The Equal Opportunity Doctrine in Political Broadcasting: Proposed Modifications of the Communications Act of 1934

"A popular government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both." —JAMES MADISON[1]

I. INTRODUCTION

To democratic societies, the rights to speak freely, to hear and be heard, and to write and publish are paramount—indeed the true test of a nation's freedom. Critical to the viability of these rights is a mass communication network capable of providing the flow of information necessary for making everyday decisions. Contemporary media enable citizens to make economic choices as to the best way to allocate their resources among the many products vying for their attention. The media records history as it happens. Perhaps the key function, however, is creating the political framework of the time—being the marketplace of political thought.

Few people today would challenge the role of the media, particularly the electronic media, as a forum for shaping opinions and as a vehicle for reaching the greatest number of people for the least amount of dollars.[2] A tension always exists between the people's "right to know" and the government's natural concern over possible manipulative abuses by the media in the exercise of its first amendment right to freedom of the press.[3] Concern with potential abuses peaked with the advent of radio in the 1920's and led to the policy decision that some degree of regulation and control was advisable. Although freedom of speech and press ranked high as national ideals, the unique persuasive power of the new media was recognized from the start. Monopolistic control of the airwaves and, hence, control of the thoughts and political direction of the people were greatly feared. During discussions in 1926 regarding the type of legislation needed, Herbert Hoover, who was then Secretary of Commerce, voiced this concern: "It can not be thought that any single person or group shall ever have the right to determine what communication

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[1]THE COMPLETE JAMES MADISON 346 (S.K. Padover ed. 1953).

[2]*See generally* P. SANDMAN, D. RUBIN, & D. SACHSMAN, MEDIA 135 (2d ed. 1976).

[3]U.S. CONST. amend. I provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

may be made to the American people."[4] Debate over regulation of the broadcast media resulted in enactment of the Radio Act of 1927,[5] and with advancing technology and the introduction of television, adoption of the Communications Act of 1934.[6] The 1934 Act serves as the governing law of the electronic media today.

Recently, there have been major moves to enact new communications legislation. A comprehensive revision of the 1934 Act, H.R. 13015, was introduced in the second session of the 95th Congress,[7] but died in committee when Congress adjourned. When the 96th Congress began, proposed communications legislation, in the form of S. 611[8] and S. 622,[9] was introduced in the Senate. H.R. 3333,[10] a revised version of the earlier H.R. 13015, was later introduced in the House.

The 1934 Act gave rise to an extensive body of law interpreting, limiting, and expanding the language of the Act. This Note will focus on the political broadcasting regulations of the 1934 Act, and in particular on the "equal opportunities" doctrine embodied in section 315, which requires that equal opportunities for the use of broadcast facilities be provided for all legally qualified candidates for a public office when facilities are provided for one.[11] The existing

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[4]H.R. REP. NO. 464, 69th Cong., 1st Sess. 11 (1926).

[5]Radio Act of 1927, ch. 169, 44 Stat. 1162 [hereinafter cited as Radio Act of 1927].

[6]Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified in scattered sections of 47 U.S.C.) [hereinafter cited as Communications Act of 1934].

[7]1 *The Communications Act of 1978: Hearings on H.R. 13015 Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 2d Sess. 2 (1978) [hereinafter cited as *H.R. 13015*].

[8]S. 611, 96th Cong., 1st Sess. (1979).

[9]S. 622, 96th Cong., 1st Sess. (1979).

[10]H.R. 3333, 96th Cong., 1st Sess. (1979).

[11]To satisfy the requirement that an equal opportunity be granted, it is necessary that upon use of the facilities by a qualified candidate and a request for the exercise of § 315 rights by an opponent, a licensee make available an equal length of time of the same "desirability," or audience potential, as the first candidate received. Primer on Political Broadcasting and Cablecasting, 43 RAD. REG. 2d (P & F) 1353, 1383 (1978) [hereinafter cited as 1978 Primer]. The time provided does not necessarily have to be on the same day or program, or even at the same time of day, if there is approximately equal audience potential as determined in good faith by the broadcaster. *Id.* Another situation requiring the licensee's good faith comes to the forefront when technical problems occur. Senator Birch Bayh lost a portion of a television appearance as a result of temporary video difficulties and complained to the FCC that this denied him equal opportunity. It appeared, though, that the licensee did everything possible to restore the video portion and that audio was undamaged throughout the broadcast. Because the station had "substantially complied" and had acted in good faith, Senator Bayh's appeal for additional time was denied. Senator Birch Bayh, 15 F.C.C.2d 47 (1968). Finally, the concept of equal opportunity applies only to the use of a station by a candidate personally, whether the "user" or the "requester," and does not extend to use by those speaking on his behalf. Felix v. Westinghouse Radio Stations, Inc., 186 F.2d 1 (3d Cir. 1950), *cert. denied*, 341 U.S. 909 (1951).

law in this and several related areas will be analyzed, the impact of the proposals now before Congress and the prospects for revision assessed, and reactions to the proposed bills by industry leaders emphasized.

The Federal Communications Commission (FCC or Commission)[12] has recognized the importance of this area: "[T]he presentation of political broadcasting, while only one of the many elements of service to the public . . . is an important facet, deserving the licensee's closest attention, because of the contribution broadcasting can thus make to an informed electorate—in turn so vital to the proper functioning of our Republic."[13]

In the early 1970's, approximately ninety-seven percent of all households in the United States had a television set and close to ninety-nine percent owned at least one radio.[14] In a climate of this nature, where market saturation of the electronic media is nearing one hundred percent, it is important for politicians to pay strict attention to the new directions broadcast law could take with the adoption of untried, untested legislation. The imminence of the 1980 gubernatorial and senatorial races for Indiana, as well as the 1980 presidential race, make it equally important for broadcasters, their attorneys, and the public alike to scrutinize the proposed legislation particularly because a bill, even of the magnitude of H.R. 3333 or one of the two Senate bills, could be enacted in time to play a critical role in the campaign plans of candidates for the 1980 elections.

II. General Legislative History of Section 315

The original legislation intended to govern "voice" broadcasters was the Radio Act of 1927.[15] It established the Federal Radio Commission (FRC) as the administrative agency for regulation of the airwaves through a system of granting licenses to qualified applicants who were bound to act in the public convenience, interest, and necessity.[16] The technology of the 1920's limited the number of frequencies available for broadcasting. At the time the Radio Act was enacted, approximately 500 licensees were in operation[17] compared

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[12]The Commission is the administrative agency charged with the enforcement of the Communications Act. The seven-person board replaced the earlier five-person Federal Radio Commission. The initial function of the FCC was basically that of allocating airwaves and preventing interference. P. Sandman, D. Rubin, & D. Sachsman, *supra* note 2, at 66.

[13]1978 Primer, *supra* note 11, at 1355 (quoting Licensee Responsibility as to Political Broadcasts, 15 F.C.C.2d 94 (1968)).

[14]T. Klein & F. Danzig, How to be Heard 303-04 (1974).

[15]Radio Act of 1927, *supra* note 5.

[16]*Id.* §§ 3-4.

[17]67 Cong. Rec. 12503 (1926) (statement of Senator Howell).

to 8,476 radio and 1,158 television stations today.[18] The limitation on frequencies was most often cited as the justification for distinguishing this new medium, radio, from the various print media for purposes of regulation and control. In the 1926 Congressional debates over the proposed bill, Senator Howell of Nebraska stated:

> [R]adio affords such a unique facility of publicity that one has to think very carefully lest he go astray, thinking of newspapers and reasoning by analogy. This vehicle for publicity is entirely different from any other with which we are familiar. We have tens of thousands of newspapers, magazines, and other publications, but there is now from necessity, and will be hereafter, only a limited number of radio stations.[19]

The Communications Act of 1934 was introduced in the 73d Congress when it became clear that more comprehensive legislation was needed because technology was advancing in giant leaps, particularly in the field of television, and this Act was subsequently adopted.[20]

The equal opportunities clause, section 18 of the Radio Act, was originally designed to prevent unequal treatment among candidates by partisan broadcasters and was included in section 315(a) of the 1934 Act.[21] The clause remained unchanged until 1959, when Congress amended the provision to allow four exemptions.[22] In its present form, section 315(a) reads:

> If any licensee shall permit any person who is a legally

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[18]BROADCASTING, Apr. 9, 1979, at 84. These statistics, reported by the FCC, were current on Feb. 28, 1979.

[19]67 CONG. REC. 12503 (1926).

[20]Communications Act of 1934, *supra* note 6.

[21]Section 315 began in the 72d Congress as H.R. 7716 and, as passed by both Houses, differed from § 18 of the Radio Act. Section 18 provided a right of equal opportunity for use of a broadcast facility *only* to candidates for public office. *See* Radio Act of 1927, *supra* note 5. H.R. 7716 would have extended the privilege to a candidate's supporters as well:

> [A]nd if any licensee shall permit any person to use a broadcasting station in support of or in opposition to any candidate for public office . . . he shall afford equal opportunity to an equal number of other persons to use such station in support of an opposing candidate for such public office . . . .

76 CONG. REC. 3768 (1933). This bill, however, was the object of a pocket veto by President Coolidge and did not become law. When the Communications Act of 1934 was introduced in the second session of the 73d Congress, both Houses agreed to omit the language previously proposed in H.R. 7716 and vetoed by the President, and the bill passed in that form. For a more complete discussion of the above legislative history, see Felix v. Westinghouse Radio Stations, Inc., 186 F.2d 1 (3d Cir. 1950), *cert. denied*, 341 U.S. 909 (1951).

[22]Act of Sept. 14, 1959, Pub. L. No. 86-274, 73 Stat. 557 (codified at 47 U.S.C. § 315(a) (1976)).

> 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 imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—
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> (1) bona fide newscast,
> (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),
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> 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 imposed 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.[23]

The latter part of section 315(a), beginning with "Nothing in the foregoing . . . ," is commonly known as the fairness doctrine—a term which is often and erroneously used interchangeably with the equal opportunities doctrine. They are easily distinguished—the fairness doctrine operates in a much looser framework, requiring only that stations present opposing views on issues of public importance. Equal opportunities, on the other hand, relies more upon explicit mathematical calculations for determining the amount of broadcast time to which a candidate is entitled when the section is triggered by a prior use of another candidate.[24] The fairness doctrine imposes

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[23]47 U.S.C. § 315(a) (1976).

[24]The equal opportunities doctrine is also frequently referred to as "equal time," and many sources use the terms interchangeably. *See, e.g.*, H. NELSON & D. TEETER, LAW OF MASS COMMUNICATIONS 491 (2d ed. 1973). The FCC, however, has indicated that it considers this term incorrect because furnishing equivalent *duration* of time is not necessarily the same as furnishing an equal opportunity. As an example, five minutes of prime time, which is traditionally the evening hours, would reach significantly more persons than five minutes in mid-morning. 1978 Primer, *supra* note 11, at 1381.

some obligations on political broadcasting in general, however, and will be discussed briefly in subsequent sections.

III. Effect of the House Proposals on Political Broadcasting

The undertaking to enact new comprehensive communications legislation officially began when the Communications Act of 1978, H.R. 13015,[25] was unveiled by its cosponsors, California Democrat Lionel Van Deerlin, chairman of the House Communications Subcommittee of the Committee on Interstate and Foreign Commerce, and the subcommittee's ranking Republican, Florida Congressman Lou Frey. The bill was hailed by some as a significant improvement over the existing law, and criticized by others as disguising the possibility of severe governmental control in some areas by promises of deregulation in other areas.[26] Despite the "death" of the bill when the 95th Congress adjourned while the proposal was still in committee, H.R. 13015 performed an important function. It caught the attention of legislators, administrators, and broadcast industry leaders, all of whom gave it serious consideration and comment, as demonstrated by the reactions of their representatives at the hearings on the bill.[27] These reactions served as guidelines for the subcommittee and are reflected in the current formulation, H.R. 3333.[28]

H.R. 3333, known as the Communications Act of 1979, was also sponsored by Congressman Van Deerlin, along with cosponsors James Collins of Texas, now the ranking Republican on the subcommittee, and North Carolina Congressman James Broyhill. Of all the proposed legislation, this bill is by far the most far-reaching, involving the most drastic deviations from the 1934 Act. H.R. 3333 therefore deserves close attention, particularly in light of Congressman Van Deerlin's position that "[t]here isn't going to be another [draft] . . . . This is the one that's going to move."[29]

A. Equal Opportunities and H.R. 3333

The equal opportunity doctrine was retained in section 463 of H.R. 3333, but in significantly different form from section 315. As introduced, section 463 reads:

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[25]*H.R. 13015, supra* note 7.

[26]*See, e.g.*, text accompanying notes 132-47 *infra.*

[27]*See generally* 3 *The Communications Act of 1978: Hearings on H.R. 13015 Before The Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 2d Sess. (1978) [hereinafter cited as *1978 Hearings*].

[28]H.R. 3333, 96th Cong., 1st Sess. (1979).

[29]*Rewrite II more radical than its predecessor*, Broadcasting, Apr. 2, 1979, at 29.

(a)(1) If any television broadcast station licensee permits any person who is a legally qualified candidate for public office to use any television broadcast station operated by such licensee through the purchase of broadcast time made available by such station, then such licensee shall afford equal opportunities for the use of such station through the purchase of broadcast time to all other such candidates for the office involved.

(2) Such television broadcasting station licensee shall have no control over the content or format of any material broadcast under the provisions of this section.

(b) The provisions of this section shall not be construed to impose any obligation or requirement upon any television broadcasting station licensee to allow the use of such station by any legally qualified candidate for public office.[30]

Section 463 would clearly change the area of political broadcasting in many respects. Most notable is the complete elimination of radio broadcasting from the obligation to provide equal opportunities.[31] Section 315(a) of the existing law applies to *any licensee* allowing a candidate to use that licensee's broadcast facilities. The wording clearly encompasses both radio and television broadcast stations, since both are licensees of the FCC. Proposed section 463(a)(1), on the other hand, specifically makes its provisions applicable only to any *television* broadcasting station licensee who allows a candidate to use its *television* broadcasting station.

The problem of classification as a legally qualified candidate is probably intended to be resolved under the proposed section in much the same manner as under the current provision. The language used is the same—"a legally qualified candidate for any public office"[32]—with the exception of the word "any," which is deleted from section 463.[33] Arguably, then, the current state of the

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[30]H.R. 3333, 96th Cong., 1st Sess. § 463 (1979).

[31]*Id.* (by negative implication).

[32]47 U.S.C. § 315 (1976).

[33]H.R. 3333, 96th Cong., 1st Sess. § 463(b) (1979). The elimination of the word "any" is perhaps explained as being a remnant of the earlier H.R. 13015, § 439(a)(1)(B), which specifically exempted the offices of President, Vice-President, Senator, and any others for which the election was statewide. *H.R. 13015*, *supra* note 7, at 98. The practical effect of that provision was to limit the application of the doctrine to local candidates and members of the House of Representatives who could be classified as "legally qualified candidates" only, which made the use of "any public office" inappropriate. The provision exempting these offices was deleted in § 463; therefore, the same justification does not exist for excluding "any" from the statutory language. Thus, the slight difference in wording between § 315 and § 463 does not appear to indicate that differing interpretations are needed.

law governing classification as a legally qualified candidate, as it has been interpreted under the 1934 Act, is applicable as well to section 463.

1. Who Is a "Legally Qualified Candidate for Public Office?"—Early in 1978, the Commission proposed a rule revising the definition of a legally qualified candidate.[34] The commissioners cited three basic deficiencies in the existing rule warranting the adoption of the amendments as corrective measures: 1) Certain candidates were not fully covered, leaving open the determination of when candidates who were running for nomination in a manner other than in a public election became legally qualified; 2) ballot candidates were inherently discriminated against in favor of write-in candidates—write-in could qualify much earlier than ballot candidates, thereby gaining an advantage, merely by publicly committing himself to seeking election by the write-in method and proceeding accordingly; and 3) no special criteria were included regarding qualifications for nomination for President or Vice-President of the United States.[35] The new revised rule went into effect on August 28, 1978, and reads, in pertinent part:

> (a) *Definitions.* (1) A legally qualified candidate for public office is any person who:
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> (i) Has publicly announced his or her intention to run for nomination or office;
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> (ii) Is qualified under the applicable local, state or federal law to hold the office for which he or she is a candidate; and,
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> (iii) Has met the qualifications set forth in either subparagraphs (a)(2), (3), or (4), below.
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> (2) A person seeking election to any public office including that of President or Vice President of the United States, or nomination for any public office except that of

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[34]Amendment of Parts 73 and 76 of the Commission's Rules Relating to Broadcasts and Cablecasts by Legally Qualified Candidates for Public Office, 67 F.C.C.2d 956 (1978). Under the Commission rules existing before the amendment, as codified in 47 C.F.R. §§ 73.120, .290, .590, & .657 (1975), a legally qualified candidate was defined as

> any person who has publicly announced that he or she is a candidate for nomination by a convention of a political party or 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 either: (1) Has qualified for a place on the ballot, or (2) Has publicly committed himself to seeking election by the write-in method, and is eligible under the applicable law to be voted for by sticker, by writing in his name on the ballot, or other method; and makes a substantial showing that he is a bona fide candidate for nomination or office.

[35]67 F.C.C.2d at 956-57.

> President or Vice President, by means of a primary, general or special election, shall be considered a legally qualified candidate if, in addition to meeting the criteria set forth in subparagraph (a)(1) above, that person:
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> (i) Has qualified for a place on the ballot, or
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> (ii) Has publicly committed himself or herself to seeking election by the write-in method and is eligible under applicable law to be voted for by sticker, by writing in his or her name on the ballot or by other method, and makes a substantial showing that he or she is a bona fide candidate for nomination or office.[36]

The first requirement under paragraph (a)(1)(i) concerning public announcement, which is not a departure from the earlier rule, means just that—the candidate must state the intention to run publicly.[37] Filing petitions with or obtaining certification from the applicable state in order to be placed on the ballot will serve as the equivalent of the public announcement.[38] The FCC has held that the definition would be unworkable without this restriction, particularly in the case of an incumbent, where a broadcaster might be forced to decide the point at which an incumbent's activities, such as speeches and attendance at public functions, "indicate" that he will seek reelection.[39]

Paragraph (a)(1)(ii), regarding eligibility to hold the office being sought, represents an important advantage from the broadcaster's point of view. To the broadcaster, the saying "time is money" is especially true. Providing an unqualified candidate access to media time at the special rates permitted for qualified candidates[40] is inequitable not only to the licensee and other candidates but to the public as well, which is entitled to a *sound* basis for decision-making.

Paragraph (a)(1)(iii) states that a candidate must also satisfy requirements (2), (3), and (4) of the rule. Subparagraph (2)(ii), suggested by the FCC in its Notice of March 16, was designed to rectify the problem under the old rule of a difference in the period of time before an election during which write-in and ballot candidates were considered legally qualified.[41] The Commission sought to insert language to the effect that write-in candidates would become legally

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[36]Broadcasts by Candidates for Public Office, 47 C.F.R. § 73.1940 (1978).

[37]1978 Primer, *supra* note 11, at 1365.

[38]*Id.*

[39]Senator Eugene J. McCarthy, 11 F.C.C.2d 511, 513-15, *aff'd*, 390 F.2d 471 (D.C. Cir. 1968).

[40]47 U.S.C. § 315(b) (1976). This section allows a qualified candidate to avail himself of a privilege known as the "lowest unit charge." *See* text accompanying note 79 *infra*.

[41]67 F.C.C.2d at 958.

qualified only at the time any other contender in the race would be eligible to qualify for the ballot.[42] In its final form, however,[43] the language of subparagraph (2)(ii) remained effectively the same as the prior subparagraph (2)[44] because the corrective language was deleted. Thus, a write-in candidate qualifying under new subparagraph (2)(ii) apparently still has a better chance of buying more media time than ballot candidates. For example, stations that might hesitate to make time available to a candidate in an attempt to avoid an equal opportunities request from other candidates will have no such worries with the write-in candidate who qualifies before ballot candidates, for *both* the person receiving time and the one requesting it must be legally qualified *at the time of the use* of the broadcast facility. At the point that such a write-in candidate requested time, no other ballot candidates would be "legally qualified."[45]

Requirement (3), according to the Commission, is to remedy the problem left open under the old definition of determining when a candidate who is seeking nomination in a manner other than a primary, general, or special election becomes qualified.[46] Paragraph (a)(3) reads:

> A person seeking nomination to any public office except that of President or Vice President of the United States, by means of a convention, caucus or similar procedure, shall be considered a legally qualified candidate if, in addition to meeting the requirements set forth in paragraph (a)(1) above, that person makes a substantial showing that he or she is a bona fide candidate for such nomination: Except, That no person shall be considered a legally qualified candidate for nomination by the means set forth in this paragraph prior to

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[42]The particular language intended to provide a solution to the dilemma read: "[N]o person shall be considered a legally qualified write-in candidate prior to the time that candidates for the same nomination or office are able, under applicable local, state or federal law, to qualify for a place on the ballot." *Id.* at 957.

[43]47 C.F.R. § 73.1940 (1978).

[44]In fact, the sole difference between the earlier provision and the 1978 clause is the addition of the phrases "himself or herself" and "his or her name" in place of the terms "himself" and "his."

[45]This assumes, of course, that there were no other qualified write-ins. McCarthy v. FCC, 390 F.2d 471 (D.C. Cir.), *aff'g* 11 F.C.C.2d 511 (1968). It is important to note that the Commission's rules place the burden of proving status as a legally qualified candidate on the person seeking the equal opportunities: "A candidate requesting equal opportunities of the licensee, or complaining of noncompliance to the Commission shall have the burden of proving that he and his opponent are legally qualified candidates for the same public office." 47 C.F.R. § 73.1940(f) (1978).

[46]67 F.C.C.2d at 958.

> 90 days before the beginning of the convention, caucus or similar procedure in which he or she seeks nomination.[47]

This provision establishes a clear standard which rectifies the problem with the prior rule. It places the group of candidates seeking nomination by alternate means, such as conventions and caucuses, on similar footing with all others by requiring compliance with paragraph (a)(1), and by imposing a time limitation similar to the limitations placed on ballot candidates under subparagraph (2).

The final problem addressed by the Commission regarding lack of criteria for determining bona fide candidacy for presidential or vice-presidential nomination, was solved with the adoption of subparagraph (4).[48] The provision in subparagraph (4) which states generally that any candidate satisfying the rule's stipulations in at least ten states will be considered legally qualified in all the states of the United States was not originally intended by the Commission. The Commission favored, instead, nationwide standing as a legally qualified candidate upon ballot qualification for presidential or vice-presidential nomination in *one* state.[49] This was an attempt to incorporate a declaratory ruling of the FCC that a person qualifying for a party's nomination for President in one state must be considered a legally qualified candidate in *all* states.[50] Qualification by nomination in one state, however, was opposed by the National Association of Broadcasters (NAB), the broadcast industry's representative organization. In response to the Commission Notice of March 16, the NAB filed comments with the FCC generally supporting the attempts to make the definition more workable, but opposing the

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[47]47 C.F.R. § 73.1940(a)(3) (1978).

[48]Subparagraph (4) now states:

> A person seeking nomination for the office of President or Vice President of the United States shall, for the purposes of the Communications Act and the rules thereunder, be considered a legally qualified candidate only in those States or territories (or the District of Columbia) in which, in addition to meeting the requirements set forth in paragraph (a)(1) of this section—
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> (i) He or she, or proposed delegates on his or her behalf, have qualified for the primary or Presidential preference ballot in that State, territory or the District of Columbia, or
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> (ii) He or she has made a substantial showing of bona fide candidacy for such nomination in that State, territory or the District of Columbia; Except, that any such person meeting the requirements set forth in paragraph (a) (1) and (4) in at least ten States (or nine and the District of Columbia) shall be considered a legally qualified candidate for nomination in all States, territories and the District of Columbia for purposes of this act.

47 C.F.R. § 73.1940(a)(4) (1978).

[49]67 F.C.C.2d at 959.

[50]Walt Disney Prods., Inc., 33 F.C.C.2d 297, 299 (1972), *aff'd sub nom.* Paulsen v. FCC, 491 F.2d 887, 892 (9th Cir. 1974).

"one-state" clause, stating that while localized political activities were important, they should not automatically entitle a candidate to nationwide status.[51] As the rule stands, qualification by nomination in one state will not confer nationwide status as a legally qualified candidate on an individual.

A final clause of note embodied in the new definition is subparagraph (5),[52] in which the Commission defined and gave examples of conditions which would satisfy the term "substantial showing" of bona fide candidacy. Briefly, "substantial showing" means "evidence that the person claiming to be a candidate has engaged to a substantial degree in activities commonly associated with political campaigning."[53] Examples of such activities would be campaign speeches, distribution of campaign literature, issuance of press releases, and maintenance of a campaign committee and headquarters.[54] The language of proposed section 463 leads to the conclusion that no changes in the definition of a legally qualified candidate were intended. Therefore, the interpretation and application of the new definition of a legally qualified candidate under the 1934 Act remain important considerations despite the potential adoption of H.R. 3333.

2. What Constitutes a "Use" of a Broadcast Facility?—Considering further changes in the equal opportunities doctrine as proposed by section 463, the most potentially troublesome area is the definition of a "use" of a broadcast facility for purposes of the section. Both section 315 of the existing law and proposed section 463 employ the word in the general sense that any licensee who permits

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[51]National Association of Broadcasters, Broadcasting and Government 1978: A Mid-Year Status Report 21 (June 1978) (published report prepared by the government relations and legal departments of the NAB for distribution to the membership).

[52]47 C.F.R. § 73.1940(a)(5) (1978).

[53]*Id.*

[54]*Id.* As indicated by the statute, this list is not exhaustive, and not all of the listed activities are necessary to satisfy the "substantial showing" requirement. The provision, however, clarifies the definition of a legally qualified candidate. The FCC has also recognized two situations in which one is *not* a legally qualified candidate. The first involves rulings by a state official with authority to declare whether a candidate is qualified for the ballot. A licensee is permitted to rely on the declaration of such an official that a candidate is unqualified unless there has been a judicial decision to the contrary. Lester Posner, 15 F.C.C.2d 807 (1968); Socialist Workers Party, 40 F.C.C. 280 (1956). The second instance involves the Federal Election Campaign Act (FECA) definition of a political candidate, 2 U.S.C. § 431(b), and whether a person qualifying under its terms is a legally qualified candidate for purposes of § 315 of the Communications Act. The unequivocal answer of the FCC has been that only the FCC definition applies. The FECA definition is specifically limited to its own Act; thus, it does not affect the definition in § 315. Anthony R. Martin-Trigona, 67 F.C.C.2d 33, 34 (1977). *See also* Federal Election Campaign Amendments of 1974, 55 F.C.C.2d 279, 33 RAD. REG. 2d (P & F) 1679 (1975).

a qualified candidate to use the broadcast facility will be subject to the equal opportunity requirements.[55]

The term "use," employed in the general sense, could reasonably be interpreted to have the same definition in the new section as it does in the current section because the word appears in the same context in both. Therefore, under section 463, "use" is likely to take on the exact meaning which has been construed in section 315. In general, then, any broadcast in which a candidate appears through voice or picture, if he can be identified by members of the audience, will be a "use."[56] Even appearances of a non-political nature are uses. Thus, when Ronald Reagan was campaigning for the Republican nomination for President in the 1976 election, stations were advised that any showing of a movie in which he appeared or of reruns of his earlier television series would entitle other candidates to equal opportunities for the use.[57]

From the earliest days of the doctrine, through case-by-case interpretation, the term took on the meaning set out in the Commission's 1956 *Letter to Kenneth E. Spangler.*[58] In that case, a candidate who was also an announcer on television sought a determination of whether his appearances as part of his employment would give rise to equal opportunities. The FCC answered that "all appearances of a candidate, no matter how brief or perfunctory are a 'use' of a station's facilities within section 315."[59] An exception to this strict and fairly inflexible standard was made where an incumbent president was concerned. President Eisenhower, then a candidate for re-election, received network time to speak to the nation on the Suez crisis without incurring equal opportunity obligations.[60] The Commission classified as exempt any reports of the President which dealt with specific, current, and extraordinary international events.[61]

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[55]*See* notes 23 & 30 *supra* and accompanying text.

[56]NATIONAL ASSOCIATION OF BROADCASTERS, POLITICAL BROADCAST CATECHISM 6-7 (8th ed. 1976).

[57]N.Y. Times, Nov. 21, 1975, at 22, col. 3 (remarks of Milton Gross, the FCC's expert on political fairness doctrine questions).

[58]40 F.C.C. 279, 14 RAD. REG. (P & F) 1226b (1956).

[59]*Id.*

[60]Public Notice 38387, 40 F.C.C. 276, 14 RAD. REG. (P & F) 720 (1956).

[61]*Id.* at 277. A similar situation arose when incumbent President Johnson was campaigning for election. He went on the air to inform the nation of a change in Soviet leadership and of the explosion of a nuclear device by Communist China. Again the Commission, citing the Suez case, found the use exempt and went even further, stating: "[W]e think that the networks could reasonably conclude that statements setting forth the foreign policy of this country by its chief executive in his official capacity constitute *news* in the statutory sense. Simply stated, they are an act of office . . . ." Republican Nat'l Comm., 40 F.C.C. 408, 410, 3 RAD. REG. 2d (P & F) 647 (1964) (emphasis added). This puts the factual situation squarely within the area contemplated by the on-the-spot coverage of bona fide news events exemption.

The FCC further relaxed the doctrine by holding that coverage of a newsworthy event on a regular newscast, including a brief display of candidates, was not a use.[62] However, the standard was tightened shortly thereafter by the infamous Lar Daly decision.[63] Lar Daly, a persistent candidate for public office in Chicago, was running for nomination on both the Republican and Democratic tickets. He complained that he was denied an equal opportunity in response to certain news film clips in which his opponents, Richard J. Daley and Timothy Sheehan, appeared. The Commission held unanimously that most of the film clips were uses entitling Lar Daly to the benefits of the statutes,[64] and over heavy objections from broadcasters, denied the petitions for reconsideration and affirmed the ruling.[65] The Attorney General of the United States filed a brief with the FCC against the ruling, voicing the fear that if appearances of candidates in regular news programs were "uses," it could bar "all direct news coverage of important campaign developments."[66]

In spite of the trauma evoked by the ruling, it led to the most significant developments in the history of the doctrine. Congressional reaction was swift; within three days of the ruling, work was begun which led to adoption of four exemptions to section 315[67]—for appearances on bona fide newscasts,[68] bona fide news interviews,[69] bona fide news documentaries,[70] and on-the-spot coverage of bona fide news events.[71]

The exemptions to classification as a "use" create the most difficult questions in interpreting section 463 of the proposed law. The four exceptions in section 315, so swiftly added by Congress, are conspicuously absent in the proposed legislation. Instead, the language specifies that only through the *purchase* by an opponent of broadcast time may a candidate avail himself of section 463, and even then he can only do so by *purchasing* the equivalent broadcast time.[72] This represents a substantial difference from both section 315

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[62]Allen H. Blondy, 40 F.C.C. 284, 285 (1957).

[63]Columbia Broadcasting Sys., Inc., 18 RAD. REG. (P & F) 238, *aff'd*, 26 F.C.C. 715, 18 RAD. REG. (P & F) 701 (1959).

[64]*Id.*

[65]26 F.C.C. at 751.

[66]*Id.* at 723.

[67]Act of Sept. 14, 1959, Pub. L. No. 86-274, 73 Stat. 557 (codified at 47 U.S.C. § 315(a) (1976)). *See* text accompanying notes 22 and 23 *supra*.

[68]47 U.S.C. § 315(a)(1) (1976). For the text of § 315(a)(1), see text accompanying note 23 *supra*. For a discussion of this exception, see text accompanying notes 90-118 *infra*.

[69]47 U.S.C. § 315(a)(2).

[70]*Id.* § 315(a)(3).

[71]*Id.* § 315(a)(4).

[72]H.R. 3333, 96th Cong., 1st Sess. (1979).

of the existing law and section 439 of H.R. 13015, for neither categorically distinguishes paid time from free time. The provision, if adopted, would enlarge the number of appearances which would not give rise to equal opportunities obligations. Proposed section 463 would effectively encompass all the section 315 exemptions because they involve situations in which money does not usually change hands. Section 463 would extend even further because programs which do not specifically qualify for exemptions under section 315, such as newscasts which are not bona fide, would be exempt under section 463 if the time during which the candidate appeared was not purchased.

It is conceivable that the drafters of the bill were seeking to avoid some of the difficulties encountered with the section 315 exemptions. Disputes over application of the exemptions have made this the most highly litigated area of political broadcasting, as well as one of the most unpredictable. Therefore, the absence of the specific exemption language and the proposal of a new test—purchase of time—can be construed reasonably as an attempt to simplify application of the doctrine for both candidates and broadcasters. Such an interpretation would be consistent with the overall scheme in section 463 of eliminating or reducing regulation.[73]

Thus, the adoption of section 463 would significantly alter the definition of a "use" of a broadcast facility. The standard which has developed under the 1934 Act—that all identifiable appearances of a candidate are uses unless specifically exempted by section 315—would be wholly replaced by the proposed purchase test. Under section 463, the only pertinent question would be whether television broadcast time was exchanged for money.

B. Related Areas of Political Broadcasting and H.R. 3333

1. Reasonable Access.—The reasonable access doctrine is another area which would be changed by adoption of H.R. 3333. Section 312(a)(7) of the existing law, known as the "reasonable access" clause, reads:

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[73]The § 463 "purchase" test seems to represent an advantage over section 439, the corresponding provision in H.R. 13015. Section 439 would have dispensed with the § 315 exemptions and replaced them with an exemption for "coverage of a news event." *H.R. 13015, supra* note 7, at § 439. These words leave much room for speculation. Again, the drafters were probably attempting to simplify the provision, consistent with the overall deregulatory scheme, yet the language may be so broad that the legislative intent is thwarted. The term "news event" would seem to encompass everything from newscasts, news documentaries, and news interviews to on-the-spot coverage of news events. In other words, there was room in the section 439 language to read in all current exemptions. Also, the language was likely broad enough for new exemptions. Rather than simplifying the situation for candidates and broadcasters, then, it would have enlarged the considerations without enunciating a straightforward test, such as the exchange of money, by which to judge each situation.

> The commission may revoke any station license or construction permit—
>
> (7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.[74]

This is the only requirement which obligates the licensee to allow a candidate access to the media. Section 315 becomes important once the *first* candidate is given broadcast time, but it does not mandate that a broadcaster make time available to that first candidate.[75] Section 312 represents an exception by requiring that reasonable access always be made available to federal candidates. The test of whether a licensee has met the section 312 stipulation, as in many other areas of broadcasting law, is one of reasonableness and good faith.[76] The Commission recently initiated a study of how well the section was working,[77] and, based upon the results, reaffirmed the rule of reasonableness.[78] On the other hand, proposed section 463(b), which is similar to the language used in section 315(a), makes it clear that a licensee has no obligation to make his facilities available to any candidate. The difference, however, is that no provision similar to section 312(a)(7) requiring reasonable access exists elsewhere in the bill, so that proposed section 463(b) arguably takes on new weight and meaning. Unlike section 315(a), it *really* means that the licensee is not obligated to provide time.

2. Lowest Unit Charge.—Another change of consequence in the proposed communications legislation is found in this area. The rates which a station may charge a candidate for any time purchased are governed by section 315(b) of the 1934 Act, which limits the fee to the "lowest unit charge" of the station during the forty-five days preceding a primary and the sixty days preceding an election.[79]

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[74]47 U.S.C. § 312(a)(7) (1976).

[75]Charles Furcolo, 48 F.C.C.2d 565, 31 RAD. REG. 2d (P & F) 195 (1974); Lew Breyer, 31 F.C.C.2d 548 (1968).

[76]Use of Broadcast and Cablecast Facilities by Candidates for Public Office, 34 F.C.C.2d 510, 23 RAD. REG. 2d (P & F) 1901 (1972). In general, time does not have to be provided free, and a licensee may be relieved of the rule if the number of federal candidates is so great that it would impose a hardship to require access for them all. *Id.* at 535, 23 RAD. REG. 2d (P & F) at 1917.

[77]Notice of Inquiry Ordered Regarding Possible Issuance of Guidelines by FCC for Political Candidates and Broadcast Licensees Concerning "Reasonable Access" Provisions of Section 312(a)(7), 67 F.C.C.2d 1098 (1978).

[78]1978 Primer, *supra* note 11, at 1395 (citing FCC Report and Order Docket No. 78-102, July 12, 1978).

[79]47 U.S.C. § 315(b) (1976):

> The charges made for the use of any broadcasting station by any person

Lowest unit charge requires that candidates be allowed all discounts which are offered to the station's most preferred commercial clients for the same class and amount of time, for the same period, regardless of whether the candidate would otherwise be eligible for those discounts. This is usually established by a station's published rate card, but if there is a current and outstanding *actual* charge which is lower than the published rate, the actual will govern.[80]

All mention of rates to be charged candidates is excluded from the rewritten Act. Thus, broadcasters would have discretion to charge any amount to any candidate. The high cost of media advertising is already prohibitive for many minor party candidates, effectively precluding them from acquiring the mass exposure available to major party candidates with better funding.[81] The elimination of the lowest unit charge could compound the financial difficulties of minor parties as well as hinder the campaigns of major candidates whose resources, while greater, are still limited.

3. The Fairness Doctrine.—The fairness doctrine, also embodied in section 315, does not require equal time in the sense that the equal opportunities doctrine does. Instead, the fairness doctrine requires reasonable opportunities for the presentation of contrasting views when one side of a controversial issue has been broadcast. Application of the doctrine to political broadcasting is evident in the area of non-uses and exempt uses, because it applies to situations where the candidate's supporters appear rather than the candidate himself and to exempt news coverage of candidates.[82] In these situations, the licensee must always be certain that his treatment of issues and persons has been equitable in all respects.

The fairness doctrine also has special application to the political situation where supporters of a candidate purchase time and appear on the air. An opponent's supporters can then buy equal time even

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who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed—

(1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and

(2) at any other time, the charges made for comparable use of such station by other users thereof.

[80]1978 Primer, *supra* note 11, at 1390. For a further discussion of "lowest unit charge" issues, see 34 F.C.C.2d 510, 23 RAD. REG. 2d (P & F) 1901 (1972).

[81]*See* Note, *Keeping Third Parties Minor: Political Party Access to Broadcasting*, 12 IND. L. REV. 713, 721-23 (1979).

[82]Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act (First Fairness Report), 36 F.C.C.2d 40, 47, 24 RAD. REG. 2d (P & F) 1925-26 (1972). *See also* Gloria W. Sage, 62 F.C.C.2d 135, 136, 38 RAD. REG. 2d (P & F) 425, 426 (1976).

though this doctrine does not usually require equality in time, just fairness in treatment.[83] This quasi-equal opportunities situation has become known as the "Zapple doctrine," and has contributed to the widespread confusion of the fairness doctrine with the equal opportunities provisions. The fairness doctrine was eliminated from H.R. 13015, but a substitute was provided in section 434(a) and was to be known as the "equity principle."[84] The only significant difference between the fairness doctrine and the equity principle was that, like proposed section 463, the equity principle would be applied only to television. Thus, it was possible that the fairness doctrine, as it relates to political television broadcasting, would have lived on through the equity principle of H.R. 13015. Section 434(a), then, was a change in name rather than a change in substance. When H.R. 3333 was drafted, this factor was considered and the fairness doctrine was completely restated under its own name in section 462(2).[85] Thus, adoption of section 462(2) would retain all the current areas of the fairness doctrine as related to political broadcasting, including the Zapple doctrine.

IV. Effect of the Senate Proposals on Political Broadcasting

Shortly after the House Communications Subcommittee introduced H.R. 13015, the Senate Communications Subcommittee of the Committee on Commerce, Science, and Transportation announced an intention to enter the arena.[86] The Senate subcommittee chairman, Ernest Hollings, indicated that he was not in favor of a complete revision of the 1934 Act and said, instead, that "[t]he '34 Act should not be packed off to a nursing home. . . . But it must be *renovated* to meet a new age."[87] The bill introduced in the 96th Congress by Senators Ernest Hollings, Howard Cannon, and Ted Stevens, S. 611,[88] reflects this attitude and seeks only to amend the 1934 Act. Senator Barry Goldwater, the ranking Republican on the subcommitee, along with Senator Harrison Schmitt, introduced S. 622,[89] another proposed revision which, again, seeks only to amend the Act of 1934.

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[83]*See* Nicholas Zapple, 23 F.C.C.2d 707, 19 Rad. Reg. 2d (P & F) 421 (1970).

[84]*H.R. 13015, supra* note 7.

[85]H.R. 3333, 96th Cong., 1st Sess. (1979).

[86]*Seed of rewrite may be sprouting on Senate side,* Broadcasting, Oct. 16, 1978, at 22.

[87]*Id.*

[88]S. 611, 96th Cong., 1st Sess. (1979).

[89]S. 622, 96th Cong., 1st Sess. (1979).

A. Equal Opportunities and S. 611, S. 622

Neither of these bills greatly affects political broadcasting, including the equal opportunities doctrine under section 315. Since section 315 is not amended by either Senate proposal, it would remain in full force should either of these bills be enacted. Because the current interpretation of the section 315 exemptions is an important factor in understanding all of the ramifications of eventual adoption of either S. 611 or S. 622 or any potential advantages of H.R. 3333, an examination of the current state of the law is warranted.

Congress clearly wanted to give the Commission considerable discretion in interpreting the exemptions. A 1959 Senate report stated: "[T]he committee in adopting the language of the proposed legislation carefully gave the Federal Communications Commission full flexibility and complete discretion to examine the facts in each complaint which may be filed with the Commission . . . ."[90] Thus, case by case, the Commission has described each exemption, while trying to balance the interests of concerned parties. Broadcasters seek to have any appearances they carry fall within an exemption to avoid statutory obligations, minority party candidates fight an incessant battle to have appearances of major candidates declared non-exempt so they may receive equal media time, and major party candidates, predictably, attempt to have their own appearances exempt and have their opponent's appearances declared non-exempt.

1. Bona Fide Newscast: Section 315(a)(1).—Broadly speaking, this provision has been interpreted to grant an exemption to any appearance falling within a newscast or news program.[91] This has been called the most justified of the exemptions by one writer, who points out that since a candidate has no editorial control over which portions of an "event" a broadcaster will air, that candidate will be greatly disadvantaged should an opposing candidate be granted the opportunity to receive equal media time which could be put to a much better use because he would retain editorial control.[92]

This exemption does not appear to be absolute. If it can be shown that a licensee acted in bad faith, for example, devoting a length of time to the candidate that was out of proportion to the length of the newscast and the significance of the news event, the exception will not apply.[93] In addition to the good faith of the licensee, other factors to consider in determining the standing of the

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[90]S. REP. NO. 562, 86th Cong., 1st Sess. 12 (1959).

[91]1978 Primer, *supra* note 11, at 1375.

[92]Note, *Equal Opportunity in Political Broadcasting: A Dying Ideal*, 8 SW. U.L. REV. 991, 1008 (1976).

[93]H.R. REP. NO. 802, 86th Cong., 1st Sess. 6 (1959).

program as a newscast are whether it is regularly scheduled and whether it consistently emphasizes news and current events.[94]

2. Bona Fide News Interview: Section 315(a)(2).—The guiding principle of this exemption is whether the news interview takes place on a bona fide news program or a bona fide news interview broadcast. If either, the appearance will be an exempt use.[95] Factors which appear to be of particular relevance in finding an exemption under this subsection are: 1) Retention of complete editorial control by the licensee such that a good faith judgment of an individual's newsworthiness is within the scope of the broadcaster's discretion;[96] 2) demonstration that the program is regularly scheduled;[97] and 3) evidence that the program's format is one which is typically concerned with news-type information and events on a recurring basis, which would include appearances by newsworthy figures of the time.[98] The clearest illustration of programs which are exempt as opposed to ones which are not can be offered by considering National Broadcasting Corporation's (NBC) popular programming in *The Today Show*, *The Tonight Show*, and *The Tomorrow Show*. *The Today Show* has been ruled exempt as a news program, with the consequence that all news interviews contained therein will receive the same treatment because it is regularly scheduled and emphasizes news, current events, and public affairs.[99] *The Tonight Show* was very clearly declared non-exempt because the network classified the program as a *variety* show.[100] The fact that newsworthy guests frequently appeared did not alter the basic nature and format of the program.[101] *The Tomorrow Show* presented a more difficult question because it had a stronger history of featuring newsworthy individuals. However, the fact that "newsworthiness" was not

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[94]Problems have arisen in this area regarding the newscaster-turned-candidate. The Commission has indicated that any fact situation involving a newscaster identified by name will be a use notwithstanding the candidate's status as an employee. Use of Station by Newscaster Candidate for Public Office Subject to Section 315, 40 F.C.C. 433 (1965). If the voice or appearance is not identifiable to the public, however, it will not generally be a use. WENR, 17 F.C.C.2d 613 (1969). To avoid this problem completely, a station can often obtain a waiver from the opposing candidates who agree in return to settle for a certain amount of time. As long as the employee-turned-candidate refrains from mentioning his candidacy during the appearance and the opponents sign the waivers with full knowledge of all the facts, the Commission generally finds the waivers binding. WBTW-TV, 5 F.C.C.2d 479, 480 (1966).

[95]1978 Primer, *supra* note 11, at 1376.

[96]*Id.*

[97]*Id.*

[98]*Id.*

[99]Broadcast Actions (Lar Daly), 40 F.C.C. 314 (1960). CBS's *60 Minutes* also has been declared exempt on similar grounds. Letter to CBS, 58 F.C.C.2d 601, 602, 36 RAD. REG. 2d (P & F) 381, 382 (1976).

[100]40 F.C.C. at 314.

[101]*Id.*

necessarily the basis of the selection, for example, guests had included strippers and handwriting analysts, made this a non-exempt program.[102]

3. Bona Fide News Documentary: Section 315(a)(3).—The documentary exemption is a less frequently litigated area under the doctrine. As originally described by Congress, the standard to be applied was an "incidental to" test, meaning coverage of a news event of contemporary news value in which a candidate's appearance was incidental to the subject matter.[103]

The elements which categorize a documentary as exempt were well-stated in *Victor E. Ferrall, Jr.*[104] The list includes but is not limited to

> 1) [W]hether the appearance of the candidate is incidental to the presentation of the subject; 2) whether or not the program is designed to aid or advance the candidate's campaign; 3) whether the appearance of the candidate was initiated by the licensee on the basis of the licensee's bona fide news judgment that the appearance is in aid of the coverage of the subject matter; and 4) whether the candidate has any control over the format, production, or subject matter of the broadcast.[105]

4. On-the-Spot Coverage of Bona Fide News Events: Section 315(a)(4).—Political conventions and all activities incidental thereto are exempt by the specific language of the statute.[106] Two other types of events, however, the debate and the press conference—both of which are normal and predictable occurrences of any campaign—are not specifically exempted. As a result, questions concerning treatment of these for purposes of section 315(a) provided fertile ground for extensive litigation.

In 1962, the Commission ruled first in *The Goodwill Station, Inc.*,[107] and immediately thereafter in *National Broadcasting Co.*,[108] that the broadcast of a debate would engender equal opportunity obligations. The Commission relied heavily on the legislative history of the doctrine which showed that in 1959 Congress had rejected

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[102]Socialist Workers Party, 65 F.C.C.2d 234, 38 RAD. REG. 2d (P & F) 943 (1976).

[103]*See* 105 CONG. REC. 14441 (1959).

[104]46 F.C.C.2d 1113, 1114 (1974) (where appearances of several candidates on a documentary were the result of their expertise in the area, and not for the purpose of advancing their individual candidacies, the documentary was termed bona fide, and hence, exempt).

[105]*Id.*

[106]47 U.S.C. § 315(a)(4) (1976).

[107]40 F.C.C. 362, 365 (1962).

[108]40 F.C.C. 370, 373 (1962).

versions of the bill which attempted to exclude debates from the requirements.[109] In *Columbia Broadcasting System, Inc.*,[110] press conferences were deemed non-exempt and held not to fall within the category of news events which could be covered "on-the-spot."[111]

The law remained settled until 1975, when the Aspen Institute, an independent broadcasting watchdog agency, and CBS obtained a decision which overruled in whole or in part these earlier cases.[112] The standard established was that debates between qualified political candidates initiated under the auspices of nonbroadcast entities, as well as candidate's press conferences, would be exempt from equal opportunities, provided they were covered live and in their entirety, based upon the good faith determination of licensees that they were bona fide news events of contemporary importance, and there was no evidence of station favoritism.[113] This position was later affirmed in *Chisholm v. F.C.C.*,[114] where the Court of Appeals of the District of Columbia found no basis for disturbing the FCC's action because the action was reasonable.[115] As of today, the rule has been extended only slightly to allow for some time delay in the broadcast of either of these events, rather than having to be aired "live."[116]

For events less directly related to the campaign itself than conventions, debates, and news conferences, an Indiana case typifies a situation intended to fall within the exemption. In *Thomas R. Fadell*,[117] a candidate was an incumbent judge who appeared on a weekly program, *Gary County Court on the Air*, which had been

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[109]*Id.* at 372.

[110]40 F.C.C. 395 (1964).

[111]*Id.* at 398.

[112]Aspen Inst. Program on Communications and Soc'y, 55 F.C.C.2d 697, 35 RAD. REG. 2d (P & F) 49 (1975).

[113]*Id.* at 703, 35 RAD. REG. 2d (P & F) at 56.

[114]538 F.2d 349 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976), *aff'g* Aspen Inst. Program on Communications and Soc'y, 55 F.C.C.2d 697, 35 RAD. REG. 2d (P & F) 49 (1975).

[115]538 F.2d at 364. For an excellent discussion of the development of the press conference and debate exemptions through the *Aspen* and *Chisholm* decisions see Note, *Communications Law—Equal Time Exemptions Expanded: Candidates' Debates and Press Conferences Granted Exemption: Chisholm v. F.C.C.*, 10 CONN. L. REV. 236 (1977).

[116]Delaware Broadcasting Co. (WILM), 60 F.C.C.2d 1030, 38 RAD. REG. 2d (P & F) 831 (1976). The Commission felt that this modification of *Chisholm* was warranted because different time zones make live broadcasts at times convenient for all citizens impossible. A standard for evaluating any delay was propounded: "[W]e must consider the length of the delay as a factor in determining the broadcaster's reasonableness and good faith. Thus, absent unusual circumstances, a delay of more than a day would raise questions concerning whether the broadcast was 'on-the-spot coverage of bona fide news events.'" *Id.* at 1032-33, 38 RAD. REG. 2d at 834. *See* Dr. John F. Donato, 67 F.C.C.2d 140 (1977) (delay in broadcast from July 1 to July 3, 1977, was unreasonable).

[117]40 F.C.C. 380, 25 RAD. REG. (P & F) 288 (1963).

broadcast for fourteen years. The Commission held that the appearance or "use" fell directly under the exemption because: 1) The program was bona fide by virtue of having been on air for fourteen years, 2) the candidate's appearance was not for the purpose of advancing his candidacy, and 3) the licensee had exercised a good faith judgment that it was a newsworthy event.[118]

B. Related Areas of Political Broadcasting and S. 611, S. 622

Other areas of political broadcasting would not be greatly altered by either S. 611 or S. 622. Lowest unit rate, section 315(b), and reasonable access, section 312(a)(7), would both be unchanged by the proposals. The fairness doctrine is also not amended by S. 611, with the only break in this pattern of retaining prior political broadcasting law being the specific elimination of the fairness doctrine as it applies to radio in section 333(a)(2) of S. 622.[119]

V. General Reactions to the Proposed Legislation

Political broadcasting law can be perplexing and troublesome. It is plagued by the inescapable fact that competing interests exist. Broadcasters view it as an annual bane and legislators, some with their own campaigns in mind, jealously guard their rights under the law. Only by understanding the competing forces at work in a given area can a rational attempt be made to analyze any suggested changes. The full significance of H.R. 3333, in particular section 463, and of S. 611 and S. 622, is not yet known. Therefore, particular attention should be given to the responses of the various interest groups affected by the legislation, for they may be the ones who will gain most by effective regulation and lose the most by enactment of unsatisfactory statutes.

Because of the recent introduction in Congress of the pending legislation, hearings on the bills had not been held at the time of this writing. However, extensive hearings were held on H.R. 13015,[120] and the statements made by those testifying represent recent reflections and expectations about political broadcasting in general and the directions which they desire new legislation to take.

A. Federal Communications Commission

The House subcommittee on Communications held hearings on the broadcasting aspects of H.R. 13015 September 11-22, 1978.[121] At

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[118] *Id.* at 381.

[119] S. 622, 96th Cong., 1st Sess. (1979).

[120] *1978 Hearings, supra* note 27.

[121] *Id.*

the time of the hearings, several of the commissioners expressed their convictions concerning the equal opportunity requirements. Chairman Charles Ferris opposed any changes in the treatment of political candidates.[122] He stated that "the present regulatory scheme is designed to foster the widest possible dissemination of information about candidates and campaigns."[123] In his opinion, the existing Act strikes a balance between the desire of candidates to conduct their campaigns in their own manner and the need of broadcasters to maintain editorial control over news coverage of political campaigns. He further stated that in abolishing the equal opportunities doctrine for radio, the fairness doctrine, lowest unit charge, and the section 312(a)(7) reasonable access requirement, H.R. 13015 "goes too far in upsetting this balance."[124] Thus, it can be inferred from these statements that the H.R. 3333 treatment of the equal opportunities doctrine would be as displeasing to Chairman Ferris as the related section in H.R. 13015, and that either S. 611 or S. 622, by keeping the equal opportunity requirements, would be preferred in that respect over H.R. 3333.

Abbott M. Washburn, FCC Commissioner, was generally opposed to the deregulation terms, favoring retention of the equal opportunities provision for both radio and television, although he indicated some approval for the exemption of the offices of President and Vice President.[125] Commissioner Washburn, it appears, would also prefer the Senate bills over the House version as far as equal opportunity is concerned, due to the retention of section 315 in the former.

Commissioner Margita White, on the other hand, reiterated her support of H.R. 13015's "overall deregulatory thrust."[126] Her statements at the hearings regarding equal opportunities were consistent with this approval of deregulation, and expressed dissatisfaction with some of the retained requirements. White pointed out that as section 439(c) of H.R. 13015 reads, exempt coverage of a news event would probably require the broadcaster's role to be one of "observer and reporter rather than promoter or participant,"[127] and as such, important programs such as *Meet the Press* would no longer be exempt. Absent a total repeal of the section, she would require equal opportunities whenever broadcast time was sold or pro-

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[122] *Id.* at 94 (statement of Charles D. Ferris, Chairman of FCC).

[123] *Id.*

[124] *Id.*

[125] *Id.* at 152 (statement of Abbott M. Washburn, FCC Commissioner).

[126] *Id.* at 154 (statement of Margita White, FCC Commissioner). White is no longer an FCC Commissioner. She left the position in early 1979.

[127] *Id.* at 160.

vided to a candidate to use as he saw fit, but would exempt all appearances over which the broadcaster retained editorial control.[128]

H.R. 3333, as the most sweeping renovation of equal opportunities—including complete repeal of the doctrine as far as radio is concerned—would likely be the preferred equal opportunities legislation of White.

James Quello, FCC Commissioner, espoused views similar to White's, and urged that Congress "[u]nequivocally remove all first amendment and regulatory constraints,"[129] in order to bring broadcasters to the same position, subject to the same responsibilities, as their "major competitor and closest cousin—newspaper."[130] He clearly wanted equal opportunities provisions for television as well as radio to be deleted in subsequent versions of the Bill. Commissioner Quello, therefore, would also probably opt for the H.R. 3333 regulation of equal opportunity.

Commissioners Joseph Fogarty and Tyrone Brown, like Ferris and Washburn, advocated retention of regulation and the fairness doctrine.[131] Neither mentioned the equal opportunities clause, but their particular opposition to deregulation where "fairness" is concerned strongly implies a preference for leaving section 315(a) as it currently stands.

Thus, most members of the agency now charged with enforcement of the statute appear to be dissatisfied with attempted changes in the equal opportunities doctrine. Some members of the Commission would be happier if the doctrine became extinct altogether, but more would prefer it in the old form, section 315.

B. Industry

The National Association of Broadcasters was represented at the H.R. 13015 hearings by a panel which reflected, generally, approval of the attempts to regulate the broadcast area less strictly. The policy of the NAB has long been that section 315 should be repealed entirely,[132] and the position taken by the panel was indicative of this view. With reference to radio, the comment was made that "[i]t is encouraging to think that under this bill the election season will no longer be a period to be dreaded . . . . We will be able to choose how we participate in the democratic process, just as

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[128] *Id.*

[129] *Id.* at 482 (statement of James H. Quello, FCC Commissioner).

[130] *Id.*

[131] *Id.* at 345, 347-48 (statements of FCC Commissioners Joseph R. Fogarty and Tyrone Brown).

[132] Interview with George Gray, Special Representative for NAB Governmental Relations, in Washington, D.C. (Dec. 20, 1978).

a newspaper chooses today."[133] The NAB's only expressed displeasure with section 439 of H.R. 13015 was that television was not treated similarly.[134]

The NAB later maintained, however, that the "coverage of a news event" exemption language[135] was vague and uncertain as to whether the intent was to cover all the specific exemptions enumerated under the old Act.[136] It suggested to the subcommittee that some interpretation and clarification was needed.[137] Thus, the NAB should be pleased with the replacement of the problem language in section 439(c) with the "purchase" test of section 463, and should also be pleased that the area of exempt appearances would be enlarged under the "purchase" test.

Other industry responses reflect the same appreciation of the intent for deregulation behind section 439. Gene Jankowski, president of the CBS Broadcast Group, addressing the subcommittee on equal opportunity and the fairness doctrine, said he was "pleased that the rewrite goes a long way toward releasing broadcasters from the restraints on their proper journalistic functions."[138] Senior vice president and general counsel for the American Broadcasting Company, Inc. (ABC), Everett Erlick, said that along with the suspension of equal opportunity for presidential and vice-presidental candidates, he favors a trial suspension for all other candidates as well.[139] This, in his opinion, "would provide broadcasters with greater freedom and flexibility in campaign coverage and would benefit the public by permitting more effective and comprehensive presentation of major candidates and important issues."[140] Once again, it appears that the House subcommittee in drafting H.R. 3333 reacted to these opinions by making the equal opportunities requirements in section 463 less stringent for broadcasters. The Senate, however, appears to have taken little notice of the broadcaster's position by leaving section 315 intact.

C. Citizens Groups

Reverend Everett C. Parker, director of the United Church of Christ Office of Communication, called the H.R. 13015 proposals "a

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[133] *1978 Hearings*, *supra* note 27, at 183 (statement of Walter E. May, NAB panel member).

[134] *Id.* at 181 (statement of Donald A. Thurston, NAB panel member).

[135] The exemption language appears in *H.R. 13015*, *supra* note 7, § 439(c).

[136] *1978 Hearings*, *supra* note 27 (supplementary statement of the NAB, at 25).

[137] *Id.*

[138] *1978 Hearings*, *supra* note 27, at 362 (statement of Gene Jankowski).

[139] *Id.* at 577 (statement of Everett Erlick).

[140] *Id.* at 577-78.

disgrace."[141] He alleged that "[t]hey intend a bigger giveaway of public rights and property than Teapot Dome. They will perpetuate entrenched monopolies in violation of the principle that the airwaves belong to the people."[142]

A recent statement by Sam Simon, executive director of the National Citizens Committee for Broadcasting, indicates that H.R. 3333 will not solve the problems of H.R. 13015. He commented that H.R. 3333, from his group's point of view, is "more contrary to the public interest than the first bill."[143]

Nolan Bowie, director of the Citizens Communication Committee, a law firm active in protecting public broadcast rights, adamantly rejected H.R. 13015 as an "anticivil rights bill."[144] In view of his overall condemnation of the deregulatory tone of the legislation as not being designed to protect or serve any public interest, it can be assumed that the repeal of *any* portion of section 315 is contrary to his group's wishes. Therefore, S. 611 or S. 622 would be more likely to receive his support than H.R. 3333. He was concerned that the inability to regulate would open the door for blatant discrimination, and was particularly concerned with the impact on minorities.[145]

D. Minorities

Pluria Marshall, chairman of the National Black Media Coalition, echoed Mr. Bowie's concern that H.R. 13015 was against minority interests.[146] Marshall pointed out that black employment in the media had risen from three percent to nine percent since 1969, and also stressed the increase in black media ownership.[147] He contended that none of this would have been possible under the new bill. Again, the equal opportunities rules were not directly discussed, but the implication seems to be that broadcasters would not conduct themselves properly in the political sphere as well without regulation.

VI. Discussion

The effect of the adoption of either S. 611 or S. 622 in their present forms would be simply to preserve the status quo with regard to political broadcasting. Section 315 would be retained with all the ad-

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[141] *At first blush: no panic in the industry street*, Broadcasting, June 12, 1978, at 41.

[142] *Id.*

[143] *Rewrite II more radical than its predecessor*, Broadcasting, Apr. 2, 1979, at 32.

[144] *1978 Hearings*, *supra* note 27, at 379 (statement of Nolan Bowie).

[145] *Id.* at 380-81.

[146] *Id.* at 391-92 (statement of Pluria Marshall).

[147] *Id.* at 394.

vantages of a developed body of case law. It would, of course, be retained with all its disadvantages, primarily the often complex interpretation of the exemption language. These advantages and disadvantages must be contrasted with whatever value would attach to the enactment of section 463 of the House version, a significantly different approach to the entire area of equal opportunities.

Strong reasons exist for approving section 463 of H.R. 3333. Strongest of all is the position taken by some that the existing law, section 315, and all similar regulatory provisions violate the first amendment guarantee of freedom of the press, and that section 463, with its partial deregulation, would lessen this violation.[148] Broadcasters challenged the equal opportunity provision on constitutional grounds as early as 1959, when it was argued that abridgement of the right could only be condoned where there was an overwhelming justification in the public interest.[149] The FCC found that justifying public interest existed and expressed it in an argument which has withstood twenty years of attacks on its constitutionality. The FCC stated:

> We fully recognize that freedom of the radio is included among the freedoms protected against government abridgement by the first amendment. . . . But this does not mean that the freedom of the people as a whole to enjoy the maximum possible utilization of this medium of mass communication may be subordinated to the freedom of any single person to exploit the medium for his own private interest. . . . Any regulation of radio, especially a system of limited licensees, is in a real sense an abridgement of the inherent freedom of persons to express themselves by means of radio communications. It is, however, a necessary and constitutional abridgement in order to prevent chaotic interference from destroying the great potential of this medium for public enlightenment and entertainment. . . . The most significant meaning of freedom of the radio is the right of the American people to listen to this great medium of communications free from any governmental dictation as to what they can or cannot hear and free alike from similar restraints by private licensees.[150]

Despite the great weight given this argument, the battle continues, and broadcasters staunchly contend they should have all the constitutional freedoms of the print media.[151] The most forceful argu-

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[148]*See, e.g., id.* at 484 (statement of James H. Quello, FCC Commissioner).

[149]Columbia Broadcasting Sys., Inc., 26 F.C.C. at 721-22.

[150]*Id.* at 745-46.

[151]*See generally 1978 Hearings, supra* note 27, at 183 (statements of members of the NAB panel).

ment that section 315 and section 463, as it would apply to television, are unconstitutional is the "deterrence effect" position. This position, stated generally, is that anything which works to deter coverage of an issue important to the American public has only a slightly less critical impact on first amendment rights than a direct ban. As recognized by Henry Geller, Assistant Secretary of the United States Department of Commerce, often the only way a broadcaster knows he has interpreted the law incorrectly is *after* an agency or court proceeding finds against him.[152] He referred to this as the "chilling effect."[153] The practical result is that all too often licensees find it easier to deny all candidate requests for time than to worry about creating potentially troublesome situations under equal opportunities law.[154] In this way, the broadcasters contend section 315 is self-defeating and, perhaps, unconstitutional.

On this issue, both the arguments pro and con have some merit. Although the courts have consistently rejected all first amendment attacks, whatever the eventual resolution, section 463, by placing no restrictions on the radio industry, lessens the potential for first amendment conflicts as viewed by broadcasters. In this respect, section 463 would represent an advantage over its earlier counterpart.

Another advantage of the new section is apparent from the results of statistical studies conducted between 1959 and 1976 by The Roper Organization, Inc.,[155] which have shown that in the 1976 elections people acquired seventy-five percent of their information about candidates running at the national level from television, as opposed to four percent from radio.[156] At the state and local levels, television also held a convincing lead, providing fifty-three percent of the knowledge about state candidates and thirty-four percent for local, as opposed to radio's five and seven percent, respectively.[157] These statistics provide a viable reason for distinguishing television's treatment from that of radio—while the candidate's right to be heard and the public's right to hear him on radio is as important as the right to be heard on television, the potential for harm is not as great because fewer people rely on radio for their information. Therefore, insufficient "justifying public interest" for abridging the first amendment would be shown as to radio and the

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[152] *Id.* at 4.

[153] *Id.* at 5.

[154] Comment, *The Quadrennial Problem: Application of the Equal Opportunity and Fairness Doctrines to Political Campaigns*, 1976 DET. C.L. REV. 83, 91.

[155] THE ROPER ORGANIZATION, INC., CHANGING PUBLIC ATTITUDES TOWARD TELEVISION AND OTHER MASS MEDIA 1959-1976 (1977).

[156] *Id.* at 9.

[157] *Id.* at 8.

section 463 language could be said to reflect this progressive view, which would be more equitable for the broadcaster than section 315.[158]

Another justification for approving section 463 is that, in part, the reason behind the original legislation no longer exists. It is generally accepted that the controlling reason for enactment of the Act of 1934 was the supposed limited nature of the airwaves.[159] The cosponsor of the new bill, Congressman Van Deerlin, indicated that the rejection of this position was one of the purposes behind the drafting of parts of the 1978 proposal. He endorsed deregulation of radio

> on the well established ground that the number of radio stations in the United States is now equal to the number of weekly newspapers and the scarcity element that existed at the time the 1934 Act was written no longer applies. . . . For television . . . we recognize that a scarcity factor does still exist.[160]

While the advantages of the new legislation are indisputable, they must be weighed against the disadvantages. The most critical disadvantage is the possibility that rights of minority groups—including minor political parties—will not be protected.[161] Within the present law, if a broadcaster is not equitable in his treatment of any person or group, or defies the equal opportunities obligations, sanctions are available. These include fines and imprisonment,[162] and in extreme circumstances, revocation of the station's license to operate.[163] Under section 463, radio would have no requirements to meet and therefore, quite obviously, no sanction could be imposed. None of the penalties in other parts of the Act were intended to extend to this area. Even though it is unlikely that radio broadcasters would, as a group, ignore the needs of minority organizations, such groups are understandably wary of a law which provides no statutory protection against the flagrant abuser. The ef-

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[158]It should be noted again that broadcasters as yet do not view it in this way. Herbert Hobler, an industry representative, has urged the position that "unless the Fairness Doctrine and equal time law are eliminated, there will be continuing erosion of First Amendment freedoms. . . . [They] not only inhibit the broadcaster but more importantly actually deny the American public their right to diversity of opinion over the airwaves!" NAB HIGHLIGHTS, June 12, 1978, at 2.

[159]H. NELSON & D. TEETER, LAW OF MASS COMMUNICATIONS 487 (2d ed. 1973).

[160]*And it is from the basement to the attic*, BROADCASTING, June 12, 1978, at 29.

[161]For a discussion of how broadcasters have treated minor party candidates for office, see Note, *Keeping Third Parties Minor: Political Party Access to Broadcasting*, 12 Ind. L. Rev. 713, 723-33 (1979).

[162]47 U.S.C. § 501 (1976).

[163]*Id.* § 312(a).

fect of this deficiency, which makes continued discrimination possible, is especially serious because radio is generally more accessible than television to the minority candidate, who may not have the financial resources of a major party candidate.[164]

An answer to the anxieties of this group of individuals might be that, while there is no *statutory* deterrent for misuse, there is a built-in protection in the system. As Commissioner Quello indicated in his statements to the House subcommittee, the print media has risen to the task of informing the electorate of pertinent campaign matters without government interference, and there is no valid reason for supposing that broadcast journalists will not do the same.[165] Indeed, the ability to remain "fair" is built into the system: A station cannot be too partisan and remain healthy economically because of the lost revenue from the non-favored sectors. The success of a partisan broadcaster would be contingent on the solvency of favored groups. Not only is such partiality bad journalism, but it is bad business judgment as well.

Therefore, while the fears of the minorities are not entirely unfounded, there is good reason to believe that in most instances all persons would be treated equitably under section 463. In addition, in the absence of the "deterrent effect" of the existing section 315, minorities and others might henceforth find the media even more available to meet their needs.

VII. Conclusion

There are reasons, as in any revamping of a major federal act, to approach the Communications Act of 1979 and the two Senate proposals with caution. Several factors are at work, and at present the far-ranging consequences of all the provisions have yet to be fully examined. How the two committees will interact and forge their separate proposals into coherent provisions remains to be seen, but Congressman Van Deerlin has stated his belief that "[e]nactment of landmark legislation is possible in the 96th Congress."[166] Others are not so sure. It has been said that "[g]iven the many substantial interests that undoubtedly will mount a highly organized opposition to all or critically related parts of H.R. 13015, passage of the legislation in anything approaching its present form seems unlikely, at least for

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[164]For an interesting discussion of the effects of media costs on minority candidates, see Note, *Equal Opportunity in Political Broadcasting: A Dying Ideal*, 8 Sw. U.L. Rev. 991, 1008 (1976).

[165]*1978 Hearings*, *supra* note 27, at 488 (statement of Commissioner James H. Quello).

[166]*Seed of rewrite may be sprouting on Senate side*, Broadcasting, Oct. 16, 1978, at 22.

a number of years."[167] This doubt would of course extend to H.R. 3333 as well.

Political broadcasting has flourished in the last forty years under the Communications Act of 1934, reacting continuously to the climate of the time. An extensive but workable body of law has developed through interpretation and application. While advantages undeniably exist in the new proposal, the only certainty regarding section 463 of the Communication Act of 1979 is that it would practically abandon forty-four years of carefully worked out precedent and a new series of proceedings and litigation would begin from scratch. Therefore, many industry members, concerned citizens, and FCC commissioners alike have reached the same conclusion as Senator Hollings and recommend "a creative blending of the Communications Act of 1934 with the most constructive provisions of H.R. 13015."[168] FCC Commissioner Washburn most aptly expressed this sentiment:

> [S]ome currency has been given to the idea that a drastic overhaul of communications regulation is necessary simply because the 1934 act is 44 years old. The U.S. Constitution was ratified in 1788. It is 190 years old and has been flexible enough to accommodate the enormous changes in this country.
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> . . . .
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> It is, therefore, inappropriate and inaccurate to depict the 1934 act as a creaky antique.[169]

LYNNE M. MCMAHAN

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[167]Communciations Act Rewrite (June 27, 1978) (an analysis of H.R. 13015 produced by the law office of Hogan & Hartson, a leading communications law firm).

[168]NAB HIGHLIGHTS, July 10, 1978, at 1.

[169]*1978 Hearings*, *supra* note 27, at 153 (statement of Commissioner Abbott M. Washburn).