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Richard G. Singer

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THE FCC AND EQUAL TIME: NEVER-NEVERLAND REVISITED

By RICHARD G. SINGER*

We are now fast approaching that cataclysmic event in American politics — a Presidential election. It seems appropriate, before that time rushes upon us unaware, to leap once more into the breach in an attempt to salvage what may yet remain of a noble effort to bring political issues to the attention of the public.[1] It is the purpose of this article to explore the Federal Communications Commission's regulation of political broadcasting[2] as affected by the "equal time" provisions of the Communications Act.[3] This evaluation will occur in the context of the dual purposes of protection of minority parties and their candidates and assurance of a politically astute and informed public, which the author believes justify government concern with political broadcasting.[4] Specific attention will be turned to the recent (1959) amendments to the statutory scheme, after which questions of reform and repeal will be discussed.

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* Assistant Professor, University of Alabama School of Law; A.B., 1963, Amherst College; J.D., 1966, University of Chicago.

1. Recent activities in Congress demonstrates a continued interest in this area. No less than five bills ranging from one calling for complete repeal of the Equal Time Act (Political Broadcasts), 47 U.S.C. § 315 (1964), to one calling for exorbitant extension of the section have been introduced, and at least three days of hearings have been spent on the topic which, over the years, has continued to intrigue and baffle the lawmakers.

2. This article will not deal with the problems raised by political editorializing. In connection with this issue, see Report On Editorializing, 1 P & F RADIO REG. 91:201 (1949). *See also* Obligation of Licensees to Carry Political Broadcasts, 25 P & F RADIO REG. 1731 (1963).

3. Equal Time Act (Political Broadcasts), 48 Stat. 1088 (1934), *as amended*, 66 Stat. 717 (1952), Pub. L. No. 86–274, § 1, 73 Stat. 557 (1959), 47 U.S.C. § 315 (1964).

4. The legislative history of § 315 is virtually barren of any indication of clear intent as to the primary purpose and philosophy underlying the section. While the scant material is somewhat ambiguous, it appears that the section was primarily meant to protect minority candidates. The early bills of the Radio Act of 1927, 44 Stat. 1162 (1927), provided that if political speeches were allowed by a licensee, then, as respects that office, the station would become a common carrier. *See generally* 67 CONG. REC. 12502–12505 (1926). The wording was struck down as too broad and the current statutory language was inserted. *See* 67 CONG. REC. 12502–12504 (1926) (remarks of Senator Howell, floor manager, and Senator Bratton).

I. SECTION 315: PAST AND PRESENT

Since section 315 has been drastically amended within the past few years, it would serve our purposes better to deal first with the section as it stood before those amendments and then to determine the effect of the amendments on the law. Prior to the 1959 amendments, section 315 stated in full:[5]

> (a) 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: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate.

Questions of statutory definition and interpretation are immediately presented: (1) Who is a "legally qualified candidate;" (2) How does a candidate "use" a station; (3) What is meant by "equal opportunities;" (4) What limitations are inherent in the phrase "other such candidates for that office;" (5) Does the proviso really mean there is "no power" of censorship; (6) What does the phrase "no obligation" import?

Of these, the central issue has been the second — defining a "315 use." The 1959 amendments were directed solely to this question and have no effect, except by implication, on the other issues; the ensuing discussion of these questions thus includes, without differentiation, decisions from both periods. It is only in the discussion of "use" that the time of the decision becomes important.

The 1959 amendments also endorsed, as appropriate to political problems, the long-standing fairness doctrine of the Commission.[6] This doctrine requires a broadcaster to afford equal opportunities, similar to those required by section 315, to proponents of both sides of "controversial" issues; it was originally intended to deal with problems not specifically falling within the ambit of section 315. In contrast to the easily applied criteria of equal time, however, the "fairness doctrine" has neither a clearly defined standard for determining violations, nor an easily applied remedy. It is thus a combined "due process" and "equal protection" approach, with all the ambiguities and difficulties inherent therein, and stands in marked contrast to the easily applied remedy of section 315.[7] The Commission has indicated

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5. Act of July 16, 1952, ch. 879, § 315, 66 Stat. 717.

6. The Commission first announced the "fairness doctrine" in Mayflower Broadcasting Corp., 8 F.C.C. 333 (1941).

7. In commenting on a suggestion that § 315 be repealed and that the fairness doctrine alone be used to decide controversies, FCC Chairman Rozel Hyde recently stated: "The fairness doctrine requires the exercise of discretion, and under the time limits and so forth, I have concerns about doing it adequately and satisfactorily." *Hearings on S. 1548, S. 1859, and S. 1926 Before the Subcomm. on Communications of the Senate Commerce Comm.*, 90th Cong., 1st Sess. 38 (1967) (transcript) [hereinafter cited as *1967 Hearings*].

that it might apply the fairness doctrine to remedy some of the loopholes and inequities now present in section 315, discussed below. Little, however, has yet been done to fulfill this promise.

A. THE "LEGALLY QUALIFIED CANDIDATE"

1. Who is a "Legally Qualified Candidate?"

Using its rule-making power granted by subsection (c) of section 315,[8] the Commission has taken as its definition that of the state in which the election is being conducted. Thus, FCC regulation 73.120 reads:[9]

> A "legally qualified candidate" means any person who has publicly announced that he is a candidate for nomination . . . or election in a primary, special, or general election, municipal, county, State or national, and who meets the qualifications prescribed by the applicable laws to hold the office for which he is a candidate, so that he may be voted for [by] the electorate directly or by means of delegates or electors, and who:
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> (1) Has qualified for a place on the ballot or
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> (2) Is eligible under the applicable law to be voted for by sticker, by writing in his name on the ballot, or other method, and
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> (i) has been duly nominated by a political party which is commonly known and regarded as such, or
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> (ii) makes a substantial showing that he is a bona fide candidate for nomination or office. . . .

This willingness of the Commission to adopt state standards has been criticized as an abdication of its own role, the contention being that by so defining this term of art, the Commission encourages minority candidates of small parties to seek equal time, thereby discouraging stations from granting any time at all to any candidate.[10] Such criticism, however, seems to miss the point; the FCC is merely following what is clearly each state's judgment on the desirability of activity by minor parties within its borders. Whatever else may be said about this approach, it must be agreed that the states are in a better position to judge

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8. 66 Stat. 717 (1952), 47 U.S.C. § 315(c) (1964), *amending* 48 Stat. 1088 (1934).

9. 47 C.F.R. § 73.120 (1967). This regulation is for AM radio stations. *See also* 73.290 (FM), 73.590 (Non-commercial FM) and 73.657 (Television). There is, however, at least one statutory exception to this definition. In reaction to the Commission's ruling in Letter to Hon. William Benton, 11 P & F RADIO REG. 233 (1950), that Communists who qualified under state laws were entitled to equal opportunities, Congress enacted § 842 of title 50, prohibiting such a result. Communist Control Act, 50 U.S.C. § 842 (1964). Aside from such a provision, however, it appears that any person who qualifies within a given state for that state's office is protected by § 315.

10. It was precisely this problem, of course, that led to the 1960 suspension of § 315 as to the Presidential race. Act of Aug. 24, 1960, Pub. L. No. 86-677, 74 Stat. 554.

the desirability of such activities in their respective jurisdictions. While it places a burden upon the broadcaster in some cases, this policy reflects as accurately as possible the national feeling on this question.[11] For this reason, it is submitted, the approach is valid and should be retained.

The criticism may be more valid, however, in regard to the Presidential race. Far from being local, the campaign is clearly national, and it might be that the Commission would be well advised to adopt different standards for "section 315 candidacy" with regard to this campaign.[12] Such a position would recognize that some limits should be placed on the economic detriment which a government may impose upon any broadcaster, notwithstanding that the licensee is viewed as a holder of a privilege, and not a right.[13] Nor is this contrary to the above view as to state races; it is completely consistent to advocate application of a federal standard in a peculiarly federal race.[14]

2. *When is a Candidate "Legally Qualified?"*

Still other problems are raised by the "legally qualified" language of section 315. One court of appeals has endorsed the Commission's position that equal time need not be given until the speaker has actually announced an intention to run for office.[15] This rule has led to the anomalous position that licensees become subject to the equal time provisions only after incumbents have officially indicated their candidacy for re-election, although the incumbents might have appeared on broad-

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11. It may be contended that the state statutes allowing fringe parties to receive write-in votes were not intended to cope with the equal time issue and that a different standard should be applied. This argument has merit but may be answered by resorting to legislative action. To the possibility that this may prove difficult or time-consuming, the response clearly must be that if the state legislature is hesitant to enact a different standard for "§ 315 candidacy" (as it could do) or to limit the scope of "candidacy," it has made a decision for this purpose.

12. Of course, the Constitution itself declares minimal standards for the office. U.S. CONST. art. II, § 1, ¶ 5. But surely a different standard for determining access to broadcasts would not be unconstitutional. No one has suggested that limitations such as those discussed in note 8 *supra* are violative of equal protection. The problem of numerous candidates in national elections is a real one. In 1964 there were 12 Presidential candidates. In 1952, the Commission held that CBS must give equal network time to a candidate who compiled only 230 votes in one presidential primary and who was denied admission to the very GOP convention whose nomination for President he was seeking.

13. This paper will not deal with whether a license ought to be treated as a mere privilege. Clearly, however, this is the current law.

14. In 1963 the suggestion was made and a bill drafted to the effect that the equal time requirements should be suspended for all elections for "federal" positions, as well as for gubernatorial chairs, along the lines of the 1960 suspension. S. 252, 88th Cong., 1st Sess. (1963). *See Hearings on S. 251, S. 252, S. 1696, and H.R.J. 247 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 88th Cong., 1st Sess., ser. 29 (1963) [hereinafter cited as *Equal Time Hearings*]. That bill was defeated, but the idea had its regenesis in S. 1926, 90th Cong., 1st. Sess. (1967), which was introduced by Senator Pastore on June 8, 1967. In effect, the proposal aimed at applying the federal definition of "candidate" which had been accepted for the 1960 suspension — the "major" party contenders — to offices not national in scope. In accord with what has already been said, it is to be hoped that Senator Pastore's bill will meet with the same fate as its predecessor and that there will be no such occurrences in the future.

15. Weiss v. Los Angeles Broadcasting Co., 163 F.2d 313 (9th Cir. 1947). *See In re* WDOC, 31 Fed. Reg. 6668 (1966).

casts for weeks after their candidacy was, as a practical matter, quite evident.[16]

It is true that an official announcement draws an objectively ascertainable time. But there are times when a Plimsoll line is not desirable;[17] at the very least, the Commission should undertake to explain, rather than merely state, this rule and to discuss the pros and cons of various proposals. As the law now stands, the Commission's standard can only add significantly to the already innumerable advantages now enjoyed by the incumbent. It is submitted, moreover, that this position of the Commission may thwart the goal of public edification, since a licensee may well believe that, notwithstanding the inapplicability of section 315 to an incumbent whose candidacy is unannounced, it should not, under a viable concept of fairness, carry his broadcasts until such announcement.[18]

Any change in the existing pattern would almost inevitably necessitate reliance on the judgment of the licensee, and ultimately of the Commission, as to when the incumbent becomes a "candidate" in practical terms. Some initial definitive line might be drawn, such as eight weeks before the primary or three months before the general election. While this might not prove satisfactory in every case, the current dilemma would to some extent be alleviated if the time span were properly fixed. Some new guidelines, at any rate, should be adopted.

3. The Applicability to Supporters' Speeches

By far the most important question stated by the "legally qualified candidate" language is whether it extends to other persons, thereby making their speeches subject to equal rebuttal time. To this the Commission, the courts, and Congress have answered resoundingly and unqualifiedly in the negative. The leading case is *Felix v. Westinghouse Radio Stations, Inc.*,[19] wherein a suit was brought against a

16. "Reports from Congress," or similar programs, are not subject to § 315 rights until candidacy is announced. *See* Carbondale Broadcasting Co., 11 P & F RADIO REG. 243 (1953); Radio Station KNGS, 7 P & F RADIO REG. 1130 (1952). The possibilities that a candidate might abuse this doctrine by accumulating the right to a large quantity of equal time and then using it just before the election have been largely eliminated by adoption of Commission rules, 47 C.F.R. §§ 73.120(e), 73.290(e) and 73.657(e) (1965), which require a complainant to file objections within one week after the date of broadcast. *Cf.* Hon. Allen Oakley Hunter, 11 P & F RADIO REG. 234 (1952). *See also* Hon. Peter Frelinghuysen, Jr., 11 P & F RADIO REG. 245 (1954).

17. The latter portion of this paper, arguing that an objective test is needed in general elections is not to the contrary. Primaries and candidacies appear far enough in advance of general elections to eliminate the need for such a test.

18. The broadcaster is caught in a ping-pong game should he decide to be "fair" and offer the announced candidate equal time, because the announced candidate's appearance activates § 315 in that he is a "legally qualified" candidate. An example of this ping-pong effect is the *Suez* case, discussed more fully at notes 65 to 68 *infra* and accompanying text. The Commission first refused to say whether President Eisenhower, in commenting on the Suez crisis, had "used" the stations. The networks, faced with demands for equal time from Eisenhower's opponents, acquiesced. The Commission then decided that the speech on the Suez situation was not a "use." This rendered the speeches given by the opponents "uses" for which the President was entitled to equal time.

19. 186 F.2d 1 (3d Cir. 1950), *cert. denied*, 341 U.S. 909 (1951).

station as publisher of libelous material contained in an address by the party chairman of one of the city's major parties. The defendant contended that the "no censorship" clause of section 315 barred him from censoring the speech, which was given on behalf of a specific candidate, and that no suit for libel could lie against the station. Ignoring the "immunity for libel" issue,[20] the court held that the statute protected only speeches by *candidates,* not their supporters. The section therefore did not forbid censorship of the supporter's speech, and the station, as publisher of libelous material which it should have deleted, was subject to liability.

The *Felix* decision is clearly in accord with the apparent Congressional intent, since Congress has several times defeated attempts to broaden the section to include political supporters.[21] Commission decisions are in accord with the concept that use by a supporter does not constitute a "315 use" entitling the opposing candidate to equal time.[22]

Notwithstanding this awesome body of precedent, however, the distinction, in these cases, between speeches by a candidate and those by a supporter of the candidate is untenable. It can be defended, if at all, only on the ground that it is exposure alone, and not repetition of the candidate's name, ideas, or philosophy, that is important in political races.[23] While it is undeniable that personal exposure is the single most important part of any political campaign, these other factors cannot be dismissed.[24] Furthermore, the possibility of exploitation of this legal loophole must be recognized; the current interpretation allows a broadcaster to lend his facilities to a supporter every night without incurring any 315 obligation, which is patently contrary to the suggested purposes of the section. The Commission's recent willingness to apply the "fairness doctrine"[25] to this problem may alleviate the difficulty to some extent, but it seems much more desirable to

20. *See* notes 79 to 107 *infra* and accompanying text.

21. *See, e.g.,* 76 CONG. REC. 5038 (1932); 78 CONG. REC. 10988 (1934) (report of House Conferences on S. 3285, 73d Cong., 2d Sess.). For a complete citation to all pertinent legislative history, the *Felix* case, *supra* note 19, is incomparable. *See also* Note, *Campaign Speeches On Radio And TV: Impartiality Via The Communications Act,* 61 YALE L.J. 87 (1952).

22. This argument, however, ignores the critical fact that in 1932 Congress did in fact pass such a bill, only to have it pocket-vetoed. The 1934 bill included such a proposal but it was struck in committee. *See* note, *Campaign Speeches On Radio And TV: Impartiality Via The Communications Act,* 61 YALE L.J. 87 (1952). It is possible, however, that supporter's speeches may be covered by the "fairness doctrine." *See* Times-Mirror, 24 P & F RADIO REG. 404 (1962), which applies the "fairness doctrine" to speeches by even unwelcome supporters. The most recent example of this phenomenon of the "supporter doctrine" occurred on November 6, 1966, when NBC gave both the Democratic and Republican National Committees, not the candidates themselves, one half hour to discuss issues in the national campaign. Vice President Humphrey and two cabinet members appeared for the Democrats; Richard Nixon appeared for the Republicans. Since no *candidate* appeared, the network was under no obligation to give equal time to other political parties or candidates.

23. This, in fact, appears to have been the general position of the Commission until at least 1959. *See* notes 33 to 41 *infra* and accompanying text.

24. Throughout the postmortems of the 1960 campaign, political pundits were surmising the effect of President Eisenhower's less than full support of Richard Nixon; there was feeling that stronger support from the President would have given Nixon the Presidency.

25. *See* note 22 *supra.*

expand this section legislatively rather than administratively to include speeches and other activities by supporters.

B. "SUCH CANDIDATE FOR THAT OFFICE"

Section 315 requires a broadcaster to give equal time only to candidates for the "office" in contention. While it is by no means a necessary conclusion from the language, the Commission has consistently held that primary and general elections are contests for different "offices." Thus, if candidate *A*, who is unopposed for his party's nomination, appears on a station while candidates *B*, *C*, and *D* are running a heated race for their party's nomination, the winner of the primary, *B*, cannot then request time equal to that received by *A* prior to *B*'s victory, notwithstanding the fact that *B* and *A* are thereafter rivals for the same "office" in the subsequent general election.[26] Likewise, *A* cannot thereafter request equal time to match *B*'s overexposure during the primary.

This interpretation poses grave possibilities for abuse by a candidate in control of his party's nomination. For example, *A* may be an incumbent, appearing regularly during the time of the primary of the other party, while *B*, a relative unknown, may have little opportunity for exposure due to a licensee's reluctance to give *B*'s opponents, *C* and *D* (and *Z*?) equal time. On the other hand, *B* may be a powerful figure in his party who allows dummy candidate *C* to oppose him simply to obtain air time which *A* cannot contest. This interpretation may reinforce perpetuation of one-party rule in states where such rule exists. Moreover, it is scarcely consistent with the Commission's staunchly-held position that it is the exposure itself, not the content of the exposure, which is regulated by the statute.[27]

The problem is a thorny one; perhaps the best solution at the moment is to support the present distinction.[28] Clearly, though, the Commission should make some effort to deal with this question, rather than continuing its present policy of ignoring it.

C. WHAT IS A "USE?"

The most important and perplexing question of interpretation of section 315 is the definition of the word "use." Under the statute, only when a candidate "uses" the station's facilities must the station afford his opponents equal time.[29]

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26. 11 P & F RADIO REG. 234 (1952); Hon. Allen Oakley Hunter, 11 P & F RADIO REG. 234 (1952). *See also* KWFT, Inc., 4 P & F RADIO REG. 885, 886 (1948), where the Commission, in dictum, said: "[W]ithout regard to the provisions of § 315, elementary principles of fairness may dictate that a station which has afforded considerable time during the primary to candidates for nomination as the candidate of a party for a particular office should make a reasonable amount of time available to candidates for that office in the general election. No general rule can be laid down on this matter. . . ." *Id.* at 886.

27. *See* the discussion of the pre-Daly position, notes 32 to 40 *infra* and accompanying text.

28. *See Equal Time Hearings, supra* note 14 (remarks of Senator Monroney), especially at 216–17.

29. The district court in the *Felix* case suggested that even though a speech by a supporter was not one by a "legally qualified candidate," it should be viewed as a

It would be difficult to list all the various factual situations which have been deemed "uses" by the Commission.[30] It is necessary, both for reasons of analysis and understanding, to distinguish between pre-1959 decisions and those made after the now infamous *Lar Daly* decision[31] which triggered the 1959 amendments. These earlier decisions, while qualified by the amendments, are by no means overruled, since Congress made it explicit in the amendments that the exemptions listed therein were not "uses." Thus, all prior law as to what constitutes a "use" was not changed except for the four categories of exemptions which will be discussed later.

1. The Pre-Daly Situation

Between 1934 and 1959, the Commission was called upon to decide, in numerous factual settings, whether the candidate for office had "used" the station. Thus, the Commission had held[32] that it was a "use" within section 315 when a candidate (1) appeared on a radio show, notwithstanding that there was no discussion either of his candidacy or of public uses in general;[33] (2) appeared for a bow on a variety show; [34] (3) made an acceptance speech;[35] (4) made reports to his constituents;[36] and (5) sold used cars.[37] In sum, the Commission's position was basically that: "all appearances of a candidate no matter how brief or perfunctory are a section 315 use of a station's facilities within section 315."[38]

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§ 315 "use:" If 'use' be given the narrow interpretation for which the plaintiff contends, it would be perfectly feasible and legal for a broadcasting station to refuse its facilities to all candidates, in their own persons, and then allow spokesmen for one side unlimited time . . . thus frustrating the policy underlying the Act and its plain intent." Felix v. Westinghouse Radio Station, Inc., 89 F. Supp. 740, 742 (E.D. Pa. 1950). *Cf.* D. L. Grace, 17 P & F RADIO REG. 697 (1958), where the Commission first stated that the candidate could "use" the station by allowing his spokesman to appear for him, but then retreated from that eminently sensible position. *Id.* at 698–99.

30. The Commission attempts to do so sporadically. These summaries are the most fertile source of information, although the short synopses are often inadequate and sometimes misleading. *See* 31 Fed. Reg. 6666 (1966); 3 P & F RADIO REG. 2d 1539 (1964); 24 P & F RADIO REG. 1901 (1962); 17 P & F RADIO REG. 1711 (1958).

31. Columbia Broadcasting System, Inc., 18 P & F RADIO REG. 238 (1959).

32. Throughout this article, the word "held," when used in connection with Commission decisions, must be viewed warily. Actually, most of these decisions are found in advisory letters issued by the Commission in response to inquiries made by broadcasters and are in no real sense "holdings" which are in any way binding on the Commission or the courts, either as res judicata or stare decisis. On the other hand, the real law of this field is made in such advisory letters, since rarely will a disenchanted candidate follow judicial procedure after the election, and even more rarely will he be able to receive judicial attention beforehand. As to these difficulties, including the question of whether such opinions are judicially reviewable, see the discussion of remedies and sanctions available to the Commission and the candidate, notes 140 to 144 *infra* and accompanying text.

33. 7 P & F RADIO REG. 1132 (1952).

34. FCC Public Notice 63585. Summary of its ruling in an unpublished letter, noted in 17 P & F RADIO REG. 1711, 1713 (1958).

35. Progressive Party, 7 P & F RADIO REG. 1300 (1952).

36. Radio Station KNGS, 7 P & F RADIO REG. 1130 (1952).

37. Station KTTV, 14 P & F RADIO REG. 1227 (1957).

38. Kenneth E. Spengler, 14 P & F RADIO REG. 1226b (1956). This position included ceremonial appearances. Thus, the Commission advised CBS that an appearance by President Eisenhower on behalf of the Community Chest would be a "use" within § 315 notwithstanding that the appearance was a traditional duty performed

One major exception, however, was carved from the general rule. In the *Allen Blondy* case,[39] the Commission indicated that mere coverage of a newsworthy event which happened also to include an appearance of the candidate was not a section 315 "use." Although the facts of the case may somewhat limit the holding,[40] it was nevertheless accepted as authority for the proposition that film clips of news events, when not clearly biased for or against a candidate, were not a "use" under 315.

2. The Lar Daly Case

It was against this background that Lar Daly filed a complaint demanding time equal to his opponents' in the mayoralty race in Chicago. The Commission's short opinion can be reprinted in full:[41]

> Commission unanimously instructed staff to inform you that following film clips constituted 315 "use" entitling Lar Daly to equal opportunities:
>
> A. Separate clips showing Mayor Daley and Candidate Sheehan filing their political petitions with Chicago City Clerk as candidates for Democratic and Republican nominations.
>
> B. Formal endorsement of Sheehan's candidacy by Chicago Republican Committee.
>
> C. Hugh Hill's interview of Sheehan.
>
> D. Hugh Hill's interview of Connel and Sheehan.
>
> Commission by 4 to 3 vote instructed staff to inform you that following clips also constituted 315 "use:"
>
> A. Daley greeting President Frondizi of Argentina, Midway Airport, Chicago.
>
> B. Daley's appeal for funds, March-of-Dimes Polio Drive.
>
> Conflict in amount of time to be resolved by parties on basis of facts.

Within three days of the *Lar Daly* decision, Congressional hearings were begun on ways to amend section 315 to avoid the impetus of the decision. In fact, the ramifications of the opinion were staggering: every film clip used by any station in any newscast, whether or not

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by the incumbent regardless of political affiliation. Columbia Broadcasting System, Inc., 14 P & F RADIO REG. 524 (1956). Adlai Stevenson immediately waived his rights. *See* United Community Campaigns, 3 P & F RADIO REG. 2d 320 (1964). Likewise, appearances of Mr. Stevenson at a Governor's Day Program were "uses" which allowed his Presidential opponent to request and receive equal time. Columbia Broadcasting System, Inc., 11 P & F RADIO REG. 241 (1952).

39. Allen H. Blondy, 14 P & F RADIO REG. 1199 (1957).

40. The candidate was one of a number of judges who were sworn into office and was only briefly depicted.

41. Columbia Broadcasting System, Inc., 18 P & F RADIO REG. 238–39 (1959).

the event was independently newsworthy, would result in a legally enforceable right to equal time on the part of every candidate for the same office.[42]

The *Lar Daly* decision was the logical culmination of an effort by the Commission to assure equality for minority party candidates and to ban once and for all the possibility of discriminatory coverage of the news. But the decision neglected completely the second purpose of the statute — to provide reasonable opportunity for the public to become informed of political events. Within six months, Congress had enacted amendments to section 315. To these we now turn.

3. The 1959 Amendments

While the 1959 amendments were prompted by the obvious difficulties broadcasters would encounter in trying to abide by the *Lar Daly* decision concerning newscasts, they not only vitiated that case by exempting newscasts from the equal opportunities obligation, but also instituted even more sweeping reforms which licensees had been seeking for years. News interviews, news documentaries, and on-the-spot coverage of bona fide news events were also made exempt from the requirement. Proposals to exempt debates and panel discussions were rejected.[43]

As finally enacted, the amendments provided that:[44]

> Appearance by a legally qualified candidate on any
>
> (1) bona fide newcasts,
>
> (2) bona fide news interview,
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
>
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto), shall not be deemed to be use of a broadcasting station within the meaning of this subsection. 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 im-

42. As the reader may have gathered, the "equal opportunities" language of § 315 has come to mean exactly equal *time*. Of course, the time must be equal in more than merely amount. The same opportunity to reach roughly the same number of viewers in the same time period, under similar conditions and format, is also required. *See* D. L. Grace, 17 P & F RADIO REG. 697 (1958); Stephens Broadcasting Co., 3 P & F RADIO REG. 1 (1945).

43. *See Hearings on H.R. 7985 Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 86th Cong., 1st Sess. 67, 70, 72 (1952) (Testimony of Robert Sarnoff, Chairman of the Board of NBC).

44. 73 Stat. 557 (1959), 47 U.S.C. § 315 (1964). The last sentence embodies the "fairness doctrine" previously referred to at note 6 *supra*.

> posed 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.

The 1959 amendments have, by and large, had the effect hoped for by their proponents. Regularly scheduled news interview shows have had no problem in receiving Commission approval of exemption.[45] News shows have been freed from complaints of the *Lar Daly* type.[46] In addition, documentaries reporting on current off-year elections and campaigns, which covered many candidates, have been held exempt.[47]

It is possible to classify post-1959 Commission decisions according to each exemption. While the Commission has done so to some extent, it has apparently preferred to apply the same standards to every program; the groups are thus factually and legally intermixed and shall be so treated. The Commission's tests, which were announced in a letter sent to licensees, are:[48]

> (1) the format, nature and content of the programs; (2) whether the format, nature and content of the program has changed since its inception and, if so, in what respects; (3) who initiates the programs; (4) who produces and controls the program; (5) when the program was initiated; (6) is the program regularly scheduled; and (7) if the program is regularly scheduled, specify the time and day of the week it is broadcast.

These criteria are controlling even though the broadcaster has honestly judged that the program is newsworthy.[49] The Commission does not upset the licensee's determination of newsworthiness but takes the position that "bona fide" means more than an honest exercise of news judgment.[50] This, of course, is reminiscent of the stance taken in the *Lar Daly* case and preceding opinions that minority candidates cannot be placed at the whim of the broadcaster, whether that whim be intentionally discriminatory or not. These criteria and the resulting strict standard have the value of protecting minority candidates, who often find themselves out of the news for long periods of time and who

45. "Eye of Philadelphia," telegram to Joseph A. Schafer (1959); "Search Light," telegram to Ethel Lobman (1961); "City Side," telegram to Charles Luthardt (1962); "New York Forum," telegram to Social Labor Party of New Jersey (1961), all reported in 24 P & F RADIO REG. 1901, 1909–10 (1962).

46. Minor exceptions will be noted as to "candidate-announcer" cases at note 57 *infra* and accompanying text.

47. Telegram to Judge John J. Murray, 31 Fed. Reg. 6666 (1966).

48. Use of Broadcast Facilities by Candidates for Public Office, 24 P & F RADIO REG. 1901 (1962). In laying down these guidelines, the Commission has been heavily influenced by legislative history. Congress indicated that the "bona fide" stipulation attached to all four categories was meant to insure that the news event was not one staged for the advantage of the candidate involved. H.R. REP. No. 1069, 86th Cong., 1st Sess. 4 (1959). With respect to the first two categories, newscasts and news interviews, Congress intended that the program be regularly scheduled to be exempt.

49. The Goodwill Station, Inc. (WJR), 24 P & F RADIO REG. 413 (1962).

50. National Broadcasting Company, Inc. and Columbia Broadcasting System, 24 P & F RADIO REG. 401 (1962).

would probably be neglected completely, all within the "honest news judgment" of the broadcaster.

The difficulty is that the Commission has been inconsistent in applying these various criteria; in one instance one is weighed more heavily, in another instance one of the other criteria may be accorded greater weight with the result being that different conclusions are reached in essentially the same fact situations. This is a not uncommon position for the Commission,[51] but it is an uncommonly unhappy one for the broadcaster. Indeed, the inconsistency here may well make the broadcaster wonder if he has not opened a Pandora's box which, though possibly not increasing his overall burden, has certainly failed to alleviate it substantially.

Specially scheduled interviews have not been exempted because of the Commission's particular attention to the desire of Congress that only regularly scheduled interviews be exempted.[52] The Commission has adhered to this policy in the face of station arguments that news interviews are a regular feature during election periods.

Press conferences of candidates are non-exempt,[53] because not a regularly scheduled feature; but portions of the same conferences are completely inviolate if presented in newscasts.[54] Similarly, other non-exempt appearances become exempt if only partially covered.[55] Candidates who are announcers are exempt if the subject matter is prepared by someone else,[56] but not if the candidate controls the substance, notwithstanding the non-political nature of the talks.[57] The Fifth Circuit Court of Appeals, in affirming the first of the "announcer" cases,[58] only added to the confusion by adding another factor — the presence or absence of intent on the part of the station to help the candidate. This would seem to conflict with the already noted Commission decisions holding that "honest news judgment," *i.e.*, lack of intent to favor a candidate, is an irrelevant factor in section 315 cases.[59]

Some inconsistencies are nevertheless present. The most notorious example, perhaps, is the *NBC* case,[60] in which the Commission, in one

51. *See, e.g.*, H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS 53–57 (1962).

52. H.R. REP. No. 1069, 86th Cong., 1st Sess. 4 (1959). This has sometimes been carried to extremes. In *National Broadcasting Company, Inc.* and *Columbia Broadcasting System, supra* note 50, the Commission held that debates between two gubernatorial candidates before the United Press International annual convention were not exempt, although the station regularly carried the convention and the debate before that convention in election years. Likewise, in The Goodwill Station, 24 P & F RADIO REG. 413 (1962), the fact that a club had invited two gubernatorial candidates to debate in accord with normal club policy and the fact that these debates were covered as part of regular election coverage did not exempt them.

53. Columbia Broadcasting System, Inc., 3 P & F RADIO REG. 2d 623 (1964).

54. *Id.* at 625 (dictum). *But see* Columbia Broadcasting System, Inc. and National Broadcasting Company, Inc. (1960), as reported in 31 Fed. Reg. 6666 (1966).

55. Columbia Broadcasting System, Inc., 3 P & F RADIO REG. 2d 623 (1964).

56. KWTX Broadcasting Co., 19 P & F RADIO REG. 1075 (1960).

57. *See* WMAY, 4 P & F RADIO REG. 2d 849 (1965). *But see* Brigham v. FCC, 276 F.2d 828 (5th Cir. 1960) (equal time need not be given where the announcer-candidate broadcasts weather reports as his regular job and was not identified by name on the air. The court held that the weather forecasts were "bona fide" newscasts within the meaning of the 1959 amendments).

58. *Id.*

59. *See* note 49 *supra* and accompanying text.

60. Lar Daly, 20 P & F RADIO REG. 350 (1960).

set of telegrams, held that the "Today" show was a bona fide news interview show and thus exempt from the equal time requirements of section 315, but that the "Tonight" show was not, and that the appearance of Presidential candidates Kennedy and Nixon on the show required NBC to give equal time to a minority candidate. In the first decision, the Commission discussed the "Today" format at great length, noting that it focused on news and news events and often contained interviews with leading political and world figures. In its second holding, the Commission refused to go behind the formal aspects of the "Tonight" application, basing its holding on the single fact that in past renewal applications NBC had listed the show as a "variety" show in its program logs; the program logs of "Today" had never been mentioned. Moreover, the Commission disregarded completely the possibility that Jack Parr, then hosting the "Tonight" show, might have conducted the interviews with complete impartiality; the mere fact of listing in the program logs raised an apparently irrebuttable presumption that any interview on the show was not a bona fide news interview.

It is possible that the Commission took official notice of the fact that Parr had control over the questions which would be asked the candidates. While it would seem that the important question is whether the candidate has control of a news interview show, the Commission apparently insists that the programming department of the station, as opposed to the interviewer, maintain control.[61] This hypothesis is buttressed by the fact that the Commission held Barry Gray's show non-exempt due to his freedom to control the interview.[62] In the "Today" telegram, the Commission specifically pointed out that the station formulated the questions which the interviewer was to ask. But since the only relevant question is whether the *candidate* has control, the Commission's preoccupation with form seems to completely ignore the purpose of the 1959 amendments.

Form is also exalted over substance in the Commission's rigid adherence to the "regularly scheduled" criterion. Even where a station has a policy of interviewing major candidates during election periods, the Commission does not regard these interviews as "regularly scheduled." Yet the same end can be accomplished by arranging to have the candidates appear on an established interview program, and equal time liability is thereby avoided.

Presidential appearances on radio and television have created an ambiguous area in the application of section 315. While the President has less control over press conferences than over prepared statements, the latter are more apt to gain exemption. In responding to inquiries of the Republican Party, the Commission indicated that President Johnson's appearance on nationwide television, reporting on a change in Kremlin leadership and the Chinese nuclear explosions would be exempt,[63] although it had recently held that a Presidential press confer-

61. It may be that the Commission fears bias on the part of some interviewers. Why this same possibility is not present when the programming department provides questions is not clear.

62. WMCA, Inc., 24 P & F RADIO REG. 417 (1962).

63. Republican National Committee, 3 P & F RADIO REG. 2d 647 (1964).

ence was not exempt.[64] One possible rationale of these two decisions, and one which was not suggested by the Commission in either of the cases, is the lack of control of timing of the event — an echo of the "regularly scheduled" standard. The President is free to call or not call press conferences at his will, while he has no such control over the course of international events.

One of the most interesting comparisons to be made between the pre-1959 period and the decisions under the present statute is afforded by two almost identical cases, the *Suez* case[65] and the *Goldwater* case.[66] The facts in the cases are virtually the same. In both, the incumbent President, spurred by quite radical changes in the international political climate,[67] addressed the nation in his capacity as Chief Executive some two or three weeks prior to the election. Immediately thereafter, his chief opponents requested and were refused equal time from the networks. The *Suez* case was brought in 1956 and was based solely on the equal time provisions of section 315. The request for equal time was denied on the ground that the "use" was not by a candidate (though under current Commission doctrine *any* exposure was a "use"),[68] but by the Chief Executive.

64. *See, e.g.*, 3 P & F RADIO REG. 2d 623 (1964).

65. Columbia Broadcasting System, Inc., 14 P & F RADIO REG. 720 (1956) (Commissioner Hyde dissenting).

66. Republican National Committee, 3 P & F RADIO REG. 2d 647 (1964); Republican National Committee, 3 P & F RADIO REG. 2d 767 (1964); both rulings affirmed by the District of Columbia Court of Appeals in an unreported opinion, *cert. denied sub. nom.* Goldwater v. FCC, 379 U.S. 893 (1964).

67. With Eisenhower, the Suez crisis; with Johnson, the ouster of Khrushchev and the detonation of Red China's first atomic bomb. It has been contended that the first of these was a real international "crisis," the second only a "change," and that the law should recognize an exemption for Presidential speeches falling under the former category, but not under the latter. Derby, *Section 315: Analysis and Proposal*, 3 HARV. J. LEGIS. 257 (1966). The distinction is logical, but hardly consistent with the "charitable appearance" case, note 38 *supra*, which Mr. Derby also embraces. What Mr. Derby says about the latter cases is also applicable to a "crisis:" "This type of appearance projects an extremely favorable image of a candidate and can be controlled by him within limits." *Id.* at 282. He recognizes this but dispels it with the statement that "In the national interest the President should be completely free to use broadcasting facilities when such use is necessary." *Id.* at 296. Exactly why it is "in the national interest" to bar opponents of the President from equal time, however, is not made clear, except for the assertion that the nation "must present a unified posture to the world" in times of international emergency. The proposition must be rejected; too many events require "unified posture" in this context. Yet the essence of an election must be to give viable, if unpleasant, alternatives to the voter.

Realistically, no candidate would attack the administration's position during an "international crisis" unless it were almost patently unsound. If, however, this were the case, the position of the government should obviously be subject to public debate prior to the most important election in the country.

It should also be noted that indirect criticism may suffice as well as direct. In the Cuban missile crisis, for example, there were not lacking those who indicated that the entire Administration approach to international affairs was wrong and directly responsible for the precipitation of the crisis. Surely it cannot be argued that the basic decision as to approach and philosophy in the international arena should be left undiscussed simply because a "crisis" happens to arise during an election campaign.

It might also be that an opponent would choose to comment on domestic affairs, rather than on the international issue, as would be consistent with § 315 rights, and that his demeanor and approach there would reflect, though silently, his posture on the international scene.

68. The decision did not say why this appearance was in theory any different from that of the "Chief Executive" in opening the Community Chest drive. *Cf.* 14 P & F RADIO REG. 524 (1956) (Commissioner Hyde dissenting). For a scathing criticism, see Friedenthal and Medalie, *The Impact of Federal Regulation on Political*

The *Goldwater* decision in 1964, however, rested on two alternative grounds. Citing the *Suez* case as controlling at first blush, the Commission then went on to hold that the Presidential address in question was "on-the-spot" coverage and therefore exempt under the amendments.[69] Commissioner Hyde, in his dissent, stressed the importance of exposure on television and pointed out that Congress, though presumptively acquainted with the *Suez* exception, had not written it into the statute.[70]

Thus far, the two cases are on all fours, both in treatment and outcome, for the "on-the-spot" exemption language in the *Goldwater* case was dictum. Having failed to obtain a favorable ruling under section 315 proper in *Goldwater,* the Republican National Chairman then applied for equal time under the "fairness doctrine" adopting the implicit suggestion of Commissioner Hyde's dissent of a requirement of fairness of exposure.[71] The Commission accepted this contention by holding that the fairness doctrine *did* apply in the instant situation. However, relief would be granted only if the networks were found to have acted unfairly. The Commission, in concluding that the networks had not been unfair, cited instances of coverage by the networks of Goldwater's reaction to the speech by President Johnson. Once again, Commissioner Hyde dissented:[72]

> Television has the unique capability of presenting the personality of the candidate before the public. The three national television networks have made a simultaneous presentation of one of the two major candidates in a special program in prime time without compensation to the networks, and they have refused to provide an opportunity for a presentation of the other major candidate under comparable circumstances.

The *Goldwater* cases are extremely useful tools for a number of purposes. In the first place, they show the willingness of the Commission to apply the fairness doctrine to politics in general, a willingness not so clear in 1956,[73] while nevertheless adhering to a rather strict interpretation of the "use" doctrine. Second, the cases demonstrate that the amendments have not resulted in changes as sweeping as

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Broadcasting: Section 315 of the Communications Act, 72 HARV. L. REV. 445 (1959). "The new exception . . . is unwise since any appearance . . . puts a candidate at an unfair advantage if his opponent cannot obtain an equal opportunity. . . . Indeed it is precisely this type of appearance during a political campaign that should be declared a use before all other types of nonpolitical or nonpartisan appearances are so declared." *Id.* at 476.

69. It cannot be successfully argued that this was a wholly alternative holding; the Commission's emphasis makes it clear that it was highly dubious as to the solidity of this principle and intended it only as a secondary ground for the decision.

70. 3 P & F RADIO REG. 2d 647, 655 (1964) (Commissioner Hyde's dissent).

71. *Id.*

72. 3 P & F RADIO REG. 2d 767, 771 (1964).

73. This parallelism can be overdrawn. In the *Suez* case, as Commissioner Hyde in his *Goldwater* dissent noted, the networks had in fact given equal time to Stevenson; but this would not have prevented Stevenson from bringing a complaint to the FCC. The fact that he did not is at least somewhat persuasive that he did not believe he had a viable claim.

might have been anticipated. The Commission did not, in the first *Goldwater* case, primarily rely on the idea that this was "on-the-spot" coverage, although that path was open to it.[74] Instead it chose to rely on the rather tenuous theory that this was not a "use."

There are other difficulties with the *Goldwater* cases, especially the second decision, which seem to bear out the fears which plagued critics of the amendments who opposed the preemption of section 315 by the fairness doctrine.[75] The facts emphasized by the Commission raise perplexing problems in the light of the statutory language and purpose. For example, the Commission noted that Goldwater had been invited to appear on "Meet the Press." If, in fact, the invitation was made to assuage the irate candidate, was it a "bona fide" news interview?[76] The Commission also mentioned that various news shows had carried Goldwater's views of the new international developments, and it relied heavily on the fact that prime time had been devoted to these newscasts. But would these newscasts have been "bona fide" if they had not carried Goldwater's views? Or could they be "bona fide" if in fact the only reason his views were explained was to comply with the fairness doctrine?

Still one more observation must be made in connection with these cases. The Commission in *Goldwater* further cited the fact that Party Chairman Burch had been allowed to reply to Johnson's speech, although Goldwater himself had not been allowed to answer. This was noted, however, in the discussion of the "fairness" issue, not under the "equal time" doctrine. Thus, the Commission implicitly reaffirmed its position that a candidate does not "use" the station when his supporter is given time to advocate the candidate's views. Had the Commission so desired, it could easily have dismissed the complaint on the basis that this was a "use" and that Goldwater had in fact been given equal time. The reluctance to dispose of the case in such a manner demonstrates that the "supporter doctrine" is still viable.

The 1959 amendments have been successful in erasing the *Lar Daly* doctrine, a result which is beneficial to all concerned.[77] And to the extent that Congress was concerned with the public's opportunity to be informed of news events through presentation in a form other than newscasts, the legislation has again proven clearly successful.

No one would deny that broadcasters should be able to present newscasts and other current events without fear of reprisal by minority

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74. Mr. Justice Goldberg, joined by Mr. Justice Black, argued, in dissenting from denial of certiorari in the cases, that a strong case could be made that this was not "on-the-spot" coverage. 379 U.S. at 894 (1964). Clearly the thrust of the exemption is not aimed at conferences called by one party specifically to allow press coverage.

75. *See* notes 133 to 139 *infra* and accompanying text.

76. This, of course, goes to motive or intent of the broadcaster, a factor the Commission has ruled irrelevant. *See* notes 48–49 *supra* and accompanying text. But surely if one licensee centered, every night, on only one candidate during a "regularly scheduled" newscast, there would be a retreat from this position. Thus, the "regularly scheduled" criterion is only a necessary, not a sufficient, ingredient of the "bona fide" quality of the program.

77. In 1963, when Daly complained of live coverage of a St. Patrick's Day parade in which the current Mayor was participating, the Commission held the appearance exempt as "on-the-spot" coverage. Lar Daly, 3 P & F RADIO REG. 2d 1539, 1543 (1963).

opponents. Of the various exceptions promulgated by the amendments, the one for newscasts is the most easily supported. Newscasts are seldom used to expound at great length the philosophy of the candidates; they are often "human interest" more than "politics." However, the other exceptions which Congress enacted in 1959 cannot be so defended. If protection of minorty views is to be supported on any utilitarian basis at all, which seems to be the thrust of the 1959 legislation, it must be that minority parties often serve as the initiators of critical introspection into the political and social system as a whole. Their platforms have many times become the predecessors of programs later pursued by the larger parties. Thus, any exemption which prevents the espousal of minority party *views,* as opposed to exposure of minority party candidates, merely undercuts the basic rationale of section 315 and, in fact, of the *raison d'etre* of the smaller party. Exposure of the candidate is least important to these activities; it is exposure of the idea which is their hope.

The 1959 amendments have thus clearly served as deterrents to third party candidates who cannot now request equal time on shows specifically meant to serve as sounding boards for political philosophies, such as "Meet the Press." That this was the Congressional intent seems clear;[78] whether it is desirable is highly dubious.

D. THE "NO POWER OF CENSORSHIP" CLAUSE: HEREIN OF LIBEL AND IMMUNITY

In the original statute, Congress specifically forbade any censorship of speeches broadcast under the aegis of the section.[79] In *Sorenson v. Wood,*[80] the broadcaster vainly contended that since he could not censor a speech given by a supporter of a candidate because of this ban, he was immune from liability in a libel suit. The court rejected this contention, as have many later Supreme Court statements, that libel was not protected by the first amendment, that it was therefore not protected by section 315, and that the station therefore failed in its duty as publisher of the libel to delete it from the speech. Thus, the "no censorship" clause was limited to mean "no censorship" except where censorship is not censorship.

In at least this one particular, the law is now clear. In *Farmer's Educational and Co-operative Union v. WDAY, Inc.,*[81] the Supreme Court rejected the *Sorenson* rule and held that section 315 contained an "implied immunity" for licensees against suits for libel. The case, in this regard, obviated the dilemma which had been created by the FCC's decision in *In re Port Huron,*[82] in which the Commission had held[83] that a licensee could not, *Sorenson* notwithstanding, delete

78. The House Report on the 1959 amendments suggests that § 315 was not repealed because Congress desired to retain the principle of "substantial equality." H.R. REP. No. 1069, 86th Cong., 1st Sess. 5 (1959). Whether this is achievable by the methods proposed is questionable.

79. 48 Stat. 1088 (1934), *as amended,* 66 Stat. 717 (1952), 73 Stat. 557 (1959), 47 U.S.C. § 315 (1964).

80. 123 Neb. 348, 243 N.W. 82 (1932).

81. 360 U.S. 525 (1959) (5-4 decision).

82. 4 P & F RADIO REG. 1 (1948).

83. In fact, this was not the holding. The case was a license renewal proceeding, and the license was renewed; this would be the technical "holding." But clearly this

libelous statements from section 315 speeches.[84] The Court further found that state libel laws had been preempted in this field by federal law.[85] The facts in *WDAY* were that allegations were made by a Republican candidate for the United States Senate that his Democratic opponents were clearly connected with petitioner, an independent farm organization, which the candidate then alleged to be Communist-controlled. The licensee, believing the statements libel per se, yet operating under the ruling of the *Port Huron* decision that deletion was forbidden, expressly asked the candidate to request time under section 315, thereby hoping to come under a dictum in *Port Huron* that immunity would be provided by the statute. The North Dakota Supreme Court affirmed a motion to dismiss the libel suit on the pleadings on the basis of section 315.[86] One judge dissented.

In affirming the dismissal, the majority of the United States Supreme Court, in an opinion by Justice Black, stated that "censorship" means censoring to any extent[87] and is prohibited, and therefore a licensee is forbidden to delete libel from a political speech. On this point, the four dissenters concurred with the majority's holding.[88] The difficult problem was whether the Communications Act, having opened the licensee to possible liability, provided him immunity.[89]

To Justice Frankfurter's dissenting comments that Congress had consistently rejected bills which would expressly have granted such an immunity,[90] the Court responded with the legislative history of bills which would have allowed the station to censor libelous material, all of which had also failed.[91] The rationale was that the mere failure of each set of bills did not prove Congressional intent on the issue; if anything, such failure evinced an unmistakable desire to insulate the licensee in one way or another. The fact that none of these bills had ever passed either house was thought unimportant. There was, however, one aspect of the legislative history which supported the majority; there had been no definite adverse Congressional response to the clear FCC policy announced in *Port Huron,* though the Communications

is the proposition for which the case has stood. *Compare* Sorenson v. Wood, 123 Neb. 348, 243 N.W. 82 (1932), *with In re* Port Huron, 4 P & F RADIO REG. 1 (1948).

84. The FCC has just recently held that the "no censorship" provision in § 315 even justifies a licensee's refusal to cancel a candidate's broadcast even if the broadcast clearly and unmistakably distorts the position of his opponent. Capitol Broadcasting Co., Inc., Document 67-800, 36 U.S.L.W. 2062 (FCC Jul. 5, 1967). Commissioner Cox dissented, arguing that where the opponent calls attention to the distortions prior to the broadcast, the licensee should at least be under a burden to investigate the charges.

85. *Cf.* 44 MINN. L. REV. 787 (1960) which suggests that the Court specifically found the "implied immunity" to avoid a clear holding on the preemption point.

86. Farmer Educational & Cooperative Union of America v. WDAY, Inc., 89 N.W.2d 102 (N.D. 1958).

87. The Court may have overlooked 18 U.S.C. § 1464 (1964) which provides: "Whoever utters any obscene, indecent or profane language by means of radio communciation shall be fined not more than $10,000 or imprisoned not more than two years, or both." Perhaps the immunity does not go this far.

88. *Compare* 360 U.S. at 527-31, *with* 360 U.S. at 535-36.

89. Farmers Educational & Cooperative Union of America v. WDAY, Inc., 360 U.S. 525, 535-36 (1959).

90. *Id.* at 540; note 4 *supra.*

91. *Id.* at 532-33, particularly nn.13 & 14.

Act had been amended twice since that decision. If the other history was in balance, the presumption of Congressional acquiescence was persuasive.

Despite the distortions of presumptions, the majority's reading of the Congressional intent is probably correct. Although it has been suggested that the result itself is unconstitutional,[92] it can certainly be argued that the contrary result would be just as violative of the fifth amendment[93] and of the "unconstitutional conditions" rule.[94] Moreover, although the Communications Act specifically states that licensees are not common carriers,[95] the peculiar thrust of section 315 is to negate that statement as far as political speeches are concerned and to make licensees, at the very least, "quasi common carriers."[96] Since common carriers are exempt from liability for libel which they transmit,[97] it is submitted that this result should also be afforded a licensee under the Communications Act and that *WDAY* is therefore correct. The decision, moreover, is in keeping with the clear policy behind section 315; immune from libel suits, licensees are much more apt to allow political speeches in general. The subsequent public enlightenment is surely the goal of the statute and its provisions.

Even if the *WDAY* Court is correct in its general result, however, the reasoning in the case is open to serious criticism. First, the majority seemed to brush aside the contention of the petitioner that even if section 315 could be construed to grant an immunity in some cases, this was not such a case.[98] The point, argued vehemently by the dissenting judge in the state court,[99] was that the libel had been directed not at an opposing candidate, but at a person somewhat related to, but not intimately involved in, the political fray. While it was possible to view *candidates* as accepting the risk of extreme and even libelous statements, he argued, it could scarcely be said that the same was true of innocent third parties. Furthermore, the libeled candidate may be allowed an immediate remedy under section 315 — equal time in which to answer. The third party has no such luxury. While it might be argued that the petitioner in the instant case, being somewhat involved in the campaign, had given at least limited tacit approval to mud-slinging, the Court's rationale goes beyond this situation to the

92. Snyder, *Liability of Station Owners for Defamatory Statements Made by Political Candidates*, 39 VA. L. REV. 303, 315 n.60 (1953): "(I)t [the result] may be held to relieve citizens of legal remedies without compensation in kind, and that it usurps the state police power. Patently, it contravenes section 414 of the Communications Act, which states that existing remedies at common law or by statute are not abridged."

93. Strict liability for libel, when one is legally unable to avoid causing the injury, would appear to deprive one of a right to defense without due process of law.

94. *See generally* French, *Unconstitutional Conditions: An Analysis*, 50 GEO. L.J. 234 (1961).

95. *But see* 67 CONG. REC. 12502 (1926).

96. Note, *Censorship of Defamatory Political Broadcasts: The Port Huron Doctrine*, 34 N.Y.U.L. REV. 127 (1959).

97. *See, e.g.*, O'Brien v. Western Union, 113 F.2d 539 (1st Cir. 1940).

98. *See* Brief for Petitioner at 39–46, Farmers Educational & Cooperative Union of America v. WDAY, Inc., 360 U.S. 525 (1959).

99. Farmers Educational & Cooperative Union of America v. WDAY, Inc., 89 N.W.2d 102, 111–12 (N.D. 1958).

one involving a completely uninvolved person against whom the candidate happens to carry an indisposition.[100]

Furthermore, the Court's definition of censorship, if applied to other situations which could arise, might result in precisely the confusion the Court was trying to avoid here, especially in light of judicial precedents.[101] For example, the Court did not consider the *Felix* problem, discussed above,[102] of whose speeches are protected by the section, unless one considers the passing disapproval of *Sorenson* as indicative of the Court's view on this question. *Sorenson,* it must be remembered, involved a *supporter's* speech. Disapproval of that case may indicate that a licensee could not censor a supporter's speech consonant with section 315. Yet such a position would require an implicit holding that "use" includes use by a supporter, a conclusion completely contrary to the law as it now stands.[103] Under *Felix,* censorship is required to protect the licensee; under *WDAY,* there is at least some doubt as to whether such deletion is constitutional.[104]

It would, of course, be much too strong to say that the Court is compelled by the reasoning in *WDAY* to include supporters within the aegis of section 315. Yet its failure to even consider this problem, or the problem of the innocent third party who is libeled, makes the decision one which must be viewed warily as a precedent on these questions.

Moreover, the facility with which the Court simply overrode the libel laws of forty states[105] is not to be viewed without criticism. Many of these states had considered the problem posed by section 315 and come to reasonable solutions.[106] It was ill-considered to curtly reject these answers.

The Court's opinion is unclear in yet another respect. If federal procedural law supplants state law, to what extent does federal substantive law now govern libel actions against the utterer — the candidate himself? While there is no reason to suppose that the state substantive law has been supplanted as well, it may be argued that the federal interest so manifest in the *WDAY* situation mandates uni-

100. An "assumption of risk" argument might not carry weight here. But the effect of New York Times Co. v. Sullivan, 376 U.S. 254 (1964) is not yet known; it could lend considerable credence to the idea that a public figure, as well as a public official, is fair game. *See* Curtis Publishing Co. v. Butts and Associated Press v. Walker, 388 U.S. 130 (1967).

101. Lamb v. Sutton, 164 F. Supp. 928 (M.D. Tenn. 1958), *aff'd,* 274 F.2d 705 (6th Cir. 1960).

102. *See, e.g.,* Felix v. Westinghouse Radio Stations, 186 F.2d 1 (3d Cir. 1950), *cert. denied,* 341 U.S. 909 (1951).

103. *See* notes 19 to 25 *supra* and accompanying text.

104. *See* Letter to William P. Webb, cited by the FCC in 24 P & F RADIO REG. 1901, 1921–22 (1962) but otherwise unreported. The case there is not on all fours with the posed issue, but seems to say that a licensee must censor any script where only supporters of the candidate appear.

105. For a graphic illustration of how these laws differed, see Note, *Censorship of Defamation in Political Broadcasts: The Port Huron Doctrine,* 34 N.Y.U.L. REV. 127 n.54 (1959).

106. Most states have enacted "reasonable care" statutes and/or doctrines. Such statutes, for example, relieved the broadcaster from liability for broadcasting defamatory speeches if he used reasonable care in screening the speech, or if he cut it off as soon as a reasonable man might have thought the speech libelous. This would seem to be more rational than either the complete immunity doctrine or the strict liability theory.

formity in deciding which statements will be considered libelous. That is to say, since *WDAY* viewed the federal interest in free and open political statements as more important than the state interest in protecting its citizens from publication of the libel, why should the action against the utterer not be governed by substantive federal laws as well?[107]

E. Is There Really "No Obligation" to Carry Political Broadcasts?

Section 315 states that "No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate." On its face, this language would seem to have the effect of banning program content review by the FCC, since there would be no duty to carry political broadcasts. This, however, has not been the case. Despite the pellucid language of the statute, the Commision has informed Congress[108] that it has the power as well as the duty to review the licensee's overall programming in renewal hearings and that political broadcasts, including section 315 speeches, will be considered:[109]

> [Section 315] does not provide that the licensee can ignore the public interest and arbitrarily refuse to serve the needs of his area as to political broadcasts. Rather, it seems to be directed to making clear that while a licensee has an *obligation* to other legally qualified candidates for office if he presents one candidate for that office, he has no such obligation with respect to that first candidate; on the contrary he can use his judgment as to whether there is an interest in affording time to the particular campaign as against other political contests, and as to any other programming considerations that may be pertinent.

The Commission thus reaffirmed a position stated in the dicta of several decisions,[110] notwithstanding the fact that Congress has specifically rejected the idea that a station should be a common carrier under section 315 in order to afford the station an opportunity to refuse to

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107. To the extent that the law of libel is changed by the doctrine of the *New York Times v. Sullivan* case, these statutes would be outmoded; but *WDAY* apparently eliminated even malicious publication as a grounds for action against the broadcaster, a step which the Court refused to take in *New York Times v. Sullivan*. *See* Snyder, *Liability of Station Owners for Defamatory Statements Made by Political Candidates,* 39 VA. L. REV. 303 (1953).

108. Obligation of Licensee to Carry Political Broadcasts, 25 P & F RADIO REG. 1731 (1963).

109. *Id.* at 1733. *But see* John B. Commelin, 19 P & F RADIO REG. 1392 (1960), where a broadcaster's refusal to sell any time to any candidate during a United States Senate primary race was upheld. On the other hand, Newton Minow, former chairman of the FCC, has said, "I still think a broadcaster is obliged to carry political discussion on the air if he is to serve the public interest." N. MINOW, EQUAL TIME 28 (1964).

110. *See* Loyola University, 12 P & F RADIO REG. 1017 (1957); City of Jacksonville, 12 P & F RADIO REG. 113 (1957); KWFT, Inc., 4 P & F RADIO REG. 885 (1948); Homer P. Rainey, 3 P & F RADIO REG. 737 (1947); E. A. Stephens Broadcasting Co., 3 P & F RADIO REG. 1 (1945). *See also* Albuquerque Broadcasting Co., 3 P & F RADIO REG. 1820 (1946).

carry *any* political broadcasting at all.[111] On the other hand, the Commission has never failed to renew a license where the only ground for complaint was noncompliance with section 315.[112]

II. WHITHER EQUALITY?

It seems abundantly clear that section 315 does not fully serve the purposes it was designed to serve. The amendments have only intensified what was already an unclear situation. The pertinent question thus becomes — what can be done? Four possibilities are usually suggested, and they reach from one extreme of the spectrum to the other: (a) complete repeal with no further statutory regulation; (b) repeal and replacement of section 315 with application of the "fairness doctrine" to all questions; (c) limitation of section 315 to "significant" parties as determined by past performance; (d) mandatory free time to all parties.

A. THE CASE FOR REPEAL OR REPLACEMENT

The case for complete repeal or modification of section 315 normally centers on several arguments: (1) inordinate cost to the broadcaster of giving free time to all candidates; (2) lack of necessity for strict rules in an industry which now recognizes its responsibilities; (3) detriment to the minor parties intended to be protected by the provision; and (4) the philosophical indefensibility of regulation of broadcasting, when other monopolies are not regulated.

None of these factors can be dismissed summarily. Undoubtedly it is costly to grant sustaining ("free") time.[113] Testimony before the Senate Subcommittee on Communications indicates that during the 1960 Presidential campaign networks alone "lost" well over $4,000,000 in sustaining time.[114] However, the performance of a public duty

111. 67 CONG. REC. 12502–12505 (1926). *See also* Friedenthal and Medalie, *The Impact of Federal Regulation on Political Broadcasting: Section 315 of the Communications Act*, 72 HARV. L. REV. 445, 476–78 (1959).

112. Controversial Issue Programming — Fairness Doctrine, Letter to Hon. Oren Harris, Chairman, Committee on Interstate and Foreign Commerce, United States House of Representatives, 3 P & F RADIO REG. 2d 163 (1963). *See also* McBride Industries, Inc., 3 P & F RADIO REG. 2d 169 (1963); Andrew B. Letson, 3 P & F RADIO REG. 2d 173 (1962). Five per cent of all broadcasters failed to carry any political broadcasts during 1962. *See Equal Time Hearings, supra* note 14, at 1.

113. The equal opportunities language of § 315 does not, of course, require a licensee to give *free* equal time to a candidate whose opponent has paid for his. Thus, if *A* appears on a purchased time slot, the licensee does not have to grant *B* free time equal to *A*'s; the only requirement is that he offer *B the same amount of time at the same rate of compensation.* Many of the more difficult cases, however, have involved gratuitous appearances (witness the *Lar Daly* case itself), and thus have led to some confusion.

114. Although there appear to be no direct figures available, comparison of the tables in the FCC Report to the Congress, reprinted on pages 12–31 of the *Equal Time Hearings, supra* note 14, seems to indicate that, during 1962, television stations throughout the country, in all elections, gave some 800 hours of free time to candidates, worth approximately $500,000; AM stations offered over 2600 hours of sustaining time, worth approximately $240,000; and FM stations lost approximately $1500 in revenue through affording some 500 hours of free time. These figures, of course, are approximate and cannot take into account various factors which might raise or lower drastically the costs here mentioned.

The figures for the networks may be derived from estimates that coverage of the "Great Debates" cost each network roughly $600,000 of television time. NBC

voluntarily accepted at the time of the granting of the license cannot be foregone because of cost. Moreover, the financial loss, taken in perspective, is not that great; the requirement operates, in practice, for only two to three months in every two year period. Surely this is not an overwhelming burden.

While it cannot be doubted that broadcasting is a far more mature industry than it was in 1927 when the provision was first enacted, it may be doubted whether outright repeal is warranted. Complaints still are lodged; decisions are still necessary. This fact alone bespeaks the need for some legislative overview.

The third argument is much more potent and has been succinctly stated as follows:[115]

> [T]he position of the spokesmen for the minor parties and candidates is less well founded. It could well be argued that they suffer more than anyone else from the operation of 315 as presently worded and interpreted. Both major parties can have access by right of demonstrated political importance and depth of purse. But minor parties have comparatively little chance, and a standard of equality that encompasses all of them is sure to hurt the more important and newsworthy among them. . . . [T]he better ones have less opportunity to get free time than they would if 315 were repealed or modified.

Equal time is sometimes attacked at its very roots. Thus, Richard Salant has written that "No new-born idea has a right to public acceptance or to equal public attention and press exposure. But each does have a right to try to gain that attention and exposure without legislative obstacles to growth."[116]

Mr. Salant further believes that regulation of political broadcasting is discriminatory. We do not require railroads, which are regulated as common carriers in the public interest, he says, to give free passage to candidates, nor do we demand that other industries controlled by government similarly acquiesce in lower rates or free service. How-

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lost an additional $1.1 million. If this is any indication of the cost to the other networks, the figures supplied are eminently conservative. *See Equal Time Hearings* 241. *See also Hearings Before the Communications Subcomm. of the Comm. on Interstate and Foreign Commerce*, 87th Cong., 1st Sess. 41, 68 (Senate 1961).

115. Thomson, *Television, Politics and Public Policy*, 8 PUBLIC POLICY 368, 390, 403 (1958). However, FCC Chairman E. William Henry, testifying before the Senate Subcommittee on Communications in 1963, testified that "the fact that there were three or more candidates, and 315 was in effect, did not seem, at least statistically, to prevent the broadcasters from giving at least as much time as they did where there were only two candidates and they could have given all they wanted theoretically." *Equal Time Hearings, supra* note 14, at 71. In fact, the chairman testified, the figures showed that "there was a slightly greater percentage of stations giving free time in the multicandidate states." *Id.* at 79. Minor parties seem to have been the victims when Congress suspended § 315 in 1960. Lawrence Speiser, testifying at the same hearings, averred that the "free time they [the networks] gave in 1960 . . . was just about the same as the amount they gave in 1956 [when § 315 was in force]. But the time they gave to all of the minority parties on radio was one-fourteenth as much [as in 1956] and as for television it was one-eighth as much." *Id.* at 138. These figures were disputed by Frank Stanton, CBS president. *Id.* at 220–42.

116. Salant, *Political Campaigns and the Broadcaster*, 8 PUBLIC POLICY 337, 362 (1958).

ever, surely one may easily distinguish between the two types of activities simply on the basis of their respective effects on the campaign. Salant's argument, of course, is basically an equal protection argument. But, as has been stated so many times that authority need not be cited, Congress need not regulate all evil-doers to assure that its laws are declared nondiscriminatory. The regulation is clearly reasonable, and the class defined truly separable. In short, a reasonable basis for the difference in treatment exists, and therefore no "invidious discrimination" is present, and the equal protection argument must fail.

Another aspect of the "discriminatory" argument relies on the analogy to a free press. We need not pause here to rehash the question of whether the Commission should be merely a "traffic cop of the ether"[117] or whether in fact the newspaper industry is basically different from that of broadcasting. The remarks of Senator Howell, one of the key supporters of the 1927 Radio Act, focus on the difficulty quite readily:[118]

> Are we to consent to the building up of a great publicity vehicle and allow it to be controlled by a few men and empower those few men to determine what the public shall hear?
>
> It may be argued that we do that with newspapers. Yes, that is true; but anyone is at liberty to start a newspaper and reply. Not so with a broadcasting station.

The contention is often made that section 315 should be replaced by wholesale application of the "fairness doctrine." This argument ignores the difficulties inherent in the amorphous nature of the latter concept. As the next section indicates,[119] section 315 problems arise in contexts which demand quick, almost formula answers; areas where the "fairness doctrine" is applied currently normally do not call for such prompt response. "Equal time" affords such a formula; the concept of "fair" time, undefined and undefinable except on a case-by-case after the fact basis, does not. The converse is likewise true. If the "fair" time concept is difficult to apply in definite factual settings, it is especially difficult to predict the results, in terms of the amount of time which the Commission would require, prior to the case itself and its resolution. Thus, the "fairness doctrine" lacks the second attribute of the "equal time" concept: predictability.[120]

B. THE CASE FOR LIMITATION — "PERCENTAGE PARTIES"

Still others have proposed that section 315 should be limited in some way by the percentage of the vote received in previous elections.[121]

117. This question was put to rest, legally at least, in National Broadcasting Co. v. FCC, 319 U.S. 190 (1943).

118. 67 CONG. REC. 12503 (1926) (Remarks of Senator Howell).

119. *See* notes 140 to 142 *infra* and accompanying text.

120. It may be that the Commission is no longer predictable, but that fault is not inherent in § 315.

121. For a discussion of this suggestion as well as others, see Friedenthal and Medalie, *The Impact of Federal Regulation on Political Broadcasting: Section 315 of the Communications Act*, 72 HARV. L. REV. 445 (1959). At least one writer has suggested such a percentage plan. *See* Derby, *Section 315: Analysis and Proposal,*

This, it may be noted, is the system used by the BBC. The proposal, however, ignores the point that most of the fringe party candidates who have had Presidential campaigns of any size, Theodore Roosevelt, Robert LaFollette, and Strom Thurmond, for example,[122] would have been excluded by such a requirement, since these parties arose from sudden splits within the major parties rather than from prolonged existence. The case against such a plan, operating *in vacuo* and without a minimum guide, has been well put by Richard Salant:[123]

> It is doubtful that the difficulties can yield to satisfactory solution for they seem to be inherent in any attempt to define in advance who is a major candidate and what is a major party. American politics is, and should be, too volatile and dynamic to permit these attempts to succeed.

C. THE CASE FOR MANDATED FREE TIME

As we have previously noted, section 315 does not require a licensee to give free sustaining time to an opponent of a candidate who has appeared in a purchased time slot; it requires only that the licensee offer the opponent the same amount of time for the same rate. The rising costs of political broadcasting in political campaigns[124] have led many to question the feasibility of this plan. Senator Clark has recently proposed an amendment to section 315 which would require that the holder of a license "make available to candidates for Federal, State, and (to the extent feasible) local public office free broadcast time on a fair and equitable basis."[125] Others have reached the same result on a philosophical level: "It is the duty of the state to foster minority views in the face of both majority apathy and hostility."[126] The proposal has been attacked as a "discriminatory tax"[127] which would confiscate "manpower, equipment and investments of millions of dollars."[128]

The FCC has, indirectly, recognized the desirability of mandated free time in other areas. Thus, such free time is now required by Commission regulation under the "individual attack doctrine" of the "fairness doctrine." Under that rule, a licensee must give equal time (or fair time) to a person who is individually attacked on any program

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3 HARV. J. LEGIS. 257 (1966). In fact, Senate Bill 3171, introduced in 1960, would have required equal opportunities for only those candidates whose parties received 4% or more of the popular vote in the previous election. The bill died quickly.

122. Or Governor Wallace?

123. Salant, *supra* note 116, at 362.

124. Senator Clark has stated that total costs for political broadcasting in a non-presidential year rose from $20 million in 1962 to $32 million in 1966. *1967 Hearings, supra* note 7, at 188–89.

125. S. 1548, 90th Cong., 1st Sess. (1962). The specifics of the system would be left to the FCC.

126. Blaine, *Equality, Fairness and § 315: The Frustration of Democratic Politics,* 24 MD. L. REV. 166, 178 (1964).

127. Testimony of Bruce Dennis, President of Radio-TV News Directors Association, *1967 Hearings, supra* note 7, at 383–84.

128. Testimony of NBC President Julian Goodman, *1967 Hearings, supra* note 7, at 165.

by any speaker, whether that speaker appeared on a sponsored program or on sustaining time.[129] Moreover, while the vitality and effect of the Commission's new rulings under the fairness doctrine on cigarette commercials is not yet clear, these rules would also seem to have the effect of requiring free time to respond, even to sponsored programming, if necessary.[130]

If free time may be commanded for personal attacks, or to protect the listener's lungs, it should be well within the power of the Commission, and certainly of Congress, to require such a concession in the case of political broadcasting. It is true, of course, that the legislative history will not support the proposal for free time.[131] Mass communication is no longer a luxury of politics; it is often the very essence. Radio and television appear to command more attention than the other forms of news information combined. Assuming that the FCC should to some extent control programming and that the government should to some degree be interested in the quality of matter that is disseminated by its licensees, why is it not possible, in fact plausible, to argue that section 315 should be used to increase political awareness of all parties? It is conceded that the first amendment prohibits control of the press, but have we not already discarded the notion that radio and television are completely protected by this amendment? And if this is true, why should it *not* be the duty of the government to guarantee the right of free access to all parties?

As an ideal, mandated, or even subsidized, free time might be the ultimate solution. For the present, however, this ideal is incapable of being realized. Moreover, some limit would clearly have to be drawn on the *amount* of time thus set aside; no such limit has yet been suggested.[132]

III. THE REGULATORY BACKDROP

Regardless of which of these alternatives, if any, is ultimately selected to solve the dilemma, one thing is clear — enforcement of that standard will be the job of the FCC. Yet, as this article has attempted to illustrate, the Commission has often failed to enforce the present standards in any meaningful way. New methods — and new sanctions — are called for.

A. NEW METHODS

The primary method presently used for interpretation and enforcement by the FCC is the issuance of advisory opinions. While the Commission officially states that it "limits its interpretative rulings or

129. It would not necessarily oppose such a view, however. *See* discussion note 4 *supra* and accompanying text.

130. 36 U.S.L.W. 2047 (1967).

131. FCC Document 67-641, June 2, 1967, reported at 35 U.S.L.W. 2731 (1967).

132. Senator Clark's bill is openended, leaving this task to the Commission with no guidelines whatever. This is a glaring weakness of the bill.

advisory opinions to situations where the critical facts are explicitly stated without the possibility that subsequent events will alter them,"[133] the policy is not uniformly followed.

This apparent over-reliance on advisory opinions need not be. The Commission clearly has rule-making power in connection with the equal time provision. It is explicitly granted such power in the section itself.[134] Moreover, it is clearly the intent of Congress that the Commission utilize this power:[135]

> The Committee wants to make it clear that it agrees with the statement contained in Commissioner Fred Ford's letter to Senator John O. Pastore dated June 24, 1959, that the committee fully intends for the Commission to exercise the rule making authority in section 315(c) on questions arising under the provisions of this bill and relating to the details concerning programs exempt from the operation of section 315(a).

To the extent that the natural increase in the FCC's workload at election times tends to hinder FCC efforts to adjudicate complaints before election day has passed, the exercise of its rule-making power would ease this burden, since this power can be exercised during the time between elections, while adjudications arise only during election periods. Moreover, rule-making as a method of achieving a regulatory system is preferable to ad hoc adjudication, since legislative rules are arguably promulgated with a more acute understanding of the problems and ramifications involved. Furthermore, under the FCC type of statute, such rules have the force of law.[136] The scope of judicial review would therefore be narrowed, but the uncertainty now inherent in the regulatory scheme would be mitigated.[137] No system, however,

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133. Pierson, Ball and Dowd, 24 P & F RADIO REG. 1901, 1925 (1958). Although the Commission is reluctant to advise a station whether the proposed appearance of a candidate will create an equal time obligation (*See, e.g.*, Fisher, Wayland, Duvall and Southmayd, 1960, reported in the *Final Report on Freedom of Communications of the Subcomm. on Communications of the Senate Commerce Comm.*, Part V, 87th Cong., 1st Sess. 255 (1962)), after a candidate has appeared, the Commission has shown no hesitancy in informing the broadcaster at that time whether he should give equal time to other candidates.

134. 48 Stat. 1088 (1934), 47 U.S.C. § 315(c) (1964).

135. S. REP. No. 562, 86th Cong., 1st Sess. 12 (1959). The Commission has just recently used its rule-making power to "codify" its "personal attack" doctrine of the "fairness doctrine," which specifies that if a licensee allows a speaker to directly impugn the personal integrity of another individual, the attacked person may demand free time to respond. 36 U.S.L.W. 2047 (1967).

136. Rules promulgated under specific power granted expressly in enabling legislation have been dubbed "legislative rules" by Professor Davis. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 5.03 (1958). These rules have the force and effect of legislation and may not be overturned, as may interpretative rules, unless they are violative of constitutional doctrines.

137. In Red Lion Broadcasting Co. v. FCC, 35 U.S.L.W. 2287 (D.C. Cir. 1966), the D.C. Circuit recently held that advisory letters are not "final orders" and hence not reviewable. Judge Fahy, dissenting, argued that the letter "placed Red Lion under obligation to comply as directed by the Commission. . . ." *Id.* at 2287. The dissent's position is clearly correct, especially in view of Frozen Food Express v. United States, 351 U.S. 40 (1956) (which held that an ICC "order" is reviewable). The Supreme Court itself has denied certiorari in one case involving such letters, Goldwater v. FCC, 379 U.S. 893 (1964), but the two dissenting judges did not indicate that lack of jurisdiction was the reason for denial. Moreover, both the Fifth

can safely predict the various hybrids which may arise. When situations arise not covered by existing rules, advisory opinions could be issued.

Any regulatory system must have as its objectives at least two goals: (1) predictability, and (2) effective and immediate enforceability. The latter is especially important in this area because of the glaring inadequacy of post-election relief. There is no remedy in law or equity, aside from the radical one of upsetting the election, which will fully compensate the defeated candidate.[138] Resort to rule-making, in addition to increasing the predictability of Commission action, would aid in assuring immediacy of enforceability. This is not to suggest that the Commission has been slow to act on most equal time complaints. To the contrary, the record demonstrates a growing capacity for quick action.[139] However, improvement is possible and more frequent rule-making by the Commission will undoubtedly expedite the achievement of the stated objectives.

B. NEW SANCTIONS

Notwithstanding the Commission's strong words on the responsibilities of the broadcaster,[140] no licensee has ever been disciplined for failure to comply with section 315. In fact, despite the existence of the "fairness doctrine" for over fifteen years, the Commission took steps only recently to enforce the dictates of that doctrine.[141] The record is hardly one which would breed respect for the statements of the Commission.

In the past, lack of enforcement may have been caused, or at least excused, by an inability of the Commission to impose fitting sanctions. The Commission has long had the power to deny license renewals and to revoke licenses.[142] But these powers have not been invoked for violations of section 315, and probably rightly so, since they are much too harsh for the offense. They would result in the public's being denied a useful service for one violation; the punishment would clearly be disproportionate to the crime.

Recently, the Commission has been equipped with more appropriate enforcement powers. A Complaint and Compliance Division has been added which measures a licensee's performance against his promises. In 1960, the Commission was given authority to levy fines for failure to observe a Commission cease-and-desist order.[143] And

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and Seventh Circuits have held such a letter reviewable. Fadell v. FCC, 25 P & F RADIO REG. 288 (7th Cir. 1963); Brigham v. FFC, 276 F.2d 838 (5th Cir. 1960). *See also* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 4.10 (1958).

138. Private law usually aims at the compensatory; the punitive, however, can at times be just as potent in effectuating social policy.

139. N. MINOW, EQUAL TIME 31 (1964): ". . . the speed with which the FCC today processes political complaints is jet-propelled when compared to the red-taped procedures that frustrated broadcasters and politicians in 1952 and 1956."

140. *See* Obligation of Licensees to Carry Political Broadcasting, 25 P & F RADIO REG. 1731 (1963).

141. *See* United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966).

142. *See* 44 Stat. 1088 (1934), 47 U.S.C. §§ 307, 312(a) (1964).

143. 44 Stat. 1088 (1934), *as amended*, 74 Stat. 894 (1960), 47 U.S.C. § 503(b) (1964). Currently, this sanction may not be exercised until after a "hearing," which

the superficially low statutory maximum of $1000 on any fine serves to be no bar to the effectiveness of the sanction, since every day that the violation continues constitutes a separate offense.

While these remedies may be helpful, they are not sufficient. As the law now stands, an individual action for damages against a station for violation of section 315 will not lie.[144] If an action for damages were allowed, probabilities of greater compliance with the section's commands would be increased. It is submitted that such a change should be forthcoming.

IV. SECTION 315: A SUGGESTION

None of the proposals outlined in section II, or the reasons which prompted them, are to be dismissed lightly. Yet each is stated by its proponents as the "only" answer to what is clearly a highly complex and controversial issue. In the hope of not appearing too naive, the author would suggest that several of these alternatives might be combined to produce a reasonable result. It is possible that this suggested answer combines only the worst elements of each proposal; on the other hand, it may appear to solve the dilemmas posed by the extreme views, while not sacrificing, in principle, the values they cherish. With this apology, let us state the proposal.

It seems clear that, at the present time, there are two major parties in the United States. It is submitted that this fact should be recognized as a fact and that, as between these two parties, the strict requirements of equal time should be maintained; in addition, the amendments of 1959, *save for the one exempting newscasts,* should be repealed. Thus, absolute equality for all candidates of these parties would be required, whether they appeared on debates, panel shows, variety shows, news interviews, or whatever.

As to candidates of other parties, the following proposal is made: that no candidate, whatever his party, whatever his past record, be denied the right to an amount of time equal to a specific fixed percentage (perhaps 50%) of that enjoyed by the major parties on all non-exempt shows.[145] Thus, if President Johnson appears for a half

cannot be held less than thirty days after notice. 48 Stat. 1086 (1936), *as amended,* 66 Stat. 716 (1952), 74 Stat. 893 (1960), 47 U.S.C. § 312(c) (1964). This notice requirement would, of course, impair the efficacy of such a procedure. But it could be applied to complaints early in the campaign, since the "hearing" language need not be interpreted to be an "evidentiary" hearing. Moreover, an amendment to the provision might well be in order.

144. Daly v. West Central Broadcasting Co., 201 F. Supp. 238 (S.D. Ill.), *aff'd,* 309 F.2d 83 (7th Cir. 1962). Although the *West Central* decision clearly stated that there was no right to bring a private action under § 315, there is interesting language in the lower court's opinion, not commented upon by the court of appeals, which might provide a springboard. The district court stated: "no provision of the Act creates, either by expression or necessary implication, any private right of action which is cognizable, *in the first instance,* by the district court." *Id.* at 241 (emphasis added). Combined with the principle that there must be exhaustion of administrative remedies, the court's statement might be construed as indicating a "primary, but not exclusive" jurisdictional holding. And perhaps it would be wise to allow a private action under § 315, for a vindication of the public's rights as well as of those of the candidate himself. *Cf.* Singer, *Church of Christ: Standing and the Evidentiary Hearings,* 55 GEO. L.J. 264 (1966).

145. The figure, of course, is not static; it is merely a suggestion for a base line.

hour on "Meet the Press," the Vegetarian candidate[146] should be allowed to express his views, on the same show, for a total of at least fifteen minutes. Thus far, at least, the desirable aspects of an objectively ascertainable standard would be maintained. Also maintained would be an assurance, for every candidate of any party, of some time in which to expound his views. While complete equality would not reign, substantial equality would be assured.

These are minimum standards. It is also suggested that an objectively definable scale be enacted which would increase the amount of time to which a candidate would be entitled based on the showing of his party in the last race of the same nature. For example, the figure of 10% of the amount of time could vary with a fixed percentage, say 4%, of the past vote.[147] Thus, the following scale would prevail:

Percentage of Total Vote Received in Last Election	*Percentage of Time Used By Major Parties to Which Minor Party Entitled*
0%	50%
1 – 3.99%	60%
4 – 7.99%	70%
8 – 11.99%	80%
12 – 15.99%	90%
over 16%	100%

The proposed scheme would have many advantages. It would provide objective standards for immediate enforceability and would recognize the right of minority candidates to the opportunty for exposition of their ideas, while at the same time tempering this right with the recognition of the costs to broadcasters of making this time available. It would further provide for a "proportionate" equality based on past performance, thereby differentiating to some extent the "legitimate"

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146. This assumes that no federal standard for candidacy is enacted. *See* notes 12 to 14 *supra* and accompanying text. As noted there, many of the problems the broadcaster faces can be attributed not to the FCC, but to the inaction of legislatures, state and federal, in defining who is a candidate. It is with these bodies, not the Commission, that many of the complaints should be lodged.

147. A scheme much like the present one was suggested in Derby, *supra* note 67, and adopted in rough form in S. 2090, 90th Cong., 1st Sess. (1967) (introduced by Senator Scott on July 12, 1967). But in both cases, the minimum level, 1/30 in Derby, 5% in the Scott proposal, seems much too low. If one accepts the normal 30-minute news interview program as a base figure (assuming the repeal of the exemptions), Senator Scott would allow the minor candidate 90 seconds; Mr. Derby would be even more pernurious, granting only one minute — no more — to expound views on all the various social and economic questions confronting the nation. Mr. Derby suggests that ability to muster more than a given per cent of voters on a petition should also be considered; this is not reflected in Senator Scott's bill. While the suggestion is reasonable, it seems to be the result of an attempt to mitigate the harshness of the low minimum percentage figures in Mr. Derby's proposal; therefore, if the 50% minimum figures here suggested be accepted, petition power should become virtually irrelevant. Neither proposal indicates whether broadcasters could, with immunity, provide more than the stipulated amount. It is submitted that this freedom should be expressly provided.

third parties from the "crackpots," and would permit the former more opportunity to grow in accord with their popular acceptance.[148]

There are faults, of course. The proposed plan would, to some extent, penalize the newly sprung minority party which may in fact be a genuine contender, or at least a potential spoiler. But here, it should be noted, the proposal deals only in minimal figures; if the broadcaster, exercising his honest news judgment, wishes to give more than the minimum, he is free to do so without incurring liability to other parties. While the plan provides an objective standard, it is also open to criticism on the ground that it accords the broadcaster too much freedom in the exercise of his subjective judgment. But this is at least bounded by some guidelines, and, in fact, broadcasting has come of age to warrant such discretion. At the very least, it is hoped that the proposal will stimulate some re-thinking on the part of those who have already refused, time and time again, to budge from positions long deemed unrealistic.

148. It might be possible to define a "major party" as one which obtains a minimum fixed percentage of the vote in three successive elections. This would allow "minor parties" to attain legally equal status with the current "major parties."