

In the weeks leading up to his announcement that he was running for President of the United States, satirist Stephen Colbert made appearances on numerous talk shows to promote his upcoming book, *I am America and So Can You*.¹ On these shows he parodied what many previous candidates for President had done before announcing they were running, he gave broad and unprompted hints that he was going to campaign.² These hints became reality on October 16, 2007 when he announced that he would run for President in 2008 on his show, the *Colbert Report*.³ The announcement appeared on national media outlets such as CNN⁴ and the New York Times.⁵ Even though he planned to only run in his native South Carolina,⁶ within a few days of his announcement, a national poll from Public Opinion Strategies had Colbert receiving 2.3% of the vote in the Democratic field between October 18-21, 2008.⁷ A Rasmussen Reports poll similarly had Colbert receiving 12% of the votes as an Independent running against Rudy Giuliani and Hillary Clinton and 13% of the votes as an Independent running against Fred

¹ McCarthy, Caroline, *Stephen Colbert announces Presidential Bid, But is it the Truth or Truthiness?*, CNET News, October 17, 2007, available at http://news.cnet.com/8301-13577_3-9798943-36.html.

² See also Dowd, Maureen, *a Mock Columnist, Amok*, New York Times, October 14, 2007, <http://www.nytimes.com/2007/10/14/opinion/14dowd.html?ex=1350014400&en=d01aa9466034843f&ei=5090&partner=rssuserland&emc=rss>.

³ Colbert is not the first comedian to run for President in America. There has been a long history of satirical presidential candidates in America. For example, one can think of comedian Pat Paulsen, who ran under the Straight-Talking American Government Party in 1968 with the campaign slogan “if elected, I will win.” One can also think of Will Rogers, who announced his candidacy in a column for *Life* magazine in 1928, and ran under the Anti-Bunk Party with a similar slogan of “if elected, I will resign.” Other comedians to run for President include Gracie Allen and Eddie Cantor. The difference between these Presidential bids and Colbert’s bid is that the above-mentioned comedians launched their campaigns before the advent of the Federal Election Commission and the federal election laws that came after.

⁴ Mooney, Alexander, *Colbert Announces Bid for White House*, October 17, 2007, <http://politicalticker.blogs.cnn.com/2007/10/17/colbert-announces-bid-for-the-white-house/?fbid=3XRZw86grayS>

⁵ Steinberg, Jacques, *Colbert Consulted parties Before Announcing Run*, New York Times, October 18, 2007, <http://www.nytimes.com/2007/10/18/arts/television/18colb.html>.

⁶ Starr, Michael, *Electile Dysfunction: Colbert Running For Prez*, N.Y. Post, October 18, 2007, available at http://www.nypost.com/p/entertainment/tv/item_sUSMGwYy2UJi3eN0MZkg7H;jsessionid=DC638DAD340300B857B343434ABA5934.

⁷ Cillizza, Chris, *Poll Tries to Measure Colbert Effect*, Washington Post, October 22, 2007, <http://voices.washingtonpost.com/fix/eye-on-2008/the-colbert-effect.html>.

Thompson and Clinton.⁸ He was also shown in a photograph possessing the notarized application form for the Democratic ballot and holding a \$2,500 check made out to the Democratic Party.⁹ However, many people believed the announcement was simply a way to promote his new book.¹⁰ People also did not know whether to take him seriously due to the fact that he rarely breaks character, even when not acting as host of the *Colbert Report*.¹¹

Despite the public's weariness about whether the campaign was legitimate, the announcement prompted many to inquire as to whether his campaign had violated campaign finance laws.¹² One area other than campaign finance that involved Colbert's 2008 campaign, which was not greatly scrutinized, were the applicable laws governing political broadcasting. The ambiguity about whether the rules and regulations would apply to a situation such as Colbert's 2008 campaign prompt a revisit into the applicability of the Communications Act of 1934¹³ and the Federal Communications Commission's (hereinafter "Commission" or "FCC") equal opportunities provisions located in 47 CFR § 73.1941(a). Questions that need to be

⁸ Rasmussen Poll, *Comedian Colbert Reaches Double Digits as Third Party Candidate*, last visited April 17, 2010, http://www.rasmussenreports.com/public_content/politics/elections2/election_20082/2008_presidential_election/median_colbert_reaches_double_digits_as_third_party_candidate.

⁹ Colbert ended his proclamation to run under both the Republican and Democratic ticket when he was informed of the \$35,000 filing fee to be placed on South Carolina's Republican primary. Citing the great cost and possibility of violating federal election laws, he abandoned plans to run under both tickets but vied to continue to his pursuit under the Democratic ticket. See *Colbert Report: Filing Papers* (Comedy Central television broadcast Oct. 17, 2007), available at <http://www.comedycentral.com/colbertreport/videos.jhtml?videoId=118638>.

¹⁰ Cynics might very well have cause to believe this was just another publicity stunt by Colbert due to his tendency to engage in such actions. For instance, Colbert once engaged in a "Meta-Free-Phor-All" metaphor contest with actor Sean Penn on his show and challenged Korean singer Rain to a Dance Dance Revolution dance-off. See *Colbert Report: Meta-Free-Phor-All: Shall I Nail Thee to a Summers Day?* (Comedy Central television broadcast April 19, 2007), available at <http://www.colbertnation.com/the-colbert-report-videos/85568/april-19-2007/meta-free-phor-all--shall-i-nail-thee-to-a-summer-s-day->; *Colbert Report: Rain Dance-off* (Comedy Central television broadcast May 5, 2008), available at <http://www.colbertnation.com/the-colbert-report-videos/156555/may-05-2008/rain-dance-off>.

¹¹ See Felling, Matthew, *He's Stephen Colbert (But He's Not!)*, CBS News, October 9, 2007, available at http://www.cbsnews.com/8301-500486_162-3347373-500486.html

¹² See Jones, Clifford A., *The Stephen Colbert Problem: The Media Exemption for Corporate Political Advocacy and the Hail to the Chief Stephen Colbert Nacho Cheese Doritos 2008 Presidential Campaign Coverage*, 19 U. Fla. J.L. & Pub. Pol'y 295 (2008).

¹³ The relevant portions of the Communications Act of 1934 dealing with equal opportunities are codified at 47 U.S.C. § 315.

answered include 1) whether the Communications Act applied to Colbert's 2008 campaign, 2) whether his appearance as host was entitled to any exemptions under the Act, and 3) whether equal opportunities apply to cable broadcasting networks. While many of the issues arising under the political broadcasting rules and regulations became moot because Colbert was denied a place on the ballot,¹⁴ these same issues could arise again should he choose to run again and be placed on the ballot in 2012. The paper concludes with a proposal of where the political broadcasting laws need clarification.

I. EQUAL OPPORTUNITIES PROVISIONS¹⁵

Statute and purpose

The applicable equal opportunities provisions which would apply to an employee-candidate such as Colbert can be found in the Communications Act ("Act") of 1934 and also under applicable FCC regulations.¹⁶ The relevant portion of the Act provides that:

[i]f any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: Provided, That such licensee shall have no power of censorship over the material broadcast under the

¹⁴ Davis, Jess, Colbert's S.C. Ballot Bid Denied, The Daily Gamecock, November 2, 2007, *available at* <http://www.cbsnews.com/stories/2007/11/02/politics/uwire/main3448063.shtml>.

¹⁵ It is important to note that equal opportunities are separate and distinct from the FCC's Fairness Doctrine. Many people confuse the Fairness Doctrine with the political broadcasting provisions involving equal opportunities. While the Fairness Doctrine does have some relevance to political broadcasting, the law on broadcasting by political candidates requires "equal opportunities," not fairness. The Fairness Doctrine applies to "issues" rather than candidates and does not require equal time or equal opportunities. It requires that a broadcaster afford reasonable opportunities for differing views to be presented on an important contentious public issue. *See* Jung, Donald J. The Federal Communications Commission, the Broadcast Industry, and the Fairness Doctrine 1981-1987.

(New York: University Press of America, Inc., 1996). The Fairness Doctrine is no longer relevant as it was effectively found unconstitutional in the FCC's 1987 decision in Syracuse Peace Council v FCC, 867 F.2d 654, 680 (D.C. Circ. 1989)(*finding that* the "intrusion by government into the content of programming occasioned by the enforcement of [the Fairness Doctrine] restricts the journalistic freedom of broadcasters ... [and] actually inhibits the presentation of controversial issues of public importance to the detriment of the public and the degradation of the editorial prerogative of broadcast journalists."). Equal opportunities, on the other hand, involve a candidate obtaining time on a broadcast station. Since the Fairness Doctrine is no longer relevant, we need not consider the Fairness Doctrine in assessing the legal implications Colbert's campaign.

¹⁶ Communications Act of 1934, ch. 652, § 315, 48 Stat. 1064, 1088 (codified as amended at 47 U.S.C. § 315(a) (2000)).

provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate.¹⁷

The purpose of the statute was due to provide political candidates equal access to the airwaves.¹⁸

Congress wanted to “require equal treatment by broadcasters of all candidates for a particular public office once the broadcaster made a facility available to any one of the candidates.”¹⁹ Stations could no longer pick and choose which candidates they allowed to use their airwaves once one candidate was granted access.

In the most common situation involving the equal opportunity provisions, one candidate will buy commercial time on a broadcast station usually in the form of a campaign advertisement. That station must then treat other legally qualified candidates in the same race equally by also allowing them to buy equal amounts of time on the station at equivalent rates to those paid by the first candidate. The most common situation differs from the case of an on-air employee candidate in that the employee-candidate’s use of the broadcast station is not simply to buy a campaign advertisement, his use involves his employment. For example, Stephen Colbert’s use of the broadcast station Comedy Central involves his employment as host of the *Colbert Report* and was not associated with his 2008 campaign. Therefore, if the equal opportunities rules did not apply to a candidate such as Colbert, they might get an unfair benefit from being the host of a show over an opposing candidate who was not such a host. In either situation, the on-air appearance of a candidate does not give rise to equal opportunity until the individual becomes a “legally qualified candidate.” Until they are considered a “legally qualified candidate,” no matter how much they say they are running, their appearances do not give rise to

¹⁷ 47 U.S.C. § 315(a) (2000)).

¹⁸ *Id.*

¹⁹ S. Rep. No. 86-562, at 8 (1954), *as reprinted in* 1959 U.S.C.C.A.N. 2564, 2571.

any of the requirements of the equal time provisions.²⁰ Therefore, Colbert's appearance as host of the *Colbert Report* would not implicate equal opportunities for his opponents unless he was considered a "legally qualified candidate."

Whether Stephen Colbert is a "legally qualified candidate."

As previously stated, many individuals did not believe that Colbert's 2008 campaign was genuine because he was only running in his native South Carolina. It is easy to see why people would be skeptical of Colbert. However, the requirements for being a "legally qualified candidate" are rather broad. When looking at them, it appears that Colbert could very well have been such a candidate under the Act.

The Communication's Act equal opportunities requirements only apply to a certain class of candidates during certain campaign periods, namely the individual must be a "legally qualified candidate."²¹ Such candidates are persons who:

1. (have) publicly announced an intention to run for office;
2. (are) qualified by pertinent law to hold the office being sought; or
3. (have) made a substantial showing of bona fide candidacy by having participated in campaign activities such as speech making, distribution of literature or press releases, operating a campaign committee, or establishing a campaign headquarters.²²

Applying the requirements to Colbert indicates that it is likely is should be considered a "legally qualified candidate." First, he clearly publicly announced his intention to run for office when he announced his candidacy on his show on October 16, 2007. He also clearly meets the necessary

²⁰ To further illustrate this point, consider the case of Howard Stern, who ran for governor of the State of New York in 1994. He actively campaigned on his morning radio show in New York City. However, Stern never filed the required papers to qualify for a place on the ballot with the New York Secretary of State. Thus, no equal opportunity issues ever arose.

²¹ Anne Kramer Ricchiuto, Note, *The End of Time for Equal Time?: Revealing the Statutory Myth of Fair Election Coverage*, 38 Ind. L. Rev. 267, 272 n.2 (2005)

²² Donald E. Lively, *Essential Principles of Communications Law* 237 (1992).

qualifications to hold the office of President of the United States.²³ A harder question arises as to whether he made a substantial showing of bona fide candidacy in his 2008 campaign because many believed his candidacy was not genuine and was merely a ploy to raise publicity for his upcoming book.²⁴ To make a substantial showing of a bona fide candidate, a person must provide evidence that the person claiming to be a candidate has “engaged to a substantial degree in activities commonly associated with political campaigning.”²⁵ The regulations do not require that every activity listed be present to demonstrate a substantial showing and additional activities not listed could also contribute to such a showing.²⁶

It is likely that Colbert’s 2008 campaign constituted a “bona fide candidacy” based on the legitimate campaign activity that he conducted in his native South Carolina. For example, he appeared at different colleges in South Carolina making speeches about his campaign and also had a strong group of supporters doing grass roots campaigning throughout the state.²⁷ He also appeared in Columbia to receive a key to the city from the mayor.²⁸ Further, he had an active campaign website, www.colbert08.org, which listed an address for the campaign in Charleston, South Carolina, as well as a way for voters in South Carolina to sign a petition to place his name on the ballot.²⁹ Colbert could easily argue that he is not a bona fide candidate because he never intended to make a legitimate run for President.³⁰ Statements made during various public appearances indicating that his road to the Presidency ends in South Carolina may further help to

²³ It is clear that he meets the requirements to run for President because Colbert is over 35 years of age, was born in South Carolina and has lived in the United States for over 14 years. See U.S. Const. art. II, § 1, cl. 5.

²⁴ *Bill O’Reilly on Publics, Presidential Candidates and Stephen Colbert*, ABC News, October 29, 2007, available at <http://abcnews.go.com/GMA/Story?id=3790117&page=1>.

²⁵ 47 CFR § 73.1940(f).

²⁶ *Id.*

²⁷ *Million Back Comic for President*, BBC News, available at <http://news.bbc.co.uk/2/hi/americas/7068040.stm>.

²⁸ Hamby, Peter, *Source: Colbert to File for S.C. Democratic Primary*, available at <http://www.cnn.com/2007/POLITICS/10/31/colbert.sc/index.html>

²⁹ See <http://www.colbert08.org/>, last visited April 25, 2010.

³⁰ Vogel, Kenneth P., *Colbert ‘Run’ Risks breaking Laws*, Politico, last visited April 25, 2010, available at http://www.politico.com/news/stories/1007/6450_Page2.html.

undercut the bona fide nature of his campaign.³¹ However, even assuming that Colbert intended for his campaign to simply be a publicity stunt aimed at promoting his forthcoming book, Colbert still took part in several activities that tend to be associated with political campaigning. In addition, as mentioned above, polling suggests that he would have received as much as 12% of the vote running as an Independent and was ahead of several “legitimate” candidates such as Dennis Kucinich and Ron Paul.³² These figures coupled with the above mentioned factors suggest that Colbert’s campaign met the requirement of a bona fide candidacy. Therefore, when Colbert publicly announced his candidacy and began conducting activities consistent with political campaigning, he became a “legally qualified candidate” for purposes of the Commission’s equal opportunities provision.

The conclusion that Colbert was a “legally qualified candidate” in 2008 under the FCC’s political broadcasting rules also makes sense when considering the purposes behind the rules and regulations pertaining to equal opportunities. As stated above, the main purpose of the Communications Act was to create equal access to the airwaves by ensuring that each “legally qualified candidate” is afforded equal opportunities for appearances. It makes sense to consider Colbert such a candidate. He is the host of a satirical news show which parodies real news events, especially news involving an election. His image and voice are also broadcasted daily during which time other opponents do not have the same sort of exposure. While denied a place on the ballot, it is still possible that Colbert could have received votes as a write-in candidate from either true supporters or those that do not wish to elect the candidates that are placed on the ballot. His daily presence on the Colbert Report would clearly give him an extra advantage that

³¹ Oxenford, David, *Stephen Colbert, Equal Opportunities, and the Case of the Candidate Host*, www.broadcastlawblog.com, last visited April 20, 2010, available at <http://www.broadcastlawblog.com/2007/10/articles/political-broadcasting/stephen-colbert-equal-opportunities-and-the-case-of-the-candidate-host/>.

³² See Rasmussen Poll *supra*

other opposing candidates would not receive. This extra advantage is violative of the purpose behind the Communications Act and its equal opportunities provisions.

What constitutes “use” of a station by a candidate?

Since Colbert was likely a “legally qualified candidate” in 2008, his appearance on Comedy Central as host of the *Colbert Report* would afford opposing candidates the right to request equal opportunities for use of Comedy Central’s airwaves. It is, therefore, important to determine what “uses” of Comedy Central the opposing candidates would be entitled.

FCC regulations define “use” as a “candidate appearance (including by voice or picture) that is not exempt” under 47 CFR § 73.1941(a)(1)-(4).³³ Section 315 does not distinguish between the uses of broadcast time by a candidate and a licensee cannot deny a request for equal time based on the licensee’s evaluation that the original use was not in aid of a candidacy.³⁴ Therefore, any non-exempt appearance by a candidate would trigger the availability of equal opportunities for opponents. Under this reasoning, unless an exemption applied to the *Colbert Report*, any time the show aired on Comedy Central, Colbert’s opponents could request equal opportunities and Comedy would be obligated to grant such requests.

In the 2008 election, no opposing candidate sought equal opportunities from Comedy Central as a result of Colbert’s short-lived candidacy. However, based on the FCC’s broad definition of “use,” Comedy Central would have had to provide requesting opposing candidates with an equal opportunity to reach the same quantity of audience as the *Colbert Report* receives daily. This burden on the broadcasting station would be enormous as the show airs four nights a week for twenty minutes an episode. Should Colbert run again in 2012, the station’s only options may be to claim an exemption under 47 CFR §73.1941(b) or remove the Colbert Report

³³ 47 CFR § 73.1941(b).

³⁴ In re Socialist Labor Party, 40 F.C.C. 241 (1952); In re Fordham University, 40 F.C.C. 321 (1961)

from its lineup during his campaign. As the “Colbert Report” is one of the highest rated shows on Comedy Central and a Presidential election would likely increase the popularity of a satirical news program, it is unlikely the station will choose to take the show off the air during the election period.³⁵ Therefore, Comedy Central’s best option for 2012 is to determine whether one of the four recognized exemptions to the definition of the term “use” apply to the “Colbert Report.”

II. EXEMPTIONS TO 47 U.S.C. § 315 DEFINITION OF “USE”

The four recognized exemptions

Before the Communications Act was amended in 1959, the FCC found that a candidate’s appearance on a television newscast constituted a “use” of a broadcasting station.³⁶ The case involved a TV station airing broadcast clips during its news program of the incumbent mayor performing his official functions.³⁷ The FCC found that the opposing candidate for mayor was entitled to equal opportunities.³⁸ This was in direct contrast to prior decisions of the FCC. They previously had not considered the appearance of a candidate on a newscast as a “use” of the broadcast facility because “such an appearance did not constitute a ‘use’ of the broadcast facility insofar as the candidate did not directly or indirectly initiate the filming or presentation of the event.”³⁹ Congress immediately amended § 315 by adding four exemptions. If a program qualifies under one of these exemptions, it is not considered a use of a facility subject to equal opportunities. These four exempted programs are:

³⁵ This is not always the case, however. For instance, broadcast stations have often removed employee-candidates from the airwaves during their campaign for political office. A perfect example of such action is former Tennessee Senator and “Law & Order” actor Fred Thompson. When Thompson decided to run for President in the 2008 election, NBC pulled all reruns off the air to avoid the Equal Opportunities Doctrine. See Oliphant, James, *Fred Thompson Campaign: Law, order, and reruns*. The Swamp, September 13, 2007, available at http://www.swamppolitics.com/news/politics/blog/2007/09/fred_thompson_campaign_law_ord.html.

³⁶ *In re Telegram to CBS, Inc. (Lar Daly)*, 18 Rad.Reg. (P & F) 238, *recon. denied*, 26 F.C.C. 715 (1959).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Chisholm v. FCC*, 538 F.2d 349, 351-52 (D.C. Cir. 1976).

- (1) bona fide newscast;
- (2) bona fide news interview;
- (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary); or
- (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto)⁴⁰

The exemptions were aimed at prevent chilling effects on the news coverage of political events that might occur from a strict interpretation of the equal time rule,⁴¹ thus “mak[ing] it possible to cover the political news to the fullest degree”⁴² while still “preserv[ing] . . . licensees’ traditional independent journalistic judgment.”⁴³ In amending section 315 in 1959, Congress also maintained that the Commission should have broad discretion in interpreting what programs should receive an exemption.⁴⁴ Congress believed that it was difficult to define exactly what a newscast, news interview, news documentary, or on-the-spot coverage constituted.⁴⁵ Therefore, they wanted the Commission to have “full flexibility and complete discretion to examine facts in each complaint...to determine on the facts submitted in each case” whether the use required equal opportunities or was subject to the exemption.⁴⁶

Since it is has been determined that Stephen Colbert was a “legally qualified candidate” in 2008 under 47 U.S.C. § 315, the next question that must be answered is whether his show fell under any of the four exemptions described above.

a. Whether the *Colbert Report* constituted a bona fide newscast

⁴⁰ Id.

⁴¹ See Michael Damien Holcomb, Comment, *Congressional Intent Rebuffed: The Federal Communications Commission’s New Perspective on 47 U.S.C. § 315(a)(2)*, 34 Sw. U. L. Rev. 87, 90–93 (2004).

⁴² 105 Cong. Rec. 14,451 (1959) (remarks of Sen. Holland), *quoted in Kennedy for President Comm. v. FCC*, 636 F.2d 417, 423 (D.C. Cir. 1980).

⁴³ Kennedy for President Comm., 636 F.2d at 424.

⁴⁴ Sen. Rep. No. 562, 86th Cong., 1st Sess. 12 (1959).

⁴⁵ Id.

⁴⁶ Id.

The Commission’s primary consideration in determining whether a program falls within the newscast exemption is whether the program reports news in a “manner similar to more traditional newscasts.”⁴⁷ Determinations are left to the broadcasting station’s good faith discretion.⁴⁸ This has led to a wide array of programs falling into this exemption. For example, the FCC has determined that entertainment news program *TMZ* fits into this exemption.⁴⁹ The determination was based on consideration of characteristics such as “whether the program reports some news of some area of current events, in a manner similar to more traditional newscasts.”⁵⁰ The FCC found that *TMZ* was a bona fide news program because it was conducted in a newscast format, incorporating news interviews, news documentaries, and on-the-spot coverage of late-breaking entertainment news.⁵¹

Applying the bona fide newscast exemption to our situation involving Stephen Colbert, the *Colbert Report* should probably be considered a bona fide news program. The show clearly reports on areas of current events similar to that of a newscast. The show follows events such as elections, legislation, the environment and entertainment (albeit with a humorous take spin). The show is also set up to mimic a traditional news program in that there is a host who presents stories in news segments. There is an argument that if a show such as *TMZ*, which deals exclusively with entertainment news, can be considered a bona fide news program, then the *Colbert Report* should also be considered a bona fide news program even if it is satirical in nature.⁵²

⁴⁷ Paramount Pictures Corp., 3 F.C.C.R. 245, para. 7 (1988).

⁴⁸ See Ricchiuto, *supra* note 2, at 274 (citing Access Hollywood, 1997 WL 358720 (F.C.C. July 1, 1997))

⁴⁹ ⁴⁹ In re Request of Telepictures, Inc For Declaratory Ruling, DA-08-1042A1 (2008).

⁵⁰ Id.

⁵¹ Id.

⁵² Strengthening the argument that the *Colbert Report* is a bona fide news program is society’s tendency to receive their news information from a variety of non-traditional sources. For example, an L.A. Times article opined that many youth today believe they can deduce what is going on in the real world by listening to jokes on fake newscasts

b. Whether the *Colbert Report* constituted a bona fide news interview program

The FCC also has a rather broad view of what constitutes an exemption as a news interview program. The Commission uses a three pronged test to determine whether a program constitutes as an exempt news interview program:

1. Whether the program is regularly scheduled;
2. Whether the broadcaster or independent producer has control over the program; and
3. Whether the broadcaster's or independent producer's decision on format, content and participation are based on newsworthiness rather than an intention to advance an individual's candidacy.⁵³

Again, the inquiry is largely based on the program's form and not its content.⁵⁴ As a result, the Commission has gone as far as to find that parts of *The Howard Stern Show* qualify as a bona fide news interview program entitled to an exemption under 47 U.S.C. § 315.⁵⁵ The Commission noted that initially only traditional question and answer formatted shows were entitled to an exemption.⁵⁶ However, after a series of declaratory rulings, the FCC now recognizes less conventional interview formats.⁵⁷ The goal was to increase news coverage of the political campaign process.⁵⁸ This expansive interpretation has been followed in recent declaratory rulings as well. For example, the FCC also found that the Christian Broadcasting Network,

such as the Daily Show and the Colbert Report. This leaves viewers with the problem of parsing out real facts from fiction and news from entertainment. See Goldberg, Jonah, *Is Fake News Now the Standard?*, L.A. Times, November 6, 2007, available at <http://www.latimes.com/news/print/edition/asection/la-oe-goldberg6nov06,0,4875370.column>.

⁵³ ABC, Inc., 15 F.C.C.R. 1355, 1358, para. 7 (1999).

⁵⁴ Id., para. 9 (concluding that "[t]he Commission . . . should confine its analysis to whether the broadcaster acted reasonably and in good faith" and should "not second-guess broadcasters about the relative newsworthiness of the interviewees or the topics of discussion").

⁵⁵ In re Request of Infinity Broadcasting Operations, Inc For Declaratory Ruling, DA-03-2865 (FCC 2003).

⁵⁶ Id.

⁵⁷ Id.

⁵⁸ Id.

Inc.'s program, the *700 Club*, was entitled to an exemption as a bona fide news interview program.⁵⁹

The *Colbert Report* probably also qualifies as a bona fide news interview program. It is a thirty minute program that discusses current events in a satirical fashion. It is essentially a mock version of legitimate political commentary programs such as the *O'Reilly Factor* and has a format similar to that show. The *Colbert Report* also conducts interviews with individuals much the same way the *700 Club* and *Howard Stern Show* did. A guest sits down with Colbert and talks about different topics such as a book the guest wrote, pending legislation a bureaucrat is developing, or an upcoming election. The interviews occur on every episode of the show. They are also controlled by the producer of the show in that they develop the questions that are asked. Further, the interviews are probably based at least partially on newsworthiness, as the participants usually discuss a current event in some capacity. Therefore, it is very likely that the *Colbert Report* would fit into a similar category as the *Howard Stern Show* or *700 Club*.

c. Whether the *Colbert Report* constitutes a bona fide news documentary

The news documentary exemption inquires into whether a documentary was intended to promote or detract from a politician's candidacy by featuring him significantly in the program.⁶⁰

The analysis focuses on a number of factors, including:

1. Whether the appearance of the candidate was incidental to the presentation of the subject;
2. Whether the program designed to aid or advance a candidate's campaign;
3. Whether the appearance of a candidate was initiated by the station on the basis of the station's bona fide news judgment that the appearance was in aid of coverage of the subject matter; and

⁵⁹ In re Request of Christian Broadcasting Network, Inc. For Declaratory Ruling, DA-08-1041A1 (FCC 2008).

⁶⁰ See Declaratory Ruling Concerning Whether the Educ. Program "The Advocates" Is an Exempt Program Under Section 315, 23 F.C.C.2d 462 (1970).

4. Whether the candidate had any control over the format, production, or subject matter of the broadcast.⁶¹

It is clear that the “Colbert Report” is not considered a bona fide news documentary. The program is designed in the style of a news commentary or news interview show such as “the O’Reilly Factor.” The show reports on current events in a humorous manner but does not purport to re-create an actual event much like a documentary is designed. Therefore, the “Colbert Report” does not meet the requirements of the bona fide news documentary exemption.

- d. Whether the Colbert Report constitutes on-the-spot coverage of bona fide news events

The on-the-spot coverage of bona fide news events exemption explicitly provides that political conventions are exempted under 47 U.S.C § 315(a)(4). This exemption has also been interpreted to include debates between qualified candidates initiated by non-broadcast entities, provided 1) that they are covered live, 2) there is a good-faith determination that the debate is a bona fide news event worth of presentation, and 3) there is no evidence of favoritism.⁶² In addition, the exemption has been applied to “contemporary, if not simultaneous” broadcasts of news events.⁶³ The “Colbert Report” generally does cover bona fide news events in its programming. It covers stories involving elections, debates, political issues, and entertainment news. However, the show does not offer on-the-spot coverage of such events in that they do not usually broadcast contemporary or simultaneously as the news event is happening. The show reports on these stories after they have already taken place, not as they are going on and offers a commentary on the news event. Therefore, the “Colbert Report” is not exempt from equal opportunities provisions under 47 U.S.C. § 315(a)(4).

⁶¹ Ricchiuto, *supra* note 2, at 275.

⁶² Chisholm v. F.C.C., 538 F.2d at 349.

⁶³ John F. Donato, 66 F.C.C.2d 599, 601 (1977)

It appears that based on the analysis of the four exemptions that the *Colbert Report* should qualify for an exemption as either a bona fide news program or bona fide news interview program. The appearance of a candidate who is being interviewed on the show would not subject to equal time obligations, as his appearance is effectively treated as a newsworthy event subject to exemption. However, a question arises as to whether Colbert's announcement that he was running for President in 2008 would still preclude opposing candidates from being granted equal opportunities.

Whether the exemptions apply to a newscaster candidate such as Colbert

Even though initially the *Colbert Report* might qualify for an exemption from equal opportunities rules, when Colbert decides that he wants to run again in 2012, his use of Comedy Central will probably not be exempted. The FCC has determined that the appearance by an employee after they qualify as a candidate for public office constitutes "use" of a station's facilities within meaning of 47 USCS § 315.⁶⁴ The U.S. Court of Appeals for the D.C. Circuit has further found that 47 U.S.C. § 315 does not exempt newscaster candidates from the equal opportunities provisions.⁶⁵ There the court found that the statute did not restrict the right for a candidate to seek political office.⁶⁶ The court believed that there was no right to run for political office and avoid all personal sacrifice.⁶⁷ Further the court noted that rules and regulations that force people to decide between their jobs and their candidacies have been upheld.⁶⁸ Therefore,

⁶⁴ Branch v F.C.C., 824 F.2d 37 (D.C. Cir. 1987); In re Republican Headquarters, 47 FCC2d 945 (1974).

⁶⁵ Branch v F.C.C., 824 F.2d 37, (D.C. Cir. 1987).

⁶⁶ Id.

⁶⁷ Id.; *See also* United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 567 (1973) (*finding that* "neither the right to associate nor the right to participate in political activities is absolute in any event.")

⁶⁸ Id.; Letter Carriers, 413 U.S. at 548; Clements v. Fashing, 457 U.S. 957 (1982); United Public Workers v. Mitchell, 330 U.S. 75 (1947).

the equal opportunities rules and regulations did not violate any of the newscaster's constitutional rights.⁶⁹

Colbert's status as an employee of Comedy Central unequivocally precludes any such exemption that the *Colbert Report* may have qualified for. Colbert's opponents clearly had a right to request equal opportunities from Comedy Central during his 2008 campaign. Likewise, if Colbert becomes a candidate for President in 2012, his opponents are entitled to equal opportunities if they request such opportunities. Now that it has been determined that Colbert was a legally qualified candidate in 2008 and that no exemptions to the equal opportunities rules applied, it must be determined what kind of time was due to opposing candidates had they requested it.

III. THE AMOUNT AND KIND OF TIME DUE TO A CANDIDATE SHOULD THEY REQUEST IT

The "Seven-Day" Rule

As previously stated, when a candidate uses the airwaves, their opponents are entitled to equal opportunities. The term "equal opportunities" has been interpreted to mean that there must be no discrimination against any candidate which deprives him of same amount of time as any other candidate if he requests it.⁷⁰ The Commission does not require a station to donate time to a candidate who cannot afford time comparable to that paid for by his opponent.⁷¹ However, if a candidate is given free time by the broadcast station, all of that candidate's opponents are entitled to the same amount of free time.

Any request for equal opportunities by an opposing candidate "must be submitted to the licensee within one week of the day on which the first prior use, giving rise to the right of equal

⁶⁹ Branch, 824 F.2d at 37.

⁷⁰ Lamb v Sutton, 274 F2d 705, (6th Cir. 1960).

⁷¹ Letter to M. R. Oliver, 11 P&F Radio Reg. 239 (1952).

opportunities, occurred.”⁷² This is referred to as the “seven day rule.” The Commission has interpreted the rule to mean that if a candidate has been broadcasting for five weeks on a station and his opponent only makes their request for equal opportunities at the end of the fifth week, the opponent is only entitled to the amount of time that the original candidate used during the fifth week.⁷³ The rule is designed to allow broadcast and cable operators the opportunity to make orderly plans for allocating time to candidates.⁷⁴

This rule would apply should Colbert decide to run in 2012. It is an important rule considering the amount of time Colbert spends on the air. Colbert’s show airs four times a day, for around twenty minutes a day. Without such a requirement, an opposing candidate could lie in wait letting Colbert rack up air time. Then near the end of an election period the candidate could request equal opportunities for all the time Colbert was on the air. This would give the opposing candidate an unfair advantage by obtaining more valuable last-minute time equal to all the time their opponent used during the whole campaign.⁷⁵ The seven day rule was designed to alleviate such concerns.

First Prior use

Also pertinent to the “seven-day” rule is that the request must be made within seven days of the “first prior use” which created equal opportunities. To illustrate this point, consider a situation where Stephen Colbert announces his candidacy within ninety days of the Democratic primary. His appearance on the “Colbert Report” that evening would have subjected Comedy Central to the equal opportunities provisions. If one of his opponents requested equal opportunities five days later, the opponent would be granted the ability to have an equal

⁷² Id.

⁷³ Id.

⁷⁴ Id.

⁷⁵ Id.

broadcast time. If another opponent then requested equal opportunities five days after the first opponent, they would be denied equal opportunities. Although the second opponent requested equal opportunities within seven days of the first opponent, they did not request within seven days of Colbert's appearance. Colbert's appearance on the show after announcing his candidacy would be considered the "first prior use."

Equal opportunity does not necessarily mean equal time

As mentioned above, equal opportunity does not necessarily equate to broadcast use at the same time as an opponent. Equal opportunities have been interpreted to encompass such elements as time of day, duration, and charge.⁷⁶ The Commission has ruled that factors such as size of the audience due to appearance of an opponent on an established or popular program should also be taken into consideration.⁷⁷ Further, the broadcast station is not required to make exactly the same period or the same day available to all candidates.⁷⁸ They also are not required to make available specific periods requested by a particular candidate.⁷⁹ All the statute requires is that comparable periods of broadcast time are given where the audience is of a comparable potential size.⁸⁰

The FCC illustrates this point in a primer they released on broadcasting and cablecasting for candidates for public office. The primer explains that if Candidate A buys thirty minutes of prime time on a television station for \$500, but the same station charges \$600 to Candidate B for the same time period, then the television station has not given Candidate B an equal opportunity. In addition, if the station does allow Candidate B to buy thirty minutes of time for \$500 but

⁷⁶ Kennedy for President Comm. v. FCC, 636 at 438.

⁷⁷ Russell J. Davis, Annotation, *Political Candidate's Right to Equal Broadcast Time under 47 U.S.C.A. § 315*, 35 A.L.R. Fed. 856 (1977).

⁷⁸ Id.

⁷⁹ Id.

⁸⁰ Id.

refuses to give Candidate B his thirty minutes in prime time instead only offering time slots at 1:00-1:30 a.m. or 6:00-6:30 a.m., Candidate B will not have received an equal opportunity. Late night and early morning programming are considered to have the smaller audiences than prime time programming. According to the FCC primer, the Commission does not require that the exact same time slot be available to an opposing candidate as the original candidate's timeslot.⁸¹ However, the station must make time periods available that normally have comparable audiences.

Therefore, once an opposing candidate requests equal time from Comedy Central due to Colbert's use of its broadcast station, Comedy Central must make comparable periods of time available to the opposing candidate so that he has the same opportunity to reach the same potential audience as Colbert received. The "Colbert Report" airs four nights a week at 11:30 p.m. Colbert appears for about twenty minutes an episode. The show is also aired via reruns several other times per month. Comedy Central would be required to provide comparable time to opposing candidates who request it. The station does not air content twenty-four hours per day. They often air infomercials in the morning hours and late night hours. The only time that a comparable audience may be available to an opponent of Colbert might be during prime time hours. Such a result would throw Comedy Centrals' program lineup into chaos. Should Colbert run again in 2012 and an opposing candidate request equal opportunities, the station would be forced to fill most of its prime slots (time usually devoted for the station's best humorous content) with non-humorous political ads from opposing candidates.⁸²

IV. APPLICABILITY OF EQUAL TIME OPPORTUNITIES TO CABLE TELEVISION

⁸¹ Public Notice: The Law of Political Broadcasting and Cablecasting, 69 F.C.C.2d 2209, 2219 (FCC 1978)

⁸² Although one might argue that some candidate's use of equal opportunities in this situation would also result in humorous content depending on the candidate.

The above analysis has determined that Stephen Colbert was likely a “legally qualified candidate” subject to equal opportunities. It also has determined that because he is an employee-candidate, his appearance as host of the Colbert Report does not qualify him for an exemption under equal opportunities. Therefore, upon request, his opponents would have been entitled to equal opportunities. It is also clear that the same would apply should Colbert choose to run in 2012. However, it is possible that Colbert could get around the equal opportunities provisions because his appearance is on a cable station.

The extent of the equal opportunity provisions’ applicability to cable broadcasting stations is unclear.⁸³ Originally, the FCC applied equal opportunities rules to cable systems without explicit statutory authority under the standard “reasonably ancillary to broadcasting.”⁸⁴ Subsequently 47 U.S.C. § 315(a) was amended to include cable operators under the political broadcasting rules.⁸⁵ The Commission then adjusted its regulatory schemes as a result of the amendment and court decisions, and decided not to apply equal opportunities rules to access programming.⁸⁶ The Commission did retain the rules as applied to cable originators, or cable systems that produced their own content.⁸⁷ It is unclear if equal opportunities would apply to network cable programs or whether equal opportunities laws only apply to origination cablecasting. The FCC has never clarified this ambiguity.

If equal opportunities laws are extended to apply to cable broadcasting, the *Colbert Report* clearly must comply with such rules. Otherwise, it is possible that as a cable broadcasting station, Colbert’s appearance as host on the show would not implicate equal

⁸³ Janow, Johnathon D., Note, *Make Time for Equal Time: Can the Equal Time Rule Survive a John Stewart Media Landscape*, 76 Geo. Wash. L. Rev. 1073 (2008).

⁸⁴ *U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

⁸⁵ Pub. L. No. 92-225, § 104(c), 86 Stat. 4, 7 (1972)(codified at 47 U.S.C. § 315(c)(1976)).

⁸⁶ See *F.C.C. v. Midwest Video Corp.*, 440 U.S. 689 (1979).

⁸⁷ Janow, *supra* 1073.

opportunities rules. In this situation, Colbert would be free to make use of Comedy Central requiring the station to give opposing candidates equal opportunities.

V. CONCLUSION

The previous sections in this paper suggest that Stephen Colbert's appearance as host of the *Colbert Report* will probably require the network to afford equal opportunities in 2012 (should Colbert decide to run) if an opposing candidate requests such time. The implications of this possibility have also been illustrated. Comedy Central will most likely have to make some very tough decisions as to how it will deal with Colbert should he choose to run in 2012. It will need to determine whether to remove the show from the airwaves while Colbert conducts his campaign so as to avoid political broadcasting laws. It might also decide to continue to air the show hoping that if any inquiry is made by an opposing candidate, the problem will be resolved by finding the rules do not apply to Comedy Central.

Either way, the current political broadcasting rules and regulations regarding equal opportunities pose many problems for Comedy Central and Stephen Colbert. The uncertainty as to whether equal opportunity rules and regulations apply to a cable network such as Comedy Central illustrates the need for clarity in this area. Until such uncertainty is resolved, Comedy Central will be in the dark as to whether it will be required to give equal opportunities to Colbert's opposing candidates. Given the growth in basic cable viewership, the increasing tendency for candidates to appear on all types of shows, and the fact that many more individuals receive their news from non-traditional sources, it is inevitable that this issue will pose significant problems in the future.