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Legal Sidebar

The Equal Time Rule for Political Candidates: Constitutional Context

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On July 23, 2024, two days after announcing that he would exit the 2024 presidential race, President Joe Biden wrote on social media that he would address the country on "what lies ahead." In advance of this address, news organizations reported that President Donald Trump's campaign had sent a letter to broadcast television networks demanding equal airtime, in response to the anticipated coverage of President Biden's address. The networks did not respond to news requests for comment, leaving unclear how or whether the campaign's demand was resolved.

The Supreme Court has recognized that the First Amendment of the United States Constitution protects the right of media speakers to choose which views they will elevate. Legally compelling a television network to broadcast content it would not otherwise choose to air may appear at odds with this right. However, the Federal Communications Commission (FCC) has long had a number of regulations in place regarding access to airwaves for political candidates, including a regulation providing political candidates "equal opportunities" to use broadcast stations. This Legal Sidebar briefly discusses the relationship between the FCC's rule and the Free Speech Clause of the First Amendment. For more information on FCC rules regarding political candidates generally, see this CRS Report.

The FCC's Equal Time Rule

The FCC administers a licensing system for the owners and operators of radio and television broadcast stations. This licensing is considered necessary because the electromagnetic spectrum on which broadcast stations operate is a scarce and finite resource. As discussed in this CRS Report, the FCC has a number of rules and regulations regarding access to airwaves by political candidates. Section 315(a) of the Communications Act of 1934, as amended, requires broadcast licensees to afford "equal opportunities to all other such candidates for that office" in the event that the licensee permits a candidate for public office "to use a broadcasting station." The FCC has issued a regulation pursuant to this statutory directive. The rule contains exceptions, including when a candidate appears on a "bona fide newscast" or in "on-the-spot coverage of bona fide news events." This rule is colloquially referred to as the "equal time rule," though this phrase does not appear in the rule or in the provision of the Communications Act authorizing it.

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Free Speech and the Right of Editorial Control

The Free Speech Clause of the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." As discussed further in these essays in the *Constitution Annotated*, the free speech right protected by the First Amendment extends not only to individuals, but also to media organizations, such as newspapers and television stations. The Supreme Court has recognized in various cases that regulating mass media may implicate the First Amendment interests of both the regulated entity and the public. These interests may not always be aligned. For example, a newspaper's interest in choosing to print material that promotes a single perspective may conflict with the public's interest in access to a variety of perspectives on significant issues. This potential conflict raises the question of whether the First Amendment permits government to require media outlets to devote space or airtime to alternative points of view—essentially, to elevate the public's speech interests over those of the media outlet. For most forms of media, the answer is no. Instead, the Court has recognized a protected right of "editorial control and judgment" for a media outlet to choose the speech it transmits.

In striking down legislative attempts to require access to media facilities, the Supreme Court has relied on the principle that government may not compel a private party to provide a forum for views other than its own. For example, in *Miami Herald Publishing Co. v. Tornillo*, the Supreme Court was unanimous in holding void under the First Amendment a state law that granted a political candidate a right to equal space to answer criticism and attacks on his record by a newspaper. The Supreme Court has recognized this right outside the context of newspapers, most recently suggesting that the right might extend to some actions performed by online social media platforms. In its most recent decision, the Court suggested that a government interest in "ideological balance" could not support abridging this right.

Free Speech and the Equal Time Rule

The regulation of broadcast media—a matter of federal law for more than 100 years—might seem to conflict with the well-settled principle that regulating the media may threaten the right to free speech and freedom of the press, particularly in light of the Supreme Court's cases on the right of editorial control. As early as 1943, the Supreme Court suggested that for First Amendment purposes, broadcast media hold a unique position in the media landscape. For example, the Court has discussed how the scarcity of broadcast frequencies and the potential for interference absent coordinated use of those frequencies requires regulation of broadcast media in ways that necessarily deny some people the ability to broadcast. By contrast, the Supreme Court has rejected efforts to extend the unique First Amendment treatment of broadcast to other media, such as the internet, based on the absence of these factors.

The Supreme Court has relied on the unique characteristics of broadcast to uphold various access rights to broadcast stations, including FCC rules requiring a broadcaster to afford individuals an on-air opportunity to respond to personal attacks aired by the broadcaster. In a case following the Court's decision in *Tornillo*, the Court upheld a law requiring "reasonable access" to a broadcast station for candidates seeking election to federal office. Responding to the argument that such a law would interfere with broadcasters' exercise of editorial discretion, the Court held that "[t]he First Amendment interests of candidates and voters" justified a limited, "reasonable" access right to broadcast stations.

The Supreme Court has also upheld government requirements imposed on cable television systems, including federal requirements that cable systems carry local broadcast television stations. In an earlier case addressing these "must carry" requirements, cable operators argued that the requirements would force the operators to transmit certain speech, in violation of the operators' editorial right. The Court rejected this argument, holding that the federal must-carry rules were unlikely to "force cable operators to alter their own messages." The Supreme Court also observed "an important technological difference" between cable television and the print media from which the right of editorial control originally emerged: that a cable operator exercises "far greater control over access" to television programming than a

newspaper publisher does to the written word. The Court noted that a cable operator owns the physical connection between a television and the cable network and can therefore control "most (if not all) of the television programming" that reaches a cable subscriber, while a newspaper cannot prevent its customers from reading competing newspapers.

The equal time rule's constitutionality has received little attention in federal court and has not been adjudicated by the Supreme Court. As discussed above, the Supreme Court has upheld the constitutionality of similar FCC rules that might constrain a broadcast station's exercise of editorial control. For many years, the FCC enforced a set of rules known collectively as the "fairness doctrine," which required broadcast stations to provide coverage of contrasting viewpoints when discussing public issues. The Supreme Court upheld the constitutionality of the fairness doctrine in 1969 based on the unique attributes of broadcast media. In upholding the fairness doctrine, the Court drew an analogy to the equal time requirements in the Communications Act, though the Court did not discuss their constitutionality. The FCC stopped enforcing the fairness doctrine in the 1980s, concluding that the doctrine violated the First Amendment. Throughout the Supreme Court's history—including prior to the FCC's departure from the fairness doctrine—various Supreme Court Justices have expressed the view that the decision upholding the fairness doctrine was misguided and broadcast media should not be subject to unique First Amendment standards. Nonetheless, the Supreme Court has not revisited its decision upholding the fairness doctrine.

The Supreme Court's cases upholding limited and "reasonable" access rights to both broadcast and cable television stations suggest that the equal time rule might not receive the same level of constitutional scrutiny applied to restrictions on editorial control in other contexts, such as print media. However, the rebuke of some broadcast regulations by both the FCC and current and former Supreme Court Justices indicates that the constitutionality of regulations like the equal time rule may not be a foregone conclusion.

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