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CAMPAIGNING IN THE ELECTRONIC AGE: THE REGULATION OF POLITICAL BROADCASTING DURING THE 1980 ELECTIONS

*By Stuart N. Brotman**

INTRODUCTION

The electronic media and political campaigns, for better or worse, have become more inextricably tied to each other with each successive campaign year.[1] A not surprising corollary of this phenomenon has been the increase in regulatory problems surrounding broadcasts of campaign activities. The recently completed campaign season generated at least four important issues in political broadcasting that reach out for long-term solutions by the Federal Communications Commission (FCC), the Congress, and/or the courts: (1) the appropriate circumstances for airing debates between or among candidates for all levels of office; (2) the point at which a candidate is considered to be "legally qualified" by the FCC so as to trigger the "equal opportunities" provision of section 315(a) of the Communications Act of 1934;[2] (3) whether a station or network acts unreasonably in refusing to sell air time to Presidential candidates several months before the first state primary; and (4) whether public broadcasting stations should be exempted from the requirement to provide reasonable access to Federal candidates under section 312(a)(7) of the Act.[3] These issues, and some suggested remedial measures, will be the focus of this article.

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1. *See generally* A. SALDICH, ELECTRONIC DEMOCRACY: TELEVISION'S IMPACT ON THE AMERICAN POLITICAL PROCESS (1979); N. MINOW, J. MARTIN & L. MITCHELL, PRESIDENTIAL TELEVISION (1973); S. MICKELSON, THE ELECTRIC MIRROR: POLITICS IN AN AGE OF TELEVISION (1972); R. MACNEIL, THE PEOPLE MACHINE: THE INFLUENCE OF TELEVISION OR AMERICAN POLITICS (1968) [hereinafter cited as MACNEIL].

2. 47 U.S.C. § 315(a) (1976).

3. 47 U.S.C. § 312(a)(7) (1976).

I. SECTION 315(A): AN OVERVIEW

Section 315(a) of the Communications Act requires radio and television stations to afford *precisely* equal opportunities to all "legally qualified candidates" (a term of art discussed below) for elective office, if any one candidate is permitted a "use" of the station. Any "use" of broadcast facilities, however slight, triggers the equal opportunities provision. Thus, if a candidate's voice or image appears in a readily identifiable manner, even if only for a brief period, a "use" has occurred and equal time must be given.[4]

The equal opportunities provision covers all programming, including commercials, except that which comes under one of the four exempt categories of the law: (1) a bona fide newscast; (2) a bona fide news interview; (3) a bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects); and (4) on-the-spot coverage of a bona fide news event.[5] Any program in one of these categories does not trigger an equal opportunities obligation; rather, the station must only ensure that if controversial issues of public importance are raised therein, it will present contrasting viewpoints on them.

Section 315(a) is applicable to state and local, as well as Federal elections. Its equal opportunities provision comprises both the equal free use of air time (commonly known as "equal time") and the right to purchase air time at rates and times comparable to those offered to other candidates for the same office.[6]

Enacted by Congress in 1959, section 315(a) encompasses two legislative objectives. The first aims to provide the public with maximum exposure to the views of all candidates, consistent with the mandate of the First Amendment to promote wide-open debate and preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.[7] The second objective is to encourage fairness in the political process by requiring broadcasters to afford equal opportunities to those seeking the same office.

In practice, however, these objectives tend to contradict each

4. *See, e.g.*, Harry M. Plotkin, 23 F.C.C. 2d 758 (1970); *cf.* National Urban Coalition, 23 F.C.C. 2d 123 (1970) (incidental appearance of future gubernatorial candidate in which he was not "readily identifiable" did not constitute a "use" under section 315(a)).

5. 47 U.S.C. § 315(a) (1976).

6. *Id.*

7. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). *See also* Associated Press v. United States, 326 U.S. 1, 20 (1945); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

other. Insuring equal opportunities for all candidates often has resulted in a station's decision not to give free time for presentations by the major candidates where there are a number of minority party candidates who, under the law, would have a mandatory right of equal time. Since the equal opportunities provision can be triggered by a single broadcast, the presence of a multiplicity of candidates for a single office (there were, for example, at least a dozen legally qualified candidates for President last year), acts as a disincentive for the broadcaster. Under such circumstances, free time requirements can become uncontrolled, and revenue-producing broadcast schedules must be rearranged to comply with the equal opportunities requirement. The practical result, consequently, has been to keep candidate air time to a minimum, and thus limit the electorate's exposure to the candidates.

This is substantiated by data gathered in the 1960 election, when Congress exempted, on a one-time only basis, the Presidential and Vice Presidential races from the equal opportunities provision. John Kennedy and Richard Nixon, the beneficiaries of this action, received almost forty hours of free time donated by the networks. By contrast, in 1964, when the provision was again in force, Lyndon Johnson and Barry Goldwater received less than five hours of donated time.[8]

II. CAMPAIGN DEBATES

Perhaps the most direct forum for discussing the issues, and for highlighting for prospective voters the philosophical differences and personal styles between competing candidates, is a political debate between candidates. This became readily apparent, for example, in last year's Presidential election; the televised debate between Jimmy Carter and Ronald Reagan in Cleveland, one week before ballots were cast, may have marked a distinctive shift in support toward the Republican challenger, who was perceived as the "winner" by most public opinion surveys.[9] But until 1975, when the FCC issued a special ruling in response to a petition submitted by the Aspen Institute's Program on Communications and Society,[10] broadcast debates were not considered under the exempt category of Section 315(a), which provides for on-the-spot coverage of a bona fide news event. Accordingly, until this

8. MACNEIL, *supra* note 1, at 285-86.

9. Isaacson, *Now, a Few Words in Closing, Reagan benefits from the Big Debate*, TIME, Nov. 10, 1980, at 18.

10. *See generally* Aspen Inst. Program on Communications and Soc'y, 55 F.C.C. 2d 697 (1975), *aff'd sub nom.* Chisholm v. F.C.C., 538 F.2d 349 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 890 (1976).

decision was released, broadcasters would not present them because of the equal time problem they created. This 1975 case, commonly known as the *Aspen* ruling, overturned prior FCC decisions by characterizing certain debates as falling within the bona fide news event exemption. It greatly reduced the inhibitory effect of equal time felt by broadcasters. On the national level, the *Aspen* ruling led to the three broadcast debates in 1976 between Jimmy Carter and Gerald Ford and the single broadcast debate between Walter Mondale and Robert Dole, all staged by the League of Women Voters.[11] Subsequently, it has allowed debates at the state and local level and at the primary election level, and in 1980, generated the Anderson-Reagan and Carter-Reagan debates.

The *Aspen* ruling, however, is limited to debates that are produced by nonbroadcast entities in non-studio settings. Thus, in 1976, the League of Women Voters [the League] selected the dates and the non-studio locations, such as the Palace of Fine Arts in San Francisco, the format, and the panelists who questioned the candidates. This year, again, the League determined the eligibility of participants and selected the formats, panelists, and remote locations in Baltimore and Cleveland for the two broadcast debates. Although the three television networks have participated to some extent in the planning of the debates, the League has clearly controlled the process in order to comply with the limitation of the *Aspen* ruling. The role of the networks has been reduced primarily to remote production and transmission; their ability to exercise broadcast journalism, in effect, has been preempted by the FCC ruling.

While the airing of the debates is a salutory accomplishment, their infrequent staging, particularly at the state and local levels, suggests that the *Aspen* ruling is, at best, a stop-gap measure until legislative revision, or perhaps a more refined interpretation by the FCC, takes place. Thus far, the *Aspen* ruling has been applied only to debates and press conferences held by candidates, but this limitation seems difficult to sustain. Other programming formats, such as a series of programs featuring candidates discussing the "great issues" of a campaign may be equally effective in informing the electorate. Under present law, however, a broadcaster could not block out time for such programming without triggering the equal time requirement. This is an especially acute problem at the state and local levels, where there are frequently a multiplicity of candidates for various offices. As noted, a broadcaster under these circumstances is not likely to plan such an informational

11. *See generally* S. KRAUS, THE GREAT DEBATES, CARTER V. FORD, 1976 (1979).

series, since a "floodgate" could be created when all the other candidates exercised their right to mandatory equal time.

The FCC or Congress should revisit the *Aspen* ruling to permit a broadcaster to exercise bona fide news judgment by covering *any* appearance of a candidate in any primary or general election campaign. Such an interpretation would eliminate the artificial line that existing law establishes for debates; that is, the requirement that they be produced by nonbroadcast entities in non-studio settings. At the least, this current limitation strains the resources of nonbroadcast groups, who are forced to expend considerable energies and significant portions of their budgets to develop broadcasting expertise. Even on the national level, there is no assurance that groups such as the League of Women Voters will be able to financially sustain Presidential debates in the future.[12] Moreover, radio and television stations already have production expertise, studios, and journalists who are familiar with the candidates. This efficiency rationale is even more urgent in state and local situations, where nonbroadcast entities may be unwilling or unable to assume the substantial responsibility of producing a series of media debates.

With a justifiably broad reading of the bona fide news event exemption, limited only by the requirements that the programming explores conflicting views on current issues of public importance and that it is not designed to serve the political advantage of any legally-qualified candidate, broadcasters could then sponsor debates at all levels of office. For the first time, broadcasters could allow candidates to appear on journalistic programs like "The Advocates" without triggering equal time—not to advance their candidacies, but to discuss important topical issues.[13]

Such revision, of course, should not preclude nonbroadcast groups from producing or sponsoring broadcast debates; rather, broadcasters should be allowed to participate actively in debates if they can act as

12. For example, during the recent presidential election campaign, the League of Women Voters indicated that it was having problems raising money to support a series of broadcast debates. *See* Clines, *Lack of Funds May Block Presidential TV Debates*, N.Y. Times, Oct. 24, 1979; § A, at 16, col. 1.

13. During 1980, "The Advocates," a series produced by WGBH, Boston and distributed nationally through PBS, presented several shows during the closing months of the campaign that dealt with discussions of important domestic and international issues that were central to the presidential election. Ironically, because of the current construction of the equal time rule, no candidate appeared on these programs to discuss these issues with an opposing candidate. Rather, ideological surrogates appeared, despite the fact that none could communicate the real position of the candidates they represented as well as the candidates themselves.

the better catalyst under the circumstances.[14] The end result should be an increase in overall air time for candidates to discuss the issues, and the greater utilization of debates and similar innovative programming formats during political campaigns.

III. THE "LEGALLY QUALIFIED" CANDIDATE

The application of section 315(a) is premised upon the use of air time by a "legally qualified" candidate. Under FCC rules, such a candidate is anyone who has publicly announced his or her intention to run for nomination or election; is qualified under the applicable local, state or Federal law to hold the office for which he or she is a candidate; or has made a substantial showing of bona fide candidacy.[15] This showing means evidence that the person claiming to be a candidate has engaged to a substantial degree in activities commonly associated with political campaigning. The FCC has said that these activities normally would include making campaign speeches, distributing campaign literature, issuing press releases, maintaining a campaign committee, and establishing campaign headquaters, even if it is also the residence of the candidate or campaign manager.[16] It has also said that this list is not exhaustive, nor are all the listed activities necessarily required in each case to demonstrate a substantial showing.[17]

The reality of today's politics, especially the Presidential campaign, is that it has developed into somewhat of a marathon.[18] Jimmy Carter, for example, began actively campaigning a full year before the New Hampshire primary in 1976, and in his own mind, at least, was engaged in a substantial showing of bona fide candidacy. The same can be said for candidates such as George Bush, whose unsuccessful quest for the Republican nomination for President began in early 1978. The question raised by these long-term campaign sagas is whether the candidate's activities coincide with the FCC's interpretation of the "legally qualified candidate" requirement, and if not, whether this interpretation should be modified in conformance with new political realties.

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14. Although it would be awkward to draft legislative language that indicates a neutral policy toward sponsorship of broadcast debates by nonbroadcast groups, such an idea could adequately be articulated in legislative history prepared to accompany any amendment to section 315(a).

15. *See* 47 C.F.R. § 94(a) (1978).

16. *Id.* at 94(a)(5).

17. *Id.*

18. *See generally* J. WITCOVER, MARATHON: THE PURSUIT OF THE PRESIDENCY, 1972-76 (1977).

Last year, the FCC was forced to focus on the problem of still another marathon candidate, Ronald Reagan. In the early summer of 1979, five months before he issued a specific announcement of his candidacy for President, the National Citizens Committee for Broadcasting [NCCB] asked the FCC to issue a declaratory ruling finding Mr. Reagan to be a "legally qualified candidate." With such a FCC ruling, any station airing Mr. Reagan's daily radio commentary, syndicated nationwide, would have been obligated to offer equal time to the ten other Republican contenders seeking the party's nomination. The result of such a ruling, in practical terms, would have forced these stations to withdraw Mr. Reagan's commentary at that time.

NCCB felt these broadcasts, if not covered by the equal time requirement, would provide Reagan with "extremely valuable extensive public exposure" at the expense of the other candidates.[19] It alleged that Mr. Reagan intended to seek the Republican nomination, and supported this charge with these assertions: (1) Senator Laxalt, the Reagan campaign director in 1976, acknowledged on CBS' "Face the Nation" that Mr. Reagan had decided to seek the nomination; (2) Mr. Reagan consented to Senator Laxalt's chairing of a "Reagan for President" committee in March, 1979; (3) the Reagan for President Committee filed a Statement of Organization with the Federal Election Commission that same month; and (4) Mr. Reagan had failed to respond to a notice of the Federal Election Commission in March, 1979, informing him that he would be deemed to be a candidate under Federal election law in the event that he failed to disavow his candidacy within 30 days.[20]

Despite this, the FCC rejected the claim, saying that the factors cited by NCCB "do not constitute evidence relevant to making a substantial showing in any specific state,"[21] and that Mr. Reagan had not yet qualified for the Presidential primary in any state.[22] It stated that the existing rule "reflects the peculiar nature of our nominating procedures, provides reasonable standards, and strikes a balance between a rigid and possibly unfair definition of a legally qualified candidate for President and a wide-open definition which could only lead to more uncertainty and not serve the public interest."[23]

This case highlighted a dilemma of equity. Declaring someone a

19. National Citizens Committee for Broadcasting, 46 RAD. REG. (P&F) 2d 1, 3 (1979).
20. *Id.* at 5.
21. *Id.*
22. *Id.*
23. *Id.* at 8.

"legally qualified candidate" on a largely unilateral basis could be unfair to someone like Mr. Reagan, whose livelihood was in part dependent on his radio commentaries. On the other hand, it may be unfair to the other candidates to allow Mr. Reagan to espouse his campaign positions, in a format he controls, that is exempt from the equal time requirement.

The FCC, could, in the future, strike a better balance by involving the putative candidate in the process of determining his or her status. This could be accomplished by a system whereby a complainant would initially have the burden of producing serious evidence that the candidate was "legally qualified." If this showing included a finding by another government body, acting under state or Federal law, then the presumption should arise that the candidate is "legally qualified." In other cases, the FCC should retain discretion, reviewable by the courts on an expedited basis, to determine whether the allegations justify the presumption. In any event, the presumption should be rebuttable; that is, the "candidate" should be given an opportunity to refute the charges and claim non-candidate status for a period of time. The candidate, then, will have significant input into the determination, and will be able to weigh the benefits and detriments to a candidacy by accepting a temporary, non-candidate status. The FCC, in rejecting NCCB's request for a declaratory ruling, should have at least commenced a rulemaking to establish standards that are more in touch with the extended nature of recent campaigns. By not doing so, it has merely postponed the resolution of a problem that may well arise again in the future.

IV. "REASONABLE ACCESS" FOR FEDERAL CANDIDATES

Section 312(a)(7) of the Communications Act gives the FCC authority to revoke a broadcast license if the licensee willfully or repeatedly fails to allow reasonable access or to permit the purchase of reasonable amounts of time for the use of a radio or television station by a legally qualified candidate for Federal elective office.[24]

In October, 1979, the Carter-Mondale Presidential Committee, Inc. filed a complaint against the three television networks with the FCC. The Committee charged that CBS, NBC, and ABC had violated the reasonable access provision by refusing to sell it time to air a thirty-minute prime time program that would be used for an appearance by the President after he declared his candidacy. NBC and ABC had refused because they felt it was "too early to begin a presidential cam-

24. 47 U.S.C. § 312(a)(7) (1976).

paign." CBS claimed that the program would involve "massive disruptions" of its regular schedule, offering instead to sell a five-minute slot at 10:55 p.m. and another in the daytime. The networks also expressed the apprehension that selling the time to the Committee would set a precedent that could be demanded by other candidates. All three claimed that the refusal to sell the requested time could not be found to be an abuse of discretion.

The FCC decided in favor of the Committee, and ordered the networks to detail how they intended to fulfill their reasonable access obligations.[25] This decision was subsequently affirmed by the United States Court of Appeals for the District of Columbia Circuit.[26] One unresolved issue in this controversy, however, remains—the interplay between the "legally qualified" candidate and the "reasonable access" provisions. As *de facto* candidacies arise many months before the start of the formal aspects of the campaign, it seems that some objective standards are necessary to evaluate when the campaign has begun. Under the record of current decision, for example, it is possible that a candidate could be found outside the confines of equal time while demanding, with FCC support, reasonable access under section 312(a)(7). This fact pattern did not arise in the Carter-Mondale situation, since the President would have been subject to the equal time restriction when reasonable access was given. But what would the FCC do in such a case? Here, again, is a matter sure to arise in the future that has not yet been properly addressed.

Additionally, the FCC's standards should be improved in the "reasonable access" as well as the "legally qualified candidate" area. As in the latter area, it would be helpful to provide illustrative examples of what the FCC would consider as "reasonable." It is not sufficient to say that all matters must be decided on an *ad hoc* basis. The fairness doctrine, for example, is administered case-by-case, yet the FCC has at least attempted to set forth examples that can provide some measure of guidance to broadcasters.[27] By setting the boundaries of a zone of reasonableness, broadcasters would be provided with better notice in this

25. *See* Carter-Mondale Presidential Comm. 74 F.C.C. 2d 657 (1979), *aff'g* Carter-Mondale Presidential Comm., 74 F.C.C. 2d 631 (1979).

26. CBS, Inc. v. FCC, 629 F.2d 1 (D.C. Cir. 1980): The Supreme Court has granted certiorari, 101 S.Ct. 353 (1980), and the author hopes the Court will deal with the serious definitional problems that have occurred in the FCC's administration of this area, a matter that is beyond the intended scope of this article.

27. *See, e.g.*, Fairness Report, 48 F.C.C. 2d 1 (1974), *reconsidered*, 58 F.C.C. 2d 691 (1976), *rev'd in part*, National Citizens Committee for Broadcasting v. FCC, 567 F.2d 1095 (D.C. Cir., 1977), *cert. denied*, 436 U.S. 926 (1978).

sensitive First Amendment area,[28] while the FCC would be providing other participants in the campaign calculus with a more defined framework for decisionmaking.

V. MANDATORY ACCESS AND PUBLIC BROADCASTING

Section 312(a)(7) currently applies to all broadcast stations, both commercial and noncommercial.[29] Although it might be argued that such coverage is equitable because it treats all stations alike, this reasoning fails to recognize the significant structural and functional attributes of public broadcasting. The silence of the legislative history surrounding this provision has created an ambiguity as to whether, in Commissioner Fogarty's words, it places "an onerous burden on public broadcasting. . . ."[30] The FCC, however, has interpreted the section as inclusive of public broadcasting, much as the equal opportunities provision of section 315(a) is applied to all broadcasters. There is, however, a critical difference between the access obligations of these two sections. Section 315(a) creates a *contingent* access obligation, so that no broadcaster becomes obligated to offer paid or free air time unless he allows a legally qualified candidate to use his facilities. By contrast, section 312(a)(7) is a *mandatory* access obligation for any candidate seeking Federal elective office who wishes to buy or obtain free air time. It is here that a meaningful distinction should come into play.

Unlike their commercial counterparts, public broadcasters are not allowed to charge for the use of air time. Rather, all required access must be given away in the form of time blocks in the regular program schedule. In heavily populated television markets, such as New York and Los Angeles, this situation can lead to substantial demand for free time on public stations because there may be literally hundreds of candidates seeking congressional seats. Thus, the mandatory access requirement applied to public broadcasters produces at least two negative consequences. First, there are the financial and management costs that must be devoted to handling access requests. The commercial broadcaster can offset costs by charging the Federal candidate for air time;

28. The Supreme Court has traditionally been wary of vague application of administrative rules. *See, e.g.*, FCC v. Cement Institute, 333 U.S. 683, 726 (1948); Keyishian v. Board of Regents, 385 U.S. 589 (1969). Moreover, it has been particularly sensitive in the area of free expression, since vagueness may create uncertainty and "the danger that the legitimate utterance will be penalized." Speiser v. Randall, 357 U.S. 513, 526 (1958). *See generally* Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

29. *See* Public Broadcasting Council of Central New York, 38 RAD. REG. (P&F) 2d 1255 (1976).

30. Labor Party v. WNET, 42 RAD. REG. (P&F) 2d 307, 310 (1978).

the public broadcaster cannot. Additionally, because there is no commercial check on requests for access time for noncommercial stations, the access requests can potentially create a severe disruption in scheduled programming, and interfere with the overall statutory mandate that requires public broadcasters to serve a broad range of social, economic, and educational needs.[31] A change in the language of the section, accompanied by legislative history that articulates why public broadcasting should receive differing treatment for mandatory access, would represent a significant step. Concurrently, however, Congress should make clear in statutory language and legislative history that both the equal opportunities provision of section 315 and its more generalized fairness doctrine (which requires that broadcasters provide contrasting viewpoints on controversial issues of public importance, including those raised by candidates during the campaign) remain in force for all broadcast stations. This is called for because the rationale for differing treatment does not apply in these areas.[32]

CONCLUSION

The issues discussed in this article suggest, both individually and collectively, that the interdependence of politics and the electronic media does not by itself create consensus regarding how regulation of the two is conceived or implemented, nor does it produce easy answers. Regulation of political broadcasting must not only be in harmony with legal precedents; it must also be attuned and willing to develop along with our constantly evolving electoral process. Appropriate policymakers, and the courts if necessary, should now reevaluate the efficiency and clarity of the existing framework governing political campaign coverage by the electronic media. Further, revisions should be made that better balance the equities between candidates and broadcasters, with the goal of producing a more informed electorate always in focus as a guiding principle.

31. *See* 47 U.S.C. § 396 (1976).

32. A bill that would have accomplished this, S. 3079, was introduced by Senator Talmadge in September, 1980. It failed, however, to be voted out by the Senate Committee on Commerce, Science, and Transportation in the 96th Congress, 2d. session.