

THE END OF TIME FOR EQUAL TIME?: REVEALING THE STATUTORY MYTH OF FAIR ELECTION COVERAGE

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INTRODUCTION

“The news is whatever I say it is.”¹

For the Federal Communications Commission (“FCC”), newscaster David Brinkley’s once tongue-in-cheek remark is a reality. As the agency charged with enforcement and interpretation of the Communications Act of 1934² (“the Act”), which also authorized its creation, the FCC makes determinations that affect our local and national election coverage. In general, the purpose of the Act was to encourage socially responsible use of the airwaves by broadcasters, who were viewed as the gatekeepers of this very valuable resource.³

Section (a) of the Act contains the “equal time rule,” which requires that stations that permit candidates to appear on their airwaves must allow opposing candidates the same privilege.⁴ Originally, the rule stopped there. However, in 1959, in response to an FCC ruling that candidate appearances on news programs would trigger the equal time requirements of the Act,⁵ Congress created four explicit exemptions from equal time for news-oriented broadcasts focusing on political candidates. These exceptions included:

- (1) bona fide newscast[s],
- (2) bona fide news interview[s],

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1. Alberto Bernabe Riefkohl, *Freedom of the Press and the Business of Journalism: The Myth of Democratic Competition in the Marketplace of Ideas*, 67 REV. JUR. U.P.R. 447, 458 (1998) (citing Ford Rowan, *News Media Responsibility—A Program for Improvement*, 17 WILLAMETTE L. REV. 231, 231 (1980)).

2. 47 U.S.C. § 315 (2000). One judge has suggested that provisions in § 315(e) of the Act requiring broadcast licensees to collect and publicly disclose records of requests for air time for political advertisements are unconstitutional. *McConnell v. Fed. Election Comm’n*, 251 F. Supp. 2d 176, 374-75 (D.D.C. 2003) (Henderson, J., concurring). However, the Supreme Court disagreed with this contention, finding that § 315(e) does not violate the First Amendment. *McConnell v. Fed. Election Comm’n*, 124 S. Ct. 619, 639-40 (2003). Further, this Note deals exclusively with § 315(a) of the Act.

3. Reed E. Hundt, *A New Paradigm for Broadcast Regulation*, 15 J.L. & COM. 527, 528-29 (1996) (discussing potential FCC strategies to ensure that broadcasters are operating in the public interest).

4. “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” 47 U.S.C. § 315(a).

5. *CBS, Inc.*, 26 F.C.C. 715, 742-43 (1959).

- (3) bona fide news documentar[ies] (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), [and]
- (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto).⁶

The exceptions were enacted to “make it possible to cover the political news to the fullest degree,”⁷ and to “preserv[e] licensees’ traditional independent journalistic judgment.”⁸ Since the creation of these exemptions, the FCC has reviewed many requests from various media outlets to determine whether certain programs constitute “bona fide news” as described in the four categories and are therefore exempted from equal time requirements.

Most recently, the FCC considered and granted an exemption to Infinity Broadcasting Operations, Inc., broadcaster of *The Howard Stern Show*, finding that Stern’s radio program met the requirements of a bona fide news interview program.⁹ In so doing, the FCC followed several similar rulings that exempted non-traditional news shows, effectively whittling away at the applicability of the doctrine.

The trend created by these rulings highlights a conflict created by the equal time rule. Clearly, as more shows are exempted, fewer have to comply with equal time and unequal media coverage for candidates multiplies. Allowing the FCC, as an administrative body, to make value judgments when applying the exemptions created by Congress does and will continue to result in anomalous outcomes regarding the exemptions.

By reviewing various decisions of the FCC and federal courts, this Note addresses the current state and the apparent demise of the equal time rule. Part I discusses the history and the contents of the Communications Act. Part II reviews and compares the various interpretations and criticisms of the equal time provisions of the Act by the FCC, the courts, and commentators. Part III explores how those interpretations have resulted in numerous exceptions and loopholes far beyond those explicitly stated in the statute and Part IV advances suggestions about the preservation or abrogation of the doctrine. Ultimately, this Note concludes that in its current state, the equal time rule is little more than an administrative burden on both the FCC and media lawyers, and should either be abandoned or radically overhauled to meet the modern challenges posed by the

6. 47 U.S.C. § 315(a)(1)-(4).

7. Thomas Blaisdell Smith, Note, *Reexamining the Reasonable Access and Equal Time Provisions of the Federal Communications Act: Can These Provisions Stand if the Fairness Doctrine Falls?*, 74 GEO. L.J. 1491, 1498 (1986) (quoting 105 Cong. Rec. 14,451 (1959) (remarks of Sen. Holland); see *id.* at 1493-94 (discussing constitutional challenges to reasonable access and equal time and concluding that neither “threaten so substantial a chill on political speech as to warrant invalidation,” but that the availability of electronic media has diminished the *compelling* need for equal time) (emphasis added).

8. *Id.* (quoting Kennedy for President Comm. v. FCC, 636 F.2d 417, 424 (D.C. Cir. 1980)).

9. Infinity Broad. Operations Inc., 18 F.C.C.R. 18603, 18604 (2003).

abundance of media outlets in today's society.

I. THE ACT

A. *A Brief History of the Act*

Historically, all broadcast regulation has been motivated by a “scarcity of the frequencies” theory.¹⁰ Although the merits of this rationale are debated,¹¹ the idea that “the radio spectrum simply is not large enough to accommodate everybody”¹² is responsible for the notion that at least some regulation is necessary to ensure fair use of this limited and valuable public resource. Since broadcast frequencies are scarce, those who control access to them are viewed as being responsible for what those who are not in control get to see and hear. This notion “that the [broadcast] licensee should operate as public trustee explains much of the panoply of regulations to which . . . broadcasters were subject . . . from approximately the end of World War II until very recent times.”¹³

One major area of regulation resulting from the scarcity doctrine is election coverage. As an initial matter, there is no common law duty of a television broadcaster to treat all political candidates alike, nor a right of candidates to be treated alike.¹⁴ Rather, the rights and obligations of both broadcasters and the public have been created by statute. The regulations of section 315(a) of the Act originated in section 18 of the Radio Act of 1927,¹⁵ which was intended to promote cooperation between public use and private control of broadcasting.¹⁶

10. Joel Rosenbloom, *The “Vast Wasteland” in Retrospect*, 55 FED. COMM. L.J. 571, 571-75 (2003) (discussing origins of the scarcity theory and noting that though it seems antique it has not yet been discredited).

11. William H. Read & Ronald Alan Weiner, *FCC Reform: Governing Requires a New Standard*, 49 FED. COMM. L.J. 289, 294-95 (1997) (outlining the “numerous problems with the scarcity rationale . . . not the least of which is the lack of scarcity”).

12. *NBC, Inc. v. United States*, 319 U.S. 190, 213 (1943).

13. THOMAS G. KRATTENMAKER, *TELECOMMUNICATIONS LAW AND POLICY* 147 (2d ed. 1998).

14. *Crommelin v. Capitol Broad. Co.*, 195 So.2d 524, 526 (Ala. 1967) (denying fraud action against broadcaster since there was no violation of any legal or equitable duty).

15.

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station, and the licensing authority shall make rules and regulations to carry this provision into effect

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Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162, 1166 (Feb. 23, 1927) (repealed July 16, 1947).

16. Angela J. Campbell, *Political Campaigning in the Information Age: A Proposal for Protecting Political Candidates' Use of On-line Computer Services*, 38 VILL. L. REV. 517, 538 (1993) (citing *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 104-05 (1973)).

Because the media was viewed as essential to distributing information and promoting political thought, Congress sought to limit private control of broadcasting that would permit censorship of opposing views, leaving citizens uninformed.¹⁷

Congress decided to revise the specifics of the equal time provision in 1959 in response to FCC rulings “requiring equal opportunity for rivals of incumbents whose activities had been the subject of routine news reporting.”¹⁸ Rejecting a proposal that would have characterized broadcasters as common carriers who were *required* to allow public access to the airwaves, Congress limited the equal opportunities obligation to apply only when other political candidates had already been permitted access to the station.¹⁹ Though the four statutory exemptions created the risk that broadcasters could abuse them to promote favored candidates during election coverage, Congress concluded that “[t]he public benefits [of dynamic coverage of political campaigns] are so great that they outweigh [sic] the risk that may result from the favoritism that may be shown by some partisan broadcasters.”²⁰ The exceptions were intended to “strike a balance between general interests in an informed public and more particularized concern with the accrual of special advantage or influence in the course of a political campaign.”²¹ The FCC “made clear during the legislative hearings that it preferred a bill which would enable it to define the exempt categories without reference to broadcaster’s motives, and to decide any cases solely by determining whether the program fell within its definition.”²² However, the legislative history also indicates Congress’ intent that “a program not be entitled to the exemption if it can be shown that the primary purpose of the broadcaster was other than the dissemination of news.”²³ Thus, it is clear that in the early years of the exceptions, Congress intended them to enhance election coverage and maximize the information received by the public. However, as this Note will discuss in Parts III and IV, it is questionable whether the exceptions have actually helped broadcasters fulfill this goal.

Congress suspended the equal time requirements in 1960 to permit the nation’s first televised presidential debates.²⁴ Because the exceptions were less

17. *Id.*

18. DONALD E. LIVELY, *ESSENTIAL PRINCIPLES OF COMMUNICATIONS LAW* 238 (1992).

19. Campbell, *supra* note 16, at 538-39.

20. Kyu Ho Youm, *Editorial Rights of Public Broadcasting Stations vs. Access for Minor Political Candidates to Television Debates*, 52 *FED. COMM. L.J.* 687, 695 (2000) (quoting S. Rep. No. 86-562, at 10 (1959)) (examining constitutional issues raised by *Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666 (1998), wherein the Supreme Court held that exclusion of a third party candidate from a debate was not a First Amendment violation).

21. LIVELY, *supra* note 18, at 238.

22. Recent Statute, *Federal Communications Act—Amendment Exempts Certain News Programs from Equal-Time Provisions*, 73 *HARV. L. REV.* 794, 795-96 (1960) (announcing statutory revision and noting that “[d]etermining the boundaries of the four excluded categories will be a difficult task for the FCC”).

23. *Id.* at 795.

24. Pub. L. No. 86-677, 74 Stat. 554 (Aug. 24, 1960).

than a year old at that point, they had yet to undergo enough interpretation to allow Congress to capitalize on their benefits immediately. The suspension “enable[d] Democratic and Republican Presidential candidates to debate without creating an obligation to provide time to other [candidates].”²⁵ Fifteen years later, the FCC categorically defined debates as “bona fide news events,” that would always be exempted from equal time.²⁶

From 1949 to 1987, the equal time requirement had a counterpart known as the “fairness doctrine,” which provided that broadcasters airing one side of a controversial issue must also provide equal time to opposing viewpoints.²⁷ The FCC ultimately abandoned the fairness doctrine, citing chilling effects on freedom of speech,²⁸ “despite a [1969] Supreme Court decision upholding the doctrine and legislation rushed through Congress . . . to make it an undeniable part of the Communications Act.”²⁹ Some commentators wonder why the equal time rule has not suffered a similar fate.³⁰

In the last several years, the equal time doctrine has virtually stagnated, serving only as a technical hurdle to broadcasters without having much effect on their substantive content or programming decisions. Its effectiveness as a promoter of public information is minimal at best.

B. *The Provisions of the Act, Defined*

1. “Legally Qualified Candidate”.—In a departure from the deference given

25. LIVELY, *supra* note 18, at 238.

26. Aspen Inst. Program on Communications and Soc’y, 55 F.C.C.2d 697, para. 21-29 (1975), *aff’d*, 538 F.2d 349 (D.C. Cir. 1976); see Paul B. Matey, *Abundant Media, Viewer Scarcity: A Marketplace Alternative to First Amendment Broadcast Rights and the Regulation of Televised Presidential Debates*, 36 IND. L. REV. 101, 104, 117-18 (2003) (concluding that federal oversight of televised debates is a necessary limit on networks’ First Amendment rights).

27. *Ackerman v. CBS, Inc.*, 301 F. Supp. 628, 632 (S.D.N.Y. 1969) (describing and applying the fairness doctrine).

28. Syracuse Peace Council, 2 F.C.C.R. 5043, para. 98 (1987).

29. WILLIAM B. RAY, FCC: THE UPS AND DOWNS OF RADIO-TV REGULATION 89 (1990). One author points out that the 1987 ruling was “just before Limbaugh inaugurated the Age of Rant Radio.” Patt Morrison, *Recent Conservative Outcry Reeks of Liberal Leanings*, L.A. TIMES, Oct. 14, 2003, at B3. That same year, President Reagan vetoed a legislative attempt to codify this doctrine. Robin R. Polashuk, *Protecting the Public Debate: The Validity of the Fairness Doctrine in Ballot Initiative Elections*, 41 UCLA L. REV. 391, 399-400 (1993). Both Presidents George H.W. and George W. Bush have threatened to veto such legislation should it be presented to them. *Id.*; Katherine Mangu-Ward, *Shut Up, They Explained*, THE WKLY. STANDARD vol. 9 (3) (Sept. 29, 2003).

30. Smith, *supra* note 7, at 1503; Michael C. Dorf, *Why U.S. Law May Keep the Terminator Off the Air Until After Election*, FINDLAW (Aug. 22, 2003), at <http://www.cnn.com/2003/LAW/08/22/findlaw.analysis.dorf.arnold/> (last visited Sept. 29, 2004). One former FCC insider predicts that “Congress, the courts, or the FCC itself under a different administration will resurrect the doctrine.” RAY, *supra* note 29, at 89.

to broadcasters in interpreting other provisions of the Act, “broadcasters are prohibited from exercising their own judgment as to who may be considered legally qualified.”³¹ As a general rule, determining whether a person is considered “a legally qualified candidate” depends on the law of the jurisdiction in which the person is running for office.³² To be a legally qualified candidate, a person must have “(1) publicly announced an intention to run for office, (2) [be] qualified by pertinent law to hold the office being sought, or (3) [have] made a substantial showing of being a bona fide candidate” by participating in campaign activities.³³ Write-in candidates who do not meet the requirements for appearing on the ballot may, in addition to the rules of their own jurisdiction, be required to make other showings such as election eligibility and proof of nomination by a commonly known and regarded political party.³⁴

In the case of a recall like California’s 2003 gubernatorial election, where the ballot first asks whether the incumbent should be recalled and then who the successor should be, *all* individuals appearing on the ballot, including the incumbent candidate, are considered legally qualified candidates.³⁵ However, the exception does not apply to candidates concurrently running in primaries for different parties because they are not yet considered “opposing” candidates, despite the fact that they are ultimately running for the same office.³⁶

2. “Use”.—The determination of whether or not a televised appearance is a “use” under the Act does not depend on whether or not the appearance is political in nature, since even nonpolitical appearances may be considered “uses” under the Act.³⁷ For example, during Ronald Reagan’s candidacy for the Republican Party nomination, the FCC determined that televising his movies would constitute a use that would entitle other candidates for the Republican nomination to equal time.³⁸

Initially, “use” was thought to be any appearance in which the candidate was

31. JOHN R. BITTNER, *LAW AND REGULATION OF ELECTRONIC MEDIA* 117 (2d ed.1994).

32. Eleanor Clark French, 40 F.C.C. 417, 418 (1964) (interpreting New York law to determine whether complaining candidate was legally qualified); Rady Davis, 40 F.C.C. 435, 435 (1965) (finding that candidate was not legally qualified since Kentucky election law did not permit write-in candidates).

33. LIVELY, *supra* note 18, at 237.

34. Frank J. Kuhn, Jr., 48 F.C.C.2d 433, 433 (1974).

35. Station KOAA-TV, Pueblo, Colo., 68 F.C.C.2d 79, 79-80 (1978) (declaratory holding) (holding, in case of first impression, that though recalls are generally not contemplated by the Act, when they include the question of who should replace the officeholder (if recalled) the incumbent would be disadvantaged if not considered a legally qualified candidate).

36. KWFT, Inc., 43 F.C.C. 284, 284 (1948) (holding that “while both primary . . . and general elections are comprehended within the terms of Section 315, such elections must be considered independently of one another and equal opportunities . . . need only be afforded to legally qualified candidates for the same office at the same election”).

37. Paulsen v. FCC, 491 F.2d 887, 891 (9th Cir. 1974).

38. Adrien Weiss, 58 F.C.C.2d 342, 342 (1976).

identifiable to the audience, even if he did not speak.³⁹ However, in 1991, the FCC re-examined that interpretation, and instead concluded that some degree of intent to “use” the media by making an appearance was necessary for the use to trigger equal time.⁴⁰ To reflect that idea, the FCC limited the definition of use to “only non-exempt candidate appearances that are controlled, approved, or sponsored by the candidate.”⁴¹ In so doing, the FCC pointed to the fact that the “plain language of the statute suggests the candidates’ tacit approved participation in the broadcast,” and that the “legislative history of Section 18 of the Radio Act . . . indicates that Congress primarily was addressing candidate-initiated appearances and speeches when enacting the equal opportunities requirement.”⁴² Therefore, the current standard for a “use” is “if a legally qualified candidate voluntarily appears as a performer, celebrity, or station employee in a non-exempt program, his opponents will continue to be entitled to equal opportunities.”⁴³ But if the appearance is involuntary, “such as in unauthorized, independently sponsored advertisements or rebroadcasts of appearances that were made prior to his attaining the status of a legally qualified candidate, [that] appearance would not constitute a use.”⁴⁴

Aside from the candidates’ intention for the appearance, the type and format of the program on which the candidate appears also affects whether or not the appearance is considered a use. The FCC has enumerated the following factors to be considered when determining whether a specific program provides the format for a use: (1) the format, nature, and content of the program; (2) whether the format, nature, or content of the program has changed since its inception, and, if so, in what respects; (3) who initiates the program; (4) who produces and controls the program; (5) when the program was initiated; (6) whether the program is regularly scheduled; and (7) if the program is regularly scheduled, the time and day of the week when it is broadcast.⁴⁵ Appearances on programs that are regularly featured by networks are more likely to be considered “uses” than, for example, a special feature that mentions a candidate for some reason other than his candidacy.

In addition, the duration of the appearance has to be “significant enough to activate the equal opportunity obligation.”⁴⁶ Appearances lasting only a few seconds “have been dismissed as inconsequential and not implicating the terms of the statute.”⁴⁷

3. *The Exceptions.*—“The question of what is a bona fide news program,

39. Nat’l Urban Coalition, 23 F.C.C.2d 123, 123 (1970).

40. Codification of the Comm’n’s Political Programming Policies, 7 F.C.C.R. 678, para. 33 (1991).

41. *Id.*

42. *Id.*

43. *Id.* at para. 34.

44. *Id.*

45. Use of Broad. Facilities by Candidates for Pub. Office, 24 F.C.C.2d 832, sec. III (1970).

46. LIVELY, *supra* note 18, at 237.

47. *Id.*

however, at a time when news and entertainment are often mixed in the same program is a subject of much debate in the communications industry.⁴⁸ As evidenced by several recent decisions, this determination remains one that sharply divides those with differing views of the FCC's proper role in regulating the media. The next portion of this Note clarifies the interpretations of each of the exemptions.

a. Exception 1: Bona fide newscast.—Similar to the determination of what constitutes a “use,” whether a program is considered a bona fide newscast seems to depend as much on its format as on its content. The FCC has stated that its inquiry focuses on a potential newscast’s subject matter, but whether it “report[s] about some area of current events, in a manner similar to more traditional newscasts.”⁴⁹ In relying on this criteria, the FCC is focused less on evaluating the quality or significance of the topics and stories selected, instead relying on good faith news judgment.⁵⁰ Critics argue that the “crossover these days between news shows and entertainment shows . . . is turning equal time into a meaningless irony.”⁵¹ However, one format in which no crossover is allowed is third-party produced newscasts created to promote a particular candidate; those programs are never considered bona fide newscasts.⁵²

b. Exception 2: Bona fide news interview.—The second exception to equal time that Congress created was for bona fide news interviews. In determining when this interview exception applies, the FCC looks to the format of the program on which the interview is aired. In so doing, it considers:

- 1) whether the broadcast is regularly scheduled[,] 2) whether the selection of the content, format, and participants of the program is under the exclusive control of the licensee and 3) whether determinations as to format, content, and participants are made in independent exercise of licensee’s news judgment rather than political advantage of any candidate.⁵³

48. Office of Int’l Info. Programs of U.S. Dep’t of State, *U.S. Radio and TV Stations Required to Give Equal Time*, ISSUES OF DEMOCRACY, Oct. 2000, at 83, available at <http://usinfo.state.gov/journals/itdhr/1000/ijde/cs322.13.htm> (last visited Sept. 29, 2004) [hereinafter ISSUES OF DEMOCRACY].

49. Paramount Pictures Corp., 3 F.C.C.R. 245, para. 7 (1988).

50. *In re Request of Access Hollywood*, 1997 WL 358720 (F.C.C. July 1, 1997).

51. Amy Wilentz, *Getting Along Famously; One Candidate’s White-hot Star Power make this an Election Campaign like no other*, L.A. TIMES, Sept. 28, 2003, at M6.

52. Codification of the Comm’n’s Political Programming Policies, 7 F.C.C.R. 678, para. 29.

53. Ishmael Flory, 66 F.C.C.2d 1047, 1047 (1976). The second circuit applied these factors in 1995, finding that an interview with an undeclared candidate for president where the tenor of the proceedings was as critical as it was flattering, where audience members asked questions in a manner wholly consistent with a typical news interview, and where the host repeatedly pressed the candidate for specifics during a question and answer segment was a bona fide news interview, notwithstanding a claim that network pursued a competitive advantage that compromised its news judgment. *Fulani v. FCC*, 49 F.3d 904, 912-13 (2d Cir. 1995).

Many programs, such as *The Howard Stern Show*,⁵⁴ *Access Hollywood*,⁵⁵ and *Politically Incorrect*,⁵⁶ are exempted in their entirety (rather than merely certain interview segments) under this exception. To be eligible, it is not necessary that program focus exclusively on current events, so long as it features bona fide interviews on a regular basis.⁵⁷ Exempting entire programs rather than individual segments from equal time requirements is one of the factors accounting for the deterioration of equal time. For example, although Howard Stern frequently has guests on his program, arguably the frequency of actual news interviews is fairly limited. However, following the September 2003 ruling, it appears that Stern never again has to comply with any equal time requirements, even if he were to suddenly shift his focus to hard-news, since the format, and not the contents of the program formed the basis of its classification as a bona fide news interview show.

c. Exception 3: Bona fide news documentary.—To determine whether a program falls under this exception, the FCC again looks to a number of factors, including (1) whether the appearance of the candidate was incidental to the presentation of the subject; (2) whether or not the program was designed to aid or advance the candidate's campaign; (3) whether the appearance of the candidate was initiated by the station on the basis of the station's bona fide news judgment that the appearance was in aid of the coverage of the subject matter; and (4) whether the candidate had any control over the format, production, or subject matter of the broadcast.⁵⁸

One common format for candidate appearances—debates—has specifically been found to preclude a program from being designated as a bona fide news documentary.⁵⁹ Therefore, under these factors, a documentary news piece on a specific issue could include various candidates' viewpoints without triggering equal time so long as the primary subject was the issue itself and the station had full control over the content.

d. Exception 4: On the spot coverage of bona fide news events.—This provision is most often applied to candidate press conferences and live coverage of debates. In specifically discussing press conferences, the FCC found that where a station makes a good-faith judgment as to the newsworthiness of the

54. In response to a request for a declaratory ruling by Infinity Broadcasting Operations Inc., the FCC relied on the following facts in determining that the Howard Stern Show is a bona fide news interview program: "the program is regularly scheduled; Infinity, which broadcasts the program, has control over all aspects of the show; Infinity's decisions on format, content, and participants are based on newsworthiness; and guests that happen to be political candidates are not selected to advance their candidacies." Infinity Broad. Operations, Inc., 18 F.C.C.R. 18603 (2003).

55. See *Access Hollywood*, 1997 WL 358720, at para. 5.

56. See *ABC, Inc.*, 15 F.C.C.R. 1355, 1359-60 (1999).

57. See *Multimedia Entm't, Inc.*, 9 F.C.C.R. 2811, 2811 (1994).

58. Declaratory Ruling Concerning Whether the Educ. Program "The Advocates" Is an Exempt Program Under Section 315, 23 F.C.C.2d 462, 462 (1970).

59. *Id.*

event and shows no favoritism toward any candidate, the broadcast of a news conference held by a candidate for public office, including an incumbent, is on the spot coverage.⁶⁰ The main criticism of this exception is that it does not require equal coverage of candidates who are not invited to participate in televised debates.⁶¹

C. Enforcement

Broadcasters are expected to comply with equal time requirements on their own volition. However, in the event of noncompliance, grievance procedures are available.⁶² Generally, a candidate must first make a request for equal time. Next, good-faith negotiations between the candidate and the station should occur, as candidates are encouraged to undergo negotiations before filing a complaint with the FCC, which must be filed prior to any court action on the matter.⁶³ After the FCC has made a ruling on the purported equal time violation, a proceeding to have the ruling reviewed may be brought in the appropriate circuit court of appeals.⁶⁴

The FCC has a variety of options for sanctioning a violation, including revocation of a station's broadcasting license (though this is unlikely for a minor equal time violation), cease and desist orders, or denial of a license renewal.⁶⁵ In extreme cases where there has been a willful and knowing violation of the Act's provisions or the FCC's regulations or orders, criminal sanctions are available.⁶⁶ However, there is no private cause of action for violation of equal time provisions,⁶⁷ which can leave candidates without a remedy should they incur any damages as a result of the FCC or a broadcaster denying their request.

60. *Chisholm v. FCC*, 538 F.2d 349, 353 (D.C. Cir. 1976). This ruling was later characterized as creating a two-part test for bona fide event programming: 1) whether the format of the program reasonably fit within the exemption category and 2) whether the decision to carry a particular event was the result of good faith news judgment, not partisan purposes. *A. H. Belo Corp.*, 11 F.C.C.R. 12306, 12308 (1996).

61. *Forbes v. Ark. Educ. Television Communication Network Found.*, 22 F.3d 1423 (8th Cir. 1994).

62. *Use of Broad. Facilities by Candidates for Pub. Office*, 24 F.C.C.2d 832 (1970).

63. The requirement that a candidate first exhaust administrative remedies has been enforced by courts. For example, a district court's refusal to rule on an independent political candidate's claim that an Arkansas state network improperly refused to grant him equal time because it was not first brought before the FCC was deemed proper by the Eighth Circuit. *Forbes*, 22 F.3d at 1427-28.

64. 47 U.S.C. § 402(b) (2000). These actions are not moot by virtue of the election having passed. *Flory v. FCC*, 528 F.2d 124, 127 (7th Cir. 1975).

65. 47 U.S.C. § 312; *id.* § 309(d).

66. *Id.* §§ 501-503.

67. *See Daly v. CBS, Inc.*, 309 F.2d 83, 85-86 (7th Cir. 1962); *Ackerman v. CBS, Inc.*, 301 F. Supp. 628, 631 (S.D.N.Y. 1969); *but cf. Weiss v. Los Angeles Broad. Co.*, 163 F.2d 313, 315-16 (9th Cir. 1947) (allowing action by candidate against radio station for deleting portions of speech, but dismissing for lack of factual support).

II. THE ACT INTERPRETED

A. *Court Interpretation*

As previously stated, courts have noted that the basic purpose of the equal time provision is to encourage the “full and unrestricted discussion of political issues by legally qualified candidates.”⁶⁸ Though nothing in the Act compels broadcasters to accept political advertisements,⁶⁹ “[b]roadcasters are not free to comply with the [e]qual [t]ime [r]ule by ignoring political broadcasting altogether.”⁷⁰ Therefore, while broadcasters need not allow advertising in all political races, they must feature at least some political broadcasting, and in those races for which they do accept broadcasting, they must afford equal time. Finally, although courts do occasionally interpret the Act, they tend to note that equal time matters should be deferred to the administrative expertise of the FCC.⁷¹ It is from these basic concepts that courts begin their interpretations of the Act and its exemptions.

In a close reading of statutory exceptions, the D.C. Circuit pointed out that by modifying each of the exempted categories with the words “bona fide,” Congress was making clear its reliance on the importance of newsworthiness in sustaining an exception.⁷² However, in determining whether an event is truly newsworthy, courts usually give great deference to the broadcaster itself. In the absence of evidence of favoritism toward a certain candidate, the FCC need only look to conditions of the broadcast and whether the broadcaster made a good-faith estimate that an event was newsworthy before airing it.⁷³ Therefore, so long as a broadcaster can make a showing that he or she believed an event to be newsworthy, no later analysis of whether that belief was reasonable or whether the event was actually newsworthy is undertaken.

Courts have also reviewed broadcasters’ interpretations of the limits of the exceptions themselves. For example, the D.C. Circuit rejected a station’s contention that three pre-recorded programs on opposing candidates that were aired back to back at three different points during the campaign were bona fide

68. *Farmers Educ. & Coop. Union of Am., N.D. Div. v. WDAY, Inc.*, 360 U.S. 525, 529 (1959); see *supra* note 16 and accompanying text.

69. *CBS, Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 110-11 (1973).

70. Roshon L. Magnus et al., *Access Rights to the Media After CBS v. FCC*, 25 How. L.J. 825, 833-34 (1982). This is because of another broadcast doctrine, the reasonable access rule, which provides that a station’s license may be revoked for “willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station . . . by a legally qualified candidate for Federal elective office on behalf of his candidacy.” 47 U.S.C. § 312(a)(7).

71. *Maher v. Sun Publ’ns, Inc.*, 459 F. Supp. 353, 356 (D. Kan. 1978).

72. *Office of Communication of United Church of Christ v. FCC*, 590 F.2d 1062, 1065 (D.C. Cir. 1978).

73. *Kennedy for President Comm. v. FCC*, 636 F.2d 417, 424 (D.C. Cir. 1980).

news interviews.⁷⁴

B. FCC Interpretation

Although stations have no affirmative duty to make their airwaves available to any candidate, if they choose to do so, the FCC has clearly held that the stations must provide equal time to the opposing candidate *without* any input as to how that time is used.⁷⁵ In fact, any attempt on the part of a station to dictate what a candidate will say or what format he will utilize to say it constitutes "censorship," and thus is prohibited by the terms of the statute.⁷⁶

In addition, the FCC has noted that candidates themselves must monitor the media for use by opposing candidates. As a general matter, stations are not obligated to inform a candidate that his opponent has been granted time and affirmatively offer equal time to comply with the statute.⁷⁷ The broadcaster need only grant the request once it is made. However, when time is arranged, the time that is offered to the other candidate must be considered truly "equal" by the FCC.⁷⁸

C. Commentator Interpretation/Criticism

Not surprisingly, commentators have criticized many aspects of the equal time rule, from its contents to its application. One main area of comment is the application of the exceptions to the equal time rule, including their potentially chilling effects on speech. It is argued that in the few broadcast contexts in which none of the exceptions apply, the requirement of providing equal time is a "disincentive for broadcasters to air material that features candidates,"⁷⁹ because they may be viewed as providing partisan coverage rather than neutral information unless they willingly comply with equal time.

In addition, because of the lack of clarity surrounding the exceptions' application, broadcasters may be so cautious that they "forgo politically oriented programming that actually would not be subject to equal time constraints."⁸⁰ If

74. *King Broad. Co. v. FCC*, 860 F.2d 465, 470 (D.C. Cir. 1988).

75. *Control of Content of Broads. Under "Equal Time" Requirements of Section 315 of the Communications Act of 1934*, 40 F.C.C. 241, 242-43 (1952) (admonishing radio station for attempting to limit subject matter of candidate's appearance to the specifics of his office and prohibit general statements advancing Socialist ideology).

76. *Id.*

77. *See* Richard L. Colby, 37 F.C.C.2d 676, 676 (1972); James Spurling, 30 F.C.C.2d 675, 675 (1971). There may be an affirmative duty under certain "unusual circumstances," such as when an opponent is granted broadcast time a very short time prior to the election.

78. Joseph L. Dorton President/CEO Ameron Broad., Inc., 7 F.C.C.R. 6537 (1992) (Station fined for violating equal time provision where one candidate was allowed to speak freely on the air for nearly five minutes while his opponent was permitted only one minute to speak, had to respond to questions rather than speak freely, and had his answers cut off by the host.).

79. Smith, *supra* note 7, at 1503.

80. *Id.*

in fact broadcasters are taking this overly-cautious stance, society is being deprived of information that is withheld out of concern for possibly violating equal time.

The likelihood of broadcasters' fears diminishing the quantity of election coverage also raises First Amendment issues in the context of citizens' rights to receive information needed to participate in the political process.⁸¹ This right, it is argued, is far more compelling than is a political candidate's right to equal time.⁸² As one commentator stated, "while the Court has implicitly recognized the value in enabling candidates themselves to present [their relative positions and personal qualities] to the public . . . merely ensuring that each competing candidate is given reasonable . . . opportunities to do so is all that is necessary to achieve this result."⁸³

In addition to concerns about public access to information, the requirements also raise questions about broadcaster autonomy. One perspective is that the inquiry required to determine whether the exceptions' application is appropriate is overbroad because "the manner in which the Commission administers the equal time . . . provisions of the Act is more disruptive of licensee operations and more intrusive into editorial discretion than is necessary to achieve the compelling government interest to which these rules are dedicated."⁸⁴

In addition, critics wonder if the benefit to the public is enough to justify the burdens that the equal time rules place on broadcasters. One observation is that the loose and varied interpretations of the exceptions have "substantially diluted" the effect of the equal time rule.⁸⁵ Whether this dilution is an unfortunate side effect or a calculated result is debatable. One critic claims that "[m]uch of the confusion in the law is intentional. . . . [It] was written by congressmen who have a direct stake involved in maximizing their air time while minimizing that of their challengers."⁸⁶

Because of the non-uniform ways in which the equal time rule has been applied and its extremely lax enforcement by the FCC, critics wonder whether the public would even notice a difference if the rule were abrogated for good.⁸⁷ As

81. *Id.* at 1511.

82. *Id.*

83. *Id.*

84. *Id.* at 1512.

85. Rex S. Heinke & Heather L. Wayland, *Lessons from the Demise of the FCC Fairness Doctrine*, 3 NEXUS 3, 7 (1998) (concluding that regulations of media unfairness are ineffective and stifle the flow of information).

86. *What Is Equal Time?*, WASH. TIMES, Aug. 15, 2003, at A18 (characterizing the equal time rule as "a populist gesture to make it look as if the proverbial little guy can take on a political Goliath with equal access to the media").

87. Robert W. Leweke, *Rules Without a Home: FCC Enforcement of the Personal Attack and Political Editorial Rules*, 6 COMM. L. & POL'Y 557, 574-75 (2001) (analyzing FCC interpretation and concluding that reinstatement of personal attack and political editorial rules is not likely or necessary).

long ago as 1976, critics have been decrying the end of equal time,⁸⁸ yet it remains a part of life for candidates and broadcasters today.

III. THE “REAL” EXCEPTIONS: LOOPHOLES IN EQUAL TIME

“[T]he legal loopholes are big enough for even Conan the Barbarian to slip through.”⁸⁹

In application it is clear that the equal time exemptions actually exclude many more situations than just the four specific categories enumerated by the Act. When viewed in light of the Act’s intent to promote widespread political coverage, it becomes evident that its effectiveness as a promoter of public access to information is questionable. This section of the Note will describe areas which have not been specifically exempted from equal time but where, because of common interpretation and application, it is not applied. While the gaps are both specifically related and tangential to broadcasting, when combined, they demonstrate the reality that equal time is averted far more often than it is applied.

Though they are not mentioned in the exemptions, several groups of people who are commonly involved in political races are free from the benefits and burdens created by equal time. First, as previously mentioned, equal time does not create an obligation for broadcasters to feature third party candidates either as part of their organized debates or to ensure that all candidates have equal time on the air.⁹⁰ Similarly, broadcasters are not required to accommodate candidates who cannot afford air time comparable to that utilized by their opponents, which, experience dictates, will often disadvantage candidates from minor parties.⁹¹ Therefore, even if a third-party candidate does succeed in getting a broadcaster to grant a request for equal time, if he cannot afford a comparable or *any* time

88. “If we truly mean to restore openness and a sense of humor to our national life, we should acknowledge that equal time is dead and broadcasters are as free as newspapers to determine what coverage to give candidates and their speeches.” BITTNER, *supra* note 31, at 116 (quoting speech by Archibald Cox, to Anti-Defamation League of B’nai B’rith, New York, Dec. 7, 1976).

89. *What Is Equal Time?*, *supra* note 86, at A18.

90. *Chandler v. Ga. Pub. Telecomm. Comm’n*, 917 F.2d 486, 489-90 (11th Cir. 1990) (holding that public television station’s decision to exclude Libertarian candidate from debate was rational since network felt that a debate between only the two major party candidates would be of most interest and benefit to state citizens); *see also* *Maher v. Sun Publ’ns, Inc.*, 459 F. Supp. 353 (D. Kan. 1978).

There are competing views on how mainstream a third party candidate has to be to justifiably expect coverage. In the context of the 2004 Democratic nomination, journalists vary widely on how much coverage they think is appropriate for “fringe” candidates, who some consider “a waste of time,” although others feel they are deserving of coverage because of their “unique perspective” and “influence [on] other candidates.” Mark McGuire, *Fringe Presidential Candidates Want Equal Time*, *TIMES UNION* (Albany, N.Y.), Jan. 27, 2004, at D1.

91. *See, e.g., Chandler*, 917 F.2d at 489; *Maher*, 459 F. Supp. at 356-57. In both cases, minor party candidates were excluded from the debates.

slot, he receives no air time. In addition, even when a candidate can afford the same time slot utilized by his opposing candidate, the station need not grant the time on the exact same program.⁹² The effective result of the fact that third party candidates do not have to be invited to debates or to receive air time that they cannot afford is that the equal time rule, in practice, usually does not assist third party candidates at all. Although that result is not specifically enumerated in either the text or the purpose of the statute, the combination of other exceptions operates to essentially exclude third parties altogether.⁹³

Another situation that is immune from the equal time doctrine is third parties speaking on behalf of candidates. Equal time is not triggered by an appearance of family members, campaign workers or any other supporter speaking on behalf or in support of a candidate.⁹⁴ Therefore, broadcasts featuring coverage of endorsements by other political leaders or footage of supporters at a campaign rally do not require equal time so long as the candidate himself is not included, despite the fact that the clear intent of the appearance is to support the candidate and thus the spirit of the equal time provision is certainly implicated.⁹⁵

Another enormous group that is largely unaffected by equal time is incumbents. Although appearances by incumbents do trigger equal time during the actual campaign period, their appearances are not considered “use of a broadcast station” under the Act until they officially announce that they are a candidate for reelection.⁹⁶ Therefore, an elected official who will soon be up for re-election but has not yet announced his candidacy can appear on television without triggering the equal time rule for his opponents who *have* declared their candidacy for his seat. This helps explain “why candidates time an announcement that they are running for office very carefully, so as not to trigger the Equal Time rule requiring stations to give broadcast time in equal measure to their opponents.”⁹⁷ One example of the benefits of incumbency occurred at a 1980 press conference held by President Jimmy Carter. At this conference, which was carried by all of the networks in prime time, President Carter criticized his

92. See Harry Dermer, 40 F.C.C. 407, 407 (1964).

93. Lack of equal time was a common complaint by Ross Perot’s campaigns, especially since he was in the unique position of being a minor-party candidate with resources to purchase the time he desired. See, e.g., *Ross Perot v. ABC*, 11 F.C.C.R. 13109, 13114-16 (1996).

94. See *CBS, Inc. v. FCC*, 454 F.2d 1018, 1029 (D.C. Cir. 1971); *Felix v. Westinghouse Radio Stations, Inc.*, 186 F.2d 1, 3-6 (3d Cir. 1950).

95. The FCC’s response to a 1970 letter from the Communications Counsel for the Committee on Commerce created some confusion on this issue. In the interpretive advisory statement now referred to as the “Zapple doctrine,” (or “quasi-equal opportunities rule,”) the FCC responded to a hypothetical posed by Mr. Zapple by concluding that “[w]here a spokesman for, or a supporter of candidate A, buys time and broadcasts a discussion of the candidates or the campaign issues,” the (now defunct) fairness doctrine requires that time be provided to supporters for an opposing candidate. *Nicholas Zapple, Communications Counsel, Comm. on Commerce*, 23 F.C.C. 2d 707 (1970).

96. *Democratic Nat’l Comm.*, 34 F.C.C.2d 572, para. 6 (1972).

97. *ISSUES OF DEMOCRACY*, *supra* note 48, at 84.

rival for the Democratic nomination. In response to criticisms of nonenforcement, the FCC said that it “refused to second-guess licensee determinations . . . ‘absent strong evidence’ that bona fide news judgment was not being exercised.”⁹⁸ More recently, one critic has commented on this continuing issue: “by abandoning principles of ‘equal time,’ the [FCC] lets stations broadcast political propaganda of authorities in power [which is] entertaining but not enlightening.”⁹⁹

There are also other timing-related issues than can shield a candidate from equal time. For example, non-incumbent candidates-to-be who have not yet declared their candidacy can also make appearances of the sort that would trigger equal time if they were officially declared. Equal time is also avoided in the reverse situation—stations need not grant a candidate broadcast time in order to compensate for time provided to his opponents before he became a candidate.¹⁰⁰

Geography creates safe harbors from equal time as well. Although equal time applies to candidates at all levels of government, it is not triggered by coverage of elections beyond a station’s principal service area.¹⁰¹ This doctrinal gap has the most impact on local or regional races in rural markets, where coverage of the fact that, for example, the neighboring mayoral race has a standout democratic candidate would not trigger equal time for either of the candidates in the station’s primary viewing area.

Aside from groups of people and logistics such as timing and location, certain types of programs may also have an easier time escaping equal time requirements. As the recent Howard Stern ruling illustrates, the FCC’s judgments about which programs may be exempted from equal time are not at all affected by the fact that a show’s format may be non-traditional. As discussed in the Stern opinion, the FCC feels that “it would be unsound to rule that a program involving a unique or innovative approach to interviewing . . . somehow lacks sufficient licensee control evident in traditional news interview programs,” because that approach “would discourage programming innovation by sending a signal to broadcasters that to be exempt an interview program should adhere only to the format of certain programs mentioned by Congress over 25 years ago.”¹⁰²

Implicit in the previous statement is the fact that the FCC does not *want* to make it difficult for programs to be exempted from equal time requirements. In

98. *The Kennedy for President Comm.*, 77 F.C.C.2d 964 (1980); *Kennedy for President Comm.*, 636 F.2d 417, 432 (D.C. Cir. 1980) (upholding FCC ruling); *see also* LIVELY, *supra* note 18, at 239.

99. Edward Wenk Jr., *Threats to Democracy at Code-Red Level*, SEATTLE POST-INTELLIGENCER, Dec. 31, 2003, at B7.

100. Aspen Inst. Program on Communications and Soc’y, 55 F.C.C.2d 697 (1975); Hon. Joseph S. Clark, United States Senate, 40 F.C.C. 332 (1962).

101. Barry D. Umansky, *Political Broadcasting Primer*, Radio World Newspaper (June 5, 2002), at http://www.rwonline.com/reference-room/broadcast-law-review/05_rwm_BDUJune5.shtml (last visited Set. 29, 2004).

102. *Infinity Broad. Operations Inc.*, 18 F.C.C.R. 18603, 18604 (2003) (quoting *Multimedia Entm’t, Inc.*, 56 P.2d 143, 147 (1984)).

fact, in that same decision, the FCC noted that “licensees airing programs that meet the statutory news exemption, as clarified in our case law, need not seek formal declaration from the Commission that such programs qualify as news exempt programming under Section 315(a).”¹⁰³ This directive by the FCC seems to be urging broadcasters not to bother with petitioning for an exemption, but to rely on their independent judgment as to whether the exception applies to them—not merely as to specific broadcasts, but for their programs as a whole. The signal sent to broadcasters by both the content and outcome of this ruling is that all but the most outrageous requests will be granted—allowing more and more media outlets to ignore equal time.¹⁰⁴

The type of media used by candidates also affects whether they must comply with equal time. The Act’s applicability to cable, a major medium, is less than clear. Given the fact that almost ninety percent of television viewers have cable or satellite,¹⁰⁵ this is obviously a significant news source which includes several news-only channels. The FCC has promulgated its own rule which copies the language in the Act and applies equal time to “cable television system[s].”¹⁰⁶ However, the reach of this agency rule is unclear even to broadcasters. During Arnold Schwarzenegger’s gubernatorial candidacy, there was debate about whether and which media outlets were allowed to air his films. Cable television networks (which are exempt) attempted to distinguish themselves from cable television operators, such as Cox Cable, that deliver service to homes.¹⁰⁷ Nevertheless, several cable operators said they believe that they are exempt from the FCC equal time rules: “Cable and broadcast are not under the same rules. We are not required to block out any signals if it is coming from one of our

103. *Id.*

104. This deference from the FCC comes even as polls continually suggest that, in fact, these alternative programs are becoming a major news source. See David Bauder, *When Campaigns and Comedy Mix, the Nervous Laugh is from Lawyers*, SAN DIEGO UNION-TRIB., Oct. 7, 2003, at E5 (citing Pew Research center poll that “more than a third of people under age 30 said they got campaign news from comedy shows”); Lynn Smith, *Taking Sides? Jay Leno’s Role at the Governor-Elect’s Rally Has Many Wondering Just How Far the Blending of Politics and Entertainment Will Go*, L.A. TIMES, Oct. 20, 2003, at E1 (noting that “10 percent of Americans—and nearly half of those under 30—now use the late-night shows as sources of news about politics”).

105. *What Is Equal Time?*, *supra* note 86, at A18.

106. 47 C.F.R. § 76.205 (2004). A “cable television system” is defined as: “a facility consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community.” *Id.* § 76.5(a). The definition identifies four categories that are *not* considered cable systems, including, for example, a “facility that services only to retransmit the television signals of one or more television broadcast stations.” *Id.* § 76.5(a)(1).

107. Kit Bowen, *Networks Hold Off Airing Schwarzenegger Movies*, Hollywood.com, Aug. 13, 2003, at <http://www.hollywood.com/news/detail/article/1724895>.

programming partners,” said one Cox spokesman.¹⁰⁸ Interestingly, during the California elections, some clearly exempt cable channels did elect to comply with the spirit of equal time. For example, both the Sci-Fi channel and FX elected to suspend scheduled airings of Schwarzenegger action films.¹⁰⁹

One smaller but still relevant medium is public access television. Equal time provisions do not apply to public access networks because “the open nature of access automatically makes time available to all who request it.”¹¹⁰ While this seems to make sense, it creates the result that candidates with regularly scheduled public access shows may campaign on those shows without providing equal time.¹¹¹

Online media is another news source on which equal time has no effect, despite the fact that it is increasingly supplementing and, in some instances, replacing broadcast. Even if the rule were generally extended to apply to online media, the definition of what is considered a “use” for the purposes of the requirement may have to be reevaluated, since a candidate could utilize the internet without ever displaying his likeness or making a formal “appearance.”¹¹² One article noted that because of the exemptions “[m]any electronic journalists assume that the equal-time and other political broadcasting rules never apply to their work.”¹¹³

Publications, another untouched medium, are also not subject to equal time requirements.¹¹⁴ Though this is an obvious point, since the print media is outside

108. *Id.*

109. Sallie Hofmeister, *FX Takes Hero Out of Action; Network Pulls Schwarzenegger Films*, L.A. TIMES, Aug. 14, 2003, at C1. However, Sci-Fi rewarded its own civic mindedness by airing a Schwarzenegger marathon immediately following the election. *Sci Fi Channel Readies a Schwarzenegger Marathon*, SAN JOSE MERCURY NEWS, Oct. 9, 2003.

110. DANIEL L. BRENNER ET AL., CABLE TELEVISION AND OTHER NONBROADCAST VIDEO § 6:82 (2004).

111. See Bill McAuliffe, *Candidates and Incumbents Are Using Cable TV to Get the Word Out*, MINNEAPOLIS-ST. PAUL STAR-TRIB., Sept. 22, 2003, at 1B.

112. Campbell, *supra* note 16, at 539-40.

113. Kathleen Kirby, *Rules of the Race*, RADIO AND TELEVISION NEWS DIRECTORS ASS'N COMMUNICATOR, Nov. 1999, available at <http://www.rtnda.org/rtndf2/publications/rules.html> (last visited Sept. 29, 2004).

Teletext created a similar inquiry in the 1980s. A combination of print and electronic media which used electronics to transmit text, teletext was excepted from the equal time requirement because it was “not a medium by which a candidate can make a personal appearance.” Teletext Rules, 48 Fed. Reg. 27054, 27061 (June 13, 1983) (to be codified at 47 C.F.R. pts. 2, 73, 74); see Jeffrey S. Hurwitz, Note, *Teletext and the FCC: Turning the Content Regulatory Clock Backwards*, 64 B.U. L. REV. 1057 (1984). Although teletext is no longer common, the FCC’s determination that it was not subject to equal time could be an indicator of the outcome of online media should the FCC ever take a position.

114. In 1974 the Supreme Court unanimously decided that a newspaper is under no obligation to give any sort of equal time—regardless of the paper’s economic power. *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 254-58 (1974); see Adrian Cronauer, *The Fairness Doctrine: A*

of the purview of the FCC's powers, it is still important to consider this medium in order to obtain a global view of election coverage. Implicit in the rationale for equal time is the notion that hearing or seeing a candidate on the radio or television results in a greater awareness of their candidacy or leads the public to believe that they were somehow better or more important than other candidates because they received network coverage. Although this might have been a legitimate concern in 1934, it is far less clear that a television appearance has the same impact on citizens in today's media-proliferated society.

Finally, regardless of where equal time is *supposed* to apply, the real measure of its effectiveness depends on enforcement—another area in which the FCC has opted for a hands-off approach. The FCC does not intervene in alleged or even blatant equal time violations without a specific complaint.¹¹⁵ And many candidates are reluctant to report possible violations because filing a complaint against a show decreases their chances of being an invited guest of that show in the near future.¹¹⁶ Therefore, when, for example, Jay Leno toes the line of equal time by allowing Arnold Schwarzenegger to both announce (while not yet a “legally qualified candidate”) and celebrate (after his candidacy has ended) his

Solution in Search of a Problem, 47 FED. COMM. L.J. 51, 53 (1994) (“If the *Miami Herald*, delivered to 37 percent of all households in its region, escapes any public service obligations, why should each of a dozen local television stations and forty local radio stations face the prospect of losing their licenses when disagreements arise over ‘fairness’?”).

115. Bauder, *supra* note 104, at E5; Steve Friedman, *Columbia, MO, Hospital Center Board Candidates Spar over Radio Remarks*, COLUMBIA DAILY TRIB., April 4, 2003.

In the years 1973 to 1976, a total of 6254 complaints were filed regarding alleged violations of equal time rules on television. Of the twenty-six station inquiries conducted by the FCC in response to these complaints, only twelve resulted in sanctions. In the prior four years, from 1969-1972, only 1950 complaints were filed alleging television violations. STEVEN J. SIMMONS, *THE FAIRNESS DOCTRINE AND THE MEDIA* 212-14 (1978).

The FCC has not kept records of the number or type of complaints they have received for at least a decade. Email from Mark Berlin, FCC Policy Division, Media Bureau (Feb. 24, 2004, 07:59:34 EST) (on file with author). However, an FCC Media Bureau staffer estimates that “you could probably be able to count the number of written equal time complaints in an entire year on both hands.” Email from Mark Berlin, FCC Policy Division, Media Bureau (Feb. 23, 2004, 10:36:50 EST) (on file with author).

116. Bauder, *supra* note 104, at E5; Friedman, *supra* note 115. However, the prospect of losing a potential appearance does not dissuade every candidate. When the 2004 Democratic-nomination candidate Rev. Al Sharpton appeared on NBC's Saturday Night Live in December 2003, candidate Sen. Joseph Lieberman requested—and was granted—an equivalent twenty-eight minutes of free air time in states where both men were on the ballot. Mary Leonard, *In Lieberman Camp, A Lawyer Takes on the Fine Print*, BOSTON GLOBE, Jan. 25, 2004, at A20. Sen. Lieberman was the only candidate to make this request. Leah Garchik, *Daily Datebook*, S.F. CHRON., Feb. 5, 2004, at E16. However, more than two dozen NBC affiliates nationwide “opted (with NBC's blessing) not to air the episode” for fear of triggering equal time requirements. Gail Pennington, *They're Politicians, But They Play Guest Stars on TV*, ST. LOUIS POST-DISPATCH, Dec. 14, 2003, at C1.

campaign on *The Tonight Show*, few media-hungry candidates, present or future, are likely to complain.¹¹⁷ In addition, even when they do intervene, “[s]ince the mid-1970s, the Commission has steered a course of review that is more deferential to a licensee’s subjective judgment regarding the availability of an exemption.”¹¹⁸ In “retreat[ing] from the view that the Commission had an obligation to force stations to carry out specific public trustee obligations,” the FCC has moved toward the position that “broadcast stations ought to be governed by marketplace forces in their programming . . . decisions and that viewers . . . should exercise influence over licensees by turning the dials on their receivers rather than by petitioning the Commission for relief.”¹¹⁹

When considering the foregoing practical effects of the equal time exceptions, it becomes evident that the doctrine in its current state provides little or no protection for candidates and does not ensure that the public receives balanced coverage of political campaigns.

IV. SUGGESTIONS FOR THE FUTURE OF EQUAL TIME

Equal time is a doctrine which, despite its well-meaning roots, is currently serving no useful purpose. But why is this the case, and who is to blame? As they did with the now defunct fairness doctrine, critics are asking whether the FCC is “simply not enforcing” the equal time rules, or if perhaps, “broadcasters [are] so thoroughly compliant that no one [can] catch them in a violation?”¹²⁰ One response to this question is that there is actually very little to comply with, given the doctrine’s limited applicability after the overwhelming combination of explicit and implicit exceptions. The FCC has stated its position that those in doubt about equal time should trust their own judgment rather than petitioning for approval.¹²¹ Moreover, Congress is surely aware of the FCC’s repeated reluctance to enforce equal time, yet it has not revised or clarified the provision since making a minute semantic change in 1972.¹²²

This inattention is despite the fact that the statute containing the equal time rule, 47 U.S.C. § 315(b), contains the guidelines for how and what broadcasters may charge for airtime. This hotly contested issue has caused the statute itself to

117. During the California governor’s race, Leno went so far as to openly taunt equal time requirements by featuring a segment in which all of the other candidates were invited to the audience (eighty-one attended) to receive ten seconds of equal time. Leno then asked the candidates what they would do as governor and aired their responses simultaneously so that none was actually decipherable. Marvin Kitman, *Calif. Debate Cheated Us*, NEWSDAY, Oct. 5, 2003, at D15; Wilentz, *supra* note 51, at M6. The result? Criticism in the print media and silence from the FCC.

118. LIVELY, *supra* note 18, at 239.

119. KRATTENMAKER, *supra* note 13, at 148.

120. Leweke, *supra* note 87, at 574-75.

121. See Infinity Broad. Operations Inc., 18 F.C.C.R. 18603, 18604 (2003).

122. Pub. L. No. 92-225 § 103(a)(2)(B), 86 Stat. 3 (1972) (adding “under this subsection” following “No obligation is imposed . . .”).

receive a great deal of attention in the recent past, yet not one of the proposed revisions makes any change to the equal time rules in section (a).¹²³

A. *Three Options for the Future*

In light of its current state, in which the doctrine is weak and not completely serving its intended purpose, three possibilities arise for its future: continued adherence to established principles, increased enforcement by the FCC, or elimination of the doctrine.

1. *The Status Quo*.—Equal time's current operation, including its deficiencies, has been described throughout this Note. Without changes to the FCC's application of the statute, especially in the area of enforcement, equal time is likely to continue on its current course as a doctrine requiring cursory consideration from media lawyers, but not one that has much practical effect on mainstream election coverage.

The doctrine's longevity is perhaps an indicator that it is unlikely that it will be soon eliminated. In light of the extensive attention given to the broadcast charge provisions amended by the BCRA and the utter lack of attention directed at the equal time provisions in section (a), one must wonder whether the lack of attention it receives is a ratification by Congress that it is satisfied with the FCC's scheme. Perhaps it, along with the courts that have so noted,¹²⁴ feel that substantial deference is owed to the FCC and that it is inappropriate to interfere with their interpretation by statutory revision.

2. *Increased Enforcement of Current Statute*.—Another option to increase the effectiveness of equal time would be enhanced enforcement by the FCC. In order for changes to be meaningful, many of the current enforcement policies would have to be modified. For example, to ensure that candidates who are deserving of equal time because of an opponent's appearance actually receive that time, they would have to be notified of all qualifying appearances. Rather than requiring candidates to self-monitor nationwide media coverage, broadcasters would have to design a system whereby a grant of time to one candidate results in notification to opponents. However, this would raise the dispute of whether the purchasing candidate or the station would be responsible for providing this notice. A decision on this point requires a value judgment about who should bear the administrative burden of equalizing political coverage. If placed on candidates, some of whom may already have their funds overextended by campaign expenses, this additional requirement may keep them off the air entirely.¹²⁵ However, placing the burden on broadcasters will potentially result

123. *McConnell v. Federal Elections Commission* upheld the McCain-Feingold-sponsored Bipartisan Campaign Reform Act (BCRA). 124 S. Ct. 619, 639-40 (2004). Although BCRA amended section (e) of the Act, the ruling made no mention of the equal time provisions of the statute.

124. *Maher v. Sun Publ'ns, Inc.*, 459 F. Supp. 353, 356 (D. Kan. 1978).

125. For a discussion of whether broadcasters should be required to provide free airtime to candidates, see Reed E. Hundt, *The Public's Airwaves: What Does the Public Interest Require of*

in less political coverage if broadcasters then refuse to sell time to candidates since they cannot pass along the charges to their viewers, who can view the broadcasts for free.

Therefore, an obvious setback increased enforcement is the burden on broadcasters. Since under the current scheme, they are not *required* to broadcast all election coverage, it is possible that the burdens created by these monitoring responsibilities would decrease the amount of coverage given to elections generally. In addition, the administrative costs generated by a notice requirement would likely be defrayed in costs to candidates—another area that is highly regulated.¹²⁶

In addition to notice requirements placed on broadcasters, the FCC would have to change its policy of not reviewing potential violations without a complaint.¹²⁷ Because many equal time violations may go unreported or even unnoticed, the current system of requiring an aggrieved candidate to both discover and complain about the violations (possibly damaging their chances of being invited on that same program) does not result in thorough, evenhanded application of the doctrine.¹²⁸ However, a change to the current policy would require the FCC to police the airwaves with meticulous detail. The obvious disadvantage to this requirement is the resulting administrative burden. Perhaps some of this burden could be decreased by instituting a dual notice system, whereby notice is provided to both the FCC and the opposing candidate at the same time upon any sale of time to a candidate.

Aside from the logistics of enforcement, changes to the substantive interpretation by the FCC, which currently results in several unintended loopholes, would be required to obtain effective enforcement. Special attention would have to be paid to common equal time victims, such as third party candidates. The disparate impact that the requirement seems to have on them would be cured in part by changes in notice and affirmative enforcement. Changes to the regulatory scheme would not, however, change the reality that third party candidates often have fewer financial resources than major party candidates and so still might have trouble purchasing the airtime even if it were more readily offered.¹²⁹

In addition, the FCC would have to refrain from its deferential approach to broadcasters' judgment. As outlined in Part I.B, many of the components of the

Television Broadcasters?, 45 DUKE L.J. 1089, 1104-09 (1996).

126. See 47 U.S.C. § 315(b) (2000) (governing lowest unit charges for sale of broadcast time).

127. As recently illustrated by the 2004 Super Bowl halftime show, the FCC is at times outspoken about what it views as a violation of its rules. Although undoubtedly there were eventually formal complaints lodged with the FCC, as soon as the day after the incident, Chairman Powell was promising a full investigation into Janet Jackson's alleged indecency. *ABC News: World News Tonight: Indecent Exposure: The Jackson/Timberlake Show* (ABC television broadcast, Feb. 2, 2004), available at 2004 WL 62998005.

128. The FCC no longer keeps data on how many equal time complaints it receives. See Email from Berlin, *supra* note 115.

129. See Hundt, *supra* note 125, at 1105-06.

equal time requirement are evaluated by reference to several factors used to determine whether, for example, something is to be considered a statutory “use.” Most of these factor tests include some review of the newscasters’ subjective judgment about whether or not the appearance, program, etc. was considered newsworthy.¹³⁰ Because of this consideration, the FCC can often satisfy itself that its factors test has been passed based on newscasters’ testimony about their own broadcast coupled with satisfaction of other factors. Because of this reliance on subjective rather than objective factors, broadcasters are justified in believing that if they can rationalize their belief that equal time was not required, the FCC will probably release them from its requirements.

When it does determine that a violation occurred, the FCC also might need more stringent tools for punishing equal time violations. Although this is an area that would require statutory revision, undoubtedly a large, publicized increase in fines for equal time violations would make broadcasters more conscientious.

However, it is not necessary that Congress enact statutory changes in order to increase enforcement. As an administrative agency, the FCC is part of the executive branch and is subject to vacillations in political support from both politicians and the public.¹³¹ For example, following the 2004 Super Bowl,¹³² the broadcast doctrine of indecency has gained new life, leading to increased programming time delays and disclaimers on network television. Congress is now calling for higher fines for violations of indecency standards to give the FCC better tools with which to enforce this doctrine, which it now perceives to have increased importance.¹³³ As this potential reform indicates, the values of the current administration are manifested in the actions taken by its agencies.¹³⁴

130. See, e.g., *supra* notes 53-54, 58 and accompanying text.

131. Four of the five current FCC Commissioners (two Democrats & three Republicans) were appointed by President Bush in 2001 or 2002. The FCC’s current Chairman, Michael Powell (R), was nominated to the Commission by President Clinton in 1997. He was appointed Chairman by President Bush in 2001 to replace Chairman William Kennard (D) who resigned from the FCC in January 2001, six months before his commission was set to expire. Chairman Powell is Secretary of State Colin Powell’s son. Fed. Communications Comm’n, *Biography of FCC Chairman Powell*, at http://www.fcc.gov/commissioners/powell/mkp_biography.html (last visited Sept. 22, 2004). See also Fed. Communications Comm’n, *Biography of William Kennard*, at <http://www.fcc.gov/commissioners/previous/kennardbio.html> (last visited Sept. 22, 2004).

132. During the 2004 Super Bowl halftime show, performer Janet Jackson suffered what has been termed a “wardrobe malfunction,” which resulted in a portion of her costume being removed, exposing her breast to millions of viewers. Various subsidiaries of Viacom Inc. (CBS’s parent company) were fined the \$550,000 statutory maximum for violating broadcast indecency standard. Press Release, FCC, FCC Proposes Statutory Maximum fine of \$550,000 Against Viacom-owned CBS Affiliates for Apparent Violation of Indecency Rules During Broadcast of Super Bowl Halftime Show (Sept. 22, 2004), 2004 WL 2138631.

133. One proposal currently under consideration includes a tenfold increase in fines for indecency violations. Michelle Knueppel, *TV Execs Object to Increase in Fines for On-Air Indecency*, L.A. DAILY NEWS, Feb. 27, 2004, at N14.

134. With regard to its sudden strong reactions to alleged indecency on television, one writer

Therefore, under a different administration, it is possible that even if procedural execution of the statute remained the same, the outcome of some of the agency decisions would differ.¹³⁵ Without specific equal time data to compare enforcement during the last few presidencies, these differences are indeed speculative, but seem to be made more likely by the renewed focus on the FCC generally since the 2004 Super Bowl.

Overall, increased enforcement would require some specific political motivation, followed up by increased time and energy by both the FCC and broadcasters. Though it certainly has critics, equal time isn't as divisive as an issue like indecency, which carries with it moral and religious judgments. On its face, providing equal time seems like an admirable goal that few are likely to speak out against, and those who are unhappy with its execution, such as minor party candidates, are not calling for its revocation so much as its revision. However, without an equal time interpretation or ruling that is somehow unfavorable to the current controlling party or a change in leadership, sudden interpretive changes resulting in strengthened enforcement seem unlikely.

3. *Elimination of Equal Time.*—Another option, of course, is to do away with the equal time rule entirely. An argument may be made that this has in fact already happened by operation, as the FCC seemingly refuses to enforce all but the most egregious violations. Two factors supporting elimination are the weakness that results from equal time's lack of applicability to numerous situations and the FCC's docile enforcement.

Elimination of the doctrine would have some positive results. For example, it is possible that it would actually increase political coverage generally. As previously stated, some broadcasters err on the side of limiting political programming to avoid allegations of equal time violations.¹³⁶ If they are uncertain whether a certain broadcast would be exempted, they may choose not to air it at all for fear of triggering equal time.¹³⁷ With the requirements lifted, broadcasters might actually increase political coverage (albeit it of their favored party and/or candidates).

notes that "Powell's FCC [has] played to the Republican base in the run-up to a national election. . . . Self-appointed moral guardians are forever waiting for any opportunity to attempt to enforce their personal rigid codes on everyone else." Tom Jicha, *The Shot Heard 'Round the Dial*, SOUTH FLA. SUN-SENTINEL, Feb. 28, 2004, at 1D.

135. For example, even if the current deferential standard remained in place, the broadcasters to which the FCC showed deference could change depending on the views of the current administration. If today Howard Stern is viewed as indecent, albeit a bona fide newscaster, under a more liberal administration, perhaps conservative talk radio hosts would fail under the same indecency standard. See Eric Deggans, *Clear Channel Becomes Conveniently 'Responsible,'* ST. PETERSBURG TIMES, Feb. 27, 2004, at 2B (quoting Rush Limbaugh asking if the "federal government start[s] to define what is okay for someone to say on radio . . . what happens if a whole bunch of John Kerry [or] . . . Terry McAuliffe types end up running this country?" (omissions in original)).

136. See Smith, *supra* note 7, at 1503.

137. *Id.*

As a matter of administration, elimination of the doctrine would alleviate the burdens on both the FCC and broadcasters caused by continued consideration. Although its general response is that the doctrine is not applicable to inquiring broadcasters, the FCC still must go through the procedures to receive and review complaints and issue occasional opinions. The resources used to do so could be directed at other areas of the agency's jurisdiction. It would also save broadcasters from having to scrutinize every broadcast featuring political candidates to see whether it might violate equal time provisions and from reviewing and responding to equal time requests by opposing candidates, which take up both administrative and air time.

Although in many ways the doctrine is weak, there would be consequences to eliminating it altogether. First, the fact remains that equal time is effective in some circumstances. As with Senator Lieberman during the 2004 presidential primary campaign, candidates still can and do take advantage of the requirement to ensure that broadcasters are not unfairly excluding coverage of certain candidates.¹³⁸ However, this doesn't necessarily help *all* candidates, only major party candidates with enough resources to monitor and contest equal time violations. The choice then becomes whether the doctrine is worth keeping to at least ensure equal coverage of all major party candidates or whether, based on the wide variety of media outlets, it is now fair for those candidates to be in the same situation as minor party candidates, that is, with virtually no equal time protection at all.

In addition, there is something to be said for the notion that broadcasters must at least take equal time into account when making programming decisions. Although they may often creatively avoid it, it is possible that the habit of going through the motions of determining whether equal time is applicable is beneficial for viewers, in that broadcasters are going to at least attempt to eliminate any gross violations. Similarly, at least some citizens value the notion of equal time.¹³⁹ It is hard to imagine a way to quantify the loss of confidence in election coverage that could result from elimination of the doctrine, as at least those who are complaining about it are already aware of its lack of force.

While complete elimination might seem a drastic solution, in light of the repeals of both the fairness doctrine and personal attack rules, it is not completely infeasible because it is clear that statutory schemes requiring content monitoring have been abolished in the past.¹⁴⁰ However, the continued existence of the reasonable access rule seems to indicate that political election coverage is one area in which Congress wants to remain involved.¹⁴¹ The inequities of a system requiring broadcasters to provide some election coverage, but *not* requiring them

138. See Leonard, *supra* note 116, at A20.

139. See, e.g., Perot, 11 F.C.C.R. 13109 (1996); Paula S. Schlesinger Against Pub. Television Station WMUL-TV, 87 F.C.C.2d 773 (1980) (alleging equal time violations).

140. Syracuse Peace Council v. FCC, 867 F.2d 654, 669 (D.C. Cir. 1989) (FCC decision to repeal fairness doctrine was not arbitrary and capricious); Radio-Television News Dirs. Ass'n v. FCC, 229 F.3d 269, 272 (D.C. Cir. 2000) (ordering FCC to repeal personal attack rule).

141. 47 U.S.C. § 312(a)(7) (2000).

to balance that coverage at all seem obvious. However, in reality, media outlets designed to advance only one political view do exist—though such stations are generally open about their political leanings, and viewers are likely to understand that they are getting only one point of view when they choose to watch. By continuing to require at least major broadcast networks to attempt to balance their coverage, citizens have the option of receiving their coverage mainly from those networks that they perceive to be more balanced.

B. Recommendation

A determination about what should become of equal time is complicated because it is difficult to separate the reality of what the doctrine has become from what it could and was meant to be. It seems unnatural to be “against” a doctrine with such well-meaning roots.¹⁴² Realistically, though, conclusions must be drawn while facing the reality that reform, especially dramatic reform, is unlikely. It is not reasonable merely to claim that if the doctrine were perfectly enforced in a vacuum, it would be worth maintaining.

Part of the judgment about what should become of equal time requires pragmatic assessment of whether it can have a meaningful role in today’s society. One can idealize its existence and argue that any rule intended to equalize election coverage and increase public access to information is worth maintaining even if it is flawed.

However, it is hard to strenuously argue that equal time should be upheld at all costs if one is realistic about its practical effect. It does not apply to cable, print media or the internet—three major sources of news. It was created during a time when election coverage was much scarcer and hearing only one of two candidates on the radio might have made a difference in who received one’s vote. Today, candidates are seen and heard through a multitude of media, and voters can seek out information about candidates that they are interested in rather than sitting by their radios hoping for a sound bite. Some celebrity candidates are already known and respected by voters before they enter the political arena. It is hard to imagine that requiring a handful of radio and television programs to intricately time all candidate coverage to ensure precise equality is increasing the actual quality of our election coverage.

However, if it’s not doing any harm, it might be appropriate to preserve the spirit of the rule in light of its limited applicability only to media outlets that citizens can access for free (provided they have the technology to receive the signals). But arguments can be made that the doctrine does cause harm by artificially ensuring that election coverage will feature more than one candidate without assuring that it will feature them all. To the extent there is a public expectation of equal time, candidates are being disserved by its inconsistent application. Therefore, limited application even in the narrow context in which

142. In fact, even Russia’s election law provides for equal time. Alex Rodriguez, *Really Cover Putin? Not Likely; Journalists Invited to Travel with the President Soon Find They’re Expected to Chronicle Through the Kremlin’s Eyes*, CHI. TRIB., Mar. 7, 2004, at 4.

it is currently applied is overly idealistic if it is not done precisely enough so that viewers can be more confident that they are receiving balanced coverage from those outlets.

Rather than forcing network attorneys and late night comedians to continue to struggle with equal time without benefit to voters or consistent application to candidates, the equal time doctrine should be abandoned—at least until a time when media development has stalled to the point where meaningful reforms may be made.

CONCLUSION

The year 2004 is equal time's seventieth year. To say that the media landscape has changed since its inception is a gross understatement. It is hard to imagine why a doctrine that was created to respond to advancements in technology has so clearly failed to keep up with its roots. Instead of expanding and changing to meet our modern society's need for information, the FCC has broadened equal time's exceptions until they now nearly swallow the whole. Rather than the four specific exceptions conceived of by Congress after twenty-five years of observing its initial formulation, numerous unstated but consistently applied loopholes have been created and maintained by FCC interpretation.

Though tempting, blaming the FCC alone ignores the fact that equal time is a statutory doctrine that Congress has chosen to leave untouched for decades. Couple that with frequent changes in FCC leadership and suddenly it seems surprising that the doctrine has enjoyed as much stability (albeit virtual stagnation) as it has, rather than a more cyclical lifespan in terms of its popularity and strength.

Declaring an end to equal time would really only have effects behind the scenes. For the most part, it would not change the substance of most American election coverage. Even if voters did notice its abolition, their disappointment could be alleviated by resort to the media outlet which best reflects their views, finally untainted by the guise of impartiality.

