Communications Law -- CBS v. FCC: The Supreme Court Upholds FCC Regulations Restricting Broadcaster Discretion in Accepting Political Advertising

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Candidates for federal office have a significantly greater right of access to the broadcast media, but individual broadcasters have much less discretion in refusing such access as a result of the decision by the United States Supreme Court in *CBS v. FCC.* Ruling that the Federal Communications Commission's regulations interpreting 47 U.S.C. § 312(a)(7) are constitutional and within the statutory objectives, the Court approved a finding by the FCC that the statute created a new right of access instead of codifying a less pervasive standing right of access arising out of a generalized public interest standard. The majority agreed with the Commission's conclusion that section 312(a)(7) creates a special right of access that "makes a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process." But, as the dissent in *CBS* pointed out, the price of promptly enforceable, increased access for federal candidates is greater Commission responsibility in political matters and a substitution of the judgment of the Commission for the historically protected judgment of the individual broadcaster.

The case arose out of an October 11, 1979 request by the Carter-Mondale Presidential Committee (Committee) to purchase air time from the three major television networks. The Committee intended to present a documentary outlining the administration's record in conjunction with President Carter's formal announcement of his candidacy. Gerald Rafshoon, acting for the Committee, requested a thirty-minute program between 8 p.m. and 10:30 p.m. on any day between December 4 and 7, 1979. Citing the large number of candidates for the presidential nomination and the potential for disruption of regular programming should all the candidates request equal time, CBS offered to sell only a five-minute segment at 10:55 p.m. on December 8 and a five-minute segment in the daytime. Both ABC and NBC indicated that they

2. The statute in pertinent part is as follows:
   (a) The commission may revoke any station license or construction permit—
   (7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.
4. 101 S. Ct. at 2830.
5. Id. at 2838-39 (White, J., dissenting) (quoting 74 F.C.C.2d at 682).
6. Id. at 2817.
7. Id. at 2818.
had not yet begun to sell time for the 1980 campaign,\(^8\) although ABC did note that it would begin sales in January 1980.\(^9\) Charging that the networks had violated their obligation under section 312(a)(7) to provide "reasonable access," the Committee filed a complaint with the FCC on October 29, 1979.\(^10\) The FCC, in a four-to-three vote, found that the networks had violated the statute and that their reasons for refusing to sell time were "deficient" under FCC standards of reasonableness.\(^11\) The FCC also asked the networks to indicate by November 26, 1979, how they would fulfill their statutory obligations. On their petition for reconsideration, the networks, by the same split vote, again were found to have acted unreasonably, and the FCC issued a clarifying memorandum.\(^12\) The United States Court of Appeals for the District of Columbia affirmed the Commission's orders.\(^13\) The court of appeals concluded that section 312(a)(7) created a new right of access and that the Commission had the authority to determine when a campaign has begun. The court upheld the conclusion that the networks did not apply proper standards and that the 1980 campaign had begun by November 1979.\(^14\)

The Supreme Court affirmed the court of appeals decision, finding that both on its face and in light of its legislative history, section 312(a)(7) grants an affirmative right of access. The Court rejected the argument that the statute merely codifies the prior public interest standard.\(^15\) The Court found the stat-

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8. Id.
9. Id.
10. Id. at 2819.
11. 74 F.C.C.2d at 649. Equal time requirements have been a part of communications law since the first federal statute that regulated broadcast media, the Radio Act of 1927, ch. 169, § 18, 44 Stat. 1162 (current version at 47 U.S.C. § 315(a) (1976)). Section 315(a) now provides the following:

(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: Provided, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is 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—

(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),
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.

12. 74 F.C.C.2d at 657. The memorandum rejected arguments that the Commission improperly substituted its judgment for petitioner's. The Commission memorandum also held that section 312(a)(7) was intended to create a new right of access.
14. Id.
15. For a description of the access requirements under a general public interest standard, the
ute's focus on the individual candidate to be an indication that Congress intended more than a codification of a general duty. In addition, the Court saw the sanction for failure to afford reasonable access—license revocation—as evidence of Congress' intent to create a new right.\footnote{16}

Further, the Court viewed the somewhat scanty legislative history of the provision as support for its finding of a new and additional right. The Court noted that the broad intent of the three campaign reform bills taken up by Congress in 1971 was "to increase a candidate's accessibility to the media and to reduce the level of spending for its use."\footnote{17} The purpose of the Federal Election Campaign Act of 1971 was to "give candidates for public office greater access to the media so that they may better explain their stand on the issues, and thereby more fully and completely inform the voters."\footnote{18} The Court also found compelling the so-called "conforming amendment"\footnote{19} to section 315(a). This section, providing that broadcast licensees are not common carriers to anyone wishing use of the airwaves, had, prior to the addition of section 312(a)(7), read as follows: "No obligation is imposed upon any licensees to allow the use of its stations by any such candidate."\footnote{20} The conforming amendment changed section 315(a) to read: "No obligation is imposed under this subsection upon any licensee..."\footnote{21} According to the majority, the amendment is "the most telling evidence of congressional intent" to broaden access for federal candidates beyond former public interest standards.\footnote{22}

Acknowledging the judicial deference paid to agency decisions in the absence of clear mistake, the Court found that the Commission had "consistently construed the statute as extending beyond the prior public interest policy."\footnote{23} The Court also noted that, because Congress had been made aware of the Commission's interpretations of section 312(a)(7), "Congress' failure to repeal or revise [the statute is] persuasive evidence that that interpretation is the one intended by Congress."\footnote{24}

In a review of Commission policies concerning section 312(a)(7), the Court held the Commission's action "a reasoned attempt to effectuate the statute's access requirement, giving broadcasters room to exercise their discretion

\footnotesize{\begin{itemize}
\item Court cited Commission Policy in Enforcing Section 312(a)(7) of the Communications Act, 68 F.C.C.2d 1079 (1978) [hereinafter cited as 1978 Report & Order]. Prior to the statute, "[n]o legally qualified candidate had... a specific right of access to a broadcasting station. However stations were required to make reasonable, good faith judgments about the importance and interest of particular races." Id. at 1088.
\item 16. 101 S. Ct. at 2821.
\item 22. 101 S. Ct. at 2822.
\item 23. Id. at 2823.
\item 24. Id. at 2824 (quoting Zemel v. Rusk, 381 U.S. 1, 11 (1965)).
\end{itemize}}
but demanding that they act in good faith."\textsuperscript{25} The Court found that the Commission had not become involved improperly in the electoral process, although under the ruling the agency would now have the power to determine whether a campaign has begun and thus whether the obligations of section 312(a)(7) attach.\textsuperscript{26} It further noted that the Commission does not set the starting date for the campaign but instead "take[s] into account the position of the candidate and the networks as well as other factors."\textsuperscript{27} The Court found no merit in petitioners' argument that the Commission's policies attach inordinate significance to candidates' desires, noting that the Commission requires "careful consideration of, not blind assent to, candidates' desires for air time."\textsuperscript{28}

Applying Commission policies to the facts before it, the Court decided that petitioners did not provide reasonable access. The Court found that ABC and NBC had "blanket policies" of refusing access before a certain time, despite Commission warnings that such policies, without counteroffers, would be deemed unreasonable.\textsuperscript{29} On the other hand, CBS, which had offered five-minute slots on two days, did not have sufficient justification for refusing the Committee's request, according to the Court. CBS had cited program disruption and potential equal time burdens as reasons for refusing the Committee, but the Court upheld the Commission's view that such claims were "speculative and unsubstantiated at best."\textsuperscript{30}

Finally, the Court rejected petitioners' assertion that their first amendment rights had been violated by the trimming away of their broadcaster discretion. The Court reaffirmed the notion that "it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."\textsuperscript{31} The Court essentially decided that the advantages of network presentation of information were "necessary for the effective operation of the democratic process" and justified the creation of a limited right of access to the media.\textsuperscript{32}

Although the history of broadcast media regulation is short,\textsuperscript{33} several major guiding principles have been developed. Central to the concepts governing

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\item \textsuperscript{25} Id. at 2827 (footnote omitted).
\item \textsuperscript{26} 74 F.C.C.2d at 665-66.
\item \textsuperscript{27} 101 S. Ct. at 2826 (emphasis omitted) (quoting 74 F.C.C.2d at 665).
\item \textsuperscript{28} Id.
\item \textsuperscript{29} Id. at 2828. See 1978 Report & Order, supra note 15, at 1090.
\item \textsuperscript{30} 101 S. Ct. at 2828 (quoting 74 F.C.C.2d at 674.)
\item \textsuperscript{31} Id. at 2829 (quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969)). An important decision that discussed at length the so-called "fairness doctrine" in broadcasting, \textit{Red Lion} concerned a challenge to the constitutionality of the FCC's promulgation of rules governing broadcasters' obligation to provide free reply time to an individual who had been the subject of a personal attack on the air. The \textit{Red Lion} Court upheld the rules, deciding that the first amendment does not protect the private censorship of broadcasters who are licensed by the government to use a scarce resource. 395 U.S. at 400.
\item \textsuperscript{32} 101 S. Ct. at 2830.
\item \textsuperscript{33} For a brief history of the development of law governing radio and television, see Coase, The Federal Communications Commission, 2 J.L. & Econ. 1 (1959). For a survey—elsewhere in this issue—of FCC regulation practice, see Chamberlin, Lessons in Regulating Information Flow: The FCC's Weak Track Record in Interpreting the Public Interest Standard, 60 N.C.L. Rev. 1057 (1982).
\end{itemize}
regulation of the broadcast media is the fairness doctrine,\textsuperscript{34} articulated in the 1949 FCC report \textit{Editorializing by Broadcast Licensees}.\textsuperscript{35} That report concluded that the broadcast licensees' duty to the public is two-fold—broadcasters must (1) devote a reasonable amount of time to the coverage of controversial and important issues and (2) provide reasonable opportunity for contrasting viewpoints to be heard.\textsuperscript{36} The report emphasized the importance of broadcasters' discretion in meeting the goals of the doctrine. The Commission noted that the Communications Act rejected both censorship by the Commission and common carrier status for would-be users of air time.\textsuperscript{37} In an important Supreme Court decision on rights of access, \textit{CBS v. Democratic National Committee},\textsuperscript{38} Chief Justice Burger analyzed the development and mechanics of the fairness doctrine as it relates to licensee responsibility:

The regulatory scheme has evolved slowly, but very early the licensee's role developed in terms of a "public trustee" charged with the duty of fairly and impartially informing the public audience. In this structure the Commission acts in essence as an "overseer" but the initial and primary responsibility . . . rests with the licensee.\textsuperscript{39} So long as a licensee meets its "public trustee" obligation to provide balanced coverage of the issues, it would appear to have broad discretion to decide what that obligation will be.

The fairness doctrine requires adequate coverage of significant and controversial issues and fairness in presenting opposing views. Broadcast licensees must present such views at their own expense if no other sponsor is available.\textsuperscript{40} Personal attack rules fall within the mandate of the fairness doctrine. When a personal attack has been made on a figure involved in a public issue, a licensee must notify the individual attacked of the date and time of the particular broadcast, furnish a script or tape of the attack and provide a reasonable opportunity for the individual to respond.\textsuperscript{41} Exempted from this requirement are attacks on foreign figures, those made by legally qualified candidates or their spokesmen, and those made during bona fide newscasts or

\textsuperscript{34} For general background on the fairness doctrine, see B. Schmidt, Freedom of the Press vs. Public Access 157-82 (1976); Houser, The Fairness Doctrine—An Historical Perspective, 47 Notre Dame Law. 550 (1972). See also Chamberlin, supra note 33, at 1059 nn. 3, 5 & 26.

The doctrine was codified into the Communications Act of 1959. Exempting news coverage from the general requirements of equal opportunities it added the following language: "Nothing in the foregoing sentence shall be construed as relieving broadcasters . . . from the obligations imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity or the discussion of conflicting views on issues of public importance." Communications Act of 1959, § 1, Pub. L. 86-274, 73 Stat. 557 (1959) (codified as amended at 47 U.S.C. § 315 (1976)).

\textsuperscript{35} 13 F.C.C. 1246 (1949).
\textsuperscript{36} Id. at 1249.
\textsuperscript{37} Id. at 1247-48. See note 56 infra.
\textsuperscript{38} 412 U.S. 94 (1973). This case tested the legality of a broadcaster's refusal to accept political broadcasts unrelated to a campaign. Both the Democratic National Committee and the Business Executives' Move for Vietnam Peace sought air time. A divided Court held that the first amendment did not obligate broadcasters to air any particular sponsor's message. Id. at 121-23.
\textsuperscript{39} Id. at 117 (opinion of Burger, C.J., joined by Stewart & Rehnquist, JJ.).
\textsuperscript{40} Cullman Broadcasting Co., 40 F.C.C. 573 (1966).
\textsuperscript{41} 47 C.F.R. § 73.1920(a) (1980).
In addition, when a licensee endorses a candidate, the licensee must notify all other candidates for the office, and when the licensee opposes a candidate the licensee must notify that candidate of its position. The licensee also must provide tapes or transcripts and offer to all affected candidates reasonable opportunities to respond.

The discretion allowed broadcasters under the fairness doctrine narrowed somewhat during the sixties. In *Red Lion Broadcasting Co. v. FCC* the Commission's rules concerning free replies to personal attacks were upheld by the Supreme Court. The Court held that the listener's right to be informed is more important than the broadcaster's right of discretion. Further, the Court distinguished the area of electronic media from print media by emphasizing the limited numbers of frequencies available for electronic broadcasters. Because frequencies are scarce resources, "to deny a station license because 'the public interest' requires it 'is not a denial of free speech.'"

The fairness doctrine complements the statutory equal time provisions. Section 315 requires licensees to provide equal time to any legally qualified candidate after another candidate for the same office has used the station for campaign purposes. Subsection (a) of section 315 exempts newscasts from the equal time requirement, and subsection (b) prohibits licensees from charging an amount for equal time slots that exceeds the price of comparable advertising for other purposes.

Access rights created under the personal attack rules, equal time provisions and section 312(a)(7) have become a wedge between first amendment protections of freedom of speech and freedom of the press. If freedom of speech fully protects the right to speak effectively, the press loses its freedom to decide what it will and will not print or air. Journalistic freedom in the print media in this country has been curtailed primarily only by libel or obscenity laws and for the most part has remained unregulated. The broadcast media, on the other hand, because of limits on the number of frequencies available, has endured explicit access requirements from the beginning of its development. The very reply right declared unconstitutional in *Miami Herald Publishing Co. v. Tornillo*, a case dealing with access to the print media, was upheld by the *Red Lion* Court because in a broadcast context the Court believed such

42. Id. § 73.1920(b).
43. Id. § 73.1930 (1980).
45. Id. at 390.
46. Id. at 389 (quoting NBC v. United States, 319 U.S. 190, 227 (1943)).
48. Id.
49. Id. § 315(a).
50. Id. § 315(b).
51. The Court rejected controls on the print media in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), in which the Court declared unconstitutional a Florida statute that granted access to newspaper space for candidates to reply to personal attacks. The Court recognized that a responsible press is not mandated by the Constitution and cannot be legislated. Id. at 257.
access would enhance public debate.\textsuperscript{53}

It is evident that rights of access such as those permitted under the personal attack doctrine and the equal time requirements of section 315(a) evolved from the fairness doctrine. However, they undermine the licensee discretion that historically has been a substantial part of the doctrine.\textsuperscript{54} Notions of public trusteeship dictate the airing of controversial subjects, the delivery of balanced coverage and the provision of a right of access to individuals best suited to presenting competing viewpoints. On the other hand, a right of access triggered by an event such as a personal attack may vest in an individual, regardless of a licensee’s judgment about the fairness in, or the public interest in, granting access.\textsuperscript{55}

Ultimately, the relevant question in examining the extent of rights of access is one of control of the media. At one extreme are the notions of the broadcast licensees as common carriers, rejected by Congress in both the Radio Act of 1927 and the Communications Act of 1934.\textsuperscript{56} At the other extreme is total broadcaster autonomy, labeled a form of private censorship by the \textit{Red Lion} Court.\textsuperscript{57} Access rights that cut against broadcaster freedom, however, of necessity involve enforcement, bringing into play the “tightrope” of the access question.

This role of the Government as an “overseer” and ultimate arbiter and guardian of the public interest and the role of the licensee as a journalistic “free agent” call for a delicate balancing of competing interests. The maintenance of this balance for more than 40 years has called on both the regulators and the licensees to walk a “tightrope” to preserve the First Amendment values written into the Radio Act and its successor, the Communications Act.\textsuperscript{58}

Four years after the \textit{Red Lion} Court legitimized rights of access in a personal attack context, the Court in \textit{CBS v. Democratic National Committee} backed away from requiring that broadcasters accept non-candidate-oriented political advertisements on the same basis as commercial advertisers.\textsuperscript{59} The access rights were to be overseen by the FCC, an idea that members of the Court found frightening.

In this sensitive area, so sweeping a concept of Government activity

\textsuperscript{53} 395 U.S. at 390, 392.
\textsuperscript{54} See B. Schmidt, supra note 34, at 157.
\textsuperscript{55} Id. at 17. Schmidt characterizes rights of access that are triggered by a prior publication, such as the equal time provision, as contingent rights of access. Affirmative rights of access exist independent of prior triggering events. See CBS v. FCC, 629 F.2d at 10-11.
\textsuperscript{56} A proposal that would permit a broadcasting station to be used as a common carrier by any candidate for public office was rejected. Senator Clarence Dill urged the Senate to strike the common carrier provision because the stations “would have to give all their time to that kind of discussion.” 67 Cong. Rec. 12,504 (1926). Instead, Dill successfully urged the Senate to pass the equal time proposal. A similar pattern of discussions occurred in 1934, but common carrier status for broadcasters again was rejected. See S. 2910, 73d Cong., 2d Sess. (1934); H.R. 7716, 72d Cong., 1st Sess. (1932); CBS v. Democratic Nat’l Comm., 412 U.S. at 110.
\textsuperscript{57} 395 U.S. at 392.
\textsuperscript{58} CBS v. Democratic Nat’l Comm., 412 U.S. at 117.
\textsuperscript{59} Id. at 94.
would go far in practical effect to undermine nearly a half century of unmistakable Congressional purpose to maintain—no matter how difficult the task—essentially private broadcast journalism held only broadly accountable to the public interest in the Communications Act.  

Congress in 1972 enacted the Federal Elections Campaign Act of 1971, a reform law aimed at curtailing large campaign contributions and expenditures. Title I included the provision codified as 47 U.S.C. § 312(a)(7). Three bills were introduced into the Senate that were intended to increase a candidate's accessibility to the media, to reduce the level of spending for its use and "to give candidates for public office greater access to the media so that they may better explain their stand on the issues, and thereby more fully and completely inform the voters." The Senate report provides little explanation of the amendment but notes that the duty of broadcasters under this provision is inherent "in the requirement that licensees serve the needs and interests of the [communities] of licensees." Section 312(a)(7) was included to "emphasize the public interest obligation inherent in making broadcast time available to candidates covered by the spending limitation." The Senate report indicates that the spending limitations should not result in "diminution in the extent of such programming." The Senate report provides that no obligation is imposed upon any licensee "under this subsection" to grant rights of access, implying, according to the majority view, that rights of access had been created elsewhere. The dissent in CBS v. FCC argued that the statute originally stated that "no obligation is hereby imposed," and that "hereby," the equivalent of "under this subsection," was omitted by the codifier of the United States Code. The dissent, therefore, suggests that the amendment restored the statute to its original state. In the final analysis, the legislative history of section 312(a)(7) is of little, if any, help in determining the true purpose of the provision.

60. Id. at 120 (opinion of Burger, C.J., joined by Stewart & Rehnquist, JJ.). For general background of the access arguments and an extensive list of citations on the question, see Lange, The Role of the Access Doctrine in the Regulation of the Mass Media, 52 N.C.L. Rev. 1, 2 n.5 (1973) (Lange is basically an opponent of increased access). See also Barron, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641 (1967); Johnson & Weston, A Twentieth Century Soapbox: The Right to Purchase Radio and Television Time, 57 Va. L. Rev. 574 (1971) (Barron, Johnson and Weston are vocal advocates of access rights).


64. Id. at 28, reprinted in 1972 U.S. Code Cong. & Ad. News 1773, 1782.


66. See note 19 and text accompanying notes 19-22 supra.


68. 101 S. Ct. at 2822-23.

69. Id. at 2835 (White, J., dissenting).

70. Id.
Perhaps as a result of the "mixed signals" sent by Congress regarding the intent behind section 312(a)(7) the Commission's administration of the section does not set a clear course for broadcasters. Three major reports issued by the FCC and a number of cases considered under section 312(a)(7) provide extensive, if not conclusive, precedent. The Commission quickly established that it did not interpret the section to be a codification of the public interest standard.\textsuperscript{71} The Commission's 1978 Report and Order\textsuperscript{72} spells out what it considers to be relevant criteria for broadcasters to consider when deciding their obligations under section 312(a)(7).\textsuperscript{73} After a candidate becomes "legally qualified,"\textsuperscript{74} the broadcaster must consider in good faith and on an individual basis requests from federal candidates.\textsuperscript{75} Broadcasters must consider the candidate's purpose in seeking air time and seek to accommodate the candidate's interests as closely as possible. Other permissible considerations include the amount of time previously sold to the candidate, the disruptive impact on other programming and the potential for requests by opposing candidates for equal time.\textsuperscript{76} The Commission report discourages across-the-board policies and concludes that if a broadcaster demonstrates a consideration of these factors in reasonable good faith, the licensee is entitled to deference.\textsuperscript{77} An earlier interpretation of section 312(a)(7) asserted that "[t]he Commission will not substitute its judgment for that of the licensee, but, rather, it will determine in any case that may arise whether the licensee can be said to have acted reasonably and in good faith in fulfilling his obligations under this section."\textsuperscript{78} The Commission reports and orders indicate that the agency was unable to glean much guidance from the legislative intent behind the provision.\textsuperscript{79}

The final impact of \textit{CBS v. FCC} is difficult to gauge, but there may be a

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\item \textsuperscript{72}See note 15 supra.
\item \textsuperscript{73}1978 Report & Order, supra note 15, at 1090-91.
\item \textsuperscript{74}A legally qualified candidate is one who (a) is eligible under the law for the office, (b) announces his candidacy or (c) qualifies for the nominating primary. 1978 Primer, supra note 71, at 2216-18. Although President Carter did not meet these criteria at the time of his request, this issue was not raised.
\item \textsuperscript{75}1978 Report & Order, supra note 15, at 1089.
\item \textsuperscript{76}See CBS v. FCC, 629 F.2d at 19.
\item \textsuperscript{78}1972 Policy Statement, supra note 71, at 536.
\item \textsuperscript{79}See 1974 Public Notice, supra note 71, at 517. Case precedents also demonstrate an unwillingness on the part of the Commission to set forth any specific rules for licensees to follow. See, e.g., Summa Corp., 43 F.C.C.2d 602 (1973). The licensee refused to grant five-minute spots to a congressional candidate because of its policy against selling advertising exceeding one minute in length, except during early-morning hours. The Commission, in its first opportunity to decide a section 312(a)(7) case, found Summa's across-the-board policies unreasonable. Id. at 605. Still, the opinion, in strong language, asserted that Congress intended to accord "complete freedom . . . to the broadcaster and candidates to develop specific program formats for the appearance of a candidate." Id. (quoting S. Rep. No. 96, 92d Cong., 1st Sess. 26 (1970)). The Commission empha-
basis for FCC Commissioner Washburn's view that the governmental intrusion that results from the case "will have far-reaching consequences that will come back to haunt the Commission and the public again and again." \(^8\) The Supreme Court's majority opinion in *CBS v. FCC* is not a particularly compelling one. Although the legislative history of section 312(a)(7) provided substantial support for the majority's reasoning in upholding the FCC, the dissent argued that the legislative history does not support the broad powers assumed by the agency. As Justice White noted in his dissent, the majority's reliance, in reaching its decision, on the 1971 Act's overall goal of providing greater candidate access may have been misplaced. This goal was achieved by other provisions in the Act, such as the provision requiring the sale of time at the lowest unit charge available during specified periods. \(^8\) Justice White viewed section 312(a)(7) instead as a protective device to prevent broadcasters from limiting access otherwise available but for the lowest-unit-charge limitations: "Section 312(a)(7) was primarily a device to insure that other provisions of the bill would not dilute the preexisting public interest standard as applied to federal elections." \(^8\) Prior, unsuccessful attempts to codify a reasonable access requirement demonstrated that Congress on at least two other occasions had intended to legislate access provisions that essentially codified the public interest standard. \(^8\) The dissent argued that section 312(a)(7) was included in the bill to emphasize the public interest obligation "inherent in making broadcast time available to candidates covered by the spending limitation." \(^8\) Justice White conceded that the statute "put teeth" into public interest obligation, but did not believe that it created the broad rights granted federal candidates by the FCC. \(^8\) The true intent of Congress in enacting section 312(a)(7) is unclear, but in the face of a lack of clarity, the Commission took an extreme position regarding access.

Acknowledging that deference must be paid to agency interpretation of a statute, Justice White argued that the appropriate amount of deference is determined by the validity of the agency's reasoning and the consistency of prior rulings. \(^8\) Justice White concluded compellingly that the Commission has been neither consistent nor persuasive in its arguments concerning this issue. \(^8\)

\(^{80}\) Carter-Mondale Presidential Comm., 74 F.C.C.2d at 682 (Washburn, Comm'r, dissenting).

\(^{81}\) 101 S. Ct. at 2830 (White, J., dissenting). The provision to which Justice White referred, 47 U.S.C. § 315(b)(1) (1976), provides that during the forty-five day period preceding primary dates or runoffs and during the sixty-day period preceding elections, the cost per unit of time sold by a broadcaster may not exceed the station's lowest available charge for the same period, class and amount of time.

\(^{82}\) 101 S. Ct. at 2834.

\(^{83}\) Id. at 2833.


\(^{85}\) Id.

\(^{86}\) Id. at 2835 (citing Martin Evangelical Lutheran Church v. South Dakota, 101 S. Ct. 2142, 2148 n.13 (1981)).

\(^{87}\) Id.
At least one scholar who has considered FCC policy in this area would no doubt agree:

The best that can be said of Commission policy precedent in this area [section 312(a)(7)] is that it is inconsistent. The worst to be said is that the Commission has vascillated, changed directions, reversed itself often, blown hot and cold, and bent like a frail reed subject to only the changing winds that each successive, changeable majority of the Commissioners brings to the decisionmaking.88

Although the Commission in this case found CBS’s five-minute counter-offers of non-prime time CBS insufficient,89 the Commission generally has stated that candidates may not demand a certain length of time or a certain period in the day for broadcasting purposes. In a 1976 ruling, *Honorable Donald W. Riegle*,90 the FCC upheld a licensee who refused to sell five-minute ads during prime time, but instead offered five-minute and thirty-minute programs in non-prime time. The Commission ruled that “[t]here is no evidence to suggest that through the passage of the reasonable access provision, the licensee is now required to sell specific periods of time for political broadcasts.”91 In the *1978 Report and Order*, the Commission reiterated its stand that although some access to prime time should be afforded, candidates are not entitled to a particular placement of his or her political announcement on a station’s broadcast schedule. “It is best left to the discretion of a licensee when and on what date a candidate’s spot announcement or program should be aired.”92 CBS offered the committee in this case non-prime-time and shorter program lengths than the committee requested.93 According to prior policy, however, those offers could be considered well within the realm of reasonableness.

The triggering of a right of access for a candidate under section 312(a)(7) is the “start” of a campaign.94 In this area, too, the FCC decision in this case seems somewhat inconsistent with prior decisions holding firm for broadcaster discretion. In a ruling on a complaint by Anthony Martin-Trigona,95 in which petitioner alleged that he had requested and was refused access in August 1977

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89. Carter-Mondale Presidential Comm., 74 F.C.C.2d at 650.
90. 59 F.C.C.2d 1314 (1976).
91. Id. at 1314-15. See Anthony Martin-Trigona, 64 F.C.C.2d 1087 (1977) (A candidate requested and was refused program-length advertisements in prime time. The FCC ruled that the candidate, who had instead been offered prime time one-minute spots, had not been denied reasonable access); Don C. Smith, 49 F.C.C.2d 678 (1974) (candidate enjoyed no right to purchase a time of any particular or minimum duration); Honorable Pete Flaherty, 48 F.C.C.2d 838 (1974) (Commission declined to recognize right by a federal candidate to program time of any particular or minimum duration).
93. See 101 S. Ct. at 2818.
for air time in preparation for a March 1978 primary, the FCC upheld the licensee's judgment:

A licensee's discretion in providing coverage of elections extends not only to the type and amount of time to be made available . . . but to the date on which its campaign coverage will commence. A licensee's decision not to accept political advertising until 45 days before a primary election cannot be said to be . . . unreasonable.96

The 1978 Report and Order somewhat confuses the FCC's position on this point. Noting that section 312(a)(7) and the "lowest unit charge" portion of section 31597 were passed concurrently, the Commission suggested that the time periods when the latter provision becomes applicable (sixty days before an election and forty-five days before a primary) are also controlling on a decision determining when a campaign has begun for section 312(a)(7) purposes.98 The Commission decided that it would be unreasonable for a licensee to deny a federal candidate access within those periods, and perhaps before, depending on circumstances. "We expect licensees to afford access at a reasonable time prior to a convention or caucus. We will review a licensee's decision in this area on a case-by-case basis."99 In contrast, the Commission's finding in CBS v. FCC and the Court's decision upholding that finding, in effect make the decision whether a campaign has begun "based on an independent evaluation of the status of the campaign, taking into account the position of the candidates and the networks as well as other factors."100 As Justice White argues, this evaluation undercuts broadcaster discretion and makes the determination of the start of a campaign a matter of law for the FCC, which is a clear departure from earlier practice.101

In an earlier explanation of section 312(a)(7), the FCC placed equal emphasis on individual candidates' needs and the other factors to be considered. "In tailoring access to meet the needs of candidates for a particular office, licensees may consider such factors as the unavailability of particular classes of time; a multiplicity of candidates; the specific desires of candidates; and etc."102 Earlier in the report the Commission concluded, "We continue to believe that the best method for achieving balance between the desires of candidates for air time and the commitments of licensees to the broadcast of types of programming is to rely on the reasonable good faith discretion of individual licensees."103 In the Supreme Court's ruling in this case, the candidates' desires are given much more weight. Broadcasters are to tailor their responses to accommodate, as much as reasonably possible, a candidate's stated purposes. . . . In responding to access re-

96. Id. at 969.
99. Id. at 1092.
100. 74 F.C.C.2d at 665.
101. 101 S. Ct. at 2837 (White, J., dissenting).
103. Id. at 1089.
quests, however, broadcasters may also give weight to such factors as
the amount of time previously sold to the candidate, the disruptive
impact on regular programming, and the likelihood of requests for
time by rival candidates under the equal opportunities provision of
§ 315(a). These considerations may not be invoked as pretexts for
denying access; to justify a negative response, broadcasters must cite
a realistic danger of substantial program disruption—perhaps caused
by insufficient notice to allow adjustments in the schedule or of an
excessive number of equal time requests.104

The Court affirmed the Commission's rather cursory consideration of broad-
caster concern over the number of candidates and the likelihood that these
candidates will demand equal time.105 Although the race was the presidential
race, and 122 candidates had announced, the Commission and the Court con-
cluded that excessive demands for equal time were unlikely.106

Inconsistencies are evident in the Commission's policies, and the Com-
mission in essence has carved a path out of precedent that is not clearly man-
dated by that precedent. As one writer in reference to another decision stated,
"It is readily apparent that precedent could have been gleaned from the Com-
misson's four major political broadcasting statements for any result the ma-

majority chose."107

Perhaps it is more important, then, to turn directly to what the Commis-
ion has "gleaned" from the CBS v. FCC decision. It becomes clear that
under the CBS decision, at every step of the process it is the Commission or
the candidate, rather than the broadcaster, who makes access determinations
in the final analysis. The Commission initially determines whether a candi-
date fits under section 312(a)(7) by deciding when a campaign has begun. The
Court argued that the FCC does not begin the campaign but rather makes an
independent objective decision whether it has begun.108 But when media cov-

erage is as important as it is to campaigning in this country, it is naive to
suggest that the opening of the "season" for political advertising will have
little effect on the commencement of campaign activities. In fact, since regular
programming clearly attracts and keeps more viewers than political advertise-
ments, it is conceivable that licensees might provide less overall coverage of
potential candidates before the official start of the campaign to delay the signs
of a campaign that would lead the Commission to determine that a campaign
has begun. Obviously, a delay of overall coverage will lead to less total expo-
sure of candidates to the public, a result clearly contrary to what the Commis-

sion perceives to be the purpose of section 312(a)(7).

After crossing the threshold question of campaign commencement,
broadcaster discretion gives way to candidate needs. The FCC originally pro-
scribed broadcasters from instituting a flat ban on all access to media time for

104. 101 S. Ct. at 2825.
105. Id. at 2829.
106. Id. at 2828; 74 F.C.C.2d at 674.
107. Albert, supra note 88, at 301.
108. 101 S. Ct. at 2826; Carter-Mondale Presidential Comm., 74 F.C.C.2d at 665.
candidates for federal public office, instead encouraging the broadcasters to engage in a balanced weighing of a number of factors in reaching their access decisions.\textsuperscript{109} Justice White, in dissent in the \textit{CBS v. FCC} decision, suggested that the new emphasis on individual candidate needs undermines the equal treatment mandate of section 315(a)(7).\textsuperscript{110} It is not unlikely that one candidate’s needs require that a licensee grant him or her greater access than it would to another candidate. The licensee’s obligation to provide equal access does not disappear, however. Since the penalty under section 312(a)(7) is the revocation of license, the licensee under this decision may be forced to provide reasonable access to one candidate at the price of unequal access overall. The Commission and the Court have insisted that broadcaster discretion remains intact. Commission Lee dissented from this conclusion in the Commission’s opinion, stating,

I have listened carefully to my colleagues explain how this decision leaves broadest discretion with the networks. However, the decision doesn’t have this effect. By the time the majority finishes its analysis of the networks’ reasons for not giving time, the networks do not have any choice other than to give the requested time. No other weighing of factors is reasonable in the view of the majority.\textsuperscript{111}

Finally, after the threshold start-of-the-campaign issue is resolved and candidate needs are assessed in a request for access, the Commission reviews a licensee’s decision. The Court indicates that if the licensee takes appropriate factors into consideration, the Commission will defer to that judgment even if the Commission’s analysis would differ in the first instance. It is evident, however, that in this case the Commission substituted its judgment for that of the licensee in considering CBS’s reasons for its counteroffer to the Committee.\textsuperscript{112} CBS, the network that did not flatly ban access before a certain date, cited the multiplicity of candidates and potential for requests for equal access as reasons for its refusal to grant the Committee’s request. The Commission, however, decided that it was unlikely that many of the 122 candidates would request equal time, thereby rejecting CBS’s experienced judgment as “speculative and unsubstantiated at best.”\textsuperscript{113}

The above discussion examines the reduction of broadcaster discretion by the Commission and by the Court in this case, a result that frightens proponents of a communications system controlled largely by independent licensees. On the other hand, proponents of access will no doubt laud the decision, viewing it as an opening to the largely closed world of electronic media. In particular, they may see it as a contribution to overall voter awareness and responsibility because of the public’s increased exposure to debate among federal candidates. Access proponents urge that with as powerful a tool as nationwide broadcasting capabilities, networks should not be allowed to provide

\textsuperscript{110} 101 S. Ct. at 2838 (White, J., dissenting).
\textsuperscript{111} 74 F.C.C.2d at 681 (Lee, Comm’r, dissenting) (footnote omitted).
\textsuperscript{112} Compare 1972 Policy Statement, supra note 71, at 536.
\textsuperscript{113} 74 F.C.C.2d at 674.
a voice only to those able to pay for it. Increased access may be an effective weapon against the increasingly powerful and monopolistic networks, which many believe to be a concentration of power in the most dangerous position possible. As Professor Barron, an active advocate of access, argues,

Our constitutional theory is in the grip of a romantic conception of free expression, a belief that the "marketplace of ideas" is freely accessible. But if ever there were a self-operating marketplace of ideas, it has long ceased to exist. The mass media's development of an antipathy to ideas requires legal intervention if novel and unpopular ideas are to be assured a forum. . . .

However compelling the arguments for increasing access may seem, it is important to question whether the Supreme Court's affirmation of increased access is worth the price of increased FCC intervention in the operation of individual stations. First, there is no guarantee that an increased number of voices will bring greater amounts of intelligent debate and discussion to the public. As one author has suggested, "it is not at all clear why we should want the media converted into sterile academics of balanced debate." Lange predicts that increased access in public debate will bring about a "new centrism" regarding target issues at the cost of suppressing serious dissent in other areas of public interest. Lange suggests that access rights may give rise to a false sense that the nation is guarding against credulity. That false sense of security will provide no protection against a resulting American orthodoxy.

Increased access may also lengthen and increase the cost of campaigns dramatically. Candidates may even be expected to campaign heavily early in the political season to trigger the FCC's campaign commencement starting-pistol. Clearly, a longer and thus more expensive campaign season is contrary to the original purpose of the Federal Election Campaign Act of 1971. For those frightened by the increasing use of television marketing in campaigning, with its attendant emphasis on selective and narrow political issues, broadened access rights tend to increase fears of a media-blitzed, but uninformed, electorate. Further, a mandated right of access for federal candidates may cause licensees to reduce time devoted to local campaigns in an effort to preserve regularly scheduled broadcasting.

Probably the most disturbing aspect of this decision is the combination of reduced broadcaster discretion and increased government intervention. That access to the electronic media is limited is undeniable, but as Justice Douglas argued in his concurrence in CBS v. Democratic National Committee:

[U]navailability of the press does not give courts carte blanche to design systems of supervision and control or empower Congress to

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114. See B. Schmidt, supra note 34, at 37-54.
115. Barron, supra note 60 at 1641.
117. See Lange, supra note 60, at 79.
118. Id. at 89.
119. 101 S. Ct. at 2834 n.2 (White, J., dissenting).
read the mandate in the First Amendment that "Congress shall make no law abridging the freedom . . . of the press" to mean Congress may, by acting directly or through any of its agencies such as the FCC make "some" laws abridging the freedom of the press.\textsuperscript{120}

Douglas voices in this concurrence his fears of the far-reaching consequences of federal supervision in the even more generalized fairness doctrine area. Though somewhat extreme in reference to the fairness doctrine, his fears bring to mind a disturbing truth. Commissioners are appointed for seven-year terms by presidents,\textsuperscript{121} who are political creatures, past candidates for political offices and often future reelection candidates.\textsuperscript{122}

As one judge expressed it, "In evaluating the danger of government non-neutrality, we cannot ignore the fact that members of the Federal Communications Commission may well have more than a passing interest in the outcome of federal elections, particularly presidential elections."\textsuperscript{123} Judge Tamm, who concurred with the majority in the court of appeals opinion in \textit{CBS v. FCC}, noted that "\[r\]egrettably there is some evidence that the Commission has, on occasion, been subjected to direct political pressure."\textsuperscript{124} Specifically, in the Watergate tapes of the Nixon administration, President Nixon is heard to threaten to try to block a license renewal for a \textit{Washington Post}-owned radio station for political reasons.\textsuperscript{125} In another setting Charles Colson indicated that to create an inhibiting impact on the networks, he would "pursue with Dean Burch (FCC Commissioner) the possibility of getting a ruling by the FCC as soon as we have a majority."\textsuperscript{126} Judge Tamm warned that the "inherently political nature of the questions to be considered will draw the Commission into a situation where the impartiality will be subject to obvious questions. The danger that standards will not be applied neutrally necessarily suggests the unconstitutionality of the system of government regulation."\textsuperscript{127}

In conclusion, the Supreme Court has affirmed a Commission interpretation of section 312(a)(7) that involves a much greater degree of government intervention in the operation of a broadcasting station than did the general public interest standard. The Supreme Court, basing its decision on legislative history and prior commission rulings, agreed with the FCC that the statute creates a general affirmative right of access for federal candidates. Weighing the importance of maintaining a high level of broadcaster discretion with the importance of opportunities for robust political debate, the Court came out on

\textsuperscript{120} CBS v. Democratic Nat'l Comm., 412 U.S. at 160 (Douglas, J., concurring).
\textsuperscript{121} 47 U.S.C. § 154(a) (1976).
\textsuperscript{123} Id. at 33 n.16. (Tamm, J., concurring).
\textsuperscript{124} Id. (quoting Taped Statement of Richard Nixon to H.R. Haldeman & John Dean (Sept. 15, 1972)), quoted in Senate Select Comm. on Presidential Campaign Activities, S. Rep. No. 981, 93d Cong., 2d Sess. 149 (1974)).
\textsuperscript{125} Id. (quoting Memorandum from Charles W. Colson to H.R. Haldeman (Sept. 25, 1970)), reprinted in Bazelon, FCC Regulation of the Telecommunications Press, 1975 Duke L.J. 213, 247.
\textsuperscript{126} Id. at 32 (quoting CBS Brief at 44).
the side of greater access. Considering the variety of possible interpretations of the legislative history and Commission precedent, the Court's conclusions seem sweeping, overly broad and somewhat frightening. Justice Stewart in *CBS v. Democratic National Committee* stated, "[T]here is never a paucity of arguments in favor of limiting the freedom of the press." Justice Douglas in the same case argued that federal supervision in general is contrary to our constitutional mandate and warned of the consequences of too much regulation at the cost of individual licensee discretion. He argued that government intervention makes

the broadcast licensee an easy victim of political pressures and reduces him to a timid and submissive segment of the press whose measure of the public interest will now be echoes of the dominant political voice that emerges after every election. The affair with freedom of which we have been proud will now bear only a faint likeness of our former robust days. His fears perhaps should be our own.

**Andrea Denise Smith**

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128. 412 U.S. at 144 (Stewart, J., concurring).
129. Id. at 164-65 (Douglas, J., concurring).