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EQUAL TIME & THE NIXON STYLE

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Two legal doctrines govern the use of television by the President and his opponents. One is the “equal opportunities” law, popularly known as “equal time,” which will be discussed here; the other is the FCC’s “fairness doctrine,” to which a second article will be devoted. The equal-time law applies only to candidates for office; when a station or network permits one candidate to use its facilities, it is required to afford “equal opportunities to all other candidates for that office.” The requirement is subject to four important exceptions added by Congressional amendment in 1959. These exempt the appearance of a candidate on a “bona fide newscast,” a “bona fide news interview,” a “bona fide news documentary,” and as a participant in “on-the-spot coverage of bona fide news events.”

The FCC has ruled that a person is not a candidate under the equal-time law until he has announced his candidacy. Thus the law had no application to President Nixon until January 7 of this year, when he released his letter to the Secretary of State of New Hampshire. That explains the flurry of Nixon television appearances in the two preceding weeks, recalling the frenzy of cigarette commercials on the last day they were allowed on the air. It also explains why, during the Dan Rather interview of January 2, Mr. Nixon stopped just short of announcing his candidacy for re-election. The FCC has also ruled that in determining the office for which a candidate is running at a particular time, the nominating process in each party must be considered separately. Thus Mr. Nixon at present is a candidate only for the Republican nomination for President. If a broadcast appearance by him prior to the Republican convention invokes the equal-time law, the only opponents who
can take advantage of it are other candidates for the Republican nomination, a field limited until recently to Congressman Ashbrook and now apparently empty. After the Republican convention it will be Mr. Nixon versus the Democratic nominee, and the various minor-party candidates for President, as far as the equal-time law is concerned.

Examining the equal-time law as it applies to the television appearances of Mr. Nixon this year, one finds a matched pair of FCC decisions perfectly designed to buttress the President's strategy, which combines a distaste for news conferences with a predilection for other kinds of appearance. On the one hand is the 1964 news conference ruling. In September 1964 the FCC ruled (by a vote of 4 to 3), and has since reaffirmed, that the broadcast of a news conference held by a President while a candidate for re-election is not exempt from the equal-time requirement. (At issue is only the complete broadcast of the conference; excerpts could still be presented on regular newscasts under the "bona fide newscast" exemption.) The President's news conference is not exempt, the FCC said, because it meets neither of the two prerequisites which appear in the legislative history of the 1959 amendment. Unlike programs such as Meet the Press, the news conference is not "regularly scheduled," and its format and content are not subject to the exclusive control of the network. "Thus, the candidate determines what portion of the conference is to be devoted to announcements and when the conference is to be thrown open to questions." (The candidate also determines, the FCC might have added, which questioners to recognize and whether or not to allow follow-up questions.) The FCC's decision on this point was plausible but not necessarily correct. The two prerequisites were indeed stated by the Congressional sponsors of the 1959 amendment, but in contexts far removed from the Presidential news conference (the concern was to prevent a local broadcaster from contriving a "news interview" with a favored candidate while denying equal time to his opponent). The conclusion that a Presidential news conference is a "bona fide news conference," which seems more in accord with common sense, was not legally precluded.

In any event, the FCC was on weaker ground with its further ruling that neither is the broadcast of a Presidential news conference "on-the-spot coverage of a bona fide news event." The FCC argued, first, that news conferences could not be exempt because debates between Presidential candidates, though equally newsworthy, are not exempt. The conclusion about debates is well accepted, as evidenced by the recent Court of Appeals ruling that the networks could not stage a debate between Senators McGovern and Humphrey, even on a "news interview" program, without giving equal time to Congresswoman Chisholm and the other candidates. It does not follow, however, that the exemption must be denied to the Presidential news conference, an institution rooted in the President's office rather than his candidacy. The FCC further argued that to recognize Presidential news conferences as "bona fide news events" would mean that a broadcaster, "in the exercise of his good faith news judgment, could cover the speeches, press conferences, indeed any and all appearances of a candidate without bringing into play the equal opportunities requirement," and would thereby in effect repeal the equal-time law for all candidates for all offices. It would not be impossible or unreasonable, however, to distinguish between Presidential news conferences and those held by lesser officials throughout the land, not to mention "any and all appearances" of any candidate.

While thus interpreting the equal-time law with respect to the Presidential news conference, a television format Nixon does not favor, the FCC has provided a counterpoint ruling on the format he likes best. That is the prepared speech—a block of fifteen or thirty minutes, in prime time, which Nixon requests and routinely receives from all three networks and uses to deliver his considered views on a subject of his choice. The scheduling, format, content and every other aspect of the presentation are entirely prescribed by the President; in particular, as the FCC observed in characterizing a series of such appearances by Mr. Nixon, "the President entertained no questions before, during, or after the speeches." We have had from Mr. Nixon, during the present year alone, the March 16th speech on busing, the speeches of January 25, April 26 and May 8 on the war in Southeast Asia, and the June 1st speech to Congress. We can expect more.

With Nixon an announced candidate for re-election, the question arises whether his speeches are subject to the equal-time requirement, as his press conferences would be. The striking answer, under existing FCC precedents, is No.

The FCC has two precedents on this issue, one each from the last two years in which a President stood for re-election. During the 1956 campaign, as late as October 31, President Eisenhower went on radio and television to make a speech on the Suez situation. The FCC ruled that the networks were not required to afford equal time to Adlai Stevenson and the minor-party candidates. The equal-time requirement does not apply, the commission said, "when the President uses the air lanes in reporting to the nation on an international crisis."

In the 1964 campaign, President Johnson took to the networks on October 18 to deliver a speech on two international events of the previous week—the deposition of Khrushchev in the Soviet Union and the first nuclear test by "Communist China"; a few Presidential remarks on the recent British election were included for good measure. A complaint requesting equal time for Senator Goldwater was duly filed with the FCC (the person filing it was Dean Burch, then chairman of the Republican National Committee, now chairman of the FCC). Acting less than a month after its press conference ruling, the FCC rejected the complaint, holding that the broadest constituted "on-the-spot coverage of a bona fide news event." The commission made much of the fact that Johnson's delivery of the address "had been recommended by the National Security Council" (brushing aside evidence that the Johnson for President Committee had first sought to purchase network time for the address). It emphasized that this speech, like the one by Eisenhower in 1956, concerned "specific, current international events affecting the country's security . . . news events of an extraordinary nature." The FCC also relied on a statement made by Senator Pastore as floor manager of the
1959 amendment. Unless bona fide news events were made exempt, Pastore had argued, "If the President of the United States were a candidate for re-election he could not stand up in front of the American flag and report to the American people on an important subject without every other conceivable candidate standing up and saying, I am entitled to equal time." The FCC's decision was affirmed, on October 27, by an equally divided Court of Appeals. The Supreme Court, acting on October 28, declined to review the decision, over the dissents of Justices Goldberg and Black.

Given Nixon's unprecedented reliance on the speech format, the issue can be expected to arise this year whether such television appearances by candidate Nixon are to be held exempt from the equal-time law, as were those by Eisenhower and Johnson. Indeed, it has already arisen. Congressman Ashbrook asked the networks for equal time to reply to Nixon's March 16th speech on bussing (Ashbrook wanted to argue "in favor of the alternative Mr. Nixon so lightly dismissed, a constitutional amendment"). Sure enough, the networks refused the request on the ground that the broadcast "was on-the-spot coverage of a bona fide news event." Ashbrook in early April was demanding prompt replies from CBS and ABC and promising to take the case to the FCC. On June 1, he took the case to the FCC. The resulting decision—assuming Ashbrook follows through now that he has withdrawn from the race—could be an important test of the two precedents, and deny Nixon, at the height of the fall campaign, the advantage enjoyed by Eisenhower and Johnson.

Whether a Nixon speech qualifies as a "bona fide news event" could depend, of course, on the circumstances. Given the two precedents, lawyers and judges and FCC commissioners can have a field day with the issue. It might be argued, for example, that the speech must be a "news event" in the sense that the President is announcing governmental action rather than merely discussing issues or events. On this theory, Nixon might have qualified for the exemption with his mine-dropping speech of May 8, but not with a routine defense of his Vietnamese policy, such as that of April 26. The theory may seem fearsomely provocative—the more momentous the action, the more certain the exemption—but in any event the distinction appears to have been rejected by the FCC in 1964. When Senator Goldwater argued that the events discussed in the Johnson speech "were well known to everyone two days before the broadcast," the FCC replied that the broadcast was still a "spot news event" because it "express[ed] the United States Government's policy in relation to those events" and "advised other nations as to that position."

The test may be, then, whether the events discussed or announced in the speech are "specific, current international events affecting the country's security," or "news events of an extraordinary nature," as the FCC said was true in 1964. But if that is not to be a carte blanche—what international event does not "affect the country's security," especially if the President says it does?—it presents the FCC and the courts with a difficult and uncomfortable task of line drawing. Presumably domestic news events could qualify, and perhaps last summer's speech announcing the wage-price freeze would have met the "extraordinary" test; but what about the second or third Nixon speech on the economic program, or the speech announcing the Supreme Court nominees, or the March 16th speech on bussing, or the June 1st speech to Congress (an occasion that was given, perhaps not inadvertently, the special patina of a "news event" by convening a joint session)?

Another possibility is Senator Pastore's view that the President should get the exemption any time he "stand[s] up in front of the American flag and report[s] to the American people on an important subject." Since that is a fair description of almost every TV speech by Mr. Nixon, it would apparently authorize the President to continue through the fall campaign his familiar pattern of preempting prime time for such an address on the average of once a month, without the networks incurring any obligation to give equal time to his opponents. True, even the Pastore test would presumably deny the exemption to a Presidential speech on the campaign stump, but if both Eisenhower and Johnson were able to find pretexts for nonpartisan "reports to the nation" at the height of the fall campaign, one would expect Nixon and his managers to be no less resourceful.

While various reasons may thus be adduced for concluding that a particular television speech by a President-candidate is or is not a "bona fide news event," the whole exercise is open to question. First it must be said that, as far as the FCC is concerned, decisions in this area may turn not on reasoned distinctions at all but on the political loyalties and dependencies of the commissioners. The danger is inevitable when a commission like the FCC, whose members are appointed by the President for terms of seven years or less, is called on to make decisions that affect the political fortunes of the President and his party far more immediately than do those of any other administrative agency. But the danger seems especially acute at the present FCC. Of the four Republicans
on the seven-member commission, three are Nixon appointees with highly political backgrounds. Chairman Dean Burch not only managed the Republican Presidential campaign of 1964, but has agreed to stay on at the FCC through the November election—according to Broadcasting magazine—"at specific behest of Administration to keep lid on political-broadcasting conflicts." Richard Wiley came to the attention of the White House when he worked in the Nixon campaign of 1968, and Charlotte Reid was a member of Congress until her recent appointment to the commission. The fourth Republican, Robert E. Lee, originally appointed by Eisenhower, is a longtime Nixon associate who, as reported in Broadcasting, desires reappointment when his present term expires in 1974, something he is unlikely to get unless Nixon is re-elected.

Indications of partisanship aside, the FCC is institutionally unsuited to sit in case-by-case judgment on Presidential speeches. It is not only unrealistic, but unseemly, to expect such a commission in effect to overrule the President, and publicly embarrass him, by deciding that a particular Presidential address was insufficiently important, unduly political, or otherwise lacking in whatever attributes may be required of a "bona fide news event." The FCC's willingness to make such a decision is further reduced by the financial burden of providing equal time it would place on the networks, whose interests customarily command the commission's deference. Even the federal courts may hesitate to rule against the President in such cases; that is suggested, for example, by the Supreme Court's refusal to take the Johnson-Goldwater case in 1964, despite the tie vote in the Court of Appeals.

A clear and uniform rule therefore seems desirable. One such rule would defer to the President's judgment, according exempt status to any speech which he says is important to the nation's security or to some other national interest. This, in fact, is essentially the approach the FCC has taken in its two decisions. But it will not do. The equal-time law provides no exception for a candidate who is the incumbent President. If the President's use of broadcast facilities to address the public is itself a "bona fide news event," simply because he claims to speak as officeholder rather than candidate, the exemption swallows the rule. Such a result would be inconsistent, by the way, with an FCC ruling in 1956 that a spotannouncement by President Eisenhower kicking off a Community Fund drive required equal time for the opposing candidates. The incumbent President's conduct of office cannot be separated from his candidacy for re-election. It is inevitably a central issue in the campaign, and no small part of that issue involves his handling of "international crises" and other urgent matters that might readily be said to justify television addresses to the nation.

Exemption for Presidential speeches seems especially questionable when placed alongside the FCC's ruling that news conferences are not exempt. The rulings dovetail to enhance the re-election prospects of Mr. Nixon, who leans heavily on the one and apparently abhors the other. Other Presidents—as, for example, Eisenhower and Johnson in the past—while likely to seek an advantage in the last-minute exempt speech, may also enjoy news conferences and find them politically beneficial in an election year. Nonetheless, the FCC seems wrong in both its positions. While speeches by a President-candidate should not be exempt from the equal-time law, news conferences should be.

Admittedly, there are arguments of fairness and practicality to support the refusal to exempt the news conference. Most Presidents would derive a competitive advantage from such an exemption, and the networks would be unable to redress the balance by offering an "equal opportunity" to the President's major opponent, even if they were willing to do so. For the opponent's press conference presumably would not be exempt—as the debates between Senators McGovern and Humphrey were recently held not to be—and would provoke equal-time demands from all the minor candidates, which the networks surely would not be listening to satisfy. This problem would be removed by enactment of the bill, now before the House after passing the Senate, that would repeal the equal-time law for the Presidential campaign, as was done in 1960, and thus clear the way for TV debates between the major nominees. But the White House is organizing Republicans in the House to oppose the measure, and Nixon— who likes debates even less than news conferences—is expected to veto it if it does pass.

With the equal-time law likely to remain in effect, the argument for exempting the Presidential news conference starts from the fact that it is plainly a "news event" as demonstrated, for one thing, by the attendance of a great many newsmen from all over the world. But it is something more. It is—or was, before Nixon killed it—a vital part of American democracy. Its essential purpose is not, as Herbert Klein claims, "to transmit information from the President to the people." The President can accomplish that purpose equally well through other channels of communication. (Of late, those other channels have also been dying up. The Wall Street Journal reported on April 28: "Nixon retreats increasingly into seclusion, consulting only a few trusted aides. ... Less and less information emerges from the White House. ...") The essential purposes of the news conference are to transmit the questions and concerns of the people to the President, to prevent the President from secluding himself from those questions and concerns, and to compel him to respond to them publicly and directly, without the massive filter of the White House public relations apparatus. The purpose is also to have the President communicate to the people, not only the information he selects on the subject he selects but the additional information, the explanations and clarifications, that questioning may elicit. The Presidential news conference is the only institution we have to serve these functions. While the British and Canadian Governments have their question periods for the Prime Minister in Parliament, we block that course with our doctrine of "executive privilege," whereby even the President's assistants refuse to testify before the Congress. The Presidential news conference is also our only mechanism, between quadrennial elections, for rendering the President directly accountable to the people.

In all these respects the news conference stands in contrast to the speech, where the President does all the talking, has complete control over content and format,
and hears and responds to questions from no one. Whatever may be said about the President’s control of his news conference—the point made by the FCC, rather ironically, in denying exemption—it is far from the total control that exists for a speech. The President must, after all, listen and respond to questions from the press. This function makes the Presidential news conference not only a unique and vital institution in our government but also a “bona fide news event.”

The period affected by the FCC’s press conference ruling is being revealed for the first time this year. (In 1964 the ruling was not issued until September 30. Between that date and the election Johnson held one press conference, which was not broadcast. What he did broadcast, on October 18, was the speech the FCC declared exempt.) Almost the entire election year is involved. This will be true if the incumbent President wants his name on the primary ballots and thus announces his candidacy early in January, as Nixon did, and if he has opposition in the primaries, as has been the case in 1972 and 1968. Of course, this year proves to be not much of a test; since Nixon has not held a televised press conference since June 1, 1971. But the ruling replenishes his battery of explanations. It will enable him to continue through the November election his refusal to face the press and the public. And in the future, the ruling will deprive the public of news conferences even by a President-candidate who, unlike Nixon, does not desire to scuttle the institution.

It is true that Presidential speeches on television also serve a public interest, and that application of the equal-time law would ordinarily preclude such appearances by a President-candidate. But in a real national crisis—a Cuban missile crisis—the networks ought to give free time to the President whether or not they would have to give it to his opponents as well. Short of such unusual cases, the public needs press conferences from the President more than it needs speeches. Not only does the press conference serve a vital purpose not provided by a speech but it can also serve the same purpose as the speech. If the President has what he considers an important message to convey to the public over television, it is not unreasonable that he be limited, during his announced candidacy for re-election, to delivering it as the opening statement at a press conference. This could readily have been done—and arguably with a considerable gain in public enlightenment—in the case of Nixon’s bussing speech, or his speeches on Vietnam, or even his mine-dropping speech. Except in a rare crisis, a President’s refusal to entertain questions about his actions or policies—the position Nixon has now resolutely assumed—seems even less warranted than the overclassification of documents, the assertions of “executive privilege” by officials as important as Henry Kissinger, and the other symptoms of a tightening, imperial secrecy in the executive branch.

There is a need for decisions this year, either by the FCC or the courts, reversing the FCC’s positions on the status of Presidential speeches and news conferences under the equal-time law. The decisions are needed before the campaign reaches September or October, the period when such cases have arisen in the past. The FCC is now engaged in an overall re-evaluation of its political broadcasting rules, which it has promised the Court of Appeals to complete by “late spring or early summer.” If the commission does not rectify the present unhappy anomaly in its law, it may be hoped that the court will.