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Political Broadcasts—A Few Short Steps Forward

Henry Geller*

There is properly great concern over rising campaign costs. Broadcasting, particularly television, is the chief contributor to these escalating costs. Thus, the FCC reported that political broadcast expenditures reached new highs in 1968.¹ The broadcast industry reported charges of \$58.9 million for political broadcasting in 1968, 70 percent higher than the \$34.6 million reported in 1964, the previous comparable election year.² Television broadcasting accounted for \$38.0 million, or 64.5 percent of the total, while radio broadcasting showed charges of \$20.9 million or 35.5 percent of the total.

In the context of the presidential campaigns, it has been said:

When television first became a serious tool in political campaigning, it was expected to displace some of the money formerly spent on radio (just as radio had displaced some of the money spent on newspapers) rather than increase costs. But after 1952, when television emerged as a dominant form of communications in presidential campaigns, the estimated cost per vote took a sharp upward turn. From 19 cents in 1952, the cost per vote rose to 29 cents in 1960 and to 35 cents in 1964. In 1968 it jumped to 60 cents.

Many factors contributed to the big 1968 rise. Wallace's campaign alone added about 10 cents per voter. The consumer price index rose 12 per cent between 1964 and 1968. And

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1. FCC, News Release No. 36,689, Aug. 27, 1970.

2. H.R. REP. No. 1347, 91st Cong., 2d Sess. 4 (1970). *See also Hearings on Review of Federal Communications Commission Activities—1969 Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 1st Sess. 39 (1969) (tables 1, 2.)

parties made more use of costly new tools, such as computer technology and jet travel, in 1968. But no single one of these factors seems to have had television's explosive effect on the cost of each vote.

Candidates for public office use broadcasting because it offers unprecedented opportunities to reach the electorate—an electorate that is growing rapidly, growing beyond the power of candidates to reach by other means. Broadcasting requires candidates to raise large sums of money for buying time on the airwaves and for the production of programs using that time.³

When the matter is viewed in the context of a congressional race, it is equally serious. The following news item describes the cost of a congressional race a century ago:

Abraham Lincoln once told how it cost him 75¢ to run for Congress in 1846. He said:

"I made the canvass on my horse; my entertainment being at the house of friends, cost me nothing; and my only outlay was 75¢ for a barrel of cider, which some farm hands insisted I should treat to. . . ."⁴

Contrast that with this news item in 1964:

Representative Carl Elliott of Alabama, 16 years in Congress and for the last 4 years a member of the powerful House Rules Committee, leaves office at the end of this session faced with the problem of raising \$20,000 to pay outstanding campaign bills from his unsuccessful, state-wide primary race this past June.

His first primary race [16 years ago] cost \$12,000, of which, he said recently, \$7,500 was his own money.⁵

The night before the election Mr. Elliott decided that the only way to meet a last minute opposition charge was to go on television; it cost him \$15,000 and required him to mortgage his automobile. He lost the next day.

Clearly, this kind of experience—these rising costs—discourage many qualified people from entering the political arena. Some who do enter have to turn to special interest groups for their funds. It happens more and more that only the rich dare make the race.

All this is a far cry from the American dream. It clearly calls for remedial action. There have been drastic proposals put forward. There was, for example, the subsidy plan embodied in the Presidential Campaign Fund Act of 1966⁶—the now inoperative Long Act—which allowed the tax-

3. TWENTIETH CENTURY FUND COMMISSION ON CAMPAIGN COSTS IN THE ELECTRONIC ERA, 1969 REPORT 10-11 (1969).

4. Washington Post, Jan. 10, 1965.

5. Washington Evening Star, Sept. 8, 1964.

6. Pub. L. 89-809, 80 Stat. 1587, 26 U.S.C. § 6096; 31 U.S.C. §§ 971-73 (Supp. V., 1970).

payer to allocate one dollar from his federal income tax payment to a general campaign financing fund, disbursements from which would be made to national party committees in amounts determined by each party's share of the popular vote at the preceding presidential election.

There were the proposals put forth in 1969 by the Twentieth Century Fund's Independent Commission on Campaign Costs in the Electronic Era, which called on the federal government to create a new form of nationwide television and radio campaign broadcasts for presidential candidates, to be called "Voters' Time."⁷ These programs would be presented in prime evening time simultaneously over every broadcast and community antenna facility in the United States during the 35 days before the election. Six 30-minute broadcasts would be allotted to candidates of major parties which had placed first or second in two of the three preceding elections. Candidates of parties on the ballot in three-quarters of the states accounting for a majority of electoral votes, which had won one-eighth of the votes in the preceding election, would receive two 30-minute program slots. And the candidate of a party meeting the three-quarters rule but not having obtained sufficient votes previously would be allowed one broadcast.

As an additional method of reducing the high cost of political campaigning and as an encouragement to voter participation, the Commission also proposed that taxpayers receive federal income tax relief for their campaign contributions. They could take either a credit up to \$25 (\$50 on a joint return) equal to one-half the amount of their contributions to legally qualified candidates in general elections for federal office or a deduction from their total taxable income for their contributions up to \$100.⁸

There are other sweeping reforms that could be examined in this field. The British practice of allocating set blocks of free television time to the political parties to be used as they wish, is one example of such reform; another is the proposal of former FCC Chairman E. William Henry to amend the Internal Revenue Code to permit broadcasters to deduct from their taxable income not only out-of-pocket costs of free political broadcasts (which are now deductible) but some portion of the profits which are thereby sacrificed.

However, it is not my purpose in this article to discuss these broad reforms. Rather I will focus here on more modest reforms which, because they are more modest, can hopefully be more readily achieved. Even these modest proposals face difficult hurdles, in view of congressional and executive reluctance to make revisions in this sensitive area affecting political lives, in-

7. TWENTIETH CENTURY FUND COMMISSION ON CAMPAIGN COSTS IN THE ELECTRONIC ERA, 1969 REPORT, 10-12 (1969).

8. *Id.*

cluding of course those of the incumbents.

There are basically two types of political broadcasts. The first is that provided by the licensee, as broadcast journalist, in his newscasts, documentaries, on-the-spot coverage of news events, and news interviews. The second type of political broadcast programming is the presentation of the issues by the candidate himself, in his own language rather than through the editorial selectivity of the broadcast journalist. In other words, it is the candidate's use of the broadcast as an electronic speaking platform or soapbox.⁹ I will discuss the modest reforms which I propose in the context of these two broad classifications of political broadcasts.

Broadcast Journalistic Coverage of Political Campaigns

Broadcasters received considerable leeway in the area of political campaigns with the enactment of the 1959 amendments¹⁰ to Section 315 of the Communications Act of 1934,¹¹ overruling the crippling effect on broadcast journalism of the FCC's *Lar Daly* decision.¹² The Commission there held that every appearance of a candidate on a broadcast station is a use, entitling rival candidates to equal opportunities.¹³ Thus, if the licensee presented a clip on the evening news of the mayor welcoming a visiting dignitary at the airport or cutting a ribbon to open a new highway, and if the mayor was then a candidate for re-election, then the licensee owed equal time to rival candidates.¹⁴ Whatever the merits of the *Lar Daly* decision, it clearly called for congressional revision, if broadcast news was to discharge its important function. A news medium cannot operate effectively if every time it presents a film clip of one candidate, it must exactly balance this with a clip

9. *Hearings on H.R. 13721, H.R. 13722, H.R. 13751, H.R. 13752, H.R. 13935, H.R. 14047, H.R. 14511, and S. 3637 Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce, 91st Cong., 2d Sess. 7-8 (1970) [hereinafter cited as 1970 House Hearings].*

10. 47 U.S.C. §§ 315(a)(1)-(4) (1964).

11. *Id.* § 315 (1964).

12. Ruling to *Lar Daly*, 40 F.C.C. 316 (1960).

13. *Id.*

14. The Department of Justice urged the Commission that when a station prepared its own film clips, the candidate was not "using" the station's facilities; rather, the station was in full control and it alone was "using" the facilities. Thus, it might select as news a segment that was most embarrassing to the candidate—yet the Commission would require equal opportunities for his rival.

Furthermore, it would often be necessary to present not just one rival but perhaps several. Thus, in the 1960 presidential election, there were on the ballots in the several states 14 different candidates for the Office of President. See S. REP. NO. 751, 91st Cong., 2d Sess. 3 (1970). In 1964, at least eight major and minor parties qualified presidential candidates for appearance on state ballots; in 1968, the figure was nine. Broadcast news journalists could never present a film clip showing one candidate for the presidency, if the consequences were to afford precisely equal time to several other candidates.

of all his rivals.¹⁵

In light of these considerations, Congress exempted from the equal opportunities provision appearance of candidates on four news-type programs: (1) bona fide newscasts; (2) bona fide news interview shows; (3) bona fide news documentaries (if the appearance of the candidate is incidental to presentation of the subjects covered); and (4) on-the-spot coverage of bona fide news events (including political conventions and activities incidental thereto).¹⁶ The fairness doctrine, rather than equal opportunities, was made applicable to these situations.¹⁷

As the legislative history makes clear,¹⁸ the common thread of these exemptions is that they are news programs under the control of the licensee. Further, Congress made clear what it meant by the term "bona fide." In all cases, the program was not to be designed to advance the candidacy of any individual,¹⁹ in the case of the news interview show, it must be a regularly scheduled program under the licensee's control.²⁰

The Commission has generally given these remedial amendments a broad interpretation.²¹ The one exception is the puzzling fourth category, on-the-spot coverage of bona fide news events.²² Clearly, this provision cannot

15. See Committee for the Fair Broadcasts, 25 F.C.C.2d 283, 292 (1970).

16. 47 U.S.C. §§ 315(a)(1)-(4) (1964).

17. The fairness doctrine requires a licensee to afford a reasonable opportunity for the presentation of contrasting viewpoints whenever he allows his facilities to be used to air a controversial issue of public importance. Since "reasonable opportunity" and "controversial issue" do not lend themselves to precise definition, there is considerably more room for discretion on the part of the licensee under the fairness doctrine than under the equal opportunities requirement. See NATIONAL ASSOCIATION OF BROADCASTERS, POLITICAL BROADCAST CATECHISM AND THE FAIRNESS DOCTRINE 21 (1968). See also 19 CATHOLIC U.L. REV. 255, 256 (1969).

18. See S. REP. NO. 562, 86th Cong., 1st Sess. (1959). "It should be noted that the programs that are being exempted in this legislation have one thing in common; they are generally news and information-type programs designed to disseminate information to the public and in almost every instance the format and production of the program is under the control of the broadcast station, or the network in the case of a network program." *Id.* at 11.

19. H.R. REP. NO. 802, 86th Cong., 1st Sess. 5-7 (1959).

20. Thus, the Conference Report states:

The intention of the committee of conference is that in order to be considered "bona fide" a news interview must be a regularly scheduled program. It is intended that in order for a news interview to be considered "bona fide" the content and format thereof, and the participants, must be determined by the licensee in the case of a news interview originating with the licensee of a station and by the network; and the determination must have been made by the station or network, as the case may be, in the exercise of its "bona fide" news judgment and not for the political advantage of the candidate for public office.

H.R. REP. NO. 1069, 86th Cong., 1st Sess. 4 (1959).

21. See 35 Fed. Reg. 13048, 13052-57, Pt. III c. (1970).

22. 47 U.S.C. § 315(a)(4) (1964).

be given a broad or literal interpretation, for if it were, there would be nothing left of the "equal opportunities" requirement of Section 315. The licensee, for example, could film a farm or foreign policy speech of a presidential candidate, and call it "on-the-spot" coverage of a bona fide news event. Congress, we know, made no provision for exemption from the equal opportunities requirement of debates between candidates; witness the necessity of the passage of the 1960 suspension law to facilitate the Kennedy-Nixon debates.²³ If the bona fide news event exemption were given a broad interpretation, the licensee could call a debate a news event (which it certainly is) and then send some cameras to cover it. The Commission has therefore refused to give this category a broad construction.²⁴

These 1959 amendments have worked fairly well in facilitating broadcast journalistic coverage of political campaigns. But there are relatively modest improvements which could be made and which would permit broadcasters to do a more effective job, contribute greatly to an informed electorate, and reduce the mounting costs to candidates of broadcast time.

First, I suggest that consideration be given to the establishment of a fifth exempt category: bona fide news programs in which at least two candidates appear in debate or back-to-back discussion of issues to be specified by the licensee. Such programs would fit the mold for exemptions. They are clearly bona fide when two or more candidates must appear, either to debate or to discuss the issues; they would make a worthy contribution to informing the electorate, since the joint appearance would insure a large audience. Finally, such a series of programs would give the candidates much needed free access to television.

There is another revision which should be considered. The 1959 amendments are too restrictive in some respects; they do not allow for innovative efforts which fit the essential purpose of the amendments but not the itemized list now in Section 315(a). An example of a restrictive interpretation of the amendments can be seen in the Commission's recent ruling on the National Educational Television program, "The Advocates."²⁵ This is a very worthwhile news program, designed to illuminate some important issue by having two lawyers, one for each side, present their own witnesses and cross-examine opposing witnesses. Since the leading spokesmen for some viewpoint might often be a public official, the producers sought a ruling that the appearance of such an official when he was running for re-election would not subject licensees to the necessity of affording equal opportunities to all

23. Pub. L. 86-677, 74 Stat. 554 (1960).

24. See, e.g., Ruling to Robert H. Wyckoff, 40 F.C.C. 366 (1962).

25. 23 F.C.C.2d 462 (1970).

rivals. It was argued chiefly that the program was a "bona fide news interview."²⁶

The Commission found that the program did not come within the 1959 exemption. It pointed out that there is, understandably and properly, cooperation between the lawyer-interviewer and his witness; his questioning is designed to present the best possible argument in favor of his side of the issue. Therefore, the program simply did not fit the clear prescriptions set out in the legislative history.²⁷

At the same time, the Commission recognized that programs such as "The Advocates" should be exempt. Thus, Chairman Burch, in testifying recently before the House Subcommittee on Power and Communications, suggested "some further remedial [legislative] changes so as to accommodate innovations in this news area which are of a bona fide nature—that is, programs that do not technically fit the 1959 exemptions but which are regularly scheduled, under the control of the licensee, and designed to illuminate some issue of importance rather than to promote the candidacy of any person."²⁸

The following would remedy this situation: addition to the present list of exemptions found in Section 315(a).

- (5) any other program of a news or journalistic character—
 - (i) which is regularly scheduled; and
 - (ii) in which the content, format, and participants are determined by the licensee or network; and
 - (iii) which explores conflicting views on a current issue of public importance; and
 - (iv) which is not designed to serve the political advantage of any legally qualified candidate.

The foregoing revisions would require legislation. But there is a step which the networks or licensees can take, without further legislation, and it would put them in a much better position to present major candidates in future elections, without having to worry about equal time to many minor party candidates. Broadcasters could devise a regularly scheduled news in-

26. See 47 U.S.C. § 315(a)(2) (1964). See generally Telegram to David Dichter, 15 F.C.C.2d 95 (1968), Telegram to Mr. Kenneth Kleindert, 40 F.C.C. 427 (1964), Letter to Hon. Frank Kowalski, 40 F.C.C. 335 (1962), Letter to Hon. Russell B. Long, 40 F.C.C. 351 (1962), Telegram to Socialist Worker's Party, 40 F.C.C. 322 (1961), Letter to Mr. Lar Daly, 40 F.C.C. 311 (1960), Telegram to Mr. Joseph A. Schaefer, 40 F.C.C. 303 (1959), Letter to Mr. Andrew J. Easter, 40 F.C.C. 307 (1960).

27. See notes 18-20 *supra*, and accompanying text.

28. See *Hearings on H.R. 18721 and S. 3637 Before Subcomm. on Communications and Power of the House Interstate and Foreign Commerce Comm.*, 91st Cong., 2d Sess. 8 (1970).

terview show, with the broadcasters controlling who appears (i.e., guests and interviewers). If in the licensee's news judgment it were warranted, the program could be expanded to an hour and presented in prime time, with either joint or back-to-back appearances of guests. For example, NBC could establish a pattern with "Meet the Press"²⁹ of occasionally presenting the show in prime time Sunday night, with two guests, appearing either jointly in a one-hour segment or back-to-back in two half-hour segments. Thus, at the time of the Cambodian crisis, NBC might have presented an administration spokesman and a leading opponent. Then, during election periods, it could present the presidential and vice-presidential candidates in a series of joint or back-to-back appearances in prime time.

I do not guarantee that such programs would be exempt under Section 315(a)(2).³⁰ Only a Commission or court ruling could settle the matter definitively. But it seems to me that strong arguments could be advanced in favor of exemption. The program would be bona fide: it would not be designed to advance the candidacy of any person; it would be wholly under the control of the licensee; and it would be regularly scheduled—that is, presented every week with the only variation being that on occasion, because of the licensee's judgment that the subject is particularly newsworthy, it would be broadcast in prime time. Since the 1959 legislation has a broad purpose of facilitating broadcast journalism's function of informing the electorate, surely the fact that a program like "Meet the Press" is presented at times in prime time, when it can reach a larger audience, does not run counter to the legislative history or purpose but rather promotes that purpose.

In short, if the networks were willing to present these new interview programs in prime time often enough to establish the bona fide nature of the scheduling pattern, it would mean that during the presidential elections they could be an effective national forum for presentation of the major candidates, either jointly or back-to-back in a weekly *evening* series dealing with the great issues of the campaign. While the foregoing example is directed to the networks and national campaigns, it is of course equally applicable to state or local campaigns and an individual station's news interview programs. This kind of program would offer the best chance of providing a needed national or local forum; certainly, it should be given careful consideration by the networks and licensees.

Use of Station Facilities by Candidates

I turn now to the second basic type of political broadcast, the presentation of

29. See Letter to Andrew J. Easter, 40 F.C.C. 307 (1960).

30. See cases cited *supra* note 26 on the exemption question.

issues by the candidate himself, uncensored by the licensee. The most important modest step which can be taken here involves revision of the present equal opportunities provision of Section 315.

The problem is both well known and easily solved. Broadcasters are deterred, it is claimed, from affording free time to candidates in important races because of the equal time requirement, the necessity to put on several minor party candidates in whom the public has no interest. Whatever the merits of this argument generally, it is clearly correct as to presidential campaigns. The 1960 suspension of the equal opportunities requirement establishes this.³¹

For the 1960 general election, the three television networks donated over 39 hours of broadcast time to candidates for public office, while for the 1964 and 1965 elections (when the equal opportunities provisions were fully applicable) they gave less than 7-1/2 hours. Moreover, the 1960 suspension made it possible for 115 million Americans to see or hear the "Great Debates." The four debates assembled the largest audience ever to view two men contending for the presidency.³²

The problem is thus obvious. The equal opportunities requirement poses no problem as to paid time. But as to free time, it inhibits affording time to major party candidates in national campaigns. It does *not* work to the advantage of the fringe party candidates. The broadcaster simply does not afford any free time, so that no one gains—not the fringe party candidates, not the major party candidates who face mounting TV costs,³³ and not the public which is precluded from seeing broadcasts which could make them better informed. Clearly, the equal opportunities requirement works counter to the "profound national commitment that debate on public issues should be uninhibited, robust, and wide-open."³⁴

The obvious solution, one might think, is to repeal the equal opportunities requirement. Certainly this is indicated for presidential and vice-presidential campaigns, since the 1960 suspension worked so well. The Commission received no substantial fairness complaints against the broadcasters. The networks treated the candidates fairly.³⁵ I would note that such campaigns are in a spotlight, and that it is most unlikely that a network or broadcaster would seek to treat them in a one-sided fashion.

The Ninety-first Congress did move to repeal the equal opportunities provision with respect to presidential and vice-presidential races in S. 3637.

31. See note 23 *supra*, and accompanying text.

32. H.R. REP. No. 1347, 91st Cong., 2d Sess. 3 (1970).

33. 1970 House Hearings at 9.

34. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

35. 1970 House Hearings at 3.

Although the President did not disagree with this action, the revision died with his veto directed to the other portions of the bill, particularly those dealing with campaign spending limitations. Congress could, nevertheless, seek to enact this one reform alone. It is certainly important enough to warrant such special attention, in view of the importance of the presidency to the nation.

However, I would suggest a more general approach which would encompass all races and not just the presidency.³⁶ I am not advocating repeal of the equal opportunities clause generally. First, I do not regard that approach as a modest step. It is, in my opinion, virtually impossible to persuade Congress to this point of view, for all these other races do not share the presidential spotlight, and Congress does not appear willing to trust every broadcaster to afford virtually equal treatment without the pressure of the "equal opportunities" provision. Second, the Commission is, I believe, correct in its opposition on administrative grounds.³⁷ It is one thing for the Commission to handle complaints as to the presidential campaign under the fairness doctrine. It is another thing for the Commission to attempt to process many complaints in all races, national or local, under a more general standard, and to render speedy decisions before the election makes the matter moot.

In any event, there is an alternative which would be just as effective in affording free time to major party candidates, and yet would not be objectionable to Congress or the Commission. I refer to proposals to apply the *equal opportunities* requirement, with respect to free time given in general partisan elections, only to candidates of parties which have met some minimal standard of significance. A candidate of a new party could meet this minimal standard by registering a specified number of signatures on petitions. The *fairness doctrine* would be applicable to all other fringe party candidates. Such legislation should, of course, define major candidates very broadly so as to include any significant candidate such as Henry Wallace, the candidate of the Progressive Party in 1948, Strom Thurmond of the Dixiecrats in 1948, or George Wallace of the American Independence Party in the last election.³⁸ In short, I would urge the selection of a numerical figure which will insure equality to any candidate who had significant public support, regardless of what his chances of winning might be.

One example of this kind of proposal is that put forward by the Commis-

36. See, e.g., H.R. REP. NO. 1347, 91st Cong., 2d Sess. 9-10 (1970).

37. See, e.g., *Hearings on S. 251 Before the Senate Subcomm. on Communications*, 88th Cong., 1st Sess. 65-66, 74-75 (1964) [hereinafter cited as *1964 Senate Hearings*].

38. *1970 House Hearings* at 8.

sion during the hearings of S.3637.³⁹ The FCC suggested that whenever a license permits a candidate for President or Vice President to use its facilities free of charge in the general election, it must provide an equal opportunity to every other such candidate who (1) is the nominee of a political party which (a) fielded candidates for those offices in at least thirty-four states in the last election, and (b) whose candidates received at least two percent of the total popular vote cast; or (2) is supported in his candidacy by petitions filed under state laws which petitions in the aggregate bear a number of valid signatures equal to at least one percent of the total popular vote cast in the preceding presidential election. In addition, in order to qualify for free time, the candidate's name would have to appear on the ballot in at least thirty-four states.⁴⁰

In those cases where a legally qualified candidate for one of these offices does not meet the requirements of (1) and (2) above, he would be entitled to equal opportunity on stations located in states where his party received at least two percent of the total popular vote cast in the preceding presidential election, or if his candidacy is supported by petitions filed under the laws of the particular state which in the aggregate bear a number of signatures equal to at least one percent of the total popular vote cast in such state in the preceding presidential election.⁴¹

Candidates for all other public offices, would be afforded equal opportunity if (1) they have been nominated by political parties whose candidates in the preceding general election received at least two percent of the total popular vote cast for such offices; or (2) they are supported by state-validated petitions signed by eligible voters numbering at least one percent of the vote cast for such offices in the preceding general election.⁴² A licensee would be bound by the fairness doctrine with respect to any candidate for any such office who does not meet the above criteria.⁴³

I do not mean to indicate that the above proposal will be easy to enact. Congress is filled with incumbents, some of whom will not welcome proposals which will facilitate debates or free time for their challengers. But if this proposal had the full support of the industry and public interest groups, it would have a good chance of receiving support from a majority of the Congress. This means that the industry must stop its vain efforts to obtain repeal of Section 315. It means that public interest groups must shelve, for

39. *Id.* at 10, 15-18.

40. *Id.* at 16.

41. *Id.*

42. *Id.*

43. The approach of this proposal is obviously applicable only to general elections of a partisan nature; its enactment would be a most significant step forward, even if it would not affect either the primary or the non-partisan election.

the moment, their more ambitious reforms and try first to secure this revision. Indeed, I submit that if this relatively modest change cannot be enacted with a united front, there is no sense in urging more sweeping reforms.

The suspension of the equal opportunities requirement for the 1960 debates shows that this reform would result in substantial amounts of free time being afforded in the presidential and vice-presidential races. Experience in other campaigns does not give similar support to the broadcaster's claim that Section 315 inhibits their affording free time.⁴⁴ However, congressional enactment of this new legislation would establish a new mood—would clearly say to broadcasters: "You have been claiming that you will give large amounts of free time if only we remove the Section 315 equal time restriction. Well, we have done so; now you must put up or shut up."

I believe that most commercial broadcasters would respond favorably in these circumstances. Clearly, the educational broadcasters would do so. Indeed, the president of the new educational network, Public Broadcasting Service, has stated the network's intention to be a national platform for discussion of controversial political and social issues. CATV, with extensive channel capacity, will increasingly be able to make a contribution in this respect.

If broadcasters should not respond to this challenge, both the Congress and the Commission could take further action. If free time should not be made available in significant amounts,⁴⁵ the Commission could require that a specified amount of free time, including prime time, be made available for political broadcasts.⁴⁶

I do not mean to suggest that by making some free time available, this will automatically halt the rising costs of elections or put an end to the issue of elections being bought through TV "blitzes."⁴⁷ Standing alone, it will not

44. See *1964 Senate Hearings*. FCC Chairman E. William Henry submitted an analysis to determine whether stations gave more time in races where there were two candidates than in races where there were more than two candidates. The Commission divided 36 states in which there were senatorial candidates into two groups: 28 states where there were two candidates and 8 states in which there were more than two candidates in the general elections. Its analysis showed first that only a minority of the stations gave sustaining time to senatorial candidates. Second, it found no significant differences in station participation in the senatorial races as between the two groups of states. In the 28 states with two senatorial candidates per race, 23 percent of the TV stations and nine percent of the AM stations reported free time for senatorial candidates. The comparable ratios for the 8 states were 26 percent of the TV stations and 14 percent of the AM stations. *Id.* at 70-73, 78-81.

45. See *1970 Hearings* at 9.

46. See 47 U.S.C. §§ 303(b), 303(r), 307(d), 309, 315(a), (c) (1964). See also *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969); *Farmers Union v. WDAY Inc.*, 360 U.S. 525, 534 (1959).

47. The choice of the campaigns to be afforded free time would be a matter for the good faith, reasonable judgment of the licensee. While some races are so important that

do so, for candidates devote by far the greatest part of their broadcast expenditures to purchasing spot announcements. This will undoubtedly continue to be the case, absent some remedial measures in this respect. Thus, the most recent FCC Political Broadcast Survey showed that in 1968, of the \$49.3 million in political broadcast charges by radio and TV stations, 91 percent was for spot announcements and only nine percent for program time. More than five million political announcements were broadcast by radio and TV stations in 1968.⁴⁸ Significantly, even with all the sustaining time given the candidates in 1960, the total expenditure for political broadcasting was much greater in 1960 than in 1956.⁴⁹ Here, I would simply note that it does not serve the public interest to have candidates or issues "hawked" like soap in brief announcements, some as short as eight seconds.⁵⁰

The industry could act on its own. For example, the networks could adopt a policy of structuring their programs so that during campaigns, five-minute segments at the end of a program would be available for political broadcasts. Some might balk at the suggestion that five minutes might be long enough to make a difference, but it is five to ten times longer than the usual presentations and allows for some development of a candidate's position on an issue. Further, a five-minute "insert" between popular entertainment programs would be more attractive than a half-hour program which commands a substantially reduced audience, often consisting mainly of the faithful. Except for spot announcements to raise campaign funds,⁵¹ it might be more constructive for the networks to concentrate upon use of these five-minute segments.

There could be congressional action in this area. However, the most recent congressional action, S. 3637, the bill vetoed by President Nixon, was a mixed bag in these respects. I encouraged the sale of spots at reduced rates yet put a ceiling on the amount of broadcast expenditures which a candidate

all licensees might want to cover them, it might be desirable to have all licensees in an area consult as to their plans for free time, so that the needs and interests of the area as to other less important but nevertheless significant races could be equitably served.

48. F.C.C. Release *supra* note 1.

49. See *Hearings Before Communications Subcomm. of the Senate Committee on Interstate and Foreign Commerce*, 87th Cong., 1st Sess. 12 (1961).

50. See, e.g., *1970 House Hearings* at 10, where Chairman Burch said: "The Commission understands why candidates have increasingly turned to the political spot. In or adjacent to a high-rated program, it can attract the attention of many viewers who would not watch a half-hour political broadcast, and its audience can be assumed to contain a much higher portion of uncommitted voters. Nevertheless, we would raise the issue as to how much short presentations—varying from a few seconds to 60 seconds—really contribute to an informed electorate, to a serious discussion of issues. Specifically, we question whether the Congressional policy should not be to promote longer program presentations."

51. See *In re Democratic National Committee*, 25 F.C.C.2d 216, 228-30 (1970).

could make.⁵²

Finally, in this connection, I would call attention to Chairman E. William Henry's plan to require a broadcaster to offer, at a minimum, an amount of free time equal to time sold. Time would continue to be sold to candidates individually, but when a major candidate purchased more than the minimum (e.g., 60 seconds), an equal amount of free time would then be afforded all the qualifying major candidates in that race. The plan would have the benefit of assuring all major candidates some free time. It might also serve to check a candidate trying to "buy" an election; for as he bought more and more time, he would also be assuring substantial free access to his major rivals. The decision as to the total time, free and paid, to be devoted to any particular race would still be left with the broadcaster.

Conclusion

The foregoing modest reforms are by no means comprehensive. But they are illustrative. The critical point is that the kinds of reform suggested above are long over-due. Interested groups should focus their efforts on early congressional action in this area. The prognosis is, I believe, reasonably good that with such concerted action and with the interest which Congress has shown in this matter, there can be positive results. In view of the importance to a democracy of an informed electorate, there is no need for discussion of the benefits to the voter of such successful reform. I do not suggest that reform should end with the suggestions discussed in this article, but only that here a good beginning can be made.

52. See S. 3637, 91st Cong., 2d Sess. §§ (b), 2(A)-(B), (3), (4), (5) (1970); H.R. REP. NO. 1420, 91st Cong., 2d Sess. 1-3 (1970).