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COMMUNICATIONS LAW—FCC FAIRNESS DOCTRINE PROCEDURES—A Complainant Runs Aground on the Commission's Procedural Shoals—*American Security Council Education Foundation v. FCC*, 607 F.2d 438 (D.C. Cir. 1979), *cert. denied*, 100 S. Ct. 662 (1980).

I. INTRODUCTION

In *American Security Council Education Foundation v. FCC*,¹ the United States Court of Appeals for the District of Columbia decided that a complaining organization submitted insufficient evidence to prove that CBS television news stories were imbalanced. The American Security Council Education Foundation (ASCEF) is a nonprofit educational institution dedicated to enhancing public awareness about this country's national security.² When the ASCEF perceived that the major television networks were presenting "dovish" opinions during news stories concerning national security, it commissioned an ambitious study in 1972 to confirm its apprehension.³ ASCEF concluded that our national security, in a military sense, was a paramount issue and that the network's editorializing during the news was weakening the viewer's awareness of threats to our country. Although ASCEF desired to examine all the major television networks, cost and time constraints led it to focus on one network. CBS was chosen because it had the greatest number of viewers and affiliated stations at that time.⁴

The researchers transcribed all CBS Evening News telecasts aired in 1972, and culled news items which fell within four topic areas the researchers felt would be most likely to produce references to national security. The four topic areas included: "United States military and foreign affairs; Soviet Union military and foreign policy; China military and foreign policy; and Vietnam affairs."⁵

1. *American Sec. Council Educ. Foundation v. FCC*, 607 F.2d 438 (D.C. Cir. 1979), *cert. denied*, 100 S. Ct. 662 (1980).

2. In 1972, the American Security Council Education Foundation (ASCEF) was known as the Institute for American Strategy. See generally F. FRIENDLY, *THE GOOD GUYS, THE BAD GUYS AND THE FIRST AMENDMENT* 168 (1975).

3. In 1974, ASCEF published the study. E. LEFEVER, *TV AND NATIONAL DEFENSE, AN ANALYSIS OF CBS NEWS, 1972-1973* (1974), *reprinted in part in American Sec. Council Educ. Foundation v. FCC*, 44 RAD. REG. 2d (P&F) 193, 216 (D.C. Cir. 1978) (appendix C), *rehearing en banc*, 607 F.2d 438, (D.C. Cir. 1979), *cert. denied*, 100 S. Ct. 662 (1980).

4. See F. FRIENDLY, *supra* note 2 at 173.

5. 607 F.2d at 441-42. The topic areas included, among other things, President Nixon's remarks and congressional debate on SALT, Administration and congress-

Each news item⁶ was classified "A," "B," or "C" according to the viewpoint which ASCEF believed CBS conveyed on national security during its broadcasts. Viewpoint "A" indicated that a CBS news story conveyed that the threat to the nation's security was more serious than perceived by the government or that the United States ought to *increase* its national security efforts; viewpoint "B" indicated that a news story conveyed that the present government threat perception was essentially correct or United States military and foreign policy efforts were adequate; and viewpoint "C" indicated that a news story conveyed that the threat to United States security was less serious than perceived by the government or that United States national security efforts should be *decreased*.⁷ Utilizing this format,⁸ ASCEF concluded that 3.54% of the culled news items reflected viewpoint "A," 34.63% reflected viewpoint "B,"⁹ and 61.83% reflected viewpoint "C." The researchers recognized that the imbalance toward viewpoint "C" was largely due to news items dealing with the Vietnam War;¹⁰ however, when references to Vietnam were excluded, the "C" views still outnumbered the "A" views by a ratio of three to one.¹¹ The thrust of the study's result, therefore, was that CBS had slanted the news to suggest that national security should be decreased, as opposed to presenting a neutral, unbiased report.

sional statements concerning the Trident Submarine System and the B-1 Bomber, the Democratic Party platform on draft evader amnesty, debate over the defense budget, Soviet presence in the Middle East, campaign statements by presidential candidate George McGovern, United States troops in Europe, South Korea and Indochina, President Nixon's 1972 China trip, the Vietnam War, and the activities of Chinese school children. *Id.* at 442.

6. The researchers broke each news item down into sentences. From the 1,396 broadcasts of separate news items originally transcribed, 274 survived screening to eliminate news items which, in the researchers view, did not express an opinion. The 274 news items were comprised of 2,235 sentences and according to ASCEF, CBS expressed its own opinion in 416 of the 2,235 sentences. *Id.* at 442 n.6.

7. *Id.* at 442.

8. The "viewpoint analysis" is similar to the three option approach used by the Brookings Institution in analyzing the United States budget. *American Sec. Council Educ. Foundation v. FCC*, 44 RAD. REG. 2d (P&F) 193, 196 (D.C. Cir. 1978), *rehearing en banc*, 607 F.2d 438 (D.C. Cir. 1979), *cert. denied*, 100 S. Ct. 662 (1980).

9. Viewpoint "B," by the researcher's standard, is an opinion that supports the current policy and declared objectives of the United States government. 607 F.2d at 442 n.7. Therefore, any statement made by an Administration official, regardless of content, would fall into viewpoint "B" by default. *Id.*

10. *American Sec. Council Educ. Foundation v. FCC*, 44 RAD. REG. 2d (P&F) 193, 197 (D.C. Cir. 1978), *rehearing en banc*, 607 F.2d 438 (D.C. Cir. 1979), *cert. denied*, 100 S. Ct. 662 (1980).

11. *Id.*

The ASCEF study was published in 1974¹² and stirred considerable response from the press.¹³ Shortly before its release, ASCEF forwarded the study to CBS with accompanying charges of distortion and imbalance, and requested that CBS take corrective action to comply with the fairness doctrine. The fairness doctrine requires a news broadcaster to present the conflicting views on an issue and also to provide sufficient information for a viewer or listener to evaluate it.¹⁴ In 1975, CBS notified ASCEF that its news programming was balanced, that no fairness doctrine violation existed, and that no response to the complaint was necessary.¹⁵ After updating its study by reexamining CBS news programs during segments of 1975 and 1976¹⁶ and concluding the imbalance was substantially unchanged,¹⁷ ASCEF filed a fairness doctrine complaint with the appropriate agency, the Federal Communications Commission. ASCEF requested that a reasonable opportunity be afforded for the presentation of the viewpoint "A" consideration that the United States ought to increase its national security efforts.¹⁸

12. See note 3 *supra*.

13. American Sec. Council Educ. Foundation v. FCC, 44 RAD. REG. 2d (P&F) 193, 197 (D.C. Cir. 1978), *rehearing en banc*, 607 F.2d 438 (D.C. Cir. 1979), *cert. denied*, 100 S. Ct. 662 (1980).

14. FCC, REPORT ON EDITORIALIZING BY BROADCAST LICENSEES, 13 F.C.C. 1246, 1249 (1949) [hereinafter cited as EDITORIALIZING REPORT]. The fairness doctrine has its statutory roots in the public interest standard of the Communications Act of 1934, Pub. L. No. 416, 48 Stat. 1064, *as amended* by 47 U.S.C. §§ 303(f), 307(a),(d), & 309(a) (1976). In 1949, the Commission clearly announced its position on licensee fairness obligations with respect to news, commentary, and opinion. EDITORIALIZING REPORT, 13 F.C.C. at 1246. In 1959, Congress recognized that the fairness doctrine was part of the public interest standard by amending the "equal time" provision of the statute to include:

Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

Act of Sept. 14, 1959, Pub. L. No. 274, § 1, 73 Stat. 557 (amending 47 U.S.C. § 315(a) (1976)). There is substantial disagreement over precisely when the fairness doctrine gelled into a cohesive mandate. See Simmons, *Fairness Doctrine: The Early History*, 29 FED. COM. B. J. 207, 242-44 (1976).

15. American Sec. Council Educ. Foundation v. FCC, 44 RAD. REG. 2d (P&F) 193, 197 (D.C. Cir. 1978), *rehearing en banc*, 607 F.2d 438 (D.C. Cir. 1979), *cert. denied*, 100 S. Ct. 662 (1980).

16. 607 F.2d at 442.

17. *Id.* at 442.

18. ASCEF specifically asked the Commission to order CBS to provide a reasonable opportunity for ASCEF to present the viewpoints that the Soviet Union is

The Commission ruled against ASCEF in 1977,¹⁹ declaring that ASCEF had not presented prima facie evidence of a violation. A fairness doctrine complainant must present prima facie evidence of a violation before the Commission will demand a response to the complaint from the broadcaster. The Commission discerned that the issue of national security encompassed too many subjects to be a particular, well-defined issue.²⁰ Regarding the classification of news items into one of the three viewpoint codes, the Commission could find no explanation for the arbitrary assignment of some news items into particular viewpoint codes.²¹ The Commission further decided that ASCEF should have examined all of CBS' non-entertainment programming, such as news programs, documentaries, panel discussions, and the like in order to meet the prima facie requirement of showing imbalance in CBS' overall programming.²²

A three judge panel of the United States Court of Appeals for the District of Columbia reversed the Commission.²³ They held that the Commission abused its discretion in rejecting the ASCEF complaint because they found the issue of national security to be singular, precisely formulated, and explicit.²⁴ According to the panel, the issue was "as plain as day: whether this nation should *do more, less or the same* about perceived threats to its national security."²⁵ The panel further held that the Commission's detailed evidentiary challenge of ASCEF's methodology and the probativeness of some particular examples was inappropriate at the prima facie stage of the proceedings.²⁶ Additionally, the panel determined that requiring ASCEF to evaluate all of CBS' nonentertainment programming was not required by the prima facie evidence requirement.²⁷

militarily superior to the United States, The Soviet Union should not be militarily superior and that the Soviet Union still has world domination as its objective. *Id.* at 443 n.11.

19. American Sec. Council Educ. Foundation v. FCC, 63 F.C.C. 2d 366 (1977), *aff'd*, 607 F.2d 438 (D.C. Cir. 1979), *cert. denied*, 100 S. Ct. 662 (1980).

20. *Id.* at 368.

21. *Id.* at 368-69.

22. *Id.* at 369.

23. American Sec. Council Educ. Foundation v. FCC, 44 RAD. REG. 2d (P&F) 193, 196 (D.C. Cir. 1978), *rehearing en banc*, 607 F.2d 438 (D.C. Cir. 1979), *cert. denied*, 100 S. Ct. 662 (1980).

24. *Id.* at 204.

25. *Id.* at 203 (emphasis in original).

26. *Id.* at 207.

27. *Id.* at 209.

Other members of the court of appeals who were not among the panel felt that the panel had been inattentive to considering the first amendment guarantee of freedom of the press considerations.²⁸ The court granted a rehearing en banc. In a six to three decision, the court affirmed the Commission's original decision to dismiss the complaint.²⁹ In the court's determination, the issue of national security was too vague to meet the Commission's prima facie requirement of a specific, well-defined issue.³⁰ The sub-issues ASCEF chose to comprise the "umbrella" issue of national security were too tangential to one another for an average viewer to realize the nexus among them.³¹ In reaching its decision, the court reasoned that to reach a contrary result would unduly burden broadcasters without a countervailing benefit to the public's right to be informed.³² After the en banc decision by the court of appeals, ASCEF filed a writ of certiorari in the United States Supreme Court. Certiorari was denied in late 1979.³³

Although the ASCEF complaint was ruled invalid, its treatment by the Commission and the court of appeals offers definitive guidance in answering the question of whether a given, methodologically sound fairness doctrine complaint involving a large, multifaceted issue could ever survive the prima facie evidence requirement. The decision offers express, procedural guidance for future complainants;³⁴ but more importantly, the decision vividly illustrates the sensitivity of the Commission's procedures to the first amendment guarantee of freedom of the press.³⁵

II. BACKGROUND

Governmental regulation of broadcasting has been questioned because it can potentially infringe on traditional first amendment rights enjoyed by the press. Nevertheless, the government has supported its ability to regulate broadcast news by arguing that there is a scarcity of frequencies available for broadcasting. No one, therefore, should be able to monopolize the airwaves because the

28. 607 F.2d at 453 (Wright, C.J., concurring).

29. *Id.* at 438.

30. *Id.* at 448.

31. *Id.* at 449.

32. *Id.* at 448.

33. 100 S. Ct. 662 (1979).

34. See text accompanying notes 53-65 *infra*.

35. See text accompanying notes 66-80 *infra*.

scarcity of frequencies obligates broadcasters to utilize their facilities as public trustees.³⁶

In its 1949 *Report on Editorializing by Broadcast Licensees*,³⁷ the Federal Communications Commission declared that it was the paramount right of the public to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning controversial issues.³⁸ The fairness doctrine effectively ensures that the right of the public to be fully informed is paramount to the right of government officials, broadcasters, or individuals to broadcast their own views to influence public opinion.³⁹ In achieving its goal, the fairness doctrine imposes a two-fold obligation on broadcasters. A broadcaster must devote a reasonable percentage of time to coverage of controversial issues of public importance, and must also provide a reasonable opportunity for the presentation of conflicting views on such issues.⁴⁰

The United States Supreme Court upheld the constitutionality of the fairness doctrine in 1969, despite its abridgement of the traditional first amendment rights enjoyed by the press. In *Red Lion Broadcasting Co. v. FCC*,⁴¹ the Court ruled that the "personal attack" and "political editorial" components of the fairness doctrine were constitutional because they furthered the paramount first amendment right of viewers to receive suitable access to ideas and experience.⁴²

36. In *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), the Supreme Court declared:

There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.

Id. at 389. See also *Office of Communication of United Church of Christ v. FCC*, 425 F.2d 543, 548 (D.C. Cir. 1969).

37. EDITORIALIZING REPORT, *supra* note 14.

38. *Id.* at 1249.

39. See note 14 *supra*.

40. FCC, FAIRNESS DOCTRINE AND PUBLIC INTEREST STANDARDS, FAIRNESS REPORT REGARDING HANDLING OF PUBLIC ISSUES, 39 Fed. Reg. 26,372, 26,374 (1974) [hereinafter cited as FAIRNESS REPORT]. See generally FCC, APPLICABILITY OF THE FAIRNESS DOCTRINE IN THE HANDLING OF CONTROVERSIAL ISSUES OF PUBLIC IMPORTANCE, 29 Fed. Reg. 10,415 (1964) [hereinafter cited as FAIRNESS PRIMER].

41. 395 U.S. 367 (1969).

42. *Id.* at 373-75, 389-90. The Commission's current personal attack and political editorial rules appear at 47 C.F.R. § 73.1910 (1979). See generally Simmons, *The FCC's Personal Attack and Political Editorial Rules Reconsidered*, 125 U. PA. L. REV. 990 (1977).

The Court, however, recognized that overly ambitious enforcement of the fairness doctrine could lead broadcasters to reduce their coverage of controversial public issues, or to cover those issues blandly in an attempt to avoid fairness complaints.⁴³ The Court believed that the danger was speculative at the time, but warned that the constitutional implications of the fairness doctrine would be reconsidered if the doctrine, in practice, reduced rather than enhanced the volume and quality of the coverage of public issues.⁴⁴ In order to avoid this chilling effect, the Commission administers the fairness doctrine with restraint and has developed demanding procedural requirements for fairness doctrine complainants.⁴⁵

Under Commission procedures, a fairness doctrine complainant must present prima facie evidence of a fairness doctrine violation.⁴⁶ Generally, prima facie evidence "consists of specific factual

43. 395 U.S. at 393.

44. *Id.*

45. In a parallel argument, in recent years the fundamental justification for the fairness doctrine, the scarcity of frequencies, has brought the doctrine into renewed debate because modern advances in television broadcasting allow transmission without frequencies by cable. See generally M. HAMBURG, ALL ABOUT CABLE (1979); S. RIVKIN, A NEW GUIDE TO FEDERAL CABLE TELEVISION REGULATION (1978); Rosenfeld, *The Jurisprudence of Fairness: Freedom Through Regulation in the Marketplace of Ideas*, 44 FORDHAM L. REV. 877, 885-87 (1976).

46. The prima facie evidence requirement is enumerated in several Commission reports. The FAIRNESS PRIMER, *supra* note 40, provides that a complainant should submit specific facts to show:

(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.

Id. at 10,416 (footnote omitted). The prima facie evidence requirement is stated slightly differently in the FCC, BROADCAST PROCEDURE MANUAL, 39 Fed. Reg. 32,288 (1974) [hereinafter cited as BROADCAST PROCEDURE MANUAL]:

The complaint should contain specific information concerning the following matters: (1) The name of the station or network involved; (2) *the controversial issue of public importance on which a view was presented*; (3) the date and time of its broadcast; (4) the basis for your claim that the issue is controversial and of public importance; (5) an accurate summary of the view [or] views broadcast; (6) the basis for your claim that the station or network has not broadcast contrasting views on the issue or issues in its *overall programming*; and (7) whether the station or network has afforded, or has expressed the intention to afford, a reasonable opportunity for the presentation of contrasting viewpoints on that issue.

Id. ¶12.14, at 32,290 (emphasis added). See also FAIRNESS REPORT, *supra* note 40, at 26,374; FCC, THE HANDLING OF PUBLIC ISSUES UNDER THE FAIRNESS DOCTRINE AND THE PUBLIC INTERESTS STANDARDS OF THE COMMUNICATIONS ACT, RECON-

information which, in the absence of rebuttal, is sufficient to show that a fairness doctrine violation exists."⁴⁷ Specifically, the Commission has defined prima facie evidence to include "[t]he particular issue of a controversial nature discussed over the air [,] . . . the basis for the claim that the station has presented only one side of the question [,] . . . and whether the station had afforded, or has plans to afford, an opportunity for the presentation of contrasting viewpoints."⁴⁸ A broadcaster will not be required to respond to a

SIDERATION OF THE FAIRNESS REPORT, 58 F.C.C.2d 691, 696 (1976) [hereinafter cited as RECONSIDERATION OF THE FAIRNESS REPORT].

47. In general terms, prima facie evidence is a minimum quantity; that which is enough to raise a presumption of fact or is sufficient if not rebutted to establish the fact. *Otis & Co. v. SEC*, 176 F.2d 34, 42 (D.C. Cir. 1949). The District of Columbia Court of Appeals has described the prima facie evidence requirements for petitions to deny broadcast licenses under 47 U.S.C. § 309(d) (1976) in *Columbia Broadcasting Coalition v. FCC*, 505 F.2d 320, 323-24, 326-30 (D.C. Cir. 1974); *Stone v. FCC*, 466 F.2d 316, 321-22, 328-30 (D.C. Cir. 1972); *WLVA, Inc. v. FCC*, 459 F.2d 1286, 1293-94, 1297-98, (D.C. Cir. 1972); and *Folkways Broadcasting Co. v. FCC*, 375 F.2d 299, 302-05, 308-10 (D.C. Cir. 1967) (Tamm, J., dissenting).

48. See note 46 *supra*. Most disputes arising under the Commission's prima facie evidence requirement have centered on whether the complainant submitted sufficient information to show: (1) that a particular issue was expressly raised in challenged programming, see e.g., *In re Bernard T. Callan*, 30 F.C.C.2d 758 (1971) (programs about a famous adoption case did not raise the issue of adoption); *In re National Broadcasting Co.*, 25 F.C.C.2d 735 (1970) (NBC News segment about air traffic danger did not raise the issue of private pilot competency); (2) that an issue is a controversial issue of public importance, see e.g., *In re Christopher S. Riley*, 53 F.C.C.2d 190 (1975) (electronic speech compression is not an issue which is controversial and of public importance); *In re Morton Schwartz*, 52 F.C.C.2d 596 (1975) (theory of curved space not an issue that is controversial and of public importance); *In re The Clarin*, 28 F.C.C.2d 313 (1971) (bullfighting in Spain not a controversial issue of public importance); *But see In re Accuracy in Media, Inc.*, 39 F.C.C.2d 416 (1973), *aff'd*, 521 F.2d 288 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 934 (1976) (sex education in public schools was an issue of public importance); *In re Accuracy in Media, Inc.*, 39 F.C.C.2d 558 (1973) (Vietnam war a controversial issue of public importance); *Lamar Life Broadcasting Co.*, 1 F.C.C. 1484 (1965) (racial integration an issue that is controversial and of public importance); and (3) that a broadcaster has presented only one side of the issue in its overall programming. See e.g., *In re Joseph A. O'Connor*, 59 F.C.C.2d 605 (1976) (abortion); *In re Dale Pontius*, 46 F.C.C.2d 1118 (1974) (impeachment of President Nixon); *In re Horace P. Rowley*, 39 F.C.C.2d 437 (1973) (bombing and mining North Vietnam). For an excellent treatment of the problems involved in isolating a fairness doctrine issue and determining if it is controversial and of public importance, see *In re Accuracy in Media, Inc.*, 40 F.C.C.2d 958 (1973), *application for review denied*, 44 F.C.C.2d 1027 (1974), *rev'd sub nom. National Broadcasting Co. v. FCC*, 516 F.2d 1101, *reversal vacated and rehearing en banc granted*, 516 F.2d 1156, *second reversal vacated as moot and remanded with direction to vacate initial order and dismiss complaint*, 516 F.2d 1180 (D.C. Cir. 1974) (dealing with the issue of pensions). See generally Simmons, *The Problem of "Issue" in the Administration of the Fairness Doctrine*, 65 CAL. L. REV. 546 (1977).

complaint which does not meet the prima facie evidence requirement because the requirement is "part of the delicate balance allocating burdens between licensees and complainants."⁴⁹ The Commission reasons that broadcasters would be unduly burdened by having to disprove allegations by reviewing their overall programming before a complainant submits sufficient evidence to convince the Commission that a violation of the fairness doctrine probably exists.⁵⁰

The prima facie burden is extremely difficult to surmount. In fiscal year 1973, for example, the Commission received approximately 2,400 fairness complaints and summarily rejected 2,306 of them for failure to state prima facie evidence of a violation.⁵¹ During 1973 and 1974, the Commission received 4,280 formal complaints, but only a handful of complaints involving news imbalance resulted in any finding adverse to the broadcaster.⁵²

The *ASCEF* opinion provides guidance as to how the Commission and the United States Court of Appeals for the District of Columbia interpret the prima facie burden. While examining the reasons why the *ASCEF* failed to hurdle the prima facie burden, it must be asked whether a claim as pervasive as the one *ASCEF* attempted could ever satisfy the prima facie requirement.

III. VIABLE COMPLAINTS SURVIVING FCC PROCEDURES

The *ASCEF* decision provides guidance to future fairness doctrine complainants, both in terms of how the Commission interprets the prima facie burden and in terms of the underlying constitutional purpose of the prima facie evidence requirement. *ASCEF* did not meet the threshold burden of presenting prima facie evi-

49. RECONSIDERATION OF THE FAIRNESS REPORT, *supra* note 46, at 696.

50. The Commission further elaborated in *In re Allen C. Phelps*, 21 F.C.C.2d 12 (1969):

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. . . . 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. at 13.

51. FAIRNESS REPORT, *supra* note 40 at 26,375.

52. Petitioner's Brief for Certiorari at 25, *American Sec. Council Educ. Foundation v. FCC*, 100 S. Ct. 662 (1980) (No. 79-515).

dence of a violation, and its lack of success can be described procedurally and constitutionally.

A. *Overcoming the Procedural Prima Facie Burden*

After the *ASCEF* decision, a complaint alleging programming imbalance over a large, multifaceted issue will be immediately attacked on specificity grounds.⁵³ In *ASCEF*, the court of appeals held that the sub-issues comprising national security were too tangential to one another for an average viewer to comprehend that a statement on one sub-issue would necessarily support or contradict a view on another.⁵⁴ For example, an average viewer would not necessarily relate a news story about the Russian position on the SALT II treaty to a story about the United States' posture in southeast Asia, and yet both topics concern our national security. National security, however, embraces countless topics upon which reasonable persons differ. National security becomes vague because the term is open to subjective construction based upon those topics a person feels are significant. Although the court expressly disavowed that a fairness complaint issue may never be based on identifiable sub-issues,⁵⁵ it held that the sub-issues chosen by *ASCEF* failed the specificity requirements of the prima facie evidence requirement.

With the benefit of hindsight, *ASCEF* apparently should have initiated at least four separate complaints, each based upon one of the four topic areas the foundation selected. Such a piece-meal attack would have delimited the Commission's attention to those separate topic areas⁵⁶ and thereby lessened the conflicts in logic and understanding when the sub-issues within each topic area were examined for interrelation. In other words, if *ASCEF* had based its

53. Before the *ASCEF* decision, the Commission had rarely dismissed a fairness complaint on grounds of specificity. See, e.g., *In re Hakki S. Tamimie*, 42 F.C.C.2d 876, 877 (1973) (complaint was inadequate when it defined the issue to be the "Middle East" and failed to specify the particular aspect of it). On occasion, the Commission has been extremely adroit in extracting sub-issues from complaints which would have otherwise been too generalized. See, e.g., *In re Accuracy in Media, Inc.*, 39 F.C.C.2d 416 (1973), *aff'd*, 521 F.2d 288 (D.C. Cir. 1975) (FCC created sub-issues voluntarily); *In re Council on Children Media & Merchandising v. ABC*, 59 F.C.C.2d 448 (1976) (FCC created sub-issues voluntarily); *Green v. FCC*, 447 F.2d 323 (D.C. Cir. 1971) (the D.C. Circuit Court of Appeals considered the complaint on each of the five possible constructions of the fairness issue).

54. 607 F.2d at 448.

55. *Id.* at 449.

56. See text accompanying note 5 *supra*.

complaint on the perceived military threat from the Soviet Union or China rather than on the general and inexplicit term "national security," the broadcaster would be in a better position to identify and reply to that specific issue's presentation. Chief Judge Wright, in his *ASCEF* concurrence, believed that a study such as the one undertaken by *ASCEF* could succeed if, in terms of specificity alone, the study was "structured around a highly specific issue, one that can be defined with precision and can be addressed and responded to directly and efficiently by the broadcaster."⁵⁷ As an example, the issue of inflation is as pervasive as the issue of national security. Yet the causes and cures of inflation are in great controversy. If a complainant believed that a broadcaster was advocating a slanted position on a potential cause or cure of inflation, and the complainant decided to base the complaint on inflation, he would probably not survive the *prima facie* burden of specificity. After *ASCEF*, such a complainant would be well advised to break down the issue of inflation into various components, such as excess demand over supply, OPEC prices, excess money supply, and so forth.

The court of appeals turned from the requirement of a specific issue to focus on the objectivity of the study. The majority said that the data obtained in *ASCEF*'s study could not be subjected to the artificial categorization involved in a "viewpoint analysis."⁵⁸ *ASCEF* channeled its culled news items into three mutually exclusive categories: The United States should increase its national security efforts; the government's perception about national security was essentially correct; or the United States should decrease its national security efforts. As Chief Judge Wright expressed the problem: "If petitioner's world is populated by 'hawks,' 'sparrows,' and 'doves,' the real world, as I understand it, is an aviary of inexhaustible variety."⁵⁹ In other words, although the "hawks" and "doves" represent the polar limits of the issue of national security, there are many positions between the two poles other than the government's point of view. During the *ASCEF* study, the Nixon Administration may or may not have represented the correct perception of national security.

57. 607 F.2d at 458 (Wright, C.J., concurring). Chief Judge Wright, however, warned that the specific issue must also meet the test of being controversial and of public importance. *Id.* at 458 n.46.

58. Chief Judge Wright characterized the viewpoint analysis as "gross reductionism." *Id.* at 455.

59. *Id.* at 455 (Wright, C.J., concurring) (footnote omitted).

It is nearly impossible to imagine a methodology in a large-scale study whereby the data are not codified in some manner. Raw data obtained in an extensive study must somehow be reduced and interpreted through some methodology. ASCEF's "viewpoint analysis" proved inadequate for fairness doctrine purposes. Perhaps it could have expanded its three categories of viewpoints to accommodate the "aviary" of views that lies between the poles of "hawks" and "doves." Whatever methodology is used, a future complainant must strive for true objectivity in the presentation of the specific issue and the quantitative indicia employed to evaluate the issue.

In addition to the prima facie requirements of specificity and objective methodology, the prima facie burden also requires that a complainant demonstrate that the alleged imbalanced broadcast is not cured by the broadcaster's overall programming effort.⁶⁰ Although the court of appeals in the *en banc* decision did not dwell on this aspect of the prima facie burden, the original court of appeals panel decision emphasized the difficulty a complainant faces in this regard.⁶¹ The Commission argued before the panel that ASCEF had studied only selected news programs aired by CBS; and, therefore, the complaint was but a generalized and unsupported attack.⁶² Further, the Commission faulted ASCEF for its failure to evaluate CBS in its "overall news, public affairs, and nonentertainment programming."⁶³ In its 1974 *Fairness Report*,⁶⁴ the Commission proffered a narrow and reasonable interpretation of this aspect of the prima facie burden. The *Fairness Report* does not require a complainant to monitor a station twenty-four hours a day, seven days a week. It merely requires that a complainant be a "regular viewer."⁶⁵ The Commission's rationale in *ASCEF*, how-

60. See text accompanying note 48 *supra*.

61. *American Sec. Council Educ. Foundation v. FCC*, 44 RAD. REG. 2d (P&F) 193, 208 (D.C. Cir. 1978), *rehearing en banc*, 607 F.2d 438 (D.C. Cir. 1979), *cert. denied*, 100 S. Ct. 662 (1980).

62. *Id.*

63. Brief for FCC at 28.

64. FAIRNESS REPORT, *supra* note 40.

65. Specifically, the FAIRNESS REPORT, *supra* note 40 provides:

[The Phelps doctrine] does not require, as some appear to believe, that the complainant constantly monitor the station While the complainant must state the basis for this claim that the station has not presented contrasting views, that *claim might be based on an assertion that the complainant is a regular listener or viewer*; that is, a person who consistently or as a matter of routine listens to the news, public affairs and other non-entertainment programs carried by the station involved. This does not re-

ever, was that since ASCEF's issue was so pervasive, it should have evaluated a correspondingly pervasive amount of programming. The lesson in this regard is that a future complainant disputing a broadcaster's coverage of a large issue would be prudent to evaluate all of a broadcaster's nonentertainment programming.

In short, future fairness doctrine complainants perturbed about a broadcaster's presentation of a large, multifaceted issue should follow the guidance provided by the court of appeals. The future complainant must precisely narrow the issue involved in order for a broadcaster to identify why the complainant argues that there was a slanted presentation of an issue. The broadcaster then will fully understand the basis of the complaint and will be able to respond accordingly. Secondly, the complainant must choose a methodology which will objectively evaluate and interpret the raw data obtained in a study. In addition, the complainant involved with a large, pervasive issue should evaluate all of the broadcaster's nonentertainment programming.

B. *Constitutional Guidance to the Prima Facie Burden*

Were a fairness doctrine complainant to proffer an overwhelmingly specific and methodologically sound complaint, together with accompanying proof of overall programming imbalance, the prima facie burden would still lie before the complainant. The Commission's procedural prima facie burden only can be overcome when the viewer or listener's right to receive unbiased news outweighs the broadcaster's first amendment right to be unhindered in the transmission of its news.

The constitutional basis of the burden is embodied in the distinction between the first amendment rights afforded broadcasters, as they have evolved to date, and the traditional first amendment rights afforded newspapers.⁶⁶ In *Miami Herald Publishing Co. v. Tornillo*,⁶⁷ a 1973 case in which the United States Supreme Court overturned a Florida statute which required newspapers to print

quire that the complainant listen to or view the station 24 hours a day, seven days a week. One example of a 'regular' television viewer would be a person who routinely (but not necessarily every day) watches the evening news and a significant portion of the public affairs programs of a given station.

FAIRNESS REPORT, *supra* note 40, at 26,379 (emphasis added).

66. See generally F. FRIENDLY, *supra* note 2; Comment, *The Regulation of Competing First Amendment Rights: A New Fairness Doctrine Balance After CBS*, 122 U. PA. L. REV. 1283, (1974).

67. 418 U.S. 241 (1974).

editorial replies, the Court stated that the choice of material to go into newspapers and the treatment of public issues in newspapers, whether fair or unfair, constitute the exercise of editorial control and judgment.⁶⁸ The Court then said: "It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time."⁶⁹ Contrast that philosophy with the Court's opinion in *Red Lion*,⁷⁰ the 1969 case in which the Court upheld the fairness doctrine against a constitutional challenge. The Court said that Congress and the Commission do not violate the first amendment when they require a radio or television station to give reply time to redress a slanted presentation of an issue.⁷¹

The Court's constitutional emphasis in *Tornillo* was the newspaper's right not to be regulated in the publication of its views. In *Red Lion*, the Court was more concerned with the public's right to receive unbiased news than it was with the broadcaster's first amendment right to transmit its views. The *Red Lion* Court justified the distinction between the first amendment rights afforded broadcasters and newspapers on the technological scarcity of broadcasting frequencies.⁷² Despite that justification, the fact remains that in order to protect the rights of viewers and listeners, the Court and Congress have placed restrictions on broadcasters which do not coincide with the spirit of a free press. The *Red Lion* Court warned that the constitutional implications of the restrictions on broadcasters caused by the fairness doctrine would be reconsidered if, in practice, the doctrine chilled the coverage of public issues.⁷³ The Commission's prima facie evidence requirement procedurally accomplishes the constitutional goal of guaranteeing unbiased news to viewers without unduly burdening broadcasters because the requirement effectively screens out all but the most compelling violations of the fairness doctrine. In light of potential infringements on the first amendment rights of broadcasters, as exemplified by their having to defend themselves continually against unsubstantiated complaints, the Commission and the courts

68. *Id.* at 258 (footnote omitted).

69. *Id.*

70. 395 U.S. 367 (1969).

71. *Id.* at 396.

72. *Id.* at 400; see text accompanying note 36 *supra*.

73. 395 U.S. at 393.

will continue their "partnership"⁷⁴ in enforcing the fairness doctrine with great restraint.

The *ASCEF* decision should have rested solely on the procedural ground of whether *ASCEF* had met the threshold burden of presenting prima facie evidence of a fairness doctrine violation. The controversy, on its face, presented no constitutional issues, yet the court determined that *ASCEF* had not met the procedural prima facie burden by factoring into its holding the constitutional interests of the viewing public and the broadcaster. The court incorporated constitutional criteria into its procedural ruling when the majority declared that the complaint had not met the prima facie procedural burden because national security was too imprecise to be a fairness doctrine issue and that "a contrary result would unduly burden broadcasters without a countervailing benefit to the public's right to be informed."⁷⁵ To say that a complainant has not met the prima facie burden because a contrary result would unduly burden broadcasters is a constitutional holding, not a procedural one.⁷⁶ Nowhere in the Commission's published definitions of the prima facie evidence requirement is it specified that part of the complainant's showing includes demonstrating the lack of undue burden on the broadcaster.⁷⁷ The *ASCEF* constitutional holding infuses the prima facie burden with first amendment criteria which allows the Commission to balance the broadcaster's burden of responding to a complaint with a large-scale complainant's burden of making a prima facie showing. Such criteria escalate the complainant's prima facie burden beyond mere procedure.

74. The D.C. Circuit Court of Appeals has used this word several times in reviewing Commission rulings. *See e.g.*, *WNCN Listeners Guild v. FCC*, 610 F.2d 838 (D.C. Cir. 1979); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851-52 (D.C. Cir. 1970). That court has often stated that its role in reviewing Commission decisions will be limited and deferential. *See, e.g.*, *Lakewood Broadcasting Serv., Inc. v. FCC*, 478 F.2d 919, 922 (D.C. Cir. 1979); *Citizens to Keep Progressive Rock v. FCC*, 478 F.2d 926, 934 (D.C. Cir. 1973); *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 1005-06 (D.C. Cir. 1966) (FCC is afforded broad discretion in formulating rules governing public intervention). *See also* *Columbia Broadcasting Sys. Inc., v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973), when the Supreme Court stated: That is not to say we "defer" to the judgment of the Congress and the Commission on a constitutional question, or that we would hesitate to invoke the Constitution should we determine that the Commission has not fulfilled its task with appropriate sensitivity to the interests in free expression. *Id.* at 103.

75. 607 F.2d at 448.

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

77. *See* note 48 *supra*.

The three dissenting judges in *ASCEF* took exception to what they deemed the majority's conversion of the prima facie evidence requirement into an open ended "prudential" doctrine whereby the Commission could decline jurisdiction in hard cases.⁷⁸ The dissenters added: "The tone and rationale of the majority opinion suggest that the wagons are being drawn about the fairness doctrine in a fashion assured to deflect the most worrisome fairness complaints—those, like petitioner's, alleging pervasive and continuous imbalance in the coverage of controversial matters."⁷⁹

The court, however, has not acted as dramatically as the dissenters suggest. The prima facie burden has always been imbued with first amendment sensitivity to broadcasters, but heretofore under the guise of discretion. The discretion afforded the Commission to veto complaints, regardless of the basis for that discretion, is necessary to counterbalance the dilatory constitutional restrictions the fairness doctrine imposes on broadcasters.⁸⁰ Although complainants could assert that the constitutional implications in the prima facie burden require them to win their case before they argue it,⁸¹ it is constitutionally sound to vest the decision to validate

78. 607 F.2d at 460 (Wilkey, J., dissenting).

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

80. See note 75 *supra*. See generally Rosenfeld, *supra* note 45. The Commission's regulatory scheme is centered around its determination that broadcasters should have maximum editorial discretion in deciding how to fulfill fairness doctrine obligations. FAIRNESS REPORT, *supra* note 40, at 26,374. In *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1972), the Supreme Court stated:

Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of a great delicacy and difficulty. The process must necessarily be undertaken within the framework of the regulatory scheme that has evolved over the course of the past half century. For, during that time, Congress and its chosen regulatory agency have established a delicately balanced system of regulation intended to serve the interests of all concerned Thus, in evaluating the First Amendment claims of [complainants], we must afford great weight to the decisions of Congress and the experience of the Commission.

Id. at 102.

81. The effect the *ASCEF* decision will have on potential complainants will be important because the Commission relies upon viewer-initiated complaints to avoid charges of direct governmental regulation. *ASCEF* invested over half a million dollars in its study and legal odyssey, and aside from the publicity they generated, they were manifestly unsuccessful in the courts. Certainly this decision will have some palling effect on future complainants. See, e.g., BROADCAST PROCEDURE MANUAL, *supra* note 46 at 32,290. For a discussion on the role of citizens' group action as an alternative to governmental regulation see Padden, *The Emerging Role of Citizens' Groups in Broadcast Regulation*, 25 FED. COM. B. J. 82 (1972); Comment, *Enforcing*

complaints with the Commission, rather than the complainants. It is undesirable for an independent organization like ASCEF to be able to influence broadcasting content when the same influence would be constitutionally repugnant if a newspaper was involved. By granting the Commission the ability to balance the burden to a broadcaster in responding to a complaint along with the already restrictive prima facie evidence requirement, the court of appeals has acted in a constitutionally correct manner. Although ASCEF may have indirectly influenced the broadcaster by its well publicized study, the prima facie burden, as a constitutional "check valve," prevented ASCEF from procedurally accomplishing what was constitutionally unmerited.

To account for the constitutional aspect of the prima facie burden, and to overcome it, a future large-scale complainant must stress that the right of the viewer or listener to receive unbiased news has been abridged to a greater extent than the broadcaster's first amendment rights would be in responding to the complaint. In *Red Lion* terms, the complainants, through the validity of their charge of imbalance and through the quality of their research, must show that "it is the right of the viewers and listeners, not the right of broadcasters, which is paramount."⁸²

The statistics of unsuccessful complainants demonstrate that the constitutional hurdle of the prima facie evidence requirement is extremely difficult to surmount. In analyzing the underlying constitutional contradictions of the fairness doctrine as it pertains to broadcasters and newspapers, however, it is clear that the constitutional aspect of the prima facie burden should screen out all but the most obvious and flagrant violations of the fairness doctrine.

IV. CONCLUSION

A future fairness doctrine complainant involved with a large, multifaceted issue should break down the issue into components which would survive a specificity attack. The complainant should also strive for true objectivity in the research and evaluation of all of a broadcaster's nonentertainment programming. Although a future complainant should note the procedural guidance offered by ASCEF, he or she should be aware that the prima facie burden is a manifestation of the Commission's awareness of the potential first

the Obligation To Present Controversial Issues: The Forgotten Half of the Fairness Doctrine, 10 HARV. C.R.-C.L. L. REV. 137, 158-78 (1975).

82. 395 U.S. at 390.

amendment infringement that the fairness doctrine presents to broadcasters. As a constitutional "check valve," the Commission's prima facie burden screens out all but the most merited complaints to avoid an undue burden on the broadcaster. No matter how procedurally viable a complaint might be, if it does not demonstrate that the viewer's right to unbiased news has been abridged more than the broadcaster's rights would be in responding to the complaint, then it will be unsuccessful.

Whom then does the fairness doctrine serve? The broadcasters present a forceful first amendment argument that the fairness doctrine is deleterious to their news organizations. ASCEF, as a concerned viewer, can now join the long line of unsuccessful complainants who could argue that the fairness doctrine does not serve them. If the viewing or listening public is constitutionally served by the fairness doctrine, it is because procedures developed by the Commission, such as the prima facie evidence requirement, ensure that the fairness doctrine is enforced with great restraint.

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