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# Equal Time Equals Unequal Treatment to Newscaster Candidates

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## EQUAL TIME EQUALS UNEQUAL TREATMENT TO NEWSCASTER CANDIDATES

A common fear among political candidates is the exposure of their opponents. A candidate will always try to remain one step ahead of his opponent by attending an extra benefit, headlining in a newspaper or magazine, or appearing on a media broadcast. However, a candidate's overexposure on media broadcasts is limited because a candidate's opponents must receive equal media time. But, should a newscaster candidate's opponents receive time equal to the news reports if the newscaster candidate is merely doing his job?

The Communications Act of 1934, 47 U.S.C. section 315(a)<sup>1</sup> ("section 315(a)"), requires broadcasters to provide equal opportunity, more commonly known as equal time,<sup>2</sup> to opponents of all candidates who "use" their station. Therefore, if a political candidate makes an appearance on television, the broadcaster must afford the candidate's opponents equal air time to make their own appearances. The statute, however, provides exemptions in which the broadcast station is not required to provide equal time to a candidate's opponents. Thus, a broadcaster must provide equal time to a candidate's opponents if the candidate "uses" the broadcasting facilities and his appearance does not fall within the exemptions.

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### 1. The Communications Act of 1934, § 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.

The Communications Act of 1934, 47 U.S.C. § 315(a) (1982).

2. Section 315(a) uses the term "equal opportunity," however, the more popular term is "equal time." Both terms will be used interchangeably throughout this note.

The Federal Communications Commission ("Commission"), in *In re William H. Branch*,<sup>3</sup> ruled that news reporting by a newscaster candidate constitutes a "use" of the broadcast facilities within the meaning of section 315(a), and that newscaster candidates do not come within the exemptions provided by the statute.<sup>4</sup> Thus, broadcasters must provide media time to every opponent of a newscaster candidate equivalent to the amount of time the newscaster spends reporting the news. Newscaster candidate William Branch ("Branch") challenged this ruling since the burden of providing equal time to his opponents forced him to abandon his campaign in order to avoid taking a leave of absence from work.<sup>5</sup>

Branch was a news reporter who covered general assignments for Sacramento television station KOVR, in which he appeared on-the-air an average of three minutes per day.<sup>6</sup> In 1984, Branch decided to seek election to the Town Council of Loomis, California.<sup>7</sup> Because he was aware that federal law imposed certain equal time requirements on broadcasters, he consulted with the station management before commencing his campaign. KOVR informed Branch of its unwillingness to provide the thirty-three hours of response time to his opponents necessary to comply with the statute.<sup>8</sup> Recognizing its duty to provide equal time to opponents of political candidates who appeared on the air, KOVR assumed the same requirement applied to newscaster candidates. Consequently, the station management told Branch that if he wished to maintain his candidacy, he must take an unpaid leave of absence from work during the campaign period.<sup>9</sup> Furthermore, KOVR refused to guarantee Branch that his position would be available after the election.<sup>10</sup>

Branch immediately sought a judicial and administrative review of his rights, claiming that section 315(a) unduly burdened his ability to run for political office.<sup>11</sup> However, he was unable to get a ruling prior to the 1984 election. Put to a choice, Branch chose to drop out of the election

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3. 101 F.C.C.2d 901 (1985).

4. *Id.* at 902-04, 906. See *Branch v. Federal Communications Comm'n*, 824 F.2d 37 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 1220 (1988).

5. *Branch*, 824 F.2d at 39.

6. *Id.* at 39.

7. Branch lived in Loomis, California, a small community (approximately 4,000 people) near Sacramento. Late in 1982, Branch participated in a successful effort to incorporate Loomis as a town. *Id.* at 39.

8. *Id.* The 33 hours of response time was calculated by "multiplying 11 (the number of Branch's opponents) times 60 days (the approximate number of days in the campaign) times three minutes per day (the approximate number of minutes per day that Branch is on the air)." *Id.* at 39 n.1.

9. *Branch*, 824 F.2d at 39.

10. *Id.*

11. *Id.* at 47-48.

instead of taking an unpaid leave of absence.<sup>12</sup> Upon the termination of his candidacy, Branch sought a declaratory ruling from the Commission which would enable him to run for political office in the future without jeopardizing his employment.<sup>13</sup>

Specifically, Branch asked the Commission to rule on two issues: (1) whether section 315(a) required broadcast stations to provide equal time to the opponents of newscaster candidates; and (2) whether section 315(a) was constitutional as applied.<sup>14</sup> The Commission held that broadcast stations must provide equal time to a newscaster candidate's opponents.<sup>15</sup> As to the second issue, the Commission deferred to Congress' determination in enacting section 315(a), claiming that decisions regarding the constitutionality of a statute were beyond its jurisdiction.<sup>16</sup>

Branch appealed in *Branch v. Federal Communications Commission*,<sup>17</sup> arguing that his appearances were exempt under the first exemption provided in the statute.<sup>18</sup> Branch asserted that a newscaster candidate's appearance while reporting the news is on a bona fide newscast and therefore exempt from the "equal time" requirement.<sup>19</sup> The court rejected this argument, stating that its simplicity was misleading.<sup>20</sup>

Moreover, the court upheld the Commission's ruling on the scope and applicability of the "equal time" requirement of section 315(a). Specifically, the court agreed with the Commission's determination that the "equal time" provision in section 315(a) applied to newscasters, and that the reporting done by newscasters did not come within any of the exemptions provided in the statute. Thus, broadcasters are required to provide equal time to opponents of newscaster candidates.

In reaching its conclusion, the *Branch* court first looked to the legislative history creating the exemptions to section 315(a). According to the *Branch* court, Congress amended section 315(a) in 1959 to overrule

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12. *Id.* at 39.

13. *Id.*

14. *Branch*, 824 F.2d at 39. The court also ruled on the government's contention that Branch lacked standing to bring this suit. The court held that Branch did have standing to bring this case. *Id.* at 40.

15. *Id.* at 39. "[T]he Commission concluded that news-caster candidates do not come within any special exemption from a station's statutory obligation to provide equal time to other candidates." *Id.* at 39 (citing *In re William H. Branch*, 101 F.C.C.2d at 902-04, 906).

16. *Branch*, 824 F.2d at 39-40.

17. 824 F.2d 37 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 1220 (1988).

18. *Id.* at 41. For the language of § 315(a)(1) see *supra* note 1.

19. *Branch*, 824 F.2d at 41.

20. *Id.* at 42.

the holding in *In re Telegram to CBS, Inc.*<sup>21</sup> (“*Lar Daly*”). *Lar Daly* eliminated the long standing exemption for a candidate’s appearance on “a routine news broadcast” from the “equal time” requirement.<sup>22</sup>

According to the *Branch* court, Congress overturned the *Lar Daly* decision because it did not want to impose the “equal time” requirement on broadcast stations that displayed news coverage of a candidate.<sup>23</sup> Congress believed that imposing such a burden would deter the broadcast media from providing the public with full coverage of political news events as well as many other news events.<sup>24</sup> The *Branch* court noted that the creation of the exemptions in the 1959 amendment to section 315(a) was Congress’ attempt to protect broadcaster freedom and discretion in determining which newsworthy events to present to the public.<sup>25</sup> However, the *Branch* court found that Congress’ purpose, greater broadcast freedom, was attainable without excluding newscaster candidates from the “equal time” requirement.

In the second issue raised before the court, Branch asserted that the Commission “acted arbitrarily and capriciously” by refusing to review the constitutionality of section 315.<sup>26</sup> The Commission refused to rule on the statute’s constitutionality, claiming that such decisions were beyond the jurisdiction of administrative agencies.<sup>27</sup> Accepting the statute as constitutional, the Commission deferred to Congress’ determination in enacting section 315 and acknowledged the governmental interest in assuring the equitable treatment of all candidates.<sup>28</sup> Agreeing with the Commission, the court rejected Branch’s argument, stating that the Commission did not have jurisdiction to declare statutes unconstitutional.<sup>29</sup>

The court, however, addressed Branch’s substantive challenges to the constitutionality of section 315(a). Branch’s first objection was that the statute extinguished his right to seek political office. Branch asserted that the statute imposed an undue burden on his ability to run for office because he was unable to continue his regular employment during the campaign period.<sup>30</sup> The court rejected this argument by balancing the

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21. 18 P & F Radio Reg. 238, *reconsideration denied*, 26 F.C.C. 715, 18 P & F Radio Reg. 701 (1959).

22. *Branch*, 824 F.2d at 43-44.

23. *Id.* at 45.

24. *Id.* at 44.

25. *Id.*

26. *Id.* at 47.

27. *In re William H. Branch*, 101 F.C.C.2d at 904 n.4.

28. *Id.* at 904.

29. *Branch*, 824 F.2d at 47.

30. *Id.* at 48.

burden placed on Branch against the important and legitimate objectives in preventing the unequal use of the broadcast media.<sup>31</sup>

Next, Branch asserted that section 315(a) was unconstitutional because the "equal time" provision violated the first amendment. Branch claimed that the "equal time" requirement imposed an unconstitutional penalty on broadcasters by compelling them to broadcast material against their will.<sup>32</sup> Moreover, Branch argued that the "equal time" provision was identical in impact to the right-of-reply statute found in *Miami Herald Publishing Co. v. Tornillo*.<sup>33</sup> In *Tornillo*, a right-of-reply statute<sup>34</sup> was struck down because it imposed an unconstitutional penalty on publishers by compelling them to publish material against their will. The *Branch* court, however, rejected Branch's first amendment challenge, holding that Branch's reliance on *Tornillo* was misplaced.<sup>35</sup> The court reasoned that Branch's situation involved the broadcast media as opposed to the print media, and that the first amendment protections applied more forcefully to the print media.<sup>36</sup> Furthermore, the *Branch* court held that the Supreme Court decision in *Red Lion Broadcasting Co. v. Federal Communications Commission*<sup>37</sup> directly foreclosed Branch's claim.

In *Red Lion*, the Supreme Court upheld the government's authority under the fairness doctrine<sup>38</sup> which requires broadcast stations to give fair coverage to each side of a public issue.<sup>39</sup> The Court focused on the uninhibited marketplace of ideas in which the right of the viewers and listeners was paramount to the right of the broadcasters.<sup>40</sup> In the course of its opinion, the Court held that the "equal time" requirement of section 315(a) and the fairness doctrine involved the same governmental

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31. *Id.* at 48-49.

32. *Id.* at 49.

33. 418 U.S. 241 (1974).

34. FLA. STAT. § 104.38 (1973) (repealed 1975). This right of reply statute provided "that if a candidate for nomination or election is assailed regarding his personal character or official record by any newspaper, the candidate has the right to demand the newspaper print, free of cost to the candidate, any reply the candidate may make to the newspaper's charges." *Tornillo*, 418 U.S. at 244.

35. *Branch*, 824 F.2d at 49.

36. *Id.*

37. 395 U.S. 367 (1967).

38. The fairness doctrine should not be confused with the equal opportunity doctrine. Unlike the equal opportunity doctrine, the fairness doctrine does not create any rights for a particular individual, rather it requires that each side of the public issue be given fair coverage. Annotation, *Political Candidate's Right to Equal Broadcast Time Under 47 U.S.C.S. § 315*, 35 A.L.R. FED. 856, 862-63 (1977) [hereinafter *Equal Broadcast Time*].

39. *Branch*, 824 F.2d at 49.

40. *Red Lion*, 395 U.S. at 390.

power.<sup>41</sup> Namely, the Court felt that the government had the power to regulate a scarce resource (broadcast air waves) which it had denied others the right to use.

Branch's final constitutional challenge to section 315(a) was that the Commission's ruling limited a broadcast station's discretion in selecting its newscasters. The court rejected this argument, stating that the burdens placed on the broadcast station in choosing its newscasters "is a much less significant burden than rules requiring the transmission of replies to personal attacks and political editorials, which were upheld in *Red Lion*."<sup>42</sup>

In his concurrence, Judge Starr stated that Branch's three-minute news segments were "bona fide newscasts" and, therefore, statutorily exempt from the "equal time" requirement. Judge Starr agreed with Branch's straightforward reading of the statute. He claimed that "a more natural statutory interpretation would exempt newscast reporters who are just doing their jobs from the 'equal opportunities' requirement of section 315(a)."<sup>43</sup> However, in light of the two permissible readings of the statute, Judge Starr concurred with the majority because he believed that Congress' intent was ambiguous. He recognized that where Congress' intent was unclear, he was bound to defer to the Commission's reasonable interpretation of the statute.<sup>44</sup>

#### PURPOSE AND HISTORICAL PERSPECTIVE OF SECTION 315(a)

Section 315(a) was enacted to encourage unrestricted discussion of political issues and to regulate the use of publicly licensed broadcasting facilities by political candidates.<sup>45</sup> Specifically, the purpose of section 315(a) is to ensure that broadcasters provide equal treatment to political candidates.<sup>46</sup> In order to keep the public informed, the public must be exposed to all sides of an issue and be free to come to its own conclusions. To keep the public informed and ensure equal treatment among candidates, the statute requires that a station which permits a candidate to "use" its facilities must afford opposing candidates the same

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41. *Branch*, 824 F.2d at 49.

42. *Id.* at 50.

43. *Id.* at 52.

44. *Id.* (construing *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984)).

45. *Paulsen v. Federal Communications Comm'n*, 491 F.2d 887, 889 (1974); Note, *The Equal Opportunity Doctrine: The Broadcast Executive Who Campaigns For Political Office Makes His Own Strange Bedfellow*, 6 CARDOZO ARTS AND ENT. L.J. 113 (1987).

46. *Paulsen*, 491 F.2d at 889 (citing *McCarthy v. Federal Communications Comm'n*, 390 F.2d 471, 473 (1968)).

opportunity.<sup>47</sup>

Section 315(a), as originally enacted and interpreted,<sup>48</sup> imposed an absolute duty on broadcasters to provide equal treatment to competing political candidates. The Radio Act of 1927 required that “[i]f any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for the office in the use of such broadcasting station . . . .”<sup>49</sup> This language served as Congress’ sole statement of the equal opportunity rule for thirty-two years.<sup>50</sup> During that period, the Commission interpreted the equal opportunity rule as requiring broadcasters to provide equal time to candidates whose opponents appeared on the air, unless the candidate appeared on a “routine news broadcast.”<sup>51</sup> The Commission reasoned that “such an appearance did not constitute a ‘use’ of the broadcast facility insofar as the candidate did not directly or indirectly initiate the filming or presentation of the event.”<sup>52</sup>

In 1959, the Commission in *In re Telegram to CBS, Inc.*<sup>53</sup> (“*Lar Daly*”) radically departed from its prior interpretation of section 315(a). The Commission applied the “equal time” rule to the appearance of a candidate on a regularly scheduled newscast.<sup>54</sup> In that case, Lar Daly, a candidate for Mayor of Chicago, filed a complaint regarding his opponent’s television appearances on newscasts. Among other things, Lar Daly requested equal air time for the broadcaster’s coverage of his opponent’s interviews. More specifically, he sought equal time for the broadcast of the incumbent Mayor, an opponent, greeting the Argentinean President at the airport.<sup>55</sup>

In response to Lar Daly’s complaint, the Commission granted him equal time. The Commission held that a candidate’s appearance on a

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47. See *supra* note 1 for text of § 315(a).

48. Radio Act of 1927, § 18, 44 Stat. 1170.

49. See *supra* note 1 for the first two sentences of § 315(a), which were a re-enactment of the Radio Act of 1927. *Equal Broadcast Time*, 35 A.L.R. FED. at 860 n.3.

50. *Branch*, 824 F.2d at 42.

51. *In re Allen H. Blondy*, 40 F.C.C. 284, 285 (1957).

52. *Chisholm v. Federal Communications Comm’n*, 538 F.2d 349, 351-52 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 890 (1976). This interpretation became embodied in the Commission’s official release of Oct. 6, 1958, entitled “Use of Broadcast Facilities by Candidates for Public Office.” *Id.* at 352 (citing Public Notice F.C.C. 58-936. III-12; 105 CONG. REC. 14459 (1959)).

53. 18 P & F Radio Reg. 238 (1959), *reconsideration denied*, 26 F.C.C. 715, 18 P & F Radio Reg. 701 (1959).

54. *In re CBS, Inc.*, 26 F.C.C. at 717; see also *Chisholm*, 538 F.2d at 352.

55. *In re CBS, Inc.*, 26 F.C.C. at 717.

newscast constituted a "use" of the broadcasting station.<sup>56</sup> This decision was severely criticized because it upset the balance between a broad definition of the term "use" and a broadcast station's freedom to determine which events merit news coverage.<sup>57</sup> The Commission recognized the severe limitation its decision had on the coverage of campaign affairs, however, the Commission believed that the result was necessary to comply with the unconditional language of section 315(a).<sup>58</sup>

The *Lar Daly* case created a national furor. Many people feared that the Commission's strict application of the equal opportunities provision "would tend to dry up meaningful radio and television coverage of political campaigns."<sup>59</sup> This fear prompted Congress to reassess the statute in light of the Commission's decision.<sup>60</sup> Congress believed that the concept of absolute equality among competing political candidates, which was the result in *Lar Daly*, must give way to two other "worthy and desirable" objectives: "First, the right of the public to be informed through broadcasts of the political events; and second, the discretion of the broadcaster to be selective with respect to the broadcasting of such events."<sup>61</sup>

Pursuant to these objectives, Congress amended section 315(a) in 1959 to provide for certain appearances by political candidates which would not require the station to provide equal time to opponents. The amendment added the following list of exemptions:

- (1) bona fide newscast,
- (2) bona fide news interview,
- (3) bona fide news documentary (if the appearance of 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).<sup>62</sup>

In this amendment, Congress included the traditional exemption to the "equal time" requirement, appearance on a routine news broadcast,

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56. See *Chisholm*, 538 F.2d at 352.

57. *Branch*, 824 F.2d at 42.

58. *In re CBS, Inc.*, 26 F.C.C. at 743.

59. *Chisholm*, 538 F.2d at 352 (quoting S. REP. NO. 562, 86th Cong., 1st Sess. 10 (1959), reprinted in 1959 U.S. CODE CONG. & ADMIN. NEWS 2564, 2572).

60. *Paulsen*, 491 F.2d at 890.

61. *Chisholm*, 538 F.2d at 352 (quoting *Hearings on Political Broadcasts—Equal Time Before the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce*, 86th Cong., 1st Sess. 2 (1959) (comment of Chairman Harris)).

62. 47 U.S.C. § 315(a)(1)-(4) (1982).

which was eliminated by the *Lar Daly* decision. Congress' intent in enacting the 1959 amendment was to return to the status quo prior to the *Lar Daly* decision.<sup>63</sup> Congress did not want a candidate's appearance on a "routine newscast" to trigger the equal time requirement.<sup>64</sup> In addition, Congress codified three exemptions which the Commission always thought were excluded from the "equal time" requirement.<sup>65</sup>

#### BRANCH'S APPEARANCES DO NOT FALL WITHIN SECTION 315(a)

Under a straightforward reading of section 315(a), Branch's appearances were not "uses" of the broadcast station. The statute provides that if a licensee permits a candidate to "use" the broadcast facilities, the licensee is required to provide equal time to the candidate's opponents.<sup>66</sup> However, the statute does not define "use." Instead, the Commission and the courts seem to presume that any appearance by a political candidate is a "use," and the only way for the candidate to rebut this presumption is if the appearance of the candidate falls within one of the exemptions.<sup>67</sup>

The plain language of the statute, however, suggests an alternative interpretation which requires a two-step approach. First, rather than presume an appearance is a "use" of a broadcast facility, the court should determine whether the candidate's appearance is actually a "use" under the common definition of the word. If the appearance is not a "use," the candidate should not be subject to the "equal time" requirement of section 315(a). On the other hand, if the appearance is a "use," the court should determine whether the appearance falls within any of the statute's exemptions.

In determining whether the appearance is actually a "use," the court should focus on the language of the statute. Specifically, the first sentence states that broadcasters should provide equal time to a candidate's opponents when the candidate is "permitted" to "use" the broadcast facilities.<sup>68</sup> As the concurrence in *Branch* demonstrates, when a newscaster presents the news, he does not "use" or is not "permitted" to use the broadcast station in the ordinary sense of those words.<sup>69</sup> "Employers

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63. *Branch*, 824 F.2d at 45.

64. *Id.*

65. *Id.* at 43 (citing 105 CONG. REC. 16229 (1959) (Rep. Harris)).

66. *See supra* note 1.

67. *See generally Branch*, 824 F.2d 37; *Use of a Station by a News-caster Candidate ("WMAY")*, 40 F.C.C. 433 (1965); *Brigham v. Federal Communications Comm'n*, 276 F.2d 828 (5th Cir. 1960).

68. *See supra* note 1.

69. *Branch*, 824 F.2d at 52.

do not 'permit' their employees to 'use' broadcast facilities. Employees are *hired* to do their jobs. Once on the payroll, they have to carry on their duties; there is no 'permission' being granted in the everyday sense of the word."<sup>70</sup> Branch, as an employee, was therefore obligated to appear on the air. While reporting the news, he was not a political candidate who KOVR permitted to use its airwaves, rather, he was merely an employee doing his job.

#### BRANCH'S APPEARANCES ARE EXEMPT UNDER THE BONA FIDE NEWSCAST EXEMPTION

Even if Branch's appearances fall within the statute, he is still excluded from the "equal time" requirement because his appearances are exempt under the bona fide newscast exemption.<sup>71</sup> Courts have not adopted the two-step analysis stated above, however, the determination of whether an appearance constitutes a "use" was used in connection with the application of the exemptions.<sup>72</sup> If the courts refuse to approach the statute in a straightforward two-step fashion, they should at least acknowledge the plain meaning of the exemptions. The first exemption provides that any appearance by a legally qualified candidate on any bona fide newscast shall not be deemed a use of the broadcast station.<sup>73</sup> Branch, in reporting his three-minute news segments unquestionably appears on a bona fide newscast. Therefore, under a natural reading of the statute, Branch's appearances are exempt under the bona fide newscast exemption of section 315(a).<sup>74</sup>

This common sense interpretation of section 315(a) was applied in *Brigham v. Federal Communications Commission*.<sup>75</sup> In *Brigham*, the court upheld the Commission's determination that the "equal time" requirement was inapplicable because a weathercaster's appearance fell within the "bona fide newscast" exemption of section 315(a).<sup>76</sup> The *Brigham* court stated:

There is not the slightest hint in the undisputed facts that this weathercaster's appearance involved anything but a bona fide effort to present the news. . . . [H]is employment is not something arising out of the election campaign but, rather, is a "reg-

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70. *Id.*

71. 47 U.S.C. § 315(a)(1) (1982).

72. See generally *Branch*, 824 F.2d at 50 (Starr, J., concurring); *Brigham*, 276 F.2d 828.

73. 47 U.S.C. § 315(a)(1) (1982).

74. *Branch*, 824 F.2d at 51.

75. 276 F.2d 828 (5th Cir. 1960). See *infra* text accompanying notes 89-93.

76. *Brigham*, 276 F.2d at 830. The *Brigham* court reiterated verbatim *In re KWTX*, 40 F.C.C. 304 (1960) in its opinion.

ular job." Certainly the facts do not indicate any favoritism on the part of the station licensee or intent to discriminate among candidates.<sup>77</sup>

The *Brigham* court held that a weathercaster reporting the weather news does not "use" the station because he is just doing his job.<sup>78</sup> Nothing in the weathercaster's appearance involved more than a man presenting the weather news. Similarly, Branch should fall within the exemption because his appearance was on a bona fide newscast. Branch's appearance was no more than a bona fide effort to present the news. Branch did not seek to use the station for political appearances or obtain free exposure in furtherance of his campaign.

The majority in *Branch*, however, rejected the *Brigham* interpretation and focused on the *Brigham* court's failure to provide an analysis of the statutory language or legislative history.<sup>79</sup> The *Branch* court also disagreed with the *Brigham* court's emphasis on favoritism by the station. Moreover, the *Branch* majority stated that five years later the Commission reversed its opinion<sup>80</sup> and concluded that newscaster candidates were not exempt under the statutory exemptions.<sup>81</sup>

The *Branch* court erred in rejecting the *Brigham* interpretation just because the *Brigham* court did not provide an in depth statutory analysis. If the *Branch* court focused on the plain meaning of the statute, it would have reached the same conclusion as *Brigham*. Because no ambiguity exists on the face of the statute, the *Branch* court should rely on its plain meaning.

### *The Branch Court Erred In The Interpretation Of Prior Case Law*

The majority in *Branch* held that *Use of a Station by Newscaster Candidate*<sup>82</sup> ("WMA Y") overruled the *Brigham* decision and concluded that newscaster candidates were not exempt from the "equal time" requirement.<sup>83</sup> The *Branch* court specifically stated that: "[b]ased on its more detailed consideration of the matter, the Commission reversed its position and concluded that the 1959 amendments did not apply to exempt newscaster candidates from the 'equal opportunities' rule."<sup>84</sup>

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77. *Branch*, 824 F.2d at 51 (quoting *Brigham*, 276 F.2d at 830).

78. *Brigham*, 276 F.2d at 830.

79. *Branch*, 824 F.2d at 46.

80. *Id.* See *WMA Y*, 40 F.C.C. 433.

81. *Branch*, 824 F.2d at 46.

82. 40 F.C.C. 433 (1965).

83. *Branch*, 824 F.2d at 46.

84. *Id.*

*WMAY* did not overrule *Brigham* because the cases are factually distinguishable. The critical consideration according to the Commission in *WMAY* was the application of the 1959 amendment.<sup>85</sup> Prior to the 1959 amendment to section 315(a), the Commission held that appearances of a station announcer who later became a candidate were "uses" under section 315(a).<sup>86</sup> The Commission in *WMAY* concluded that the amendment did not determine whether appearances by newscaster candidates were exempt.<sup>87</sup> Since the Commission's report in *WMAY* stated that the case was limited strictly to the facts presented,<sup>88</sup> the Commission's conclusion only addresses a limited factual situation. Therefore, the determination of whether equal time should be afforded to newscaster candidates' opponents should focus on the particular factual situation.

In *Brigham*, the weatherman, referred to on the air as "TX Weatherman,"<sup>89</sup> delivered two regularly scheduled television newscasts and two regularly scheduled radio newscasts.<sup>90</sup> In addition, he did newscasts on the television farm program and read warnings and weather bulletins during emergencies.<sup>91</sup> All of his newscasts dealt exclusively with weather; he never made reference to political matters. After the weatherman announced his candidacy for the state legislature, his opponent demanded equal time. The Commission determined that equal time was not required because the weatherman's appearance was on a bona fide newscast and therefore exempt.<sup>92</sup> The *Brigham* court affirmed this ruling, holding that the appearance involved only a bona fide presentation of the news.<sup>93</sup> Furthermore, the *Brigham* court found no station favoritism and concluded that the weatherman's appearance was not something arising out of an election campaign, but rather was a regular job. In *Brigham*, as in *WMAY*, the court limited the holding strictly to the facts presented.

Contrary to *Brigham*, the Commission in *WMAY* held that the appearance of a newscaster candidate would be considered a "use" of the broadcast station.<sup>94</sup> In *WMAY*, the newscaster candidate, Mr. Brown,

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85. *WMAY*, 40 F.C.C. at 433.

86. *Id.*

87. *Id.* at 434.

88. *Id.*

89. He was employed to broadcast weather news on KWTX-TV and KWTX Radio. *Brigham*, 276 F.2d at 828. The facts of *Brigham* are quoted directly from the Commission's report in *In re KWTX*, 40 F.C.C. 304 (1960).

90. *Brigham*, 276 F.2d at 829.

91. *Id.*

92. *Id.* at 829.

93. *Id.* at 830.

94. *WMAY*, 40 F.C.C. at 434.

was the station's news director, who prepared the news himself and presented it on regularly scheduled programs. During his candidacy for the school board, Mr. Brown discontinued broadcasting editorials and was not identified by name on the air.<sup>95</sup>

The main distinction between *Brigham* and *WMAY* is each newscaster candidate's responsibilities beyond reporting the news. The weatherman in *Brigham* was strictly a weatherman, whereas, in *WMAY*, Mr. Brown was the station's news director as well as a reporter. The fact that Mr. Brown was the station's news director is critical and is the reason for the differing results in *WMAY* and *Brigham*.

The Commission in *WMAY* relied on the legislative history of section 315(a) and indicated that the appearance of a candidate who participated in the "format and production" of the news would not be exempt.<sup>96</sup> However, the Commission made no reference to candidates who did not participate in the "format and production." The Commission in *WMAY* quoted the following passage from Congress:

It should be noted that the programs that are being exempted in this legislation have one thing in common. They are generally news and information-type programs designed to disseminate information to the public and in almost every instance the format and production of the program is under the control of the broadcast station, or the network in the case of a network program.<sup>97</sup>

As the station news director and preparer of the news materials, Mr. Brown had control over the "format and production" of the news. Obviously, he participated in decisions regarding what the station broadcast. On the other hand, *Brigham's* result reflected the weatherman's nonparticipation in the "format and production" of the newscast. Therefore, since the holdings are factually distinguishable, the facts of *Branch* must be analogized to *Brigham* and *WMAY*.

The facts in *Branch* are more analogous to the facts in *Brigham* than to the facts in *WMAY*. *Branch's* situation can clearly be distinguished from *WMAY* because *Branch* was merely a news reporter who reported stories assigned to him. *Branch* was not a station news director as was Mr. Brown, nor was he involved in the news production; he did not determine which news stories the station reported.

On the other hand, *Branch's* responsibilities were similar to the "TX

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95. *Id.* at 433.

96. *Id.* at 434.

97. *Id.* (quoting S. REP. No. 562, 86th Cong., 1st Sess. 10 (1959)).

Weatherman's" responsibilities in *Brigham*. The weatherman was employed exclusively to broadcast weather news on television and radio and he was responsible for the preparation and presentation of the weathercasts.<sup>98</sup> The weatherman had little discretion in what was broadcast. Branch, much like "TX Weatherman," also had little discretion in what was broadcast because he covered general assignments given to him by the station.

The factor which distinguished *WMAY* from *Brigham* was the newscaster's extensive involvement with the format and production of the newscasts. When a newscaster candidate has control over the format and production of the broadcast, a potential for abuse arises. He may accept or reject news stories in order to enhance his campaign. On the other hand, a newscaster candidate who merely reports the news has little discretion and the potential for abuse is minimal. Since the facts in *WMAY* and *Brigham* are distinguishable, the *Branch* court should apply *Brigham* as precedent because of the analogous facts. Therefore, the outcome in *Branch* should have been the same as the outcome in *Brigham*, in that Branch's opponents should have been denied equal time.

#### *The Branch Court Erred In The Application Of Section 315(a)'s Exemptions*

The *Branch* court made a detailed examination of the exemptions provided in section 315(a) by focusing on the legislative history. The court concluded that the congressional intent in enacting the exemptions was to protect the broadcaster's discretion to air newsworthy events.<sup>99</sup> The court found that Congress objected to the "equal time" requirement placed on stations because the requirement deterred broadcast stations from providing full coverage of political news events.<sup>100</sup> From the legislative history the court derived the principle that Congress intended to limit the exemptions only to candidate appearances which were presented to the public as news.<sup>101</sup> The *Branch* court stated that the candidate's appearance must occur as part of the event covered in order to be exempt.<sup>102</sup> According to the *Branch* majority, newscasters only communicate the event; the communication is not a part of the event. Therefore, the court concluded that reporting the news by a newscaster

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98. *Brigham*, 276 F.2d at 828.

99. *Branch*, 824 F.2d at 51.

100. *Id.* at 44.

101. *Id.* at 51.

102. *Id.* at 45.

was not exempt under section 315(a).<sup>103</sup>

The *Branch* court's analysis focuses on the language of the third and fourth exemptions.<sup>104</sup> The third exemption, the news documentary exemption, is clarified in parentheses in the statute which applies "if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary."<sup>105</sup> The *Branch* court concluded that the third exemption applies only when the candidate's appearance relates to the subjects covered in the program.<sup>106</sup>

Similarly, the fourth exemption, on-the-spot coverage, is clarified as applying only to bona fide news events which includes but is not limited to political events.<sup>107</sup> "Here again the focus is on a news *event* that is being covered with the candidate's appearance expected to occur as part of the event *being covered*."<sup>108</sup>

Oddly enough, the court did not analyze the first exemption, bona fide newscast, which has no clarification, despite Branch's reliance on this exemption. Rather, the court analyzed the third and fourth exemptions which focus on the subjects and events of news coverage.<sup>109</sup> From its analysis, the court made a generalization that Congress intended all the exemptions to apply only to candidates presented as the content of the news. If Congress had wanted such a generalization, Congress would have written a clarification to accompany the first exemption. Since no clarification followed the first exemption, a natural reading of the statute would exempt Branch because his appearance was on a bona fide newscast.

#### A NEWSCASTER CANDIDATE IS FORCED TO FOREGO HIS LIVELIHOOD

A newscaster candidate should not have to forego his livelihood in order to campaign for a political office. The court held that Branch's inability to remain at his job during the campaign was not an undue hardship, stating "nobody has ever thought that a candidate has a right to run for office and at the same time to avoid all personal sacrifice."<sup>110</sup> Requiring a newscaster candidate to take an unpaid leave of absence if he decides to run for a political office is not only a detriment to the news-

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103. *Id.*

104. 47 U.S.C. § 315(a)(3)-(4) (1982). *See supra* note 1.

105. 47 U.S.C. § 315(a)(3) (1982).

106. *Branch*, 824 F.2d at 45.

107. 47 U.S.C. § 315(a)(4) (1982). *See supra* note 1.

108. *Branch*, 824 F.2d at 45.

109. *Id.*

110. *Id.* at 48.

caster candidate, but also a hindrance to the political process. By imposing substantial economic disincentives to newscaster candidates who wish to seek an elective office, the "equal time" requirement burdens entry into elective campaigns and concomitantly, limits the choice available to voters.

The barrier of foregoing livelihood placed in the path of qualified newscaster candidates is burdensome and beyond personal sacrifice. The effect of being forced to make such a choice will deter newscaster candidates from campaigning for political office. In addition, this barrier is not applied equally to all candidates running for political office. A baker is not required to forego his job at the bakery just because he decided to run for the town council, whereas the same is not true in the case of a newscaster.

The scenario in which a newscaster is running for a political office and wants to continue working during his campaign is usually found where a newscaster is running in a local election.<sup>111</sup> In order to run in local elections, the candidate must be an outgoing and energetic person and must be willing to work in a demanding public service job with little glamour or pay. Therefore, not only the candidate, but also the community is harmed when a newscaster campaigning in a political election is discouraged from running for office.

#### RECOMMENDATIONS

Given that a newscaster may abuse his appearances on television, this abuse may be minimized with certain restrictions. First, the newscaster must be employed with the broadcast station for at least six months prior to his announcement of candidacy to ensure that the candidate became a newscaster for reasons other than obtaining free exposure for his campaign.

Second, the newscaster must maintain the same working hours that he had prior to his candidacy. That is, a newscaster who worked forty hours a week prior to his campaign must continue working such hours, unless a reasonable agreement is made with the station. A candidate should not be able to make broadcast appearances at his own convenience. On the other hand, the same requirement should apply to prevent excess exposure. The newscaster candidate should not increase his ap-

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111. See generally *Branch*, 824 F.2d at 39; *WMAY*, 40 F.C.C. at 433. A candidate running in an election other than a local election will most likely be forced to spend the majority of his time campaigning and would not be able to continue full time employment.

pearances for the mere purpose of increasing his public exposure during the campaign.

Third, the newscaster candidate's real name should not be used on the air after he has announced his candidacy to help avoid name recognition. In *Brigham*, the court specifically noted that the weatherman was known as "TX Weatherman" as opposed to being identified by his real name.<sup>112</sup> In addition, Mr. Brown in the *WMAY* case was not identified by his real name after he announced his candidacy.<sup>113</sup> By avoiding name recognition, or any reference to the campaign, viewers will be less likely to associate the newscaster as a political candidate.

Fourth, the newscaster candidate should not be involved in the format or production of the newscasts. Furthermore, he should have little or no discretion in what is broadcast.

Fifth, the newscaster candidate should not be allowed to report on campaign or political issues. In addition, the newscaster candidate should not present editorials in which his viewpoint is expressed. If the newscaster candidate primarily reports on political issues or presents editorials, he should not continue working while he is campaigning because he is likely to influence the audience and is in essence "using" the broadcast station. On the other hand, if the newscaster candidate is doing his job by reporting everyday events, such as the weather or sports, he is not "using" the broadcast station nor is he abusing his position.

### CONCLUSION

A newscaster candidate's appearance on the air should not automatically trigger the "equal time" requirement. The courts should look to the plain meaning of section 315(a) for its interpretation. The language provides that a candidate's opponents receive equal time if the candidate "uses" the station. Under a straightforward reading of the statute, a newscaster candidate does not "use" a broadcast station unless he is involved with the format and production of the newscast. Therefore, a newscaster candidate's appearances should not fall within section 315(a).

Even if courts determine that newscaster candidates do fall within section 315(a), a newscaster candidate's appearances are exempt from the "equal time" requirement. A newscaster who merely reports the news is on a routine newscast is exempt under the plain meaning of the bona fide newscast exemption.

Therefore, under a straightforward reading of the statute, news-

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112. *Brigham*, 276 F.2d at 830.

113. *WMAY*, 40 F.C.C. at 433.

caster candidates' opponents should not receive media time equivalent to the amount of time the newscaster spends reporting the news. However, to avoid possible abuses by newscaster candidates, the newscaster candidates should be required to adhere to the guidelines recommended above.

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