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POLITICAL BROADCASTING AFTER THE ASPEN RULING: LEGISLATIVE REFORM OF SECTION 315(a) OF THE COMMUNICATIONS ACT OF 1934

Stuart N. Brotman*

The Federal Communications Commission (FCC or Commission), responding in 1975 to a petition filed by the Aspen Institute's Program on Communications and Society, expressly reversed two of its prior decisions that limited the scope of the exemptions of section 315(a) of the Communications Act of 1934.¹ These prior decisions, *The Goodwill Stations, Inc. (WJR)*² and *National Broadcasting Co., Inc. (NBC (Wyckoff))*³ involved

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The views presented herein are solely those of the author, and are not intended to represent the position of the National Telecommunications and Information Administration.

¹ 47 U.S.C. § 315(a) (1976). Section 315(a) states:

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 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. 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 chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

² 40 F.C.C. 362 (1962).

³ 40 F.C.C. 370 (1962).

broadcast coverage of political debates staged by nonbroadcast organizations, the Economic Club of Detroit and the convention of the United Press International, respectively. The FCC held that both programs triggered the equal opportunities provision for political candidates embodied in section 315(a) and that they did not fall within one of that section's four exemptions.⁴

The Aspen Institute's petition sought a revision or clarification of the Commission's policies concerning the applicability of section 315(a) to joint appearances by candidates before nonbroadcast groups.⁵ The Aspen Institute argued successfully that such appearances should be exempt from the equal opportunities requirement, since under a broad construction of one of the legislative exemptions, they could be characterized as on-the-spot coverage of a bona fide news event.⁶

The FCC's new interpretation of section 315(a) in the *Aspen* ruling greatly reduced its inhibitory effect on broadcasters. The ruling, however, has created further interpretive problems regarding the broadcast debate format, and has not completely resolved the more general problem of giving the electorate greater and more direct exposure to candidates during campaigns through programming that forces candidates to confront each other on the major issues. This article will discuss the background of section 315(a),⁷ then explain each of its exemptions. Finally, it will propose possible reforms in the area of political broadcasting in light of the *Aspen* ruling.

I. SECTION 315(a) AND ITS EXEMPTIONS

Section 315(a) requires a broadcast licensee to afford precisely equal opportunities to all legally qualified candidates for a given public office if it permits any candidate for such office a "use" of the station.⁸ It is applicable to state and local as well as to federal

⁴ See note 1 *supra*.

⁵ CBS, Inc. filed a separate petition requesting a declaratory ruling that presidential press conferences are exempt for the equal opportunities provision. *Aspen Inst. Program on Communication and Soc'y*, 55 F.C.C.2d 697, 698 (1975), *aff'd sub. nom* Chisholm v. FCC, 538 F.2d 349 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976).

⁶ *Id.* at 703-08.

⁷ See generally Note, *FCC Implementation of the Section 315(a): The Disappearance of the Equal Time Doctrine*, 6 U. BALT. L. REV. 70 (1976); 10 CONN. L. REV. 236 (1977).

⁸ As a general rule, any "use," however slight, of broadcast facilities by a legally qualified candidate imposes an obligation on broadcasters to afford equal opportunities to all other candidates for the same office. Thus, if a candidate's voice or image appears in a readily identifiable manner, even if only for a brief period, a "use" has occurred. See, e.g., *Harry M. Plotkin*, 23 F.C.C.2d 758 (1966); cf. *National Urban Coalition*, 23 F.C.C.2d 123 (1970) (incidental appearance of future gubernatorial candidate in which he was not "readily identifiable" did not constitute a "use" under § 315(a)).

elections.⁹ The phrase "equal opportunities" comprises both equal free use of air time, if one candidate receives any free time, and the right to purchase air time at rates¹⁰ and times comparable to those offered to other candidates for the same office.¹¹ There are four instances in which a station is not required to provide an equal opportunity even though a use has occurred. Exemptions are provided when a candidate appears in 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), or (4) on-the-spot coverage of bona fide news events.¹² Any program in one of these categories does not trigger an equal opportunities obligation, although the station must still comply with the general fairness doctrine.¹³

The underlying legislative objectives of section 315(a) are twofold and tend to contradict each other. The first objective of section 315(a) is to provide the public with maximum access to the views of all candidates; that is, to promote the necessary wide-open debate required for an informed electorate under the First Amendment.¹⁴ The second objective is to encourage fairness in the political process by requiring that broadcasters give equal opportunities to those seeking the same office. In practice, however, insuring equal opportunities for all candidates often has resulted in a licensee's decision not to afford free time for presentations by the major candidates where there are a number of minor party candidates who have a mandatory right to free time.

⁹ See *Farmers Educ. & Coop. Union of America v. WDAY, Inc.*, 360 U.S. 525, 535 (1959).

¹⁰ The Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 103(a)(1), 86 Stat. 7 (1972), amended § 315 of the Communications Act of 1934 to require that the charges made for the use of a broadcasting station by any person who is a legally qualified candidate for any public office cannot, during the forty-five days preceding a primary election and during the sixty days preceding a general or special election, exceed the lowest unit charge of the station for the same class and amount of time for the same period. See generally *Licensee Responsibility Under Amendments to the Communications Act of 1971*, 47 F.C.C.2d 516 (1974).

¹¹ Section 315(a) does not impose upon any licensee an obligation to allow the "use" of its station by political candidates. Section 312(a)(7), however, does give the FCC authority to revoke a license if a licensee willfully or repeatedly fails to allow reasonable access 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. 47 U.S.C. § 312(a)(7) (1976).

¹² 47 U.S.C. § 315(a) (1976).

¹³ Under § 315(a), the more generalized fairness doctrine requires the licensee to present contrasting viewpoints on issues of public importance, but allows the licensee to select the time, format, and spokesperson for presentation of contrasting viewpoints on such issues. See generally *The Handling of Public Issues Under the Fairness Doctrine and Public Interest Standards of the Communications Act*, 48 F.C.C.2d 1(1974).

¹⁴ See generally T. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 1-15 (1966).

To invite such a situation where free time requirements would be uncontrolled and broadcast schedules interfered with is contrary to the economic interest of the broadcaster. The practical result has been to keep candidate air time to a minimum. Section 315(a) thus has a chilling effect on political coverage and ultimately disservices the electorate, since it goes against the First Amendment interest of preserving "an uninhibited marketplace of ideas in which truth will ultimately prevail."¹⁵ This suggests an implicit, though equally important, set of competing interests: the broadcaster's desire to control programming and to maintain a profit, and the public's need to obtain as much information as possible about all candidates.

II. THE *Aspen* RULING

In *WJR*¹⁶ and *NBC*,¹⁷ the Commission maintained that only candidates' appearances that were "incidental to" the presentation of a bona fide news event would qualify for the on-the-spot news coverage exemption; under these rulings the intention, purpose, and judgment of the broadcast licensee was deemed irrelevant.¹⁸ In *Aspen*, however, the Commission acknowledged that its initial interpretation of the legislative history that had accompanied the enactment of the four exemptions to section 315(a) was in error because it had been based upon language stricken in conference from the final bill.¹⁹ Moreover, the Commission noted other language in the legislative history which supported broad journalistic discretion by the licensee and rejected the idea that a news event cannot be exempt when the candidate's appearance is the central aspect of the broadcast event.²⁰ Thus, the *Aspen* ruling extended the definition of the bona fide news event exemption of section 315(a) to debates between qualified political candidates initiated by nonbroadcast entities in a nonstudio setting and to press conferences conducted by the candidates themselves. The FCC required that the characterization of these programs as bona fide news events be based upon a good faith determination by the broadcaster, and that the broadcaster demonstrate no favoritism in its presentation of these events.²¹ The Commission

¹⁵ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). See also *Garrison v. Louisiana*, 379 U.S. 64 (1964); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

¹⁶ See note 2 *supra*.

¹⁷ See note 3 *supra*.

¹⁸ See *NBC (Wyckoff)*, 40 F.C.C. 370 (1962).

¹⁹ *Aspen Inst. Program on Communications and Soc'y*, 55 F.C.C.2d 697, 703-04 (1975).

²⁰ *Id.* at 704-05.

²¹ *Id.* at 708.

indicated that the policy underlying the change was to allow broadcasters to make "a fuller and more effective contribution to an informed electorate."²² The Commission's ruling was upheld on appeal to the United States Court of Appeals for the District of Columbia in *Chisholm v. FCC*.²³

The immediate effect of the *Aspen* ruling was to permit as exempt programming the three broadcast debates in 1976 between Jimmy Carter and Gerald Ford and the single broadcast debate between Walter Mondale and Robert Dole. In accordance with the FCC's interpretation, the debates were staged by a non-broadcast entity, the League of Women Voters, in various nonstudio settings, including the Palace of Fine Arts in San Francisco. These debates were, of course, produced with radio and television audiences in mind. Consequently, the three commercial networks were invited to participate in the planning of the debates, although the League of Women Voters clearly controlled the process in order to comply with the *Aspen* ruling. It selected the dates and locations, the format, and the panelists who questioned the candidates. The role of the networks was limited primarily to remote production and transmission, since the networks' exercise of broadcast journalism was preempted by the Commission's requirement that exempt programming in the debate or press conference categories must not present the opportunity for broadcaster abuse.²⁴

Although the airing of these debates was a salutary accomplishment, the infrequent staging of similar debates in subsequent elections, particularly at the state and local levels, has demonstrated that the *Aspen* ruling is, at best, a stop-gap measure until legislative revision takes its place. The ruling is unsatisfactory primarily because it does not logically delineate what constitutes exempt programming. Thus far, the *Aspen* ruling has been applied only to debates or press conferences, but this limitation seems difficult to sustain. Other programming formats, such as a series of programs featuring candidates discussing the "great issues" of the campaign, may be equally suitable for informing the electorate. Under present law, however, a broadcaster cannot block out air time for such programming without triggering the mandatory equal time requirement.²⁵ Furthermore, *Aspen* does

²² *Id.* at 706.

²³ There, the court deferred to the Commission's new interpretation, which it felt had "substantial support" in general legislative intent in spite of an "inconclusive" legislative history. 538 F.2d 349 (D.C. Cir. 1976). The Supreme Court subsequently denied further review. *Chisholm v. FCC, cert. denied*, 429 U.S. 890 (1976).

²⁴ *Aspen Inst. Program on Communications and Soc'y*, 55 F.C.C. 2d 697, 707 (1975).

²⁵ *Id.*

not address the situation where there is a multiplicity of candidates, a situation that frequently occurs at the state and local levels. A broadcaster in this case would probably not plan an informational series about the issues because a "floodgate" could be created if all the candidates in the campaign demanded equal time. The *Aspen* ruling should be interpreted to permit a broadcaster to exercise bona fide news judgment by covering *any* appearance of a candidate in any primary or general election campaign. The FCC has remained silent to date in this regard.

The practical limitations of the *Aspen* ruling further demonstrate that it should not be accepted as the best solution in striking a balance between access of candidates to the airwaves and equality of treatment for all candidates. Nor should it be accepted as the best means of reconciling the journalistic and economic interests of broadcasters with the informational needs of the viewing public. Since a nonbroadcast entity must first sponsor the event in a "neutral" setting before the broadcaster can make plans to cover it, the broadcaster must assume a passive or reactive role under *Aspen*.

Although *Aspen* may currently provide an adequate solution on the national level, where groups such as the League of Women Voters have both personnel and money to stage debates in conformance with the ruling, there is no assurance that these resources will continue to be available.²⁶ At a minimum, it strains the resources of nonbroadcast groups, forcing them to expend considerable energies and significant portions of their budgets to develop broadcasting expertise. Even assuming that there would continue to be no limitation on broadcasters donating money to nonbroadcast groups to sustain the production costs of debates,²⁷ and that broadcasters would donate money in the absence of some control in producing the program, this is not the most efficient solution. The broadcaster already has the production expertise, the studios, and journalists who are familiar with the candidates. The same result could therefore be achieved at a significantly smaller cost if the producer were able to use these available

²⁶ Indeed, the League of Women Voters has recently indicated that it may not have sufficient funds to sponsor a series of debates during next year's presidential election. See *New York Times*, Oct. 24, 1979, § A, at 16, col. 1.

²⁷ The Federal Election Commission (FEC) proposed regulations in 1979 that would have prohibited broadcasters from contributing money or production services to sponsor debates. It had unsuccessfully proposed a similar measure in 1977. The latest proposal was also unsuccessful; it was blocked by a floor resolution introduced by the ranking majority and minority members of the Senate Rules Committee. Nevertheless, there remains the possibility that the FEC will, in the future, seek to restrict this source of funding. *BROADCASTING*, Sept. 10, 1979, at 32; Sept. 17, 1979, at 29.

resources. This efficiency rationale is even more urgent in state or local campaigns, where nonbroadcast entities may be unwilling or unable to assume the major responsibility of producing a series of media debates.

III. LEGISLATIVE REFORM SUGGESTED BY *Aspen*

A. *Elimination of Section 315(a)*

The broadest legislative response to the *Aspen* ruling would be the complete elimination of section 315(a), so that the only limitation on broadcaster discretion would be the fairness doctrine.²⁸ The House bill²⁹ that would have rewritten the Communications Act of 1934, which recently was killed in the House Subcommittee on Communications, favored the repeal of the equal opportunities requirement, at least where free air time was at issue.³⁰ This feeling, however, was not shared by the corresponding subcommittee in the Senate. Two bills introduced there to amend the Communications Act of 1934 completely failed to deal with the political broadcasting area.³¹ Regardless of these factors, a full repeal of section 315(a) is inadvisable. If it were fully repealed, the balance would be tilted too heavily toward the access rationale without giving adequate attention to the principle favoring equality of treatment among all candidates seeking the same office. Moreover, full repeal would change only the standard for resolving disputes in the political broadcasting area: the fairness doctrine would then be used to evaluate, on a case-by-case basis, whether broadcasters presented contrasting viewpoints of candidates receiving air time. The broadcaster would thereby receive greater journalistic license, but the cumbersome and frequently inconsistent rulings under the fairness doctrine suggest that administrative chaos might well be the most immediately realized effect of such a reform measure.³²

²⁸ For a discussion of § 315(a), see note 13 *supra*.

²⁹ H.R. 3333, 96th Cong., 1st Sess. (1979). Section 463, which covered equal opportunities for political candidates, was made applicable only where paid air time was involved.

³⁰ Under § 463(a)(1), the equal time requirement would only apply to purchased time. A Senate bill introduced last year also indicated sentiment favoring the repeal of § 315(a). See S. 22, 95th Cong., 2d Sess. § 4 (1978). But as indicated in the text accompanying note 31 *infra*, this sentiment was not present on the Senate side in the most recent session of Congress.

³¹ See S. 611 & S. 622, 96th Cong., 1st Sess. (1979).

³² Data from the 1978 elections supports the argument that administrative chaos would result if the broader and more time consuming standard of the fairness doctrine replaced the equal opportunities requirement. For example, in September and October of 1978, the final two months of the campaign, the FCC's Complaints and Compliance Division re-

B. Restriction of Section 315(a) to Presidential and Vice-Presidential Candidates

In 1960, on a one-time-only basis, Congress passed a joint resolution suspending the application of the free time, equal opportunities provision to candidates for President and Vice President, although it did make clear that the general fairness doctrine remained applicable to those candidates.³³ This resolution enabled the television networks to make time available for the Kennedy-Nixon debates and demonstrated that suspension of section 315(a) reduced the inhibitions of broadcasters against granting candidates free air time.³⁴ Politically, this reform measure may once again be the most acceptable to Congress because it is based on precedent and is limited to the most visible political race. Although this solution would smooth over the inconsistencies of the *Aspen* ruling, it would be applicable only to the presidential and vice-presidential candidates. Accordingly, the resurrection of this limited suspension of section 315(a) would not be very meaningful for political broadcasting as a whole.

C. Restriction of Section 315(a) to Statewide Elections

Yet another possibility was suggested by an earlier draft of the House bill that rewrote the Communications Act of 1934.³⁵ This bill presented an approach that keyed the exemptions of section 315(a) to the office being sought. Under this proposal, the equal opportunities provision would have been made inapplicable to all candidates for President, Vice President, United States Senator, and to candidates for any other office for which a statewide election is held (e.g., Governor or Attorney General).³⁶ The theory behind this proposal was that since there are many broadcast stations available in such races, any abuse by an individual station in "freezing out" certain candidates would have minimal impact. This incremental approach would have expanded the scope of reform that Congress had chosen in the past. Ultimately,

ceived 2,810 calls from broadcasters requesting help in interpreting the equal opportunities provisions and from candidates complaining about broadcasters. This figure does not include the number of complaints and inquiries received in the mail. BROADCASTING, Nov. 6, 1978, at 7.

³³ See Act of Aug. 24, 1960, Pub. L. No. 86-677, 74 Stat. 554 (1960).

³⁴ Kennedy and Nixon, for example, received much more free time from networks than Johnson and Goldwater received in 1964, when § 315(a) was again in full force: almost forty hours in 1960 vs. less than five hours in 1964. R. MACNEIL, *THE PEOPLE MACHINE: THE INFLUENCE OF TELEVISION ON AMERICAN POLITICS* 285-86 (1968).

³⁵ H.R. 13015, 95th Cong., 2d Sess. (1978).

³⁶ *Id.* § 439(a)(1)(B).

however, it was an inadequate solution because it was both over-inclusive and underinclusive. The proposal failed to take into account either large urban areas where there are numerous stations to cover non-statewide races³⁷ or sparsely populated states where there are few stations available to cover statewide races.³⁸ Moreover, the federal office that is closest to the voter's geographic interest, United States Representative, was not covered by this plan, since House races are determined in individual districts rather than throughout the state as a whole.

D. Restriction of Section 315(a) to "Significant" Candidacies

A broader restriction of the scope of section 315(a) that shifts the emphasis from the office sought to the importance of the candidacy is perhaps more desirable. The present equal opportunities scheme applies to all legally qualified candidates. Under many state laws, it is easy for a person to qualify for a place on the ballot and thus claim the status of a "legally qualified candidate."³⁹ An abundance of fringe parties (*e.g.*, Vegetarian, Prohibition, Socialist Labor)⁴⁰ provides a disincentive for broadcasters to

³⁷ For example, the metropolitan area (ADI) of New York City has sixteen television stations, and the Los Angeles ADI has fifteen television stations. BROADCASTING YEARBOOK 1978, at B-41, 50 (1978).

³⁸ In contrast, the entire state of Nevada has nine television stations and New Hampshire's total is eight. *Id.* at B-116.

³⁹ The Supreme Court has been an influential force in this area. For example, three of its decisions during the past two decades have, on constitutional grounds, lowered the threshold for appearing on the ballot as a candidate in California, Texas, and Ohio, respectively. See *Lubin v. Panish*, 415 U.S. 709 (1974); *Bullock v. Carter*, 405 U.S. 134 (1972); *Williams v. Rhodes*, 393 U.S. 23 (1968).

⁴⁰ This is not fanciful. In 1960, at the time of Nixon-Kennedy debates and the suspension of the equal time requirement, there were fourteen other candidates for the office of President on the ballots in several states: C. Benton Coiner, Conservative Party of Virginia; Merritt Curtis, Constitution Party; Lar Daly, Tax Cut Party; Dr. R.L. Decker, Prohibition Party; Farrell Dobbs, Socialist Worker and Farmers Party, Utah; Orval E. Faubus, National States Rights Party; Symon Gould, American Vegetarian Party; Eric Hass, Socialist Labor Party, Industrial Government Party, Minnesota; Clennon King, Afro-American Unity Party; Henry Krajemski, American Third Party; J. Bracken Lee, Conservative Party of New Jersey; Whitney Harp Slocum, Greenback Party; William Lloyd Smith, American Beat Consensus; Charles Sullivan, Constitution Party of Texas. See *Amicus Curiae* Brief for League of Women Voters, Common Cause, and Aspen Inst. in Opposition to Certiorari at 6 n.4, *Chisholm v. FCC*, 429 U.S. 890 (1976). In 1964, the cost estimates were \$2,500,000 if the networks agreed to give equal time to seven other candidates because of a telecast by President Johnson. *Goldwater v. Federal Communications Commission*, Case No. 18963 (D.C. Cir. 1964) (Brief for Federal Communications Commission at 19). The figure would be much higher today. See also *Political Broadcasting — 1970: Hearings on H.R. 13721, H.R. 13722, H.R. 13751, H.R. 13752, H.R. 13935, H.R. 14047, H.R. 14511, and S. 3637 before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. (1970) (statement of FCC Chairman Burch).

grant free time to the significant candidates, since one non-exempt appearance triggers the equal opportunities provision for all other candidates seeking the same office. Narrowing the definition of a "legally qualified candidate"⁴¹ to *significant* candidates would ameliorate the problem. A percentage based on petition signatures could be used to determine whether a given candidate was "significant." However, this is an expensive and time-consuming process that should generally be avoided. As a practical matter, the only way to evaluate the importance of a candidate would be to consider his or her party's showing in the last election. A low percentage such as one or two percent could be used. The requisite information would be readily available in public records. Under this proposal, the definition of a "legally qualified candidate" would be further limited to apply only to free time. Since section 315(a) has caused no practical problems in its application to paid time, there is no reason to deny any candidate the opportunity for equal treatment when paid time is involved.

Under this scheme, not all candidates would receive equal treatment when they demand free time. However, there appears to be little benefit from insuring equal treatment for candidates whose public support is virtually insignificant and there is the potential detriment of shutting off vigorous debate.⁴²

The troublesome limitation of this proposal is that, as a practical matter, it would necessitate limiting the equal opportunities provision to candidates in general, partisan elections, because candidates in primaries often do not have any prior quantifiable base of support. Additionally, since primaries involve intra-party selection, a determination of a party's support in the previous primary election would be illogical. Primaries have become an increasingly important component of the electoral process, and success in the primaries often means success in gaining a party's nomination for the general election. Contrary to the practice of twenty years ago, most delegates to political conventions are

⁴¹ The FECA campaign funding standards, 2 U.S.C. § 431(b)(1976), are inapposite. Since the FECA standard for "legally qualified candidate" is looser than that of the FCC, there is no reason to articulate it as a model; if anything, the existing standard is too broad, so that an excessive number of "candidates" could become eligible for equal time, resulting in a reduction of air time for political broadcasting.

⁴² Where there are significant third-party candidacies, such as John Lindsay running as the Liberal Party candidate for mayor in New York City or James Buckley running as the Conservative Party senatorial candidate in New York, broadcasters would also have to afford equal time periods for non-exempt appearances under this plan. The views of fringe candidates, of course, would still be presented under the fairness doctrine, but this matter would be within the broadcaster's discretion, e.g., NBC program with all the fringe candidates given five minutes each to state their views.

picked by rank-and-file voters in primaries rather than by professional politicians. For example, of the 3,331 delegates to be selected for the 1980 Democratic Convention, over two-thirds — enough delegates to nominate a candidate — will be chosen in direct primaries. A similar situation will be applicable at the Republican Convention.⁴³ Voters in primary elections deserve exposure to the candidates and their issues, yet a percentage scheme that might promote exposure in a general, partisan election would fail to do so for the primaries.

E. Expansion of Exempt Programming Categories

A much simpler and preferable approach which can be made applicable to both primaries and general, partisan elections would be a legislative revision of section 315(a) that follows the lead of the *Aspen* ruling and further expands the exempt programming categories.⁴⁴

First, there should be an exemption for any joint or “back-to-back” appearances of candidates. This would allow a station or a network to air a series of “great issues” programs during the campaign without triggering the equal opportunities obligation. Second, an exemption is needed to cover any other program of a news or journalistic character that meets all of the following criteria: (i) the program is regularly scheduled; (ii) its content, format, and participants are determined by the licensee or network; (iii) it explores conflicting views on a current issue of public importance; (iv) it is not designed to serve the political advantage of any legally qualified candidate. This provision would allow for broadcaster-produced debates⁴⁵ and for the first time would allow candidates to appear on journalistic programs like “The Advocates,” not to advance their candidacies, but to discuss an important topical issue.

⁴³ Hunt, *Endorsement Race is Heated But Means Little*, Wall St. J., Oct. 26, 1979, at 22, col. 2.

⁴⁴ The United States Court of Appeals for the District of Columbia has expanded the FCC's *Aspen* ruling slightly, so as to permit the later airing, within twenty-four hours, of a prerecorded debate or press conference if the program otherwise conforms with *Aspen*. Office of Communications of United Church of Christ v. FCC, No. 76-1878 (D.C. Cir. Sept. 11, 1978). But given the great deference that the courts have afforded to the Commission's judgment in evaluating the scope of § 315(a) exemptions, judicial resolution of remaining ambiguities does not seem promising. An example of this deference is described in note 23 and accompanying text *supra*. See also note 7 *supra*.

⁴⁵ The licensee, of course, would be able to affect the public's image of a candidate by its decision as to which candidates would be admitted to a debate and which would be relegated to later appearances. But this is true today in many situations. See, e.g., *In re Messrs. William F. Ryan and Paul O'Dwyer*, 14 F.C.C.2d 633 (1968). It is especially true in how much time is devoted to candidates in the all-important news programs.

The obligation of the broadcaster to comply with the fairness doctrine by presenting contrasting viewpoints on controversial issues of public importance should provide adequate protection for potential abuses. Moreover, the 1960 data compiled during the limited equal time suspension⁴⁶ and the generally responsible manner in which broadcasters have covered elections in programs that are covered by the existing exemptions indicate that the potential for abuse is minimal.

These exemptions should cover both primaries and the general election, since debates and similar issue-oriented programming formats at each stage can provide valuable information about candidates to the electorate. Neither exemption would preclude nonbroadcast groups from producing or sponsoring broadcast debates; rather, broadcasters would finally be allowed to participate actively in debates if they could act as the better catalyst under the circumstances. The result of this change would be an increase in overall air time for candidates to discuss the issues and greater utilization of debates and similar innovative programming formats.

CONCLUSION

As the 1980 elections approach, Congress should take a careful look toward revising section 315(a) of the Communications Act of 1934.⁴⁷ The approaches discussed here are not exhaustive and other options may arise during the legislative process. But they suggest a viable way to satisfy the competing policy considerations to a greater extent than they are at present. Absent efforts to increase broadcaster discretion, the only real alternative is to accept the arbitrary and unsatisfactory categories that have been created.

The FCC, as the recipient of congressional authority under the Communications Act of 1934, has already responded in part to the problems created by the equal opportunities provision in its *Aspen* ruling. Although this ruling may be further refined at the agency level,⁴⁸ the better approach is congressional revision. Congress is clearly in the best position to implement broad policies for political broadcasting. It can fine-tune the delicate balance it

⁴⁶ See note 34 *supra*.

⁴⁷ Revision in this area should be limited to equal opportunities for free time, since § 315(a), as noted, has caused no practical problems in its application to paid time.

⁴⁸ Recently, the National Association of Broadcasters began drafting a petition requesting the Commission to revisit its *Aspen* ruling so as to give it a broader construction. BROADCASTING, Oct. 29, 1979, at 7.

sought to establish when it promulgated section 315(a) between a better informed electorate and the deprivation of the opportunity for all candidates to express their views equally over the airwaves.

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