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Notes and Comments: FCC Implementation of the Section 315(a) Exemptions: The Disappearance of the Equal Time Doctrine

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FCC IMPLEMENTATION OF THE SECTION 315(a) EXEMPTIONS: THE DISAPPEARANCE OF THE EQUAL TIME DOCTRINE

As required by the equal time doctrine, broadcast licensees that permit their facilities to be used by legally qualified candidates for public office must provide all other legally qualified candidates for that office equivalent broadcast time. In 1959, Congress amended Section 315(a) of the Communications Act of 1934 and created four statutory exemptions to the doctrine. The author analyzes the FCC implementation of these exemptions to determine the parameters and application of each to specific circumstances.

I. INTRODUCTION

Ninety-seven percent of all homes in America contain one or more television units,[1] a fact which has permitted the TV medium to develop into a major source of information,[2] and a determinant of social behavior for the mass population. No one can deny the effect that television has had on the purchasing decisions of the consumer at large; the imputed or perceived attributes of one toothpaste or automobile over another can largely be ascribed to the constant exposure of commercial messages over a period of time.[3] As a testimonial to the effectiveness of television as a commercial medium, advertisers in 1975 spent a total of five billion, three million dollars for commercial time.[4]

In their efforts to inform and influence constituency voting patterns of particular geopolitical subdivisions, candidates for elected office have long recognized the importance of utilizing television in their media mix. Over thirty-one million dollars were spent for political broadcast time on television during the 1972 election.[5] As one industry source has reported:

> Television, the most expensive advertising medium, is the one preferred by seven out of seven presidential candidates. Ironically, the reason most prefer it this year is because they haven't much money.[6]

1. A.C. NIELSEN Co., 1976 U.S. TV OWNERSHIP ESTIMATES 5.
2. NATIONAL ADVERTISING BUREAU, BASIC FACTS ABOUT NEWSPAPERS, March, 1975, in which 46% of the U.S. population indicated that television was their primary news information source.
3. C. Swanson, *Frequency Structure of Television and Magazines,* JOURNAL OF ADVERTISING RESEARCH, Vol. 7, June, 1967, at 8–14.
4. ADVERTISING AGE, July 5, 1976, at 32.
5. BROADCASTING, May 14, 1973, at 25.
6. BROADCASTING, April 26, 1976, at 26.

As the media representative for Senator Henry Jackson explained:

> TV is expensive . . . but it's more far-reaching than any other medium. . . . The quickest way to get a message across with a limited amount of funds is TV.[7]

The benefits that the broadcasting industry brought to political campaigning did not go unnoticed by the Congress of the United States, even at the inception and early developmental stage of this industry. Moreover, Congress did not underestimate the potential for abuse and its impact which could arise without the establishment of institutional safeguards. Congress therefore promulgated the Radio Act of 1927,[8] and by Section 18, imposed on broadcast licensees what has come to be known as the "equal time doctrine." This doctrine required that if any licensee permitted its facilities to be used by a "legally qualified" candidate for public office, then an equal opportunity must be made available to all other legally qualified candidates for that office. The purpose of the legislation was to prevent licensees from supporting candidates by allowing them mass audience exposure to the exclusion or disproportion of all other candidates. In 1934, Congress enacted the Communications Act of 1934[9] which replaced the Radio Act of 1927 but retained verbatim Section 18, under what is now Section 315(a).[10]

Under Section 315(a), no exemptions were originally announced. It was not until 1959 that Congress reassessed its position in response to a Federal Communications Commission ruling[11] and legislated four exemptions.[12]

This article addresses the Section 315(a) exemptions and their parameters, and in particular their application in specific circumstances. The object is to ascertain whether the exemptions, as interpreted by the Federal Communications Commission (hereinafter Commission), are so broad as to defeat the Congressional intent to safeguard against political broadcast abuse.

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7. *Id.*
8. Radio Act of 1927, Act of Feb. 23, 1927, ch. 169, § 18, 44 Stat. 1162.
9. The Communications Act of 1934, ch. 652, § 315, 48 Stat. 1088 (1934), *as amended* 47 U.S.C. § 315(a) (1959).
10. 47 U.S.C. § 315(a) (1959).
    > 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. No obligation is imposed . . . upon any licensee to allow the use of its station by any such candidate.
11. Letter to CBS, Inc., (WBBM-TV), 18 P&F Radio Reg. 236, *reconsideration denied*, 26 F.C.C. 715, 18 P&F Radio Reg. 701 (1959) [hereinafter cited as Lar Daly] [P&F Radio Reg. is hereinafter cited as R.R.].
12. 73 Stat. 557 (1959), 47 U.S.C. § 315 (1970), *as amended* (Supp. IV, 1974).

II. OPERATIONAL ASPECT OF SECTION 315(a)

To gain insight into the dimension of Section 315(a) exemptions, a working knowledge of the operational aspect of the provision must be understood.

An individual seeking the benefit or protection of the "equal time provision" must demonstrate, to the satisfaction of the Commission, first, that the petitioner is a legally qualified candidate for elected office; second, that the broadcast licensee permitted his facility to be used by another legally qualified candidate for that same office; and third, that the petitioner made a timely request to the licensee for equal time.[13]

The phrase "legally qualified candidate" is one of limitation, evincing a Congressional intent that candidates for public office not possess an absolute right to equal access of broadcast mass communication mediums. By way of an administrative ruling, the Commission has interpreted this term by reference to the local laws of the various jurisdictions.[14] The essence of most of these local laws is that a candidate filing a complaint must initially verify that the constituents making up the contested electoral subdivision may vote for him. In presidential contests which transcend local boundaries, however, it is apparently sufficient to be on the ballot of any one state.[15]

In addition, under Section 315(a), a candidate is not legally qualified unless he has declared his status as such. This means that both the petitioner and the person whose media coverage he wishes to match must publicly announce his candidacy within a certain time framework prior to the election. In *McCarthy v. FCC*,[16] Senator McCarthy, an announced candidate for the Democratic presidential nomination, argued that he was entitled to equal time as a consequence of network coverage of a one-half hour, year-end interview with President Johnson, who had not made an announcement with respect to his candidacy at the time. In rejecting the Senator's position that Section 315(a) had vitality when the only deficiency of candidate status was an official announcement, the court of appeals reasoned that the "difficulty in determining whether a likely public figure [was] a candidate within the intent of the statute justified the . . . [Commission] in promul-

13. *Id.*
14. 47 C.F.R. 73.657(a) (1975); *see* Felix v. Westinghouse Radio Stations, Inc., 186 F.2d 1 (3d Cir. 1950), *cert. denied*, 341 U.S. 909 (1951); Letter to the Hon. Peter Frelinghuysen, Jr., 40 F.C.C. 1080, 11 R.R. 245 (1954) (application of this limitation).
15. *See* Paulsen v. FCC, 401 F.2d 887 (9th Cir. 1974).
16. 390 F.2d 471 (D.C. Cir. 1968).

gating a more or less absolute rule."[17] In so ruling, the court also rejected the implicit argument that a presumption arose that an incumbent who was eligible for re-election was to be considered an announced candidate.

The requirement that a petitioner be a legally qualified candidate is particularly important to the identification by licensees of potential complaints under Section 315(a). This requirement limits the write-in problem for licensees by compelling the candidate to announce his candidacy. Nevertheless, the licensee may still be placed in a precarious position since demands for equal time could be forthcoming from unexpectedly announced sources and in unknown quantities. Moreover, when contestants for a particular office are numerous, the licensee's economic realities[18] may preclude extensive campaign coverage. Nevertheless, in the normal situation, a ballot listing under local law[19] and a declaration of candidacy would provide the licensee with sufficient information to make policy decisions concerning campaign coverage.

The drawback associated with requiring a declaration of candidacy, however, is the incentive, contrary to the spirit of Section 315(a), for incumbents to delay announcements of their candidacy in hopes of encouraging broadcaster coverage of their media events to the exclusion of announced challengers.

Once the petitioner demonstrates that he is a legally qualified candidate, he must then prove that there is a utilization of the licensee's facilities by another legally qualified candidate.[20] As

17. *Id.* at 474.
18. Cognizance should be taken of the reality that time represents the only marketable commodity, which the licensee must allocate judiciously. Where a licensee is required to make available an inordinate amount of equal time to candidates, such an imposition will result in a loss of revenues. In view of these circumstances, a real possibility exists that licensees would curtail coverage of political events.
19. *Compare* MD. ANN. CODE art. 33, § 4D-1 (1976 Repl. Vol.) (write-in campaigns, requiring write-in candidates to file a certificate of candidacy), *with* ORE. REV. STAT. § 249.354-4 (when ballot contains blank in primary elections), *and* ORE REV. STAT. § 256.110-4 (write-in blank in general election).
20. *See* McCarthy v. FCC, 490 F.2d 471 (D.C. Cir. 1968); Kay v. FCC, 443 F.2d 638 (D.C. Cir. 1960), wherein the court upheld a Commission ruling that "primary elections or conventions held by one party [were] to be considered separately from the primary elections or conventions of other parties." 443 F.2d at 641.

    The *Kay* decision presents an opportunity for licensees to lend support to one candidate in contravention of the purposes adopted by the equal time doctrine. Where one party dominates the general election, the licensee can provide extensive coverage of the primary election at the expense of the general election. Thus, the minority parties' share of the media's voice will be considerably diminished. The results of this bar could effectively curtail the development of those parties and the proposals which they might generate. Letter to Arnold Peterson, 40 F.C.C. 246, 11 R.R. 234 (1952); Letter to Lar Daly, 40 F.C.C. 317, 19 R.R. 103 (1960) (once the nomination is closed, there can be no valid request for equal time from a losing candidate). *But see* Letter to George Shaw, ____ F.C.C.2d ____, 37 R.R.2d 355 (1976).

mentioned above, Congress used words of limitation to preclude any absolute right of equal access to mass communication mediums. While the term "legally qualified candidate" has caused some concern, the major confrontations have focused upon the construction of the word "use." If a legally qualified candidate has not "used" a licensee's facility within the meaning of the statute, then equal opportunities are unavailable. As originally intended, the term "use" referred to political partisan broadcasts which were initiated by candidates themselves and not by licensees.[21] As interpreted and applied by the Commission, however, the definition of "use" took on an all-inclusive meaning, synonymous with any broadcasted appearance "no matter how brief or perfunctory."[22] The Commission abandoned the partisan standard by ruling that "use" does not require that an appearance be of a political nature.[23] This position that a non-political "use" of a broadcast medium by a legally qualified candidate could give rise to equal time obligations was affirmed in 1974 by the Ninth Circuit Court of Appeals in the declaratory judgment of *Paulsen v. FCC*.[24] The court recognized that objective standards were necessary to insure minimum government involvement in the fair and equal use of broadcast mediums by candidates. Therefore, it was not unreasonable to apply the statute to any "use." In arriving at the decision, the court expressed concern with the ever present danger of licensee abuse if non-political uses were exempt. If these appearances were exempt, "a station could support one candidate by inviting him or her to appear on numerous shows but strongly discouraging the discussion of political issues."[25] This additional exposure would surely constitute a benefit to that candidate and would vitiate the purpose of Section 315(a). It was primarily under this rationale that Paulsen's appearance on a children's show, "Mouse Factory," was considered a use within the meaning of the statute. Hence, in 1974, "use doctrine" received a literal interpretation; unless expressly excluded by Section 315(a), all appearances by a candidate subjected the licensee to the equal time provision.

Once a facility has been used by a legally qualified candidate, a candidate must meet the seven day statute of limitation to come

21. S. REP. No. 562, 86th Cong., 1st Sess. 112–13 (1959) [hereinafter cited as S. REP. No. 562]; *see* Erbst, *Equal Time for Candidates: Fairness or Frustration*, 34 S. CAL. L. REV. 192 (1961).
22. Letter to Kenneth E. Spengler, 40 F.C.C. 279, 14 R.R. 1226 (1956) [hereinafter cited as Spengler]; Letter to the Hon. Allen Oakley Hunter, 40 F.C.C. 246, 11 R.R. 234 (1952) [hereinafter cited as Hunter].
23. Letter to Earle C. Anthony, Inc., 40 F.C.C. 257, 11 R.R. 242 (1952).
24. 491 F.2d 887 (9th Cir. 1974).
25. *Id.* at 891.

within the purview of Section 315(a). His claim is barred unless he requests equal time within one week of an opponent's use.[26]

When all three requirements are satisfied, the petitioner is entitled to equal time.[27] However, due to the use requirement's all-pervasive nature, there arose a conflict in legislative purposes which necessitated the development of exemptions to narrow the use parameters.

III. DEVELOPMENT OF SECTION 315(a) EXEMPTIONS

A. Administrative Development and Legislative Response

Between the inception of Section 315(a) in 1934, and 1959, only two major exemptions developed which limited the scope of the equal time provision, both established by the Commission. During the presidential campaign of 1956, President Eisenhower requested and received network time to report to the nation on the "Suez Crisis." After some vacillation,[28] the Commission ruled that the broadcast did not constitute a use, stating:

> [W]hen Congress enacted Section 315 it [did not intend] to grant equal time to all Presidential candidates when the President uses the air lanes in reporting to the Nation on an international crisis.[29]

26. 47 C.F.R. 73.657(e) (1975). Moreover, if an appearance comes within 48 hours of the election, the licensee must notify the various contestants and make available equal time upon demand.

27. Letter to Standard Broadcasting Station, WOR (RKO General, Inc.), 25 F.C.C.2d 117, 19 R.R.2d 1047 (1970) [hereinafter cited as RKO General, Inc.]; Letter to W. Ray Smith (WIIC-TV Corp.), 33 F.C.C.2d 629, 24 R.R.2d 114 (1972). When licensees are obligated to grant demands for equal time, they are not required to sell candidates specific time segments or permit appearances on particular programs so long as the delivered audiences are of the same general character.

28. Derby, *Section 315: Analysis and Proposal,* 3 HARV. J. LEGIS. 257, 286–87 (1966) [hereinafter cited as Derby]:

> Eisenhower's report was made on October 31, 1956 and the decision was made in haste. The FCC first notified the networks on November 1 that it declined to rule on the request for equal opportunities because the decision would be '. . . dependent on such an involved and complicated legal interpretation. . . .' Thereupon, the networks granted equal opportunities to Stevenson and other Presidential candidates. The FCC then reversed itself on the eve of the election and ruled that the report was exempt because Congress had not intended '. . . to grant equal time to all Presidential candidates when the President uses the air lanes in reporting to the Nation on an *international crisis.*' The decision, however, was by a split vote. Three commissioners were unqualifiedly in favor, one dissented, two continued to maintain that the issue was too complex, and the last commissioner concurred because he thought it doubtful that Congress meant to so inhibit the President and because he felt time was of the essence. The networks were consequently then compelled to offer time to Eisenhower to reply to Stevenson, but it was so close to the election that Eisenhower declined. This decision was never appealed, and there has never been a judicial determination on the point. (footnotes omitted).

29. Public Notice 38387, 40 F.C.C. 276, 14 R.R. 720 (1956).

This exemption continued to exist independently of the legislated exemptions. While it has only been applied to presidential broadcasts covering international events,[30] the same rationale would likely make the exemption applicable to domestic crises.[31]

The second exemption evolved in 1957, with the *Blondy* ruling.[32] In that ruling the Commission held that a candidate's appearance in a film segment during a newscast did not constitute a "use" within the meaning of the statute because the candidate did not initiate the request for the broadcast time. However, this ruling occurred prior to the use doctrine having been given its all-inclusive parameters.[33] In 1959, the *Blondy* ruling was devitalized by the *Lar Daly* opinion.[34]

Lar Daly, a perennial candidate, announced his candidacy in 1959 for both the Democratic and Republican nominations for the office of mayor of Chicago. During this campaign, three licensees aired film clips in their news telecasts of Daly's competitors attending ceremonial functions. The aggregate time of these telecasts was 17½ minutes. After his request for equal time was rejected by the licensees, Daly filed a complaint with the Commission. The Commission ruled in favor of the Daly request both in its original ruling and a subsequent Interpretative Opinion.[35] The position of the Commission was that the appearances of the candidates constituted a use, notwithstanding that the candidates neither initiated nor controlled the broadcasts; further, the statute provided "any appearance" constituted a use without exception, and the Commission lacked authority to create such exceptions. Disregarding the rationale behind *Blondy*, the *Daly* ruling distinguished *Blondy*[36] under the *de minimis* principle of law. Because the appearances of the candidates in two telecasts during the newscasts had a duration of less than one minute, the exposure in *Blondy* was insignificant.

Congress' response to *Daly* came swiftly. Within three days after the decision was rendered, the legislative branch began hearings on proposed amendments recognizing certain exceptions to the equal time provision. Before the House of Representatives and the

30. Letter to Republican National Committee, 40 F.C.C. 408, 3 R.R.2d 647, *aff'd by an equally divided court, sub nom.* Goldwater v. FCC, No. 18,963 (D.C. Cir. Oct. 27, 1964), *cert. denied*, 379 U.S. 893 (1964) (Black and Goldberg, J.J., dissenting). *See* Derby, *supra* note 28 (critical analysis of decision).
31. *See* Public Notice 38387, 40 F.C.C. 276 (1956) (concurring statement by Commissioner Doerfer).
32. Letter to Allen H. Blondy, Esq., 40 F.C.C. 284, 14 R.R. 1199 (1957) [hereinafter cited as Blondy].
33. *See* Spengler, 40 F.C.C. 279 (1956); Hunter, 40 F.C.C. 246 (1952).
34. Lar Daly, 18 R.R. 236, *reconsideration denied*, 26 F.C.C. 715, 18 R.R. 701 (1959).
35. *Id.*
36. *See* Letter to Republican National Committee, 40 F.C.C. 408 (1964).

Senate were a number of bills designed to remedy what was considered an erroneous interpretation of Congressional intent in *Daly*.[37] The legislative proposals involved bills which advocated a return to the pre-*Daly* era or bills which advocated extensive reforms of Section 315.[38] After a House conference, a compromise bill emerged which was subsequently enacted into law.[39] The substantive provision of this law retained Section 315 with four exemptions. Broadcasts which did *not* constitute a use included:[40]

37. S. 1585, S. 1604, S. 1858, S. 1929, H.R. 5389, H.R. 5675, H.R. 6326, H.R. 7122, H.R. 7180, H.R. 7216, H.R. 7602, H.R. 7985, 86th Cong., 1st Sess. (1959).
38. S. REP. No. 562, *supra* note 21.
39. H.R. REP. No. 1069, 86th Cong., 1st Sess. (1959) [hereinafter cited as H.R. REP. No. 1069].
40. 73 Stat. 557 (1959), *as amended* 47 U.S.C. § 315(a) (Supp. IV, 1974). The equal time provision as modified by the 1959 amendatory legislation reads as follows:

> 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 stations: Provided, That such licensees shall have no power of censorship over the material broadcast under the 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. Appearance by a legally qualified candidate on any—
>
> (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),
>
> shall not be deemed to be use of a broadcasting station within the meaning of this subsection.

Congress further extended its authority over the broadcasting industry when it adopted the fairness doctrine in the 1959 amendments. Section 315(a) went on to enact the following:

> Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

The essential difference between the equal time provision and the fairness doctrine is that the former doctrine creates a right of access to particular individuals and is based on a mathematical equivalent standard, while the latter doctrine creates no individual right and is satisfied when adequate coverage of public issues has been achieved. CBS v. Democratic National Committee, 412 U.S. 94 (1973); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); Democratic National Committee v. FCC, 481 F.2d 543 (D.C. Cir. 1973); CBS v. FCC, 454 F.2d 1081 (D.C. Cir. 1971); Green v. FCC, 447 F.2d 323 (D.C. Cir. 1971).

The fairness doctrine has had a significant impact on the equal time doctrine. The equal time provision clearly stated that licensees were under no obligation to permit candidates to utilize their facilities; under the controlling fairness doctrine, however, licensees were required to provide candidates with reasonable amounts of free time or paid time (not both) in cases when the office contested was a federal office. *See* Letter to Dennis J. Morriseau, 48 F.C.C.2d

(1) bona fide newscasts,
(2) bona fide news interviews,
(3) bona fide news documentaries (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).[41]

B. Legislative History

The legislation initially proposed in the House of Representatives exempted a use from the provisions of Section 315(a) if the candidate appearances were *incidental* to a presentation of news events.[42] Therefore, without regard to the format utilized by the licensee, political events which were specifically designed to attract media coverage for the purpose of advancing one's candidacy were to be considered uses. The intention of the House was that the burden of proof to establish the newsworthiness of the covered event be placed upon the licensee.[43] In effect, this would constitute a presumption that the broadcast was a use. The licensee would then have an opportunity to refute the presumption, a throwback to the *Daly* opinion. Subsequently, the conference bill omitted the incidental test,[44] and the House of Representatives adopted this change, having accepted the argument that this test would have been at best difficult to administer.[45] In the final bill, only news documentaries were subject to the incidental test.[46]

If the House's incidental test had been adopted, the overall effect may have restricted the dissemination of current politically newsworthy information. Congress, realizing that the *primary* responsibility for news content had to remain with the licensee,[47] vested the licensee with a certain degree of discretion. Consequently, the licensee was required to exercise his good faith news judgment in presenting political events for which he sought the

436, 31 R.R.2d 10 (1974); *In re* Complaint of Dr. Benjamin Spock and the People's Party, 44 F.C.C.2d 12, 28 R.R.2d 1475 (1973).

41. As a consequence of Congress' swift action in response to the *Daly* decision, the ruling was never overturned. Thus, the statute must be read in conjunction with *Daly*'s rigid holding. Therefore, any appearance which does not fall squarely within the enumerated exemptions is a use, creating equal time obligation on the part of the licensee.
42. H.R. Rep. No. 802, 86th Cong., 1st Sess. 1 (1959) [hereinafter cited as H.R. Rep. No. 802].
43. 105 Cong. Rec. 17781 (1959) (remarks by Representative Brown).
44. *See* H.R. Rep. No. 1069, *supra* note 39, at 4.
45. 105 Cong. Rec. 17778 (1959) (remarks by Representative Bennett).
46. 73 Stat. 577 (1959), *as amended* 47 U.S.C. § 315(a) (Supp. IV, 1974).
47. *See* H.R. Rep. No. 802, *supra* note 42, at 4–5; S. Rep. No. 562, *supra* note 21, at 11.

particular exemption. However, Congress did not intend to permit a licensee to have unfettered discretion in covering political events. Common to each of the four recognized exemptions was the phrase "bona fide." By interpreting this standard to require appearances to be in conjunction with *current news events*, Congress delineated the scope of these exemptions.[48] For programming to be exempt, it had to be concerned with the actual news content of an event as distinguished from events serving the sole political advantage of any particular candidate, such as exemplified by staged incidents or stump speeches.[49]

As applied to news interviews and arguably to newscasts,[50] the definition of bona fide was broadened by Congress to include additional criteria. The result was that only those broadcasts of candidates within *regularly scheduled*[51] programs under the *control of the licensee* were exempted from the equal time requirements. Regularly scheduled programs encompassed only those programs which had a history of being aired before the public at consistent time intervals for a given period prior to the campaign.[52] Hence, to be bona fide, a program had to be regularly scheduled, under the control of the licensee, and deal with current news events. Notwithstanding the exercise of a licensee's good faith news judgment, unless these types of broadcasts are regularly scheduled within the bona fide standard, the licensees cannot develop informational type programming during the campaign period without being subjected to the provisions of Section 315(a).

The *bona fide test* is based on the same premise as the House of Representatives' original incidental test. Both resulted from Congressional concern with the potential abuse by licensees in using programming as vehicles for political self-aggrandizement rather than as informational type broadcasts.[53] An example of this concern was the expansion of the definition of bona fide in relation to news interviews. In an attempt to safeguard the original purpose of Section 315(a), Congress required licensees to control the format, content and the selection of the participants when news interviews

48. 105 CONG. REC. 14441 (1959); *see* Letter to Thomas R. Fadell, Esq., 40 F.C.C. 380, 25 R.R. 288, *aff'd per curiam, sub nom.* Fadell v. FCC, 25 R.R. 2063 (7th Cir. 1963).
49. *See* H.R. REP. No. 802, *supra* note 42, at 6.
50. *See* H.R. REP. No. 802, *supra* note 42 (the House of Representatives recognized that the criteria of the exemptions overlapped).
51. H.R. REP. No. 1069, *supra* note 39, at 4.
52. *Compare* Letter to Storer Broadcasting Co., 50 F.C.C.2d 790, 36 R.R.2d 1005 (1976) (program broadcast once a quarter over a seven year period), *with* Letter to Gross Telecasting Co., 46 F.C.C.2d 36 (1974) (irregular schedule over a period of years).
53. *See* S. REP. No. 562, *supra* note 21, at 10.

originated from the licensees' facilities.[54] Ultimately, the licensee assumed responsibility for the character of the broadcast.

In modifying Section 315(a), Congress attempted to balance two legislative purposes that often conflicted. Congress reaffirmed its desire to maintain institutional safeguards by protecting the right of candidates (particularly independents and candidates of minority parties) to be treated fairly with respect to media access, while at the same time, recognizing the right of the public to be assured of political information. Congress believed that if the *Daly* decision remained in force with the rigid application of the equal time provision, there would be an imbalance in the dual legislative purposes. The imbalance would result in a lack of meaningful broadcast coverage of political campaigns. This coverage is deemed desirable and necessary to the election process. Congress promulgated the bona fide and good faith discretion standards as guidelines for the application of the Section 315(a) exemptions. These guidelines provide a basis upon which to evaluate whether administrative rulings and court decisions are within the framework of the statute or whether they extend beyond the legislation.

IV. APPLICATION OF THE SECTION 315(a) EXEMPTIONS

Congress purposefully legislated broad statutory guidelines and specifically vested the Commission with extensive discretionary powers.[55] The legislative goals were equal access to broadcasts and the dissemination of information. The history of the Commission's administrative rulings provides the parameters of each exemption.

A. Bona Fide Newscasts

The bona fide newscast exemption was clearly designed to override the *Daly* decision. An appearance by a candidate as part of the content within a newscast comes within the purview of the exemption and does not require the granting of equal time. This is true, notwithstanding that the exemption would *not* have been operational if the appearance had been presented in a different format.[56] This is not absolute; if it could be shown that the newscast was not bona fide,[57] or that the licensee acted in bad faith,[58] he would then be subjected to equal time obligations. Congress instructed the Commission to evaluate whether the licensee

54. *See* H.R. REP. No. 1069, *supra* note 39, at 4.
55. 73 Stat. 557 (1959), *as amended* 47 U.S.C. § 315(d).
56. Letter to Citizens for Reagan, _ F.C.C.2d ___, 36 R.R.2d 885 (1976).
57. Letter to the Hon. Clark W. Thompson, 40 F.C.C. 328, 23 R.R. 178 (1962) (Congressmen's report, prepared by the candidate and broadcast *in toto* during a newscast, was held not to be exempt since the licensee lacked the requisite control).
58. *See* H.R. REP. No. 802, *supra* note 42, at 6.

exercised good faith news judgment. A factor to be considered is the length of time devoted to the candidate in proportion to "the length of the newscast and significance of the news event."[59]

The limit of this exemption was judicially reached in *Brigham v. FCC*.[60] In *Brigham*, the Fifth Circuit Court of Appeals upheld a Commission ruling that an appearance by a legally qualified candidate who was employed by a licensee to broadcast the weather did not constitute a use when the candidate remained unidentified with respect to name and candidate status. The court stressed the absence of any evidence to establish a breach of the licensee's good faith:

> There is not the slightest hint in the undisputed facts that the weathercaster's appearance involved anything but a bona fide effort to present the news. The weathercaster is not even identified . . . and his employment is not something arising out of the election campaign but, rather, is a 'regular job.' Certainly the facts do not indicate any favoritism on the part of the station licensee or intent to discriminate among candidates.[61]

The emphasis on the good faith requirement, to the exclusion of other considerations such as newsworthiness, could have been applied to circumstances involving identified station personnel. However, when presented with this factual situation,[62] the Commission distinguished its earlier position by holding that an appearance identifying the candidate by name constituted a use notwithstanding his employment status. The Commission concluded:

> [T]he amendment [was] aimed at allowing greater freedom to broadcasters reporting the *news* . . . but it did not deal with . . . appearances of station employees . . . . Appearances of candidates on a news type program in which he had participated in the format and production are not exempt.[63]

The bona fide newscast exemption, which is intended to protect broad journalistic freedom, has been liberally applied. However, the licensee still remains accountable if the candidate's appearance is not newsworthy. There is a rebuttable presumption of news-

59. *Id.*
60. 276 F.2d 828 (5th Cir. 1960). *See also* RKO General, Inc., 25 F.C.C.2d 117, 122, 19 R.R. 1047 (1970) (voice so well known in community no issue of identification). *But see* Letter to the National Urban Coalition, 23 F.C.C.2d 123 (1970) (identification impossible when candidate appeared in a group of 120 and did not constitute a use); Letter to Gene A. Bechtel, Esq., 17 F.C.C.2d 216 (1969) (issue of identification left to good faith judgment of licensees).
61. 276 F.2d 828, 830 (5th Cir. 1960).
62. Public Notice: Use of Station by Newscaster Candidate for Public Office Subject to Section 315 Equal Time Provision, 40 F.C.C. 433 (1965).
63. *Id.* (emphasis added).

worthiness which, if overcome, will result in the licensee's obligation to grant equal time.

B. Bona Fide News Documentaries

Equal time issues arising out of the news documentary exemption have come before the Commission at irregular intervals and in minimal numbers. When these issues have been presented, the Commission rulings have only marginally refined the Congressional guidelines as found in the statute and the legislative history. In giving this provision dimension, Senator Pastore confirmed the proposition that news documentaries were merely "a documentation of . . . [a] point at issue in a present news item by showing the history and the logical development that preceded the particular event or instance."[64] As finally adopted, the news documentary provision was the only exemption which retained the incidental standard. As discussed previously, the incidental standard holds that notwithstanding the licensee's designation of a program as a news documentary, programming that had as its focal point a candidate, as distinguished from a news event, would subject the licensee to equal time obligations. The defect in such a program would be the absence of an "*event* of contemporary news value."[65]

In one case,[66] the Commission was presented with the situation in which a candidate participated in a panel discussion on local transportation problems. The candidate was selected due to his expertise in the field. In determining whether this came within the news documentary exemption, the Commission evaluated the following issues:

> (1) whether the appearance of the candidate is incidental to the presentation of the subject; (2) whether or not the program is designed to aid or advance the candidate's campaign; (3) whether the appearance of the candidate was initiated by the licensee on the basis of the licensee's bona fide news judgment that the appearance is in aid of the coverage of the subject matter; and (4) whether the candidate has any control over the format, production, or subject matter of the broadcast.[67]

Therefore, to fall within this limited documentary exemption, an appearance by the candidate had to be both tangential to an event of contemporary news value and, in the good faith news judgment of the licensee, helpful to the understanding of the program con-

64. 105 CONG. REC. 14441 (1959) (ed. remarks of Senator Pastore).
65. *Id.*
66. Letter to Victor E. Ferrall, Jr., Esq., 46 F.C.C.2d 1113 (1974).
67. *Id.*

tent. Additionally, the Commission required the licensee to maintain the integrity of the broadcast as an event of contemporary news value by retaining full control over the program's production and presentation. This control reinforced the marginal role of the candidate in the presentation and met the legislative goal of dissemination of information without infringing upon equal access.

C. Bona Fide News Interviews

The narrow application of the bona fide news interview exemption by the Commission can also be traced directly to Congressional intent and has been one of the two most litigated exemptions. By the news interview being part of a regularly scheduled program with a news format controlled by the licensee, a balance of the legislative objectives of equal access and dissemination of information was established. Therefore, the licensee was responsible for the newsworthiness of the program's content.

In satisfaction of the informational objective for which the news interview exemption was enacted, such regularly scheduled programs as "Meet the Press,"[68] "College News Conference"[69] and "Searchlight"[70] were expressly excluded from the operative section of the statute. Even though the above-mentioned programs formed the bedrock of this exemption, they have been the center of controversy in a number of instances, requiring the Commission to determine the propriety of the rejection by a licensee of equal time demands. The central issue in these complaints focused upon program regularity. In 1962, the Commission received a complaint that a request for equal time, based on an opponent's appearance on "Meet the Press," was denied by the network.[71] The complaining candidate argued that since the program had been expanded into a time period that was foreign to it, the particular program did not meet the regularity standard. Thus, the candidate contended that the program was not bona fide, and therefore the appearance constituted a use. The Commission rejected this position and held that the program remained within the exemption.

The issue of program regularity will be decided in favor of the licensee if the program has a history of scheduling at regular intervals. Therefore, the history will satisfy the exemption's criteria, notwithstanding the changes in time periods or the program

68. Letter to Andrew J. Easter, 40 F.C.C. 307 (1960).
69. Letter to Charles V. Falkenberg, Esq., 40 F.C.C. 310, 20 R.R. 350 (1960) [hereinafter cited as Falkenberg].
70. Letter to Socialist Workers Party, 40 F.C.C. 322, 7 R.R.2d 766 (1961).
71. Letter to the Hon. Frank Kowalski, 40 F.C.C. 355 (1962).

length of particular broadcasts, as long as the licensee remains in control of the programming and the basic format remains constant.

The issue of a program's format is a recurring theme before the Commission. In a series of decisions,[72] the Commission identified essential elements of the program's format which a bona fide news interview must exhibit in order to be exempt. Two cases,[73] brought before the Commission in 1960, provided the framework for its present position. In a case of first impression,[74] the Commission ruled that the appearance by the presidential candidate Senator John F. Kennedy on the "Tonight Show" constituted a use and was outside the bona fide news interview exemption. The Commission's ruling rested, in large part, on the classification of the program as a variety show. Hence, the program's interview was not considered bona fide and the network was subjected to equal time obligations. One day later, the Commission ruled that an appearance on the "Today Show"[75] was exempt since the program emphasized news coverage, news interviews, news documentaries and coverage of on-the-spot news events. The position adopted in the "Tonight Show" and the "Today Show" rulings was emphasized in the *Phone Forum*[76] decision. In that case, a program with a two-year scheduling history, produced solely by the licensee prior to the campaign and classified as a public affairs program, was held to be within the exemption. "Phone Forum's" format consisted of a moderator employed by the licensee who fielded questions from the public-at-large. These questions were then directed to a guest. The Commission assumed that the station personnel retained *some* control over the interview, thereby narrowing the issue to the regularity of public figure appearances. Under the specific factual circumstances, the Commission concluded that the frequency of appearances by public figures was sufficient to classify the program as a news-oriented interview.

The sum of these cases hold that to be within the news interview exemption, the format of the program must be concerned with news type information and, as a recurring theme, include appearances by newsworthy public figures. The licensee must also con-

72. Letter to Jean Steiner (Socialist Labor Party), 7 F.C.C.2d 857, 9 R.R.2d 1083 (1967) [hereinafter cited as Steiner]; Public Notice 90745, 40 F.C.C. 314 (1960); Falkenberg, 40 F.C.C. 310, 20 R.R. 350 (1960).
73. Public Notice 90745, 40 F.C.C. 314 (1960); Falkenberg, 40 F.C.C. 310, 20 R.R. 350 (1960).
74. Falkenberg, 40 F.C.C. 310, 20 R.R. 350 (1960).
75. Public Notice 90745, 40 F.C.C. 314 (1960).
76. Steiner, 7 F.C.C.2d 857, 9 R.R.2d 1083 (1967) (Commission distinguished open mike formats when the guest speaker exerts control over time segment to convey his or her views without constraint, which were held to be a use); Letter to WMCA, 40 F.C.C. 367, 24 R.R. 417 (1962) (program was not exempt since format of program was under the control of independent contractor).

trol the production and presentation of the program to be within the purview of the news interview exemption. In determining the extent of the licensee's control, the Commission examines such factors as the regularity of the program's schedule, the method of guest selection, the way in which the program was produced, and the relationship of the moderator and/or interviewers to the licensee.[77] When sufficient control is present, in the absence of bad faith, the broadcast is bona fide and not construed to be a use.

A licensee who does not control the broadcast is not exercising good faith journalistic discretion, and the broadcast, therefore, is outside the exemption. In one case,[78] in which a station aired a syndicated news interview of a legally qualified candidate, the licensee was subjected to equal time obligations because the necessary licensee control was lacking. Similarly, the Commission has maintained a consistent position with respect to programming characterized as Congressional reports to local constituents. When these programs are produced by the Congressional representatives themselves[79] or when the moderator of the program is employed by someone other than the station to conduct the questioning,[80] the licensee lacks control; therefore, he is not exercising good faith journalistic discretion and the protection afforded by the exemption is precluded.

The limiting effect of these elements of the news interview exemption was clearly illustrated in the *CBS* ruling.[81] This case involved a presidential press conference which was contended by CBS to be within the news interview exemption. The majority of the Commission held that these press conferences were within the operative section of the statute since they were not arranged and controlled by the networks or stations and because they were not regularly scheduled. "[T]he candidate determines what portion of the conference is to be devoted to announcements and when the conference is to be thrown open to questions."[82] Hence, since the

77. The Commission has adopted Congress' guidelines in this area. *See* Letter to the Hon. Russell B. Long, 40 F.C.C. 351 (1962); H.R. REP. No. 1069, *supra* note 39.
78. Letter to Tennessee Educational Ass'n, 48 F.C.C.2d 438, 31 R.R.2d 57 (1974).
79. *See* Blondy, 40 F.C.C. 284, 14 R.R. 1199 (1957); Letter to the Hon. Joseph Clark, 40 F.C.C. 325 (1962). *But see* Letter to Miami Valley Broadcasting Corp., 24 F.C.C.2d 460 (1970) (program held to be exempt).
80. Letter to WMCA, 40 F.C.C. 367, 24 R.R. 417 (1962). *See also* Letter to Jean Steiner (Socialist Workers Party), 40 F.C.C. 421, 7 R.R. 259 (1964).
81. *Compare* Letter to CBS, Inc., 40 F.C.C. 395, 3 R.R.2d 623 (1964) [hereinafter cited as CBS, Inc.], *with* Letter to the Hon. Michael V. DiSalle, 40 F.C.C. 348 (1962) ("Governor's Radio Press Conference" was held to be exempt).
82. CBS, Inc., 40 F.C.C. 395, 3 R.R.2d 623 (1964). The Commission's ruling extended to candidates for office. For a particularly strong dissent, see Commissioner Loevinger's statement that he would exempt press conferences under either the news interview category or the on-the-spot coverage category. *Id.*

press conference scheduling was at the discretion of the candidate and not *totally* controlled by the licensee, the petitioner was granted equal time.

The requisite elements which are associated with the bona fide news interview have developed primarily to foster the flow of information to the population-at-large, while at the same time safeguarding against the possibility of these forums being usurped by particular individuals for the sole purpose of advancing their candidacies.

D. On-The-Spot Coverage of Bona Fide News Events

To further guarantee the public's access to events of contemporary news value despite their political nature, Congress excluded from the equal time provision those broadcasts of on-the-spot coverage of bona fide news events. Specifically, the legislation exempts the reporting of political conventions and related incidents.[83] In developing a set of criteria for the application of this exemption, Congress again looked to the issue of control. Congress recognized that the broadcasters could not exercise the total control over these news events that they could when utilizing the newscast or news interview format. Due to this impossibility, a measure of journalistic discretion which was equated with control was permitted in the editorializing of the licensee's presentation. The Conference Committee Report to the Senate explained:

> The broadcaster determines in the exercise of his news judgment whether or not a candidate shall appear on a newscast or a news interview. However, in the case of political conventions the respective political parties largely control whether, in what capacity, and to what extent a particular political candidate shall participate in the convention; and the broadcaster exercises his news judgment primarily with respect to whether or not he will provide on-the-spot coverage of a particular political convention, and, if so, what parts of the convention activities he will cover.[84]

In recognizing that other events worthy of on-the-spot coverage would result in even less licensee control, the Conference Report explained further that, aside from convention coverage, the principal test was whether the appearance was intended to aid the

83. 73 Stat. 577 (1969), *as amended* 47 U.S.C. § 315(a)(4) (Supp. IV, 1974). *See* Letter to Lester Gold, Esq., _ F.C.C.2d ___, 38 R.R.2d 223 (1976) (an interview of a legally qualified candidate away from the convention center held to be incidental to the coverage of the convention); Letter to DeBerry-Shaw Campaign Committee, 40 F.C.C. 394, 7 R.R.2d 255 (1964).

84. H.R. Rep. No. 802, *supra* note 42, at 6-7.

candidacies of particular individuals.[85] Consistent with its concern for abuse, Congress directed the Commission that stump speeches or staged events were not within the parameters of this exemption.[86] Further, when a candidate was given broadcast time free of any constraints, the broadcast would fall within the operative provision of Section 315(a). The initial extension of the on-the-spot coverage exemption from the political convention situation came early in a case which involved the broadcast of courtroom proceedings.[87] In the *Fadell* ruling,[88] the Commission was presented with the issue of whether a program which broadcasted courtroom proceedings constituted a use when the presiding judge was a legally qualified candidate for elective office. The Commission found that the program had been on the air for fourteen years while retaining the same format. Furthermore, the Commission determined that the program was concerned with current events of news importance. However, one certainly could not imagine that the judge was merely incidental to the program since he had an obvious role in controlling the program's content.[89] Nevertheless, in holding that the exemption protected the licensee, the Commission adopted the proposition that the term "bona fide"

> was used to emphasize the [Congressional] intention to limit the exemption from the equal time requirement to cases where the appearance of a candidate [was] not designed to serve the political advantage of the candidate.[90]

Ultimately, the Commission found that the judge's appearance was not connected with his candidacy and hence, the appearance satisfied the bona fide criteria. Furthermore, the Commission determined the program to be within the "reasonable latitude for the exercise of the good faith news judgment on the part of the licensee."[91] Thus, the program was brought within the exemption.

The continued expansion of the on-the-spot coverage exemption included both candidate debates broadcasted live in their entirety and candidate press conferences broadcasted live in their entirety. These two areas have produced the most volatile and far-reaching issues to arise out of the equal time concept. Initially, the position

85. *Id.* at 7.
86. *Id.* at 6.
87. Letter to Thomas R. Fadell, Esq., 40 F.C.C. 380, 25 R.R. 288, *aff'd per curiam, sub nom.* Fadell v. FCC, 25 R.R. 2063 (7th Cir. 1963) [hereinafter cited as Fadell].
88. *Id.*
89. The judge exercised control with respect to the court docket and therefore, he could enhance his image by only presiding at important, newsworthy trials during the campaign period.
90. *See* Fadell, 40 F.C.C. 380, 25 R.R. 288 (1963).
91. *Id.*

of the Commission was to include debates between the candidates in the operative provision of Section 315(a). In the *Goodwill Station* decision,[92] the Commission faced two questions involving the broadcasting of a debate between two legally qualified candidates when the debate originated under the auspices of an independent third party. In addressing the question of whether Congress had intended to exclude debates from the equal time provision, the Commission examined three areas. First, the Commission noted that the statute did not expressly provide for a debate exemption. Second, the Commission, having reviewed the proposals introduced at the time of the enactment, gave consideration to the fact that although a debate exemption had been offered, both the House and the Senate rejected this proposal. Third, the Commission evaluated later Congressional action in which legislation was enacted to suspend temporarily the operative provision of Section 315(a), thereby enabling the networks to broadcast the "Great Debates" in 1960, without equal time obligations being imposed.[93] The Commission concluded

> that neither the language of the amendment, the legislative history, nor subsequent Congressional action contemplated an exemption from the 'equal opportunities' provision of Section 315 of the broadcast of a debate between legally qualified candidates.[94]

Once the Commission determined that the exemptions were not intended to exclude debates, they then focused upon the question of "whether a non-exempt program such as a debate [could] be broadcasted as an on-the-spot coverage of a bona fide news event, and thereby attain exempt status."[95] The Commission held that a debate did not come within this specific exemption, reasoning that the program itself and not extraneous factors determined the applicability of the exemption. In examining the debate format, the Commission observed that these events were essentially staged; moreover, the appearance of the candidate was designed to advance

92. Letter to The Goodwill Station, Inc., 40 F.C.C. 362, 24 R.R. 413 (1962) [hereinafter cited as Goodwill Station, Inc.].
93. Equal Time Provision Suspension Act, Act of Aug. 24, 1960, PUB. L. No. 86-677, 73 Stat. 557. The "Great Debates" were in reality glorified news interviews with two candidate participants. Had the networks deleted the closing statements featured in these broadcasts and incorporated such interviews within regularly scheduled programs, albeit an expanded version in a different time period, the news interview exemption could arguably have been applied. Letter to William K. Shearer, 49 F.C.C.2d 1429, 31 R.R.2d 1181 (1974) (appearance of two candidates within an exempt news interview does not destroy the exemption). *But see* Chisholm v. F.C.C., No. 72-1505 (D.C. Cir.), 24 R.R.2d 2061 (1972).
94. *See* Goodwill Station, Inc., 40 F.C.C. 362, 24 R.R. 413 (1962).
95. *See* note 93 *supra.*

his or her candidacy. Therefore, regardless of their origin, debates were not bona fide news events and thus, not within the exemption.

In the *Wychoff* ruling,[96] a factual situation similar to *Goodwill Station,* the Commission expanded its rationale for rejecting the proposition that debates could be brought under the exemption of on-the-spot coverage. The licensee argued that the sole criterion for determining the existence of a bona fide news event was the licensee's exercise of good faith news judgment. The licensee contended that the intent with which the *broadcast* was made, and not the *appearance* of the candidate, was the true test of the bona fide news event. The licensee argued that this construction would be consistent with Congress' intent to prevent broadcasters from consciously aiding the candidacies of particular individuals. Therefore, according to the licensee, Congress only wanted to prevent unequal politically motivated *broadcasts* of candidates unless these broadcasts came within an expressed exemption. The gravamen of this argument was equating broadcasts with appearances. In rejecting this rationale, the Commission took a prospective view of the licensee's position and concluded:

> [I]f the sole test of the on-the-spot coverage exemption is simply whether or not the station's decision to cover the event and to put it on a broadcast program constitutes a bona fide news judgment, there would be no meaning to the other three exceptions in Section 315(a) since these, too, all involve a bona fide news judgment by the broadcaster. Carried out to its logical conclusion, this approach would also largely nullify the objectives of Section 315 'to give the public the advantage of a full, complete, and exhaustive discussion, on a fair opportunity basis, to all locally qualified candidates and for the benefit of the public at large.' In any campaign for political office which attracts the interest of the electorate, the statement and actions of a candidate for that office could always be deemed . . . 'on-the-spot coverage of bona fide news events.' And this would be so whether the statement and appearance is a debate with an opposing candidate or is a separate speech and individual appearance of but one candidate. It is clear, however, that the 1959 amendment which was enacted by the Congress reflected a resistence by the Congress to any such broad scale delimitation of a broadcaster's obligation under Section 315.[97]

Thus, the Commission regarded the licensee's proposed test as devitalizing the equal time doctrine, contrary to the clear legislative intent.

96. Letter to CBS, Inc., and NBC, Inc., 40 F.C.C. 370, 24 R.R. 401 (1962).
97. *Id.* at 371, 24 R.R. at 402.

The *Fadell, Goodwill Station* and *Wychoff* rulings delineated a two-pronged test for determining the bona fide nature of a news event. First, the event must be insulated from possible candidate manipulation, and second, the event must have news value regardless of the candidate's presence.[98] In a subsequent ruling,[99] the Commission extended this dual bona fide news event test to presidential press conferences. Applying the same rationale used in the debate cases, the Commission concluded that these events were within the operative section of the statute, and not excluded.

In the spring of 1976, in *Chisholm v. FCC*,[100] the Commission ruling[101] was affirmed which permitted candidate debates under limited circumstances and candidate press conferences to come within the on-the-spot coverage exemption. The court seemingly accepted Commissioner Loevinger's dissenting statement in *Wychoff*,[102] that debates and press conferences were newsworthy, notwithstanding the partial control that candidates exerted over them. The court stated:

> Nothing in the language of subsection 315(a)(4) itself would indicate that debates or press conferences could not be considered 'news events' worthy of coverage. On the contrary, the inherent newsworthiness of speeches and debates seems no greater or less than that of 'political conventions and activities related thereto,' events expressly within the scope of the exemption . . . . We remain unconvinced by petitioners' arguments that those events are distinguishable based on the degree of control by the candidate, or the degree to which candidates tailor such events to serve their own political advantages. It is more reasonable to believe, as the Commission apparently does, that *any* appearance by a candidate on the broadcast media is designed, to the best of the candidate's ability, to serve his own political ends. There is ample support in the legislative history for the Commission's conclusion that a candidate's partial control over a press conference or debate does not, by itself, exclude coverage of the event from Section 315 (a)(4). This conclusion is consistent with the Commission's new position that, absent evidence of broadcaster intent to advance a particular candidacy, the judgment of the newsworthiness of an event is left to the reasonable news judgment of professionals.[103]

98. *See* Derby, *supra* note 28, at 293.
99. CBS, Inc., 40 F.C.C. 395, 3 R.R.2d 623 (1964).
100. Chisholm v. FCC, 538 F.2d 349 (D.C. Cir. 1976), *aff'd sub nom.* McCarthy v. Carter, 45 U.S.L.W. 3314 (U.S. Oct. 26, 1976).
101. Aspen Institute Program on Communications and Society, 55 F.C.C.2d 697, 35 R.R.2d 49 (1975).
102. *See* CBS, Inc., 40 F.C.C. 395, 3 R.R.2d 623 (1964).
103. Chisholm v. FCC, 538 F.2d 349, 358–59 (D.C. Cir. 1976), *aff'd sub nom.* McCarthy v. Carter, 45 U.S.L.W. 3314 (U.S. Oct. 26, 1976).

If four restraining features can be shown to exist, debates between candidates can be presented without subjecting the licensee to equal time liability. To be exempt, debates have to be presented: (1) under the auspices of third parties, (2) live in their entirety, (3) as a news event of contemporary importance, and (4) in the absence of station favoritism. While the first two limitations are designed to satisfy the on-the-spot requirement of the exemption, the third and fourth limitations establish the good faith requirement which is to be the sole bona fide test.

The court clarified the underlying public policy reason for exempting press conferences by noting that President Ford had declared his candidacy fifteen months prior to the general election.[104] If the equal time provision had been operational with respect to press conferences, licensees and networks would conceivably curtail their coverage of presidential press conferences to minimize equal time demands from the President's opponents. Under the circumstances, the public's interest in presidential reports would be sufficiently important to outweigh the candidate's right to equal access of the media. However, since it would be repugnant to the statute's intent to permit one candidate to possess unfettered discretionary time before a mass audience, equal time treatment could not be ignored entirely. Therefore, in an effort to harmonize the conflicting legislative purposes, the court further extended the press conference exemption to include candidate sponsored press conferences.

In reaching the final holding, the court rejected the two-pronged bona fide test in favor of one based solely on the licensee's exercise of good faith news judgment. The two-pronged bona fide test would bar debates and press conferences from attaining bona fide status since the candidate had some discretionary control over these events. The court reasoned that in the absence of express Congressional guidelines for determining an event's bona fide character, the Commission acted reasonably. Moreover, the Commission's new standard was consistent with the Congressional purpose expressed in the legislative history to the 1959 amendment. The majority opinion explained that the new test of good faith conformed to the Congressional intent to effect broad remedial measures in revamping Section 315(a) by fostering dissemination of information involving significant political events and vesting greater journalistic discretion in broadcast licensees. In an alternative line of reasoning, the court invalidated the two-prong bona fide test on grounds that this test had incorporated the incidental

104. *Id.* at 353.

test within its mechanism, a standard which Congress had expressly rejected.

In his dissent, Judge Wright attacked the proposition that Congress intended to include debates in the exemption. He emphasized that by rejecting proposals which would have expressly excluded debates from Section 315(a), Congress, in effect, demonstrated the intent to exclude debates from the exemption parameters, the position originally set forth by the Commission. Contrary to the majority's liberal construction of the statute, Judge Wright concluded that the exclusion of an express debate category from the amendatory legislation demonstrated a Congressional concern to avoid a broad, vague exemption.[105]

With respect to his attack on the exempt status applied to candidate press conferences, Judge Wright suggested that, notwithstanding the rejection of the incidental test by Congress, no intent existed to incorporate staged political events such as press conferences within the on-the-spot news coverage exemption. The correct analysis of bona fide news events remained the two-pronged test of control and purpose. Judge Wright acknowledged that exceptions existed to this test since "neither factor [could] serve as a litmus test for distinguishing all exempt events from all non-exempt events . . . ."[106] However, at a minimum, there must be an absence of candidate control over the event to be within the exemption.[107] Thus, Judge Wright concluded that a press conference was analogous to a stump speech or a staged political event in which the candidate retained partial control, and therefore, it was not within the parameters of the exemption.

Aside from Judge Wright's desire to retain the two-pronged bona fide test, he rejected the majority's contention that Congress had intended to invest licensees with the discretion to determine whether an event was exempt. Judge Wright supported his argument by recognizing that the good faith test would so expand the exemption that a devitalization of the equal time provision would result, a proposition first announced by the Commission in *Wychoff*. Secondly, the test would defeat Congress' intent to supervise the administration of the Act, with the Commission being assigned

105. *Id.* at 374 *n.*35.
106. *Id.* at 380.
107. Judge Wright distinguished political conventions from press conferences under the theory of no control. In the former event, while the candidate was an essential element, there was a lack of control of the presentation, since the event occurred only once during the election. In the latter event, however, the candidate could repeatedly call press conferences at his whim. When total control is exercised by the candidate, the event would be absolutely barred from the parameters of the exemption. *See* Goodwill Station, Inc., 40 F.C.C. 362, 24 R.R. 413 (1962).

regulatory duties. If the licensees were to determine the bona fide character of the event, the Commission's task would be limited to the determination of the licensee's good faith. In the face of the vagaries associated with this standard and the resulting difficulty in its application, the Commission would, in effect, be delegating its regulatory authority over the licensees to the licensees themselves. A situation would be created in which those who were to be regulated were, in fact, the regulating agency. Not only would this delegation of authority be clearly improper, but it would also conflict with the legislative intent. Judge Wright contended, therefore, that journalistic discretion was designed to permit the licensees to decide the question whether an event was to be broadcasted *only after the event came within one of the exempt categories.*[108]

In conclusion, Judge Wright argued that the rejection of the incidental test was not intended to give deference to licensee good faith news judgment, but rather, an attempt to avoid an ambiguous test. Congress had delegated the responsibility to develop an acceptable test for determining the bona fide nature of news events to the Commission. The Commission accomplished this task when it promulgated the two-pronged bona fide test. The effects of this test, however, were abrogated by the institution of the licensee good faith news judgment test.

V. CONCLUSION

The *Chisholm* decision is one of limited application as it pertained to candidate debates. The restraining features of independent third party sponsorship together with live and total coverage are at best artificial. The element of good faith has always had merit and is not being questioned. Therefore, no reason exists to believe that the *Chisholm* debate doctrine will not be extended to achieve parity with the candidate press conference exemption which requires only good faith news judgment. If the controlling test is one of good faith, little reason exists to prevent the broadcast of newsworthy events on a delayed basis. The mere fact that the broadcast is not live but rather transmitted on a twenty-four hour delayed basis would not negate the bona fide standard exhibited by the live news event.[109] Therefore, consistent with the overriding policy desiring informational dissemination (emphasized by *Chisholm*), these delayed presentations should come within the exemption. When considering events sponsored by the licensee, the

108. *See* note 100 *supra.*

109. Letter to Sally V. Hawkins, ___ F.C.C.2d ___, 38 R.R.2d 222 (1976), *reconsidered,* ___ F.C.C.2d ___, ___ R.R.2d ___ (1976) (a twenty-four hour delayed broadcast is permissible, any longer delay will go to the issue of licensee good faith).

rationale for requiring independent sponsors would fail in a similar manner. One need only ask the question of whether the staging of presidential debates by the licensee is fatal to the newsworthiness of these events. On the other hand, if the good faith test is adopted as the sole test, it would effectively immobilize the Commission from implementing the equal access policy, since the determination of an event's exempt status would then be dependent upon the licensee's discretion. The licensees would gain *de facto* regulatory responsibilities, and Section 315(a), as it pertains to journalistic coverage of political campaigns, would correspondingly become ineffective.[110] Moreover, the injured candidate would be without a remedy since no common law right of equal access to the media has been recognized in the courts and no individual remedy has been incorporated into the statute.[111]

Whereas the *Daly* decision went too far in favor of the equal access policy, *Chisholm* has upset the intended equilibrium in favor of the informational policy. Therefore, the Commission and the courts should take the first opportunity to reinstate the holdings of *Goodwill Station, Wychoff* and *CBS,* returning to the two-pronged bona fide test pending further Congressional directives. The Commission is assigned the difficult task of maintaining a tenuous balance between frequently conflicting legislative social policies. However, the Commission is not empowered to devitalize either of the integral elements of the equation; rather, the Commission must comply with Congressional directives.[112] If the Commission's current rulings with respect to Section 315(a) reflect the contemporary attitude of Congress, Congress should legislate any future modifications to the statute.

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110. *See* Derby, *supra* note 28. *See also* the majority opinion in Chisholm v. FCC, 538 F.2d 349 (D.C. Cir. 1976) (disregarding S. REP. No. 562, *supra* note 21; H.R. REP. No. 802, *supra* note 42, in light of the omission of the incidental test). It is argued here, that this posture distorts the intent with which the change was made. The shift from the incidental test to one where there was an absence of intent to advance the candidacy of individuals was an attempt to avoid an ambiguous test. Therefore, this change should not be read as a disavowal of the legislative purposes, nor should the standard be regarded as changed.

111. Daly v. CBS, Inc., 309 F.2d 83 (7th Cir. 1962).

112. *See* H.R. REP. No. 802, *supra* note 42; 105 CONG. REC. 14440 (1959). Senator Pastore remarked: "We are not repealing section 315. We are merely writing into section 315 an exemption which will take care of the very ridiculous situation which is presented because of the *Lar Daly* decision."