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# THE VENTILATION OF THE PRESIDENT, 1972: POLITICAL BROADCASTING UNDER THE CAMPAIGN COMMUNICATIONS REFORM ACT

MICHAEL BOTEIN\*

## I. INTRODUCTION

In recent years the rising cost of campaigning for elective office has assumed particularly alarming proportions. Though general inflationary pressures certainly are responsible for some of that increase, most of the blame has been ascribed to the broadcasting establishment. Expenditures for political broadcasts have more than doubled during the last decade.<sup>1</sup> Accordingly, politicians comprise a significant revenue source for broadcasting while raising that revenue is a primary obstacle for politicians.<sup>2</sup>

The sheer size of radio and television campaign spending is naturally not evil per se. Extensive and expensive political broadcasting, however, may have undesirable repercussions for both the candidates and the voters. The high cost of broadcast campaigning creates some "rich men's elections" in which well-financed candidates literally drown out their less affluent opponents. In some elections, candidates and their families have contributed staggering amounts to their campaigns.<sup>3</sup> Though money is obviously not the sole route to political bliss, it nevertheless does buy time to talk. As a result, well-funded candidates show a hardly surprising tendency to win.<sup>4</sup>

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1. H. ALEXANDER, *FINANCING THE 1968 ELECTION* 4-5 (1971) [hereinafter cited as ALEXANDER].

2. Though broadcasters and politicians are often at odds, there is a substantial amount of interaction between the groups for the simple reason that many congressmen have ownership interests in radio and television stations. See Smith, *The Wired Nation*, *THE NATION*, May 18, 1970, at 582, 592.

3. For example, New York's Governor Nelson Rockefeller received almost one and one half million dollars for his 1968 presidential nomination bid from his stepmother, Mrs. Martha Baird Rockefeller. ALEXANDER at 26.

4. THE TWENTIETH CENTURY FUND, *VOTERS TIME: REPORT ON THE TWENTIETH CENTURY FUND COMM'N ON CAMPAIGN COSTS IN THE ELECTRONIC ERA* 11 (1969) [hereinafter cited as *VOTERS TIME*]. Interestingly enough, the Chairman of the Commission was Newton Minow—who had been FCC Chairman under President Kennedy—and one of its members was Dean Burch—who was to become FCC Chairman under President Nixon. *Id.* at vi. See also Reeves, *The Boss of New York and Other Power People*, *NEW YORK*, Jan. 1, 1973, at 26. In

More significantly, candidates often must accept funds from all available sources—thus incurring political debts that are payable only in kind.<sup>5</sup> Though the public trust may not have fallen into private hands, large corporate interests and labor unions do supply a great proportion of campaign financing.<sup>6</sup>

Finally, broadcasting has a very powerful and perhaps even irrational impact on voters.<sup>7</sup> As a result, a candidate unsaleable in person or on paper may win on radio or television.<sup>8</sup> This may produce not only poor public officials but also cynical or alienated voters.<sup>9</sup>

During the last few years, a plethora of reform bills has been introduced into Congress, only to die untimely deaths.<sup>10</sup> In 1970, Congress passed the Political Broadcast Act, an attempt to limit both campaign spending and political advertising rates.<sup>11</sup> President Nixon's veto was hardly surprising: his party was financially paramount, and he had doubled his opponent's expenditures in the previous election.<sup>12</sup>

The President's veto message, however, committed him to some form of legislation,<sup>13</sup> and in 1971 Congress passed the Federal Election Campaign Act.<sup>14</sup> Perhaps the most important part of the Campaign Act is Title I, the Campaign Communications Reform Act.<sup>15</sup> It makes a two-pronged attack upon the problems of campaign

listing the ten most powerful politicians in New York City, Mr. Reeves awarded the first three places to Governor Rockefeller.

5. *VOTERS TIME* at 12. Thus Senator Eugene McCarthy received substantial contributions from the banking industry—an interest group that his campaign rhetoric hardly would have seemed to have favored—because of his membership on the Senate Finance Committee. *ALEXANDER* at 44-45.

6. See *ALEXANDER* at 176-207. Not surprisingly, the legal profession is a comparatively large contributor to campaigns. *Id.* at 176-77.

7. *VOTERS TIME* at 15.

8. For an excellent and graphic description of how the process worked for at least one presidential candidate, see T. WHITE, *THE MAKING OF THE PRESIDENT* 1960 (1961).

9. *VOTERS TIME* at 12-13.

10. Comment, *The Federal Election Campaign Act of 1971: Reform of the Political Process?* 60 *GEO. L.J.* 1309, 1311 n.15 (1972). This comment counted over 105 reform bills in the last three Congresses alone.

11. S. 3637, 91st Cong., 1st Sess. (1970).

12. *ALEXANDER* at 96.

13. Letter from Richard M. Nixon to Hugh Scott, 116 *CONG. REC.* 18746 (1970).

14. Federal Election Campaign Act of 1971, 86 Stat. 3 (codified in scattered sections of 2, 18, 47 U.S.C.).

15. 47 U.S.C. §§ 801-05 (1972) [hereinafter cited as Campaign Communications Reform Act. Section numbers refer to U.S.C.].

spending by limiting candidates' expenditures for mass media,<sup>16</sup> and perhaps more importantly, by restricting the mass media's charges to candidates.<sup>17</sup> While these measures hardly solve all the problems of broadcast campaigning, they nevertheless represent at least an effective holding action.<sup>18</sup>

## II. APPLICABILITY OF THE REFORM ACT

The Reform Act's first problem is its vagueness in defining not only the media, but also the candidates to which it applies. In issuing its interpretative *Primer* on the Act, the Federal Communications Commission noted that it had encountered "some extremely difficult decisions as to congressional intent . . . ."<sup>19</sup>

### A. Media

The Reform Act begins by defining "communications media" as "broadcasting stations, newspapers, magazines, outdoor advertising facilities, and telephones . . . ."<sup>20</sup> A "broadcasting station" under the Act is not just a radio or television station, but also a cable television system<sup>21</sup>—a result that seems superficially logical but which may create regulatory dilemmas.<sup>22</sup>

More importantly, the Reform Act does not apply to many important campaign techniques. First, the Act covers telephones only if used "to communicate with potential voters"<sup>23</sup>—language which the Comptroller General recently interpreted as allowing opinion polls.<sup>24</sup> Candidates thus still may spend huge amounts to determine

16. See text accompanying notes 41-63 *infra*.

17. See text accompanying notes 61-96 *infra*.

18. Thus, though it attempts to equalize candidates' relative positions somewhat, it does not even approach the subsidization scheme which the Twentieth Century Commission felt to be the starting point of real reform. *VOTERS TIME* at 19-27.

19. *Primer on Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 37 Fed. Reg. 5796 (1972) [hereinafter cited as *Commission Primer*].

20. Campaign Communications Reform Act § 801(1).

21. Thus, Campaign Communications Reform Act, § 801(2) provides that "'broadcasting station' has the same meaning as such term under section 313(f) of this title." But section 315(f)(1)(A), an amendment added by the Reform Act, then goes on to state that "the term 'broadcasting station' includes a community antenna television system."

22. See text accompanying notes 84-88 *infra*.

23. Campaign Communications Reform Act, § 801(1).

24. Federal Campaign Funds, 37 Fed. Reg. 11940, 11945 (1972) [hereinafter cited as *Comptroller General Opinion*]. There, the Comptroller General excepted from the Act "[o]pinion polls which are conducted without identification of sponsorship by or on behalf of a Federal candidate . . . ." But though such polls may not help a candidate in directly influenc-

the electorate's mood and to analyze the best use of their limited media funds.<sup>25</sup> Similarly, the Act does not limit a candidate's expenditures in producing—as opposed to distributing—political advertisements.<sup>26</sup> Thus, a candidate with money for opinion polls and program production can use his limited media funds much more effectively than a less affluent opponent.

Second, the Reform Act does not apply to mailing expenditures. The introduction of extensive and expensive computerization, however, has transformed mass mailings into a highly effective means of reaching voters.<sup>27</sup> In addition, computerized mailings not only require but also raise vast amounts of money,<sup>28</sup> giving credence to the old American proposition that "it takes money to make money."

Third, under the Reform Act a candidate may spend unlimited amounts of money on non-media public relations efforts. A candidate may therefore provide plush accommodations for reporters covering his campaign<sup>29</sup> or may stage a convention that will attract maximum media attention.<sup>30</sup> Though these expenditures create unquantifiable benefits, they nevertheless give an obvious advantage to a wealthy candidate.

Finally, the Reform Act does not regulate use of traditional "giveaways"—such as campaign literature, bumper stickers, and but-

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ing the electorate, they still can provide information helpful in structuring allowable use of the media. *See* note 25 *infra*.

25. ALEXANDER at 113-14. For example, the late Senator Robert Kennedy's 1968 nomination campaign made extensive use of opinion polls to determine the impact of his advertisements upon the public. *Id.* at 57-58.

26. As the Twentieth Century Commission noted:

Advances in broadcasting technology have made it possible to present a candidate in the best possible light, with all inept answers to hard questions edited out of the tape, with false starts and all uncertainties and human failings eliminated, all warts and blemishes removed, a single smooth image alone remaining. It is no criticism of television or radio to say that some day it may be possible to offer a wholly plausible and wholly false impression of a candidate.

VOTERS TIME at 37.

27. ALEXANDER at 15. Moreover the trend appears to be on the increase. In the 1972 presidential campaign, the Committee to Re-elect the President launched a \$6,000,000 program designed to mail more than 12,000,000 personally addressed, computer-written letters. Atlanta Constitution, Oct. 3, 1972, at 3, col. 1.

28. ALEXANDER at 145-47.

29. Though reporters usually reimburse a candidate for their travel expenses, the Nixon press accommodations in the 1968 campaign were noted for their "comfort and luxury." ALEXANDER at 83.

30. Conducting an interesting and attractive political convention can be a surprisingly expensive proposition. *Id.* at 73-74.

tons. Though these techniques may seem somewhat obsolete and inefficient, they are still the “workhorses” of any campaign<sup>31</sup>—as indicated by the chaos their absence creates.<sup>32</sup>

The result of the Reform Act’s limited coverage is simply to create a regulatory void. A well financed candidate can stay within the comparatively generous media spending limitations while flooding the electoral market in other ways. Under the guise of following the statutory regulations, that candidate may well spend more on an election today than before the passage of the Act.

### B. Candidates

The Reform Act is equally unclear in its applicability to candidates. While it initially defines a “legally qualified candidate” as one eligible to “hold the Federal elective office” which he is seeking,<sup>33</sup> it then adopts the term “person who is a legally qualified candidate for any public office . . . .”<sup>34</sup> In theory, the Act might cover campaigns for state as well as federal elective offices—an area where reform is needed. In practice, however, Congress obviously did not contemplate the Act’s application to state and local elections,<sup>35</sup> since it explicitly authorizes state limitations.<sup>36</sup> The Commission’s *Primer* thus construes the Reform Act as applicable only to federal elections.<sup>37</sup>

The Reform Act also leaves somewhat unclear the point at which a candidacy commences—and thus at which the spending limitations attach. A person becomes a presidential candidate upon making “an expenditure for the use of any communications medium on behalf of his candidacy for any political party’s nomination . . . .”<sup>38</sup> This formulation creates two main difficulties. First, the Commission’s *Primer* indicates that “the mere making of minimal expenditures” does not constitute a candidacy.<sup>39</sup> Though a *de minimis* rule may be sensible here, the Commission’s failure to define “minimal” ob-

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31. *Id.* at 32.

32. *Id.*

33. Campaign Communications Reform Act, § 801(4).

34. *Id.*, § 315(a).

35. 1 U.S. CODE CONG. & AD. NEWS 45, 54 (1972).

36. Campaign Communications Reform Act, § 315(d).

37. *Commission Primer* at 5800. In addition, the Commission also construes the Reform Act as inapplicable to a campaign for nomination to a federal office by a state convention. *Id.*

38. Campaign Communications Reform Act, § 803(a)(3)(B).

39. *Commission Primer* at 5800.

viously invites confusion and litigation. Second, and deserving greater emphasis, determining the start of a serious presidential candidacy will often be impossible. A candidate may expend huge sums on building a national reputation for years before formally announcing his candidacy.<sup>40</sup>

### III. CAMPAIGN SPENDING LIMITATIONS

The Reform Act's first major innovation is its imposition of spending limitations on both primary and general elections for all federal offices. Though the effects of the limitations may be questionable, their mechanics are fairly simple.

A congressional candidate may spend no more than \$50,000 or ten cents per potential, as opposed to registered, voter within his district or state.<sup>41</sup> A presidential candidate's limit is the total of all the state limitations.<sup>42</sup> The Comptroller General may, however, increase the ten cent figure to reflect general inflationary pressures.<sup>43</sup>

Both congressional and presidential candidates may allocate only 60% of their spending limits to broadcasting,<sup>44</sup> a change from both the vetoed 1970 Act and previous drafts of the Reform Act.<sup>45</sup> Since the spending limits apply separately to primary and general elections,<sup>46</sup> a nominee can reach his limit in the primary and then begin the general election anew.

In theory, the campaign spending limitations should reduce excessive political expenditures. In practice, however, they fall short of their avowed goals for a number of reasons. Spending limitations do not apply to the many previously noted important methods of influ-

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40. For example, both Richard Nixon and Lyndon Johnson spent huge sums in preparation for the 1968 campaign. ALEXANDER at 27-32. This type of expenditure obviously has some residual value in an actual primary or general election.

41. Campaign Communications Reform Act, § 803(a)(1).

42. *Id.*, § 803(a)(2).

43. *Id.*, § 803(a)(4).

44. *Id.*, § 803(a)(1)(B). The Reform Act thus creates a partial—and conscious—subsidy program for the nation's ailing newspapers. It reverses the traditional pattern of candidates' spending six times as much on the electronic media as on the print media, ALEXANDER at 109, by giving candidates a de jure incentive to spend 40% of each campaign dollar in newspapers or magazines.

45. See note 35 *supra*.

46. Campaign Communications Reform Act, § 104(a)(1). Indeed, depending on state law, a candidate presumably could allocate his full spending limitation to three separate elections: primary, primary-run-off, and general. He thus would have three, as opposed to two bites of the apple. See text accompanying notes 49-51 *infra*.

47. See text accompanying notes 23-27 *supra*.

encing the electorate. As a result, they are not an effective restriction on a candidate's total expenditures.<sup>48</sup> In addition, the ten cents per potential voter formula is not as restrictive as it might appear. All eligible voters are not registered, and all registered voters do not vote. In recent years, for example, only about one-half of the nation's eligible voters have bothered to exercise their franchise,<sup>49</sup> and the reduction of the voting age has increased the number of eligible voters.<sup>50</sup> The ten cent figure is therefore more than twenty cents for each vote cast. In fact, the spending limit for each presidential candidate approaches the amount which President Nixon spent on the electronic media in his 1968 campaign.<sup>51</sup> These limitations represent not so much a retreat as a retrenchment; they are a hedge against inflation, not a roll-back of presently high costs.

The spending limitations also apply separately to primary, runoff, and general elections. A candidate thus can take two or even three bites out of the Reform Act apple. This obviously increases not only a candidate's political expenditures but his public exposure.

Furthermore, the Reform Act does not deal adequately with the basic fact that a broadcaster reaches more than one district or state at a time.<sup>52</sup> Though the Act does require the Comptroller General to allocate a presidential candidate's expenditures among the states that his broadcast reaches,<sup>53</sup> it does not require similar treatment for congressional candidates. Their spending limitations therefore must absorb the cost of reaching viewers who cannot vote for them,<sup>54</sup> and,

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48. See text accompanying notes 27-40 *supra*.

49. In the 1972 Presidential election, for example, 139,642,000 people were eligible to vote. Out of this, only 76,116,500 bothered to exercise their franchise. CONGRESSIONAL QUARTERLY, Nov. 11, 1972, at 2947.

50. Although the total number of votes cast in the 1972 presidential election was a record, participation of eligible voters was the lowest in years. *Id.*

51. Under the Comptroller General's computations, a presidential candidate could spend no more than \$14,250,509 on communications media. Comptroller General Opinion at 11,957. By contrast, President Nixon spent \$12,600,000 in his 1968 campaign on radio and television. ALEXANDER at 96.

52. For example, television stations in New York City reach at least three states other than New York. In terms of a specific audience, cable television is thus far preferable to broadcast television. It not only follows existing geographical and jurisdictional boundaries, but also can subdivide its coverage area easily. Botein, *Access to Cable Television*, 57 CORNELL L. REV. 419, 424-25 (1972).

53. Campaign Communications Reform Act, § 803(a)(3)(C). Moreover, the Comptroller General deems the section applicable only where the candidate "intends to reach persons in two or more states in which he is actively seeking primary votes or convention delegates." Comptroller General Opinion at 11,944.

54. For example, a New York City congressional candidate must pay for reaching viewers not only in different districts, but also in different states.

consequently, television campaigning is still too inefficient for many Senate and most House candidates.

Finally, the Reform Act uses a less than satisfactory method of identifying and allocating a candidate's expenditures<sup>55</sup>—a problem that plagues all attempts at electoral reform. The identification dilemma creates an inherent Scylla and Charybdis situation.

On the one hand, accepting a candidate's account of his expenditures opens the door to fraud: the claim that a candidate never authorized a particular expense is too easy to make and too difficult to refute. On the other hand, recognizing all amounts allegedly spent "on behalf of" a candidate invites a political shell game: a candidate might well pour huge sums into advertisements that were nominally on behalf of but actually detrimental to his opponent.

The Reform Act attempts to steer a compromise course between these two extremes by requiring a pre-sale certification procedure. Thus it prohibits a broadcaster or newspaper from billing a candidate "unless such candidate (or a person specifically authorized by such candidate in writing to do so) certifies in writing that the payment of such charge will not violate" the spending limitations.<sup>56</sup> Both the Commission and the Comptroller General have adopted procedures sufficiently complex to discourage broadcasters or newspapers from consummating a deal.<sup>57</sup> Yet the Reform Act does not rely solely on the flat prohibition which was unenforced<sup>58</sup> and perhaps unenforceable<sup>59</sup> under prior law. Instead, it forces each communications medium to police itself. Although broadcasters are technically still free to accept advertising from an overextended candidate, their inability to collect would obviously reduce their desire to do so.

The Reform Act's failure to define amounts spent "on behalf of" a candidate, however, does not clarify the status of "policy" ads,

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55. Campaign Communications Reform Act, § 803(a)(6) provides only that "[a]mounts spent for the use of communications media on behalf of . . . [a candidate] shall, for the purposes of this subsection, be deemed to have been spent by such candidate." As a result, it begs the obvious and difficult question of defining "behalf."

56. *Id.*, § 803(b). Obviously enough, the statute does not bar a newspaper or broadcaster from giving free time to an overextended candidate. The loss of potential revenue and the requirement of free reply time, however, probably combine to make this approach too financially unattractive for all except the most ideological media owners.

57. *Commission Primer* at 5803-04; Comptroller General Opinion at 11,944.

58. No recorded prosecution was ever brought under previous statutes. Note, *Campaign Finances Reform: Pollution Control for the Smoke-filled Rooms*, 23 CASE W. RES. L. REV. 631, 643 n.45 (1972).

59. VOTERS TIME at 30.

which endorse an ideology rather than a candidate.<sup>60</sup> It also fails to deal with ads that do not support a candidate but instead attack his opponent.<sup>61</sup> Though the Comptroller General has recognized and attempted to resolve the problem, his solution is less than satisfactory.<sup>62</sup> Additionally, requiring a candidate's authorization for an ad may silence politically independent groups whose support a candidate does not desire. Whether the candidate's refusal to grant authorization constitutes a total veto is less than clear.<sup>63</sup>

The Reform Act's spending limitations undoubtedly will change the nature of present campaigns. Candidates will divert money from newspapers and broadcasters into other means of public exposure. In addition, they presumably will allocate more money towards creating ads and less towards distributing them.<sup>64</sup> And some candidates may move from today's "spot" advertisements to longer programs<sup>65</sup>—an obviously beneficial side effect.<sup>66</sup>

The spending limitations are thus no cure for the ills of contemporary campaigning. Nevertheless, they represent at least a holding action for the present and possibly an advance for the future.

#### IV. CHARGE LIMITATIONS

Those limitations, however, are only one part of the Reform Act. Potentially more important is the requirement that broadcasters and newspapers charge reasonable rates.

The Reform Act creates a double standard, however, for print and broadcast media. A newspaper need not sell space at all and, if it does, must only "not exceed the charge made for comparable

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60. Many advertisements—particularly in newspapers—do not identify themselves with a particular candidate. ALEXANDER at 111-12, 127.

61. See Comment, *supra* note 10, at 1319.

62. A candidate is not charged for amounts spent in attacking his opponent where "a responsible person" deals with the station, the station "takes reasonable precautions," and "there is no reason to suspect that any candidate is a party to the transaction." The last criterion obviously will be the most difficult to fulfill.

63. See Comment, *supra* note 10, at 1318-19.

64. See text accompanying notes 23-37 *supra*.

65. Comment, *supra* note 10, at 1315. This change will depend upon candidates' views of broadcasting's cost-effectiveness. Though spots cost more than longer programs, they usually reach a much larger audience—and thus actually are cheaper in terms of cost per thousand viewers (CPM). VOTERS TIME at 16. On the other hand, a program obviously gives a candidate a better opportunity to influence viewers. The party faithful, however, may be the only people to watch longer programs.

66. See VOTERS TIME at 2.

use."<sup>67</sup> Broadcasters are subject to a different set of requirements. Radio and television stations must allow "reasonable access or . . . permit purchase of reasonable amounts of time . . ." <sup>68</sup> For forty-five days before a primary and sixty days before a general election a broadcaster may demand only "the lowest unit charge of the station for the same class and amount of time for the same period"<sup>69</sup>—a formula borrowed from a previous reform proposal.<sup>70</sup> At all other times, broadcasters are subject to the same "comparable use" requirement as newspapers.<sup>71</sup>

The charge limitations should insure that less affluent candidates are able to compete in the media market.<sup>72</sup> In theory, the spending and charge limitations are thus complementary: the former reduces a well-financed candidate's advantage while the latter decreases a less wealthy candidate's disadvantage. In practice, however, the charge limitations contain a number of doctrinal as well as pragmatic defects.

One flaw in the Act is the discrimination between print and broadcast media. Unlike radio and television stations, newspapers and magazines need not take political advertisements if "comparable use" rates are substantially lower than normal charges.<sup>73</sup> Moreover, broadcast media are regulated by the Commission,<sup>74</sup> and print media by the Comptroller General.<sup>75</sup> This division of regulatory responsibility presumably is based on fears that exclusive jurisdiction would allow the Commission to stick its nose under newspapers' first amendment tent. Nevertheless, it may create jurisdictional conflicts,

67. Campaign Communications Reform Act, § 802. This Reform Act section explicitly allows newspapers to reject all political advertising, by requiring that a newspaper charge the "comparable use" rate only "[t]o the extent that [it] sells space . . ."

68. *Id.*, § 312(a)(7).

69. *Id.*, § 315(b)(1).

70. The Twentieth Century Commission proposed that candidates receive subsidized time for thirty-five days before the election and that stations be compensated on the basis of fifty percent of their rate card or their "lowest unit price." *VOTERS TIME* at 31.

71. Campaign Communications Reform Act, § 315(a)(1).

72. The Twentieth Century Commission, however, felt that spending limitations would be useless unless coupled with a subsidy, since poor candidates would still be at a disadvantage. *VOTERS TIME* at 29. Given the amount of money available to even third party candidates, however, this problem does not seem serious.

73. Newspapers' and magazines' actual desire to do so, of course, will vary not only with the difference between normal and "comparable use" rates, but also with the over-all availability of advertising.

74. Campaign Communications Reform Act, § 312(a).

75. *Id.*, §§ 802, 804.

since many newspapers and television stations are jointly owned.<sup>76</sup> Both constitutional and regulatory dogma have drawn a traditional distinction between print and broadcast media.<sup>77</sup> The time may have arrived, however, for a reappraisal of this conventional wisdom. There is no immediately obvious reason for federally licensing a low-power radio broadcaster but not the *New York Times*.<sup>78</sup> Furthermore, in a non-constitutional dimension, both newspapers and broadcasters sell advertisements on the basis of rate cards. As a result, there appears to be little justification for the Reform Act's distinction.

The Reform Act's requirement of the "lowest unit charge" during the pre-election period also seems questionable. While it may shorten campaigns by giving candidates a de jure incentive to save their media dollars for the end,<sup>79</sup> the special pre-election rate might have some undesirable effects. Low media costs and high spending limitations could allow well financed candidates to continue waging last-minute *blitzkrieg* campaigns.<sup>80</sup> In addition, a shortened campaign handicaps new candidates: incumbents receive continuing media coverage while their challengers need more time to impress voters. Furthermore, the Reform Act adopts but does not define "lowest unit charge" and "comparable use." Realistically, these standards probably will be the part of the Reform Act most difficult to administer and most likely to produce litigation. The Commission's *Primer* sheds at least a little light on the issue. Congress apparently equated "lowest unit charge" with the rates that large commercial

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76. For example, newspapers control or have substantial ownership interests in almost one hundred television stations—which are among the more profitable ones in the country. Frazier, Gross & Co., *Valuation of Newspaper Owned Television and Radio Stations Affected by the FCC's Proposed Divestiture Rule*, 11 PROFESSIONAL STUDIES IN SUPPORT OF COMMENTS OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION A-6, in FCC Docket No. 18110 (1971).

77. *NBC v. FCC*, 319 U.S. 190, 226 (1943).

78. Thus some observers have begun to call for closer regulation of the print media. See, e.g., Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 164 (1967). And at least one has even gone so far as to propose that newspapers be subject to the same requirements of reply time as broadcasters. Note, *A Fairness Doctrine for the Press*, 40 N. DAK. L. REV. 317 (1964).

79. See CODE, *supra* note 35, at 53. The Committee noted that "a limitation on the length of time when this most favored rate is available will be an incentive to candidates to shorten the duration of their campaigns . . . ."

80. Any candidate—but especially a well-known and well-entrenched incumbent—simply could make minimal media expenditures until the last few days of the campaign and then spend his limit.

advertisers can command through long-term contracts and high bargaining power.<sup>81</sup> Thus the *Primer* defines lowest unit charge as the lowest rate that a station charges for a particular time slot.<sup>82</sup> Determining the lowest actual charge then becomes the problem, since radio and television rates vary according to a number of factors. The Commission's formulation, however, considers most of the variables, such as the amount of air time, the time of day, the day of the week, and the season.<sup>83</sup> Moreover, candidates receive inexpensive "local" rather than costly "national" rates.<sup>84</sup>

But some candidates will receive lower rates than others. For example, if Candidate *A* contracts for a one-minute spot at 7:00 PM on a Sunday during the "winter" season and Candidate *B* buys a one-minute spot at 3:00 P.M. on a Saturday during the "summer" season, Candidate *A* will pay much more than Candidate *B*. The difference reflects not discrimination but reality, since Candidate *A* will reach a far larger audience than Candidate *B*.

The difficulty, however, comes in administering this system. The *Primer* derives the lowest unit charge not from the station's rate card, but rather from any greater actual discount.<sup>85</sup> The Commission's resulting formulation inevitably will create bickering as to who paid what, where, when, why, and how—issues that will be hard to verify and likely to produce rather complex litigation. The Comptroller General has attempted to facilitate matters somewhat by requiring newspapers to "make available" their rate cards,<sup>86</sup> but this vague requirement probably will create little stability.

In addition, the application of the Act to cable television systems is somewhat unclear.<sup>87</sup> To the extent that cable systems voluntarily

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81. See CODE, *supra* note 35, at 52.

82. *Commission Primer* at 5800.

83. *Id.* at 5801-02.

84. *Id.* at 5802-03. Moreover, the FCC has resolved most questions in favor of candidates—a tendency neither surprising nor detrimental. Thus contracts bind stations, but not candidates. If the lowest unit charge decreases after a contract is made, the candidate is entitled to the new rate; if the lowest unit charge increases, however, the candidate is entitled to the contract rate. *Id.* at 5801.

85. *Id.* at 5801. This approach creates the rather intriguing spectacle of government participation in price-fixing. Under the Commission's formulation, a station owner cannot afford to cut his rates even in a few isolated cases, since any change will be reflected in lower rates for all political advertising that he carries.

86. Comptroller General Opinion at 11,943.

87. See note 21 *supra*. As noted there, the Reform Act lumps cable systems in with "broadcasting stations" through a rather circuitous route.

or involuntarily "originate" their own local programming they apparently will be treated like broadcasters.<sup>88</sup> The Commission's new cable television rules, however, require cable systems to provide not only a "local origination" channel, but also a "public access" channel.<sup>89</sup> Since the Act requires "access" or "purchase" of time, a cable system arguably might not be required to sell any time at all—a logical but undesirable result.<sup>90</sup>

In addition, the Reform Act retains the "equal time" provision of the Communications Act, despite its proposed deletion.<sup>91</sup> The equal time issue has been debated for so long that it probably can no longer be resolved rationally. The broadcasters protest, with some justification, that it inhibits debate between major party candidates;<sup>92</sup> the civil libertarians claim, with equal validity, that it is a necessary check on broadcasters' power.<sup>93</sup> Unfortunately, however, it does not mesh smoothly with either the spending or charge limitations of the Reform Act because the *Primer* sets the rate for a candidate's "equal time" either at what his opponent paid or at the lowest unit charge, whichever is less.<sup>94</sup> As a result, the cost of equal time may be unequal. The *Primer* further prohibits a candidate from buying reply time if he already has reached his spending limit.<sup>95</sup> A final "cat and mouse" game, in which each candidate attempts to coerce the other over his limit and thus score an unopposable blow may occur.

Finally, neither the Congress nor the Commission has provided any real standard as to what time periods a candidate is entitled to buy. The *Primer* does state that a station no longer may refuse to air

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88. *Commission Primer* at 5805. The Commission there stated that a cable system without "origination" capability need not provide access or sell time.

89. *Cable Television Report and Order*, 47 C.F.R. § 76.201(a) (1972) forbids cable systems with more than 3,500 subscribers from carrying broadcast television signals unless they "operate to a significant extent as a local outlet by origination cablecasting . . . ." For a fuller discussion of the new rules, see Botein, *The FCC's New Cable Regulations—Round Four*, 1972 N.Y.U. ANN. SUR. 577.

90. Though a candidate presumably could get free time on a cable system's "public access" channel under 47 C.F.R. § 76.251(a) (1972), this time probably would be of little real help. So far at least, the access channels have had little use and thus have developed almost no audience. Botein, *Access to Cable Television*, 57 CORNELL L. REV. 419, 442-43 (1972).

91. See Report, *supra* note 35, at 52.

92. And thus the networks have waged a continual battle for repeal of the provision. See, e.g., BROADCASTING, March 19, 1973 at 45.

93. See, e.g., Barron, *In Defense of "Fairness": A First Amendment Rationale for Broadcasting's "Fairness" Doctrine*, 37 U. COLO. L. REV. 31 (1964).

94. *Commission Primer* at 5801-02.

95. *Id.* at 5805.

any political broadcasts.<sup>96</sup> It construes the Reform Act's "access" and "purchase" language in the disjunctive and thus allows a station to not sell time by donating token amounts of free time.<sup>97</sup> The issue is hardly academic to either broadcasters or candidates. Past experience has shown that some candidates deliberately will buy up the most attractive time periods in a station's schedule—thus leaving their opponents little chance for exposure.<sup>98</sup> While most candidates will want prime time, some broadcasters may not wish to sell it to them since political advertisements may disrupt their usual programming.<sup>99</sup> As the Reform Act and the *Primer* now stand, a broadcaster apparently may offer only those time slots that he chooses.<sup>100</sup> The Commission's failure to confront the problem may be due to its present difficulty in dealing with access to broadcasting.<sup>101</sup>

## V. CONCLUSION

The Campaign Communications Reform Act is far from perfect. Its spending limitations are too narrow in their application and too generous in their monetary restrictions. Its charge limitations are often inequitable, unclear and uncoordinated; they only approach providing equality among candidate expenditures.

Though the Reform Act is a step forward, by no means has it resolved the vast problems involved in controlling campaign expenditures. In all probability, it also has not affected the outcome of elections. Those candidates with huge monetary resources may have the innate ability to devise means to use all their funds fully and yet remain within the limits of the Act.

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96. *Id.*

97. *Id.* The Commission requires a station to give away only "reasonable amounts of free time"—a standard that lends itself to de minimis treatment.

98. For example, Senator McCarthy followed a deliberate approach of buying up all "good time" on California stations during his bid for the Democratic nomination. ALEXANDER at 41.

99. Broadcasters obviously have a vested interest in keeping their viewers tuned to their channel—the problem of "adjacencies." See Botein, *supra* note 90, at 443-44. Only after considerable effort was Senator McGovern able to purchase prime time early in the campaign. See BROADCASTING, Oct. 16, 1972, at 17.

100. The Commission made the enlightening statement that "[i]t was not intended that all or most time be preempted for political broadcasts. The foregoing appears to be the only definite statement that may be made about the new section, since no all-embracing standard can be set." *Commission Primer* at 5804.

101. For a discussion of the Commission's difficulty in dealing with the emerging right of access, see Botein, *Clearing the Airwaves for Access*, 59 A.B.A.J. 38 (1973).

To eliminate these problems, legislation should limit the total gross expenditures allowed a candidate during his campaign. In addition, presently exempted expenditures should be included in the total gross expenditure limitation. This would lessen substantially the amounts presently being spent by forcing candidates to establish campaign priorities. An amendment also would reduce the present extravagant waste of money on political campaigning.

The present Reform Act has failed to accomplish Congress' goals. Once realized, its failures hopefully will produce additional legislative reform. But though inequities remain, the Act does represent a marked improvement over the past regulatory void and thus perhaps the beginning of real reform.

