An overview of local, state, and federal regulations imposed upon political advertising

Gina B. Polovina

University of Nevada, Las Vegas

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An overview of local, state, and federal regulations imposed upon political advertising

Polovina, Gina B., M.A.
University of Nevada, Las Vegas, 1994
AN OVERVIEW OF LOCAL, STATE, AND FEDERAL REGULATIONS IMPOSED UPON POLITICAL ADVERTISING

by

Gina B. Polovina

A thesis submitted in partial fulfillment of the requirements for the degree of

Master of Arts

in

Political Science

Department of Political Science
University of Nevada, Las Vegas
May 1994
The Thesis of Gina B. Polovina for the degree of Master of Arts in Political Science is approved.

Chairperson, Jerry L. Simich, Ph.D.

Examining Committee Member, Steven Parker, Ph.D.

Examining Committee Member, Dina Titus, Ph.D.

Graduate Faculty Representative, Joseph A. Fry, Ph.D.

Dean of the Graduate College, Ronald Smith, Ph.D.

University of Nevada, Las Vegas
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ABSTRACT

An Overview of Local, State and Federal Regulations Imposed Upon Political Advertising discusses the 1991 policy revisions enacted by the Federal Communications Commission that effect political advertising. In addition, considerable attention is devoted to how the judicial system has treated cases dealing with a variety of political advertising issues ranging from the posting of campaign signs to assuring that proper sponsorship identification appears on campaign materials.
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CHAPTER 1

INTRODUCTION

What a difference a hundred years make, for, in just a little over a century, the essence of political advertising has evolved from campaign speeches on tree stumps to the sophisticated media-dominated political advertising to which we are so accustomed today.

The presidential election of 1840, which pitted Martin Van Buren against William Henry Harrison, was significant in that it marked the first campaign that showcased the use of “image” advertising (Jamieson 1992). The intent of image advertising is to link popular symbols—such as the Constitution, bald eagle, or Lady Liberty—to the candidate (Jamieson 1992). Harrison successfully associated himself with a log cabin and hard cider, which had the effect of transforming the son of a wealthy governor into a modest, hardworking farmer and backwoodsman (Jamieson 1992).

The most common form of political advertising during the 1840 election was “word-of-mouth.” Another important contribution that arose out of that political contest was the use of the direct appeal (Jamieson 1992).
The direct appeal allowed the candidate the opportunity to speak publicly on his own behalf and in his own defense (Jamieson 1992). But, these refutations of the candidate's character were limited, as it was not until 1912 that the presidential candidate was accepted as an active campaigner and an advocate of his own cause (Jamieson 1992). Prior to 1912, the traditional campaign protocol was for the candidate to deliver a speech of thanks after being notified of the party's nomination. Aside from writing a letter stipulating the precise aspects of the party platform on which he would run, the candidate was silent until the election results were announced (Jamieson 1992).

While William Jennings Bryan pioneered the modern campaign in 1896 by giving several impassioned speeches across the country advocating his candidacy, it was not until 1928 that a revolution occurred in the realm of political communication: The creation of a national audience via the radio (Jamieson 1992). The radio offered candidates the ability both to speak to huge audiences and to position political messages into specific time boundaries (Jamieson 1992). Because it was essentially impossible to measure the impact of a given message on an invisible audience, campaigns began to rely on the use of polls conducted to chart audience predispositions and responses (Jamieson 1992).

The duration of the political speech witnessed a dramatic decline, since candidates were charged the standard commercial rates for radio air time (Jamieson 1992). In 1928, the average amount of time purchased by candidates
was one hour, as opposed to 1980 when the typical message ran only thirty seconds (Jamieson 1992).

Newsreels emerged side by side with radio (Jamieson 1992). In fact, the newsreel was, in many respects, the predecessor of today’s televised political advertisement (Jamieson 1992). The newsreel technology made it possible for partisan films to be distributed through the established newsreel channels (Jamieson 1992). In 1948, Truman’s documentary newsreel may have proven to be the difference in his ultimate narrow victory over Dewey (Jamieson 1992). Truman’s film, which ran the last week before the election, was created in response to Dewey’s professionally-prepared newsreel (Jamieson 1992). Truman’s film, unlike Dewey’s, maintained a newsreel-like feel to which theatre-goers were accustomed, perhaps making it more credible and, therefore, more effective (Jamieson 1992).

The partisan newsreel was estimated to reach a weekly audience of 65 million in 1948 via the nation’s 20,000 theatres (Jamieson 1992). The audience was considered a captive one since the theatre attendees paid money to see the feature presentation. Therefore, they had a self-interest in staying in the theatre throughout the presentation of whatever the theatre offered (Jamieson 1992). Further, the newsreel was also able to reach voters of all political persuasions (Jamieson 1992).
The election of 1948 was also noteworthy in that it was the first in which presidential candidates purchased television time in order to influence voters (Jamieson 1992). It was, however, in 1951 that coast-to-coast television became a reality, thus making massive viewing audiences available to political campaigns outside the confines of the movie theatre (Jamieson 1992).

While televised political advertisements continue today to be one of the most effective campaign tools, astounding technology is on the horizon that will have an enormous impact on the future of political advertising. The use of the video cassette, for instance, is becoming very prevalent in helping candidates get their political messages out in a precisely targeted manner. New methods of voter targeting track whether households have at least one video cassette recorder (VCR). Campaigns can then send such households cassette duplications of campaign-produced commercials that can be specifically aimed at the particular voter. Using voter-specific video cassette distribution, campaigns can be spared the necessity of having to purchase costly television air time. To create effective levels of recognition for a candidate, a given televised spot has to be seen at least three times and, to ensure that the spot is viewed that many times by any particular voter, a substantial media buy is required on several different television channels simultaneously.

The use of video cassettes is advantageous because they are extremely cost effective when they are dubbed (copied) in mass quantities, especially in
comparison to television rates. Additionally, the video cassette recipient has the opportunity to view the message at his leisure. Also, since the viewer has made the conscious choice to watch the video cassette, he or she is much more likely to give it greater attention. Above all, the candidate knows, as with his direct mail literature, his message is being received in exactly the place he wants it to go—where it can be most effective—and is being seen by whom he wishes it to be seen.

The emerging VCR campaign technology is just one example. The possibilities that personal computers offer to the political campaign, as another example, are just beginning to be tapped. With on-line user services composed of millions of subscribers, the opportunities for candidates to have their political messages available on computer services nationwide are indeed a reality.

While the development of new technology that will surely change the means of political communication is exciting to watch as it unfolds, the scope of this paper will concentrate instead on the more "traditional" print and broadcast media and the roles they play in the realm of political advertising.
A Distinction Between Broadcast and Print Media

Congress and the courts have treated the broadcast and print media differently. In contrast to newspaper publishing, the operations of a broadcaster have always been subject to elaborate governmental control (Dorsen 1976). The apparent rationale for allowing such stringent governmental regulation is that broadcast frequencies are a public resource. The ability to use the airwaves is limited by the fact that there are a limited number of frequencies to be had (Dorsen 1976). The concept that the airwaves are not available to everyone was coined the "scarcity theory" by the Supreme Court in the 1943 case of National Broadcasting Co. v. U.S. (Dorsen 1976). The notion of the scarcity theory has allowed the Federal Communications Commission (FCC) not only to deal with the technical and engineering impediments influencing the effective use of the broadcast media, but it has also enabled the FCC to establish a regulatory scheme to ensure that aired broadcasts conform with "public interest, convenience or necessity" (Dorsen 1976).

The First Amendment and the Ability to Regulate

While this paper will spend some time discussing the current policies of the FCC as they relate to political advertising, it will also analyze the judicial treatment that many political advertising regulations have received inside courtrooms across America. Some of these cases deal directly with FCC
policies, while many others arose as challenges to local and state ordinances in their attempts to regulate political speech.

Because the right to political speech is one that is protected under the umbrella of the First Amendment, the judicial system strictly scrutinizes any attempts to restrict it. In general, however, it appears that if the presiding court finds that a legitimate governmental interest is served by the regulation, then it will be allowed to stand. A Harvard Law Review article, “Developments in the Law—Elections,” perhaps best summarizes the essence of governmental regulations in the forum of the electoral process:

No institution is more central to the United States’ system of representative democracy than the election. Americans have continually relied on elections to implement the fundamental principle that all sovereignty rests in the governed. That almost half of the amendments to the Constitution adopted since 1791 have concerned the franchise and election procedure highlights the importance of the electoral process. In order for elections of public officials (and public referendums) to take place, some State regulation is necessary. All States extensively regulate a variety of aspects of the electoral process. Laws have been enacted regulating campaign financing and spending, campaign speech, and various kinds of unscrupulous campaign practices. Many election regulations are highly controversial, for considerable disagreement exists as to both the propriety of the States’ assuming any role in these areas, and the wisdom of specific laws. Moreover, many election laws raise serious constitutional questions. Although the power of the State to regulate elections is beyond dispute, that power must be exercised within the limits imposed by the Constitution (as noted in Kansas v. Davis 1991).

It is not the intent of this paper to examine every conceivable form of regulation imposed upon political advertising. Instead, it should serve as more
of an introductory overview of some of the various types of regulations that
exist. The information presented herein is intended to serve as a sort of
reference source for candidates, campaign staffs, political aficionados, and
perhaps, in a much more limited context, lawmakers as they attempt to discern
how and what types of regulations are permissible when dealing within the
“sacred political arena.”
CHAPTER 2

THE POLICIES OF THE FCC

Clearly, the entire realm of politics has come a long way from the days when Lincoln and Douglas participated in numerous multiple-hour debates before groups of concerned voters. Today, most of the information that voters receive about the individuals seeking office is contained in brief evening news "sound bites," or in campaign-produced thirty-second radio and television commercials, or "spots." Because our society is so media-oriented, it has put increased emphasis on a campaign speech writer to fill the candidate's presentation with as many usable sound bites as possible to increase the odds of the media actually using at least one of the sound bites, the better to get the candidate's precise message across to the voting public. In the area of paid political advertising, a campaign's media consultants bear the burden of targeting demographics and producing "compelling" spots that will get their candidate favorably noticed.

Media consultants do not have complete autonomy when it comes to crafting political advertisements. The Federal Communications Commission has an array of specific guidelines that must be adhered to by both the campaign and the broadcasting stations. As recently as December 1991, several changes
were enacted in the FCC's political programming policies. This chapter will address the new FCC policies, some of the congressional enactments that led up to this sweeping change, and the effectiveness the FCC's reforms.

After experiencing the political battles of the 1988 presidential election, political pundits surmised that the public's low expectations of public officials had prompted reform ("Talking Heads" 7). Several political advertising and accountability reform bills were proposed in the Congress in 1990. Senator Bob Graham and Representative Ed Markey co-sponsored a bill intended to institutionalize presidential debates ("Talking Heads" 8). Their idea was to require all presidential candidates using public financing to participate in at least four 90-minute debates, each debate to include 30 minutes of the individual candidates directly addressing the viewing audience ("Talking Heads" 8). Graham and Markey also sought to use the Public Broadcasting Service to allow for 15 prime-time minutes once or twice a week for the candidates to address the nation ("Talking Heads" 8).

Another series of reforms was proposed by Senators Warren Rudman and Daniel Inouye. They sponsored a bill that would require campaign commercials to consist only of the candidate talking to the viewers without elaborate graphics or voice-overs—the so-called "talking head" ("Talking Heads" 8). While this particular version may, in fact, violate the freedom of expression component of the First Amendment, there are other possibilities that could prove to be
acceptable. One alternative would be to make the "talking head" requirement voluntary and provide free television air time for those who comply ("Talking Heads" 8). Candidates could be given vouchers to spend at any television or radio station, enabling them to target the precise audiences that would be of help to them in terms of votes ("Talking Heads" 8). If the station, as a whole, were to exceed its ceiling time allotment, the government could reimburse the station for the additional time at standard advertising rates with money raised by the voluntary presidential campaign contribution box found on Federal income tax returns ("Talking Heads" 8). It is believed that such a plan could reduce the influence of powerful political action committees (PACs) ("Talking Heads" 8).

Essentially, the basis of a reform proposal like this is to give candidates large amounts of "free" television and radio time for voluntary spending limitations and for voluntary compliance with the "talking heads" rule ("Talking Heads" 8). While it is acknowledged that the "talking heads" rule would not mean the end of negative televised ads, it would be a step in a more positive direction.

The two congressional enactments that eventually provided the impetus for the FCC's policy reforms came in the form of bills S. 3 and H.R. 3750. Senate Campaign Reform Bill S. 3 was authored by Senator David Boren and it passed the senate in May of 1991 by a 56-to-42 margin (Sukow 35). The
legislation requires that broadcasters sell all eligible candidates advertising time at their “lowest unit rate” on a non-preemptible basis (Sukow 35). The bill also sets voluntary spending limits for senatorial candidates only, and those senate campaigns that remain below the established limits between the primary and general elections would be eligible for a further 50% discount off the lowest unit rate (Sukow 35). Additionally, S. 3 creates a government-funded voucher program to lessen the costs for large blocks of political advertising, such as longer format spots that run from one to five minutes each (Sukow 35).

Senator John Danforth amended S. 3 to allow for preemptions of spots until they are paid in full (Sukow 35). The amendment also made it very clear that broadcasters will not be penalized if a spot is preempted by circumstances beyond the station’s control, such as late-breaking news (Sukow 35). Additionally, limitations were placed on the period in which candidates would be eligible for the lowest unit rate: 30 days before the primary and 45 days before the general election, with the exception of those candidates eligible for the extra 50% discount (Sukow 35).

The House Campaign Spending Limit and Election Reform Act (H.R. 3750) was sponsored by Representative Sam Gejdenson (Sukow 35). The bill contained the lowest unit rate aspects of the Danforth amendment, but without providing for the 50% discount for either House or Senate members (Sukow 35). This bill was not without its critics from within the broadcasting industry. In
fact, it was several months after the hearings commenced on the initiative that the broadcasting trade group, the National Association of Broadcasters (NAB), agreed to support the passage of a policy that would guarantee political candidates that their commercials would air when scheduled at the lowest unit rate and that these lowest rates would be available 30 days prior to the primaries and 45 days prior to the general elections ("National Association" 51).

With the support of the broadcasters, the Federal Communications Commission ultimately adopted these reforms in the Commission's political programming policies on December 12, 1991 (FCC 91-403, 1). There were four major components to the reform: Reasonable access, equal opportunities, lowest-unit-charge, and political file requirements (FCC 91-403, 1).

Reasonable Access

Reasonable access is a term that applies solely to candidates running for Federal offices (FCC 91-403, 6). It requires stations to use reasonable, good faith judgement in providing equal access to broadcasting media sources (FCC 91-403, 8). There is no formal mechanism to determine exactly what reasonable access would entail. The Commission will look at the particular issues in a given case to determine if reasonable access had or had not been afforded (FCC 91-403, 8).

While FCC licensees can forbid the sale of time for political advertisements during news broadcasts, there are a few guidelines to which stations must adhere in the area of reasonable access (FCC 91-403, 9). Reasonable access must
be provided at least 45 days before a primary and 60 days before either a general or special election (FCC 91-403, 9). Commercial and noncommercial stations alike must make program time available to Federal candidates during prime time and other periods unless circumstances exist that make it reasonable to deny access (FCC 91-403, 9). If a commercial station chooses to donate rather than sell advertising time to candidates, then it must make time of the same various lengths that it allows for commercial advertisers available free of charge to the Federal candidates (FCC 91-403, 9). Further, a station may not use a denial of reasonable access as a way to censor or exert control over the content of political material (FCC 91-403, 10). However, stations can take into account their programming and business commitments, including the numbers of candidates running in a particular race, the program disruption that would be caused by the political advertising, and the amount of time already sold to a candidate when they decide whether or not to afford the candidate reasonable access (FCC 91-403, 10).

The reasonable access provision does not apply to non-Federal candidates. In addressing this issue, the Commission decided to stand by its existing policy of not allowing a "specific right of access" to state and local candidates (FCC 91-403, 11). Section 312(a)(7) of the political broadcasting laws explicitly states that the reasonable access provision creates a right of reasonable access exclusively for Federal candidates (FCC 91-403, 11). Even the Supreme Court, in the case
of *CBS, Inc.* v. *FCC*, stated that, under the "public interest" standard, "an individual [non-Federal] candidate can claim no personal right of access" (FCC 91-403, 11). Stations may satisfy any public interest obligation with regard to state and local elections through the areas of news and public affairs programming (FCC 91-403, 11).

Overall, the real basis of the reasonable access provision is to require stations to allow Federal candidates reasonable access to a station's facilities. Also, it is to allow the Federal candidates to purchase what are considered "reasonable amounts of time" (FCC 91-403, 6).

**EQUAL OPPORTUNITIES**

The second major component of the FCC's reforms is that of equal opportunities. This requires that stations which allow Federal, state, or local candidates to "use" the station must provide equal opportunities to all other candidates running for the same office to likewise "use" the station (FCC 91-403, 14). Bona fide newscasts, as well as news interviews, documentaries, and news events, are all exempt from this requirement (FCC 91-403, 15). A bona fide newscast is one deemed to report upon news of some area of current events in a manner similar to more traditional newscasts (FCC 91-403, 15). Licensees are expected to exercise control over the newscast by exercising their editorial discretion as to whether or not to air a program that may constitute a candidate "use" (FCC 91-403, 16).
A "use" means an appearance by the candidate by voice or picture in which the candidate is identifiable to the audience (FCC 91-403, 17). It includes only nonexempt candidate appearances that are controlled, approved, or sponsored by the candidate (or the candidate's recognized committee) after the time when the candidate becomes a legally qualified candidate (FCC 91-403, 17). If a legally qualified candidate does not voluntarily appear in a nonexempt broadcast, such as unauthorized, independently-sponsored advertisements or rebroadcasts of appearances made prior to the particular candidate attaining the status of a legally qualified candidate, his appearance would not constitute a "use" (FCC 91-403, 18). Essentially, the definition of "use" depends solely on whether a given appearance was voluntary (under the candidate's control) after the candidate had become a legally qualified candidate.

In the area of sponsorship identification guidelines, the FCC has required additional actions to ensure that sponsor information is more available to the public (FCC 91-403, 21). Stations must keep lists of information for inspection by the public pertaining to a political sponsor's identity (FCC 91-403, 21). Announcements of sponsorship in those advertisements that run for five minutes or more are to be made at both the beginning and at the end of the advertisement (FCC 91-403, 21). Political advertisements carried by television stations are required to have both audio and video identification (FCC 91-403, 23). The minimum video identification of the sponsor is to appear with letters
equal to or greater than 4% of the picture height, and the identification must appear on the screen for no less than ten continuous seconds (FCC 91-403, 24).

A reasonable standard basis is to be used by the licensees to assure that the size and timing requirements are being met (FCC 91-403, 24).

The "liability for incorrect sponsorship identification rests with licensees" (FCC 91-403, 21). In this light, stations may require that political advertisements contain the appropriate sponsorship announcements (FCC 91-403, 21). This is an exception to the no-censorship rule described earlier. When identifying the appropriate sponsor of the political material, licensees need only exercise reasonable care (FCC 91-403, 21).

The FCC does not require candidates to submit their advertisements to the station prior to being aired so that the station might determine whether the advertisement complies with the sponsorship identification rules (FCC 91-403, 23). Instead, the FCC adheres to a policy of permitting broadcasters to request a pre-airing submission of the advertisement to determine if it meets with both technical and sponsorship requirements (FCC 91-403, 24). There are occasions, however, when the candidate refuses to allow the advertisement to be pre-screened, or when there is insufficient time to review an advertisement that should be run without delay (FCC 91-403, 24). In such cases, the station can presume that the advertisement complies with the established requirements and they may run it the first time without fear of FCC sanctions (FCC 91-403, 24).
If it is discovered that the proper identification is lacking, then it is the station’s responsibility to add or modify the message of sponsorship to bring it into compliance (FCC 91-403, 24).

LOWEST-UNIT-CHARGE

The third major area of reform involves that of the “lowest-unit-charge.” The concept of providing for the lowest-unit-charge came about in 1972 when Congress added Section 315(b) to the Communications Act (FCC 91-403, 24). The Section directs broadcast and cable stations to charge political candidates the “lowest-unit-charge of the station” for the same class, time period, and amount of time as a station’s “most-favored advertiser” during a window of time that is to run from 45 days prior to a primary election and 60 days prior to a general election (FCC 91-403, 24). Congress’ expressed intent was “to give candidates for public office greater access to the media and . . . to halt the spiraling costs of campaigning for public office” (FCC 91-403, 24). Congress wanted stations to place candidates in the same class as a broadcaster’s “most-favored advertiser” (FCC 91-403, 24).

The broadcaster is responsible for informing the candidates about the lowest-unit-charge. A particular candidate’s lack of knowledge about the lower rates does not alleviate the broadcaster’s obligation to offer the candidate this reduced rate (FCC 91-403, 26). The station is required to disclose information to candidates regarding the description and definition of each class available to
commercial advertisers, and that such information be complete enough to allow candidates to identify and understand what specific attributes differentiate each class (FCC 91-403, 26). A complete description of the lowest-unit-charge and related privileges—such as priorities against preemption and "make-goods" prior to specific deadlines—for each class of time offered to commercial advertisers must also be provided to candidates (FCC 91-403, 27). Also, a description of the method a station uses to sell preemptible time—as well as the likelihood of preemption for each kind of preemptible time—must be disclosed (FCC 91-403, 27). Finally, the station must inform the candidate about how its sales practices are conducted with regard to audience delivery impacts (FCC 91-403, 27). Once complete disclosure is made, stations must negotiate in good faith to sell time to candidates in accordance with this disclosure (FCC 91-403, 27).

There are two primary categories or classes of time: preemptible and non-preemptible time. Preemptible time, as its name implies, consists of flexible time slots that can be preempted from airing at a particular time by the broadcaster (FCC 91-403, 30). There are also several different forms of preemptible time, ranging from immediately preemptible, where the spot can be rescheduled indefinitely or until another time, to preemptible with notice, where the station must give prior notice to the individual if the spot is to be cut (FCC 91-403, 30). A class such as preemptible with notice is generally more expensive than one that is immediately preemptible because of the additional
notification provided to the client so that alternate arrangements can be made quickly. However, all of the different classifications of preemptible time still must be offered to the candidate at the lowest-unit-charge (FCC 91-403, 30).

Non-preemptible classes of time are even more costly than preemptible time because of the fact that spots in this time class cannot be deleted from their scheduled airing (FCC 91-403, 30). Non-preemptible time is usually sold for a particular range of time during which the spot will air. This range of time could consist of the spot airing during a certain program, or at a specific time of the day (FCC 91-403, 30).

Yet another classification that is closely related to non-preemptible time is fixed-position time. Fixed-position is the most costly of the three classes because a fixed-position spot is guaranteed to air at the time denoted (FCC 91-403, 30). If the spot is scheduled to appear at 8:15 p.m. on August 31st, then that is precisely when the station must air this spot.

Under the lowest-unit-charge rule, the creation of special, "premium-priced" classes of time sold to candidates is prohibited (FCC 91-403, 35). Stations may sell the costly fixed-position or non-preemptible time to candidates if such a higher-priced class of time is made available to both candidates and commercial advertisers alike, and that no lower-priced class of time—such as preemptible—is, in a functional sense, equivalent to the non-preemptible class (FCC 91-403, 36).
Stations are allowed to calculate the lowest-unit-charge on a weekly basis in conjunction with the sale of weekly rotations (FCC 91-403, 37). Stations must verify that the lowest-unit-charge is the lowest price paid by any advertiser during a given period in a certain week. This includes those commercial advertisers or other political candidates whose spots appeared in that particular week, but who may have standing contracts with the station that are in effect over the course of several weekly rotations (FCC 91-403, 37).

Distinctly different rotations constitute separate periods of time for the purposes of calculating the lowest-unit-charge, regardless of whether or not they overlap with one another (FCC 91-403, 38). Distinctly different rotations are rotations that have “meaningful differences in value” to an advertiser (FCC 91-403, 38). For example, a radio morning-drive time rotation of 6:00 a.m. to 9:00 a.m. is a distinctly different rotation from a 6:00 a.m. to 3:00 p.m. rotation due to the possibility that the advertiser’s spot could run in the less valuable 10:00 a.m. to 3:00 p.m. time period.

No rate increases are allowed during the campaign period except in those circumstances where changes in “ordinary business practices” dictate such alterations (FCC 91-403, 39). Such circumstances could include changes in audience ratings, seasonal program changes, and rate changes that occur on a weekly basis at those stations that sell time on a weekly basis (FCC 91-403, 39). Candidates who sign a contract with the station to purchase time after the
effective date of such a rate increase are entitled to the lower rates charged to other advertisers, whether they are commercial or political, who contracted for time prior to the rate increase, provided that the spots are of the same class and length (FCC 91-403, 39).

"Fire sale" time availabilities are those sold at the last minute when it is determined that there is available time inventory (FCC 91-403, 44). Stations are to treat fire sales as affecting all classes of time, but only during the particular time period in which fire sale spots are broadcast (FCC 91-403, 44). The fire sale rate must be made available to all candidates and the availability of the fire sale time also must be fully disclosed (FCC 61-403, 45).

A “make-good” refers to those situations when an advertisement is preempted and the station is forced to find a new availability in which to reschedule the advertisement (FCC 91-403, 45). A station is required to offer make-goods to candidates if make-goods are also offered to the station’s commercial advertisers who have purchased time in the same class (FCC 91-403, 45). Make-goods for political spots must air before the election and “where the licensee would so treat its most-favored commercial advertiser where time is of the essence” (FCC 91-403, 46).

Stations are required to include make-goods in lowest-unit-charge calculations (FCC 91-403, 47). When determining the lowest-unit-charge for a particular class of time, a broadcaster must include the rate paid by an advertiser
whose spot was “made good” during that same period (FCC 91-403, 48). Where a station places a make-good in a more valuable program or time of day, the value of that make-good must be factored into the calculation of the lowest-unit-charge for that more valuable time slot (FCC 91-403, 48). Candidates who purchase a more expensive spot than the one in which the station provides the make-good are entitled to a rebate of the difference between the rate they paid and the rate of the make-good spot (FCC 91-403, 48). If a candidate’s promised audience delivery falls below the anticipated level, then the candidate is to be given an additional make-good or a bonus spot in the same manner as would be offered to commercial advertisers (FCC 91-403, 48).

The FCC’s lowest-unit-charge sold-out policy states that a station may not inform candidates that the preemptible time is sold out in order to leave them no choice but to purchase non-preemptible spots during the same program or time period (FCC 91-403, 49). There is no requirement that a station is to sell time during a given program, but once a station decides to sell time within a given period, it cannot inflate the price of a spot sold to a candidate beyond the minimum necessary by stating that all the preemptible time is sold out (FCC 91-403, 49).

**Political File Requirements**

The final area of reform addressed by the FCC is in the area of station political file requirements (FCC 91-403, 49). The FCC requires that a station
maintain neat and accurate political files so that anyone viewing the files can easily determine what the station has sold or provided to each and every candidate (FCC 91-403, 50). Station files are to include information showing the schedule of the time provided or purchased, when the spots actually aired, the rates charged, and the classes of time purchased (FCC 91-403, 51). This information is necessary to determine whether a station is providing candidates with equal opportunities and whether they are receiving favorable or unfavorable treatment in the placement of spots (FCC 91-403, 51). Such treatment is especially important when one considers the fact that most stations offer widely varying rotations (FCC 91-403, 51).

**REACTIONS TO THE FCC POLICY CHANGES**

As one can easily see, the changes made by the FCC in the area of political programming reforms are quite vast. Because of this, it was probably of no great shock when important judicial questions began emerging even before the FCC's proposed policy revisions were down on paper. In October of 1991, a state court in Alabama ruled that political candidates should be permitted to take broadcasters to court for alleged overcharges for political commercials ("An Alabama" 12). The broadcasters, in their losing effort, had argued that it should be the FCC who decides whether or how much overcharging had occurred ("An Alabama" 12).
The FCC responded to the legal predicament by asserting total jurisdiction over enforcement of the lowest-unit-charge law (Jessell 34). This stand taken by the FCC had the effect of preempting lawsuits filed against stations by political candidates claiming to have been overcharged for airing their spots (Jessell 34). Due to the number of lawsuits filed in state courts as a result of the Alabama decision, the National Association of Broadcasters lobbied extensively to convince the FCC to assert jurisdiction in determining the lowest-unit-charge rate liability and remedies (Jessell 34). Additionally, the FCC decided to include complaint procedures that would allow for a discovery process that would be similar to what would be expected in a court of law (Jessell 34).

As one might expect, the political complaints came in large numbers. It is interesting to note the types of complaints rejected by the FCC. A complaint filed by Democratic congressional candidate Tom Laughlin alleged that the reasonable access provision was denied him when a television station in New Hampshire rescheduled an hour-long segment that Laughlin had purchased to immediately follow a debate in which he took part ("FCC Turns" 6). Further, the station required Laughlin to submit a video tape of his hour-long show, refusing to allow him to broadcast live ("FCC Turns" 6). In its decision, the FCC agreed that he had the right to broadcast live, but that there was no definitive evidence that the rescheduling was unreasonable ("FCC Turns" 6).
Democratic congressional candidate Lenora Fulani complained that public stations WGBH-TV in Boston and WENH-TV in Durham both denied her equal opportunity after they refused to provide her with two hours of prime time programming ("FCC Turns" 6). The stations both took this position partly because she was not included in a debate between five Democratic candidates that was produced by MacNeil/Lehrer Productions and aired by PBS ("FCC Turns" 6). The stations did offer her five minutes of programming instead of the two hours, and the FCC held that this concession was not unreasonable and thus denied her complaint ("FCC Turns" 6).

A somewhat related issue involved a law firm that represents the majority of the political candidates who file complaints against broadcasters for their alleged violations of the lowest-unit-charge rules ("Barnes, Browning" 56). The firm of Barnes, Browning, Tanksley and Casurella filed a suit against the Arbitron rating organization ("Barnes, Browning" 56). The suit alleged a breach of contract because Arbitron apparently reneged on its agreement to sell its ratings information to the law firm ("Barnes, Browning" 56). It seems that Arbitron decided not to sell the ratings information when it learned that the information would be used to determine whether the stations had overcharged Barnes, Browning, Tanksley and Casurella's political clients ("Barnes, Browning" 56). An Arbitron spokesperson stated that the company "does not seek to profit from selling data that would be used against our customers" ("Barnes,
Bobby Kahn, a partner in the law firm, remarked that Arbitron's actions were part of a "conspiracy of the industry as a whole to deny refunds of overcharges" ("Barnes, Browning" 56). Although a decision in the case is forthcoming, it is noteworthy that the Superior Court of Fulton County, Georgia, not the FCC, will be the forum in which the verdict is rendered.

Complaints of a different nature abound regarding the FCC's new policies. Indeed, even months after the comprehensive political broadcasting rules were adopted, groups of broadcasters, politicians, and citizens demanded still more reforms (Flint 50). In the area of audio sponsorship, many claim that the requirement falls under the category of "forced political speech," which would naturally abridge the First Amendment, because at least 20% of a thirty-second campaign commercial would be filled by the audio identification requirement (Flint 50). This, advocates claim, would "unreasonably and unconstitutionally" limit political speech (Flint 50). Candidates are now only able to purchase twenty-four seconds rather than thirty seconds at the lowest-unit-charge, which would seemingly deprive the candidates of their benefit granted by Congress (Flint 50). Such a policy, according to the Republican National Committee, defeats the purpose of the lowest unit rate when candidates pay for a thirty-second spot, of which six seconds are not available for use (Flint 50). With the continuation of this requirement, it appears that ten-second and fifteen-second spots would be virtually eliminated (Flint 50).
A group known as the Media Access Project is upset at the FCC's definition of just what constitutes a "use" (Flint 50). In the past, the FCC defined a "use" to consist of any identifiable appearance by a candidate, either by voice or picture (Flint 50). Now, with increased emphasis placed on the attainment of a candidate's legally qualified status in order for that candidate's appearances to constitute a "use," Media Access Project believes that this will allow independent groups—such as political action committees (PACs)—to aggressively promote their favorite candidates without triggering a "use" as depicted in Section 315 of the political broadcasting laws (Flint 50).

Several groups of broadcasters—including the CBS and ABC television networks—and the National Association of Broadcasters have filed complaints with the FCC (Flint 50). They contend that the "news adjacency rate," which applies to political advertisers who choose to air their spots immediately prior to and after a news broadcast, is unnecessary (Flint 50). The broadcasters believe that the time before and after the newscasts should be priced and sold to political advertisers in a manner that is consistent with that offered to commercial advertisers (Flint 50).

Additionally, the broadcasters disagree with the provision that requires them to insert the sponsorship identification in an advertisement that does not meet the necessary FCC requirements (Flint 50). They see themselves put into the position that the advertiser should be in, because the liability for compliance
with the sponsorship identification is on the broadcaster instead of the advertiser (Flint 50).

At the same time, the broadcasters themselves come under fire for requiring up-front payment from political advertisers. The Federal Election Commission (FEC) insists that broadcasters ease the rules for advance payment ("In-credit-able" 22). The chief of the FCC's political programming branch states that "requiring advance payment is inappropriate" if a candidate or a candidate's agency has a credit history that is comparable to the commercial advertisers that are allowed to pay on credit ("In-credit-able" 22). Since a candidate with an unfavorable credit rating can hire and use an agency with a favorable credit history, there are several political consulting agencies that are unhappy with the thought that they may be pressured into sacrificing their own good credit ratings on behalf of candidates who may be unable to pay the bills ("In-credit-able" 22).
CHAPTER 3

THE ROLE OF THE COURTS

The courts at both the Federal and state levels have dealt rather extensively with several aspects of political advertising. This chapter will examine some of the more compelling judicial treatments of political advertising. These cases, heard in various venues from the Supreme Court down to the state district courts, deal with issues ranging from advertising rates for politicians to provisions placing restrictions on campaign literature.

The first such case, *ACLU v. Jennings*, which was decided in 1973 by the U.S. District Court in the District of Columbia, is considered a landmark decision due to the magnitude of its outcome. *Jennings* is significant in that it appears to have the effect of helping to determine what constitutes a political advertisement and what does not. In *Jennings*, the plaintiff, the American Civil Liberties Union, sought to publish an advertisement during the 1972 presidential campaign that had the effect of denouncing the incumbent (*ACLU v. Jennings* 1973). The advertisement, which the plaintiff submitted for publication to *The New York Times* in September of 1972, expressed the ACLU's opposition to the Nixon Administration-backed legislation which was designed to limit court-
ordered busing (*ACLU v. Jennings* 1973). In the advertisement, the plaintiff listed the names of the 102 members of the House of Representatives who had previously opposed this antibusing policy (*ACLU v. Jennings* 1973). While the plaintiff did hope to generate favorable public opinion to their position by publishing the ad, there was no intention by the plaintiff to aid in the election or reelection of any political candidate (*ACLU v. Jennings* 1973). Upon receiving the advertisement, the *New York Times* notified the plaintiff that their failure to comply with the certification requirements of Title I of the 1971 Federal Election Campaign Act precluded them from printing their advertisement (*ACLU v. Jennings* 1973).

The Title I certification requirement is such that any person who wants to publish an advertisement for a candidate has to obtain certification from that candidate stating that the publication of the advertisement would not have the effect of exceeding the candidate's allotted spending limits (*ACLU v. Jennings* 1973). Certification is also required in order to print statements made about candidates in a derogatory fashion (*ACLU v. Jennings* 1973). The certification was designed to establish the independence of the sponsor from any candidates for election opposing the candidate who is denounced in the particular advertisement (*ACLU v. Jennings* 1973). The sponsor of a derogatory advertisement must either state its source, or provide a disclaimer stating that
no other candidate has authorized the publication of the advertisement (ACLU v. Jennings 1973).

The ACLU filed suit alleging that Title I was unconstitutional in that it imposed undue burdens that had the effect of infringing upon the First and Fourteenth Amendments to the Constitution (ACLU v. Jennings 1973). After the suit was filed, the district court ordered a preliminary injunction that allowed The New York Times to publish a revised copy of the plaintiff's original advertisement on October 27, 1972 (ACLU v. Jennings 1973). This revised advertisement referred to the ongoing court dispute, proclaiming "It took a court order to get this advertisement printed" (ACLU v. Jennings 1973).

Title I, while it applied to the media and not directly to the plaintiffs, caused the plaintiffs to suffer harm as they were exposed to a prior restraint on their right to speak freely (ACLU v. Jennings 1973). The restraint was enforced by the Times, a private party, because of the threat of criminal sanctions under Title I (ACLU v. Jennings 1973).

The defendants attempted to dismiss the proceedings on the grounds of mootness because the advertisement had already run, but the court held that the situation presented in the case was one that involved challenging a governmental policy that is, in the words of the Roe Court, "capable of repetition, yet evading review" (ACLU v. Jennings 1973). The defendants submitted affidavits that spoke to the effect that, in their opinions as governmental officials, the
restrictions that would ordinarily be necessary under Title I would not apply because the statute was never intended to apply to organizations such as the ACLU, but to bona fide political committees that advocate certain candidates for office (ACLU v. Jennings 1973). The court held that the defendants' affidavits only served to express an administrative judgement that is discretionary at best (ACLU v. Jennings 1973).

According to the court, "Title I is tantamount to government prescription of what may or may not appear in public print" if the publication is printed without certification and the media is subject to criminal prosecution (ACLU v. Jennings 1973). The court noted that previous attempts to impose prior restraints on political speech have consistently met with "judicial disfavor" (ACLU v. Jennings 1973). The sort of speech involved in this case is, as Justice Brennan called it in Garrison v. Louisiana, "... more than self-expression, it is the essence of self-government" (ACLU v. Jennings 1973). The district court went on to state:

Any attempt to restrict the free and unfettered dissemination of such opinions cannot be favorably viewed. The fact that restrictions have been imposed in furtherance of matters of legitimate governmental concern is neither dispositive nor, in this instance, persuasive (ACLU v. Jennings 1973).

The court explained that Title I caused unacceptable prior restraints that had the effect of discouraging open discussions on topics of public interest and was, therefore, an unconstitutional means of achieving Congress' objectives
(ACLU v. Jennings 1973). The method by which these prior restraints are to be enforced by the media appears to intensify the Title’s unconstitutional nature (ACLU v. Jennings 1973). The court stated that the media should not be placed in the role of the deciding factor as to whether or not a particular advertisement meets the requirements under the Federal Election Campaign Act (FECA), since, in those instances when the media believes that a certain advertisement may be permissible, but is unsure, the advertisement may not be published for fear of potential criminal prosecution (ACLU v. Jennings 1973).

Overall, the court declared that “the airing of opinion in a public forum must not be subordinated to political expediencies.” Therefore, the court held Title I, subsection 104(b) to be facially unconstitutional (ACLU v. Jennings 1973).

Also under examination in the Jennings case was whether Title III of the FECA was constitutional. The effect of Title III upon the plaintiffs’ First Amendment rights seemingly was not as clear cut as the court found Title I to be (ACLU v. Jennings 1973). Plaintiffs contended that the “reporting and disclosure” requirements that Title III imposes on political committees that would be triggered by the publication of the advertisement should be deemed an unconstitutional violation of their right to freely associate (ACLU v. Jennings 1973). Publishing the names of those affiliated with the plaintiffs’ organization would also be against their right to privacy (ACLU v. Jennings 1973).
Title III defines political committees as groups that receive contributions or spend more than $1,000 per year in order to influence the election of a Federal candidate (ACLU v. Jennings 1973). The plaintiff argued that the vagueness of this definition concerning what constitutes a political committee may be construed in such a way as to compel those organizations that wish to express their opinions politically, but not advocate a particular candidate for office, to submit to the disclosure requirements (ACLU v. Jennings 1973).

Seeking to avoid declaring all of Title III unconstitutional, however unclear the definition of political committee was regarded as being, the court stated:

We are of the opinion that the contested operational language of Title III is susceptible to a limited and narrow construction which will at once remove any chilling effects worked upon the plaintiffs as well as obviate the necessity of this court having to invalidate the Title (ACLU v. Jennings 1973).

The court went on to explain how the Second Circuit of the United States Court of Appeals had previously defined political committees under Title III as “those groups which solicit contributions or make expenditures, the major purpose of which is the nomination or election of candidates into Federal office” (ACLU v. Jennings 1973). Satisfied that this definition was in accordance with the primary concern of the Act, which was campaign reform and addressing the problems of excessive campaign expenditures, the court concluded
that the plaintiff, on the basis of the advertisement submitted, was not subject to the regulations required by Title III (ACLU v. Jennings 1973).

In Sadowski v. Shevin, the Florida Supreme Court reviewed a Florida statute that restricted candidates for public office from making any use of the advertising media except during a specified "political season" (Sadowski v. Shevin 1977). Sadowski was a candidate for a seat in the Florida House of Representatives whose opponent was the incumbent legislator (Sadowski v. Shevin 1977). The statute prohibited Sadowski from filing for office and paying his filing fees and party assessments until noon on July 6, 1976, the sixty-third day before the primary, which was also after the scheduled adjournment of the regular session of the Florida State Legislature (Sadowski v. Shevin 1977).

It was Sadowski's intent to spend campaign funds for media advertising and printing before qualifying for office, but he was prevented from doing so because of Section 106.15(1) of the Florida Statutes that held:

No person, candidate, political party, political committee or person acting on behalf of another shall, prior to qualifying for office, directly or indirectly in furtherance of any candidacy make use of:

(a) Advertising on radio or television;
(b) Advertising in newspapers, magazines or periodicals;
(c) Advertising on billboards, banners or streamers;
(d) Advertising on campaign literature or any other printing; or
(e) A rented hall in which to address the public. (*Sadowski v. Shevin* 1977)

Sadowski filed a complaint seeking to have Section 106.15(1) declared unconstitutional because he contended that it abridged his constitutional right to speak out on the public issues of the day, including the activities of the Florida legislature while in session (*Sadowski v. Shevin* 1977).

In its review of the case, the Florida Supreme Court held that Section 106.15(1) of the Florida statutes, which regulated election activities, was a restraint of free speech and a restriction on the "quantity of a candidate's communication and diversity of political speech" contrary to the dictates of the Supreme Court in *Buckley v. Valeo*, as it constituted a limitation on candidate spending (*Sadowski v. Shevin* 1977). The statute denied candidates their "fundamental right to speak to political issues and to advocate their candidacy by making use of advertising" in the various media and in rented halls until they were well within the described political season (*Sadowski v. Shevin* 1977). Simply because candidates are allowed to spend unlimited amounts for advertising activities within the designated political season does not compensate for the speech restraints, according to the court (*Sadowski v. Shevin* 1977).

The court went further in its holding to state that the people who comprise the electorate are entitled to receive all the information that each candidate can provide about himself, his opponent, and their specific stances on
political issues (Sadowski v. Shevin 1977). The court believed that the entire election process was hampered if the information was restricted or was unavailable as the public's "need to know" was most critical during an election campaign (Sadowski v. Shevin 1977).

Shevin, Florida's attorney general, argued that section 106.15(1) advanced an important governmental interest by protecting the public from "frivolous or fraudulent candidacies" and that it prevented acts of deception and frustration in the democratic process by restricting the use of campaign advertising to only "serious candidates" (Sadowski v. Shevin 1977).

The court refuted this argument stating that the statute did not have the ability to bring about this result because there was nothing in the act to prevent a candidate from making his candidacy known to the public through means of communication other than those specified by the statute (Sadowski v. Shevin 1977). Furthermore, the court stated that if the public were given the necessary information, then it would be able to adequately fulfill its responsibility to sort out the candidates in the field and decide which ones were serious as opposed to those engaging in "political frivolity" (Sadowski v. Shevin 1977). Thus, because Section 106.15(1) was designed to serve as a limitation on the quantity of political speech, the court declared the act unconstitutional as a violation of freedom of political speech rights (Sadowski v. Shevin 1977).
LIBEL

In 1964, the United States Supreme Court handed down a landmark decision in the case of *New York Times v. Sullivan*. The Court held that a publication is responsible for libel contained in any advertising it carries (*New York Times v. Sullivan* 1964). The rule arising out of *Sullivan* was that a plaintiff, to prevail in a libel suit, must be able to prove with "convincing clarity" before the court that the offensive statements were invalid and made with "actual malice" (*New York Times v. Sullivan* 1964). Actual malice refers to the knowledge that the questionable statements were false or were made with "reckless disregard" of whether they were false or not (*New York Times v. Sullivan* 1964). Thus, it was necessary for a plaintiff to prove that the newspaper had prior knowledge that the advertisement submitted was untrue or that the publication acted in a "reckless" manner by not carefully scrutinizing the content of the publication if the advertisement appeared questionable on its face.

The "Sullivan rule" was at issue in the cases of *Varanese v. Gall* and *Cronley v. Pensacola News-Journal*. In *Varanese*, the Ohio Supreme Court declared that a newspaper's liability for failure to check the accuracy of a political advertisement was limited to those situations where the newspaper actually knew before printing that the statement was false or where the statement appeared to be facially false (*Varanese v. Gall* 1988). The plaintiff,
Barbara Varanese, was a candidate for Geauga County Commissioner and, at the
time the advertisement was published, she was serving as the Geauga County
Treasurer (Varanese v. Gall 1988).

The advertisement in question was submitted to the Geauga Times Leader
and the Maple Leaf Shopper by the Committee to Elect Tony Gall. Gall was the
plaintiff's opponent for the county commission seat (Varanese v. Gall 1988). The advertisement charged the plaintiff with various acts of misfeasance and
nonfeasance in her capacity as treasurer and positioned her as an advocate for
the elimination of various services including programs supporting veterans, the
elderly, and conservation (Varanese v. Gall 1988). The advertisement provided
footnotes to support the allegations, several of which cited the Geauga Times
Leader as a source of information (Varanese v. Gall 1988). The plaintiff
ultimately lost her election bid (Varanese v. Gall 1988).

At the trial court, the defendant filed a motion for summary judgement
asserting that, as a public official, the plaintiff was required to show that the
defendant acted with actual malice (Varanese v. Gall 1988). The defendant
contended that the plaintiff could produce no evidence sufficient to demonstrate
such actual malice with "convincing clarity" (Varanese v. Gall 1988).

While the trial court was in apparent agreement with the defendant and
granted his motion for summary judgement, the Ohio Court of Appeals
reversed this ruling on appeal (Varanese v. Gall 1988). The court of appeals reasoned that,

. . . the record contains evidence from which a jury could determine with convincing clarity that Lake-Geauga Printing Co. published the advertisement with actual malice, and with a high degree of awareness of its probable falsity (Varanese v. Gall 1988).

The case was then appealed to the Ohio Supreme Court, which reversed the decision handed down by the court of appeals (Varanese v. Gall 1988). The court stated that the case hinged on a single question: Whether or not the appellee, Varanese, presented enough evidence to withstand appellant’s motion for summary judgement on the question of actual malice (Varanese v. Gall 1988). The court found that appellee’s evidence of actual malice to be insufficient (Varanese v. Gall 1988). The court reasoned that, at the time the advertisement was printed, Varanese was a public official and, thus, she bore the burden of proving, with convincing clarity, that Gall published the advertisement with actual malice (Varanese v. Gall 1988). The court explained that the Supreme Court, in New York Times v. Sullivan, held that reckless disregard on the part of the newspaper must be established by “clear and convincing evidence” that the publication went ahead and published the piece with “a high awareness of . . . probable falsity,” or that “[it] entertained serious doubts as to the truth of the publication” (Varanese v. Gall 1988).
The thrust of Varanese's argument was that the Gall had ready access to information that should have brought about questions as to the truthfulness of the advertisement, or that should have prompted some form of investigation into its accuracy (Varanese v. Gall 1988). The court stated that while the allegations, if true, might raise the issue of negligence, they did not reach the level of showing actual malice (Varanese v. Gall 1988). The court reasoned that political advertisements, unlike news stories, are not generated from within a media organization, which should diminish the responsibility of the media for verifying the accuracy of any statements contained in such advertisements (Varanese v. Gall 1988). The failure to check the truth of a statement is not enough of a basis to raise the issue of actual malice unless the statement is "facially incredible" or the defendant had a "subjective reason" to question the reliability of a source (Varanese v. Gall 1988). Because the record did not contain any evidence that Gall had any subjective reason to doubt the reliability of the sources of the advertisement, the court concluded that there was no evidence of actual malice on his part (Varanese v. Gall 1988).

The case of Cronley v. Pensacola News-Journal was similar to Varanese in that it involved a public official political candidate who brought forth a libel action against a newspaper that had published an article and an advertisement that were, in the appellant's opinion, defamatory (Cronley v. Pensacola News-Journal 1990). The first district of the Florida Court of Appeals held in May
of 1990 that since the appellant was a public figure and had to prove actual
malice on the part of the newspaper, the trial court was proper in dismissing the
case in favor of the newspaper because the "undisputed material facts failed to
reveal a basis for a jury to render a verdict in the appellant's favor" (Cronley v.
Pensacola News-Journal 1990). The court stated that both the appellee's
advertising director and executive editor acted in good faith to publish truthful
statements by providing background evidence as to the validity of the
could not be shown with convincing clarity that the allegedly defamatory
statements were made with actual malice, the court affirmed the trial court's
summary judgement motion for the appellee newspaper (Cronley v. Pensacola

A libel action was also at the heart of a case heard by the Alabama
Supreme Court in July of 1992. In Camp v. Yeager, the appellee advertising
agency (Yeager) produced a televised political advertisement that, according to
the court record, contained statements that the agency knew were false (Camp
v. Yeager 1992). The commercial was challenged as being defamatory because
it stated that the public "got hit with three rate increases" while the appellant
was the president of the Alabama Public Service Commission (APSC) and that
"as a reward", the appellant received over $760,000 in consultant fees (Camp v.
Yeager 1992). The court record illuminated the fact that Camp voted against all
three rate increases and that such increases are not granted under the control of the APSC, but only pursuant to state court orders (Camp v. Yeager 1992).

Furthermore, the fact that he received over $700,000 in consulting fees did not arise directly due to his service as a public service commissioner (Camp v. Yeager 1992). After Camp left the APSC, he opened his own consulting firm and he entered into a three-year contract with Georgia Power Company to perform economic development work, labor relations consulting, and consulting on public relations and regulatory affairs involving nuclear generation of electric power (Camp v. Yeager 1992).

The Alabama Supreme Court held that such statements, obviously made without the necessary background knowledge, were capable of having defamatory meanings (Camp v. Yeager 1992). The court relied on the reasoning it set forth in the case of Loveless v. Graddick:

The test to factually determine the defamatory nature of a statement is that meaning would be ascribed to the language by the reader or listener of average or ordinary intelligence, or by a common mind (Camp v. Yeager 1992).

The court stated that because the appellant was a public figure, a false or defamatory statement may be made intentionally and with ill will toward the public figure, but the public figure may be ineligible for a remedy if the statement was made without the knowledge of its falsity or without "reckless disregard" of its validity (Camp v. Yeager 1992). This rule, brought forth in the
case of Mobile Press Register, Inc. v. Faulkner, is based on the rationale espoused by the Supreme Court in Garrison v. Louisiana (Camp v. Yeager 1992). The Garrison Court held that debate on public issues should not be inhibited if the speaker runs the risk that what he may say will be brought to court in order to prove that he spoke out of hatred (Camp v. Yeager 1992). Such statements that are honestly believed by a public official, even if spoken out of hatred, contribute to the “free exchange of ideas and the ascertainment of truth” (Camp v. Yeager 1992).

Based on the former court ruling, the Alabama Supreme Court decided that the trial court erred in granting the advertising agency summary judgement because the appellant presented evidence that was “clear and convincing” enough for a jury to “reasonably determine” that the agency knew that the statements made in the televised political advertisement were false (Camp v. Yeager 1992).

The court was not unanimous in its decision in the Camp case and Justice Maddox’s dissenting opinion is worthy of discussion. Maddox explained how the case of New York Times v. Sullivan should be the controlling legal guideline (Camp v. Yeager 1992). Maddox argued that, even if the appellant was able to prove that the television commercial contained a false statement and that it was defamatory, “public officials and political candidates . . . should be men [and women] of fortitude” and should not expect to be protected from the harshness of the political arena (Camp v. Yeager 1992). Thus, Maddox stated,
such public officials should not be entitled to a trial on the issues (Camp v. Yeager 1992).

Maddox cited how the Supreme Court in *New York Times v. Sullivan* came extremely close to declaring that political speech, even speech that is false and defamatory, had absolute protection under the First Amendment (Camp v. Yeager 1992). *New York Times v. Sullivan* was decided, as the Supreme Court expressed it,

> [A]gainst the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well contain vehement, caustic, and sometimes unpleasantly sharp attacks upon government and public officials (Camp v. Yeager 1992).

Maddox further made the case that “the substance of the television commercial was not materially different” from the newspaper story of the same facts (Camp v. Yeager 1992). The court record depicted how the appellee created the television commercial content, in part, on information that appeared in two published articles (Camp v. Yeager 1992). In comparing the news accounts with the television commercial, Maddox concluded that the “implication and innuendos” were essentially the same between the two (Camp v. Yeager 1992). Both forms of communication referred to a former public service commissioner who “received $770,000 from a sister company of a company he regulated” when he served as the president of the Alabama Public Service Commission
(Camp v. Yeager 1992). Maddox went on to state that even if the “implications and innuendos” among the two were different, the

... television commercial was just the kind of protected political speech that the Supreme Court of the United States found to be protected in New York Times v. Sullivan (Camp v. Yeager 1992).

Maddox then expressed how he would affirm the summary judgement ruling of the trial court because he believed that the appellant failed to show that he could prove, in a clear and convincing manner, that the appellee's speech was not protected by the First Amendment (Camp v. Yeager 1992).

A RETURN TO THE FAIRNESS DOCTRINE

The Supreme Court was the forum in which two cases that dealt with the “fairness doctrine” were heard. During political campaigns, the fairness doctrine refers to the treatment that the media are required to give those candidates seeking office. Generally speaking, the fairness doctrine would apply in a case in which a story aired that presented the views of one of the two candidates in a race without presenting the views of the opponent. In such a situation, the fairness doctrine requires that both candidates’ views receive treatment by the media. Of course, the fairness doctrine comes into play in cases that do not involve political candidates, as well. The combined case of Red Lion Broadcasting, Co. v. Federal Communications Commission and U.S. v. Radio Television News Directors Association allowed the Supreme Court to analyze the fairness doctrine.
The case arose when the plaintiff, Red Lion Broadcasting, the operator of a radio station in Pennsylvania, aired a fifteen-minute broadcast on November 27, 1964 (Red Lion Broadcasting, Co. v. Federal Communications Commission and U.S. v. Radio Television News Directors Association 1969; hereafter Red Lion and RTNDA 1969). During the broadcast, Reverend Billy James Hargis discussed a book written by Fred J. Cook titled Goldwater—Extremist on the Right (Red Lion and RTNDA 1969). Hargis stated that Cook had been fired by a newspaper as a result of false charges made against city officials, that Cook had worked for a communist-affiliated publication, that he defended Alger Hiss and attacked J. Edgar Hoover and the CIA, and now Cook had written a book to "smear and destroy" Barry Goldwater (Red Lion and RTNDA 1969). In response, Cook demanded reply time and the station refused (Red Lion and RTNDA 1969).

The FCC determined that the broadcast constituted a personal attack on Cook and that the station failed to meet its obligation under the fairness doctrine to send a tape, transcript, or summary of the broadcast to Cook and offer him reply time (Red Lion and RTNDA 1969). The Court of Appeals upheld the FCC’s position and the Supreme Court affirmed, stating that the specific application of the fairness doctrine in Red Lion was authorized by Congress (Red Lion and RTNDA 1969).
The Radio Television News Directors Association (RTNDA) portion of the case involved a new rule adopted by the FCC to make the personal attack aspect of the fairness doctrine more precise and enforceable (Red Lion and RTNDA 1969). RTNDA also sought to specify the rules relating to political editorials deemed to be unconstitutional (Red Lion and RTNDA 1969). The Supreme Court held that the specific application of the fairness doctrine, authorized by Congress, served to enhance—rather than abridge—freedoms of speech and the press protected by the First Amendment (Red Lion and RTNDA 1969).

The "new rule" required that when views were presented on controversial issues of public importance, any attack made on the "honesty, character, integrity or like personal qualities of an identified person or group" will mandate that the station licensee inform the recipient of the attack within at least one week (Red Lion and RTNDA 1969). The date, time, and identification of the broadcast and a script, tape, or accurate summary of the broadcast must be made available to the "attackee," along with an offer of a reasonable opportunity to respond using the licensee's facilities (Red Lion and RTNDA 1969). The rule applies to: Attacks on foreign groups or foreign public figures; personal attacks made by a candidate, authorized spokesperson or any other person associated with the campaign on another candidate; attacks presented
during newscasts, news interviews or on-the-spot news coverage (Red Lion and RTNDA 1969).

When the situation arises where a licensee editorially endorses or opposes a legally qualified candidate or candidates, the licensee, within a day after the editorial is aired, must notify the candidate attacked as well as the other candidate or candidates in the race (Red Lion and RTNDA 1969). Editorials aired within 72 hours before the election must make the necessary allowances for timely responses to be made by the attacked candidate or other candidates in the race (Red Lion and RTNDA 1969).

The Court held that, without the fairness doctrine, a licensee could have the ability to ban all campaign appearances by candidates themselves from the air and deliver only the views of candidates supported by the broadcaster to the exclusion of all other candidates (Red Lion and RTNDA 1969). The fairness doctrine serves to prohibit the broadcaster from exerting such a dominating control over the exposure of candidates by the broadcaster in a given election (Red Lion and RTNDA 1969).

In these cases, the fairness doctrine was examined by the Federal Communications Commission, which declared that the policy of radio and television licensees of not selling editorial advertising time was not in violation of the Federal Communications Act of 1934, nor was it a violation of the First Amendment (CBS v. DNC 1973). The plaintiffs held that responsible individuals had a right to purchase editorial advertisement time to comment on public issues without worrying if the broadcaster was in compliance with the fairness doctrine (CBS v. DNC 1973).

The Court of Appeals reversed the decision of the FCC and stated that the broadcasters' policy of refusing paid editorial time violated the First Amendment, as other sorts of paid commercial advertisements were permissible (CBS v. DNC 1973). The United States Supreme Court reversed the Court of Appeals and the Court majority was in agreement with the reasoning of the FCC (CBS v. DNC 1973).

Parts I, II, and IV constituted the majority opinion of the Court (Id. at 735). To begin with, Justice Burger, writing for the majority, stated that a case based on First Amendment grounds must be evaluated within the statutory and regulatory scheme that had been developed over the years by the decisions rendered in the Congress and by the FCC (CBS v. DNC 1973). In the past, Congress had consistently rejected attempts to impose a "common carrier" right of access to broadcaster facilities for any and all individuals seeking to express
their views on public issues (CBS v. DNC 1973). The fairness doctrine came into being to require that broadcasters' coverage of important public issues be adequate enough so that differing viewpoints could be reflected (CBS v. DNC 1973). Further, the majority went on to proclaim that no private individual or group could command the use of broadcast facilities (CBS v. DNC 1973).

The Court expressed that the public interest standard of the Communications Act, within which First Amendment principles are contained, did not go so far as to require broadcasters to accept editorial advertisements (CBS v. DNC 1973). According to the Court, the FCC was correct in deciding that the public interest in having a "marketplace" sort of access for ideas and experiences would not be satisfied by ordering a right of access to advertising time (CBS v. DNC 1973). There was an inherent risk that such a system would be monopolized by those who could afford air time costs and, thus, the operation of the fairness doctrine would be "undermined" (CBS v. DNC 1973). The public accountability on the broadcaster would be diluted (CBS v. DNC 1973).

Such an absolute right of access would require the FCC to be involved on a case-by-case basis in deciding who should be heard and when, which would have the effect of dramatically increasing the involvement of the government in broadcasting operations (CBS v. DNC 1973). The Court stated that the public interest dictates that a substantial degree of journalistic discretion must remain with broadcasters (CBS v. DNC 1973).
Justice Stewart, who concurred with the majority, made the separate point that since private broadcasters were, as members of the press, protected by the First Amendment guarantee of freedom of the press, it would be unnecessary to hold that First Amendment protection of free speech required the government to impose controls, as sought in this case, to protect First Amendment values (*CBS v. DNC* 1973). If private broadcasters were considered a part of the government, then the private newspapers and their freedoms of the press would likewise be gone (*CBS v. DNC* 1973). According to Stewart, under the public interest standards of the Communications Act, the FCC was not incorrect in refusing to require that every broadcaster must accept paid, public-issue advertising (*CBS v. DNC* 1973).

In their dissenting opinion, Justices Brennan and Marshall began by explaining that the public nature of the airwaves, the Federal licensing of broadcasters, the regulation of programming, and the FCC's specific approval of broadcasters' absolute bans against accepting editorial advertisements are all actions taken by the government and are, therefore, subject to the auspices of the First Amendment (*CBS v. DNC* 1973). The fairness doctrine, in their opinion, was not sufficient to satisfy the First Amendment interests between individuals and the public in an uninhibited exchange of views on items of a controversial nature that concerned matters of public importance (*CBS v. DNC* 1973). When the interests and First Amendment rights of the broadcasters, the
public as a whole, and individuals wishing to express their views are all weighed against each other, the ban on all editorial advertisements violates the First Amendment (*CBS v. DNC* 1973). Such a ban, according to the dissenters, is particularly hard to swallow because the same air time is available for commercial advertisers (*CBS v. DNC* 1973). The justices believed that the Court of Appeals decided the case correctly when they left broad latitude to the FCC and the licensees to develop reasonable regulations to govern a limited right of access for editorial advertising (*CBS v. DNC* 1973).

**Reasonable Access**

The Supreme Court was also the venue for the joint cases of *CBS v. FCC*, *ABC v. FCC*, and *NBC v. FCC*, where these three television networks petitioned the Court for review of FCC orders holding that they had failed to meet their obligation to allow for reasonable access by federal candidates for the purchase of broadcast time (*CBS v. FCC, ABC v. FCC, NBC v. FCC* 1981).

On October 11, 1979, the Carter-Mondale Presidential Committee requested that each of the three major networks provide time for a paid thirty-minute program sometime between 8:00 p.m. and 10:30 p.m. on any day from the fourth through the seventh of December 1979 (*CBS v. FCC, ABC v. FCC, NBC v. FCC* 1981). It was the intention of the Committee to present, in conjunction with the formal announcement of President Carter's candidacy, a
documentary that was to outline the record of his administration (CBS v. FCC, ABC v. FCC, NBC v. FCC 1981).

All three networks refused to provide the requested time to the Committee (CBS v. FCC, ABC v. FCC, NBC v. FCC 1981). CBS stated that there were many candidates in the field competing for the presidential nomination and that the potential disruption of regular programming in order to allow for requests for equal treatment was significant. But, CBS did offer to sell a five-minute segment at 10:55 p.m. on December 8, and an additional five-minute segment in the daytime (CBS v. FCC, ABC v. FCC, NBC v. FCC 1981). ABC indicated that it had not determined when it would begin selling political time for the 1980 presidential campaign, but it later decided that it would permit such sales in January 1980 (CBS v. FCC, ABC v. FCC, NBC v. FCC 1981). NBC also expressed that it was not prepared to sell time for political programs as early as December of 1979, as the potential existed for so many time requests for the several candidates (CBS v. FCC, ABC v. FCC, NBC v. FCC 1981).

The Carter-Mondale Committee filed a complaint with the FCC charging that the networks had violated their obligation to provide "reasonable access" under Section 312(a)(7), part of the Federal Election Campaign Act of 1971,
which authorizes the FCC to revoke any broadcasting station license,

... for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcast station by a legally-qualified candidate for Federal elective office on behalf of his candidacy (CBS v. FCC, ABC v. FCC, NBC v. FCC 1981).

The FCC, in their ruling, held that the networks had violated the statute and that their reasons for refusing to sell the time requested were "deficient" under the FCC's standard of reasonableness (CBS v. FCC, ABC v. FCC, NBC v. FCC 1981). At the time of their decision, the FCC directed the networks to indicate, by a specified date, exactly the manner in which they intended to fulfill their statutory obligation (CBS v. FCC, ABC v. FCC, NBC v. FCC 1981).

The Supreme Court stated that when the FCC is faced with reviewing a decision that a broadcaster has made in terms of whether to provide the requested time or not, only two questions are to be considered:

1. Has the broadcaster adverted to the proper standards in deciding whether to grant a request for access, and
2. Is the broadcaster's explanation for his decision reasonable in terms of those standards (CBS v. FCC, ABC v. FCC, NBC v. FCC 1981)?

The Court commented that the legislative history confirmed that Section 312(a)(7) created a vehicle that enlarged the scope of the political broadcasting responsibilities of licensees (CBS v. FCC, ABC v. FCC, NBC v. FCC 1981). The report of the Senate Commerce Committee stated that one of the key purposes 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 (CBS v. FCC, ABC v. FCC, NBC v. FCC 1981).

Indeed, the Court noted that the legislative history supports the plain meaning of the statute in that individual candidates for federal elective office have a right of reasonable access to the use of stations for paid political broadcasts on behalf of their candidacies without regard to whether an opponent has secured time as well (CBS v. FCC, ABC v. FCC, NBC v. FCC 1981).

The Court continued in its reasoning to state that Section 312(a)(7) makes a significant contribution to freedom of expression by enhancing the ability of candidates to present to the public the information necessary for the effective operation of the democratic process (CBS v. FCC, ABC v. FCC, NBC v. FCC 1981). The statute represented an effort by Congress to guarantee that a resource as important as the airwaves be used in the interest of the public (CBS v. FCC, ABC v. FCC, NBC v. FCC 1981). The Court concluded that this statutory right of access "properly balances the First Amendment rights of Federal candidates, the public and broadcaster" (CBS v. FCC, ABC v. FCC, NBC v. FCC 1981).
LOWEST-UNIT-CHARGE

During a political campaign, candidates are faced with the challenge of trying to get their message across to the voters. Often, laws are passed that help to facilitate this process. An interesting case out of Florida, *Gore Newspapers Company v. Shevin*, involved newspaper publishers who sought to declare two Florida state statutes unconstitutional because they had the effect of requiring newspapers and broadcasters to charge political candidates the lowest local advertising rate, and prohibited the airing or printing of any item on election day that could be perceived as an attack “against the candidate” (*Gore Newspapers Company v. Shevin* 1975). The plaintiffs in this case were newspaper publishers who believed that the two statute requirements were in violation of the First and Fourteenth Amendments to the Constitution (*Gore Newspapers Company v. Shevin* 1975).

The defendant, Shevin, was the attorney general for the State of Florida and had issued a series of opinions as to the constitutionality of the statutes and their applicability to the plaintiffs (*Gore Newspapers Company v. Shevin* 1975). The defendant also stated, by letter, that the statutes would be enforced against the plaintiffs if they were ever violated, and that criminal proceedings would be instituted (*Gore Newspapers Company v. Shevin* 1975).

Prevailing business practice was that the lowest local rate charged by the plaintiffs went into effect only when a client contracted to purchase 25,000
column-inches during a period of one year (Gore Newspapers Company v. Shevin 1975). Political candidates were charged the same rates—higher, or less discounted—that other, less frequent advertisers were charged (Gore Newspapers Company v. Shevin 1975).

Chapter 106 of the Florida statutes stated that publishers and broadcasters may not charge a political candidate any more than the “lowest local rate” available to advertisers (Gore Newspapers Company v. Shevin 1975). The statute also held that no one political candidate could be charged more for advertising than any other political candidate (Gore Newspapers Company v. Shevin 1975). A violation of the statute would entail a fine to the guilty corporation of $10,000, along with a “forfeiture of its right to do business in the state” (Gore Newspapers Company v. Shevin 1975).

While the plaintiffs argued that the statute was created by politicians to give politicians a preferred status, the state countered that the statute was a valid exercise of the state’s police power to allow those individuals who may be otherwise financially prevented from seeking public office the opportunity to do so (Gore Newspapers Company v. Shevin 1975). The plaintiffs also stated that the economic regulation imposed by the statute with its limitation upon advertising revenue makes the press “vulnerable to be ‘taxed’ out of existence or into silence” (Gore Newspapers Company v. Shevin 1975).
The U.S. Florida District Court ruled that the statute did not compel the plaintiffs to print advertisements for the candidates, but that it only required that the rate for the advertisements must be at the lowest local advertising rate (Gore Newspapers Company v. Shevin 1975). The publisher or broadcaster was free to decline all political advertising if it was not profitable (Gore Newspapers Company v. Shevin 1975). According to the court,

If the loss of revenue would prove to be significant, the newspapers might very well decide to decline all political advertising, thus severely limiting media access for all candidates whether well-heeled or running on a shoestring (Gore Newspapers Company v. Shevin 1975).

The effort of the legislature in its attempt to make news media advertising available to candidates was commendable, stated the court, but the exercise of the state's police power had been the subject of several statutes that restrained the content of the publication, and which had been struck down by the Supreme Court (Gore Newspapers Company v. Shevin 1975). The mere fact that the restraint in this case was aimed at revenue instead of content did not insulate it from the "binds" of the First Amendment (Gore Newspapers Company v. Shevin 1975). Thus, the First Amendment prior restraints by the government extended to the lessening of advertising revenue, making the lowest local rate provision invalid (Gore Newspapers Company v. Shevin 1975).

The state of Texas also treated particular aspects of the lowest-unit-charge rule in a unique fashion. This is apparent in the case of KVUE v. Moore.
A Texas statute that allowed for year-round lowest unit rate political advertising was at issue in this case (KVUE v. Moore 1983). The Fifth Circuit of the United States Court of Appeals held that the Texas statute was unconstitutional because it applied year-round, thereby widening the scope of the advertising rate provisions of the Communications Act Section 315, and further applying the discounted rates to both candidate and issue-oriented political advertising (KVUE v. Moore 1983). The FCC was deemed responsible for the enforcement of Section 315, which allows the lowest unit rate charge 45 days before a primary election and 60 days before a general election (KVUE v. Moore 1983). The Texas statute, Article 14.09(B), prohibited radio and television stations from charging a rate for political advertising that is more than the lowest unit charged to the station's "most favored advertisers" for the same class, condition and duration of time (KVUE v. Moore 1983).

In reviewing the legislative history of the Communications Act Section 315, the court held that Congress and the FCC intentionally limited the scope of the Act to require broadcasters to charge the lowest unit rate to candidates and their campaign committees only (KVUE v. Moore 1983). According to the court,

This extension of the statute's coverage to noncandidates and the lowest-unit-charge to a year-round rule stands as an obstacle to the achievement of Congress’ purpose in enacting the rate regulation statute (KVUE v. Moore 1983).
The Texas statute had the effect of conflicting with the Federal statute by lengthening—rather than shortening—the campaign season (KVUE v. Moore 1983). It also brought about greater campaign spending by encouraging candidates and noncandidates (issues) to advertise on a year-round basis (KVUE v. Moore 1983). Finally, the Texas statute imposed a heavier burden on broadcasters to make these lower rates available year-round (KVUE v. Moore 1983). The court declared the Texas statute unconstitutional by means of the Supremacy Clause because the Federally-enacted legislation supersedes legislation passed at the state level (KVUE v. Moore 1983).

Censorship

The second aspect of the case of Gore Newspapers Company v. Shevin dealt with a prohibition against publishing attacks against a candidate on the day of the election. The plaintiffs stipulated that material published in its election-day edition of the newspaper may have included old charges or adverse information about candidates that may have been considered to be attacks against the candidates (Gore Newspapers Company v. Shevin 1975). Section 104 of the Florida statutes was written with the intent of preventing any last minute “smear tactics” against candidates, and the law had existed without being questioned since 1909 (Gore Newspapers Company v. Shevin 1975).

The plaintiffs argued that the requirement that forbade publishing any negative attacks against a candidate should be declared unconstitutional based
on the decision rendered in the case of *Mills v. Alabama* (*Gore Newspapers Company v. Shevin* 1975). In *Mills*, the Supreme Court held that an Alabama law, which made it a crime to "solicit any votes in support of or in opposition to any proposition" on the day of the election, was unconstitutional as it violated the First Amendment (*Gore Newspapers Company v. Shevin* 1975). In that case, an editor of an Alabama newspaper was arrested after an editorial advocating a particular proposition was printed on election day (*Gore Newspapers Company v. Shevin* 1975).

The district court was in agreement with the plaintiffs. It ruled the Florida statute fit nicely within the parameter of the *Mills* decision and, therefore, declared Section 104 of the Florida state statutes unconstitutional as a violation of the First Amendment (*Gore Newspapers Company v. Shevin* 1975). The court felt that the newspapers and broadcasters should be free to print or air whatever they chose regarding a candidate on election day and that they should not be censored, which the existing law had the capability of doing (*Gore Newspapers Company v. Shevin* 1975).

The issue of censorship also involved the broadcast medium in the case of *Kuczo v. Western Connecticut Broadcasting*. In *Kuczo*, the Connecticut District Court concluded, in 1976, that a radio station's review and censorship of two mayoral candidates' political advertisements constituted Federal action subject to the First Amendment (*Kuczo v. Western Connecticut Broadcasting*).
1976). The case arose during the 1969 Stamford, Connecticut, mayoral election when two of the three candidates—plaintiffs Kuczo and Nocerino—had their radio political advertisement scripts reviewed and edited by the defendant radio station's general manager prior to airing (Kuczo v. Western Connecticut Broadcasting 1976). Schwartz, the station's general manager, did not review or edit the audio scripts of the third candidate, who was ultimately elected to office (Kuczo v. Western Connecticut Broadcasting 1976).

The FCC conducted a hearing after a complaint was submitted to the regulatory agency by the plaintiffs (Kuczo v. Western Connecticut Broadcasting 1976). The FCC ruled that the radio station's review and censorship of the candidates' scripts were a "flagrant violation" of Section 315(a) of the Communication Act of 1934, and the defendants were fined $10,000 (Kuczo v. Western Connecticut Broadcasting 1976). In the case before the Connecticut court, the defendants maintained that no violation of the First Amendment occurred as the plaintiffs alleged because there was no "governmental action" taken since the station was a private operator, not an entity of the government (Kuczo v. Western Connecticut Broadcasting 1976).

The Connecticut District Court stated that the core question in this case, which had yet to be officially resolved in any forum, involved to what extent actions taken by broadcasters who are licensed and regulated by the FCC—a governmental agency—rise to a level to which they may be classified as
constituting Federal action (*Kuczo v. Western Connecticut Broadcasting* 1976). The court followed the reasoning of the Supreme Court in that court's decision in *Jackson v. Metropolitan Edison Co.* where the Court held that,

> [T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be as fairly treated as that of the State itself (*Kuczo v. Western Connecticut Broadcasting* 1976).

The district court held that the Federal government ensured that one radio station licensee would have a monopoly of the Stamford airwaves and that, if a candidate wanted to reach eligible voters over the radio, defendant's WSTC-AM and WSTC-FM were the most natural and effective vehicles available (*Kuczo v. Western Connecticut Broadcasting* 1976). In effect, by granting the defendants a monopoly control over the airwaves, the FCC has invested Western Connecticut Broadcasting with the ability to obstruct free speech in the local elections (*Kuczo v. Western Connecticut Broadcasting* 1976).

The court continued in its reasoning to state how the essence of a monopoly is a prime concern of the First Amendment (*Kuczo v. Western Connecticut Broadcasting* 1976). Because the government delegated its control over the local airways to a single radio station licensee, the opportunity for abuses created by the monopoly that the First Amendment was specifically designed to prohibit are obvious (*Kuczo v. Western Connecticut Broadcasting* 1976). Simply because the station’s general manager was not a government
employee does not allow him to avoid his constitutional responsibility as he functions at his position under the auspices of a governmental license (*Kuczo v. Western Connecticut Broadcasting* 1976). The court ruled that,

... it is this nexus between the governmental regulation and the constitutional right in issue that imbues the defendant's action with governmental character vis-à-vis that right (*Kuczo v. Western Connecticut Broadcasting* 1976).

Indeed, it is the government's restrictions on competitive entry that magnify the impact which its licensee's decisions can have on free speech.

**THE POWER OF THE PRESS**

Can a newspaper legally adhere to a policy of not publishing paid political advertisements on the day prior to the general election? The case of *Citizen Awareness Regarding Education v. Calhoun County Publishing, Inc.*, dealt with precisely that concern. In the case, a West Virginia trial court order, which required the newspaper to publish a paid political advertisement submitted by a local political action committee, was found to be a violation of the First Amendment guarantee of a free press (*Citizen Awareness Regarding Education v. Calhoun County Publishing, Inc. 1991*).

The West Virginia Supreme Court of Appeals ruled that the government can never require a private newspaper to print anything without violating the First Amendment (*Citizen Awareness Regarding Education v. Calhoun County Publishing, Inc. 1991*). The court record indicated that the newspaper had
printed previous advertisements from the Citizens Awareness Regarding Education political action committee—a group formed in order to oppose a local school bond issue—but the paper refused to print an ad on May 3, 1991, because they had a policy of not printing any political ads in the last issue prior to an election (Citizen Awareness Regarding Education v. Calhoun County Publishing, Inc. 1991). While the trial court granted an injunction on May 1, 1991, forcing the newspaper to publish the advertisement, there existed no legal support for the injunction sought by the political action committee and, thus, the granting of the injunction was a violation of the First Amendment (Citizen Awareness Regarding Education v. Calhoun County Publishing, Inc. 1991).

**Monetary Limitations on Media Advertising**

The issue of media advertising costs was again raised in the case of Abercrombie v. Burns. However, unlike Gore, Abercrombie involved state-imposed limitations on the amount of money political candidates could spend in the news media (Abercrombie v. Burns 1974). The plaintiffs brought the suit on the grounds that the statute was a violation of the First and Fourteenth Amendments (Abercrombie v. Burns 1974).

Hawaii Act 185 limited the amount of money a political candidate could spend during the course of an election, and set limits on the amount of money that could be spent in the news media (Abercrombie v. Burns 1974). The purpose behind the limits in the expenditure provision was to permit potential
candidates of limited means to seek office (*Abercrombie v. Burns* 1974). A standing committee report indicated that there must be an implementation of the principle of equal opportunity in order to participate in the political process (*Abercrombie v. Burns* 1974).

According to the Hawaii U.S. District Court, the equal opportunity element was fulfilled by the limitation on the total amount of campaign expenditure as stated in Subsection 11-206(a) (*Abercrombie v. Burns* 1974). Limitations on the amount of advertising a candidate wished to spend on the newspapers, magazines, and radio and television, as stated in Subsection (b), was simply an additional, unwarranted burden (*Abercrombie v. Burns* 1974). But, a law that infringes on free speech requires more than a rational basis to uphold it (*Abercrombie v. Burns* 1974). Clearly, the court stated, the requirement imposed by Subsection (b) infringed on political speech (*Abercrombie v. Burns* 1974). The fact that a political announcement may be purchased in a news media cannot force it into a category of lower-grade protection (*Abercrombie v. Burns* 1974). The distinction is between speech that is profit-motivated (commercial), and speech that has an informational intent (political) (*Abercrombie v. Burns* 1974).

The *Abercrombie* court made reference to the case of *U.S. v. O'Brien*, which established the test to judge the limitations on media expenditures (*Abercrombie v. Burns* 1974). The four test criteria were set as follows:
(1) A government requirement is justified if it is within the constitutional power of the government.

(2) The requirement is justified if it furthers an important governmental interest.

(3) The requirement is justified if the governmental interest is unrelated to the suppression of free expression.

(4) The requirement is justified if incidental restrictions on the alleged First Amendment freedoms are no greater than necessary to further that interest (Abercrombie v. Burns 1974).

According to the court, Act 185 satisfied the first three criteria, but failed on the fourth (Abercrombie v. Burns 1974). The restriction of Subsection (b) of the Act on First Amendment freedoms, on its face, appeared to be greater than necessary to promote the principle of equality of opportunity to take part in the political process (Abercrombie v. Burns 1974). This interest was amply protected under Subsection 11-206(a), and the additional limitation created by Subsection (b) on expenditures for advertising appeared to be an unjustifiable infringement of the First Amendment freedoms (Abercrombie v. Burns 1974).

LIMITATIONS ON CORPORATE POLITICAL ACTIVITY

Federal campaign regulations have limited the ability of corporations to participate in the political arena by prohibiting contributions made by corporations to political candidates. However, a Montana state statute, at issue in the case of C&C Plywood v. Hanson, which forbade corporations or banks from making contributions in order to promote or defeat a ballot issue, was
declared an unconstitutional limitation of the corporation's or bank's First Amendment rights (C&C Plywood v. Hanson 1990).

The Ninth Circuit Court of Appeals held that the corporation's rights to express their views on "issues of general public interest" may not be abridged by the state unless a compelling state interest is shown to exist (C&C Plywood v. Hanson 1990). The court stated that when corporations seek to influence the electorate and not an individual candidate or party, no such state interest exists because corporate activities cannot create political debts like those contemplated in the case of Buckley v. Valeo, which had the effect of limiting overall spending in Federal political campaigns (C&C Plywood v. Hanson 1990). Just because a corporation's involvement may influence the outcome of a vote does not adequately support the need to suppress corporate speech (C&C Plywood v. Hanson 1990). Since the Montana statute had the effect of totally prohibiting any contributions or payments, it was not "minimally regulatory," but "totally prescriptive and therefore overbroad" (C&C Plywood v. Hanson 1990).

The court concluded that the portion of the Montana statute that forbade payments or contributions by corporations in support of or in opposition to ballot issues was an unconstitutional restriction of the corporation's First Amendment rights (C&C Plywood v. Hanson 1990). The court further stated that, while regulations to ensure disclosure of the source of payments or contributions may be enacted without a showing of a compelling
state interest, the complete suppression of expression created by the Montana statute was overbroad and, thus, impermissible (C&C Plywood v. Hanson 1990).

Corporate political activity was also at issue in the case of Austin v. Michigan Chamber of Commerce in which the Supreme Court held, in 1990, a Michigan statute constitutional, even though it limited political speech, because it was narrowly tailored and served a compelling state interest (Austin v. Michigan Chamber of Commerce 1990). Austin involved an advertisement the Michigan Chamber of Commerce wanted to place in a publication in order to advocate the candidacy of Richard Bardstra to the Michigan House of Representatives (Austin v. Michigan Chamber of Commerce 1990). The Chamber was prevented from running the advertisement because of Section 54(1) of the Michigan Campaign Financial Act, which prohibited all corporations from using general treasury funds toward state political expenditures (Austin v. Michigan Chamber of Commerce 1990).

The advertisement was not run at the direction of the Bardstra campaign, rather the advertisement was to be an “independent expenditure” which was not made at “the direction of, or under control of, another person” (Geary 1992). The Chamber was a nonprofit organization of about 8,000 members whose activities included “speak[ing] out on legislative, political, legal, economic, and social issues that effect the business community” (Geary 1992). Funding for the Chamber’s activities came from dues paid by all members to the general
treasury, the same treasury that would have funded Bardstra's advertisement (Geary 1992).

In his Boston University Law Review article, Sean T. Geary stated that *Austin* appeared to "foreclose the opportunity to make independent corporate political expenditures" (Geary 1992). Among the troubling reasoning, he continued, was the Court's broad definition of corruption that was defined as "corrosive and distorting effects of immense aggregations of wealth," a distinction that, the Court held, corporations could attain more easily than individuals (Geary 1992). According to Geary, the Court made this assumption without showing any actual proof of this effect (Geary 1992). He went on to state that,

The corrupting influence of independent corporate expenditures should be shown with some specificity to establish its allegedly greater degree of danger relative to independent expenditures by individuals. This showing would further explain the state interests that justify burdening corporate free speech, the constitutional status of which the Court also needs to define more adequately (Geary 1992).

The extent to which a newsletter is able to publish material that is highly critical of a presidential candidate was the focus in the case of Federal Election Committee v. Phillips Publishing. The respondent, Phillips Publishing, was the publisher of a newsletter called *The Pink Sheet on the Left* (*Federal Election Committee v. Phillips Publishing* 1981). *The Pink Sheet* was a for-profit newsletter that targeted a conservative audience of about 14,000, and it had been
in publication for ten years (Federal Election Committee v. Phillips Publishing 1981). *The Pink Sheet*—which served as a periodical not under the control of any party, candidate or committee—claimed exemption under Section 431(a)(b)(7) of the United States Code, which provided that any promotional material distributed by such an agency not controlled by any political entity is exempt from any possible prosecution (Federal Election Committee v. Phillips Publishing 1981).

The particular issue of *The Pink Sheet* in question in this case was printed in early 1980 and distributed to subscribers and potential subscribers (Federal Election Committee v. Phillips Publishing 1981). The tone of the issue was one of an attack against the presidential candidacy of Senator Edward Kennedy (Federal Election Committee v. Phillips Publishing 1981).

The Kennedy Presidential Committee filed a complaint to the Federal Election Committee alleging that *The Pink Sheet* violated four Federal election laws (Federal Election Committee v. Phillips Publishing 1981). The Federal Election Committee, in turn, issued a "reason to believe" letter to Phillips Publishing stating that they may have violated Federal election laws (Federal Election Committee v. Phillips Publishing 1981). The Federal Election Committee believed that the following four statements from *The Pink Sheet* violated election laws:

(1) "We must stop Kennedy before he seizes the Presidency."
(2) "You can help with this effort to stop Kennedy."

(3) "You learn how you can use this valuable information to help defeat Teddy Kennedy's drive for the Presidency."

(4) "Whether you are a man or woman, young or old, a businessman, teacher, student, employer, union member, or government worker—you can actually help combat Teddy Kennedy and advance the cause of conservatism in America" (*Federal Election Committee v. Phillips Publishing* 1981).

The Federal Election Commission also thought that the edition of *The Pink Sheet* was in the form of a "solicitation letter," as it was not in the form of a news story, commentary, or editorial, thus excluding it from the Section 431(a)(b)(1) press exemption (*Federal Election Committee v. Phillips Publishing* 1981). The FEC alluded to the fact that *The Pink Sheet* was not printed with the traditional heading typeface, publication information legend, and, additionally, it was addressed "Dear Friend" instead of "Dear Subscriber" (*Federal Election Committee v. Phillips Publishing* 1981).

When the FEC issued their "reason to believe" letter, they also issued a subpoena requesting that Phillips Publishing furnish the Commission information to refute the alleged violations (*Federal Election Committee v. Phillips Publishing* 1981). The case at hand sought to resolve whether a district court order enforcing the FEC's subpoena was justified. The court ultimately held that the enforcement of the subpoena was not permissible (*Federal Election Committee v. Phillips Publishing* 1981).
The United States District Court ruled that the FEC did not challenge the contention that Phillips Publishing was not owned or controlled by any one political party or candidate (Federal Election Committee v. Phillips Publishing 1981). The court went on to declare that the fact that The Pink Sheet had been published for ten years further confirms the fact that it was not simply generated for this particular race (Federal Election Committee v. Phillips Publishing 1981). In essence, the FEC’s complaint was based only on the supposition that a violation may have occurred (Federal Election Committee v. Phillips Publishing 1981).

The court was particularly concerned with the FEC’s subject matter jurisdiction in this matter and they referred to the language of the Supreme Court in the case of Sweezy v. New Hampshire when it said that,

\[ \ldots \text{the power of compelling process [must] be carefully circumscribed when the investigative process tends to impinge on such highly sensitive areas of freedom of speech or press, freedom of political association, and freedom of communication of ideas (Federal Election Committee v. Phillips Publishing 1981).} \]

The court concluded that since the FEC made no “threshold” showing that a violation may have occurred, and that it was unlikely that one would be found, and since the danger exists that any further inquiry by the FEC might violate the respondent’s First Amendment freedoms, the FEC’s petition for enforcement of its subpoena was to be denied (Federal Election Committee v. Phillips Publishing 1981).
CAMPAIGN SIGNS

Hawaii was the site of another case in which the Hawaii U.S. District Court decided a controversial case involving political advertising: Local politicians were prohibited from displaying campaign signs. Ross v. Goshi arose when the plaintiffs, a group of local politicians brought suit against Maui city officials to declare Maui City Ordinance 308 Section 3(a)(4), as amended by Maui County Ordinance 697, unconstitutional because the ordinance violates the First and Fourteenth Amendments (Ross v. Goshi 1972). Section 3(a)(4) prohibits all outdoor political campaign signs (other than signs identifying the headquarters of a political candidate) placed on real property, buildings, and structures in view of the general public (Ross v. Goshi 1972). The stated purpose of the section to limit the posting of signs was to "abate the traffic and fire hazards caused by the proliferation of such signs and to preserve the natural beauty of the county" (Ross v. Goshi 1972). The penalty for putting up a sign, which was not permitted, was $500 per day until the sign was removed (Ross v. Goshi 1972).

When it was originally passed in 1961, Section 3(a)(4) allowed political signs that were no larger than eighteen square feet to be posted for sixty days prior to and ten days following an election (Ross v. Goshi 1972). The amendment to the section was passed in 1971 and it had the effect of banning all political campaign signs at all times (Ross v. Goshi 1972). Section 8 of Maui
County Ordinance, while prohibiting certain kinds of signs, including political campaign signs, did allow for the display of various types of commercial signs (*Ross v. Goshi* 1972). The distinction, according to the court, was that political signs were prohibited and other signs were permitted simply due to the message appearing on the face of the sign (*Ross v. Goshi* 1972).

Several cases have been decided in which certain reasonable regulations placed on the posting of outdoor signs were deemed permissible when the regulation was found to serve some “significant governmental interest” (*Ross v. Goshi* 1972). Any types of restrictions that come close to infringing upon First Amendment freedoms are subject to careful scrutiny by the courts (*Ross v. Goshi* 1972).

Maui county officials needed to show that the restriction against posting political campaign signs had some “rational relationship to the effectuation of a proper governmental purpose,” and that it was necessary in order to promote a “compelling state interest,” as was stated in the case of *Peltz v. City of South Euclid* (*Ross v. Goshi* 1972). There could be no compelling state interest in a regulation when lesser means were available to achieve the same purpose (*Ross v. Goshi* 1972).

In *Ross*, the defendants were unable to show that political signs that were reasonable in “size, structure, appearance and placement” created a safety hazard or tarnished the aesthetic beauty of Maui County in a way that was different
from the various types of commercial signs that were permitted (*Ross v. Goshi* 1972). The defendants relayed to the court that, as it was originally enacted, Maui County Ordinance 308 did warrant some sort of regulation because of the multitude of signs permitted (*Ross v. Goshi* 1972). However, the court stated that the amendment to the ordinance that prohibited all political campaign signs was an overreaction, as a lesser measure could have been employed to regulate the signs instead of getting rid of them altogether (*Ross v. Goshi* 1972). In *Peltz v. City of South Euclid*, the Ohio Supreme Court held that a “municipality is not powerless” to create reasonable regulations against the nuisances that may be caused by political signs, but that public officials may not take steps to prohibit all campaign signs (*Ross v. Goshi* 1972).

The *Ross* court deemed that Maui County Ordinance 697 was unconstitutional in that it infringed on the plaintiffs’ constitutionally protected freedom of speech and equal protection under the law (*Ross v. Goshi* 1972). In overturning ordinance 697, Section 3(a)(4) was left as it was originally enacted where it allowed political signs of certain sizes to be posted for set durations of time prior to and following an election (*Ross v. Goshi* 1972). In deciding whether or not the original ordinance was constitutional, the court found that the restrictions imposed by the ordinance were a permissible form of balancing the constitutional rights of the candidates against all other governmental
interests (*Ross v. Goshi* 1972). Thus, Maui County Ordinance 308 as originally set forth was reinstituted (*Ross v. Goshi* 1972).

Three additional cases are worthy of note for the fact that their election sign limitation ordinances each proved to be in violation of the First Amendment.

In *Van v. Oregon Travel Information Council*, an Oregon statute that prohibited the posting of signs at all times—except for a period of sixty days prior to a general election—on land that was adjacent to federal highways was found to be a violation of the First Amendment by the Oregon Court of Appeals (*Van v. Oregon Travel Information Council* 1981). The act, which limited the erecting of temporary political signs, was promulgated by the Oregon Travel Information Council (*Van v. Oregon Travel Information Council* 1981). The stated purpose of the act was to,

... promote the public safety, to preserve the recreational value of public travel on state highways, and to preserve the natural beauty and aesthetic features of such highways and adjacent areas (*Van v. Oregon Travel Information Council* 1981).

The court found that the aesthetic interests seeking to be advanced by the state through the passage of the ordinance were legitimate, but that it was difficult to determine a relationship between the sixty-day limitation on the posting of political signs, and matters relating to public safety—permitting political signs on a temporary basis made it hard to imagine how prohibiting
such signs at other times significantly promotes highway safety (Van v. Oregon Travel Information Council 1981). According to the court,

Limiting the time period during which the political signs may be maintained is more closely related to considerations of aesthetics and preservation of the recreational value of Oregon's highways, but these interests, although valid, are not sufficient to justify this significant restriction on political speech (Van v. Oregon Travel Information Council 1981).

The court went further to note that the entire process of acquainting the public with new candidates is a slow one (Van v. Oregon Travel Information Council 1981). Oregon's election scheme inherently intensifies this process, as its primary elections are held during the month of May, with the general elections occurring in November, nearly six months later (Van v. Oregon Travel Information Council 1981). Thus, the sixty-day political sign limitation was even more unreasonable in hampering political speech (Van v. Oregon Travel Information Council 1981).

Yet another such case that had the effect of infringing upon the guarantees of political speech was Carollo v. Miami (Carollo v. Miami 1984). In 1984, the Florida Circuit Court struck down a Miami ordinance that required a permit and the payment of a fee to post any temporary campaign sign that measured over fifteen square feet on privately-owned commercial property (Carollo v. Miami 1984).
The plaintiff in this case, Carollo, was a candidate running for reelection for his seat on the city commission (Carollo v. Miami 1984). Carollo posted an estimated 75% of his 225 campaign signs on private property (Carollo v. Miami 1984). His signs measured 32 square feet (Carollo v. Miami 1984). Carollo did not apply for or obtain a permit, nor did he pay any fees for the posting of his signs (Carollo v. Miami 1984). He was able to secure a temporary restraining order to prohibit the enforcement of the ordinance and challenged the provisions of the ordinance that banned temporary campaign signs on private property without the required permit along with the payment of a minimum fifteen dollar fee for all signs exceeding fifteen square feet in size (Carollo v. Miami 1984).

According to the court, Miami’s temporary sign ordinance inhibited the use of political signs by imposing permit and fee requirements (Carollo v. Miami 1984). The court applied a balancing test pitting the First Amendment guarantees against the legitimate governmental interest seeking to be furthered (Carollo v. Miami 1984). The court noted that the same permit application form was used for all signs, whether they were commercial, decorative, political, or otherwise (Carollo v. Miami 1984). A permit application was to be filed and a fee paid for each and every regulated sign, even if all the signs were identical (Carollo v. Miami 1984). Carollo’s permit fees for his campaign signs would
have amounted to $2,500, an unnecessary burden, according to the court (Carollo v. Miami 1984).

The circuit court stated that the equal protection clause of the Fourteenth Amendment requires that any statute that affects First Amendment freedoms be narrowly drawn to meet the state's objectives, and not based on a classification method that is discriminatory (Carollo v. Miami 1984). Section 2025.3 of the act allowed for the establishment of exemptions to the permit requirements (Carollo v. Miami 1984). Signs displayed on vehicles, for example, served to illustrate the ordinance's discriminatory propensity (Carollo v. Miami 1984). A political sign that exceeded two hundred square feet would be permissible on privately-owned commercial property without need of a permit or permit fee if the sign were attached to a truck or another vehicle parked on the property and if that vehicle could be used for normal transportation purposes (Carollo v. Miami 1984). The same two-hundred-square-foot sign posted on the same commercial property without having been mounted on a vehicle would require the payment of an eighty-dollar permit fee (Carollo v. Miami 1984).

The court concluded that the distinctions and classifications created by such exemptions were both arbitrary and discriminatory because they favored nonpolitical over political speech (Carollo v. Miami 1984). The city's claim that the ordinance was passed for means of aesthetics, safety, and the ensured
removal of the signs after the election did not bear a "substantial relationship" to the protection of such interests by imposing permits and fees (Carollo v. Miami 1984). The court held that,

Miami has not sufficiently tailored its regulation of temporary campaign signs to avoid arbitrary interference with the free exercise of fundamental First Amendment rights (Carollo v. Miami 1984).

Finally, the case of Arlington County Republican Committee v. Arlington County involved a challenge to a zoning ordinance that restricted the placement of political signs on private property to no more than two such signs (Arlington County Republican Committee v. Arlington County 1993). The plaintiffs argued that the challenged provision violated their First Amendment guarantee of freedom of speech as the two sign limit prevented both political parties and individual homeowners from expressing their political views (Arlington County Republican Committee v. Arlington County 1993).

The defendants expressed their belief that the ordinance furthered the county's substantial interest in promoting aesthetics and traffic safety (Arlington County Republican Committee v. Arlington County 1993). The Arlington County Republican Committee countered this viewpoint by providing evidence showing the lack of any specific aesthetic or traffic safety problems during the period of time in which a preliminary injunction prohibiting the enforcement of the ordinance was in effect (Arlington County Republican Committee v. Arlington County 1993). Thus, the political committee charged that the county
failed to narrowly tailor its ordinance to further its stated interest (Arlington County Republican Committee v. Arlington County 1993). The United States Fourth Circuit Court of Appeals agreed with the Committee in that the two-sign limitation was an infringement on political speech violating the First Amendment, as it did not serve to further the state's aesthetic and public safety interests (Arlington County Republican Committee v. Arlington County 1993).

**Sponsorship Identification**

Politicians seeking Federal office are subject to regulations that can greatly differ from those that regulate state and local elections. The case of *U.S. v. Scott* illustrated the importance of proper sponsorship information appearing on campaign materials (*U.S. v. Scott* 1961). The case involved the alleged violation of a statute that prohibited the publication of a piece of campaign literature for a candidate who sought the office of United States Senator, when the name of the sponsor of the literature—in this case, a campaign brochure—was not disclosed anywhere on the literature (*U.S. v. Scott* 1961). The defendant argued that the sponsorship disclosure requirement infringed on his First Amendment rights, and he moved for dismissal of the charges against him that he violated Section 612 of Title 18 of the United States Code (*U.S. v. Scott* 1961).

Section 612 of the Code states that it is unlawful for an individual or group to knowingly publish and distribute any campaign material on behalf of
a candidate for Federal office without declaring the name of the sponsor or sponsors of the published piece (U.S. v. Scott 1961). The penalty for violating the section is a fine of up to $1,000, a year in prison, or both (U.S. v. Scott 1961).

After senatorial candidate Quentin Burdick had declared his intention to seek the office of Senator from North Dakota prior to June of 1960, Scott, during the month of June 1960, published and distributed copies of a pamphlet concerning Quentin Burdick titled, "Is this smear, or are they fact?" without including any of the identities of the individuals responsible for producing the pamphlet (U.S. v. Scott 1961).

The defendant stated that the charges brought against him violated his First Amendment rights because, as a farmer, he was subject to a myriad of Federal governmental regulatory interferences (U.S. v. Scott 1961). Scott stated that each crop that he grew had certain guidelines that were set and determined by Federal agencies and that, if he were to disclose his name on the campaign literature, he would be subject to future retaliation by Federal officials (U.S. v. Scott 1961).

Congress intended for the identities of the individuals producing campaign literature to be disclosed so that the voters could be informed and could make a decision about a particular candidate knowing by whom they had been supported or opposed (U.S. v. Scott 1961). The North Dakota U.S. District
Court stated that the defendant’s theory of potential future “reprisal is highly speculative and conjectural” (U.S. v. Scott 1961). According to the court, the mere possibility of retaliation is not sufficient enough to permit one from following the prescribed sponsorship identification requirement (U.S. v. Scott 1961). The apparent value of Section 612 of the Code to the public outweighed the alleged infringement of the defendant’s rights (U.S. v. Scott 1961). The court held that Section 612 is a valid exercise of legislative power in the national interest and that “scurrilous” publications by unknown authors are an “evil which the Congress has seen fit to proscribe within the ambit of Section 612” (U.S. v. Scott 1961).

The issue of sponsor identification on published political advertisements was the focus of the case Kansas v. Davis. The Kansas District Court in Jefferson County ruled, in September of 1991, which a Kansas statute that proscribed criminal penalties against those who publish political advertisements without any form of sponsorship identification is overly-broad (Kansas v. Davis 1991).

The state held that the newspaper defendants published a display advertisement for a third party—one who took a position on an upcoming jail bond election—which was in violation of Kansas Statute 25-2407 because the advertisement ran without “attribution,” in that it contained no wording to identify the sponsor of the advertisement (Kansas v. Davis 1991). Statute 25-
2407 was referred to as Kansas' "corrupt political advertising statute" (Kansas v. Davis 1991). It stated, in essence, that when publishing or broadcasting a print advertisement or a broadcast commercial that is intended to advocate one political position over another, then the name of the chairman of the sponsoring organization or political committee must be disclosed (Kansas v. Davis 1991). A violation of the statute constituted a misdemeanor (Kansas v. Davis 1991).

The newspaper defendants charged that the Kansas statute was unconstitutionally overbroad as it applied to "issue-oriented" speech, which is protected by the First Amendment (Kansas v. Davis 1991). The court was in agreement with the defendants and declared that the Kansas statute was unconstitutionally overbroad (Kansas v. Davis 1991). The court stated that the statute's attribution requirement, as it related to candidate-oriented speech, was not a violation of the First Amendment, but the goal of complete disclosure was not met by the statute (Kansas v. Davis 1991). The court also held that while the anonymous criticism of government is protected, the anonymous criticism of candidates for public office may lead to an abuse of the electoral process (Kansas v. Davis 1991). This notion, in turn, leads to the necessity of "substantiating the state interest" in order to justify a "limited impediment" on one's First Amendment rights (Kansas v. Davis 1991).

Along similar lines, the Supreme Judicial Court of Massachusetts, in June of 1975, declared unconstitutional a criminal statute prohibiting any person
from writing, printing, posting, or distributing election circulars or posters unless there appeared "conspicuously" on the publications the names of the officers of the organization that issued it, "or of some voter who is responsible therefore" (Communications Law 1975). The court, in Commonwealth v. Dennis, found the statute to either "impose . . . an unconstitutional prior restraint on a nonvoter's exercise of First Amendment rights" or, if construed to be inapplicable to nonvoters, to establish an unconstitutionally irrational distinction between voters and nonvoters (Communications Law 1975).
CHAPTER 4

CONCLUSION

The Microscopic View:

It has been said that the new FCC rules are "an effort to bring order and chaos out of the FCC's existing political broadcasting enforcement, which has evolved over the years and confounded FCC officials, broadcasters, and candidates alike" (Jessell 34). Perhaps the jury is still out with regard to how effective the new FCC political advertising reforms will be. In my opinion, many of the complaints that were discussed earlier in Chapter Two are quite valid.

In terms of the audio sponsorship identification requirement, the fact that precious seconds are used up—often approximately 20% of a thirty-second spot—makes one wonder if the FCC should be forcing candidates to buy the thirty-second spots when they could be requiring stations to sell candidates twenty-four-second spots instead. If the stipulation does, in fact, lead to the virtual demise of the shorter ten- and fifteen-second spots for political candidates, only those candidates with the war chests to purchase the longer-
duration spots will be able to access this form of the media. The main intention behind the video and audio sponsorship requirements was so that both hearing- and visually-impaired voters could discover on whose behalf the political advertisement was aired. However, if only the more wealthy candidates are the ones who will be able to afford the longer spots, then all voters are put at a disadvantage because they will not be afforded the exposure to as many of the candidates as would otherwise be possible.

The argument expressed by the broadcasters regarding the responsibility that they were given to make sure that political spots contain the proper sponsorship identification is also justifiable. It should be the candidate or the candidate's campaign management team who is ultimately responsible for improper sponsorship identification. However, the way the policy was enacted requires that the station has the obligation to make sure that all political spots conform to the FCC regulations and, if they do not, that the station is responsible for making sure that the spots are repaired in order to meet the prescribed format. The broadcaster is not expected to do the revisions free of charge to the candidate, but if a spot were ever aired without the proper identification and it were discovered as such, the station would be liable and would face possible sanctions by the FCC. The broadcaster is responsible for making sure that hundreds of political spots meet the FCC regulations, and it is not outside the realm of probability that one advertisement may get
overlooked, especially in those situations when the candidate does not allow the
spot to be previewed by the station. A better approach would be to pass the
liability problem down to the candidate. This responsibility could be assumed
in the form of a waiver that the station should require the candidate to sign
attesting to the fact that the sponsorship identification requirement has been met
and, if it is learned that it has not, the candidate and not the station will assume
responsibility for any sanctions levied by the FCC.

On a more positive side, the political file requirement that the broadcast-
ers must fulfill is very admirable. This provides complete candidate spot
scheduling disclosure to anyone requesting information at the station. The
station is responsible for providing a log that lists each individual who requests
information on a given candidate, and exactly what information has been
requested. The station is allowed to make copies of the information for the
inquisitor. With such a log of those who have sought access to the files, both
the candidate and his opponents benefit. The candidate can discover who
requested information on his advertising plans, and the opponents can use the
information to strategize exactly when and how much they choose to spend on
radio and television advertising. However, to be truly fair, it is essential that
the files and logs are maintained according to the established FCC requirements.

Of the cases discussed, the case of *Gore Newspapers Company v. Shevin*
was perhaps the most interesting, holding that candidates should not be given
the lowest local advertising rate. Obviously, this perspective is long a thing of the past as the FCC itself requires that the media provide political candidates the lowest rates possible during the campaign period. The reasoning of the U.S. District Court of Florida was interesting because, while it seems that the justices were in agreement with the Florida legislature that these lesser rates should be allowed, they reversed this train of thought and held the provision unconstitutional. Their seemingly weak rationale was based on the fact that the First Amendment protects against a prior restraint by the government that, in this case, dealt with the lessening of newspaper advertising revenues.

Overall, the cases discussed in this paper appear to be a sound representation of the types of cases at the Federal and state level that have dealt with political advertising. While it is clear that legislatures are not restricted from placing regulations on issues that have an effect on political campaigns, it is also equally clear that when these restrictions come particularly close to infringing upon an individual’s First Amendment rights, the courts, as a whole, will see fit to impose a rigorous test upon the restrictions to make certain that the governmental interest allowed by the restriction is crucial enough to allow these encroachments upon constitutional freedoms.

The cases that focused on regulations imposed upon the posting of political signs, for instance, are good examples of the court system’s desire to protect the citizens’ constitutional rights and to take into account the fact that
local governments in particular may have a valid reason for trying to impose posting regulations. The courts, in general, held that as long as the government's aesthetic and public safety reasons were found to be truly served by an ordinance, then the regulation was found to be a permissible constitutional limitation. Any slight infringement on the candidate's ability to speak to the voters, which would hamper the public's right to be informed, was likely to be deemed unconstitutional by the courts.

The new reforms proposed by the Federal Communications Commission will have a definite effect upon political advertising in the years to come. Only time will tell if, as the FCC had originally intended, the citizens prove to be the real beneficiaries of this increased level of voter information. Indeed, today's political environment is not what it once was. Those candidates with high ideals of changing the world for the better will not get very far if they do not possess the ability to get their distinctive message to the voters. The use of television and radio, especially in large markets and in statewide races, is invaluable if the candidate wants a reasonable chance of attaining office. However, the constitutional right to exercise one's freedom of political speech is not immune from encroachment by the regulatory agencies or the judiciary. It seems, then, that we Americans are at the mercy of these varied entities to assure that our rights are not usurped and are protected in the best manner possible.
The Macroscopic View:

If, for a moment, we take a step back from the intricacies of all the enactments and regulations imposed on political advertising—taking a longer, broader, more macroscopic view of both the intent and the demonstrated practice of the process of political advertising—the immediate question that arises is this: Have the many and various enactments and court decisions actually been effective in "leveling the political playing field" by making it more accessible to a wider spectrum of candidates?

It can be argued that they have not.

The political process is no more accessible simply because a candidate with greater financial resources still has the ability to "overpower" the less well-financed candidate in the advertising arena, and it is in this arena, regrettably—an arena not of issues and clear debate, but one of advertising power, manipulation, and acumen—that elections are so overwhelmingly often decided.

An example that illustrates this point: Candidate A and Candidate B are running against one another for political office. Candidate A is heavily-financed, while Candidate B has considerably less money in her campaign account. Both candidates will use various means of political advertising to get what they hope to be their "distinctive" messages across to the voters.
The regulations on political advertising will affect each candidate equally, but because Candidate A has the funds to more effectively saturate the political terrain with his message, he finds himself at a distinct advantage over Candidate B. Regulations such as the lowest-unit-charge provision will do little to aid a candidate who is unable to match another candidate's spending levels. One thousand gross rating points will beat one hundred gross rating points almost every time.

Ironically, the lowest-unit-charge provision—inaugurated to assist candidates such as Candidate B above—is actually a boon to Candidate A, the highly-funded candidate. The provision lowers air time costs universally, allowing his already abundant funds to go even further, to buy even more.

Furthermore, one should also never lose sight of the fact that the legislative bodies—and the individual members of those bodies—who craft the regulatory measures are quite mindful that, come reelection time, they, too, will be bound by any new restrictions and/or regulations they enact. In other words, as they consider possible election reform laws and regulations, they are well aware they are determining the rules they will themselves have to follow to keep their jobs as elected legislators. This is a situation in which the incumbent can have a distinct advantage.

For example, an incumbent may find a double benefit in being a part of limiting the extent and duration of political signage. On the one hand, he can
“grandstand” to his constituents about how he helped “rid our neighborhoods of the ‘litter’ of political signs,” while on the other hand he knows that, as the incumbent, he does not so badly need the simple awareness such signs provide the electorate for a challenger.

Another troubling point concerning political advertising is that executive branch agencies, such as the FCC, regulate in a venue that is essentially closed to the voter. The average citizen cannot write to his or her “local” FCC commissioner to urge him to support certain regulations over others because there is no “local” FCC commissioner. In fact, no part of the FCC is directly accountable to the voting public. If the average citizen communicates on such matters at all, it will most likely be with his or her elected representatives.

Day-to-day enforcement—or lack of enforcement—of enacted political advertising regulations takes place in an arena virtually inaccessible to those whom it most profoundly affects. Only those individuals who are avid and knowledgeable observers of the intricacies of the political process—an extremely small proportion of the total electorate—will be privy to how legislation is being regulated.

Perhaps the only real way the public can effectively voice their opinions on matters that will truly affect how political advertising is regulated and, therefore, is presented to them is, ironically, by exercising their right to vote. The electorate must express its support for candidates who will not merely
devise hollow legislation that provides candidates the opportunities to “grandstand.” They must back candidates who seriously want to make the electoral process an equitable one for all who wish to enter politics and serve their constituents. That, ultimately, is not the responsibility of the FCC or of Federal, state, or local politicians. It is the responsibility—and the choice—of each individual voter.
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