clearly satisfie[s] the customary preponderance of the evidence standard used in administrative proceedings." Radio Carrollton, 69 F.C.C.2d 424, 425 (1978) (footnote omitted).

75. Jim Myers, 69 F.C.C.2d 963, 965 (1978); *accord*, Mary Jo Bradley, 47 F.C.C.2d 1063, 1065 (1974); Mrs. J. R. Paul, 26 F.C.C.2d 591, 592 (1969). See also Rudolph P. Arnold, 52 F.C.C.2d 405, 408 (1975) ("Man of the Month" program not discriminatory because of reasonable presence of women in overall programming); David E. Houskins, 42 F.C.C.2d 1055, 1056 (1973) (referring to "statements by individuals who have personal knowledge that a licensee ordered the news to be distorted). In Michael D. Bramble, 58 F.C.C.2d 565 (1976), FCC staff conducted a "field investigation" when a former newsman alleged that his employer's "top management" directed the suppression of news. The FCC concluded, however, that its staff investigation found insufficient evidence of news suppression by the broadcaster. *Id.* at 572-73.

76. Jim Myers, 69 F.C.C.2d 963, 965 (1978); see Robert J. Bolan, 49 F.C.C.2d 1263, 1265 (1974); Mrs. J. R. Paul, 26 F.C.C.2d 591, 591-92 (1969).

77. *E.g.*, Jim Myers, 69 F.C.C.2d 963, 965 (1978); Mrs. J. R. Paul, 26 F.C.C.2d 591, 592 (1969).

78. *E.g.*, KMAP, Inc., 63 F.C.C.2d 470, 476 (1977); Universal Communications Corp., 27 F.C.C.2d 1022, 1025-26 (1971). Similarly, when the complainant alleged that the broadcaster was the only network to carry an inaccurate report accusing the complainant of wrongdoing, the FCC found that the broadcaster did not engage in improper news reporting. Henry M. Buchanan, 42 F.C.C.2d 430, 432 (1973). See also Robert J. Bolan, 53 F.C.C.2d 781, 781 (1975) (no extrinsic evidence of distortion when there was an absence of "specific information which would indicate

extrinsic evidence standard imposes a difficult burden of proof on private citizens and public interest advocates seeking FCC action against improper news broadcasting. Nevertheless, the standard is designed to obviate the concern that "unduly burdensome regulation will induce broadcasters to decrease vigorous and effective coverage of issues that are the subject of public debate."<sup>79</sup>

#### A. *News Distortion*

Complaints lodged against broadcasters for distortion are generally based on allegations of inaccurate reporting<sup>80</sup> or on a purposely skewed presentation of an event or condition in the community.<sup>81</sup> The FCC believes that handling complaints of news distortion in the absence of extrinsic evidence that a broadcaster has engaged in deliberate misconduct,<sup>82</sup> would involve the FCC in an evidentiary quagmire requiring investigation of the accuracy of a broadcaster's report of a news event.<sup>83</sup> Thus, for example, the FCC refused to

that [the broadcaster] stated or implied . . . that the interview . . . took place subsequent to the [time represented in the broadcast] and that such statement was made by [the broadcaster] knowing it was untrue.") In addition, the FCC has ruled that discrepancies between a broadcaster's report of a news event and a newswire account do not constitute extrinsic evidence of news falsification when the reporter in question did not "unreasonably" ascribe the discrepancies to his reliance on a different dispatch by the same newswire service. *RKO Gen., Inc.*, 51 F.C.C.2d 367, 369 (1975). The FCC also found that the reporter's "exaggeration of the information" from the newswire did not warrant FCC action. *Id.* at 369 n.6. In one case, however, the FCC has found that a broadcaster's report of air temperatures "without a factual foundation for [the] readings" constituted "extrinsic corroboration of . . . reckless disregard of easily ascertainable facts and materials," sufficient to warrant censure. *Action Radio Inc.*, 51 F.C.C.2d 803, 807-08 (1975).

79. *American Security Council Educ. Foundation v. FCC*, 607 F.2d 438, 445 (D.C. Cir. 1979) (en banc) (footnote omitted), *cert. denied*, 100 S. Ct. 662 (1980); see *Public Media Center v. FCC*, 587 F.2d 1322, 1328 (D.C. Cir. 1978); *National Org. For Women v. FCC*, 555 F.2d 1002, 1010 (D.C. Cir. 1977).

80. *E.g.*, *Cairo Broadcasting Co.*, 63 F.C.C.2d 586, 591 (1977) (charges of inaccurate report of shooting incident); *James L. Waller*, 57 F.C.C.2d 1281, 1284 (1976) (allegations of "misuse of statistics" in newscast about gun control); *Action Radio Inc.*, 51 F.C.C.2d 803, 807-08 (1975) (broadcaster censured for reporting air temperatures "without a factual foundation"); *RKO Gen. Inc.*, 51 F.C.C.2d 367, 367-69 (1975) (allegation of falsification of news report).

81. See, *e.g.*, *Tri-State Broadcasting Co.*, 59 F.C.C.2d 1240, 1244 (1976) (allegation that broadcaster "delayed, altered, distorted, or censored important news stories that might displease commercial advertisers or threaten [broadcaster's] relationship with the business and political community"); *Los Angeles Irish Coalition for Fairness in the Media*, 52 F.C.C.2d 681, 681 (1975) (claim that broadcaster "grossly and continuously distorted" the conflict in Northern Ireland); *Effingham Broadcasting Co.*, 51 F.C.C.2d 453, 454 (1975) (allegations of distortion in broadcaster's coverage of complainant's appearance at a school board meeting); *Shady Wall*, 31 F.C.C.2d 484, 485-86 (1971) (allegations of distortion in news coverage of complainant's speech).

82. See *WANV, Inc.*, 59 F.C.C.2d 1430, 1433 (1976) (no extrinsic evidence presented when petitioner "has merely questioned the truth of certain news stories"); *Tri-State Broadcasting Co.*, 59 F.C.C.2d 1240, 1244-45 (1976) (no action warranted based on allegations that broadcaster distorted news to assuage local sponsors when complainant failed to present "significant extrinsic evidence of . . . deliberate distortion"); *RKO, Inc.*, 51 F.C.C.2d 367, 369 (1975) (request to submit issue of news distortion denied when petitioner "failed to submit sufficient 'extrinsic evidence' to show that [the broadcaster] has engaged in news falsification" (citation omitted)).

83. "[I]n this democracy, no Government agency can authenticate the news, or should try to

take action against a broadcaster who transposed questions and answers in a news interview by splicing tapes,<sup>84</sup> or a broadcaster who inaccurately reported during a documentary about malnutrition that an infant died from starvation,<sup>85</sup> when the complainants failed to demonstrate that the broadcaster's actions were motivated by an intent to distort the news.

### B. News Suppression

Generally, the FCC has treated allegations of news suppression and allegations of news distortion similarly.<sup>86</sup> In *Universal Communications Corp.*,<sup>87</sup> for example, the complainants alleged that the broadcaster suppressed news coverage of events of interest to blacks, by incompletely reporting a statement by a black spokesman and by failing to report a speech by another black leader at a convocation covered by the broadcaster.<sup>88</sup> The FCC decided that the complainants' charges of news suppression were "unsupported by the facts," and "merely established that they disagree with Universal's news judgments."<sup>89</sup> According to the FCC, "a pattern of disagreements" does not constitute "a pattern of distortion"<sup>90</sup> absent evidence of an intentional and actual distortion in the broadcaster's coverage of the events.<sup>91</sup> If complainants were not required to present such extrinsic evidence, the FCC would become involved in reviewing the broadcaster's daily news judgments, a task it endeavors to avoid.<sup>92</sup>

### C. News Staging

FCC review of complaints that allege news staging is based on considerations similar to those used in FCC handling of complaints of news distortion and suppression.<sup>93</sup> In addition to the requirement that a complainant present extrinsic evidence that a news event has been staged,<sup>94</sup> the FCC considers

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do so. We will therefore eschew the censor's role, including efforts to establish news distortion in situations where Government intervention would constitute a worse danger than the possible rigging itself." CBS Program "Hunger in America," 20 F.C.C.2d 143, 151 (1969) (footnote omitted).

84. CBS Program "The Selling of the Pentagon," 30 F.C.C.2d 150, 151 (1971).

85. CBS Program "Hunger in America," 20 F.C.C.2d 143, 151 (1969)

86. Although the FCC has used such terms as "rigging," "slanting," and "deliberate distortion" of the news in describing proscribed practices, "the FCC believes that deliberate suppression or attempted suppression of news because of the licensee's private interests, personal opinions or prejudices is a form of 'rigging,' 'slanting,' or 'deliberate distortion' of the overall news presentation of the station." Michael D. Bramble, 58 F.C.C.2d 565, 572 (1976) (footnote omitted).

87. 27 F.C.C.2d 1022 (1971).

88. *Id.* at 1023-24.

89. *Id.* at 1025-26.

90. *Id.* at 1026.

91. *Id.*

92. "Clearly, the Commission cannot decide that a broadcaster erred in its choice to present film of one speaker instead of another, or that one story should have been covered instead of another on a particular day." *Id.*; see, e.g., *KMAP Inc.*, 72 F.C.C.2d 241, 241 (1979); *Wichita County Human Rel. Comm.*, 50 F.C.C.2d 322, 324 (1974).

93. See notes 80-92 *supra* and accompanying text.

94. *Network Coverage of the Democratic Nat'l Convention*, 16 F.C.C.2d 650, 657 (1969). See also *ABC*, 45 F.C.C.2d 41, 46 (1973).

three other factors in determining whether a broadcaster is responsible for such staging. First, the deliberately staged news event must be a "significant 'event' which did not in fact occur but rather is 'acted out' at the behest of news personnel."<sup>95</sup> Second, the FCC carefully examines the role of the broadcast management in directing the staging, supervising employees in order to prevent the staging, and investigating allegations of staging by other reporters.<sup>96</sup> Third, the FCC requires a broadcaster to make a thorough and conscientious investigation of complaints of staging.<sup>97</sup> Accordingly, the FCC found that a broadcaster acted improperly when the broadcaster relied upon the denials of an inexperienced news reporter that he had not staged a filmed event, instead of corroborating such denials by interviewing one of the participants in the allegedly staged event.<sup>98</sup>

#### D. *Analysis of the Extrinsic Evidence Standard*

As a formidable barrier to a complainant seeking FCC sanctions for news distortion, suppression, or staging, the extrinsic evidence approach reflects the FCC's strong reluctance to arbitrate disputes over the exercise of a broadcaster's news judgment.<sup>99</sup> Perhaps in recognition of the intense demands faced by news editors in preparing to broadcast daily news programs,<sup>100</sup> the FCC will

95. *Network Coverage of the Democratic Nat'l Convention*, 16 F.C.C.2d 650, 657 (1969), *see* WBBM-TV, 18 F.C.C.2d 124 (1969). In evaluating the propriety of filming and reporting an arranged event, the FCC concluded that "while the pot party was authentic in many respects and thus cannot be deemed a flagrantly staged event or outright fraud on the public, it . . . [gave] the impression that WBBM-TV had been invited to film a student pot gathering which was in any event being held, whereas, in fact, its agent had induced the holding of the party." *Id.* at 134.

96. *Network Coverage of the Democratic Nat'l Convention*, 16 F.C.C.2d 650 (1969). The FCC distinguished between instances of staging instigated by employees without the knowledge of management and staging conducted at the request of management. *Id.* at 657. Instances of the first variety would not require the FCC to investigate the broadcaster's fitness to operate; incidents of the second type, however, would compel the FCC to conduct a hearing to determine whether the licensee is qualified to retain a broadcast permit. *Id.* The FCC does not want to jeopardize a licensee because of an isolated lapse of an employee; otherwise, broadcast journalism might be discouraged. *Id.*; *see* Black Producer's Ass'n, 70 F.C.C.2d 1920, 1928 (1979); WBBM-TV, 18 F.C.C.2d 124, 139 (1969).

97. CBS Program "Hunger in America," 20 F.C.C.2d 143, 151 n.6 (1969), *quoted in* ABC, 45 F.C.C.2d 41, 45 (1973).

98. WBBM-TV, 18 F.C.C.2d 124, 137 (1969). *See also* CBS, Inc., 45 F.C.C.2d 119, 128 (1973) (broadcaster was "derelict" in investigating allegations of staging when broadcaster "did not make a thorough investigation of its own, and discovered facts of significance only after the Commission confronted it with evidence contrary to its original statements and requested further investigation").

99. National Citizens Comm. for Broadcasting, 32 F.C.C.2d 824, 825 (1971); *see* Black Producer's Ass'n, 70 F.C.C.2d 1920, 1930 (1979); A. Burton White, M.D., 18 F.C.C.2d 658, 659 (1969); Fairness Report, *supra* note 2, at 1.

100. "Any attempt to evaluate such complaints as to 'what should have been broadcast' as against, or in addition to, what had been broadcast would place this agency in the role of national arbiter of the news; in fact, dictator of which news items should be broadcast. Since there are only so many hours in the broadcast day . . . it obviously is impossible for each licensee to present as much news about every event as every member of the public might desire." Kenneth M. Cooper, 39 F.C.C.2d 1000, 1002 (1973). *See also* American Security Council Educ. Foundation v. FCC, 607 F.2d 438, 451 (D.C. Cir. 1979) (en banc), *cert. denied*, 100 S. Ct. 662 (1980).



review a broadcaster's judgments only under certain exigencies: when a complainant sets forth substantial, highly probative evidence indicating that a broadcaster has seriously abused its journalistic discretion in news reporting.<sup>101</sup> The extrinsic evidence standard thereby minimizes FCC oversight when government intervention in news broadcasting would constitute more of a threat to freedom of speech and press than the broadcaster's alleged infringement of the public's right to be informed.

### III. REGULATION OF BROADCAST NEWS UNDER CONFLICTING STANDARDS

#### A. *The Evolution of Inconsistent Standards of Review*

By its adoption of the extrinsic evidence standard, the FCC attempted to distinguish complaints that would be reviewed under the fairness doctrine evidentiary standards and those that would be resolved under a more rigorous standard. The rationale for these different standards of review is the FCC's determination that its proper role as a regulatory agency charged with protecting the public interest in utilization of broadcast frequencies<sup>102</sup> is to oversee the "fairness" or "balance" of news reporting, but not to become an insurer of its "accuracy" or "truth."<sup>103</sup> In *Network Coverage of the Democratic National Convention*,<sup>104</sup> for example, the FCC stated that the fairness doctrine would apply only to ensure that a broadcaster provides opportunities for presentation of contrasting viewpoints.<sup>105</sup> The FCC rejected any application of the fairness doctrine "to determine whether [news coverage] is fair in the sense of presenting the 'truth' of an event as the Commission might see it."<sup>106</sup> Furthermore, if the FCC were to assume the role of "national arbiter of the truth," it would improperly intrude in the domain of "the journalistic judgment of the networks."<sup>107</sup>

The factual circumstances in *Democratic National Convention* permitted a relatively facile distinction between allegations of unfairness and news staging,<sup>108</sup> but since that decision, the demarcation between fairness and distortion complaints has become less clear. More recent complaints of improper

101. See *Star Stations of Indiana, Inc.*, 51 F.C.C.2d 95, 105-09, *aff'd*, 527 F.2d 853 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 992 (1976) (broadcaster's application for license renewal denied when, in addition to other misconduct, the general manager testified that the station's principal owner instructed him to slant news reporting in order to provide favorable coverage for a U.S. Senate candidate).

102. See 47 U.S.C. §§ 303, 303(r) (1976). See also *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 109 (1973); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 379 (1969).

103. *E.g.*, *International Bhd. of Teamsters v. NBC*, 59 F.C.C.2d 1317, 1320 (1976) ("Rather than determining the truth or falsity of [news reports], the Commission deems it more appropriate to assure that a reasonable opportunity is afforded for the presentation of contrasting viewpoints."); see *Alan Schultz*, 53 F.C.C.2d 1215, 1217 (1975); *Rudolph P. Arnold*, 52 F.C.C.2d 405, 408 (1975).

104. 16 F.C.C.2d 650 (1969).

105. *Id.* at 654.

106. *Id.* at 655.

107. *Id.*

108. *Id.* at 656. The complainants alleged that television crews of the major networks staged protests and fabricated incidents of bodily injuries to anti-war demonstrators outside the Democratic Convention in Chicago in 1968. *Id.* at 651.

news presentation have been framed in amorphous terms such as "bias,"<sup>109</sup> "advocacy,"<sup>110</sup> "inaccuracy,"<sup>111</sup> "news management,"<sup>112</sup> "discriminatory weighting of news items,"<sup>113</sup> and "censorship and news manipulation."<sup>114</sup> In ruling on such variously defined allegations of improper news reporting, the FCC has generally attempted to resolve claims of bias and advocacy under the fairness doctrine standards,<sup>115</sup> while ruling on complaints of inaccuracy, news management manipulation, and distortion under the extrinsic evidence standard.<sup>116</sup> Although it disposes of such complaints according to these markedly different standards, the FCC has provided little explanation of how it determines which standard will be applied to a particular complaint.

Furthermore, despite the theoretical benefits of the FCC's policy of distinguishing unreasonable conduct under the fairness doctrine<sup>117</sup> from willful conduct under the distortion and suppression rationale,<sup>118</sup> this distinction becomes tenuous when viewers complain of bias, advocacy, inaccuracy, and manipulation. Realistically, any of the latter complaints may arise out of either unreasonable or willful conduct by a broadcaster. For example, in *Newhouse Broadcasting Corp.*,<sup>119</sup> the complainants' characterizations of improper news presentation ranged from "gross misrepresentation and distortion of the coverage of news, especially for the Black community,"<sup>120</sup> to "anti-

109. *Cairo Broadcasting Co.*, 63 F.C.C.2d 586, 591-92 (1977); *Newhouse Broadcasting Corp.*, 61 F.C.C.2d 528, 541 (1976); James L. Waller, 57 F.C.C.2d 1281, 1281 (1976).

110. American Security Council Educ. Foundation, 63 F.C.C.2d 366, 367 (1977); J. Allen Carr, 30 F.C.C.2d 894, 894 (1971).

111. James L. Waller, 57 F.C.C.2d 1281, 1281-82 (1976).

112. ABC, 56 F.C.C.2d 275, 275 (1975); David E. Houskins, 42 F.C.C.2d 1055, 1055 (1973).

113. *National Org. for Women v. FCC*, 555 F.2d 1002, 1010 (D.C. Cir. 1977).

114. Jim Myers, 69 F.C.C.2d 963, 965 (1978); see *Pulley v. Station WBFN*, 58 F.C.C.2d 1224, 1227 (1976).

115. See *Cairo Broadcasting Co.*, 63 F.C.C.2d 586, 591-93 (1977); American Security Council Educ. Foundation, 63 F.C.C.2d 366, 367-68 n.2 (1977), *rev'd*, No. 77-1443 (D.C. Cir. Sept. 13, 1978), *vacated on rehearing en banc*, 607 F.2d 438 (D.C. Cir. 1979) (affirming FCC decision), *cert. denied*, 100 S. Ct. 662 (1980); *Newhouse Broadcasting Corp.*, 61 F.C.C.2d 528, 541 (1976); James L. Waller, 57 F.C.C.2d 1281, 1281-84 (1976); J. Allen Carr, 30 F.C.C.2d 894, 895-97 (1971). When complainants combine allegations of "bias" with allegations of "distortion" or "suppression," the FCC applies the extrinsic evidence standard. See *KIRO, Inc.*, 58 F.C.C.2d 86, 87-88 (1976); *Vincent P. Dole, M.D. v. Station WNBC-TV*, 54 F.C.C.2d 508, 513-14 (1975); *The Outlet Co.*, 38 F.C.C.2d 355, 363 (1972); *Mrs. J. R. Paul*, 26 F.C.C.2d 591, 591-92 (1969). In some instances, however, the FCC has applied the extrinsic evidence standard to bare allegations of bias. See *Robin Ficker*, 66 F.C.C.2d 1044, 1044-45 (1976); *Cliff Wilmath*, 41 F.C.C.2d 603, 604 (1973).

116. *National Org. for Women v. FCC*, 555 F.2d 1002, 1010 (D.C. Cir. 1977); Jim Myers, 69 F.C.C.2d 963, 965 (1978); James L. Waller, 57 F.C.C.2d 1281, 1284 (1976); ABC, 56 F.C.C.2d 275, 276 (1975); David E. Houskins, 42 F.C.C.2d 1055, 1056 (1973).

117. Fairness doctrine violations are usually considered to arise from a "failure" to give adequate coverage to a certain viewpoint or issue. See *Fairness Report*, *supra* note 2, at 10.

118. Such cases are usually considered to present the issue of whether the broadcaster engaged in "deliberate" or intentional activity. See, e.g., *CBS Program "Hunger in America"*, 20 F.C.C.2d 143, 150 (1969); *Tri-State Broadcasting Co.*, 59 F.C.C.2d 1240, 1245 (1976).

119. 61 F.C.C.2d 528 (1976).

120. *Id.* at 532 (footnote omitted).

Black bias"<sup>121</sup> to "blacking out" the complainants' press releases.<sup>122</sup> In rejecting the complainants' petition to deny renewal of a broadcast license, the FCC applied the extrinsic evidence standard to the allegations of distortion and misrepresentation,<sup>123</sup> and fairness doctrine evidentiary standards to allegations of bias and "blacking out" the press releases.<sup>124</sup> Yet, in applying the two different standards, the FCC did not explain why it considered the factual allegations distinguishable and used almost identical reasoning to support its rulings.<sup>125</sup>

In another case, the FCC appeared to have decided allegations of imbalance or unfairness not under the reasonableness test, but by applying the extrinsic evidence standard. In *WSM, Inc.*,<sup>126</sup> the complainants claimed that the broadcaster's televised news program "improperly emphasize[d] the less attractive aspects of Nashville's black community . . . tend[ing] to perpetuate a perceived link between blacks and crime."<sup>127</sup> Although these allegations would seem to involve imbalanced or unfair reporting,<sup>128</sup> the FCC construed the claims as allegations of "deliberate distortion, slanting or staging,"<sup>129</sup> and concluded that the complainants failed to establish that the broadcaster abused "[t]he broad discretion accorded a broadcast licensee in the exercise of professional news judgment."<sup>130</sup>

In addition, due to the lack of clarity in the FCC's decisions, viewer complaints often reflect confusion over the FCC's application of the fairness doctrine and extrinsic evidence standards. In one case a complainant equated

121. *Id.* at 534.

122. *Id.* at 540.

123. *Id.* at 535.

124. *Id.* at 540-41.

125. *Compare id.* at 535 ("[T]he Commission has consistently held that it is not the national arbiter of truth in broadcast journalism. Absent extrinsic evidence of deliberate distortion or staging, we are prohibited from substituting our judgment for the reasonable, good faith journalistic judgment of the licensee." (citation omitted)) *with id.* at 541 ("[T]he Commission does not sit to review the broadcaster's news judgments. Clearly, we cannot decide that a broadcaster erred in its choice that one event should be covered instead of another on a particular day . . . In reviewing fairness or news bias complaints, we eschew the role of censor . . .")

126. 66 F.C.C.2d 994 (1977).

127. *Id.* at 996.

128. *Id.*; *cf.* *Cairo Broadcasting Co.*, 63 F.C.C.2d 586, 591-93 (1977) (allegations of bias in news coverage of the black community decided under fairness doctrine), *James L. Waller*, 57 F.C.C.2d 1281, 1284 (1976) (allegations of "inaccuracy" in coverage of gun control decided under extrinsic evidence standard). In *Robin Ficker*, 66 F.C.C.2d 1044 (1976), without distinguishing its prior decisions applying the fairness doctrine to allegations of biased news reporting, the FCC disposed of a complaint of news bias by applying the extrinsic evidence standard *id.* at 1045. The complainant alleged that the broadcaster violated the fairness doctrine by giving inadequate coverage to his election campaign and was "biased against [his] campaign" because of his political outlook and a pending, unrelated suit against the broadcaster. *Id.* at 1044. Although the FCC applied the fairness doctrine in deciding that the complainant's allegations of inadequate coverage lacked merit, *id.* at 1044-45, the FCC disposed of complainant's allegations of bias by applying the extrinsic evidence standard. *Id.* at 1045. In so doing, however, the FCC at no point explained why it applied different standards to the related allegations. *See id.* at 1044-45, note 115 *supra*

129. *WSM, Inc.*, 66 F.C.C.2d 994, 997 (1977).

130. *Id.*

news suppression with fairness doctrine violation,<sup>131</sup> while another complainant expressed the belief that "the Commission allows only the showing by extrinsic evidence of bad faith on the part of the licensee to support a fairness doctrine violation."<sup>132</sup> It is arguable, therefore, that the FCC's inconsistent standards of review are too indeterminate and imprecise for application of the fairness doctrine to satisfy the delicate balancing of interests required by the first amendment.

#### B. American Security Council Education Foundation v. FCC

The difficulty in comports with first amendment considerations that is engendered by the FCC's inability to delineate cogently the circumstances in which it will apply the reasonableness test of the fairness doctrine or the extrinsic evidence standard, is demonstrated by *American Security Council Education Foundation v. FCC*.<sup>133</sup> Based on an extensive study of all CBS Evening News broadcasts televised during 1972, the American Security Council Education Foundation (ASCEF)<sup>134</sup> complained that the network "violated the fairness doctrine with respect to the coverage of 'national

131. Mary Jo Bradley, 47 F.C.C.2d 1063, 1065 (1974). In another case, a complainant seeking FCC action to correct allegedly incomplete reporting of the Vietnam War, expressly refused to frame his complaint in terms of a fairness doctrine violation or willful distortion, but instead chose to rely on "the public's right to adequate news coverage" as the basis for his claim. Kenneth M. Cooper, 39 F.C.C.2d 1000, 1002 (1973).

132. ABC, 56 F.C.C.2d 275, 283 (1975). The FCC has often stated that it deems its regulation of broadcast news to be more appropriate under the fairness doctrine than under the extrinsic evidence standard. See *International Bhd. of Teamsters v. NBC*, 59 F.C.C.2d 1317, 1320 (1976); Alan Schultz, 53 F.C.C.2d 1215, 1217 (1975); Bernard T. Callan, 30 F.C.C.2d 758, 760 (1971). The District of Columbia Circuit, however, recently concluded that "[g]enerally the licensee's news judgment will not be questioned [by the FCC] unless there is extrinsic evidence of deliberate distortion or news staging . . . or unless the licensee consistently fails to report news events of public importance that could not in good faith be ignored." *National Org. for Women v. FCC*, 555 F.2d 1002, 1010 (D.C. Cir. 1977).

133. 607 F.2d 438 (D.C. Cir. 1979) (en banc), cert. denied, 100 S. Ct. 662 (1980).

134. ASCEF transcribed televised reports dealing with "United States military and foreign affairs; Soviet Union military and foreign policy; China military and foreign policy; and Vietnam affairs." *Id.* at 441-42. The transcribed reports were then broken down into sentences and compared to what ASCEF considered to be three major positions on national security issues: Viewpoint A included coverage perceiving the threat to United States security as more serious than regarded by the government and desiring increased national security effort; Viewpoint B included coverage perceived as agreeing with government national security policies; and Viewpoint C included coverage perceiving threats to United States security as less serious than regarded by the government and desiring "decreased" national security efforts. The government view was deemed to be the position of the Nixon administration. *Id.* at 442, 479-80. ASCEF reviewed CBS Evening News broadcasts for 1972, 1973, 1974, and 1976, in addition to other CBS news and public affairs programming. 63 F.C.C.2d 366, 367 (1977). ASCEF is a private organization that describes itself as "a non-profit educational institution whose purpose is to improve public understanding of facts and issues relating to the national security of [the United States]." 607 F.2d at 452. (Wright, C.J., concurring). Others have termed ASCEF a " 'Cold War college' to train leaders for the battle against Communism." Levine, *Anti-Communist Group Lobbies to Keep U.S. a Military Superpower*, Wall St. J., Aug. 1, 1972, at 1, col. 1, quoted in F. Friendly, *supra* note 5, at 168.

security issues' ”<sup>135</sup> by engaging in “advocacy journalism.”<sup>136</sup> The ASCEF requested the FCC to direct CBS to provide opportunities for presentation of contrasting views on issues of national security and to offer “‘compensatory opportunities . . . to help balance the years [of] non-coverage of such views.’ ”<sup>137</sup>

The FCC ruled that the ASCEF complaint did not state a *prima facie* fairness doctrine violation because it failed to present a sufficiently “well-defined issue” to which CBS allegedly afforded imbalanced coverage.<sup>138</sup> Under the rubric of “national security,” the FCC found that ASCEF had included such topics as “‘Soviet and Chinese political and military objectives,’ ” “‘domestic foreign policy,’ ” “‘Chinese military and non-military policies,’ ” and “‘Southeast Asia and foreign relations generally.’ ”<sup>139</sup> According to the FCC, to require a broadcaster “to refute a broad claim of imbalance on a general, far-reaching issue,”<sup>140</sup> could have a “‘chilling effect’ on the journalistic efforts of a broadcaster.” Therefore, the FCC declined to require CBS to respond to the ASCEF complaint.<sup>141</sup>

Although a three judge panel of the District of Columbia Circuit reversed the decision of the FCC and remanded the action for further proceedings,<sup>142</sup> the FCC’s decision was ultimately affirmed by the majority of the court sitting *en banc*.<sup>143</sup> The court agreed that ASCEF failed to define properly the issue to which CBS allegedly accorded imbalanced coverage.<sup>144</sup> According to the majority, the diverse topics ASCEF included under the heading of national security<sup>145</sup> lacked the cohesive interrelationship necessary to enable the FCC to determine whether a broadcast dealing with one issue could be viewed as supporting or conflicting with a broadcast about another.<sup>146</sup> The majority also expressed the concern that FCC review of CBS’s conduct might upset the balancing of interests required by the first amendment “by inducing broad-

135. 63 F.C.C.2d at 366.

136. *Id.* at 367. Specifically, the ASCEF study found that of the sentences transcribed, 3.54% reflected Viewpoint A, 34.63% reflected Viewpoint B, and 61.83% reflected Viewpoint C. 607 F.2d at 442-43, 481.

137. 63 F.C.C.2d at 367.

138. *Id.* at 368; *see pt. I(c) supra*.

139. 63 F.C.C.2d at 368.

140. *Id.*

141. *Id.* at 370.

142. No. 77-1443 (D.C. Cir. Sept. 13, 1978). The three judge panel found that “ASCEF’s complaint . . . made the relevant issue as plain as day: whether this nation should do more, less or the same about perceived threats to its national security.” *Id.*, slip op. at 15.

143. 607 F.2d 438 (D.C. Cir. 1979) (*en banc*), *cert. denied*, 100 S. Ct. 662 (1980).

144. *Id.* at 448.

145. ASCEF included in the national security issue such diverse topics as NATO, detente with China, amnesty for Vietnam War draft evaders, and SALT. *Id.* at 449.

146. The court referred to the national security issue as an “umbrella concept,” encompassing issues with only a tangential relationship. “Consideration of the issues together, rather than individually, would not provide a basis for determining whether the broadcaster presented a reasonable balance of conflicting views because views on any one issue do not support or contradict views on the others.” *Id.*

casters to forego programming on controversial issues or by disrupting the normal exercise of journalistic judgment in such programming that is aired."<sup>147</sup> Furthermore, the court recognized the potential interference with news broadcasting that could be caused by overly rigorous enforcement of the fairness doctrine:

The broadcasting of daily news demands the exercise of enormous editorial skill. The news editor must select from the vast array of the day's fast-moving events those which, in the limited amount of broadcast time available, should be presented to the public. In attempting to comply with the fairness doctrine as interpreted by ASCEF, an editor's news judgment would be severely altered.<sup>148</sup>

Thus, the court concluded that ASCEF's attempt to impose a regimen of balance upon news broadcasting "would not promote the public interest [because] the limitations on the exercise of news judgment would be unjustified."<sup>149</sup>

Chief Judge Wright concurred in the majority's decision to affirm the FCC's application of the prima facie case requirement because he believed the decision would properly prevent the agency from "serv[ing] merely as a conduit for all charges made against broadcasters under the fairness doctrine."<sup>150</sup> Were the FCC to remove the limited procedural protection afforded by the prima facie case requirement, "[t]imidity might well supplant curiosity as the operative journalistic ethic in . . . coverage of public events."<sup>151</sup>

Judge Bazelon also concurred in the majority's analysis of the prima facie case requirement.<sup>152</sup> Yet, he questioned the validity of the fairness doctrine in general, stating that it "poses a serious threat to the independence of the broadcast press."<sup>153</sup> Furthermore, Judge Bazelon doubted "whether the application of the fairness doctrine to daily news coverage, absent bad faith or deliberate distortion, could ever meet the FCC's statutory mandate or the dictates of the First Amendment."<sup>154</sup>

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147. *Id.* at 451.

148. *Id.* (footnote omitted).

149. *Id.* (footnote omitted).

150. *Id.* at 453 (Wright, C.J., concurring). *See also* 93 Harv. L. Rev. 1028, 1032 (1980).

151. 607 F.2d at 453. The Chief Judge agreed that "to require CBS to respond to such an ill-defined charge would . . . threaten to chill future communications." *Id.* at 454. He also noted that the FCC's prima facie case requirement is "a formidable procedural barrier, but one that is not insurmountable to complainants with legitimate fairness doctrine claims." *Id.* at 453 (footnote omitted). The prima facie case requirement demonstrates, in the Chief Judge's view, that the FCC "conscious[ly] shrink[s] back, as it were," recognizing that its "regulatory domain overlaps that of the First Amendment." *Id.* at 454 (footnote omitted). Chief Judge Wright did speculate, however, that a study patterned after ASCEF's might succeed if it were "structured around a highly specific issue," *id.* at 458 (footnote omitted), "reflect[ed] a high level of qualitative correspondence between its narrowly defined issue and the subjects dealt with by the news items evaluated in the study," *id.*, and attempted "to achieve a true objectivity not based on the spurious notion that any single [presidential] administration is uniformly centrist in its positions." *Id.* at 459.

152. *Id.* at 460 (Bazelon, J., concurring).

153. *Id.* at 459 (footnote omitted).

154. *Id.* at 459-60 (footnotes omitted).

The three dissenting judges argued that the FCC and the majority erroneously applied the fairness doctrine's prima facie case requirement by "infus[ing] the standard with an element of discretion, and hence vagueness, painfully at odds with the precision customarily required of regulation affecting speech."<sup>155</sup> Furthermore, the dissent contended that the issues presented by ASCEF's complaint were "as plain as day," and that the FCC's inability to grasp the concreteness of the national security issue was due to "a willful obtuseness."<sup>156</sup> The dissent extensively examined the methodology of ASCEF's study<sup>157</sup> and concluded that the FCC "has seen fit to convert the prima facie evidence standard into an open-ended 'prudential' doctrine allow[ing] [it] to decline jurisdiction over hard cases."<sup>158</sup>

C. *Analysis of American Security Council Education Foundation v. FCC and Inconsistent Standards of Review*

In addition to the diversity of opinions offered by the FCC and the District of Columbia Circuit, ASCEF's complaint has provoked a fair amount of criticism from commentators and the broadcasting industry.<sup>159</sup> One commentator has expressed the fear that other special interest groups may be encouraged by the ASCEF complaint to obtain additional news coverage by conducting their own studies and "repeatedly involve the federal government, via the FCC in second-guessing the news judgments of broadcast journalists who must make decisions based on the news demands of each day."<sup>160</sup> Although such concerns may be allayed by the failure of ASCEF's complaint, it seems likely that a similar complaint might overcome the FCC's prima facie case requirement if it properly specified the issue allegedly given improper news coverage.<sup>161</sup>

It is in this context that the shortcomings inherent in the indistinction between applicability of the fairness doctrine standards and extrinsic evidence standard become manifest. Although ASCEF couched its complaint against CBS in terms of a fairness doctrine violation,<sup>162</sup> the study underlying the

155. *Id.* at 463 (Wilkey, J., dissenting) (MacKinnon, J. & Robb, J., joining).

156. *Id.* at 465. According to the dissent, ASCEF's complaint and accompanying report identified a discrete issue: "whether this nation should do more, less, or the same about perceived threats to its national security." *Id.* (emphasis omitted).

157. *Id.* at 460-73.

158. *Id.* at 460 (emphasis omitted).

159. See F. Friendly, *supra* note 5, at 167-91; S. Simmons, *supra* note 5, at 207-08. Criticism of the ASCEF complaint is usually directed at the methodology of ASCEF's study. One of the major criticisms is that by placing the Nixon presidential administration at the center (Viewpoint B) of its national security spectrum, ASCEF distorted the results, in effect predetermining the finding of a small percentage of "A" viewpoints. See F. Friendly, *supra* note 5, at 174; S. Simmons, *supra* note 5, at 207.

160. S. Simmons, *supra* note 5, at 208. See also F. Friendly, *supra* note 5, at 183-84 ("a dozen zealots in a dozen other life-and-death areas—energy, the environment, unemployment, hunger, cancer, the cities—will testify [that] television slights them too").

161. *E.g.*, Public Media Center, 59 F.C.C.2d 494 (1976) (nuclear power plants), *remanded*, 587 F.2d 1322 (D.C. Cir. 1978), *on remand*, 72 F.C.C.2d 776 (1979), James L. Waller, 57 F.C.C.2d 1281 (1976) (gun control); Michael McKee, 49 F.C.C.2d 1258 (1974) (abortion).

162. 63 F.C.C.2d at 366.

complaint frequently charged CBS with "advocacy"<sup>163</sup> of a particular view of national security as well as "bias"<sup>164</sup> in covering such related issues. In addition, ASCEF's study accused CBS of "seriously deficient factual reporting"<sup>165</sup> and presenting viewers with a "highly distorted view of the U.S. Armed Forces."<sup>166</sup> The FCC quickly dispensed with ASCEF's allegations of "bias," construing the use of the term "to mean an imbalance of contrasting views."<sup>167</sup> The District of Columbia Circuit concurred with the FCC's assessment, concluding that ASCEF did not allege that "CBS deliberately distorted the news."<sup>168</sup>

It is submitted that at the core of ASCEF's complaint is an allegation that CBS improperly exercised its news judgment. Essentially, ASCEF sought government intervention to force the broadcaster to report ASCEF's perception of the "truth" concerning United States national security.<sup>169</sup> Viewed from this perspective, the ASCEF complaint differs little from numerous other complaints to which the FCC has applied the extrinsic evidence standard.<sup>170</sup> Had the FCC applied the extrinsic evidence standard, needless litigation would have been avoided because ASCEF presented no evidence that CBS intentionally misrepresented news events or deliberately underrepresented opposing viewpoints.<sup>171</sup> Nonetheless, ASCEF's phrasing of its complaint in terms of a fairness doctrine violation allowed it to circumvent the stringent evidentiary requirements of the extrinsic evidence standard.<sup>172</sup> Furthermore, had ASCEF succeeded in overcoming the specific issue criterion of the *prima facie* case requirement,<sup>173</sup> the FCC would have been compelled to examine the reasonableness of CBS's daily news judgments made over the course of a year.<sup>174</sup> Such a result would appear inconsistent with the traditional reluctance of the government to interfere with a broadcaster's journalistic discretion.<sup>175</sup>

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163. 607 F.2d at 432-83, 486.

164. *Id.* at 482.

165. *Id.* at 484.

166. *Id.* at 486.

167. 63 F.C.C.2d at 368 n.2.

168. 607 F.2d at 451 n.41.

169. See notes 133-41 *supra* and accompanying text. In its study, ASCEF alleged that as a result of CBS's treatment of national security, "the attentive viewer throughout 1972 would never have heard a *clear-cut* statement to the effect that the Soviet Union was militarily superior to the United States." 607 F.2d at 484 (emphasis in original).

170. See notes 72-98 *supra* and accompanying text.

171. See American Security Council Educ. Foundation v. FCC, 607 F.2d 438, 462 n.9 (D.C. Cir. 1979) (en banc) (Wilkey, J., dissenting), *cert. denied*, 100 S. Ct. 662 (1980).

172. See pt. II *supra*.

173. See pt. I *supra*.

174. In reversing the decision of the FCC, the three judge panel of the District of Columbia Circuit assumed that "national security" constituted a controversial issue of public importance and remanded the proceeding to the FCC for further action. American Security Council Educ. Foundation v. FCC, No. 77-1443, slip op. at 28-29 (D.C. Cir. Sept. 13, 1978). Had CBS been directed to respond to ASCEF's complaint, it would have been compelled to review its entire news programming broadcast over several years. The burden of such a task upon the broadcaster would have been enormous. 607 F.2d at 451; see notes 9, 19 *supra*.

175. Congress explicitly prohibited the FCC from censoring broadcast programming. 47



## CONCLUSION

Although the objectives of the fairness doctrine should continue to be pursued, it must be recognized that inhibitory effects may inhere in any complaint, regardless of its form, challenging a broadcaster's editorial judgment. Therefore, the first amendment goals of vigorous and open public debate would be furthered by applying the extrinsic evidence standard to adjudication of all disputes concerning improper news reporting. Adoption of this approach would not only result in more consistent and coherent FCC resolution of these disputes, but would also strike an equitable balance between the public's interests and those of the broadcasters.<sup>176</sup> First, viewers

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U.S.C. § 326 (1976); see note 39 *supra*. Furthermore, the Supreme Court has acknowledged the wide scope of journalistic discretion afforded broadcasters: "For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility—and civility—on the part of those who exercise the guaranteed freedoms of expression." *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 124-25 (1973); see notes 10, 15, 16 *supra*.

176. The proposed approach for FCC regulation of broadcast news may be supported by recent Supreme Court decisions affecting both the public and broadcast industry. In *Herbert v. Lando*, 441 U.S. 153 (1979), the Supreme Court held that the first amendment does not shield the editorial process of broadcast journalists from pre-trial discovery in defamation cases. *Id.* at 174-75. Nevertheless, the Court acknowledged that its holding should not be construed to mean that "editorial discussions or exchanges have no constitutional protection from casual inquiry. There is no law that subjects the editorial process to private or official examination merely . . . to serve some general end such as the public interest; and if there were, it would not survive constitutional scrutiny . . ." *Id.* at 174. Thus, the current administration of the fairness doctrine may have only precarious validity because it purports to justify government regulation of the reasonableness of broadcast news reporting by a need to promote the "public interest." See *American Security Council Educ. Foundation v. FCC*, 607 F.2d 438, 459-60 (D.C. Cir. 1979) (en banc) (Bazelon, J., concurring), *cert. denied*, 100 S. Ct. 662 (1980). The public interest in receiving accurate information about newsworthy events, however, can be protected without unnecessary interference with the editorial process. For example, before a public figure plaintiff can recover damages for defamation, it is essential that he prove that the allegedly defamatory utterance was made "with actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Herbert v. Lando*, 441 U.S. at 156 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964)); see *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *St. Amant v. Thompson*, 390 U.S. 727 (1968). Accordingly, to avoid "self-censorship" by the media, recovery is "conditioned on the specified showing of culpable conduct." *Herbert v. Lando*, 441 U.S. at 159. Analogously, extension of the extrinsic evidence standard to FCC review of all complaints of improper news reporting would protect broadcast journalism from government sanctions except when a complainant adequately demonstrates that a broadcaster had deliberately distorted the news. See pt. II *supra*. Both the FCC, in enunciating its extrinsic evidence standard, and the Supreme Court in establishing the "actual malice" requirement, stressed the need to permit criticism of public officials and to preserve public debate. Compare *New York Times Co. v. Sullivan*, 376 U.S. at 270 (recognizing the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp

and listeners would be assured that broadcast licensees would not superficially cover news events in order to avoid fairness doctrine obligations, and would be afforded a means of redress against licensees who seek to subvert the public interest.<sup>177</sup> Second, broadcasters could retain broad editorial discretion in deciding how to cover news events and controversial issues so long as they do not deliberately engage in improper news reporting.<sup>178</sup> Accordingly, the FCC should apply the extrinsic evidence standard to all complaints of improper news reporting to "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."<sup>179</sup>

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attacks on government and public officials.") *with* Network Coverage of the Democratic Nat'l Convention, 16 F.C.C.2d 650, 660 (1969) (stating that "[t]he right to be critical of public officials is . . . well engrained in the first amendment . . . . Indeed, one of the most fundamental purposes of the amendment is to insure the freedom of the press to criticize Government.").

177. *See* pts. II-III *supra*.

178. *See* pt. II *supra*.

179. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).