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Federal Communications Commission - Fairness Doctrine - Requirement That a Fairness Doctrine Complaint Establish a Prima Facie Case Defining a Specific Issue

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FEDERAL COMMUNICATIONS COMMISSION—FAIRNESS DOCTRINE—REQUIREMENT THAT A FAIRNESS DOCTRINE COMPLAINT ESTABLISH A PRIMA FACIE CASE DEFINING A SPECIFIC ISSUE.

American Security Council Education Foundation v. Federal Communications Commission (D.C. Cir. 1979)

In September, 1976, the American Security Council Education Foundation (ASCEF)[1] submitted to the Federal Communications Commission (FCC or Commission) a fairness doctrine complaint[2] against the Columbia Broadcasting System, Inc. (CBS).[3] The complaint, founded upon ASCEF's recently completed study of the network's news programs, charged CBS with failing to present a balance of viewpoints in its news and public affairs broadcasts, asserting specifically that the CBS Evening News adopted a decidedly "dovish" stance on matters pertaining to national security.[4] ASCEF

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1. The American Security Council Education Foundation described itself as "a nonprofit educational institution whose purpose is to improve public understanding of facts and issues relating to the national security of this country." American Sec. Council Educ. Found. v. FCC, 607 F.2d 438, 452 (D.C. Cir. 1979) (Wright, C.J., concurring), *quoting* Brief for Petitioner at 1.

2. 607 F.2d at 442. Under the fairness doctine, "[t]he Federal Communications Commission has for many years imposed on radio and television broadcasters the requirement that discussion of public issues be presented . . and that each side of those issues must be given fair coverage." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 369 (1969). Applying the doctrine, the FCC attempts to insure that the American broadcasting system is operated in the public interest. 607 F.2d at 443. For the duties imposed by the fairness doctrine, *see* notes 22-26 and accompanying text *infra*. As explained by the *American Security Council* court, "[f]rom its inception, the doctrine's goal has been to promote the 'paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning [the] vital and often controversial issues which are held by various groups which make up the community.' " 607 F.2d at 442, *quoting* Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1249 (1949). To achieve this goal, the fairness doctrine requires broadcasters to devote a reasonable percentage of air time to controversial issues of public importance and to provide a reasonable opportunity for the presentation of opposing views on such issues. *Id. See also* Democratic Nat'l Comm. v. FCC, 460 F.2d 891, 910 (D.C. Cir.), *cert. denied*, 409 U.S. 843 (1972).

3. *In re* American Sec. Council Educ. Found., 63 F.C.C.2d 366 (1977). Accompanying the complaint was a book, *E. Lefever, T.V. and National Defense* (1974), describing the study upon which the complaint was based, as well as a press release and news articles concerning the book. 63 F.C.C.2d at 366. The contents of the book were incorporated into the complaint by reference. *Id.*

4. 607 F.2d at 460-62 (Wilkey, J., dissenting). ASCEF undertook a study to determine the veracity of what it perceived to be a dovish bias in the broadcast media's presentation of issues which it broadly categorized as relating to national security. *Id.* at 460 (Wilkey, J., dissenting). Led by Ernest W. Lefever, a Senior Fellow at the Brookings Institute, eleven research analysts studied transcripts of all CBS Evening News programs televised during 1972. *Id.* at 461 (Wilkey, J., dissenting). ASCEF chose CBS because it had the largest news audience and the greatest number of affiliated stations. *Id.* Lefever reduced national security to four components: 1) United States military and foreign affairs; 2) Soviet military and foreign policy; 3) Chinese military and foreign policy; and 4) Vietnam affairs. *Id.* Researchers then dissected the transcripts

asked the Commission to find CBS in violation of the fairness doctrine[5] and to require that the network provide a reasonable opportunity for the expression of opposing views on the matter of national security[6] as well as "compensatory time for such expression to balance the years of non-coverage."[7]

In dismissing ASCEF's complaint,[8] the FCC found that the complaint failed to meet the pleading requirement of presenting a prima facie case[9] because it did not frame precisely a particular, well-defined, controversial issue of public importance.[10] On appeal, a divided panel of the United States Court of Appeals for the District of Columbia Circuit reversed the FCC ruling, finding that the Commission had abused its discretion in dismissing ASCEF's complaint,[11] and ordered the FCC to demand a response from CBS.[12]

On rehearing en banc, the court of appeals reversed the panel and reinstated the FCC's original ruling, *holding* that "ASCEF (had) failed to

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into sentences and characterized each sentence as representing one of three viewpoints: 1) the threat to U.S. security is more serious than perceived by the government; 2) present government threat perception is essentially correct; and 3) the threat to U.S. security is less serious than perceived by the government. *Id.* at 442. According to ASCEF's study, CBS presented the third viewpoint approximately 61% of the time, the second viewpoint 35% of the time, and the first viewpoint 4% of the time, thereby evidencing a dovish bias. *Id.* at 462 (Wilkey, J., dissenting).

5. *Id.* at 443. In its complaint, ASCEF stated that, pursuant to FCC regulations, it had notified CBS directly of its grievance in a letter dated October 15, 1974. *See In re* American Sec. Council Educ. Found., 63 F.C.C.2d at 367. CBS had replied to this letter of grievance stating that, in its opinion, the fairness doctrine had not been violated. *Id.*

6. *In re* American Sec. Council Educ. Found., 63 F.C.C.2d at 367.

7. *Id.*

8. *Id.* at 370.

9. *Id.* at 368. The Commission stated:

> Because of the delicate First Amendment considerations involved in this area, a complainant must establish a *prima facie* case on non-compliance with the fairness doctrine before the Commission will take action.
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> . . . Part of the complainant's evidentiary burden in establishing a *prima facie* case [of non-compliance] is to define precisely the specific issue of public importance presented.

Id. at 368. For a description of the factors required to present a prima facie case, *see* notes 42-45 and accompaning text *infra*.

10. 63 F.C.C.2d at 368. *See* note 9 *supra*. Additionally, the FCC found that ASCEF's complaint did not sufficiently present evidence of an absence of opportunity to present the opposing side in CBS's overall programming, and questioned the validity of ASCEF's method of establishing bias. 63 F.C.C.2d at 368-69.

11. American Sec. Council Educ. Found. v. FCC, No. 77-1443 (D.C. Cir. Sept. 13, 1978), *reprinted in* 4 MEDIA L. REP. 1516 (BNA). Writing for the panel, Judge Wilkey described the FCC's finding that ASCEF's complaint was not based upon a well-defined issue as "willful obtuseness," a phrase he would echo in his blistering dissent to the later en banc decision. No. 77-1443, *reprinted in* 4 MEDIA L. REP. 1516, 1522 (BNA). *See* 607 F.2d at 465 (Wilkey, J., dissenting); note 100 and accompanying text *infra*. Judge Wilkey further asserted that the issue examined in ASCEF's study was presented clearly as "whether this nation should *do more, less or the same* about perceived threats to its national security." No. 77-1443, *reprinted in* MEDIA L. REP. at 1522 (BNA) (emphasis in original). To evidence the clarity of the issue, Judge Wilkey noted that the authors of 30 articles discussing the report upon which the complaint was based "discerned [the issue] with perfect comprehension." *Id.*

12. American Sec. Council Educ. Found. v. FCC, No. 77-1443 (D.C. Cir. Sept. 13, 1978), *reprinted in* 4 MEDIA L. REP. 1516 (BNA).

base its complaint on a particular, well-defined issue because (1) the indirect relationships among the issues aggregated by ASCEF under the umbrella of 'national security' do not provide a basis for determining whether the public received a reasonable balance of conflicting views, and (2) a contrary result would unduly burden broadcasters without a countervailing benefit to the public's right to be informed."[13] *American Security Council Education Foundation v. Federal Communications Commission*, 607 F.2d 438 (D.C. Cir. 1979).

The fairness doctrine, which applies to radio, television, and other forms of licensed electronic communication,[14] finds its statutory foundation in the Radio Act of 1927.[15] That Act created the Federal Radio Commission (FRC) to, among other things, assign frequencies, regulate broadcasting apparatus, hold hearings, and make regulations "in a way responsive to the public convenience, interest or necessity."[16]

Seeking to cultivate robust debate on all sides of controversial issues,[17] the newly created FRC, acting under the Radio Act's "public convenience, interest or necessity"[18] language, not only required broadcasters to provide for a right to reply to controversial expressions of opinions, but also absolutely prohibited them from expressing personal editorial views.[19] As these requirements evolved into the fairness doctrine in its present form, the FCC replaced the FRC[20] and ultimately dropped the provision prohibiting the expression of personal editorial opinions by broadcasters.[21]

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13. 607 F.2d at 448.

14. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375-77 (1969).

15. Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162 (repealed by the Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064, 1102-03). The Radio Act of 1927 evolved out of four national radio conferences held between 1922 and 1925 in response to public pressure on the government to organize the then uncontrolled use of the airwaves, and to systematize the sporadic reception of broadcasts provided to the radio-hungry American public. Simmons, *Fairness Doctrine: The Early History*, 29 FED. COM. B.J. 207, 219-24 (1976).

16. Radio Act of 1927, Pub. L. No. 69-632, § 4, 44 Stat. 1162, 1163 (repealed by Communications Act of 1934, Pub. L. No. 73-416, § 602-94, 48 Stat. 1064, 1102-03). Thus, it appears that the initial nature and justification for governmental intervention in electronic communications was purely technical—a reaction to the chaos resulting from uncontrolled use of the airwaves. *See* Simmons, *supra* note 15, at 218.

17. *See* Great Lakes Broadcasting Co. v. FRC, 3 F.R.C. 32, 33 (1929), *rev'd on other grounds*, 37 F.2d 993 (D.C. Cir.), *cert. dismissed*, 281 U.S. 706 (1930). In *Great Lakes*, the FRC stated that "public interest requires ample play for the free and fair competition of opposing views, and the [Federal Radio] [C]ommission believes that the principle applies . . . to all discussions of issues of importance to the public." 3 F.R.C. at 33.

18. Radio Act of 1927, Pub. L. No. 69-632, § 4, 44 Stat. 1162, 1163 (repealed by Communications Act of 1934, Pub. L. No. 73-416, § 602-94, 48 Stat. 1064, 1102-03).

19. *See In re* Mayflower Broadcasting Corp., 8 F.C.C. 333 (1940). *See generally* Simmons, *supra* note 15, at 256-58.

20. 47 U.S.C. §§ 81-119, 151 (1976). The Communications Act of 1934 replaced the Federal Radio Commission with the FCC, transferring most of the duties and powers of the old Commission to the FCC. Pub. L. No. 73-416, §§ 602-604, 48 Stat. 1064, 1102-03 (current version at 47 U.S.C. §§ 81-119 (1976)).

21. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 377 (1969).

As applied by the FCC[22] and the courts,[23] the fairness doctrine imposes a two-pronged duty:[24] the broadcaster must cover a wide range of controversial issues of public importance in his overall programming and, having done so, must provide a reasonable opportunity for the expression of opposing views.[25] This construction of the doctrine was statutorily endorsed by Congress in 1959.[26]

First amendment questions[27] regarding the fairness doctrine restrictions on the media reached the Supreme Court in *Red Lion Broadcasting Co. v. FCC*,[28] a 1969 case in which the Court unanimously, though somewhat qualifiedly,[29] approved the FCC's construction and Congress' codification of the doctrine.[30] Answering a first amendment challenge to the FCC's

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22. Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949). In this report, the FCC set forth the two-pronged duty of the fairness doctrine, basing this duty on public interest, convenience, and necessity. *Id.* at 1249. *See also In re* Applicability of the Fairness Doctrine in Handling Controversial Issues of Public Importance, 40 F.C.C. 598 (1963).

23. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 377 (1969); Brandywine—Mainline Radio, Inc. v. FCC, 473 F.2d 16, 38-46 (D.C. Cir. 1972); Green v. FCC, 447 F.2d 323, 327-29 (D.C. Cir. 1971).

24. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 377 (1969); Fairness Report, 48 F.C.C.2d 1, 7 (1974).

25. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 377 (1969). The fairness doctrine is designed to encourage the "robust and wide open debate" identified by the Supreme Court in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), as crucial to our democratic system and the paramount aim of the first amendment. *Id.* at 270.

26. Communications Act Amendments of 1959, Pub. L. No. 86-274, § 1, 73 Stat. 557 (current version at 47 U.S.C. § 315(a) (1976)). *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380-82 (1969). In the 1959 amendments, Congress stated that there is no exception "from the obligation imposed upon [broadcasters] under this Act to operate in the public interest and afford reasonable opportunity for discussion of conflicting views on issues of public importance." Communications Act Amendments of 1959, Pub. L. No. 86-274, § 1, 73 Stat. 557 (current version at 47 U.S.C. § 315(a) (1976)). Relying on this language, the *Red Lion* Court found that Congress had legislatively adopted the FCC's policy requiring broadcasters to treat all sides of controversial issues of public importance. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380 (1969).

27. *See* United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948). In *Paramount*, the Court expressly stated that broadcasting clearly qualifies for first amendment protection. *Id.* Furthermore, in the Communications Act of 1934, Congress recognized the electronic media's first amendment rights by forbidding the FCC to censor this industry. *See* 47 U.S.C. § 326 (1976). Thus, the application of the fairness doctrine is subject to first amendment restrictions as well as specific statutory limitations.

28. 395 U.S. 367 (1969). In *Red Lion*, an author alleged that a radio show host's critique of his book amounted to a personal attack, and demanded free time for reply under the FCC's personal attack regulations. *Id.* at 371-72. *See* 47 C.F.R. § 73.123 (1979). The FCC agreed with the complainant and ordered the station to comply with his request for time. 395 U.S. at 372. The radio station appealed, challenging the constitutionality of the fairness doctrine and its component rules. *Id.* at 370.

In affirming the FCC decision, the Supreme Court held that the specific application of the fairness doctrine in *Red Lion* by the FCC was authorized by Congress and enhanced, rather than abridged, first amendment freedoms. *Id.* at 375.

29. For a discussion of the Supreme Court's concerns in approving the constitutionality of the fairness doctrine, *see* notes 34-36 and accompanying text *infra*.

30. 395 U.S. at 400-01. In endorsing the validity of the FCC's construction and Congress's 1959 codification of the fairness doctrine, the Supreme Court in *Red Lion* stated:

> Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction. And here this principle is given special force by the equally

authority to interfere in any way with broadcasting, the Court raised the traditional technical limitations,[31] stating: "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgable First Amendment right to broadcast. . . ."[32] The Court further noted that it is the public's right to be informed, not the licensees' right to broadcast, which is the paramount concern of the first amendment.[33]

Although the Court emphatically endorsed the purposes and principles of the fairness doctrine, as well as the FCC's authority to enforce it through regulations,[34] the Court did not specifically "approve every aspect of the fairness doctrine," nor did it "ratify every past and future decision by the FCC with regard to programming."[35] Rather, the Court qualified its approval to some extent by acknowledging the spectre of potential first amendment infringement inherent in the doctrine.[36]

Given the first amendment controversies created by the fairness doctrine, the Commission[37] and the courts[38] have recognized that restraint in its

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venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction. Here, the Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation.

Id. at 380-82 (footnotes omitted).

31. *See* note 16 and accompanying text *supra.*

32. 395 U.S. at 388. *See also* National Broadcasting Co. v. United States, 319 U.S. 190, 213 (1943); Fairness Report, 48 F.C.C.2d 1, 3 (1974).

33. 395 U.S. at 390. *See also* note 2 *supra.*

34. 395 U.S. at 380-82. The Supreme Court concluded that broadcasters were given the privilege to use the airwaves as proxies or trustees for the entire community, and that no first amendment right existed allowing a licensee to monopolize a frequency. *Id.* at 389, 394. Citing the scarcity of radio frequencies, the Court relied on "differences in the characteristics of new media" to justify differences in first amendment standards applied to them. *Id.* at 386, 390. Finally, the Court emphasized the necessity to share the airwaves, stressing that the "people as a whole retain their interest" in free speech on the radio. *Id.* at 390.

35. *Id.* at 396.

36. *Id.* at 393. Considering the possibility that enforcement of the fairness doctrine could induce self-censorship among broadcasters who might become afraid to deal with controversial issues, the Court stated: "Such a result would indeed be a serious matter, for should licensees actually eliminate their coverage of controversial issues, the purposes of the doctrine would be stifled." *Id.* The Court, however, dismissed this possibility for the present, stating that if the fears of fairness doctrine critics materialize and experience indicates that the volume of news coverage has been reduced because of the fairness doctrine's restrictions, *then* it will be time to reconsider the constitutional implications. *Id.* Maintaining that "[t]he fairness doctrine in the past has had no such overall effect," the Court expressed confidence that the possibility of self-censorship in the communications inudstry was speculative at best. *Id.*

Fears of fairness doctrine abuses, however, continue to concern some jurists. *See* Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 103 (1973); Straus Communications Inc. v. FCC, 530 F.2d 1001, 1008 (D.C. Cir. 1976). The *Columbia Broadcasting* Court, for instance, noted that the first amendment problems of regulation are rendered more difficult because the broadcast industry is dynamic . . . ; solutions adequate a decade ago are not necessarily so now." 412 U.S. at 103. *See also id.* at 162-64 (Douglas, J., concurring).

37. *See* Memorandum Order and Opinion on Reconsideration of the Fairness Report, 58 F.C.C.2d 691, 694 (1976); Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1250-51 (1949).

38. *See* Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 102 (1973); Straus Communications Inc. v. FCC, 530 F.2d 1001, 1008 (D.C. Cir. 1976).

enforcement is crucial. The doctrine's requirements, which tread so closely to constitutional infringement, must be clearly defined,[39] accurately circumscribed,[40] and restrictively applied.[41] To this end, the Commission has set forth precise procedural standards for bringing a fairness doctrine complaint.[42] As applied by the FCC,[43] the standards require the applicant to

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39. *See* Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973); The Handling of Public Issues Under the Fairness Doctrine, 58 F.C.C.2d 691, 694 (1976). In this FCC report, the Commission outlined specific procedural requirements and "substantial guidelines upon which both the viewer and the licensee may rely." *Id.*

40. *See* Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973). In deciding the constitutionality of an Oklahoma law regulating the political activities of state workers, the Supreme Court in *Broadrick* stated:

> It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.

Id.

41. Democratic Nat'l Comm. v. FCC, 460 F.2d 891, 900-01 (D.C. Cir.), *cert. denied*, 409 U.S. 843 (1972). In this case, the court endorsed the Commission's restrictive policy which limits Commission review to determining whether the licensee's decision is a reasonable, good faith action. 460 F.2d at 900. The Commission will not substitute its judgment for that of the licensee and will allow for considerable journalistic discretion. *Id.*, *citing In re* Applicability of Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 40 F.C.C. 598 (1964).

42. *In re* Applicability of the Fairness Doctrine in The Handling of Controversial Issues of Public Importance, 40 F.C.C. 598 (1963). The FCC stated that its purpose in issuing this report was to advise licensees and the public of their rights, obligations, and responsibilities under the fairness doctrine. *Id.* The Commission detailed five factors which it expected to be specified by the complainant, noting that its intention in doing so was to "reduce significantly the number of complaints made to the Commission." *Id.* at 600. For a list of these five factors, *see* note 44 *infra*.

In a subsequent case, the Commission made the *advised* procedure mandatory and tied it to the first amendment policy of protecting the licensee from undue burdens. *In re* Allen C. Phelps, 21 F.C.C.2d 12, 13 (1970). The *Phelps* opinion stated that the complainant was required to "*(a)* specify the particular broadcast in which the controversial issue was presented, *(b)* state the position advocated in such broadcasts, and *(c)* set forth reasonable ground for concluding that the licensee in his overall programing [*sic*] has not attempted to present opposing views on the issue." *Id.* (citation omitted). These requirements became known as the *Phelps* standard, which represents a frequently employed formulation of the procedure for bringing a fairness doctrine complaint. In announcing this standard, the Commission explained:

> Absent detailed and specific evidence of failure to comply with the requirements of the fairness doctrine, it would be unreasonable to require licensees specifically to disprove allegations such as those made [in *Phelps*]. 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.

Id.

Finally, in 1974, the Commission revised its procedural manual, emphatically spelling out for the public that a fairness doctrine complainant must establish a prima facie case, and setting forth the *Phelps* factors as the elements comprising such a pleading. Broadcast Procedure Manual, 49 F.C.C.2d 1, 5 (1974). For an elaboration of the *Phelps* factors, *see* note 44 *infra*.

43. In 1976, the Commission described the entire fairness doctrine procedure as follows:

> After the complainant has . . . [met the prima facie case requirement], the licensee is called upon to answer an inquiry by the Commission staff which recites the issue specified by the complaint. The licensee is asked whether that issue is a controversial issue of

specify, *inter alia*,[44] "the particular issue of a controversial nature discussed over the air."[45] In *Columbia Broadcasting System, Inc. v. Democratic National Committee*,[46] the Supreme Court endorsed this prima facie case requirement of the FCC.[47]

Notwithstanding judicial approval of the prima facie requirement,[48] voices from within the FCC[49] and from without[50] have questioned the re-

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public importance, whether the program in question addressed that issue, and whether other programming has been or will be presented on that issue.

Reconsideration of the Fairness Report, 58 F.C.C.2d 691, 696-97 (1976). The Commission then determines whether the licensee's responses to that inquiry are reasonable. *Id.* at 697. Critical in this determination is the Commission's policy that the licensee is to be granted broad discretion regarding these answers and the editorial decisions they reflect. *Id.* The Commission does not substitute its judgment for the licensee's. *Id. See also* Democratic Nat'l Comm. v. FCC, 460 F.2d 891, 903 (D.C. Cir.), *cert. denied*, 409 U.S. 843 (1972). Furthermore, if judicial review of the FCC's decision is sought, the court's role is simply to determine whether the action of the Commission was based on findings supported by evidence and pursuant to the authority granted to the FCC by Congress. 460 F.2d at 912.

44. The FCC requires that the complaint contain specific information regarding

(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.

In re Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 40 F.C.C. 598, 600 (1963).

45. *Id.*

46. 412 U.S. 94 (1973).

47. *Id.* at 102. The Court noted the careful balancing of interests entailed in administering the fairness doctrine, and recognized the vital role which the FCC's regulatory scheme plays in this delicate process. *Id.*

48. *See id.*; Democratic Nat'l Comm. v. FCC, 460 F.2d 891, 907 (D.C. Cir.), *cert. denied*, 409 U.S. 843 (1972); Hale v. FCC, 425 F.2d 556, 559 (D.C. Cir. 1970).

49. *See* Memorandum Opinion and Order on Reconsideration of the Fairness Report, 58 F.C.C.2d 691, 703 (1976) (Robinson, Comm'r, dissenting). Commissioner Robinson observed: "In the face of increasing demands to redress fairness grievances the Commission has evolved procedural barriers, such as the 'Phelps Doctrine,' . . . to forestall becoming too easily involved in licensee programming judgments." *Id.* at 710 (Robinson, Comm'r, dissenting). Commissioner Robinson's dissent, however, did not favor applying the fairness doctrine with less restraint; rather, he suggested its *retirement*. *Id.* at 711 (Robinson, Comm'r, dissenting).

Commissioner Johnson's dissent to the FCC's dismissal of *In re* Diocesan Union of Holy Name Societies, 43 F.C.C.2d 548 (1973), launched a frontal attack on the Commission's application of the prima facie requirement, calling it "a procedural straightjacket." *Id.* at 548 (Johnson, Comm'r, dissenting). He continued with a scathing attack on the Commission's decision, stating:

> The effect of the Commission's action is to sanction a procedural requirement which discourages public complaints, and literally rips the heart out of the fairness doctrine. While it is true that the death knell of the doctrine has, of late, been sounded rather frequently, it seems chicken-hearted to destroy it on as flimsy a procedural infirmity as the Commission has chosen today.

Id. at 550 (Johnson, Comm'r, dissenting).

50. *See* National Citizen's Comm. for Broadcasting v. FCC, 567 F.2d 1095, 1097, 1111 (D.C. Cir. 1977). In *National Citizen's*, the court considered three petitions challenging aspects of the FCC's Fairness Report, 48 F.C.C.2d 1 (1974). 567 F.2d at 1097. While the court left the Report itself undistrubed, it instructed the FCC to further investigate suggestions for alternative approaches to achieve the goals of the fairness doctrine. *Id.* Addressing specifically the procedural requirements for bringing a fairness doctrine complaint, the court noted that as

> [a]n unavoidable consequence of those procedures . . . complaints will not be received, or will not be acted upon, unless there exist persons organizations who are simultaneously

quirement's validity. One element generating substantial litigation[51] is that which requires a fairness doctrine complaint to focus upon a "particular issue of a controversial nature."[52] Dealing with the degree of specificity required in a complaint, the FCC in *In re Hakki S. Tamimie*[53] found that the complainant's broad categorization of the "Middle East" as an issue lacked such specificity because it did not identify a particular aspect of what the Commission decided was too general a topic.[54] Subsequently, however, in *In re Council on Children, Media and Merchandising*,[55] the Commission found that while the complainant had stated the "children's advertising" issue in three different ways, the Commission could fairly treat all three formulations as saying essentially the same thing.[56] This decision showed a tendency on the Commission's part to search a lay person's inartful pleadings in order to find their inherent meaning.[57] The Court of Appeals for the District of Columbia Circuit showed much the same tendency in the 1971 case of *Green v. FCC*.[58]

In *Green*, the court reviewed an FCC decision to dismiss a complaint.[59] Judge Wilkey,[60] writing for the panel, *did* move past the

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"regular" viewers or listeners of the relevant station, aware that there exist opposing points of view to that presented by the station, and interested enough in having those opposing views aired that they are willing to initiate a Commission inquiry into the matter.

Id. at 1111.

51. *See In re* Council on Children, Media and Merchandising, 59 F.C.C.2d 448 (1976); *In re* Hakki S. Tamimie, 42 F.C.C.2d 876 (1973); *In re* Horace P. Rowley, 39 F.C.C.2d 437 (1973).

52. *See In re* Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 40 F.C.C. 598 (1963). For the elements which must be included in a complaint under the prima facie rule, *see* notes 42-45 and accompanying text *supra*.

53. 42 F.C.C.2d 876 (1973).

54. *Id.* at 877.

55. 59 F.C.C.2d 448 (1976).

56. *Id.* at 452. The Commission identified the three formulations in this complaint as follows: 1) "Whether, in view of a child's inability to critically evaluate advertisements, children should be exposed to commercials that urge them to use, consume and purchase various products;" 2) "whether children should be solicited by commercial messages and how those messages should be regulated;" and 3) "whether children should ever be exposed to advertising without at least being informed as to its techniques and intent." *Id.* The Commission synthesized these issues into one: "Whether in view of a child's inability to critically evaluate advertisements, children should ever be exposed to commercials that urge them to use, consume and purchase various products unless those children are also informed as to the techniques and purposes of product advertising." *Id.*

57. *Compare id. with* Dioguardi v. During, 139 F.2d 774, 775 (2d Cir. 1944). In *Dioguardi*, Circuit Judge Clark reversed the lower court's dismissal of a complaint on demurrer stating that "however inartistically they may be stated, [if] the plaintiff has disclosed his claims [to the court]" he should not be deprived of his day in court. *Id.* The *Dioguardi* decision is particularly applicable to the fairness doctrine procedure since it involved a home-drawn pleading. The FCC encourages lay-person involvement in fairness doctrine matters, noting that effective enforcement of the doctrine depends on the efforts of concerned citizens. *See* Broadcast Procedure Manual, 49 F.C.C.2d 1, 2 (1974).

58. 447 F.2d 323 (D.C. Cir. 1971).

59. *Id.* at 324.

60. It should be noted that Judge Wilkey authored the lengthy dissent to the *American Security Council* case, focusing his criticism, for the most part, on the majority's failure to

petitioner's generally stated issue of "military recruitment" to analyze five subissues which he identified from the petitioner's presentation of the case.[61] After considering the allegations made as to each identifiable subissue, the court affirmed the FCC's dismissal of the complaint.[62] While the *Green* court *was* willing to sort through the petitioner's evidence and find sufficiently specific subtopics in the pleading, it clearly did not discount the need for specificity, stating: "[I]t is not only necessary to define a controversial issue of public importance, but implicitly it is first necessary to define the issue."[63]

Against this background, the *American Security Council* court[64] began its analysis by identifying the court's function in reviewing a decision made by the FCC to be that of determining "whether the Commission's order is unreasonable or in contravention of a statutory purpose."[65] The court acknowledged its traditional deference to the Commission's judgments in fairness doctrine cases, noting that the FCC's experience is entitled to "great weight."[66]

Proceeding to analyze the FCC's decision, the *American Security Council* court first undertook a detailed examination of the fairness doctrine.[67] While noting the Supreme Court's approval in *Red Lion* of the doctrine's constitutionality,[68] the court here emphasized *Red Lion*'s recognition of the possible chilling effect that overzealous enforcement might have.[69] The

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search for subissues. 607 F.2d 466-69 (Wilkey, J., dissenting). *See also* note 96-101 and accompanying text *infra*.

61. 447 F.2d at 329. The issues considered by the court concerned voluntary military recruitment, the draft, the Vietnam War, the morality of participating in any war, and the desirability of military service. *Id.*

62. *Id.* at 329-31. As to three of the subissues identified, the court found that the petitioner had not alleged reporting imbalance with respect to these now more narrowly defined topics. *Id.* Regarding the fourth, the court found that the issue itself had not been raised by the broadcaster. *Id.* at 331. Turning to the fifth, the court took judicial notice of what it deemed to be a comprehensive, well-balanced presentation of the controversy. *Id.*

The result in *Green* demonstrates the practicality and necessity of defining a specific issue in a fairness complaint. While the court was able to sort out five specific issues from the material presented by the petitioner, because these issues had not been properly framed, key allegations and showings of fact were absent in each instance. *Id.* at 324, 329-34.

63. *Id.* at 329.

64. 607 F.2d at 441. Circuit Judge Tamm wrote the opinion for the court and was joined by Judges McGowan, Leventhal, and Robinson in this 4:1:1:3 decision. *Id.* Chief Judge Wright and Judge Bazelon filed separate concurrences, and Judge Wilkey filed a dissent. *Id.*

65. *Id.* at 447, *quoting* Democratic Nat'l Comm. v. FCC, 460 F.2d 891, 912 (D.C. Cir.), *cert denied*, 409 U.S. 843 (1972).

66. 607 F.2d at 448, *quoting* Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 102 (1973).

67. *See* 607 F.2d at 443-47. The court noted that the fairness doctrine aims at promoting the paramount right of the public to be informed. *Id.* at 443. *See also* Red Lion Broadcasting Co. v. FCC, 395 U.S. at 376; text accompanying note 33 *supra*.

68. 607 F.2d at 443-44, *citing* Red Lion Broadcasting Co. v. FCC, 395 U.S. at 389-90. For a discussion of *Red Lion*, *see* notes 27-36 and accompanying text *supra*.

69. 607 F.2d at 444. The *American Security Council* court stated: "[A]mbitious enforcement could lead broadcasters to reduce coverage of controversial public issues, or to cover those issues blandly, in an attempt to avoid fairness complaints." *Id.* For the *Red Lion* Court's consideration of the potential chilling effect of the fairness doctrine, *see* note 36 *supra*.

court noted with approval the FCC's restraint in administering the doctrine[70] and insisted that the Commission's policy decision affording broadcasters maximum discretion[71] was central to the constitutional administration of the regulatory scheme.[72] Responding to *Red Lion*'s cautionary words,[73] the court found that endorsement of ASCEF's notion of an issue[74] would create precedent that might seriously affect news programming by causing broadcasters to forego coverage of controversial issues.[75] The court concluded this part of its analysis by emphasizing that ASCEF's "blunderbuss approach" would contribute little toward the goals of the first amendment, while posing all the dangers associated with government intervention.[76]

The court also focused upon the procedure for bringing a fairness doctrine complaint,[77] specifically examining the prima facie evidence standard.[78] This standard, according to the court, is "part of the delicate balance of allocating burdens"[79] and is therefore essential before "the broadcaster will be required to establish compliance."[80] Turning to ASCEF's contention that "national security" constituted a well-defined issue in satisfaction of the "particular issue" requirement of the prima facie evidence rule, the court noted that ASCEF had actually aggregated a number of individual issues that *it* found related to national security, using a broad umbrella concept.[81] Although the court agreed that it was possible for a fairness doctrine complaint to be based on an issue consisting of separate subissues,[82] it

70. 607 F.2d at 445. *See* note 41 *supra*.

71. 607 F.2d at 445. *See* notes 41 & 43 *supra*.

72. 607 F.2d at 445.

73. *See* notes 36 & 69 and accompanying text *supra*.

74. 607 F.2d at 449. While ASCEF defined the issue broadly as "national security," the court found that this definition was too vague, and that the topic presented by ASCEF actually consisted of a variety of related and unrelated subissues. *Id.*

75. *Id.* at 451. The court expressed its fear that journalists might become overly burdened by being "required to decide whether any of the day's newsworthy events is tied, even tangentially, to events covered in the past," and whether a report balances or imbalances coverage. *Id.* Such a result, the court found, would be unacceptable and contrary to the public interest. *Id.*

76. *Id.* at 451-52. Looking to the purpose of the fairness doctrine procedure and the philosophy of the FCC in applying it, the court found that acceptance of the broad topic of "national security" as a particular issue would subject the broadcaster to an unwarranted burden in attempting to produce evidence of compliance. *Id.* at 450-51. The court stated that unless the broadcaster can recognize the issue with precision and accuracy, it becomes impossible to determine which broadcasts should be included in building a case, or how the views expressed over long periods of time should be tallied to measure the "balance" which the fairness doctrine requires. *Id.* at 451.

77. *Id.* at 445-47. *See* notes 42-45 *supra*.

78. 607 F.2d at 445. The court stated that "prima facie evidence consists of specific factual information which, in the absence of rebuttal, is sufficient to show that a fairness doctrine violation exists." *Id.* (footnote omitted).

79. *Id.* at 446, *quoting* Memorundum Opinion and Order on Reconsideration of the Fairness Report, 58 F.C.C.2d 691, 696 (1976).

80. 607 F.2d at 446. The court noted that the FCC rarely finds that a prime facie case has been made out, as is evidenced by 1973 figures which indicate that only four percent of all fairness complaints lodged that year required the filing of a response by the licensee. *Id.* at 447.

81. *Id.* at 448-49. The court observed that ASCEF joined broadcasts relating to SALT, amnesty for draft evaders, detente with China, the Vietnam war, the B-1 Bomber, and the President's trip to China under its broad umbrella issue. *Id.* at 449.

82. *Id.* at 449 & n. 37, *citing In re* Horace P. Rowley, 39 F.C.C.2d 437, 442 (1973).

pointed out that to do so, the component issues must be found to bear some resemblance or relation so that an opinion on one issue necessarily conflicts or agrees with an opinion on another in a way that can be found to state a view regarding the overall issue.[83] The court held that ASCEF's complaint failed in this respect,[84] and that, because the pleading had not framed a well-defined issue, it would be impossible to decide whether a balance of opinion had been presented in the broadcasts.[85] Thus, noting that the prima facie requirement is designed to weed out complaints that would "burden broadcasters without sufficient likelihood that a countervailing benefit will be gained,"[86] the court upheld the FCC's dismissal of ASCEF's complaint on the ground that ASCEF had not made out a prima facie case.[87]

In a concurring opinion, Chief Judge Wright expressly emphasized certain of the majority's arguments, stressing especially the complaint's lack of specificity.[88] Chief Judge Wright went on to anticipate and reject one of the dissent's criticisms of the majority decision[89]—what he termed, the disgruntled school student's argument that if the study was good, the procedural hurdle which it failed to overcome must be bad.[90] Acknowledging

83. 607 F.2d at 449-50.

84. *Id.* The court found than an issue was not defined with sufficient particularity if, in viewing the evidence presented, an average citizen could not determine whether a balance of views was struck in the broadcaster's presentations. *Id.* at 450. Under ASCEF's approach, a broadcast containing a view on SALT would be expected either to conflict with or to support a broadcast containing a view on amnesty for draft evaders, detente with China, or the Vietnam war. *Id.* at 449. The court, however, found that a view on any of these topics contributed little, if anything, toward informed evaluation of a view on any of the other topics, and provided no basis for determining whether the broadcaster had presented a reasonable balance of opinions. *Id.*

85. *Id.* at 449. The court emphasized that the nexus between the subissues must be such that the "*average viewers or listeners* can be expected to believe that expression of a view on one supports or refutes a view on another. . . ." *Id.* at 450 (emphasis added).

86. *Id.* at 452.

87. *Id.* The court directed its analysis only to ASCEF's use of "national security" as an issue, and gave only tacit acknowledgement to the additional grounds enumerated by the FCC for dismissal. *Id.* at 448. In its decision, the FCC had first relied upon the absence of a well-defined issue, but continued by raising questions concerning 1) the validity of the viewpoint analysis used to establish bias; 2) the complaint's failure to show that there was no reasonable opportunity offered for airing opposing viewpoints; and 3) the limitation of the scope of the study. *In re* American Sec. Council Educ. Found., 63 F.C.C.2d at 368-70.

88. 607 F.2d at 453-59 (Wright, C.J., concurring). Chief Judge Wright revealed some of the vagueness of the ASCEF issue by noting a number of meanings which can be attached to the idea of "national security":

> To some, national security means devoting the bulk of our national resources to creating the ideal society—one, that is, whose economic dynamism and social amenities are attractive to citizens of foreign powers and thus likely to channel the currents of world ideology in our direction. To others, this is nonsense: national security translates literally into military superiority. Still others take a more discriminating view and seek to arrive at a secure compromise between domestic improvements and military might.

Id. at 454-55 (Wright, C.J., concurring) (footnote omitted). Chief Judge Wright, contending that ASCEF failed to attribute a particular meaning to national security, observed that "ASCEF's complaint before the FCC . . . described national security variously in terms of 'the basic conflict relationship and the relative military balance between the U.S. and the U.S.S.R.'; 'Soviet and Chinese political and military objectives'; and 'domestic foreign policy.' " *Id.* at 455 (Wright, C.J., concurring) (footnotes omitted).

89. *See id.* at 468 (Wilkey, J., dissenting).

90. *Id.* at 454 (Wright, C.J., concurring).

the quality and comprehensiveness of the study, the Chief Judge pointed out that a good study did not necessarily make a good complaint,[91] although he did concede that such a study, shaped to conform to the contours of the fairness doctrine by meeting three basic requirements,[92] might succeed as a complaint.[93]

Judge Bazelon, in a separate concurring opinion, refused to try to limit the fairness doctrine by a strict construction of the prima facie requirement;[94] rather, he harpooned the doctrine, joining those who question its constitutionality, and its effectiveness in promoting an informed public.[95]

In a stinging dissent,[96] Judge Wilkey asserted that the court's opinion converted the prima facie rule into an open-ended prudential doctrine[97] which allowed the Commission to decline jurisdiction over hard cases.[98] Judge Wilkey charged that the court's opinion infused what should be a precise standard with unprecedented discretion,[99] and called the court's inability to discern the issues presented 'willful obtuseness.' "[100] Concluding that ASCEF's issue was specific enough, the dissent further contended that if the FCC refused to aggregate the subissues into one general issue, it certainly should have treated the subissues separately.[101]

Cursory analysis of this decision might lead to the conclusion that, as the dissent contended, the majority used the prima facie requirement as a device to arbitrarily eliminate a fairness complaint which the Commission did not want to process.[102] It is submitted, however, that careful scrutiny of the majority opinion reveals that it reflects a thoughtful attempt to apply the prima facie rule in a way which best served its purpose of preventing

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91. *Id.* (Wright, C.J., concurring).

92. *Id.* at 458-59 (Wright, C.J., concurring). According to Chief Judge Wright, such a study must first be structured around a highly specific issue which can be identified and responded to by the broadcaster. *Id.* at 458 (Wright, C.J., concurring). Second, the study must show a clear and substantial correspondence between the issue it focuses upon and the topics treated by the broadcaster. *Id.* (Wright, C.J., concurring). Finally, absolute objectivity must control its methods and conclusions. *Id.* at 459 (Wright, C.J., concurring).

93. *Id.* at 459 (Wright, C.J., concurring).

94. *Id.* at 459-60 (Bazelon, J., concurring).

95. *Id.* at 459 (Bazelon, J., concurring). *See* notes 49-50 and accompanying text *supra*.

96. 607 F.2d at 460 (Wilkey, J., dissenting). Circuit Judge Wilkey was joined in his dissenting opinion by Judges MacKinnon and Robb. *Id.*

97. *Id.* (Wilkey, J., dissenting).

98. *Id.* (Wilkey, J., dissenting).

99. *Id.* at 463 (Wilkey, J., dissenting).

100. *Id.* at 465 (Wilkey, J., dissenting). *Cf.* note 11 *supra*.

101. 607 F.2d at 468 (Wilkey, J., dissenting). Finding no reason to dismiss the complaint on the ground of non-specificity, Judge Wilkey went on to consider and reject the FCC's other reasons for dismissal. *Id.* at 469-74 (Wilkey, J., dissenting). For a list of these reasons, *see* note 87 *supra*. Judge Wilkey maintained that the FCC's questioning of the methodology employed by ASCEF addressed the merits of the case, an analysis inappropriate at the time for considering the pleading. *Id.* at 470 (Wilkey, J., dissenting). As to the Commission's displeasure with the scope of the programming evaluated by the study, Judge Wilkey found that the requirement of reviewing a reasonable amount of programming had been met. *Id.* at 472-73 (Wilkey, J., dissenting).

102. *Id.* at 460, 463 (Wilkey, J., dissenting). *See* notes 96-98 and accompanying text *supra*.

unnecessary encroachment on the first amendment's protection of broadcasters.[103] Moreover, it is suggested that the majority's opinion is supported by logic[104] and backed by precedent[105] except that in its extremely strict application of the specificity requirement, the court refused to consider possibly identifiable subissues[106] and, thus, may have departed from the more liberal approach of some previous cases.[107]

In determining the standard for judicial review of FCC cases, it is submitted that the court followed precedent by adopting a deferential standard of review.[108] Applying the Supreme Court's reasoning in *Columbia Broadcasting System, Inc. v. Democratic National Committee*,[109] it is submitted that the court here rightly afforded "great weight"[110] to the Commission's experience in deciding particular cases on their facts, and in shaping policy with regard to administration of the fairness doctrine in general.[111] Therefore, it is suggested that the court correctly limited its decision to determining whether the Commission's action was supported by the evidence and was within its legislated authority.[112]

Regarding the constitutional questions addressed by the *American Security Council* court, it is contended that the court's sensitivity to the tension between those first amendment interests which the fairness doctrine *promotes*[113] and those which it *threatens*[114] reflects a close reading of judicial[115] and FCC[116] precedent regarding the goals of and limitations upon the regulation of broadcasting. It is submitted that the court, in justifying the

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103. *See* Memorandum Opinion and Order on Reconsideration of the Fairness Report, 58 F.C.C.2d 691 (1976). *See* notes 37-42 and accompanying text *supra;* notes 113-21 and accompanying text *infra.*

104. *See* notes 121-22 and accompanying text *infra.*

105. *See* notes 113-19 and accompanying text *infra.*

106. 607 F.2d at 448-52.

107. *See* notes 126-32 and accompanying text *infra.*

108. *See* 607 F.2d at 447-48; notes 65-66 and accompanying text *supra. See generally* Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 102-03 (1973); Democratic Nat'l Comm. v. FCC, 460 F.2d 891, 912 (D.C. Cir.), *cert. denied,* 409 U.S. 843 (1972) (court held that it "was not at liberty to substitute its discretion for that of administrative officers who have kept within the bounds of their administrative power").

109. *See* 412 U.S. 94, 102-03 (1973). For a discussion of *Columbia Broadcasting, see* note 36 *supra;* notes 46-47 and accompanying text *supra.*

110. *See* 412 U.S. 94, 102-03 (1973). Regarding the weight accorded to construction of legislation by the agency charged with its administration, *see* note 30 *supra.*

111. *See* notes 65-66 and accompanying text *supra.*

112. 607 F.2d at 447.

113. *See id.* at 443-44. The fairness doctrine was designed to facilitate the first amendment goal of a balanced presentation of divergent views by encouraging citizens to monitor the media. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. at 377, 390; Fairness Report, 48 F.C.C.2d 1, 8 (1974); notes 25-26 & 33 and accompanying text *supra;* note 34 *supra.*

114. *See* 607 F.2d at 443-46; note 36 and accompanying text *supra.* While any attempt at governmental regulation of the broadcast media carries some potential for first amendment abuse, the fairness doctrine, with its focus on content, moves dangerously close to censorhsip. *See* Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. at 114-21.

115. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. at 393-94.

116. *See* Memorandum Opinion and Order on Reconsideration of the Fairness Report, 58 F.C.C.2d 691, 695 (1976); *In re* Allen C. Phelps, 21 F.C.C.2d 12, 13 (1970).

existence of the prima facie standard,[117] properly balanced the public's right to know, which is promoted by the fairness doctrine,[118] against the need to protect the broadcaster from undue burdens,[119] which could be threatened by the doctrine.

With respect to the majority's recognition of the need for specificity in a fairness doctrine complaint,[120] it is suggested that the court's position is supported by logic and practical necessity. As the court stated in an earlier opinion, "[i]n law, as in philosophy, the task of ascertaining the sound rule or precept often turns significantly on rigor in statement of the problem. Nowhere is this more the case than in application of the fairness doctrine."[121] It is submitted that this principle is clearly demonstrated by the facts of the instant case.

Had the court instructed the Commission to require CBS to respond to ASCEF's complaint with the issue framed as "national security," it is suggested that CBS would be faced with the extremely burdensome task of reviewing virtually all its tapes and transcripts for 1971 to determine if a reasonable balance of views had been presented on the vast number of subissues encompassed by this broad topic.[122] Thus, it is suggested that by requiring the issue to be specific and well-defined, the court limited the broadcaster's task by narrowing the potentially voluminous evidence to only that which would be relevant to the narrow topic addressed. However, looking to the dissent's arguments, it is submitted that the court may have applied the specificity requirement too restrictively by failing to address identifiable subissues and, in so doing, may have departed from precedent.[123]

In what is perhaps its most compelling criticism of the court's decision, the dissent challenged the majority's dismissal of the complaint, contending that if the Commission refused to treat "national security" as a general umbrella issue, then it was at least obliged to consider identifiable subtopics separately.[124] The majority disposed of this idea by throwing the ball back to the petitioner and suggesting that the complaint could have focused on each of the individual subtopics included within "national security."[125] Nevertheless, the majority's refusal to look for and independently consider

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117. 607 F.2d at 452.

118. *See id.* at 443-44, 452. For a discussion of the fairness doctrine's goal of promoting an informed public, *see* notes 17-33 and accompanying text *supra*.

119. 607 F.2d at 444-45, 452.

120. *Id.* at 449.

121. *See* National Broadcasting Co. v. FCC, 516, F.2d 1101, 1125 (D.C. Cir. 1974) (court found that rigor in defining the issue was the first and most important step in framing fairness complaint, stressing that it facilitated the entire judicial procedure). *See generally* Memorandum Opinion and Order on Reconsideration of the Fairness Report, 58 F.C.C.2d 691 (1976); *In re* Hakki S. Tamimie, 42 F.C.C.2d 876 (1973).

122. 607 F.2d at 451; *id.* at 455 (Wright, C.J., concurring).

123. *See* notes 55-63 and accompanying text *supra;* notes 124-32 and accompanying text *infra*.

124. 607 F.2d at 468 (Wilkey, J., dissenting).

125. *Id.* at 450.

the imbedded subissues presents a departure from earlier cases such as *Green v. FCC*.[126] In *Green*, the court *did* look beyond a generally stated issue in order to consider identifiable subissues.[127] In *In re Council on Children, Media and Merchandising*, the Commission, faced with three formulations of an issue, translated them into a single comprehensive statement.[128] These cases indicate a tendency on the part of the FCC and the District of Columbia Circuit to look beyond the technical statement of the issue to find the meaning intended by the petitioner.[129] Moreover, since examining the subissues is consistent with the Commission's expressed reliance on citizen complaints to enforce the fairness doctrine,[130] and with the federal courts' liberal approach to pleadings,[131] the court's apparent departure from these standards in the instant case seems, as the dissent alleges, unwarranted.[132]

Less convincing, however, is the dissent's charge that the majority infused the prima facie rule with unprecedented discretion by using a free-wheeling balancing of interests approach when applying the prima facie requirement.[133] It is suggested, instead, that the majority used the balancing of interests analysis when *justifying* the FCC's stringent prima facie case requirement,[134] not in *applying* that rule.[135]

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126. 447 F.2d 323 (D.C. Cir. 1971). For a discussion of *Green*, *see* notes 58-63 and accompanying text *supra*.

127. 447 F.2d at 329-31. *See* notes 58-63 and accompanying text *supra*.

128. 59 F.C.C.2d 448, 452 (1976). *See* notes 55-57 and accompanying text *supra*.

129. It should be noted, however, that in *Green* the complaint was ultimately dismissed, essentially on the ground that evidence of imbalance was not pleaded. 447 F.2d at 329-31.

130. *See* Fairness Report, 48 F.C.C.2d 1, 8 (1974). Recognizing its own limitations, the FCC has stated that effective enforcement of the fairness doctrine depends on the diligent efforts of interested citizens. Broadcast Procedure Manual, 49 F.C.C.2d 1, 2 (1974).

131. *See* notes 57-63 and accompanying text *supra*.

132. 607 F.2d at 466, 469 (Wilkey, J., dissenting). Judge Wilkey alleged that

> there is in this case ample evidence of imbalance separately concerning several of the precise "component" issues which the majority conceded were sufficiently specific. For example, ASCEF adduced evidence separately with regard to (1) U.S. involvement in Vietnam, (2) Soviet foreign policy objectives, (3) detente with the Soviet Union, (4) the appropriate relative military postures of the U.S. and the U.S.S.R., and (5) U.S. military expenditures and SALT.

Id. at 468 (Wilkey, J., dissenting).

133. *Id.* at 463 (Wilkey, J., dissenting). The dissent maintained:

> [The majority] infuses the standard with an element of discretion, and hence vagueness, painfully at odds with the precision customarily required of regulation affecting speech. Contrary to the majority's assertion, there is simply no warrant in law for the sort of free-wheeling "balancing" of interests under cover of the *prima facie* evidence test which the court today approves. . . .

Id. (Wilkey, J., dissenting).

134. *Id.* at 444-46. *See* notes 117-19 and accompanying text *supra*.

135. Noting that the prima facie evidence requirement is part of the delicate balance of allocating burdens between licensees and complainants, the court justified the existence of this requirement by applying the Commission's analysis as set forth in *In re* Allen C. Phelps, 21 F.C.C.2d 12, 13 (1969). For a discussion of this analysis, *see* note. 42 supra. Then, following a discussion of the burdens which vague complaints would impose on broadcasters and the possible chilling effect they might have on a licensee's handling of controversial issues, the court stated that "[t]he prima facie case requirements are designed to weed outthose complaints that would burden broadcasters without sufficient likelihood that a countervailing benefit would be

The dissent further asserted that the majority's decision in this case indicates that "the wagons are being drawn about the fairness doctrine" to deflect worrisome complaints.[136] This criticism might appear troublesome in view of the lengthy treatment of first amendment concerns engaged in by the majority[137] and concurring opinions.[138] Such treatment, it is suggested, reveals the court's sympathy for, and, it might be argued, oversensitivity to the constitutional interests of broadcasters. As suggested earlier,[139] however, the court's attention to first amendment interests was directed at justifying the *existence* of the prima facie rule, not at applying that standard. While it could be contended that this court's quite apparent first amendment sympathies might lead it to stretch the prima facie rule in such a way as to allow the licensee to escape from a burdensome but meritorious complaint, it is submitted that this is not the situation under the facts of this case since, here, the court could reasonably find ASCEF's complaint vague, amorphous, and insufficiently specific.[140] Indeed, it is submitted that this is the very sort of complaint the standard is designed to weed out.[141] Therefore, it is suggested that the dissent's criticism, although a reasonable warning to bear in mind for future litigation, was unfounded with regard to the instant case.

Finally, Judge Wilkey charged that if the position taken by the FCC and the majority is sustained, and if the Commission remains unwilling to consider complaints which include many subtopics under an umbrella issue, it would be very difficult to make *any* major area of American life the subject of a fairness complaint.[142] Even more serious is the potential continuation of this argument: that it would be impossible as well to bring a complaint against a broadcaster for "pervasive and continuous imbalance"[143] in overall news programming since this *necessarily* would involve many subissues. It is submitted that such an argument, while ostensibly accurate and disturbing, fails because, as the majority suggests, complainants could raise the subtopics individually, pleading the required elements for each particular issue.[144]

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gained." 607 F.2d at 452. Thus, it is submitted that the court's purpose in considering so carefully the first amendment concerns and the allocation of burdens was to justify application of the prima facie requirement in screening fairness doctrine complaints, not to make decisions on the basis of such considerations.

136. 607 F.2d at 463 (Wilkey, J., dissenting).

137. 607 F.2d at 443-46, 451.

138. *Id.* at 453-54, 458, 459 (Wright, C.J., concurring); *id.* at 459-60 (Bazelon, J., concurring).

139. *See* notes 133-35 and accompanying text *supra*.

140. As pointed out by Chief Judge Wright in his concurring opinion, the petitioner's *own* papers indicate that "national security" was ill-defined and indeterminate: "Its brief on appeal . . . refers in places not to the national security issue but to 'national security *issues*.' " 607 F.2d at 454 (Wright, C.J., concurring) (footnote omitted) (emphasis in original). *See* note 88 *supra*.

141. *See* notes 37-47 & 85 and accompanying text *supra*.

142. *Id.* at 467 (Wilkey, J., dissenting).

143. *Id.* at 463 (Wilkey, J., dissenting).

144. 607 F.2d at 450-51. *See also* notes 124-25 and accompanying text *supra*.

In conclusion, it is submitted that the *American Security Council* court showed a sensitivity to the need to shield the media from procedures that might "chill" the "robust and wide open" debate crucial to our system of government.[145] As such, it is contended that the court's analysis represents an accurate interpretation of the Supreme Court's first amendment stance, as summed up in *Red Lion*[146] and *New York Times v. Sullivan*.[147] Precise application of the long-standing prima facie standard allowed the court to protect those first amendment constitutional goals in a way consistant with logic and precedent.

When constitutional interests collide, one must necessarily yield to the other in the balancing which ensues. Here, it is submitted that the court wisely concluded that the first amendment purpose of guaranteeing an informed public[148]—the purpose which the conflicting interests[149] in this case were designed to promote—was best served by shielding the broadcaster and increasing the burden on the individual citizen complainant. The court's decision affirming the FCC's dismissal of ASCEF's complaint thus represents a soundly reasoned decision.

Doris Del Tosto

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145. *See* note 25 *supra*.

146. 395 U.S. 367 (1969). *See* note 25 *supra;* notes 28-33 and accompanying text *supra*. It should be noted that the first amendment is not intended to protect the right of the licensee to broadcast whatever he wishes; rather, it protects the right of the public to hear various viewpoints on a wide variety of issues. 395 U.S. at 390.

147. *See* 376 U.S. 254 (1964); note 25 *supra*. In *New York Times*, Justice Brennan observed that there is a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." 376 U.S. at 270.

148. *See* notes 25 & 67 *supra;* note 33 and accompanying text *supra*.

149. On one hand, the Commission's fairness doctrine policy encourages citizen monitoring to ensure presentation of a balance of viewpoints on a variety of controversial issues of public importance. *See* notes 57 & 130 *supra*. Nevertheless, it also recognizes that broadcasters are protected by the first amendment, *see* note 27 *supra*, and acknowledges the danger of "chilling robust debate" by too vigorous enforcement of the fairness doctrine. *See* notes 25, 36, 69 & 73-76 and accompanying text *supra*.