Abortion on the Air: Broadcasters and Indecent Political Advertising*

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Introduction

In the United States, the statutory regulation of the relationship between broadcasters and candidates for elective office is an example of congressional commitment to democracy. Through Section 315(a) of the Communications Act--the anti- censorship provision--Congress has attempted to level the playing field for all legally qualified candidates for office.(note 1) Section 315(a) allows for the presentation of candidates' unvarnished positions on issues important to the voting public. Democracy, however, is not always pretty.

Often, political issues of public interest and concern are couched in offensive or racially charged language. In fact, broadcasters' concerns over the content of political advertisements are not new. In the late 1950s, the concerns centered on whether licensees could be held liable for defamatory statements made by a candidate in a political ad.(note 2) Two major cases occurred during the 1970s. In one, a civil rights group asked the Federal Communications Commission (FCC or Commission) to banish the word "nigger" from the airwaves,(note 3) and another requested that broadcasters eliminate racial slurs from political advertisements.(note 4) In the 1980s, employees of a radio station were concerned that a candidate's use of the word "bullshit" in the course of a political ad could offend members of the audience.(note 5)

In the 1990s, the ads that caused the collision between political candidates' interests and those of broadcasters have centered around abortion, perhaps the most divisive social issue of the 1980s and 1990s. Specifically, in 1992, the ads for Republican congressional candidates Michael Bailey of Indiana and Daniel Becker of Georgia contained graphic pictures of aborted fetuses.(note 6) The abortion ads were broadcast during the early afternoon and prime time. One broadcaster, fearing public outrage, asked the FCC to (1) declare ads containing abortion pictures indecent and (2) allow broadcasters to channel political ads containing pictures of aborted fetuses to hours when children were less

likely to be in the audience.(note 7)

The FCC has defined indecency as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."(note 8) In order to protect children from indecent material, the FCC has traditionally channeled indecent programs to the late hours of the evening. This period, known as "safe harbor," begins around midnight.(note 9)

Broadcasters, who for years have been fighting the FCC's attempts to regulate indecency, asked the Commission to declare graphic depictions of aborted fetuses "indecent."(note 10) The broadcasters' central concern appeared to be that if they showed pictures of aborted fetuses at times when children may be in the audience and those pictures were indecent, the FCC could hold stations in violation of the indecency statute--18 U.S.C. sec. 1464.(note 11)

The controversy over the use of abortion pictures in political ads does not end there. While Section 312(a)(6) of the Communications Act(note 12) states that a station may lose its license for violating Section 1464-- which punishes the use of obscene, indecent, or profane language over the airwaves--Section 315(a) forbids any censorship of political advertisements, and Section 312(a)(7)(note 13) requires that broadcasters give candidates running for federal office reasonable access to their stations or risk losing their licenses. The conflict between these three statutes has caused confusion and concern among broadcasters and raised questions that have not yet been answered conclusively.

For example, if a federal candidate chooses to use graphic depictions of aborted fetuses in campaign ads and those pictures were declared indecent, would the channeling of the ads be a violation of Section 312(a)(7), 315(a), or both? If the pictures were indecent and broadcasters aired them as required by law, would broadcasters violate Section 1464 and Section 312(a)(6) of the Communications Act? Or does the anti-censorship clause of Section 315 protect them from liability? Finally, where does the First Amendment stand among these conflicting interests?

These are just some of the questions that the current controversy over political advertising has raised. Although this Article cannot answer all of them, the importance of the issues outlined above requires that an attempt to do so be undertaken.

Part I of this Article will focus on the law governing political advertising, specifically the reasonable access requirement for federal candidates, Section 312(a)(7), and the anti-censorship provisions of the political advertising rules, Section 315(a). Part II will look at the law regulating broadcast indecency, 18 U.S.C. sec. 1464 and 47 U.S.C. sec. 312(a)(6), which has been the main weapon broadcasters have used in their attempt to channel abortion political ads to hours when children are least likely to be in the audience. Part III will examine the use of abortion pictures in ads by political candidates and the controversy and reactions such ads have stirred. Finally, Part IV will review the constitutional and statutory implications of the proposed channeling of indecent political advertisements.

I. Statutes Governing Political Broadcast Advertising

Two sections of the Communications Act, Sections 312(a)(7) and 315(a), generally control political advertising over the broadcast media for federal candidates. Section 312(a)(7), known as the "reasonable access rule," allows the FCC to impose the "death penalty," or license revocation, for willful failure to make time available for purchase by federal candidates.(note 14) The FCC has interpreted the reasonable access rule to require that broadcasters accommodate the requests of individual candidates for airtime to the maximum extent possible.(note 15) Likewise, the FCC has said that reasonable access requires that broadcasters provide access to candidates during prime time.(note 16)

In 1981, the United States Supreme Court affirmed the constitutionality of the reasonable access rule. In *CBS, Inc. v. FCC*,(note 17) the Court said that once the political campaign began, broadcasters had to consider each request for time from a federal candidate and make a reasonable effort to accommodate it.(note 18) The case involved a request to the networks from the Carter-Mondale campaign to broadcast a thirty- minute documentary approximately eleven months prior to the election. While CBS offered five minutes of prime time, both NBC and ABC said they were not ready to sell any time for the 1980 campaign at such an early date.(note 19)

The networks argued that the FCC's decision that the Carter- Mondale campaign had been denied "reasonable access"

interfered with the editorial decisionmaking of broadcasters.(note 20) But the Supreme Court said that broadcasters who adopted blanket policies denying access to candidates were in violation of the reasonable access rule.(note 21) Thus, while a blanket policy was likely to be more convenient for broadcasters, the Court said compliance with Section 312(a)(7) required that broadcasters take into account the campaign needs of federal candidates.(note 22)

Once a station has complied with the requirements of Section 312(a)(7) and agreed to make time available, it then faces the strict requirements of the anti-censorship rule of Section 315(a). This section prohibits the broadcast licensee from censoring material submitted for broadcast by the candidate.(note 23) Even if the material contained in the ad is libelous, the Supreme Court has ruled that a licensee is prohibited from deleting it. In *Farmers Educational & Cooperative Union of America v. WDAY, Inc.*,(note 24) the U.S. Supreme Court ruled that WDAY, a small radio station in rural North Dakota, could not delete Union references to certain government officials as "Communists." The Court said that "permitting a broadcasting station to censor allegedly libelous remarks would undermine the basic purpose for which [Section] 315 was passed--full and unrestricted discussion of political issues by legally qualified candidates."(note 25) Since broadcasters were legally bound by the anti-censorship provision, the Court affirmed the FCC interpretation that compliance with Section 315(a) granted broadcasters immunity from liability for any statements made by political candidates.(note 26)

Similarly, if after agreeing to provide a candidate with broadcast time a station learned that the candidate's appearance would involve the expression of highly inflammatory or extremely unpopular points of view, the station could not then refuse to carry the candidate's material. In 1972, the FCC denied a request from the National Association for the Advancement of Colored People (NAACP) that broadcasters be allowed to reject political ads that contained the word "nigger" and other highly offensive language.(note 27) The NAACP claimed that the ads of J.B. Stoner, a self-proclaimed white supremacist, posed an "immediate threat to the safety and security of the public."(note 28) The NAACP argued that since stations airing Stoner's ads had allegedly received bomb threats, avoiding the broadcast of racially charged advertisements was the "responsibility of [a] licensee under the public interest standard."(note 29) The FCC denied the NAACP request, citing *Farmers* as precedent, and declared that after an investigation there was no evidence that stations had actually received bomb threats.(note 30) Thus, said the Commission, there appeared to be no clear and present danger of imminent violence. The FCC concluded by saying that a "contrary conclusion would permit anyone to prevent a candidate from exercising his rights under Section 315 by threatening a violent reaction."(note 31) The Commission also ruled that "the public interest is best served by permitting the expression of any views that do not involve `a clear and present danger of serious substantive evil that rises far above public inconvenience, annoyance, or unrest.'"(note 32)

In 1978, after the U.S. Supreme Court decided *FCC v. Pacifica Foundation*,(note 33) Julian Bond, of the NAACP, asked the FCC to declare the word "nigger" obscene, thus preventing the word from being used over the airwaves.(note 34) In *Pacifica*, the Supreme Court affirmed an FCC ruling that declared a George Carlin monologue containing the words "shit, piss, fuck, cunt, cocksucker, motherfucker, and tits"(note 35) indecent. The FCC had defined indecency as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."(note 36) The Court's decision allowed the FCC to regulate the times at which indecent words could be used on the air in order to protect children.

The NAACP petition erroneously construed the Supreme Court decision to declare Carlin's seven "dirty" words "obscene" rather than "indecent." The FCC denied the NAACP's request, saying the word "nigger" did not fit the definition of indecency advanced in *Pacifica*.(note 37) Moreover, the FCC said that "even if the Commission were to find the word `nigger' to be `obscene' or `indecent,' in light of Section 315 we may not prevent a candidate from utilizing that word during his `use' of a licensee's broadcast facilities."(note 38)

In a 1980 case, Citizens Party presidential and vice- presidential candidates Barry Commoner and LaDonna Harris asked NBC Radio to air an ad that contained the word "bullshit."(note 39) Commoner and Harris filed a complaint with the FCC alleging that NBC Radio had violated the anti- censorship provision of Section 315. Commoner and Harris claimed that an NBC employee rejected the ad, and it was not until after the advice of NBC's legal counsel that the station agreed to run the commercial.(note 40)

Although the FCC found that NBC had not violated Section 315(a), the Commission said the "initial reactions of the

NBC staff in rejecting the spot and urging its modification were clearly in error."(note 41) Thus, the Commission warned NBC to ensure that its staff was aware that political ads could not be censored even if offensive language was used.

II. Broadcast Indecency: A Knotty Problem

Section 1464 restricts the broadcast of "indecent" material. If a broadcast licensee violates the indecency statute, Section 312(a)(6) of the Communications Act empowers the FCC to revoke the license.

The standard used to regulate indecency comes from *FCC v. Pacifica Foundation*.(note 42) As stated above, in *Pacifica* the U.S. Supreme Court held that comedian George Carlin's monologue *Seven Dirty Words* was indecent. For the nine years following the 1978 *Pacifica* decision, the FCC generally took no action against broadcasters for indecency violations. Meanwhile, broadcasters felt that airing indecent material between 10 p.m. and 6 a.m. was "safe" because there was less risk that children would be in the audience.(note 43)

In a series of rulings in 1987, however, the Commission revived its regulation of indecent speech and greatly broadened the scope of its applicability.(note 44) The new indecency policy reached beyond the "seven dirty words" listed in *Pacifica*, and included material that fit the general definition of indecency. The FCC also ruled that the beginning of the safe harbor should be moved from 10 p.m. to midnight.(note 45)

On June 1, 1987, the National Association of Broadcasters and other groups filed a petition for clarification of the rulings.(note 46) On December 29, the Commission acknowledged that the regulation of indecent material was a sensitive task due to the possibility of infringement on the broadcasters' First Amendment rights.(note 47) The Commission said, however, that it had an obligation to enforce the indecency restrictions, and that by enforcing Section 1464, it was advancing the government interest in protecting children from offensive material and allowing parents to decide what children would see or hear.(note 48)

In 1988, the U.S. Court of Appeals for the District of Columbia Circuit struck down the "channeling" provision of the FCC ruling. In *Action for Children's Television v. FCC* (*ACT I*),(note 49) the court upheld the Commission's power to prohibit indecent broadcasting during the day and to expand the scope of what constituted indecency. However, the *ACT I* court held that the FCC lacked evidence to support the change of the 10 p.m. safe harbor.(note 50)

The reaction from Senate conservatives was swift. Senator Jesse Helms (R-N.C.) pushed a bill through Congress ordering the FCC to draft regulations for a twenty-four-hour ban on indecency.(note 51) As required, the Commission drew up a regulation to enforce the legislation,(note 52) but the regulations were quickly challenged by broadcasters and stayed by the courts while the Commission collected public comment.(note 53) After the comment period, however, the FCC again announced a twenty-four-hour ban, which was challenged by broadcasters.(note 54) In 1991, the D.C. Circuit Court declared the 'round-the-clock ban unconstitutional in *Action for Children's Television v. FCC* (*ACT II*).(note 55) The *ACT II* court ordered the Commission to conduct a "full and fair hearing" to determine the times at which indecent material may be broadcast.(note 56)

In the meantime, Congress was busy drafting another law that would restrict broadcast indecency to the hours between midnight and 6 a.m. on all commercial and most noncommercial stations. Although the midnight to 6 a.m. safe harbor was declared unconstitutional by the *ACT I* court, President Bush signed the bill funding public broadcasting,(note 57) which contained the measures restricting broadcast indecency. The FCC was expected to implement the new safe harbor early in 1993,(note 58) but Action for Children's Television obtained from the U.S. Court of Appeals for the District of Columbia Circuit an order staying the midnight to 6 a.m. safe harbor. In November 1993, the U.S. Court of Appeals for the D.C. Circuit struck down the latest attempt to implement the safe harbor provision, but later vacated the opinion and granted a rehearing en banc.(note 59)

III. Abortion on the Air and in the Home

In the meantime, attention nationwide became riveted on the Bailey antiabortion ads after the Indiana Republican won the May 5, 1992, primary in an upset.(note 60) Bailey's spots included photos of healthy infants labeled "Choice A" followed by bloody photos of what the ad claimed were aborted fetuses, labeled "Choice B."(note 61) Fellow Republican congressional candidate Daniel Becker of Georgia aired similar ads later that summer on CNN, ESPN, and during Atlanta Braves games on Superstation WTBS.(note 62) WTBS Executive Vice-President and General Manager Terry Segal said the station received hundreds of complaints from parents, who were worried their children would see the abortion ads.(note 63)

In July, Becker submitted his ads to another Atlanta television station, WAGA-TV, a property of Gillett Communications. Gillett resisted running the spots and petitioned the FCC for a ruling that would declare the ads "indecent," allowing WAGA to restrict their broadcast to the midnight to 6 a.m. period.(note 64) Gillett argued that the depictions of dead fetuses covered with "menstrual gore" constituted "excretory" activity, thus bringing the political ad within the definition of indecency. Gillett then asked the Commission to determine whether Section 1464 of Title 18 was an exception to the application of Section 315(a), and if so, whether channeling ads containing graphic pictures of aborted fetuses would be a violation of Section 312(a)(7).(note 65)

In a letter denying Gillett's petition, Roy Stewart, chief of the Commission's Mass Media Bureau, said that restricting commercials like Becker's would violate a candidate's right of "reasonable access" to a broadcast station.(note 66) Stewart said that "[a]s a general matter, broadcasters may not direct candidates to unwanted times of the day or evening."(note 67) Stewart said that after reviewing Becker's ad, FCC staff found it was not indecent and that fetal tissue, or fetuses themselves, were not "excrement."(note 68) To support the FCC decision, Stewart said that Gillett failed to provide any legal precedent that would bring images of aborted fetuses within the definition of "excretory," and therefore, within the definition of indecency. Thus, the Mass Media Bureau chief expressed reluctance to expand that definition. Finally, since the FCC staff did not find the ad indecent, Stewart said it was not necessary to reach the issue of whether Section 1464 overrode Sections 315(a) or 312(a)(7) of the Communications Act.(note 69)

As the race came down to the last few weeks of the campaign, controversy over Becker's advertising heated up. In late October, Becker campaign workers attempted to schedule a thirty-minute political advertisement called *Abortion in America: The Real Story*, on WAGA-TV.(note 70) The campaign wanted to buy time to run the ad between 4 p.m. and 5 p.m. on Sunday, November 1.(note 71) After reviewing the tape and seeing that it contained about four minutes of graphic footage of an abortion procedure, the station again contended the ad was indecent and should not be run at the time requested.(note 72)

On Thursday, October 29, 1992, Gillett/WAGA filed suit in the U.S. District Court in Atlanta seeking declaratory and injunctive relief.(note 73) WAGA asked the court whether it could "channel" the thirty-minute spot to the safe harbor hours--between midnight and 6 a.m.--without violating the reasonable access and anti-censorship provisions of the Communications Act. The next day Judge Robert H. Hall declared the ad indecent and allowed WAGA to channel it as requested.(note 74) Judge Hall said that Section 1464, which regulates the broadcasting of indecent material, constituted an exception to the reasonable access and anti- censorship requirements of the Communications Act.(note 75) Judge Hall said his decision did not "significantly undercut" the purpose of the reasonable access and anti-censorship provisions of the Communications Act: "namely to prevent discrimination against candidates and to allow candidates a full opportunity to relate to the public their political stand."(note 76)

Becker appealed Hall's decision to the Court of Appeals for the Eleventh Circuit, which referred the matter to U.S. Supreme Court Associate Justice Anthony Kennedy, who handles emergency matters in that circuit. Kennedy denied the request without comment on Saturday, October 31, letting stand the lower court's decision.(note 77)

On October 30, the same day that Judge Hall approved WAGA's plan to channel Becker's ad, Roy Stewart, the FCC's Mass Media Bureau chief, sent a letter to Daniel Becker.(note 78) The letter informed the candidate of WAGA's concern that the broadcast of Becker's political advertisement would violate Section 1464. Stewart acknowledged that the Commission had never formally considered how the anti- censorship and indecency statutes should be reconciled. However, Stewart noted that in a 1984 letter to Congressman Thomas A. Luken (D-Ohio), then-FCC Chairman Mark Fowler wrote that "the application of both traditional norms of statutory construction as well as an analysis of the legislative evolution of Section 315 militates in favor of reading Section 1464 as an exception to Section 315."(note

79)

Stewart cautioned that because there were no definitive guidelines, it would be reasonable for broadcasters to rely on the informal opinion that the Commission had given to Congressman Luken. Because of the importance of the controversy, Stewart said the FCC was issuing a public notice seeking public comment on the issues concerning noncensorship of political ads and indecency. In the meantime, Stewart said broadcasters could channel to the safe harbor period political programming that the broadcaster "in good faith believes is indecent."(note 80)

IV. Constitutional and Statutory Considerations

Over a period of years the courts and the FCC have adhered closely to a position affirming the preeminence of Section 315(a) over several other attractive positions. In refusing to yield a politician's right to broadcast his message in the face of possible civil unrest, the Commission has made it clear that unsettling and even abhorrent political messages have a place in the debate of political issues.(note 81)

In fact, both First Amendment scholars and the U.S. Supreme Court have acknowledged the paramount position of political speech in the scheme of self-government. For instance, First Amendment scholar Alexander Meiklejohn carried the concept of freedom beyond a simple lack of interference from the government: "The freedom that the First Amendment protects is not, then, an absence of regulation. It is the presence of self-government."(note 82) The U.S. Supreme Court echoed that sentiment a few years later, holding that "speech concerning public affairs is . . . the essence of self-government."(note 83) The Court elaborated on that position and extended it explicitly to political advertising in 1976 with the declaration that "it is of particular importance that candidates have the . . . opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day."(note 84)

Section 315(a) has also triumphed over indecency and obscenity. On the heels of the 1978 *FCC v. Pacifica Foundation* decision, the Commission turned aside an attempt by Julian Bond of the NAACP to characterize a word at least as offensive as those used in *Pacifica* as obscene or indecent. The FCC ruled that even if the word "nigger" were indecent or obscene, the anti-censorship language of Section 315 prevented the Commission from taking any action.(note 85)

This reluctance by the FCC to expand the category of words or materials that fits the definition of indecency was recently affirmed. In its August 21, 1992, letter to legal counsel for WAGA, the Commission refused to expand the definition of indecency to include fetal tissue as "excretory" material. The Commission said that neither the expulsion of fetal tissue nor fetuses themselves constituted "excrement."(note 86) Had the FCC expanded the scope of what constitutes indecent material, it would have represented a significant departure from the traditional application of the concept.

The issue of abortion pictures in political advertisements has opened a new avenue that requires the FCC to interpret the limits of the definition of indecency. Historically, the FCC has not found indecency outside the realm of pandering, vulgar, or titillating depictions of sexual or excretory activities or organs.(note 87) Although the Commission has classified certain explicit language as indecent, context has often been a determining factor for finding a violation of Section 1464. For instance, in a case involving National Public Radio's *All Things Considered* program, the FCC refused to declare that a segment about organized crime boss John Gotti was indecent. The Commission said that while it recognized that the use of the word "fuck" and "fucking" throughout a segment of a news story was patently offensive, when considered in context the language was an integral part of a bona fide news story. The FCC added that traditionally it had avoided intervening in the editorial judgment of broadcast licensees on how best to present serious public affairs programs.(note 88) Likewise, the Commission has refused to take action for a violation of the indecency statute when stations have discussed sexual subjects in a serious manner. The FCC found that a frank discussion of sexual techniques in a program entitled *Unlocking the Great Mysteries of Sex* was not intended to pander or titillate and was not otherwise vulgar or lewd.(note 89) In another case, however, the FCC found that on-air vulgarities were indecent when used repeatedly by disc jockeys who also solicited audience participation using similar language. The Commission refused to view audience-participation programs as serious news. This finding negated the station's claim that the vulgar language was neither pandering nor titillating.(note 90)

Given the emphasis the Commission has placed on context-- whether a program is serious or attempts to pander and titillate-- it appears the use of graphic pictures of aborted fetuses in political advertisements does not fit within the pattern of FCC actions for violations of Section 1464. Moreover, the unambiguous posture of the Supreme Court toward Section 315(a) in *Farmers* weighs heavily in favor of taking the power to regulate offensive political ads out of the hands of broadcasters. In *Farmers*, the Court recognized that to give broadcasters latitude in determining what should be deleted would undermine the very purpose of Section 315.(note 91)

The issue in *Farmers* was whether, despite Section 315(a), broadcasters could censor libelous remarks from a candidate's advertisement. Although the current controversy deals with indecency, the Court's reasoning in *Farmers* should be applicable. After all, to determine whether a political ad is indecent, a broadcaster must first judge the content of the commercial. The *Farmers* Court said that:

> The decision a broadcasting station would have to make in censoring libelous discussion by a candidate is far from easy. . . . Yet, under the petitioner's view of the statute [deciding whether a statement is libelous] . . . would have to be resolved by an individual licensee during the stress of a political campaign, often, necessarily, without adequate consideration or basis for decision.(note 92)

More recently, the FCC has been equally reluctant to rely on broadcasters' good faith judgments to determine what is indecent. In 1987, the FCC rejected a plea from broadcasters who asked that reasonable licensee judgments preclude an FCC finding that material broadcast violated the indecency provision of Section 1464.(note 93)

On the other hand, the issue of channeling a political ad because it is indecent conflicts with the reasonable access requirement--Section 312(a)(7) of the Communications Act. In *CBS, Inc. v. FCC*, Chief Justice Burger said the requirements of Section 312(a)(7) included the accommodation of a candidate's advertising needs, as determined by the candidate.(note 94) Thus, under *CBS*, forcing a candidate into undesirable time slots is not an accommodation of the candidate's needs, but a unilateral decision made on other grounds by the broadcaster.

In 1980, the FCC recognized that censorship can take "many forms besides the outright refusal . . . to broadcast a political spot."(note 95) More recently, in its response to WAGA's request that ads containing pictures of aborted fetuses be declared indecent, the FCC characterized channeling as a form of censorship under Section 315 that violated Section 312(a)(7).(note 96)

Conclusions

The law is clear on the power of the FCC to punish broadcasters who violate the indecency statute during entertainment programming.(note 97) However, when the context of the indecent language is political advertising, broadcasters should be immune from liability under *Farmers*. In addition, under the standard applied by the Commission in the Julian Bond case(note 98) broadcasters have traditionally been powerless to prevent a candidate from using offensive material in advertisements.

While *Farmers* precludes any censorship of an ad's content, *CBS* requires that broadcasters accommodate the campaign needs of political candidates for federal office. Despite the possible impact that political ads depicting abortions may have on children, Section 315(a) bans any censorship by broadcasters. This prohibition should include channeling because channeling would in fact violate the principles affirmed in both *Farmers* and *CBS*.

Taken together, Section 312(a)(6) of the Communications Act and 18 U.S.C. sec. 1464 allow the FCC to revoke a broadcaster's license if indecency and obscenity are allowed on the air. These statutes conflict directly with the anti-censorship mandate of Section 315(a) of the Communications Act, however, and no appellate court has addressed the interpretation of the conflicting provisions. To date, the only evidence that has been arrayed against the *Farmers* precedent is an informal 1984 letter(note 99) and the district court decision involving Becker.(note 100) Thus, until an appellate court, or ultimately the U.S. Supreme Court, resolves the conflict, there is no reason to fear the heavy penalties prescribed by Section 312(a)(6) for the violation of Section 1464, particularly given the U.S. Supreme Court's unequivocal position in *Farmers*.

As the previous discussion has demonstrated, broadcasters' concerns that airing potentially indecent political ads may bring about sanctions for violation of Section 1464 appear to be unwarranted. On the other hand, any expansion of the definition of indecency could lead to future incursions into that category of speech, which broadcasters are likely to abhor.

Even though, in light of the *Farmers* decision, broadcasters would not be liable for the broadcast of political ads containing pictures of aborted fetuses, in order to be responsive to their audience's concerns, broadcasters may want to implement some kind of warning when political ads containing graphic pictures of aborted fetuses are broadcast. This would allow viewers to exercise their discretion. For instance, broadcasters could have a twenty-second disclaimer that contains both an aural and visual component. Once the warning is given, the picture could fade to black before the political ad appeared on the screen.

Who would bear the cost of the additional twenty seconds is a matter that will likely stir additional debate. Considering that it is the choice of a political candidate to use pictures that have a potentially harmful or disturbing impact on viewers, particularly children, it would not be unreasonable to require candidates to bear the cost of the warning.

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Notes

* First Place, Open Competition Law and Policy Division, Broadcast Education Association, Las Vegas, Nevada (1993). Return to Text

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1. 47 U.S.C. sec. 315(a) (1988) provides:

   > If 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 provisions of this section.

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2. *See* Farmers Educ. & Coop. Union of Am. v. WDAY, Inc., 360 U.S. 525 (1959). Return to text

3. *See* Letter from Wallace E. Johnson, Chief, BC, to Julian Bond, Atlanta NAACP, 69 F.C.C.2d 943 (1978). Return to text

4. *See* Letter from Ben F. Waple, Secretary, to Lonnie King, Atlanta NAACP, 36 F.C.C.2d 635 (1972). Return to text

5. *See In re* Complaint of Barry Commoner and LaDonna Harris Against NBC Radio, *Memorandum Opinion and Order*, 87 F.C.C.2d 1 (1980). Return to text

6. *See* Joe Flint, *Graphic Political Spots Bedevil Stations*, Broadcasting & Cable, Aug. 31, 1992, at 6. Return to text

7. *See* Letter from Roy J. Stewart, Chief, MM, to Vincent A. Pepper, Esq., Counsel, Gillett Comm. of Atlanta, Inc., 7 FCC Rcd. 5599, 5599 (1992). Return to text

8. *In re* Citizen's Complaint Against Pacifica Found. Station WBAI (FM), N.Y., N.Y., *Memorandum Opinion and*

Order, 56 F.C.C.2d 94, para. 12 (1975), *quoted in* FCC v. Pacifica Found., 438 U.S. 726, 732 (1978). Return to text

9. The FCC has been involved in an intense anti- indecency campaign since 1987 and the "safe harbor" has been the subject of FCC, congressional, and judicial debate and actions. For an account of the changes in the regulation of indecency since 1987, see John Crigler and William J. Byrnes, *Decency Redux: The Curious History of the New FCC Broadcast Indecency Policy*, 38 Cath. U. L. Rev. 329 (1989).

   The period during which it is safe to air indecency is itself the subject of controversy. From 1978 to 1987, it was from 10 p.m. to 6 a.m.; after a series of FCC actions in 1987, the FCC attempted to change the start of safe harbor to midnight. *See In re* Infinity Brdcst. Corp., *Memorandum Opinion and Order*, 3 FCC Rcd. 930, 937-38 n.47 (1987). The U.S. Court of Appeals for the District of Columbia Circuit, however, struck down the midnight safe harbor in Action for Children's TV v. FCC, 852 F.2d 1332 (D.C. Cir. 1988) (*ACT I*). After several other legal maneuvers, *see* Action for Children's TV v. FCC, 932 F.2d 1504 (D.C. Cir. 1991) (*ACT II*), *cert. denied sub nom.* Children's Legal Found. v. Action for Children's TV, 112 S. Ct. 1281, *and cert. denied*, 112 S. Ct. 1282 (1992), it was unclear what time was safe for the broadcast of indecency. In order to avoid problems, the FCC decided not to punish indecent programs from 8 p.m. to 6 a.m. until clear rules that did not conflict with the court decisions in *ACT I* and *ACT II* were instituted. In 1992, however, Congress passed the funding bill for the Corporation for Public Broadcasting, which included a midnight safe harbor. *See* Public Telecommunications Act of 1992, Pub. L. No. 102-356, sec. 16(a), 106 Stat. 949, 954. In November 1993, the U.S. Court of Appeals for the D.C. Circuit, acknowledging the government's compelling interest in protecting children from indecency, ruled that the midnight to 6 a.m. safe harbor restriction was not sufficiently narrowly tailored to survive constitutional scrutiny, but the decision was vacated when the court granted rehearing. Action for Children's TV v. FCC, 11 F.3d 170 (D.C. Cir. 1993) (*ACT III*), *vacated and reh'g granted en banc*, No. 93-1092, 1994 WL 50415 (D.C. Cir. Feb. 16, 1994). Return to text

10. Letter from Roy J. Stewart to Vincent A. Pepper, *supra* note 7, at 5599. Return to text

11. 18 U.S.C. sec. 1464 (1988) ("Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both."). Return to text

12. 47 U.S.C. sec. 312(a)(6) (1988). Return to text

13. 47 U.S.C. sec. 312(a)(7) (1988). Return to text

14. 47 U.S.C. sec. 312(a)(7) (1988) (providing for revocation of a license "[f]or willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy"). Return to text

15. *See* Political Brdcst. and Cablecasting, *Primer*, 100 F.C.C.2d 1476, para. 73 (1984) (quoting Use of Brdcst. and Cablecast Facils. by Candidates for Pub. Office, *Public Notice*, 34 F.C.C.2d 510, 536 ("The Commission will not substitute its judgment for that of the licensee but, rather, it will determine in any case that may arise whether the licensee can be said to have acted reasonably and in good faith in fulfilling its obligations under this section.")). Return to text

16. *Id.* para. 74; *In re* Commission Policy in Enforcing sec. 312 (a)(7) of the Comm. Act, *Report and Order*, 68 F.C.C.2d 1079, para. 40 (1978). Return to text

17. *CBS*, 453 U.S. 367 (1981). Return to text

18. *Id.* at 387. Return to text

19. *Id*. at 372-73. Return to text

20. *Id.* at 394. Return to text

21. *Id*. at 387-88. Return to text

22. *Id.* at 389. Return to text

23. 47 U.S.C. sec. 315(a) (1988). Return to text

24. *Farmers*, 360 U.S. 525 (1959). Return to text

25. *Id.* at 529-30. Return to text

26. *Id.* at 533. Return to text

27. Letter from Ben F. Waple to Lonnie King, *supra* note 4. Return to text

28. *Id*. at 635. The text of J.B. Stoner's ad was as follows:

> I am J. B. Stoner. I am the only candidate for U.S. Senator who is for the white people. I am the only candidate who is against integration. All of the other candidates are race mixers to one degree or another. I say we must repeal Gambrell's civil rights law. Gambrell's law takes jobs from us whites and gives those jobs to the niggers. The main reason why niggers want integration is because the niggers want our white women. I am for law and order with the knowledge that you cannot have law and order and niggers too. Vote white. This time vote your convictions by voting white racist J. B. Stoner into the run-off election for U.S. Senator. Thank you.

Id. at 636. Return to text

29. *Id.* at 635. Return to text

30. *Id*. at 636-37 n.1. Return to text

31. *Id*. at 637. Return to text

32. *Id*. (quoting *In re* Complaint of Anti-Defamation League of B'nai B'rith Against Station KTYM, Inglewood, Cal., *Memorandum Opinion*, 4 F.C.C.2d 190, 191 (1966), *aff'd sub nom.* Anti-Defamation League of B'nai B'rith v. FCC, 403 F.2d 169 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 930 (1969)). Return to text

33. *Pacifica*, 438 U.S. 726 (1978). Return to text

34. Letter from Wallace E. Johnson to Julian Bond, *supra* note 3, at 943. Return to text

35. *Pacifica*, 438 U.S. app. at 751. Return to text

36. *Id.* at 732 (quoting *In re* Citizen's Complaint Against Pacifica Found. Station WBAI (FM), N.Y., N.Y., *Memorandum Opinion and Order*, 56 F.C.C.2d 94, para. 12 (1975)). Return to text

37. Letter from Wallace E. Johnson to Julian Bond, *supra* note 3, at 944. Return to text

38. *Id.* Return to text

39. *In re* Complaint of Barry Commoner and LaDonna Harris Against NBC Radio, *Memorandum Opinion and Order*, 87 F.C.C.2d 1 (1980).

> Man: Bullshit.

> Woman: What?
>
> Man: Carter, Reagan and Anderson. It's all bullshit.
>
> Barry: Too bad people have to use such strong language. But isn't that what you think, too? That's why we started an entirely new political party. The Citizens Party. The truth is we've got to break the power of the big corporations. Profit-oriented corporate decisions have left the rest of us with high inflation, nuclear insanity, and a poisoned environment. This is Barry Commoner. I'm the Citizens Party candidate for President, along with LaDonna Harris, our Vice-Presidential candidate. We'll be on the ballot in 30 states. If we can poll just 5% in this election, we'll get millions in federal funding to organize for the next election. Why not vote for us, Barry Commoner and LaDonna Harris.

Id. app. A at 7. Return to text

40. *Id*. para. 3. Return to text

41. *Id*. para. 11. Return to text

42. *Pacifica*, 438 U.S. 726 (1978). Return to text

43. Young listeners or not, the broadcast of obscene material is prohibited at all times. The basic guidelines followed in identifying obscenity are set out in Miller v. California, 413 U.S. 15 (1973):

> (a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

Id. at 24. Return to text

44. *See In re* Infinity Brdcst. Corp., *Memorandum Opinion and Order*, 2 FCC Rcd. 2705 (1987); *In re* Regents of the Univ. of Cal., *Memorandum Opinion and Order*, 2 FCC Rcd. 2703 (1987); *In re* Pacifica Found., Inc., *Memorandum Opinion and Order*, 2 FCC Rcd. 2698 (1987); New Indecency Enforcement Stds. to Be Applied to All Brdcst. and Amateur Radio Licensees, *Public Notice*, 2 FCC Rcd. 2726 (1987). Return to text

45. *In re* Infinity Brdcst. Corp., *Memorandum Opinion and Order*, 3 FCC Rcd. 930, 937-38 n.47 (1987). Return to text

46. *Id.* para. 30. Return to text

47. *Id.* paras. 7, 10. Return to text

48. *Id.* at 937-38 n.47. Return to text

49. *Action for Children's TV*, 852 F.2d 1332 (D.C. Cir. 1988). Return to text

50. *Id*. at 1341-44. Return to text

51. *See* Dennis McDougal, *Broadcasters May Protest New Indecency Ban*, L.A. Times, Oct. 7, 1988, Calendar Section, at 1; *see also* Pub. L. No. 100-459, sec. 608, 102 Stat. 2186, 2228 (1988). Return to text

52. 47 C.F.R. sec. 73.3999 (1992). Return to text

53. Action for Children's TV v. FCC, 932 F.2d 1504, 1507 (D.C. Cir. 1991) (citing Action for Children's TV v. FCC, No. 88-1916 (D.C. Cir. Jan 23, 1989)), *cert. denied sub nom.* Children's Legal Found. v. Action for

Children's TV, 112 S. Ct. 1281, *and cert. denied*, 112 S. Ct. 1282 (1992). Return to text

54. *Id.* Return to text

55. *Id.* at 1509. Return to text

56. *Id.* at 1510 (quoting *Action for Children's TV*, 852 F.2d at 1344). Return to text

57. Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949. Return to text

58. *Id.* sec. 16(a), 106 Stat. at 954. Return to text

59. Action for Children's TV v. FCC, 11 F.3d 170 (D.C. Cir. 1993), *vacated and reh'g granted en banc*, No. 93-1092, 1994 WL 50415 (D.C. Cir. Feb. 16, 1994); *see also* Joe Flint, *Indecency Rules Under Fire in Courts at FCC*, Broadcasting & Cable, Mar. 1, 1993, at 44. Return to text

60. Steven W. Colford, *More Fetus Ads Are Coming*, Advertising Age, May 18, 1992, at 18, 18. Return to text

61. *Anti-Abortion TV Ads Catch on in Campaigns*, Wash. Post, July 20, 1992, at A1. Return to text

62. *Id*. Return to text

63. Russell Shaw, *Graphic Political Ads Vex Local TBS Viewers*, Electronic Media, July 20, 1992, at 8. Return to text

64. *See* Letter from Roy J. Stewart to Vincent A. Pepper, *supra* note 7. Return to text

65. *Id*. at 5599. Return to text

66. *Id*. Return to text

67. *Id.* Return to text

68. *Id*. at 5600. Return to text

69. *Id*. n.3. Return to text

70. Gillett Comm., Inc. v. Becker, 807 F. Supp. 757, 759 (N.D. Ga. 1992), *appeal dismissed*, 5 F.3d 1500 (11th Cir. 1993). Return to text

71. *Id.* Return to text

72. *Id.* Return to text

73. *Id.* at 760. Return to text

74. *Id.* at 761. Return to text

75. *Id*. at 762. Return to text

76. *Id.* Return to text

77. *High Court OKs Ban on TV Ads Showing Abortions*, Chi. Trib., Nov. 2, 1992, at 8. Return to text

78. Letter from Roy J. Stewart, Chief, MM, to Daniel Becker, 7 FCC Rcd. 7282 (1992). Return to text

79. *Id*. (citing Letter from Mark S. Fowler, Chairman, FCC, to Hon. Thomas A. Luken (Jan. 19, 1984)). Return to

text

80. *Id*. On October 30, 1992, the FCC issued a Public Notice Request for Comments asking about the rights or obligations a broadcaster may have to channel political advertisements he or she believes, in good faith, to be indecent. The FCC also asked for comment on the issue of whether broadcasters have any right to channel material that, while not indecent, may be otherwise harmful to children. The deadline for public comment was January 22, 1993. Reply comments could be filed until February 23, 1993. *See In re* Petition for Declaratory Ruling Concerning sec. 312(a)(7) of the Comm. Act, *Request for Comments*, 7 FCC Rcd. 7297 (1992). Return to text

81. *See, e.g.*, Letter from Ben F. Waple to Lonnie King, *supra* note 4, at 637. Return to text

82. Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 Sup. Ct. Rev. 245, 252. Return to text

83. Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964). Return to text

84. Buckley v. Valeo, 424 U.S. 1, 52-53 (1976). Return to text

85. Letter from Wallace E. Johnson to Julian Bond, *supra* note 3, at 944. Return to text

86. Letter from Roy J. Stewart to Vincent A. Pepper, *supra* note 7, at 5600. Return to text

87. *See, e.g.*, In Re Applications of Palmetto Brdcst. Co., *Decision*, 33 F.C.C. 250 (1962), *recon. denied*, 34 F.C.C. 1011 (1963), *aff'd sub nom.* Robinson v. FCC, 334 F.2d 534 (D.C. Cir.), *cert. denied*, 379 U.S. 843 (1964). This case, known as the Charlie Walker case, involved the use of offensive language by a disc jockey at Station WDKD in Kingstree, South Carolina. Among the subjects requiring the Commission's action was whether Walker had broadcast material that violated sec. 1464. At the time this decision was issued, the FCC had not clearly defined indecency, but the Commission dealt with the issue by saying that Walker had broadcast language that was "coarse, vulgar, suggestive or susceptible of indecent double meaning." *Id.* para. 23.

    In Sonderling Broadcasting Corp., 27 Rad. Reg. 2d (P & F) 285, *recon. denied*, 41 F.C.C.2d 777 (1973), *aff'd sub nom.* Illinois Citizens Committee for Brdcst. v. FCC, 515 F.2d 397 (D.C. Cir. 1975), the FCC issued a forfeiture against a radio station that aired a program that dealt largely with sexual topics. This was the first time that the FCC said that the discussions of sex were handled in a "titillating and pandering fashion." *Id.* at 290. Return to text

88. Letter from the FCC to Peter Branton, 6 FCC Rcd. 610 (1991); All Things Considered Segment on John Gotti Found to Be Not Indecent, FCC Rpt. No. MM-520, 1991 FCC LEXIS 469 (Jan. 25, 1991). In June 1993 the Court of Appeals for the D.C. Circuit held that Branton lacked standing to challenge the FCC's decision. Branton v. FCC, 993 F.2d 906, 908 (D.C. Cir. 1993). Return to text

89. *In re* Liability of Sagittarius Brdcst. Corp., *Memorandum Report and Order*, 7 FCC Rcd. 6873, para. 7 (1992) (citing Letter from Roy J. Stewart, Chief, MM, to Mel Karmazin, Pres., Sagittarius Brdcst. Corp., 5 FCC Rcd. 7291, 7294 n.3 (1990)). Return to text

90. *In re* Liability of Goodrich Brdcst., Inc., for a Forfeiture, *Memorandum Opinion and Order*, 6 FCC Rcd. 7484, para. 6 (1991). Return to text

91. Farmers Educ. & Coop. Union of Am. v. WDAY, Inc., 360 U.S. 525, 529 (1959). Return to text

92. *Id*. at 530. Return to text

93. *In re* Infinity Brdcst. Corp., *Memorandum Opinion and Order*, 3 FCC Rcd. 930, paras. 25-27 (1987). Return to text

94. *CBS*, 453 U.S. 367, 386-90 (1981). Return to text

95. *In re* Complaint of Barry Commoner and LaDonna Harris Against NBC Radio, *Memorandum Opinion and Order*, 87 F.C.C.2d 1, para. 10 (1980). Return to text

96. Letter from Roy J. Stewart to Vincent A. Pepper, *supra* note 7, at 5600. Return to text

97. *See* FCC v. Pacifica Found., 438 U.S. 726 (1978); Action for Children's TV v. FCC, 852 F.2d. 1332 (D.C. Cir. 1988). Return to text

98. Letter from Wallace E. Johnson to Julian Bond, *supra* note 3. Return to text

99. Letter from Mark S. Fowler, Chairman, FCC, to Hon. Thomas A. Luken (Jan. 19, 1984), *noted in* Letter from Roy J. Stewart to Vincent A. Pepper, *supra* note 7, at 5600 n.3. Return to text

100. Gillett Comm., Inc. v. Becker, 807 F. Supp. 757 (N.D. Ga. 1992), *appeal dismissed*, 5 F.3d 1500 (11th Cir. 1993). Return to text