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**TELECOMMUNICATION—Right of Access—Section 312(a)(7)
of Federal Communications Act Provides Affirmative Right of
Individual Access to Broadcast Time for Federal Political
Candidates.**

CBS v. FCC,

—U.S.—, 101 S. Ct. 2813, 69 L. Ed. 2d 706 (1981).

In October of 1979, the Carter-Mondale Reelection Committee (the Committee) tried to purchase thirty minutes of prime air time, scheduled for early December, 1979, from the three major television networks.¹ Each network denied the access request,² responding that it was too early in the presidential campaign to begin selling time for political broadcasts.³ As a result of the refusals, the Committee filed a complaint with the Federal Communications Commission (FCC) contending it was denied “reasonable access” to the public under section 312(a)(7) of the Federal Communications Act.⁴ The FCC ruled section 312(a)(7) creates a new individual right of access for federal candidates,⁵ and all three networks

1. See *CBS v. FCC*, —U.S.—, —, 101 S. Ct. 2813, 2817-18, 69 L. Ed. 2d 706, 713 (1981). The Committee explained in a letter that the requested time would coincide with President Carter's scheduled candidacy announcement, and would be used to present a documentary detailing his three year administration. See *id.* at —, 101 S. Ct. at 2818 n.1, 69 L. Ed. 2d at 713-14 n.1.

2. See *id.* at —, 101 S. Ct. at 2818, 69 L. Ed. 2d at 714. CBS offered to sell the Committee two five minute programs in December, one of which fell within prime time. See *id.* at —, 101 S. Ct. at 2818 n.2, 69 L. Ed. 2d at 714 n.2 (letter to Mr. Rafshoon from Mr. Dillion of CBS). ABC and NBC both refused to provide any time in December. See *id.* at —, 101 S. Ct. at 2818-19 nn.3 & 4, 69 L. Ed. 2d at 714-15 nn.3 & 4 (letters from Mr. Allen of ABC and Mr. Iaricci of NBC).

3. See *id.* at —, 101 S. Ct. at 2818-19 nn.2-4, 69 L. Ed. 2d at 714-15 nn.2-4 (denial letters). The networks based their rejection of the Committee's access request on their assertion that it was too early, that any sale would force them to sell time to a substantial number of rival candidates, and that such sales would disrupt regularly scheduled programs. See *id.* at —, 101 S. Ct. at 2818-19, 69 L. Ed. 2d 714-15.

4. See *id.* at —, 101 S. Ct. at 2819, 69 L. Ed. 2d at 715. Section 312(a)(7) of the Communications Act provides in pertinent part:

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

47 U.S.C. § 312(a)(7) (1976).

5. See *CBS v. FCC*, —U.S.—, —, 101 S. Ct. 2813, 2819, 69 L. Ed. 2d 706, 715 (1981). The Commission issued two separate Memorandum and Order Opinions. Eight days after

failed to apply appropriate standards⁶ when evaluating the Committee's request.⁷ The United States Court of Appeals for the District of Columbia Circuit affirmed the Commission's orders, holding Congress had established a new affirmative right for federal candidates to seek public access from broadcasters.⁸ The United States Supreme Court granted certiorari.⁹ Held—*Affirmed*. Section 312(a)(7) of the Federal Communications Act provides an affirmative right of individual access to broadcast time for federal political candidates.¹⁰

The Federal Communications Act of 1934 governs broadcast airwaves in the United States.¹¹ Closely resembling the Radio Act of 1927,¹² the Communications Act prohibits unregulated transmission and private ownership¹³ in order to increase the effective use of broadcast frequen-

their first detailed, 4-3 decision, a second ruling clarified their previous decision and extended the deadline for the networks to comply. *See id.* at ___, 101 S. Ct. at 2819, 69 L. Ed. 2d at 715.

6. *See id.* at ___, 101 S. Ct. at 2819, 69 L. Ed. 2d at 715. "Reasonable access" requires broadcasters to consider and address all non-frivolous matters in processing requests under § 312(a)(7). *See Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 F.C.C.2d 1079, 1089-95 (1978).

7. *See* 74 F.C.C.2d 631, *reprinted in CBS v. FCC*, ___U.S. ___, 101 S. Ct. 2813, 2819, 69 L. Ed. 2d 706, 715 (1981). The second Memorandum and Order Opinion by the Commission specifically rejected the petitioners' arguments that Congress never intended to create a "new" right of broadcast access by enacting section 312(a)(7), and that the Commission improperly preempted the network's response to the Carter-Mondale Re-election Committee in favor of their own evaluation. *See* 74 F.C.C.2d 657, *reprinted in CBS v. FCC*, ___U.S. ___, 101 S. Ct. 2813, 2819, 69 L. Ed. 2d 706, 715 (1981).

8. *See CBS v. FCC*, 629 F.2d 1, 28 (D.C. Cir. 1980), *aff'd*, ___U.S. ___, 101 S. Ct. 2813, 69 L. Ed. 2d 706 (1981). The court of appeals also held that the Commission had implemented section 312(a)(7) under reasonable standards consistent with the first amendment. *See id.* at 25.

9. *See CBS v. FCC*, ___U.S. ___, ___, 101 S. Ct. 2813, 2817, 69 L. Ed. 2d 706, 713 (1981).

The United States Supreme Court granted certiorari to determine: (1) whether the court below erred in construing section 312(a)(7) to create a new and enlarged obligation for broadcasters and (2) whether the Commission and Court correctly determined petitioners failed to provide reasonable access as required by section 312(a)(7). *Id.* at ___, 101 S. Ct. at 2817, 69 L. Ed. 2d at 713.

10. *See id.* at ___, 101 S. Ct. at 2825, 69 L. Ed. 2d at 722.

11. *See* 47 U.S.C. §§ 151-609 (1976) (originally enacted as Federal Communications Act of June 19, 1934, ch. 652, 48 Stat. 1064).

12. *See* Radio Act of 1927, ch. 169, 44 Stat. 1162 (pt. II) (repealed 1934). Original justification for regulation of radio communication was the problem of limited frequencies and resulting interference. *See National Broadcasting Co. v. United States*, 319 U.S. 190, 213 (1943) (Congress acted to prevent potential of radio from being wasted through lack of regulation).

13. *See* 47 U.S.C. § 301 (1976). A major purpose of the Act was "to provide for the use of such channels, but not the ownership." *Id.*

cies.¹⁴ The Act vested the FCC¹⁵ with sole authority to establish standards of operation, licensing procedures,¹⁶ and maintenance fairness in the use of broadcast facilities.¹⁷ The FCC's authority is governed by a standard of "public interest, convenience, or necessity."¹⁸ Although the FCC has relative freedom to regulate under the public interest standard,¹⁹ it is restricted from censorship or interfering with free speech.²⁰

In a 1943 landmark case, *National Broadcasting Co. v. United States*,²¹ the United States Supreme Court announced that the first amendment is applied differently to radio and television than to "other modes of expression."²² Over a quarter of a century later, in *Red Lion Broadcasting Co. v. FCC*,²³ the Supreme Court evaluated, for the first time, FCC regulations

14. See *id.* § 303(g).

15. See *id.* § 154(a) (Commission consists of seven members appointed by President for seven years).

16. See *id.* § 303(r) (Commission has authority to make rules, regulations, restrictions, and conditions consistent with law and necessary to further purposes of Act).

17. See *id.* § 303(g), (i).

18. See *id.* § 309(a) (license grants); *id.* § 307(d) (license renewals); *id.* § 312(a)(2) (license revocation). Public interest has been interpreted to be the interest of the listening public in "the larger and more effective use of radio." *NBC v. United States*, 319 U.S. 190, 216 (1943).

19. See, e.g., *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 101-02, 110-11, 117-18, 125 (1973) (determining best interest of public difficult, deference must be given Congress and experience of Commission); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 379 (1969) (commission may regulate license to assure stations serve public interest); *NBC v. United States*, 319 U.S. 190, 218 (1943) (radio spectrum demands control for public interest). See generally Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213, 215 (Commission has largely uncontrolled administrative discretion in review of broadcast programming).

20. See 47 U.S.C. § 326 (1976). Courts have recognized that Congress enacted section 326 because of an aversion to censorship. See *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 116 (1973) (Commission must remain sensitive to first amendment interests); *Accuracy in Media, Inc. v. FCC*, 521 F.2d 288, 296 (D.C. Cir. 1975) (increasing Commission control of programming would upset constitutional balance), *cert. denied*, 425 U.S. 934 (1976).

21. 319 U.S. 190 (1943).

22. See *NBC v. United States*, 319 U.S. 190, 226-27 (1943); *cf.* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press"). The distinction between the amount of regulation allowed over broadcasters as opposed to other types of media is illustrated by recent decisions expanding rights of commercial advertisers under the first amendment. In each case, the constitutional principles announced were applied only to the print media, excluding the broadcast media. See, e.g., *Bates v. State Bar*, 433 U.S. 350, 384 (1977) (broadcast media demands special consideration); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976) (special problems of broadcast media require special approach); *Bigelow v. Virginia*, 421 U.S. 809, 825 n.10 (1975) (unique characteristics of electronic media make it especially subject to regulation and outside scope of this decision).

23. 395 U.S. 367 (1969).

in light of first amendment objections.²⁴ Although a strict reading of the first amendment would not permit such regulation,²⁵ the *Red Lion* Court upheld the statutory and constitutional validity of both the FCC policies of program balancing²⁶ and the fairness doctrine.²⁷ The Court justified the FCC's affirmative use of the first amendment²⁸ by reasoning the scarcity of wave lengths requires governmental licensing, and such licensing confers a free, preferred status upon the licensee.²⁹ The licensee, therefore, can be regulated in speech content matters.³⁰ Enforcing the right of access to broadcast facilities for political speech³¹ is another such affirmative application of the first amendment³² which the Court has justified by the unique character of the broadcast medium.³³ The Supreme Court,

24. See *id.* at 386.

25. See *id.* 386. Compare *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (guarantee of free press includes guarantee of press autonomy) with *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 394 (1969) (licensees are proxies for public). See generally Alstyne, *The Möbius Strip of the First Amendment: Perspectives on Red Lion*, 29 S. CAROLINA L. REV. 539 (1978).

26. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 400-01 (1969).

27. See *id.* at 400-01. The fairness doctrine was originally a policy of the Commission in applying the "public interest, convenience, or necessity" language of the Communications Act. See *Fairness Report*, 48 F.C.C.2d 1, 2-3 (1974). The rule was codified by Congress in a 1959 amendment to section 315(a) of the Communications Act. See 47 U.S.C. § 315(a) (1976) (requires equal opportunity for candidates).

28. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386-93 (1969). The *Red Lion* holding adopted an affirmative use of the first amendment as a "sword" to impose obligations on the press. See, e.g., *Time, Inc. v. Hill*, 385 U.S. 375, 389 (1967) (guarantees of first amendment not for benefit of press so much as for people); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (foster wide open debate on public issues); *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (first amendment based on wide dissemination of information from diverse and antagonistic sources).

29. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386-93 (1969).

30. See *id.* at 394. The Court held the first amendment does not prevent the government from requiring a licensee to share his frequency with others or to act as a fiduciary for the views and voices of his community. *Id.* at 389. See generally Schenkkan, *Power in the Marketplace of Ideas: The Fairness Doctrine and the First Amendment*, 52 TEXAS L. REV. 727 (1974).

31. See, e.g., *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776-77 (1978) (discussion of governmental affairs indispensable to democracy); *Buckley v. Valeo*, 424 U.S. 1, 52-53 (1976) (candidate needs "unfettered opportunity" to make views known to public); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) (speech about public affairs essence of self government).

32. See 47 U.S.C. § 303(g) (1976) (encourages larger and more effective use of airways in public interest); see also *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (crucial right is public's access to social, political, aesthetic, moral, and other ideas).

33. See, e.g., *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 116 (1973) (broadcast medium major access to marketplace of ideas and expression); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 392 (1969) (licensee could wield unrestrained power to limit views to those with money); *NBC v. United States*, 319 U.S. 190, 226 (1943) (limited facilities im-

however, has also viewed the first amendment as having the traditional function of shielding the broadcasting "press" from such governmental regulation.³⁴ The Court in *Columbia Broadcasting System, Inc. v. Democratic National Committee*³⁵ felt these competing first amendment views required a balancing approach.³⁶ Thus, the Court weighed the rights of the FCC to promote diversity of speech against the rights of the broadcast licensee to operate as a journalistic free agent.³⁷

Prior to 1971, broadcast law provided political media exposure under section 315 of the Communications Act,³⁸ under the FCC's fairness doctrine,³⁹ or under the general public interest standard.⁴⁰ All three methods provided the candidate "contingent" rights of access largely within the licensee's discretion.⁴¹ No individual or political candidate could claim an

pinge freedom of utterance). Notions of scarcity, frequency interference, and the unmatched persuasiveness of the mass media have been used to justify regulation of the telecommunication press. See generally T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 627 (1970).

34. See *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 116 (1973). Several learned jurists have stated that broadcasters should be given the same constitutional protection as the print "press." See, e.g., *id.* at 145 (Stewart, J., concurring) (must not lose sight of first amendment in blind pursuit of its values); *id.* at 167 (Douglas, J., concurring) (first amendment bars decision that government control of licensee is lesser risk); *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16, 79 (D.C. Cir. 1972) (Brazelon, J., dissenting) (must preserve a free press in broadcast media, otherwise value of first amendment is denied), *cert. denied*, 412 U.S. 922 (1973). Judge Bazelon of the Court of Appeals for the District of Columbia Circuit believes a right of access substitutes an independent press for a multitude of speakers, a substitution that is impermissible if the first amendment really protects the press. See Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 *DUKE L.J.* 213, 235. See generally Jaffee, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 *HARV. L. REV.* 768 (1972).

35. 412 U.S. 94 (1973).

36. See *id.* at 117.

37. See *id.* at 117 (regulator and licensee walk "tightrope" to protect first amendment values).

38. 47 U.S.C. § 315(a) (1976) (if candidate obtains time on station, other candidates for same office may obtain equal opportunities on station); accord *Public Notice: The Law of Political Broadcasting and Cablecasting*, 69 *F.C.C.2d* 2209, 2214-15 (1978). When section 312(a)(7) was added to the Communications Act, section 315(a) was amended to add three words to the sentence "No obligation is imposed *under this subsection* upon any licensee to allow the use of its station by any such candidate." See 47 U.S.C. § 315(a) (1976) (emphasis added).

39. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 375-78 (1969) (origin and development of licensee obligation to cover controversial public issues).

40. See, e.g., *Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525, 534-35 (1959) (political broadcasting is one public service criterion considered in license renewal proceedings); *Public Notice: The Law of Political Broadcasting and Cablecasting*, 69 *F.C.C.2d* 2209, 2286 (1978) (political broadcasting is major element of station's service); *Licensee Responsibility as to Political Broadcasts*, 15 *F.C.C.2d* 94, 94 (1968) (political broadcasting vital to an informed electorate).

41. See *CBS v. FCC*, 629 F.2d 1, 10-11 (D.C. Cir. 1980), *aff'd*, ___ U.S. ___, 101 S. Ct.

“affirmative” right of access.⁴³

Title I of the Federal Election Campaign Act of 1971⁴³ guarantees “reasonable access” for a narrowly defined group (qualified federal elective candidates) to “use” airtime to advocate their candidacy.⁴⁴ Since 1971, the FCC, through policy statements, public notices, and decisions resolving specific cases,⁴⁵ has consistently stated that section 312(a)(7) created an “additional” requirement to the general mandate of operating in the public interest.⁴⁶ Specifically, the FCC interpreted the purpose of section

2813, 69 L. Ed. 2d 706 (1981). Judge Bazelon, writing for the court, defined affirmative right of access as existing “regardless of the actions of the broadcaster. By contrast a contingent right of access must be activated by some prior event.” *Id.* at 10-11.

42. *See, e.g.*, FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 474 (1940) (Communications Act recognizes broadcasters are not common carriers); Use of Broadcast and Cablecast Facilities by Candidates for Public Office, 34 F.C.C.2d 510, 536-37 (1972) (public entitled to more than political programs); Memorandum Concerning Interpretation of Second Sentence of Section 315(a), 40 F.C.C. 1088, 1095 (1963) (licensee must make good faith judgment on how to meet needs and interests in political broadcasts). Since 1927, broadcasters have not been subject to all reasonable requests for access. *See* 47 U.S.C. § 152(b) (1976).

43. Pub. L. No. 92-225, § 103(a)(2)(A), 86 Stat. 3 (1972) (codified at 47 U.S.C. § 312(a)(7) (1976)). Title I was termed the “Campaign Communications Reform Act.” *Id.* § 101. Three significant provisions for increasing access to the media while halting escalating campaign costs were contained in Title I. *See* 47 U.S.C. § 312(a)(7) (1976) (created affirmative right of access); *id.* § 315(b)(1) (secured lowest unit rate charge for political candidates during specified period); *id.* § 801(1) (established spending limits), *repealed by* Pub. L. No. 93-443, title II, § 205(b), 88 Stat. 1278 (1976). *See generally* Wick, *The Federal Election Campaign Act of 1971 and Political Broadcast Reform*, 22 DEPAUL L. REV. 582, 590-92 (1973).

44. *See* 47 U.S.C. § 312(a)(7) (1976). The legislative history of section 312(a)(7), however, does not clearly indicate whether the intent was to create an individual right of initial access, to define what access is reasonable, or to set out procedures contemplated to enforce the substantive obligations of the broadcasters. *See* S. Rep. No. 96, 92d Cong., 1st Sess. 20 (1971), *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 1773, 1774; S. Rep. No. 229, 92d Cong., 1st Sess. 56 (1971), *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 1773, 1822. The various House versions of the Federal Election Campaign Act of 1971 contained no comparable provision to section 312(a)(7). *See* S. Conf. Rep. No. 580, 92d Cong., 1st Sess. 1, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 1773, 1867. *See generally* Kako, *The Right of Reasonable Access for Federal Political Candidates Under Section 312(a)(7) of the Communications Act*, 78 COLUM. L. REV. 1287, 1292-93 (1978).

45. *See* Commission Policy in Enforcing Section 312(a)(7) of the Communications Act, 68 F.C.C.2d 1079, 1089 (1978) (refused to adopt specific rules regulating access under 312(a)(7)). Prior to 1979, only one court had considered an action based on section 312(a)(7). *See* *Morrisseau v. Mt. Mansfield Television, Inc.*, 380 F. Supp. 512, 514 (D. Vt. 1974) (judicial action on § 312(a)(7) barred by candidates' failure to exhaust administrative remedies).

46. *See, e.g.*, Commission Policy in Enforcing Section 312(a)(7) of the Communications Act, 68 F.C.C.2d 1079, 1088 (1978) (no merit to contention that § 312(a)(7) merely codified existing political broadcasting policies); Public Notice: The Law of Political Broadcasting and Cablecasting, 69 F.C.C.2d 2209, 2286 (1978) (law does not require stations to permit

312(a)(7) as expanding the fiduciary obligation of the licensee to allow federal candidates access to the electorate.⁴⁷ The FCC's enforcement policy has generally deferred to the discretion of the licensee as to what constitutes "reasonable access" under the circumstances of each case.⁴⁸ The Supreme Court, however, continued to reject individual right of access claims against broadcast and print media.⁴⁹

In *CBS v. FCC*,⁵⁰ the United States Supreme Court evaluated whether the Commission correctly determined that section 312(a)(7) of the Communication Act provides an affirmative right of reasonable access to broadcast stations for individual candidates seeking federal elective office.⁵¹ In upholding the statute's enlarged obligation on broadcasters, the majority rejected CBS's narrow reading of section 312(a)(7) as a simple codification of preexisting practices under the public interest standard.⁵²

access to all candidates but does require access for federal candidates); Licensee Responsibility Under Amendments to the Communications Act Made by Federal Election Campaign Act of 1971, 47 F.C.C.2d 516, 516 (1972) (§ 312(a)(7) imposes on licensee specific responsibility to afford reasonable access).

47. See Commission Policy in Enforcing Section 312(a)(7) of the Communications Act, 68 F.C.C.2d 1079, 1090-94 (1978). In general, licensees must not impose a flat ban on appearances of the same lengths of time offered to commercial advertisers. Licensees will be considered acting unreasonable if they do not afford access at least 45 days before a primary election and 60 days before a general election. Candidates are not entitled to a particular placement of the advertisement or any advantage, if their request for time is exercised late in the campaign. See *id.* at 1090-94.

48. See, e.g., Hon. Donald W. Riegle, 59 F.C.C.2d 1314, 1315 (1976) (commission will look at facts to determine reasonableness of licensee's offer); Hon. Pete Flaherty, 48 F.C.C.2d 838, 848 (1974) (commission will exercise narrow review over licensee's actions under § 312(a)(7)); *Summa Corp.*, 43 F.C.C.2d 602, 604 (1973) (if licensee's judgment made in good faith, commission will affirm); see also *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 117 (1973) (first amendment requires delicate balance between interests of licensee and public); *NBC v. FCC*, 516 F.2d 1101, 1118 (D.C. Cir. 1975) (editorial judgment of licensee must not be disturbed if reasonable and made in good faith).

49. See, e.g., *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979) (commission has no authority to mandate access because broadcasters not common carriers); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 254-58 (1974) (state statute granting political candidate right of reply to print media invalidated as infringing constitutional guarantee of free press); *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 107-09 (1973) (Congress refused right of access for all persons speaking on public issues). The constitutionality of section 312(a)(7) was challenged by parties responding to the Commission inquiry in 1978. The Commission refused to consider the question. See Commission Policy in Enforcing Section 312(a)(7) of the Communications Act, 68 F.C.C.2d 1079, 1094 (1978) ("such issues are for the Courts and Congress to resolve").

50. ___ U.S. ___, 101 S. Ct. 2813, 69 L. Ed. 2d 706 (1981).

51. See *id.* at ___, 101 S. Ct. at 2820, 69 L. Ed. 2d at 717.

52. See *id.* at ___, 101 S. Ct. at 2825, 69 L. Ed. 2d at 722. The petitioners relied on a footnote in *CBS v. Democratic Nat'l Comm.*, in which the Court stated section 312(a)(7) "essentially codified the Commission's prior interpretation of § 315(a) as requiring broad-

The Court found that the language of the statute is unambiguous and expands the pre-1971 broadcast requirements.⁵³ In affirming the Commission's determination that CBS failed to provide reasonable access as required by section 312(a)(7),⁵⁴ the Court reasoned the Commission has authority to implement the statute's access requirement,⁵⁵ and enforce the "reasonable" component of the guarantee.⁵⁶ The Court held the FCC's standards were neither arbitrary nor capricious as applied to the petitioners,⁵⁷ and concluded the statutory right of access, as implemented by the FCC, contributes to freedom of expression on vital political issues and does not impermissibly interfere with the licensee's first amendment rights.⁵⁸

In a lengthy dissent, three Justices argued the FCC erred in interpreting the extent of the access right created by section 312(a)(7).⁵⁹ Relying heavily on the pre-1971 tradition of not affording rights of access to individual speakers or groups, the dissent interpreted the legislative history of section 312(a)(7) as a congressional attempt to codify the public interest standard of selling time to candidates.⁶⁰ Further, the dissent criticized

casters to make time available to political candidates." *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 116 (1973); *see CBS v. FCC*, ___ U.S. ___, ___ 101 S. Ct. 2813, 2824, 69 L. Ed. 2d 706, 722 (1981).

53. *See CBS v. FCC*, ___ U.S. ___, ___ 101 S. Ct. 2813, 2821, 69 L. Ed. 2d 706, 718 (1981). The majority concluded that section 312(a)(7) as interpreted by the Commission had received Congressional review. *See id.* at ___ 101 S. Ct. at 2824, 69 L. Ed. 2d at 721-22.

54. *See id.* at ___ 101 S. Ct. at 2829, 69 L. Ed. 2d at 727-28.

55. *See id.* at ___ 101 S. Ct. at 2825, 69 L. Ed. 2d at 723. The Court decided the Commission has statutory authority under 47 U.S.C. § 303(r) to review, on an ad hoc basis, whether the campaign has commenced and the broadcaster obligations have attached under section 312(a)(7). *See id.* at ___ 101 S. Ct. at 2825, 69 L. Ed. 2d at 723; *cf.* 47 U.S.C. § 303(r) (1976).

56. *See CBS v. FCC*, ___ U.S. ___, ___ 101 S. Ct. 2813, 2826-27, 69 L. Ed. 2d 706, 724-25 (1981). The Court cited the Commission's 1978 Report and Order as establishing the relevant criteria to determine if broadcasters respond to access requests in good faith. *See id.* at ___ 101 S. Ct. at 2825-26, 69 L. Ed. 2d at 723-24; *cf.* Commission Policy in Enforcing Section 312(a)(7) of the Communications Act, 68 F.C.C.2d 1079, 1089-92 (1978).

57. *See CBS v. FCC*, ___ U.S. ___, ___ 101 S. Ct. 2813, 2827, 69 L. Ed. 2d 706, 725 (1981). The Court did comment that the Commission's standards interpreting section 312(a)(7) had achieved greater clarity as a result of responding to the Carter-Mondale Re-election Committee complaint. *See id.* at ___ 101 S. Ct. at 2827, 69 L. Ed. 2d at 725.

58. *See id.* at ___ 101 S. Ct. at 2830, 69 L. Ed. 2d at 729 (rights of broadcaster must be balanced against rights of candidate and public).

59. *See id.* at ___ 101 S. Ct. at 2830, 69 L. Ed. 2d at 730 (White, Rehnquist, Stevens, J.J., dissenting).

60. *See id.* at ___ 101 S. Ct. at 2831-37, 69 L. Ed. 2d at 730-38 (White, J., dissenting). The dissent contended Congress intended to eliminate concern that the Commission lacked adequate authority to enforce its public interest standard by creating a remedy of license revocation for "willful or repeated violations." *See id.* at ___ 101 S. Ct. at 2834, 69 L. Ed. 2d at 734-35 (White, J., dissenting). In addition, the dissent urged that Congress sought to

the validity of a governmental commission intruding so heavily into the latitude of a licensee's judgment as to the nature and amount of time to be made available to federal candidates,⁶¹ warning that candidates and the public would be adversely affected by limiting broadcast discretion.⁶² The dissenting Justices rejected the majority's decision, reasoning the FCC had exceeded the limits of their responsibility in political broadcast matters in their application of section 312(a)(7) to CBS.⁶³

The holding of the Supreme Court in *CBS v. FCC* is a sound reading of the access right created for federal candidates and is easily reconciled with the precise wording of section 312(a)(7).⁶⁴ The Court's conclusion that a new access right was intended by Congress is supported by the change in focus manifested by the language Congress used to define who could invoke the statute ("candidate for federal elective office") and for what purpose the medium must be used ("on behalf of his candidacy").⁶⁵ The pre-1971 public interest standards, to the extent they established a right of access, made no distinction between federal, state, and local candidates.⁶⁶ In addition, the adoption of section 312(a)(7) necessitated a

ensure that the enactment of other provisions of the Federal Election Campaign Act of 1971, particularly the lowest unit rate and media expenditure limitations, would result in no diminution of access from broadcasters. *See id.* at ___, 101 S. Ct. at 2834, 69 L. Ed. 2d at 734-35 (White, J., dissenting).

61. *See id.* at ___, 101 S. Ct. at 2831, 69 L. Ed. 2d at 730 (White, J., dissenting) ("reasonable access" and "reasonable amounts of time" are matters about which fair minds could differ).

62. *See id.* at ___, 101 S. Ct. at 2840-41, 69 L. Ed. 2d at 742-43 (White, J., dissenting). The dissent criticized the Commission's position that reasonable access may mean unequal access to candidates. *See id.* at ___, 101 S. Ct. at 2838, 69 L. Ed. 2d at 739 (White, J., dissenting).

63. *See id.* at ___, 101 S. Ct. at 2837-41, 69 L. Ed. 2d at 738-43 (White, J., dissenting). In addition, Justice Stevens in a separate dissent warned the Commission approach creates the risk that the evaluation of a given refusal will be or appear to be biased. *See id.* at ___, 101 S. Ct. at 2841, 69 L. Ed. 2d at 743 (Stevens, J., dissenting).

64. *See, e.g., id.* at ___, 101 S. Ct. at 2821, 69 L. Ed. 2d at 718 (command of § 312(a)(7) differs from limited public interest duty); Commission Policy in Enforcing Section 312(a)(7) of the Communications Act, 68 F.C.C.2d 1079, 1088 (1978) (particular phraseology of § 312(a)(7) reflects Congress' intent that access be provided); Public Notice: The Law of Political Broadcasting and Cablecasting, 69 F.C.C.2d 2209, 2286 (1978) (law does not require access to all candidates but does require access for federal candidates).

65. 47 U.S.C. § 312(a)(7) (1976). The section provides, in pertinent part, "to permit the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." *Id.* (emphasis added).

66. *See* 47 U.S.C. § 315(a) (1976) (if candidate obtains time on station, other candidates for same office may obtain equal opportunities on station). Even the dissent in *CBS v. FCC* could not explain why, if section 312(a)(7) does no more than codify the public interest doctrine, its plain language limits its application to federal candidates. *Compare* *CBS v. FCC*, ___ U.S. ___, 101 S. Ct. 2813, 2821, 69 L. Ed. 2d 706, 718 (1981) (§ 312(a)(7) focuses on individual legally qualified federal candidates) *with id.* at ___, 101 S. Ct. at 2834, 69 L. Ed.

contemporaneous congressional amendment to section 315 (a) which had previously declared broadcasters free from any obligation of initial access to political candidates.⁶⁷

By holding the FCC correctly applied the statutory provisions of section 312(a)(7), the *CBS* Court recognized both Congress' authority to allocate airwaves for political use,⁶⁸ and the FCC's power to enforce a candidate's right of access.⁶⁹ The power exercised by the FCC in *CBS* was confined to a review of the explanation each network offered on how they met their obligation of reasonableness; and, in the final analysis, each network failed to justify how their "blanket bans" were reasonably "tailored" to the candidate's stated need.⁷⁰ As long as the FCC minimizes government intrusion on the licensee, the first amendment rights of candidates, voters, and broadcasters can remain balanced.⁷¹

In creating the first affirmative right of access on the broadcast industry,⁷² the Court's reasoning in *CBS* is not without potential pitfalls.⁷³ Sec-

2d at 734 (White, J., dissenting) (Congress sought to codify preexisting duty to serve public through political broadcasts).

67. See, e.g., *CBS v. FCC*, ___U.S.____, ___, 101 S. Ct. 2813, 2822-23, 69 L. Ed. 2d 706, 719-20 (1981) (Congress retreated from "no obligation" of access to § 312(a)(7) that gives "reasonable access"); *id.* at ___, 101 S. Ct. at 2835, 69 L. Ed. 2d at 735 (White, J., dissenting) (the "conforming amendment" of § 315(a) indicates Congress intended to give individual candidates right of reasonable access); Commission Policy in Enforcing Section 312(a)(7) of the Communications Act, 69 F.C.C.2d 1079, 1089 (1978) (the concurrent amendment of § 315 clearly implies obligation was imposed elsewhere in Communication Act).

68. See, e.g., *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776-77 (1978) (discussion of governmental affairs indispensable to democracy); *Buckley v. Valeo*, 424 U.S. 1, 52-53 (1976) (candidate needs opportunity to communicate to public); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386-94 (1969) (government can require licensee to share frequency with others).

69. See, e.g., 47 U.S.C. § 303(r) (1976) (make rules and regulations consistent with law); *id.* § 303(g) (encourage use of media); *id.* § 302(a) (Commission can regulate network practices); see also *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 102-03 (1973) (court will defer to Commission judgments).

70. See *CBS v. FCC*, ___U.S.____, ___, 101 S. Ct. 2813, 2828-29, 69 L. Ed. 2d 706, 726-28 (1981). ABC and NBC had adopted "blanket" policies refusing time to any candidate until January 1980. CBS, although not adopting a total ban, had a policy of selling only five minute spots to all candidates. These policies failed, on their face, to address the individual request of the Committee in the "thought to be crucial days" of December. See *CBS v. FCC*, 629 F.2d 1, 22 (D.C. Cir. 1980), *aff'd*, ___U.S.____, 101 S. Ct. 2813, 69 L. Ed. 2d 706 (1981).

71. See *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 117 (1973) (first amendment requires delicate balance between interests of licensee and public); *NBC v. FCC*, 516 F.2d 1101, 1118 (D.C. Cir. 1975) (editorial judgment of licensee must not be disturbed if reasonable), *cert. denied*, 412 U.S. 910 (1976).

72. See *CBS v. FCC*, ___U.S.____, ___, 101 S. Ct. 2813, 2830, 69 L. Ed. 2d 706, 729 (1981). Compare *id.* at ___, 101 S. Ct. at 2825, 69 L. Ed. 2d at 722 (new right of access) with *FCC v. Midwest Video Corp.*, 440 U.S. 689, 705 (1979) (Congress may someday devise limited right of access).

tion 312(a)(7) is a regulation designed to encourage political speech, and as a departure from the public interest standard, is the single most intrusive obligation on broadcasters.⁷⁴ Consequently, section 312(a)(7) is suspect because it is not designed to balance the presentation of ideas, but rather it is designed to grant air time to particular speakers.⁷⁵ Deference to individual candidates could infringe upon the overall best interest of the public.⁷⁶ Broadcasters have an affirmative obligation under section 312(a)(7) to grant access to the airwaves, while candidates have no obligation to weigh the needs or interests of the listener.⁷⁷ Access to greater amounts of airtime during political campaigns could also encourage candidates to increase their expenditures in an ever - escalating effort to present political broadcasts.⁷⁸ Thus, the airwaves could be monopolized prior

73. See, e.g., *CBS v. FCC*, ___ U.S. ___, ___, 101 S. Ct. 2813, 2840-41, 69 L. Ed. 2d 706, 742-43 (1981) (White, J., dissenting) (government intrusion unwarranted and will "haunt us"); *id.* at ___, 101 S. Ct. at 2841, 69 L. Ed. 2d at 743 (Stevens, J., dissenting) (impermissible risk of governmental bias); *CBS v. FCC*, 629 F.2d 1, 29 (D.C. Cir. 1980) (Tamm, J., concurring) (government deciding individual needs raises grave first amendment dangers), *aff'd*, ___ U.S. ___, 101 S. Ct. 2813, 69 L. Ed. 2d 706 (1981).

74. Compare 47 U.S.C. § 312(a)(7) (1976) (Commission may revoke license for willful or repeated failure to provide reasonable access) with *Farmers Educ. and Coop. Union v. WDAY, Inc.*, 360 U.S. 525, 534-35 (1959) (political broadcasting is public service criterion considered in license renewal) and *Public Notice: The Law of Political Broadcasting and Cablecasting*, 69 F.C.C.2d 2209, 2286 (1978) (political broadcasting one of fourteen elements in station's service).

75. Compare *CBS v. FCC*, ___ U.S. ___, ___, 101 S. Ct. 2813, 2831, 69 L. Ed. 2d 706, 718 (1981) (focus is on individual candidate) with *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 379-86 (1969) (FCC may regulate licensee to assure station serves public interest) and *NBC v. United States*, 319 U.S. 190, 215-18 (1943) (radio spectrum demands control for public).

76. See, e.g., *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1966) (guarantees of first amendment not for benefit of press as much as for people); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (foster wide open debate on public issues); *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (first amendment based on wide dissemination of information from diverse sources).

77. See 47 U.S.C. § 303(g) (1976) (encourage more effective use of airways for public). In *Red Lion Broadcasting Co. v. FCC*, the Supreme Court of the United States allowed the government, for the first time, to require a licensee to share his frequency as a fiduciary for the public. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389 (1969). The justification was both the uniqueness of the medium and the higher first amendment values being sought. See *id.* 400-01. Specifically, the Court stated these values to be "the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas." *Id.* at 390 (emphasis added). Although section 312(a)(7) grants the federal candidate access to the airways, the candidate has no obligation similar to 47 U.S.C. § 303(g) to guard the public interest. See *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 145 (1973) (Stewart, J., concurring) ("we must not lose sight of the first amendment in blind pursuit of its values").

78. See *CBS v. FCC*, ___ U.S. ___, ___, 101 S. Ct. 2813, 2834 n.2, 69 L. Ed. 2d 706, 735 n.2 (1981) (White, J., dissenting) (Campaign Act of 1971 designed to shorten campaigns and reduce overall costs); *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 123 (1973) (public inter-

to election by the politician best able to pay.⁷⁹

Notwithstanding the fact section 312(a)(7) is designed to apply uniformly to all candidates and to defer to the licensee's determination,⁸⁰ the decision in *CBS* forewarns that the FCC will be more directly involved in the supervision of broadcast judgments.⁸¹ Such an enlargement of governmental supervision creates the risk that the FCC will not remain neutral and objective.⁸² Since section 312(a)(7) deals solely with candidates for federal political office, the FCC, as a politically appointed body,⁸³ may favor the ideas of a particular speaker.⁸⁴ In addition, the authority of the FCC to evaluate a broadcast editor's determination of "reasonable access" on a case by case basis increases the likelihood of governmental determinations being substituted for journalistic discretion.⁸⁵ Simultane-

est in providing access to marketplace of ideas not served by system heavily weighed in favor of wealthy).

79. *Cf. Buckley v. Valeo*, 424 U.S. 1, 58-59 (1976) (per curiam) (first amendment does not tolerate personal expenditure limits on candidates since it restricts ability to engage in protected political speech).

80. *See, e.g., CBS v. FCC*, ___ U.S. ___, ___, 101 S. Ct. 2813, 2830, 69 L. Ed. 2d 706, 729 (1981) (Commission will not de novo determine reasonableness of licensee judgment); Hon. Donald W. Riegle, 59 F.C.C.2d 1314, 1315 (1976) (Commission will look at facts to determine if licensee's offer was reasonable); Hon. Pete Flaherty, 48 F.C.C.2d 838, 848 (1974) (Commission will exercise narrow review over licensee's actions under § 312(a)(7)).

81. *Compare CBS v. FCC*, ___ U.S. ___, ___, 101 S. Ct. 2813, 2830, 69 L. Ed. 2d 706, 729 (1981) (if broadcasters make good faith evaluation of all relevant factors, Commission will uphold their decisions) *with id.* at ___, 101 S. Ct. at 2838, 69 L. Ed. 2d at 739 (White, J., dissenting) (each assessment will be reviewed by Commission) *and NBC v. FCC*, 516 F.2d 1101, 1118 (D.C. Cir. 1975) (editorial judgment of licensee must not be disturbed if reasonable).

82. *See, e.g., FCC v. Pacifica Found.*, 438 U.S. 726, 745-46 (1978) (first amendment demands government remain neutral in marketplace of ideas); *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 153-54 (1973) (Douglas, J., concurring) (fear of power should cut against rather than for governmental control); *CBS v. FCC*, 629 F.2d 1, 33 n.16 (D.C. Cir. 1980) (commission has in past been subjected to direct political pressure), *aff'd*, ___ U.S. ___, 101 S. Ct. 2813, 69 L. Ed. 2d 706 (1981).

83. *See* 47 U.S.C. § 154(a) (1976) (President appoints seven members for seven years).

84. *See CBS v. FCC*, 629 F.2d 1, 32 (D.C. Cir. 1980) (Tamm, J., concurring), *aff'd*, ___ U.S. ___, 101 S. Ct. 2813, 69 L. Ed. 2d 706 (1981). The Commission may have an interest in the outcome of an election, especially a presidential race. *See id.* at 32.

85. *See, e.g., CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 117-21 (1973) (regulator and licensee walk "tightrope" to preserve first amendment right to editorial discretion); *id.* at 167 (Douglas, J., concurring) (first amendment bars decision; government control of licensee is lesser risk); Commission Policy in Enforcing Section 312(a)(7) of the Communications Act, 68 F.C.C.2d 1079, 1089 (1978) (best method of balancing is to rely on discretion of licensee). *Compare CBS v. FCC*, ___ U.S. ___, ___, 101 S. Ct. 2813, 2831, 69 L. Ed. 2d 706, 730 (1981) (fair minds could differ about "reasonable access") *with id.* at ___, 101 S. Ct. at 2837, 69 L. Ed. 2d at 739 (White, J., dissenting) (deference to editorial judgment by Commission has not been followed).

ously, a ruling by the FCC that the "political season" has begun and section 312(a)(7) obligations have attached on broadcast facilities could, in effect, give the FCC power to "start" television campaigns.⁸⁶

Although its approach is not without potential hazards, the Supreme Court's reasoning in *CBS v. FCC* that an affirmative access right has been created by section 312(a)(7) will increase the candidate's exposure through the communication medium most used by our society.⁸⁷ Consequently, *CBS* will allow political debate on issues critical to our system of government.⁸⁸ If broadcasters could simply ignore the stated needs of a federal candidate, or decide when airtime should be made available, the candidate would effectively be restrained from communicating with a large sector of the electorate.⁸⁹ As long as the FCC is careful to maintain a limited overseer role and to safeguard against favoring one speaker or viewpoint over another, the allocation of the airwaves made by section 312(a)(7) is not an unwarranted intrusion of the first amendment.⁹⁰

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86. See 47 U.S.C. § 315(a) (1976) (if a candidate obtains time, other candidates may obtain equal opportunities). Compare *CBS v. FCC*, ___ U.S. ___, ___ 101 S. Ct. 2813, 2826, 69 L. Ed. 2d 706, 724 (1981) (Commission independently determines campaign start) with *id.* at ___, 101 S. Ct. at 2838, 69 L. Ed. 2d at 739 (White, J., dissenting) (reasonable men could differ about when moment of access obligations should begin).

87. See *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 116 (1973) (broadcast medium major access to marketplace of ideas and expression); *CBS v. FCC*, 629 F.2d 1, 10 (D.C. Cir. 1980) (hard to overestimate importance of television to politics), *aff'd*, ___ U.S. ___, 101 S. Ct. 2813, 69 L. Ed. 2d 706 (1981).

88. See, e.g., *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776-77 (1978) (discussion of governmental affairs indispensable to democracy); *Buckley v. Valeo*, 424 U.S. 1, 92-93 (1976) (increasing public discussion and participation is vital to electoral process of self-governing society); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) (public affairs speech essence of self government).

89. See, e.g., *CBS v. FCC*, ___ U.S. ___, ___ 101 S. Ct. 2813, 2830, 69 L. Ed. 2d 706, 729 (1981) (§ 312(a)(7) prevents diminished access); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 392 (1969) (licensee could wield power to limit views to those with money); *NBC v. United States*, 319 U.S. 190, 226 (1943) (limited facilities limit speech).

90. See, e.g., *CBS v. FCC*, ___ U.S. ___, ___ 101 S. Ct. 2813, 2830, 69 L. Ed. 2d 706, 729 (1981) (rights of broadcaster to private control of media must be balanced against essential public accountability); *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 117-21 (1973) (regulator and licensee walk "tightrope" to protect first amendment values); *Accuracy in Media, Inc. v. FCC*, 521 F.2d 288-96 (D.C. Cir. 1975) (increasing Commission control of programming would upset constitutional balance), *cert. denied*, 425 U.S. 934 (1976).