

1-1-1980

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Recommended Citation

Frank J. Kahn and Erwin G. Krasnow, *The Public Interest in Political Broadcasting: Evaded, Eroded, and Eviscerated*, 2 HASTINGS COMM. & ENT.L.J. 635 (1980).

Available at: https://repository.uchastings.edu/hastings_comm_ent_law_journal/vol2/iss4/2

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The Public Interest in Political Broadcasting: Evaded, Eroded, and Eviscerated

By FRANK J. KAHN*
ERWIN G. KRASNOW**

Title III of the original Communications Act of 1934¹ was a virtual reenactment of the Radio Act of 1927,² which endowed the radio licensing authority with a discretionary "public interest" standard to guide its activities.³ Section 18 of the 1927 Act read as follows:

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station, and the licensing authority shall make rules and regulations to carry this provision into effect: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this paragraph. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate.⁴

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1. Communications Act of 1934, Pub. L. No. 416, 48 Stat. 1064 (current version at 47 U.S.C. §§ 151-609 (1976)).

2. Radio Act of 1927, Pub. L. No. 632, 44 Stat. 1162 (current version at 2 U.S.C. §§ 361, 362 (1976)).

3. The Radio Communications Act of 1912, Pub. L. No. 264, 37 Stat. 302 (current version at 47 U.S.C. §§ 351-63 (1976)), proved ineffective as a means of preventing signal interference when court decisions held that it conferred no discretionary power to refuse a radio license to anyone who met the Act's requirements (*Hoover v. Intercity Radio Co.*, 286 F. 1003 (D.C. Cir. 1923)) and no authority to issue regulations (*United States v. Zenith Radio Corp.*, 12 F.2d 614 (N.D. Ill. 1926)). Thus in 35 Op. Att'y Gen. 126, 132 (1926), Acting Attorney General William Donovan stated his view "that the present legislation is inadequate to cover the art of broadcasting, which has been almost entirely developed since the passage of the 1912 Act." The 1927 Act was speedily enacted.

4. Radio Act of 1927, Pub. L. No. 632, § 18, 44 Stat. 1170 (current version at 47 U.S.C. § 315(a) (1976)). For a timely evaluation of the original provision, see D. Ostroff, *Equal Time: Origins of Section 18 of the Radio Act*, 24 JOURNAL OF BROADCASTING 367 (1980).

With minor editorial changes,⁵ section 18 reappeared as section 315 of the Communications Act.

This article will demonstrate that section 315 and its recent companion, section 312(a)(7), (1) have failed to achieve their supposed purposes, (2) conflict with other provisions of the Act, and (3) represent a clear example of legislation favoring the private interests of the legislators. Therefore, these sections should be revised or repealed.

Purpose Evaded

According to the Supreme Court, "the basic purpose for which § 315 was passed" was to achieve "full and unrestricted discussion of political issues by legally qualified candidates."⁶ A former CBS president put it this way: "The original intent of the law was simply to prevent broadcasters from giving unfair advantage to one candidate over another."⁷ Neither purpose has been achieved. For one thing, a broadcaster could completely cut off a candidate's access to his station's audience by declining to permit any uses of the station for such purposes.⁸ Additionally, since it is not incumbent on the licensee to provide free time to any candidate, numerous aspirants to public office are precluded from taking advantage of the "equal opportunities" provision because they cannot afford the time charges that their rivals can pay. All men may be created equal, but wealth is not among the attributes with which they are inalienably (or even temporarily) endowed.

Section 315 has been a substantial barrier to "full and unrestricted discussion of political issues" in several respects. For most of its history it has served as a bar to the broadcasting of joint appearances by major party candidates without fee because broadcasters would thereby become liable to honor

5. The word "Commission" replaced "licensing authority" and "section" replaced "paragraph."

6. *Farmers Educ. and Coop. Union of America v. WDAY, Inc.*, 360 U.S. 525, 529 (1959).

7. F. Stanton, *The Case for Political Debates on TV*, *NEW YORK TIMES MAGAZINE*, Jan. 19, 1964, at 68.

8. Admittedly, the licensee's discretion not "to allow the use of its station by any such candidate" is seriously undercut by an FCC policy statement that includes "political broadcasts" among the 14 "major elements usually necessary to meet the public interest, needs and desires of the community. . . ." Report and Statement of Policy Res Commission *en banc* Programming Inquiry, 44 F.C.C. 2303, 2314 (1960). Licensee discretion to deny access to candidates for federal office was largely preempted by enactment of section 312(a)(7) in 1972.

requests for free time from minor party candidates whose numbers, especially in presidential contests, could be prodigious. A one-time congressional suspension of the "equal opportunities" provision, as it applied to presidential and vice presidential nominees, permitted the famous "Great Debates" between candidates Kennedy and Nixon in 1960.⁹ No subsequent suspension was enacted and no broadcast debates were held during the three succeeding presidential campaigns. However, in 1975, the Federal Communications Commission (FCC) altered its interpretation of a 1959 amendment exempting "on-the-spot coverage of bona fide news events"¹⁰ to permit licensees to carry candidates' debates without incurring "equal opportunities" obligations so long as such debates were arranged by someone other than the broadcasters.¹¹

Since television's arrival as the dominant mass medium, another problem has arisen which prevents broadcasters from presenting anything resembling "full and unrestricted discussion of political issues" in time controlled by candidates themselves. It is well known that the typical political candidate does not spend his campaign funds to finance debates or lengthy broadcast speeches in the course of which he or she can focus on "political issues."¹² Instead, candidates opt for the purchase of spot announcement time in which they can retain the audience and get at least a snippet of a message across. Thus are political candidates merchandised in much the same manner as many commercial products with messages like those that herald how this soap floats or has a pleasing scent, how that beer is low in calories or has a fuller head, and how this car rather than that one is economical or roomy. "Political issues" may be alluded to in these fleeting messages, but their primary purpose is to create a favorable image of the

9. Pub. L. No. 677, 74 Stat. 554 (1960).

10. 47 U.S.C. § 315(a)(4).

11. Petitions of the Aspen Institute Program on Communications and Society and CBS, Inc., for Revision or Clarification of Comm. Rulings under Section 315(a)(2) and 315(a)(4), 55 F.C.C.2d 697 (1975). This ruling was upheld in *Chisholm v. FCC*, 538 F.2d 349 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976).

12. There are a host of reasons explaining candidates' disinclination to purchase time in which to deliver speeches. Prime among these is the tendency of the available audience to avoid such speeches, who prefer instead to listen to other offerings during full-length political telecasts. When Democratic Party presidential candidate Adlai Stevenson preempted the "I Love Lucy" program for a political address in 1952, this message was received from a disgruntled viewer-voter: "I Love Lucy, I Like Ike, drop dead." ERIK BARNOUW, *THE IMAGE EMPIRE* 77 (Oxford Univ. Press, 1970).

candidate in the minds of the electorate.¹³ Thus, the amount of serious political dialogue conveyed in the war of spot announcement trivia is abysmally low, and while it cannot be said that section 315 caused this state of affairs, it has not been a deterrent to it. The candidates with the most money to spend on spot advertising have an "unfair advantage" over their opponents insofar as they are able to achieve at least a greater degree of "brand awareness." Clearly, section 315 has failed to achieve any of the above purposes ascribed to it.

The other provision of the Communications Act that relates to political broadcasting is section 312(a)(7), which provides:

- (a) the Commission may revoke any station license or construction permit . . .
- (7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.¹⁴

This provision was added by the Campaign Communications Reform Act, also known as Title I of the Federal Election Campaign Act (FECA) of 1971.¹⁵ While the legislative history of the section is incomplete,¹⁶ it was the intent of its predecessor provision,¹⁷ "to assure that those few broadcasters who happen to favor incumbent candidates cannot continue to do so by forbidding the sale of time to the opposition as well."¹⁸ Other parts of the FECA were supposed to be "an incentive to candidates to shorten the duration of their campaigns, thereby helping to reduce campaign costs."¹⁹ Nevertheless, when the Carter-Mondale Presidential Committee filed a complaint with the FCC after its October, 1979, request to purchase 30 minutes of prime time early in December was rejected by the three major commercial television networks, the FCC ruled in a 4-3 decision which "split along strict party lines"²⁰ that the networks

13. See generally GENE WYCKOFF, *THE IMAGE CANDIDATES* (Macmillan, 1968).

14. 47 U.S.C. § 312(a)(7).

15. Federal Election Campaign Act of 1971, Pub. L. No. 225, 86 Stat. 3 (1972).

16. *CBS, Inc. v. FCC*, 46 Rad. Reg. 2d (P&F) 1711, 1719 n. 32 (1980), 5 MED. L. REP. 2649, 2654 n. 32 (1980).

17. S. 956, 92d Cong., 1st Sess. § 302(c) (1971).

18. *Federal Election Campaign Act of 1971: Hearings Before the Senate Subcomm. on Communications of the Comm. on Commerce*, 92d Cong., 1st Sess., 348 (1971) (statement of Senators Scott and Mathias).

19. [1972] U.S. CODE CONG. & AD. NEWS at 1781.

20. T. Smith, *F.C.C., 4-3, Upholds the President in Bid for Prime Time on Television*,

had acted “unreasonably” in their rejection of the Committee’s request and therefore had violated section 312(a)(7).²¹ That ruling was subsequently upheld by the District of Columbia Circuit Court of Appeals.²²

Thus section 312(a)(7) has been interpreted in such a way as to favor incumbent candidates and prolong the duration of the presidential campaign to almost a full year, contrary to the intent of the section and the statute of which it is part. It is certainly debatable whether the seven political appointees who compose the FCC are capable of stating or applying “a variety of ‘objective indicia’ ”²³ reasonably or objectively when the question before them concerns the broadcast access rights of the very person in whose hands their reappointment prospects reside.²⁴

Conflict with Other Act Provisions

The provisions of sections 312(a)(7) and 315 fly in the face of sections 153(h) and 326 of the Act. Section 153(h) provides, in pertinent part, that “a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.”²⁵ Section 326 states:

Nothing in this Chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.²⁶

Authoritative definitions of “common carrier” are difficult to discover. However, the Supreme Court has said: “common carriers are required to furnish communications service on reasonable request and may charge only just and reasonable

N.Y. Times, Nov. 21, 1979, at A17. Four Democrats voted to honor the complaint and three Republicans voted against.

21. Carter-Mondale Presidential Comm., Inc., against the ABC, CBS, and NBC Television Networks, 46 Rad. Reg. 2d (P&F) 829, *recon. denied*, 46 Rad. Reg. 2d (P&F) 899 (1979).

22. CBS, Inc. v. FCC, 46 Rad. Reg. 2d (P&F) 1711 (1980), 5 MED. L. REP. 2649 (1980), *cert. granted*, 49 U.S.L.W. 3321 (U.S. Nov. 4, 1980) (No. 80-207).

23. *Id.* at 1723, 5 MED. L. REP. at 2657.

24. “The irony is that Commissioner Quello, who cast the decisive vote, is lobbying the President for reappointment,’ [Andrew] Schwartzman [executive director of the Media Access Project] said.” T. Smith, *supra* note 20, at A17.

25. 47 U.S.C. § 153(h).

26. 47 U.S.C. § 326.

rates. . . .”²⁷ Among the amendments to section 315 enacted in 1972 was the insertion of “under this subsection” between the words “imposed” and “upon” in the last sentence of former section 18 of the Radio Act of 1927, in order to permit the addition of section 312(a)(7), which imposes an obligation upon licensees to permit the use of stations by federal candidates. Another 1972 amendment to section 315 requires stations to offer all candidates the “lowest unit charge . . . for the same class and amount of time for the same period” during the 45 days before a primary or primary runoff election and the 60 days before a general or special election.²⁸ The pre-existing provisions of section 315 requiring broadcasters to provide equal opportunities to political candidates and prohibiting licensee discretion concerning the material broadcast under section 315 lent a common carrier cast to political uses of the electronic media; the 1972 amendments confirmed this concept by mandating “reasonable access to or . . . purchase of reasonable amounts of time for the use of a broadcasting station” by federal candidates and by stipulating the maximum fees that licensees may charge for such uses at certain times prior to elections.

In the *Carter-Mondale* case, the FCC required the networks, and hence their affiliated stations, “to furnish communications service on reasonable request,” an element which the Supreme Court said was a characteristic of a common carrier. Furthermore, the Act grants all candidates preferential rates on an equal opportunities basis in their uses of stations two months prior to general elections and 1½ months before primaries.²⁹ This condition provides the congressional equivalent of setting “just and reasonable rates,” which is another characteristic of common carriers, according to the Court. This constellation of written law and interpretation illegally converts broadcasters into common carriers, even if the statute standing alone did not. A more obvious violation of section 153(h) cannot be envisioned.³⁰

27. *United States v. Radio Corp. of America*, 358 U.S. 334, 349 n.17 (1959).

28. 47 U.S.C. § 315(b)(1).

29. An earlier effort to set political broadcasting rates was enacted in 1952 when subsection (b) was added to section 315. Subsection (b) read: “The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.” This provision remains substantially the same. 47 U.S.C. § 315(b)(2).

30. An equivalent violation of section 153(h), namely imposition by the FCC of

Section 326 is among the least sturdy of the Act's provisions. It has been eroded by Supreme Court decisions upholding FCC interference with broadcasters' discretion on grounds of "scarcity"³¹ and "intrusiveness"³² alike. "[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection."³³ Still, section 326 of the Act and the constitutional amendment from which it derives must stand for something. The argument can be made that no broadcaster was compelled by the Act to permit any political candidate to use his station prior to 1972. Section 312(a)(7) changed that situation. As recently interpreted by the FCC in *Carter-Mondale*, it permits the Commission to override broadcasters' discretion as to when to permit federal candidates to exercise their statutorily granted access rights and to elevate candidates' professed needs above licensees' requirements. Once a broadcaster permits any federal candidate to use his station under section 312(a)(7), then the licensee must meet his section 315 obligation to grant equal opportunities to all other candidates for that office. By substituting its discretion for that of the licensee, the FCC "interfere[s] with the right of free speech by means of radio communication" in violation of section 326. This is a matter that must be finally adjudicated by the Supreme Court.³⁴

Legislation Favoring Legislators

The legislative history of section 315 and its predecessor, section 18 of the 1927 Radio Act, shows that Congress considered but rejected the notion that non-discriminatory access be af-

access channel requirements on cable systems, was struck down in *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979). There the Court reaffirmed the construction of section 153(h) with these words: "[T]he purpose of the provision [embodied in section 153(h)] and its mandatory wording preclude Commission discretion to compel broadcasters to act as common carriers, even with respect to a portion of their total services." 440 U.S. at 705 n.15.

31. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), upheld the FCC's application of the "fairness doctrine" and rules premised thereon based on a scarcity of spectrum space rationale.

32. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), upheld the FCC's determination that a daytime broadcast of a humorist's monologue was "indecent" within the meaning of 18 U.S.C. § 1464 following a nuisance channeling rationale resting on broadcasting's "pervasive presence" (*id.* at 748-49) and its accessibility to children (*id.* at 749-50).

33. *Id.* at 748.

34. See note 22, *supra*.

forded by licensees for the "discussion of any question affecting the public. . . ."³⁵ Instead, it limited the scope of the sections to "legally qualified candidate[s] for public office," a class that includes members of Congress seeking another term in office.

Prior to 1952 it was common broadcast industry practice to have three classes of rates: the lowest for local advertisers; a higher one for national advertisers because (a) it was likely that messages on their behalf would reach a larger audience of potential customers for the product, and (b) the sales commission system typically returned a lower percentage of the rate to the broadcaster than would a local time sale; finally, a third and highest rate was established for political advertising, probably motivated in part by the realization that politicians' debts frequently went unpaid or had to be settled for less than their face value. When section 315(b) was enacted,³⁶ broadcasters were prohibited from maintaining this tripartite fee structure. Thereafter, local candidates were charged the local rate and national candidates generally paid the national rate. To some extent broadcasters could avoid politicians' bad debts by requiring payment in advance of broadcast to a greater degree than formerly.

Then, in 1972, the FECA was enacted with a fee structure that entitled candidates to the "lowest unit charge" made by stations.³⁷ This meant that a station had to give the benefit of its most preferential frequency discount to politicians. While the provisions of section 315(b)(1) pertain to all legally qualified candidates for public office, the grant of "reasonable access" in section 312(a)(7)³⁸ was made applicable only to candidates for federal elective office, the dominant class of which is the Congress. Chairman Charles Ferris and Commissioner Joseph Fogarty of the FCC, both of whom were Senate aides at the time of the FECA's passage, have termed the law "a selfish piece of legislation."³⁹

The history of sections 312(a)(7) and 315 suggests that Congress has acted more in its own interest than in the public's.

35. See generally *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 105-110 (1973) (emphasis omitted).

36. See note 29, *supra*.

37. See text accompanying note 28, *supra*.

38. See text accompanying note 14, *supra*.

39. *BROADCASTING*, July 17, 1978, at 28.

These sections have in effect created government of, by, and for the government, rather than of, by, and for the people. Some broadcasters feel that this legislation cannot effectively be opposed by the broadcasting community; they fear that Congress' perception of industry antagonism to sections 312(a)(7) and 315 would motivate enactment of laws that licensees would find onerous. The quest for change must more effectively be initiated by nonbroadcasters who, convinced of the legitimacy of the views expressed here, feel compelled to wage the battle.

Conclusion

Broadcasters have amply demonstrated their ability to fulfill their responsibility to give full and fair treatment to political campaigns in their news coverage, discussion programs, interview shows, and the like. Doubtless there are many other areas and ways in which the quality of the broadcast political dialogue could be enhanced. But sections 312(a)(7) and 315 have outlived their usefulness, have become albatrosses around the necks of broadcasters, and have disserved the general public.

Urging repeal of section 315 a decade and a half ago, former FCC Chairman Newton Minow said, "[G]ive the broadcaster the same kind of political freedom the press enjoys."⁴⁰ The addition of section 312(a)(7) and the changes wrought in section 315 in 1972 have exacerbated the problem. Repeal or substantial modification of these counterproductive provisions is a pressing social need in our democracy.

40. Newton N. Minow with Lawrence Laurent, "*Is There No Way Out of This Madness?*," TV GUIDE, January 30, 1965, at 9. The plea for repeal was paired with a proposal that broadcasters make available four hours of free time in the month preceding election day to the two major political parties every presidential election year.

