FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

April 11, 2002

MEMORANDUM

TO: The Commission
General Counsel
Staff Director
Public Information
Press Office
Public Records

FROM: Rosemary C. Smith RCS
Assistant General Counsel

SUBJECT: Petition for Rulemaking filed by the CBS Broadcasting INC., *et al.*

Attached is a Petition for Rulemaking submitted on April 10, 2002 by several major news organizations. The Office of General Counsel is in the process of preparing a response to the petition in accordance with 11 CFR Part 200, and expects to forward a Notice of Availability for the Commissions consideration in the near future.

Attachment

cc: Associate General Counsel for Policy
Congressional Affairs Officer
Executive Assistants

SOCIETY OF PROFESSIONAL JOURNALISTS

By: Bruce W. Sanford
Robert D. Lystad
Bruce D. Brown

Baker & Hostetler LLP
1050 Connecticut Avenue, NW
Suite 1100
Washington, D.C. 20036-5304

Its Attorneys

TRIBUNE COMPANY

By: Charles J. Sennet
435 North Michigan Avenue
6th Floor
Chicago, IL 60611

Its Attorney

April 10, 2002

CBS
1515 BROADWAY
NEW YORK, NEW YORK 10036-5794

(212) 846-3561
FAX: (212) 846-1807
hjaeckel@cbs.com

HOWARD F. JAECKEL
VICE PRESIDENT AND ASSOCIATE GENERAL COUNSEL

BY AIRBORNE EXPRESS

Re: Petition for Rulemaking of CBS Broadcasting Inc., American Broadcasting Companies, Inc., Belo Corp., Cox Enterprises, Inc., Gannett Co., Inc., the National Association of Broadcasters, National Broadcasting Co., Inc., News America Incorporated, The New York Times Company, Post-Newsweek Stations, Inc., the Radio and Television News Directors Association, the Society of Professional Journalists, and Tribune Company.

Dear Chairman Mason: April 9, 2002

On behalf of the above news organizations and trade associations representing members of the press, I am pleased to enclose a copy of a Petition for Rulemaking that is being filed with the Commission on Wednesday, April 10, 2002. The petition asks the Commission to amend Section 110.13 (c) of its rules to make clear that the sponsorship of a debate between political candidates by a news organization (or a trade association representing news organizations or journalists) does not constitute an illegal corporate campaign contribution or expenditure in violation of the Federal Election Campaign Act.

Sincerely,

Howard F. Jaeckel

David M. Mason
Chairman
Federal Election Commission
999 E Streets, NW
Washington, D.C. 20463

NEWS AMERICA INCORPORATED

By: Ellen S. Agress
1211 Avenue of the Americas
New York, NY 10036

Its Attorney

THE NEW YORK TIMES COMPANY

By: George Freeman
229 West 43rd Street
New York, NY 10036

Its Attorney

POST-NEWSWEEK STATIONS, INC.

By: John Ronayne III
550 W. Lafayette Boulevard
Detroit, MI 48226

Its Attorney

RADIO AND TELEVISION NEWS DIRECTORS ASSOCIATION

By: Kathleen A. Kirby
Wiley, Rein & Fielding
1776 K Street, NW
Washington, D.C. 20006

Its Attorney

Before the
FEDERAL ELECTION COMMISSION
Washington, D.C. 20463

In the Matter of:	)
	)
PETITION FOR	)
RULEMAKING RE:	)
SPONSORSHIP OF	)
CANDIDATE DEBATES	)
BY NEWS	)
ORGANIZATIONS	)

To: The Commission

PETITION FOR RULEMAKING OF

CBS BROADCASTING INC.; AMERICAN BROADCASTING COMPANIES, INC.; BELO CORP.; COX ENTERPRISES, INC.; GANNETT CO., INC.; NATIONAL ASSOCIATION OF BROADCASTERS; NATIONAL BROADCASTING CO., INC.; NEWS AMERICA INCORPORATED; THE NEW YORK TIMES COMPANY; POST-NEWSWEEK STATIONS, INC.; RADIO AND TELEVISION NEWS DIRECTORS ASSOCIATION; SOCIETY OF PROFESSIONAL JOURNALISTS; TRIBUNE COMPANY

Howard F. Jaeckel
Counsel for CBS Broadcasting Inc.
1515 Broadway
New York, NY 10036

Andrew Merdek
Stuart J. Young
Counsel for Cox Enterprises, Inc.
1400 Lake Hearn Drive, NE
Atlanta, GA 30319

John W. Zucker
Counsel for American Broadcasting
Companies, Inc.
77 West 66th Street
New York, NY 10023

David P. Fleming
Counsel for Gannett Co., Inc
7950 Jones Branch Drive
McLean, VA 22107

(List of Counsel Continued)

COX ENTERPRISES, INC.

By: Stuart J. Young
1400 Lake Hearn Drive, NE
Atlanta, GA 30319

Its Attorney

GANNETT CO., INC.

By: David P. Fleming
7950 Jones Branch Drive
McLean, VA 22107

Its Attorney

NATIONAL ASSOCIATION OF BROADCASTERS

By: Jack N. Goodman
1771 N Street, NW
Washington, D.C. 20036-2891

Its Attorney

NATIONAL BROADCASTING CO., INC.

By: Maya Windholz
30 Rockefeller Plaza
New York, NY 10112

Its Attorney

(List of Counsel Continued)

David S. Starr
Counsel for Belo Corp
400 South Record Street
Dallas, TX 75252-4841

Jack N. Goodman
Counsel for National Association
of Broadcasters
1771 N Street, NW
Washington, D.C. 20036-2891

Maya Windholz
Counsel for National.Broadcasting Co., Inc
30 Rockefeller Plaza
New York NY 10019

Kathleen A. Kirby
Counsel for Radio and Television
News Directors Association
Wiley Rein & Fielding
1776 K Street, NW
Washington, D.C. 20006

Ellen S. Agress
Counsel for News America Incorporated
1211 Avenue of the Americas
New York, NY 10036

Bruce W. Sanford
Robert D. Lystad
Bruce D. Brown
Counsel for Society of Professional
Journalists
Baker & Hostetler LLP
1050 Connecticut Avenue, NW
Suite 11000
Washington, D.C. 20036-5304

George Freeman
Counsel for The New York Times Company
229 West 43rd Street
New York, NY 10036

John Ronayne III
Counsel for Post-Newsweek
Stations, Inc.
550 W. Lafayette Boulevard
Detroit, MI 48226

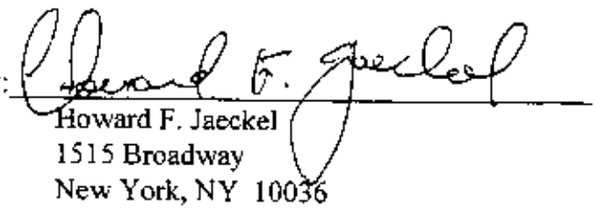
Charles J. Sennet
Counsel for Tribune Company
435 North Michigan Avenue
6th Floor
Chicago, IL 60611

April 10, 2002

HFJ/46315

Respectfully submitted,

CBS BROADCASTING INC.

By: 

Howard F. Jaeckel
1515 Broadway
New York, NY 10036

Its Attorney

AMERICAN BROADCASTING COMPANIES, INC.

By: John W. Zucker
77 West 66th Street
New York, NY 10023

Its Attorney

BELO CORP.

By: David S. Starr
400 South Record Street
Dallas, TX 75252-4841

Its Attorney

---

appearance of corruption would be implicated by a trade association's sponsorship of a candidate debate is even less plausible -- if that is possible -- in this context than with respect to individual news organizations themselves.

TABLE OF CONTENTS

The debates under consideration here do not, of course, involve sponsorship of a debate by a state-owned broadcaster, but are presented by privately owned news organizations. The potential intrusion on First Amendment rights inherent in constricting the editorial judgments of journalists to fit "pre-established, objective criteria" is thus even more drastic in this case than in *Arkansas Educational Television Commission.*

In sum, *any* Commission action hindering news organizations in the unfettered exercise of their journalistic judgment in this area would be unconstitutional. And because debates and candidate interviews serve as one of the principal means relied on by the news media to convey information about political candidates to the public, the potential infringement on First Amendment rights could hardly be more serious. As the Supreme Court has long recognized

> [I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. ... Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently ... .[75]

CONCLUSION

The Commission's debate regulation should be amended to make clear that it does not apply to the sponsorship of a candidate debate by a news organization or a trade organization composed of, or representing, members of the press.[76]

---

75 *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 491-92 (1975).

76 All of the considerations cited above for exempting debates sponsored by corporate news organizations from FEC oversight apply equally to debates sponsored by trade associations such as petitioners NAB, RTNDA and the Society of Professional Journalists. Indeed, the notion that the state's interest in avoiding corruption or the

STATEMENT OF INTERESTS OF PETITIONERS

CBS BROADCASTING INC. ("CBS") operates the CBS Television Network and, through the CBS News Division, provides news and public affairs programming to more than 200 affiliated television stations nationwide, as well as to radio stations affiliated with the CBS Radio Networks. CBS is an indirect wholly-owned subsidiary of Viacom Inc., a diversified media company which owns and operates 34 television stations and more than 180 radio stations (19 of which have an all-news or news/talk format), along with interests in broadcast and cable television networks, motion picture production and distribution, book publishing, home video, television program production and distribution, theme parks, entertainment licensing, online entertainment and information, and outdoor advertising.

AMERICAN BROADCASTING COMPANIES, INC. ("ABC"), a wholly-owned subsidiary of the Walt Disney Company, operates a national news organization that provides news and public affairs programming to television and radio stations owned by or affiliated with ABC across the country.

BELO CORP., ("Belo") is a diversified media company, and owns 19 television stations, owns or operates six cable news channels, and publishes four daily newspapers, including *The Dallas Morning News*, with a combined circulation that exceeds 800,000.

COX ENTERPRISES, INC., ("Cox") operates the Atlanta Journal-Constitution newspaper, owns Cox Broadcasting, Inc., Cox Newspapers, Inc., and Cox Interactive Media,

The Supreme Court has recently reaffirmed this principle in an analogous context. Thus, in *Arkansas Educational Television Commission v. Forbes,*[72] the Court rejected a claim that a state-owned network of educational television stations violated the First Amendment when it declined the request of an independent congressional candidate to participate in a debate between the Democratic and Republican candidates for the office. Despite its finding that the fact of state ownership subjected the network's selection of debate participants to some degree of First Amendment scrutiny, the Court held that the broadcaster's decision to exclude the independent candidate, based on its determination that neither the voters nor other news organizations considered him a serious candidate, "was a reasonable, viewpoint-neutral exercise of journalistic discretion consistent with the First Amendment."[73] Significantly, the Court rejected the notion that editorial judgments of this kind must be made in accordance with pre-defined "objective" criteria in order to pass muster. "Were the judiciary to require, and so define and approve, pre-established criteria for access," the Court observed, "it would risk implicating the courts in judgments that should be left to the exercise of journalistic discretion."[74]

---

different news judgment might well be made, as might also be the case where the marginal candidate was a notable public figure in a non-political field, or held a distinctive viewpoint on a critical public issue. The point is that such judgments must be made by journalists based on the particular circumstances surrounding each individual case, which are likely to vary from election to election. They may not, consistent with the First Amendment, be placed in a regulatory straightjacket requiring the enumeration of "pre-established objective criteria."

72 523 U.S. 666 (1998).

73 *Id.* at 683.

74 *Id.* at 674.

Inc., and owns a majority of the shares of the publicly-traded Cox Communications, Inc. and Cox Radio, Inc., which collectively operate numerous television and radio stations, daily newspapers, web sites and cable systems throughout the United States.

GANNETT CO, INC., ("Gannett) is a large diversified news and information company having operations in 43 states, the District of Columbia, Guam, the United Kingdom, Belgium, Germany, Italy and Hong Kong. Gannett owns 95 daily newspapers in the United States (including USA TODAY) having a combined daily paid circulation of 7.7 million, a variety of non-daily publications, 22 television stations covering 17.7 percent of the television households in the United States, and has more than 100 web sites in the United States and the United Kingdom. In addition, Gannett is involved in a variety of other media ventures.

NATIONAL ASSOCIATION OF BROADCASTERS ("NAB") is a trade association that promotes the interests of radio and television broadcasters before Congress, federal agencies and the courts. NAB represents more than 1,100 television stations and 6,100 radio stations.

NATIONAL BROADCASTING CO., INC. ("NBC") is a diversified media company that produces and distributes news, entertainment and sports programming via broadcast television, cable television, the Internet and other distribution channels. The NBC News division provides news and public affairs programming to more than 200 affiliated television stations across the country, including 13 stations which are owned and operated by NBC and

connection with" a federal election, that activity is also unquestionably a press function protected by the First Amendment. Since the notion that a news organization's sponsorship of a debate between two opposing candidates might result in its later receiving some sort of *quid pro quo* is far-fetched in the extreme, regulating the news judgments of journalists in this regard manifestly does not serve to prevent the appearance or reality of corruption -- "the only legitimate and compelling government interest[ ]" which could conceivably sustain such an encroachment on freedom of the press.

Requiring a news organization's journalistic judgments to be cabined within so-called "pre-established, objective criteria" would be irreconcilable with the press freedom guaranteed by the First Amendment. As the Supreme Court has emphasized:

> The choice of material to go into a newspaper, and the decisions made as to ... treatment of public issues and public officials -- whether fair or unfair -- constitute the exercise of editorial control and judgment. It has yet to be demonstrated how government regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.[71]

---

in the absence of the exemption, the Act's prohibition of corporate campaign expenditures might "conceivably" have been interpreted as encompassing election-related news stories and editorials. Because the media exception "ensures that the Act does not hinder or prevent the institutional press from reporting on, and publishing editorials about, newsworthy events," the Court held that the statute's disparate impact on media and non-media corporations was based on a constitutionally valid distinction. Id. at 666-668.

71 *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1975); *see also Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 124-25 (1973) ("For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors -- newspaper or broadcast -- can and do abuse this power is beyond doubt, but . . . [c]alculated risks of abuse are taken in order to preserve higher values.").

The constraint placed on journalists by the "objective criteria" requirement is not merely theoretical. For example, a news organization would probably choose in most instances not to include in a debate a candidate expected to draw only three percent of the vote. But in an election expected to be particularly close -- with the vote attracted by such a candidate possibly spelling the difference between the two leading contenders -- a

which also separately produce and broadcast local news and public affairs programs. NBC also owns and operates cable network CNBC, and operates and jointly owns (with Microsoft) MSNBC, a 24-hour cable news network.

NEWS AMERICA INCORPORATED ("News America") is a multi-faceted entertainment and media company with operations in filmed entertainment; book, newspaper and magazine publishing; and television programming, production, distribution and licensing. Through direct and indirect subsidiaries, News America owns and operates the Fox Television Network and 33 television stations. Through a subsidiary, News America also owns and operates Fox News Channel, a 24-hour all news cable channel that is currently available to over 67 million U.S. cable and DBS households. Fox News Channel also produces a weekend political commentary show, Fox News Sunday, for broadcast on the Fox Television Network.

THE NEW YORK TIMES COMPANY (" Times Company") is a diversified media company that publishes *The New York Times* and *The Boston Globe* and 16 other newspapers. It also owns and operates eight television stations, two radio stations and more than 40 web sites.

POST-NEWSWEEK STATIONS, INC. ("Post-Newsweek") owns and operates six network-affiliated television stations, and is a subsidiary of The Washington Post Company, the publisher of, among other newspapers and magazines, *The Washington Post* and *Newsweek* magazine.

the rule that limit[ing] ... political activity [is] contrary to the First Amendment."[67] Likewise, the Court has emphasized that preventing the actuality or appearance of corruption remains "the only legitimate and compelling government interest[ ] . . . for restricting [First Amendment rights in the regulation of] campaign finances."[68]

These decisions make clear that the Commission's regulation purporting to restrict the news judgments of journalists in deciding which candidates should be included in a debate cannot withstand constitutional review. Plainly, the staging of a debate between two competing aspirants for public office cannot be considered a contribution to their campaigns in any meaningful sense of the word, since the participants cannot control what happens at the debate and whether it will be helpful or harmful to their candidacies.[69] And although the costs of staging a candidate debate may, in some sense, be said to be an expenditure by a corporate news organization[70] "in

---

67 *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 296 (1981).

68 *FEC v. National Conservative Political Action Committee, supra,* 470 U.S. at 496-97.

69 The element of control is central to whether the expenditure of money for political expression is deemed a "contribution" under the Act. Thus, for example, if a political advertisement paid for by a third party is controlled by or coordinated with a candidate, it is considered a contribution to that candidate. *See, Buckley v. Valeo, supra,* 424 U.S. at 46-47; *see also Federal Election Commission v. Colorado Republican Committee,* 121 S.Ct. 2351 (2001) (unlike independent expenditures by political parties on behalf of a candidate, party expenditures which are coordinated with the candidate may be regulated consistent with the First Amendment).

70 Although the Supreme Court has held that the First Amendment does not permit the restriction of independent expenditures expressly advocating the election or defeat of a federal candidate by an individual or a political party, *see Buckley v. Valeo, supra, Colorado Republican Federal Campaign Committee v. Federal Election Commission,* 518 U.S. 604 (1996), it has sustained regulations prohibiting such expenditures by a corporation. *See, Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990). Notably, however, the Michigan statute upheld in *Austin* contained a media exemption very similar to the one included in the Federal Election Campaign Act. Rejecting an equal protection challenge to the statute based on this provision, the Court observed that,

RADIO AND TELEVISION NEWS DIRECTORS ASSOCIATION ("RTNDA") is the world's largest professional organization devoted exclusively to electronic journalism. RTNDA represents local and network news executives in broadcasting, cable and other electronic media in more than 30 countries.

SOCIETY OF PROFESSIONAL JOURNALISTS ("SPJ") The Society of Professional Journalists is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

TRIBUNE COMPANY ("Tribune") is a diversified media company, operating businesses in broadcasting, publishing and on the Internet. Tribune operates 11 leading English-language daily newspapers, including *Los Angeles Times; Chicago Tribune; Newsday; The Baltimore Sun; South Florida Sun-Sentinel; Orlando Sentinel; The Hartford Courant; The Morning Call* (Allentown, Pa.); *Daily Press* (Newport News, Va.); and *The Advocate* (Stamford, Conn.). Tribune also owns and operates 23 major-market television stations, including national superstation WGN-TV, and reaches more than 80 percent of U.S. television households.

> defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views. ... [This] undermines the limitation's effectiveness ... by facilitating circumvention by those seeking to exert improper influence upon a candidate or officeholder.[63]

In fact, however, the Court did not accept the view that independent expenditures lend themselves to corruption. As a consequence, it found that spending ceilings were not narrowly drawn to promote an important government interest. Even independent expenditures directly advocating the election of a particular candidate, the Court said, "may well provide little assistance to the candidate's campaign."[64] Moreover, the Court noted,

> [t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments.[65]

Concluding that the expenditure limitations "heavily burden core First Amendment expression" while "fail[ing] to serve any substantial government interest in stemming the reality or appearance of corruption in the electoral process," the Court invalidated those provisions of the Act.[66]

The Supreme Court has subsequently emphasized that, in upholding the Federal Election Campaign Act's contribution limitations in *Buckley*, it "identified a single narrow exception to

---

63 Id. at 45.

64 Id. at 47.

65 Id.

66 Id. at 47-48.

Before the
FEDERAL ELECTION COMMISSION
Washington, D.C. 20463

In the Matter of:	)
	)
PETITION FOR	)
RULEMAKING RE:	)
SPONSORSHIP OF	)
CANDIDATE DEBATES	)
BY NEWS	)
ORGANIZATIONS	)

To: The Commission

PETITION FOR RULEMAKING OF

CBS BROADCASTING INC.; AMERICAN BROADCASTING COMPANIES, INC.; BELO CORP.; COX ENTERPRISES, INC.; GANNETT CO., INC.; NATIONAL ASSOCIATION OF BROADCASTERS; NATIONAL BROADCASTING CO., INC.; NEWS AMERICA INCORPORATED; THE NEW YORK TIMES COMPANY; POST-NEWSWEEK STATIONS, INC.; RADIO AND TELEVISION NEWS DIRECTORS ASSOCIATION; SOCIETY OF PROFESSIONAL JOURNALISTS; TRIBUNE COMPANY

INTRODUCTION

In this Petition for Rulemaking, a group of media companies and trade organizations representing broadcasters, newspapers and journalists ("Petitioners") respectfully request that the Federal Election Commission ("FEC" or "Commission") amend its regulations to make clear that the sponsorship of a debate between political candidates by a news organization (or a related trade association) does not constitute an illegal corporate campaign contribution or expenditure in violation of the Federal Election Campaign Act ("FECA" or the "Act").

drawn to serve that end, since limiting the amount that any person or group could contribute to a candidate or political committee "entails only a marginal restriction" on the contributor's expressive rights.[58] According to the Court, while a contribution "serves as a general expression of support for the candidate and his views, [it] does not communicate the underlying basis for the support."[59] Therefore, a limitation on the amount of money a person is permitted to give to a candidate or campaign organization "involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues."[60]

By contrast, the Court found the Act's restrictions on expenditures to "represent substantial rather than merely theoretical restraints on . . . political speech."[61] Having construed the statute as applying only to expenditures or communications "express[ly] ... advocat[ing] the election or defeat of a clearly identified candidate,"[62] the Court held that the expenditure limits were insufficiently related to preventing corruption. Even if it were assumed, the Court noted, that large independent expenditures pose the same dangers of actual or apparent corruption as large contributions,

> [the statute] does not provide an answer that sufficiently relates to the elimination of those dangers. . . . So long as persons and groups eschew expenditures that in express terms advocate the election or

---

58 424 U.S. at 20.

59 Id. at 20-21.

60 Id. at 21.

61 Id. at 19.

62 Id. at 44. The Court so construed the statute in order to avoid vagueness issues that would have rendered the law unconstitutional.

That proposition, we suspect, would be regarded as self-evident by almost everyone -- public officials, candidates, journalists, political party members and voters alike. Indeed, its converse would never even occur to most citizens. Yet since the late 1970s, this Commission has maintained that a news organization's sponsorship of such a debate could indeed be considered an illegal corporate campaign contribution, punishable as a crime, unless the debate participants had been selected in accordance with with rules prescribed by the FEC. Under the current version of those regulations, news organizations must adhere to so-called "pre-established objective criteria" in selecting debate participants -- rather than simply exercising their good faith news judgment -- at the risk of running afoul of the Federal Election Campaign Act.[1]

This petition derived its original impetus from complaints brought by fringe candidates seeking to force their inclusion in debates sponsored by several of the petitioners on the ground that there had been no "objective criteria" justifying the sponsors' decisions not to invite them. In one of those complaints, a fringe candidate in the 2000 New York senatorial race – who ultimately drew only one percent of the vote – asked the FEC to override a decision by WCBS-TV, New York, not to include him in a televised debate between Hillary Clinton and her Republican opponent, Rick Lazio.[2] Another such complaint involved similar charges against the co-sponsors of a candidate debate (WBZ-TV and *The Boston Globe*) by a primary candidate for Congress who complained that there were no "objective criteria" for excluding him from participation -- despite the decidedly objective facts that (1) he did not qualify for the ballot until

---

1 11 CFR § 110.13 (c).

2 *See*, MUR 5102. WCBS-TV is owned by petitioner CBS Broadcasting Inc., an indirect wholly owned subsidiary of Viacom Inc.

expression protected by the First Amendment. Observing that the "[d]iscussion of public issues and debate on the qualification of candidates [is] integral to ... the system of government established by our Constitution," the Court noted that the "contribution and expenditure limitations [of the Federal Election Campaign Act] operate in an area of the most fundamental First Amendment activities."[53] Accordingly, the Court held those restrictions to be "subject to the closest scrutiny."[54]

In order to survive "the exacting scrutiny" required by the First Amendment,[55] a regulation must both advance a "sufficiently important government interest" and do so by means "closely drawn" to accomplish that end.[56] The Court has stated that, when this test is applied, the necessary fit between ends and means requires that "government ... curtail speech only to the degree necessary to meet the particular problem at hand, and ... avoid infringing on speech that does not pose the danger that has prompted regulation."[57]

Applying this test to the contribution limitations of the Federal Election Campaign Act, the *Buckley* Court held that the principal legislative purpose asserted in their defense -- namely the prevention of corruption and the appearance of corruption -- was a constitutionally sufficient justification for regulation. Further, the Court found that the contribution limitations were closely

---

53 Id. at 14.

54 Id. at 25.

55 Id. at 16.

56 Id. at 25.

57 *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 265 (1986).

the day before the debate was taped, (2) had never held public office of any kind, and (3) was totally unknown to the professional journalists responsible for the debate, including one with nineteen years of experience in the Boston market.[3]

But although this petition was engendered by the increasing efforts of marginal candidates to induce this Commission, on the basis of the "objective criteria" requirement, to second-guess the editorial judgment of professional journalists in selecting debate participants, the recent enactment of the Bipartisan Campaign Reform Act of 2002 (the "Campaign Reform Act")[4] makes consideration of these issues by the Commission especially timely.

One of the principal goals of the Campaign Reform Act was to close a perceived loophole in the present law regarding corporate campaign expenditures. Thus, under the present statute and applicable court decisions, corporations and labor unions are prohibited from making expenditures for messages that directly endorse or oppose a candidate for federal office, but allowed to make such expenditures for so-called "issue ads" attacking or supporting identified candidates, so long as the ads do not expressly advocate the candidate's election or defeat.[5] In

---

3 *See*, MUR 5224. WBZ-TV is owned by Viacom Inc., the parent of petitioner CBS Broadcasting Inc. *The Boston Globe* is owned by by petitioner New York Times Company.

4 107 P.L. 155; 116 Stat. 81 (enacted H.R. 2356, March 27, 2002).

5 In order to avoid vagueness issues that would have rendered the law unconstitutional, the Supreme Court has construed the prohibitions of the Federal Election Campaign Act as applying only to expenditures or communications "express[ly] ... advocat[ing] the election or defeat of a clearly identified candidate." *Buckley v. Valeo*, 424 U.S. 1, 44 (1976). The effect has been to allow corporations and labor unions to make expenditures for "issue ads" free of regulation. *See, Florida Right to Life v. Lamar*, 238 F.3d 1288 (11th Cir. 2001); *Citizens for Responsible Government v. Davidson*, 236 F.3d 1174 (10th Cir. 2000); *Perry v. Bartlett*, 231 F.3d 155 (4th Cir. 2000); *Vermont Right to Life, Inc. v. Sorrell*, 221 F.3d 376 (2d Cir 2000); *Faucher v. Federal Election Commission*, 928 F.2d

reflected by the "lowest unit rate" provision of Section 315 (b) of the Communications Act. In this regard, the Commission stated:

> Congress has shown a clear, statutory interest in providing Federal candidates with reasonably priced airtime. . . . While the Federal Election Commission cannot surrender jurisdiction, nor simply defer to the FCC when our statutes conflict, in this instance, the Communications Act provides important guidance in interpreting the Federal Election Campaign Act by illuminating the policy Congress intended to foster.[51]

The same considerations are applicable here. Recognizing Congress' clear intent to "take some risks with the equal time philosophy in order to permit . . . broadcasters more fully to cover the political news," the FCC has found it unnecessary to require journalists artificially to enumerate so-called "objective" criteria for selecting the participants in candidate debates. Rather, absent some indication that the selection has been made to favor the interests of a particular candidate, it has chosen to rely on the good faith news judgment of broadcasters. Taking account of the FCC's "guidance [as to] . . . the policy Congress intended to foster," this Commission should do likewise.

IV. THE COMMISSION'S EXISTING DEBATE REGULATION IS UNCONSTITUTIONAL

The most fundamental reason for changing the Commission's debate regulation is, of course, that as it presently stands it violates the First Amendment.

In its seminal decision in *Buckley v. Valeo*,[52] the Supreme Court made clear that, in order to be constitutional, campaign finance regulations must not unduly infringe on the freedoms of

---

51 Advisory Opinion 1998-17A.

52 424 U.S. 1 (1976).

order to eliminate this seeming anomaly, the Campaign Reform Act adds to the prohibitions of the existing statue a ban on corporate or union disbursements for "any . . . electioneering communication." [6] For purposes of this provision, an "electioneering communication." is defined as a "broadcast, cable, or satellite communication . . . which refers to a clearly identified candidate for Federal office" and is made within 60 days of a general, or 30 days of a primary, election.[7] Significantly, this definition expressly excludes a communication "which constitutes a candidate debate . . . conducted pursuant to regulations adopted by the Commission." [8]

The exclusion of candidate debates from the definition of prohibited corporate and union "electioneering communication[s]" is yet another indication of Congress' clear intent, discussed in detail below, for the sponsorship of such debates by news organizations to remain unaffected by legislation prohibiting corporate campaign "contributions" and "expenditures." Nonetheless, because the exclusion applies by its terms only to debates "*conducted pursuant to regulations adopted by the Commission*," the provision is not self-executing; the adoption of rules by the

---

468 (1st Cir.), *cert. denied*, 502 U.S. 820 (1991); *Federal Election Commission v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2d Cir. 1980); *Maine Right to Life Committee v. Federal Election Committee*, 914 F. Supp. 8 (D. Me.), *aff'd*, 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 522 U.S. 810 (1997); *Federal Election Commission v. Christian Action Network*, 894 F. Supp. 946 (W.D. VA. 1995), *aff'd*, 92 F.3d 1288 (4th Cir. 1996). Similarly, political parties have been able to spend unlimited amounts of "soft money" for "issue ads." *See. Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604 (1996).

6 107 P.L. 155, § 203 (a).

7 Id. at § 201(a).

8 Id.

time philosophy in order to permit broadcast coverage of on-the-spot news and to enable broadcasters more fully to cover the political news."[45]

Since 1975, the FCC has held a broadcaster's presentation of a candidate debate to be "on-the-spot coverage of a bona fide news event"[46] exempt from the "equal opportunities" requirement.[47] In so doing, the FCC has expressly rejected assertions that all "major" or "serious" candidates must be included in a debate in order for it to qualify for exempt status.[48] Rather, the Commission has held that a broadcaster's presentation of a candidate debate will be exempt from "equal time" requirements so long as the broadcast reflects its bona fide news judgment, rather than an intent to serve the interests of any candidate.[49] And candidate debates produced by a broadcaster, no less than those sponsored by an outside party, are entitled to the news exemption.[50]

This Commission has previously recognized the desirability of aligning its policies with those of the FCC. Thus, in approving the proposal of a cable television operator to provide free time for spot advertising to federal candidates, the Commission took note of the opinion of the FCC's General Counsel that the provision of such time would serve to advance the purposes

---

45 *Chisholm v FCC*, 538 F.2d 349, 358 (D.C. Cir), *cert. denied*, 429 U.S. 890 (1976).

46 47 U.S.C. § 315 (a) (4).

47 *See, e.g., Aspen Institute*, 55 FCC 2d 697 (1975), *aff'd sub nom. Chisholm v. FCC, supra.*

48 *See, American Independent Party and Eugene McCarthy*, 62 FCC 2d 4 (1976), *aff'd sub nom. McCarthy v. FCC*, Case No. 76-1915 (D.C. Cir., Oct. 1976).

49 *See, Leonora Fulani*, 3 FCC Rcd. 6245 (1988); *Political Primer 1984*, 100 FCC 2d 1476 (1984); *American Independent Party and Eugene McCarthy, supra.*

50 *Henry Geller*, 95 FCC 2d 1236 (1983).

FEC will be required to give the exemption effect. Indeed, under the Commission's *existing* regulations, news organizations arranging a candidate debate must select participants in accordance with "pre-established objective criteria" in order to avoid having their sponsorship labeled an illegal corporate campaign contribution or expenditure.

The Campaign Reform Act directs the Commission to promulagate regulations to carry out its provisions no later than 270 days after its enactment.[9] The Commission will therefore shortly have to consider the rules it should adopt to implement the Act's exclusion of candidate debates from the definition of prohibited "electioneering communications." For all the reasons set forth below, the Commission should use this occasion to make clear that the Federal Election Campaign Act's proscription of corporate campaign contributions and expenditures, as well as "electioneering communications," has no application to debates sponsored by news organizations and related trade associations.

But even apart from the need to promulagate regulations pursuant to the Campaign Reform Act, immediate action by the Commission on this issue is necessary. First, in light of the plain conflict between the present regulation and the First Amendment (see dicussion at pages 21-28, *infra*), the FEC should not wait until the effective date of the Campaign Reform Act (November 6, 2002)[10] to make clear that news organizations do not violate the criminal law by relying on their own editorial judgment in selecting the participants in a debate. Moreover, the survival of the Act's restrictions on "electioneering communications" -- and therefore the

---

9 Id. at § 402 (c). This applies to provisions of the Act other than those carrying out Title I (regulating the receipt and expenditure of "soft money" by political parties), which must be promulgated within 90 days of enactment.

10 107 P.L. 155, §

candidates participating in each program is the only difference between the programs "created and covered" in the Bloomberg case, and the debates that might have been "created and covered" by another news organization, the Commission regards the former, but not the latter, as being unqualifiedly exempt from the prohibitions of the Act.

Other cases could be cited,[44] but there is no need to belabor the point. The Commission's decisions regarding the provision of free time to candidates by media outlets are totally irreconcilable with its debate regulation.

III. THE COMMISSION'S REGULATION CONFLICTS WITH THE FCC'S LONGSTANDING INTERPRETATION OF SECTION 315 OF THE COMMUNICATIONS ACT CONCERNING THE PRESENTATION OF CANDIDATE DEBATES BY BROADCASTERS

Another reason for the Commission to amend its debate regulation is to eliminate the conflict that presently exists between its policies and those of the Federal Communications Commission regarding the sponsorship of candidate debates by broadcasters.

In 1959, Congress amended Section 315 of the Communications Act to exempt certain categories of news programming from the general requirement that a broadcast station allowing an on-air appearance by one candidate grant "equal opportunities" on request to all of that candidate's legally qualified opponents. As the U.S. Court of Appeals for the D.C. Circuit has observed, the intent of Congress in amending the statute was to "take some risks with the equal

44 *See*, note 38, *supra*.

debate exemption included in those provisions -- is not guaranteed. Those provisions of the Act, among others, are now being challenged in two lawsuits. [11] Although petitioners take no position on the merits of these actions, the issues involved are generally regarded as being difficult, and the outcome of the litigation uncertain.[12] What *is* certain, however, is that the Commission's current debate regulation cannot be reconciled with either the First Amendment or the clear intent of Congress in enacting the Federal Election Campaign Act. The Commission should not delay proceedings to repeal or amend this badly flawed rule based on assumptions regarding the outcome of litigation concerning the Campaign Reform Act.

In the discussion that follows, we will show that the Commission's current debate regulation is plainly inconsistent with the intent of Congress in adopting the Federal Election Campaign Act; is logically irreconcilable with the Commission's own rulings that media entities do not violate the Act by providing free time to candidates; and conflicts with long-established policies of the Federal Communications Commission ("FCC") concerning the presentation of campaign debates by broadcasters. Even more fundamentally, the debate rule is manifestly unconstitutional, since it does nothing to advance the purpose of preventing corruption or the appearance of corruption in the political process -- the objectives which the Supreme Court has held are "the only legitimate and compelling government interests thus far identified for

---

11 *See, McConnell v. Federal Election Commission*, Case No. __, U.S.D.C., D.C., March 27,2002; *National Rifle Association v. Federal Election Commission*, Case No. 02-0581 (CKK), U.S.D.C., D.C., March 27, 2002.

12 *See, e.g.*, Neil A. Lewis, "Coming Next, Landmark Ruling in Campaign Money Fight," *The New York Times*, March 23, 2002, at A-13.

Opinion stating that Bloomberg's presentation of an "Electronic Town Hall," featuring presidential candidates in separate appearances, would not constitute a prohibited contribution or expenditure under the Act.[42] Once again, there was no representation by the sponsor that all candidates would be invited or that "pre-established objective criteria" would be used in selecting the participants. Indeed, the Bloomberg request seemed to suggest the opposite, since it indicated that the participants would be invited to appear "in their dual capacities as candidates and office holders," thus apparently excluding any non-office holder candidates, such as Ross Perot.

Nonetheless, citing the intent of Congress to "preserve the traditional role of the press with respect to campaigns," the Commission found the proposed programs to be exempt. In this regard, the Commission noted that Bloomberg essentially proposed "to create and cover a news event in much the same way as a newspaper would arrange, report, and comment on its own staff interview with a political candidate or cover a press conference." Finding on this basis that the Bloomberg news services were "press entities that will be acting as press entities,"[43] the Commission held that the proposed programs qualified for the media exemption.

These decisions are plainly inconsistent with the Commission's treatment of candidate debates. Thus, no less than the programs at issue in the DNC/RNC ruling, debates afford candidates "access . . . to discuss issues"; nonetheless, the Commission does not consider them as qualifying for the *per se* exemption afforded to "commentar[ies]." And while the number of

---

42 Advisory Opinion 1996-16.

43 Id., *citing Reader's Digest Association v. Federal Election Commission,* 509 F.Supp. 1210 (S.D.N.Y. 1981).

restricting [First Amendment rights in the regulation of] campaign finances." *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 496-97 (1985).

It is manifestly illogical to consider the sponsorship of candidate debates -- which are often characterized by the participants' stinging attacks on one another -- to be campaign "contributions." And it is past time for the Commission to abandon its anomalous assertion of authority over such debates presented by the news media. Petitioners respectfully urge the Commission promptly to commence a rulemaking proceeding to make clear, once and for all, that it has no jurisdiction over the sponsorship of debates by the electronic and print press, or by trade organizations made up of press entities or journalists.

I. THE DEBATE REGULATION IS CONTRARY TO THE CLEAR INTENT OF CONGRESS THAT THE COVERAGE OF POLITICAL CAMPAIGNS BY NEWS ORGANIZATIONS REMAIN UNAFFECTED BY ENACTMENT OF THE FEDERAL ELECTION CAMPAIGN ACT

There can be little question that the FEC's existing debate regulations are fundamentally at odds with the express and unambiguously stated intent of Congress that the Commission refrain from involving itself in this area in the guise of regulating campaign finance. In order to appreciate the full extent of this conflict, it is necessary briefly to review the history of the FEC's efforts to regulate the sponsorship of candidate debates by news organizations.

From the time the Federal Election Campaign Act was adopted, Congress made absolutely clear that the statute was not intended to affect the traditional -- and constitutionally protected -- role of the institutional press in informing the public about the candidates and issues in federal election campaigns. Although the Act essentially just recodified the existing prohibition in Title 18 of corporate contributions and expenditures made "in connection with" a

interpretation is eminently sensible and unquestionably consistent with Congressional intent, it cannot be reconciled with the Commission's treatment of media-sponsored debates.

In the first of these advisory rulings, the Commission held that an incorporated cable network would not violate the Act in providing a free two-hour block of time to both the Democratic and Republican national committees for campaign-related messages.[39] Without raising any question as to whether time would be provided to any minor party -- or the criteria that would govern the disposition of any third party requests for a similar opportunity -- the Commission found the proposed programs to be covered by the media exemption. Noting the intent of Congress to "assure[ ] the unfettered right of the newspapers, television networks and other media to cover and comment on political campaigns,"[40] the Commission characterized the political party presentations to be telecast by the cable network as "commentar[ies]." In this regard, the Commission stated:

> Although the statute and regulations do not define "commentary," the Commission is of the view that commentary cannot be limited to the broadcaster. The exemption already includes the term "editorial" which applies specifically to the broadcaster's point of view. In the opinion of the Commission, "commentary" was intended to allow third persons access to the media to discuss issues. The statute and the regulations do not define the issues permitted to be discussed or the format in which they are to be presented, nor do they set a time limit as to the length of the commentary.[41]

Similarly, in response to a request from Bloomberg, L.P. ("Bloomberg"), the operator of broadcast, cable and online financial news services, the Commission in 1992 issued an Advisory

---

39 Advisory Opinion 1982-44.

40 *See,* note 15, *supra.*

41 Id. at 4.

federal election,[13] a new provision was added expressly exempting from the definition of "expenditure" any "news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine or other periodical publication, unless such facilities are owned or controlled by any political party, political committee or candidate."[14] The exemption was intended, according to the House Committee Report on the legislation, to "assure[ ] the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns." [15]

Given this clear statement of Congressional purpose, it might have been expected that the FEC would steer clear of purporting to regulate the sponsorship of candidate debates by news organizations. Unfortunately, however, the Commission has never disavowed its authority to regulate such debates, and in fact has actively asserted its jurisdiction to do so on several occasions.

Thus, in 1977, the FEC began an inquiry into the sponsorship and financing of federal candidate debates by the League of Women Voters and other organizations.[16] In that proceeding, a number of news organizations filed comments urging the Commission not to take any action that might adversely affect the willingness and ability of the League and other impartial groups to sponsor such debates. More fundamentally, they urged that the Commission should, on

---

13 *Compare*, 2 USC § 441b and former Section 313 of the Corrupt Practices Act, discussed in *United States v. CIO*, 335 U.S. 106 (1948).

14 2 USC § 431 (9) (B) (i).

15 H.R. Rep. 93-1239, 93d Cong., 2d Sess. at 4 (1974). In defining "contribution" and "expenditure," the FEC's regulations track the statutory exemption.

16 42 Fed Reg. 35846 (July 12, 1977).

Although Congress did not use the word "debate" in enacting the press exemption, there can be little doubt that it would have regarded FEC oversight of candidate debates staged by the press as burdening "the unfettered right of the . . . [news] media to cover and comment on political campaigns." And any doubt on this score that might conceivably have been thought to remain is clearly dispelled by the express statements of key Congressmen that the Commission was "[a]bsolutely not" to involve itself with campaign debates absent the clearest indication of intent to favor one candidate over another.

The Commission's debate regulation is therefore manifestly contrary to the intent of Congress in enacting the 1974 amendments to the Federal Election Campaign Act. In addition, as we now show, it is also glaringly inconsistent with the FEC's own decisions involving the gift of time by news outlets to candidates for the purpose of presenting their views to the voters.

II. THE DEBATE RULE IS IRRECONCILABLE WITH OTHER FEC DECISIONS REGARDING THE PROVISION OF FREE TIME TO FEDERAL CANDIDATES.

In a series of advisory opinions, the Commission has held that corporate media outlets may provide free time to federal candidates without running afoul of the Federal Election Campaign Act, construing such gifts of time as falling within the media exemption.[38] While this

---

38 *See, e.g.*, Advisory Opinion 1998-17A; Advisory Opinion 1996-48, Advisory Opinion 1996-41, Advisory Opinion 1996-16, and Advisory Opinion 1982-44. All cited opinions are available through the FEC's Advisory Opinion Search Page, http://herndon2.sdrdc.com/ao/.

constitutional grounds, disclaim any authority over the sponsorship of debates by the broadcast and print press.[17]

Almost two years later, the FEC transmitted to Congress proposed regulations that purported to exempt certain "non-partisan" debates sponsored by tax-exempt organizations from the Act's limitations on "contributions" or "expenditures" in connection with federal elections. However, ignoring the concerns expressed by press organizations, the proposed regulation and the accompanying explanation failed to make clear that the regulations did not apply to debates sponsored by the news media.[18]

Because of this omission, the proposed regulations were susceptible of the interpretation that the sponsorship of a federal candidate debate by a corporate news organization was an illegal "expenditure" or "contribution" prohibited by the Act. This potential was not lost on the Senate, which quickly voted to disapprove the regulations.[19] In his statement on the resolution of disapproval, Senator Pell stated:

> It was Congress' intent in enacting federal election laws to safeguard the integrity of the electoral process largely by means of campaign finance disclosure. The laws were not intended to impede the free flow of information to the voters, or disrupt the dialog among candidates for political office.[20]

---

17 *See, e.g.*, Comments of CBS Inc., Federal Candidates: Sponsorship and Financing of Public Debates, filed September 30, 1977.

18 *See*, 44 FR 39348 (July 5, 1979).

19 125 Cong. Rec. S 12821 (daily ed. September 18, 1979). Under the Act, the Commission is required to transmit regulations that it proposes to adopt to the House of Representatives and the Senate. If neither House disapproves the regulations within thirty legislative days, the Commission may then proceed to promulgate them. 2 USC § 438 (d).

20 Id. Along similar lines, Senator Hatfield stated:

candidate debate, it is completely clear that Congress did not intend for the Act to affect basic press functions of this kind. Thus, as noted above, when Congress recodified the longstanding prohibition against corporate campaign contributions or expenditures in adopting the 1974 amendments to the Federal Election Campaign Act, it took pains expressly to exempt from the definition of expenditure any "news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine or other periodical publication, unless such facilities are owned or controlled by any political party, political committee or candidate."[36] In discussing this provision, the House Committee Report on the 1974 amendments to the Act stated:

> [The exemption] make[s] it plain that it is not the intent of the Congress in the present legislation to limit or burden in any way the first amendment freedoms of the press ... Thus, [the exemption] assures the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns.[37]

---

36 2 USC § 431 (9) (B) (i). Notably, Congress added this provision despite the fact that a predecessor statute had already been narrowly interpreted by the United States Supreme Court. Thus, in *United States v. CIO*, 335 U.S. 106 (1948), the Court affirmed the dismissal of an indictment against a labor organization and its president under Section 313 of the Corrupt Practices Act, which prohibited corporations and labor unions from making any contribution or expenditure in connection with a federal election. The indictment charged that the defendants had violated the statute by publishing an editorial in a union newspaper urging the election of a particular congressional candidate. Although the district court had held such an application of the law to violate the First Amendment, the Supreme Court did not find it necessary to reach that issue. Instead, based on statements made during the Senate debate concerning the legislation, and the "grave[ ] doubt . . . as to its constitutionality" that would arise under the government's interpretation of the law, the Court found that, in prohibiting union "contributions" and "expenditures," Congress had not intended to outlaw the publication in question. Id. at 121-23. A contrary interpretation, the Court noted, would be inconsistent with Congress' clear objective "[not] to pass any legislation that would threaten interference[ ] with the privileges of speech or press." Id. at 120.

37 H.R. Rep. 93-1239, 93d Cong., 2d Sess. at 4 (1974).

Following the Senate's rejection of its proposed debate regulations, the FEC opened a new rulemaking proceeding. In its notice concerning the rulemaking, the Commission stated that the proposed regulations that it had previously transmitted to Congress "were not intended to address the issue of whether incorporated news media staging and covering candidate debates would be permissible under [the Act]."[21] But rather than clearly stating that its proposed regulations would not be applicable to the sponsorship of candidate debates by news organizations, the questions posed in the Commission's notice suggested that it was still entertaining the possibility of asserting jurisdiction over such debates.[22] Despite comments filed by news organizations once again requesting that the Commission clearly disavow any such intent -- either by expressly so stating in explanatory language or by interpreting the existing statutory exemption for any "news story, editorial or commentary" to include debates -- the Commission explicitly held that debates sponsored by the press were *not* covered by the statutory

---

> I am concerned that the Federal Election Commission's proposed regulations on the funding and sponsorship of candidate debates represent an unwarranted intrusion of new Federal regulation into the political process, and are not in keeping with Congressional intent in enacting the Federal campaign laws. I express my own concern that the record is bare of any evidence of abuse.

Id.

21 44 Fed. Reg. 59162 (October 12, 1979).

22 For example, the Commission sought information on the frequency of press-sponsored debates, the selection of candidates for inclusion, the sale of advertising in and adjacent to such debates, and the exclusivity of FCC jurisdiction over broadcasters. Id.

to adopt standards governing the kind of debate that could be legally sponsored by news organizations. Although eliminating the word "non-partisan" from the regulation, the Commission added a new requirement for establishing that a news organization's sponsorship of a debate did not constitute an illegal corporate campaign "contribution" or "expenditure" -- namely, that the news organization select the debate participants in accordance with "pre-established objective criteria."[32] The Commission cautioned staging organizations that they would be "well advised to reduce their objective criteria to writing," so that they could "show how they decided which candidates to invite to the debate."[33] Moreover, in a complete reversal of the position expressed in promulgating its 1979 debate regulations, the Commission ruled out major party status as a valid "criterion" for selecting the participants in a debate.[34]

In short, the Commission ignored Congress' admonition that it "[not] substitute its judgment of the propriety of a particular debate for the on-the-spot judgment of the sponsor," and that it not intervene in such matters unless it were "clear on the face of a complaint [that] the sponsoring of the debate involves something other than the good faith editorial judgment of the sponsor."[35]

But even apart from such Congressional statements explicitly warning the FEC against second-guessing the editorial judgments of the press as to the appropriate participants in a

---

32 60 FR 64260, 64262 (December 14, 1995).

33 Id.

34 Id. *Compare*, 44 FR at 76735.

35 *See*, Letter dated March 10, 1980 from Representative Frank Thompson, Jr., Chairman, House Committee on Administration, to Robert O. Tiernan, Chairman, Federal Election Commission, reprinted at Cong. Rec. H1822.

news media exemption.[23] Further, instead of recognizing that the regulation of candidate debates arranged by news organizations was beyond its statutory mandate -- let alone its constitutional authority -- the Commission proposed new regulations stating, among other things, that non-profit organizations and media entities could stage "non-partisan" debates. "Non-partisan" debates were defined as those that "[did] not promote or advance one candidate over another."[24]

Although this standard might have proved to be acceptably non-intrusive if interpreted in the same manner as the FCC applied its similar test for determining whether a broadcaster's coverage or sponsorship of a candidate debate qualified for exemption from the "equal opportunities" requirement,[25] it soon became apparent that the FEC did not view the scope of its authority in so limited a manner. Thus, in February 1980, while the proposed regulations were still before Congress, the Commission found "reason to believe" that *The Nashua Telegraph* was about to violate the Act by sponsoring a debate between Ronald Reagan and George Bush, without inviting the other Republican candidates in the New Hampshire primary to participate.

---

23 44 FR 76734 (Dec. 27, 1979).

24 Id.

25 *See*, 47 U.S.C. § 315 (a). The FCC considers a broadcaster's presentation of a candidate debate to be exempt from "equal time" requirements so long as its decision to sponsor the debate reflects its bona fide news judgment, rather than an intent to serve the interests of any candidate. *See*, discussion at pages 19-20, *infra*. Ironically, in promulgating the regulation discussed in the text, the FEC stated its belief that "sufficient safeguards as to the nonpartisanship of debates staged by broadcasters are set forth in the Communications Act, most particularly [Section] 315, and the present regulations and interpretations of the Federal Communications Commission under this section." 44 FR at 76735. However, the FEC's subsequent actions in the *Nashua Telegraph* case -- not to mention the "objective criteria" requirement of its present debate regulation -- are completely inconsistent with the FCC's approach under Section 315 of affording deference to the news judgments of broadcasters, absent circumstances clearly suggesting that a broadcaster's sponsorship of a debate was intended to favor a particular candidate or candidates.

> participate in specific debates. ... It seems to me that its action in the *Nashua Telegraph* case justifies that fear.[28]

Asked by Representative Frenzel whether "our failure to veto these regulations will concede statutory authority to the FEC to fully involve itself" in the sponsorship of candidate debates by news organizations, Chairman Van Deerlin replied that it "[a]bsolutely [would] not." Noting that "the intended ramifications of this approval have been made abundantly clear to the FEC,"[29] Chairman Van Deerlin quoted approvingly a letter from House Administration Committee Chairman Frank Thompson to the FEC admonishing the Commission to

> be reluctant in enforcing these regulations to substitute its judgment of the propriety of a particular debate for the on-the-spot judgment of the sponsor. Before the Commission should choose to take any action, it should be clear on the face of a complaint that the sponsoring of the debate involves something other than the good faith editorial judgment of the sponsor. The mere fact that a debate does not include the full field of eligible candidates should not in itself be reason to believe that the debate falls outside these regulations.[30]

Following this clear expression of Congressional intent, the Commission did not attempt to apply the Act's prohibition of corporate campaign expenditures to the sponsorship of candidate debates by the news media for the next fifteen years. In 1995, however, in a rulemaking proceeding undertaken primarily to further define the characteristics of "express advocacy" of a candidate's election or defeat -- the only kind of independent campaign speech that, according to the Supreme Court, could constitutionally be regulated[31] -- the Commission once again purported

---

28 Id. at H1822.

29 Id.

30 Id.

31 *See*, discussion at page 23 and note 62, *infra*.

After the Commission threatened to seek injunctive relief to prevent the debate, the newspaper withdrew funding for the event.[26]

Following this unprecedented action by the Commission, there were renewed calls for Congress to disapprove the Commission's proposed debate regulations. Although neither the House nor the Senate did so, Congress' inaction plainly did not reflect approval of the Commission's expansive view of its authority to interfere in the journalistic judgments of news organizations. Thus, in explaining his reluctance to support rejection of the proposed regulations, the Chairman of the House Communications Subcommittee, Lionel Van Deerlin, noted that the proposed rules would clarify the uncertainty created by a previous FEC policy statement about the ability of non-partisan and non-profit organizations, such as the League of Women Voters, to accept corporate contributions for the sponsorship of candidate debates -- an uncertainty which Chairman Van Deerlin noted had "chilled ... if not frozen ... sponsorship and funding of political debates."[27] However, in a floor colloquy with Representative Frenzel, Chairman Van Deerlin noted his concern about the provisions of the pending regulations that purported "[to] 'grant' news organizations the already well recognized privilege of sponsoring debates," and then qualified that privilege by requiring that the debates be "non-partisan." Chairman Van Deerlin stated:

> The FEC's failure to define this non-partisan requirement created enormous uncertainty and widespread fear that the Commission had put itself in a position to second-guess the news judgment of professional news organizations regarding which candidates should

---

26 *See*, Cong. Rec. at H1821 (March 12, 1980); Lou Cannon, "Reagan Forces to Pay Costs of Debate With Bush," *The Washington Post*, February 22, 1980, p. A-2; Walter R. Mears, "Bush, Reagan Square Off in New Hampshire Tonight," Associated Press, February 23, 1980.

27 Cong. Rec. at H1821 (March 12, 1980).