



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

**CONCURRING STATEMENT OF
COMMISSIONER LEE E. GOODMAN
ON NOTICE OF DISPOSITION OF PETITION
FOR RULEMAKING ON CANDIDATE DEBATES**

On July 16, 2015, the Commission voted not to open a new rulemaking proposing stricter mandates on corporate debate sponsorship as proposed in a petition submitted by an organization called Level the Playing Field. Today, the Commission issued its formal Notice of Disposition explaining the rationale for its decision. I joined the vote and the Notice of Disposition for the reasons stated in that document and at the Commission's meeting on July 16, 2015.

I write separately, however, to express more fundamental concerns with the Commission's regulation of press organizations that sponsor candidate debates as part of their news coverage and programming. For too long, the Commission has ignored the congressional and constitutional mandates to unconditionally protect the free press rights of media entities. Our shared American democracy thrives only when government respects the media's freedom and independence to inform the public about public affairs. But thirty-five years ago, the Commission made a regulatory error that has encroached upon that autonomy ever since.

This statement traces the important role media organizations have played in our nation's electoral debates before the Commission's existence, explains the origins of the Commission's 1979 regulatory mistake, and then details how that decision continues to impact media organizations and the citizens who benefit from the information they disseminate.

I. America's Rich History of Press-Sponsored Debates

Press organizations had been sponsoring candidate debates for decades by the time Congress enacted the Federal Election Campaign Act of 1971 and its amendments in 1974 (the "FECA" or "Act"). Indeed, by the time Congress passed the Act, primary and general election debate sponsorship was a common part of the news gathering, coverage and programming function for most press organizations.

In 1948, KEX-ABC radio station of Portland, Oregon sponsored an in-studio, one-hour debate between Republican presidential primary candidates Governor Thomas Dewey and Governor Harold Stassen, with an estimated audience of over 40 million listeners.¹ In 1956, the American Broadcasting Company (ABC) sponsored a televised one-hour debate between

¹ See Comm'n on Presidential Debates, *Debate History, 1948 Debate*, www.debates.org/index.php?page=1948-debate.

Democratic presidential primary candidates Governor Adlai Stevenson and former Senator Estes Kefauver.² And in advance of the 1960 West Virginia Democratic primary, John Kennedy and Hubert Humphrey debated at WCHS-TV in Charleston.³ The debate was carried “by all six television stations in the state as well as several television stations across the nation and the Mutual Radio Network.”⁴

Following the 1960 Democratic primary debate, the three national television broadcasting companies, the American Broadcasting Company (ABC), Columbia Broadcasting System (CBS), and National Broadcasting Company (NBC), jointly sponsored four televised, general election presidential debates between Senator Kennedy and Vice President Richard Nixon.⁵ The first debate, on September 26, was staged in CBS affiliate WBBM-TV’s studio in Chicago. The second, on October 7, was staged in NBC affiliate WRC-TV’s facility in Washington, D.C.. For the third debate, on October 13, Vice President Nixon was interviewed in an ABC studio in Los Angeles while Senator Kennedy answered questions in ABC’s New York studio, with the two candidates appearing together on a split screen. The fourth and final debate was staged on October 21 with both candidates appearing in ABC’s New York studio. The moderators and panelists who participated in the debates were broadcast and print journalists from ABC, CBS, NBC, the Mutual Broadcasting System, Inc. (a radio broadcasting corporation), *Newsday*, United Press International, the *New York Herald Tribune*, and *Reporter Magazine*.⁶ It was estimated that over 60 million Americans watched each debate.⁷

In 1968, Senators Robert F. Kennedy and Eugene McCarthy debated on the ABC News program *Issues and Answers* in advance of the California Democratic primary.⁸ And in addition to presidential debates, newspapers also have a long history of sponsoring debates in local, state, congressional, and national elections over many decades.⁹

² See Comm’n on Presidential Debates, *Debate History, 1956 Debate*, www.debates.org/index.php?page=1956-debate.

³ Robert Rupp, *Bright Idea Played Big Role in TV Debate History*, *Charleston Gazette*, Sept. 30, 2004.

⁴ *Id.*

⁵ See Comm’n on Presidential Debates, *Debate History, 1960 Debate*, www.debates.org/index.php?page=1960-debates.

⁶ *Id.*

⁷ *Id.*

⁸ Ross Baker, *The Impact of Presidential Debates is Debatable*, *Newark Star-Ledger*, Dec. 19, 1999; Univ. of Minn., *Eugene McCarthy-Robert F. Kennedy Debate*, <https://umedia.lib.umn.edu/node/68933> (linking to audio file of debate).

⁹ See 125 CONG. REC. 24958 (daily ed. Sept. 18, 1979) (Senator Hatfield remarking “A representative of the Gannett newspaper chain, in a letter to the FEC’s General Counsel, described the experience of a selected handful of local papers which had sponsored candidate debates” and recognizing “the thousands of newspapers in the States and communities across the country which have in the past sponsored candidate debates”).

The legality of these press-sponsored debates was not questioned under the Tillman Act of 1907, the Federal Corrupt Practices Act of 1925, or the Taft-Hartley Act of 1947. And broadcast stations were allowed to sponsor debates under the Communications Act of 1934 and regulations adopted by the Federal Communications Commission.¹⁰ The debates were important exercises in journalistic coverage and programming to inform the American public under the Free Press Clause of the First Amendment.

II. Congress Protects Press Freedoms When Passing Post-Watergate Reforms

In 1971, Congress passed the Act and subsequently enacted major restrictions upon the financing of federal campaigns in a comprehensive set of 1974 amendments. Together, the Act and the amendments of 1974 form the foundation for the federal campaign finance regulatory scheme. The Act's continuation of the Tillman Act's strict prohibition against corporate contributions to federal candidates was prominent among the Act's many restrictions.¹¹

While enacting a new regulatory scheme to restrict political speech, Congress was acutely aware of the special problem presented by the right of newspapers, magazines, and broadcast stations—the press—to publish political news, commentary, and editorials about candidates and elections. The First Amendment provides that “Congress shall make no law ... abridging the freedom of the press.”¹² The Supreme Court consistently has emphasized “the special and constitutionally recognized role of [the press] in informing and educating the public, offering criticism, and providing a forum for discussion and debate.”¹³

Accordingly, Congress enshrined the media's First Amendment protections in the Act. Congress expressly exempted the press from the Act's regulations, excluding “any news story, commentary, or editorial distributed through the facilities of any broadcasting station,

¹⁰ Prior to 1983, broadcast stations typically complied with the Federal Communications Commission's (FCC) Equal Time Doctrine by incorporating debates into regularly scheduled news programs such as ABC's *Issues and Answers*. S. Hellwig, M. Pfau, S. Brydon, *Televised Presidential Debates: Advocacy in Contemporary America* (Praeger Publishers 1992) at 1-5; *but see* Matter Under Review 6703 (WCVB-TV & Hearst Stations, Inc.) (the Federal Election Commission declined, by a vote of 3 to 3, to treat a debate hosted in-studio on a regularly scheduled Sunday morning news program (*On the Record*) as a bona fide news program exempt from Commission regulation). In other instances, including the 1960 presidential debates, either Congress or the FCC – recognizing the importance of press sponsored debates – suspended or relaxed the Equal Time Doctrine to facilitate the debates. Hellwig *et al.*, at 2-3.

¹¹ 52 U.S.C. § 30118 (formerly 2 U.S.C. § 441b). The Supreme Court held in *Citizens United v. FEC*, 558 U.S. 310 (2010), that the Act's prohibition against independent expenditures by corporations was unconstitutional.

¹² U.S. Const., Amend. I.

¹³ *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 781 (1978)(emphasis added); *accord, Mills v. Alabama*, 384 U.S. 214, 219 (1966) (explaining that “the press serves ... as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve,” and how the suppression of that right “muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free.”).

newspaper, magazine, or other periodical publication” from the definition of regulated expenditures.¹⁴ Congress explained its intent to respect broad freedom for the press:

[I]t 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 and of association. Thus the exclusion assures the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns.¹⁵

This exemption became known as the “press exemption.”¹⁶

III. The Commission’s 1976 Policy Statement Imposing Restrictions on Debates Applied to Non-Profits, Not Press Entities

In the lead up to the 1976 presidential election, the League of Women Voters Educational Fund (“League”), a non-profit corporation exempt from taxation under Section 501(c)(3) of the Internal Revenue Code,¹⁷ was planning to sponsor presidential debates. As a corporation – and particularly as a non-press agency – the League faced a potential legal predicament: could the League, a corporation funded by corporate and labor union donations, coordinate debate preparation with federal candidates and pay for debate planning, venues, and staging, or would its disbursements violate the ban on corporate contributions and expenditures?

The Commission responded by interpreting the Act to permit non-partisan, non-profit corporations to sponsor debates on the basis that sponsorship of joint appearances in debate format was not a “contribution” or “expenditure” made “for the purpose of influencing an election” within the meaning of the Act.¹⁸ However, the Commission’s Policy Statement on Presidential Debates concluded that the League was prohibited from using corporate or labor funds to sponsor debates.¹⁹ The League later sued the Commission challenging this funding prohibition, and the Commission amended its policy in 1977 to permit the League to accept corporate and labor donations to fund debates.²⁰

¹⁴ 52 U.S.C. § 30101(9)(b)(i) (formerly 2 U.S.C. § 431(9)(b)(i)). In its regulations, the Commission exempted the press from the definition of “expenditure” and “contribution,” 11 C.F.R. §§ 100.73, 100.132, and thus coordinated expenditures by the press are exempt from regulation as well.

¹⁵ H.R. Rep. No. 93-1239, 93d Congress, 2d Sess. at 4 (1974).

¹⁶ The “press exemption” is also referred to as the “media exemption.”

¹⁷ 26 U.S.C. § 501(c)(3).

¹⁸ FEC Policy Statement on Presidential Debates, Aug. 30, 1976. The Commission’s policy was preceded by an opinion of counsel that opined that the League could sponsor debates in compliance with the Act. OC 1975-82.

¹⁹ *Id.* at 2.

²⁰ FEC Minutes for Meeting of Dec. 8, 1977 (recording adoption of Exhibit VI-B) (the minutes incorrectly note adoption of Exhibit IV-B, but the correct reference is Exhibit VI-B); *see generally*, Memorandum from William P. Oldaker to the Commission, Apr. 24, 1979 (Agenda Document No. 79-93 for Meeting of Apr. 26, 1979) (summarizing history of Commission actions on debate rules in connection with the League of Women Voters).

The Commission's work in the mid- and late-1970s regarding debate rules focused on the League. And the Commission's reasoning implicitly made clear that it considered non-profit corporate sponsorship of debates as a unique issue. The 1976 Policy Statement and the 1977 amendment were issued specifically to address the League's sponsorship of 1976 presidential debates and its lawsuit against the Commission.²¹ And these policies applied only to the League and similar non-profit charitable organizations; the documents did not mention or even contemplate press organizations.²²

The League sponsored four major debates in 1976, three between Governor Jimmy Carter and President Gerald Ford, and one between vice presidential candidates Senator Walter Mondale and Senator Robert Dole.²³ The debates between Carter and Ford were held on September 23, October 6, and October 22, while the vice presidential debate was held on October 15. Rather than holding these debates in news studios, these debates were staged in performance and academic theatres, including the Walnut Street Theatre in Philadelphia, the Palace of Fine Arts in San Francisco, and Phi Beta Kappa Hall on the College of William and Mary campus in Williamsburg.²⁴

Immediately a third-party candidate, Tom Anderson of the American Party, who was not invited to participate in the debate, filed a legal complaint against the League with the Federal Election Commission.²⁵ The complaint alleged that the League's disbursements to sponsor the debate amounted "to an illegal campaign contribution as proscribed by [the Act]" because the "monies spent by the [League] to sponsor the aforementioned debates necessarily have the force and effect of enhancing the chances for election of the participants to the detriment and prejudice of all other legally qualified candidates"²⁶

Within three weeks, the Commission dismissed the Anderson complaint, finding no reason to believe that a violation had occurred and explaining in a letter to the complainant that "the Commission in its Debates Policy Statement stated its conclusion that, in general, disbursements made by an organization such as the [League of Women Voters Educational

²¹ FEC Policy Statement on Presidential Debates, Aug. 30, 1976, at 1 ("The League of Women Voters' Education Fund proposes to sponsor several debates between the 1976 Republican and Democratic presidential nominees.")

²² *Id.* at 1-2 ("In short, it is the Commission's view that the disbursements by the League, or by any other comparable or similarly qualified organization, through a charitable trust fund are not made for the purpose of influencing a Federal election").

²³ See Comm'n on Presidential Debates, *Debate History, 1976 Debates*, www.debates.org/index.php?page=1976-debates.

²⁴ *Id.*

²⁵ Matter Under Review 241 (League of Women Voters Educational Fund), Complaint to Federal Election Commission, Sept. 23, 1976. Anderson filed a complaint with the Federal Communications Commission as well. See Complaint to Federal Communications Commission, Oct. 4, 1976. .

²⁶ Matter Under Review 241 (League of Women Voters Educational Fund), Complaint to Federal Election Commission, Sept. 23, 1976.

Fund] to sponsor such joint appearances are not made for the purpose of influencing a Federal Election” under the Act.²⁷

IV. The Commission’s Problematic 1979 Rulemaking on Non-Profit Debate Sponsorship

In July 1977, the Commission issued a Notice of Proposed Rulemaking seeking public comment on a proposal to codify its Debates Policy Statement as a formal regulation.²⁸ The purpose of initiating a rulemaking was solely to address the legal issues raised by the League’s sponsorship of the 1976 presidential debates.²⁹ A public hearing was held on September 12, 1977.

Two years later, in July 1979, as the League was planning debates for the upcoming presidential election in 1980, the Commission promulgated a new regulation to exempt non-partisan debate sponsorship by non-partisan organizations from the general ban against corporate contributions and expenditures.³⁰ The exemption did come with certain regulatory conditions on the conduct of such debates, although these were broad and left significant discretion to the debate sponsor.³¹

In the process of resolving the League’s issues, however, the Commission inadvertently created another problem. The Commission used overbroad language to explain the scope and import of the new regulation. The language was so broad that it suggested the new regulation would dictate the exclusive means by which any entity could sponsor debates. “The Commission has adopted regulations which govern the funding and sponsorship of candidate debates,” the explanation read.³² The regulations would “specify which organizations may sponsor such debates and establish a structure for various types of nonpartisan debates between Federal candidates.”³³ And further, the Commission explained that “only an organization which has a history of nonpartisanship would qualify as a sponsor. In addition, the sponsor would have to be tax exempt under 26 U.S.C. § 501(c)(3).”³⁴

²⁷ Matter Under Review 241 (League of Women Voters Educational Fund), Certification, Oct. 14, 1976; Letter from General Counsel John G. Murphy to Tom Anderson, Oct. 15, 1976.

²⁸ 42 Fed. Reg. 35,856 (July 12, 1977).

²⁹ See Letter from Chairman Robert O. Tiernan to Hon. Frank Thompson, Jr., Chairman, Committee on House Administration, Sept. 14, 1979 (“The proposed regulations . . . were intended solely to respond to the issues presented by the League of Women Voters in the 1976 sponsorship of the presidential debates.”)

³⁰ *Funding and Sponsorship of Candidate Debates*, 44 Fed. Reg. 39,348-39,351 (July 5, 1979).

³¹ *See id.*

³² *Id.* at 39,348.

³³ *Id.*

³⁴ *Id.*

Press organizations, the Federal Communications Commission (FCC),³⁵ the House of Representatives,³⁶ and the Senate³⁷ reacted swiftly and with deep concern about the implications of the Commission's sweeping explanation of the new regulation. By affirmatively granting debate-sponsorship rights under a regulatory explanation that, on its face, applied exclusively to 501(c)(3) non-profits, stakeholders perceived that the Commission intended to shut out press organizations that had a long history of sponsoring debates.

The Commission attempted to allay these concerns by explaining the limited scope of the new regulation in a letter to Congress:

The proposed regulations were never intended by the Commission to address the issue of news media sponsorship of candidate debates. Rather, they were intended solely to respond to the issues presented by the League of Women Voters in the 1976 sponsorship of the presidential debates. The regulations as drafted simply create a narrow exemption that would permit certain groups to pay the costs of staging a debate between candidates for Federal office through the use of corporate and union contributions. Without the regulations, the use of such funds would be barred by Section 441b of the Federal Election Campaign Act of 1971, as amended.³⁸

But the explanation was too little, too late. The Senate disapproved the debate regulation over concerns the Commission might prohibit press organizations from sponsoring debates.³⁹

³⁵ See Letter from FCC General Counsel Robert R. Bruce to FEC General Counsel William Oldaker, Aug. 13, 1979 ("As you are aware, we firmly believe that as presently drafted the proposed regulations will unnecessarily interfere with the FCC's mandate under the Communications Act to assure that the public is fully and fairly informed by broadcasters during the electoral process."); Letter from FCC Chairman Charles D. Ferris to Senator Claiborne Pell, Chairman, Senate Committee on Rules, Sept. 10, 1979 ("The new regulations would restrict debates, whether broadcast or not, to those 'sponsored' by a qualified tax exempt organization. Thus, most of the debates which now may occur, whether broadcast or not, will be prohibited.").

³⁶ See Letter from Hon. Frank Thompson, Jr., Chairman of the Committee on House Administration to Chairman Robert O. Tiernan, Sept. 12, 1979 (requesting the Commission to "clarify" the effect of the regulation upon "media activities").

³⁷ See 125 CONG. REC. 24957-24958 (daily ed. Sept. 18, 1979) (remarks of Senator Hatfield stating, "Another serious question raised by the regulations is their restriction of newspapers' sponsorship of candidate debate. A representative of the Gannett newspaper chain, in a letter to the FEC's General Counsel, described the experience of a selected handful of local papers which had sponsored candidate debates . . . I express my own concern on this point that the record is bare of evidence of abuse by the thousands of newspapers in the States and communities across the country which have in the past sponsored candidate debates . . . I question whether Congress ever intended to involve the Federal Election Commission in determining the format for candidate debates, or in deciding who may sponsor them.").

³⁸ See Letter from Chairman Robert O. Tiernan to Hon. Frank Thompson, Jr., Chairman, Comm. on House Administration, Sept. 14, 1979.

³⁹ Senate Resolution 236, Sept. 18, 1979. The Senate vetoed the regulation under statutory authority that has since been ruled unconstitutional. See *INS v. Chadha*, 462 U.S. 919 (1983); *Bowsher v. Synar*, 478 U.S. 714 (1986).

**V. The Commission Exacerbated the Problem
By Inventing Extra-Statutory Legal Authority to Regulate the Press**

The Commission went back to the drawing board. The Commission was acutely aware of the widespread debate sponsorship by news media organizations over the decades preceding enactment of the Act as well as Congress's inclusion of a provision in the Act that exempted the press from Commission regulation.⁴⁰ Congressman Frank Thompson, Jr., Chairman of the Committee on House Administration, had put this question to the Commission: "Is 2 U.S.C. § 431(f)(4)(A) [the press exemption⁴¹] or 2 U.S.C. § 441b [the corporate contribution and expenditure ban⁴²] controlling with regard to the activities of a newspaper, broadcast station, or other news organization which is not controlled by a political party, political committee, or candidate?"⁴³

Therefore, before the Commission was a clear statutory—and constitutional—answer to the tension between, on the one hand, the proposed regulation of debates sponsored by non-profit corporations and, on the other hand, a clear pre-existing statutory exemption for press corporations to continue sponsoring debates as they had for decades free of government regulation. All the Commission needed to do in order to allay the concerns expressed by Congress, the FCC, and press entities was to acknowledge the unfettered right of press organizations like *The New York Times* and CBS, under the Act's press exemption and the Free Press Clause of the First Amendment, to continue sponsoring debates as a legitimate press function. Meanwhile, the Commission could adopt a regulation permitting non-profit corporations like the League to sponsor debates so long as they complied with certain conditions.

A straightforward recognition of the statutory press exemption certainly would have satisfied a Congress that had enacted that exemption five years earlier. It certainly would have satisfied the concerns expressed by Senator Hatfield who expressed his "own concern on this point that the record is bare of evidence of abuse by the thousands of newspapers in the States and communities across the country which have in the past sponsored candidate debates" and remarked that the "serious question raised by the regulations is their restriction of newspapers' sponsorship of candidate debates."⁴⁴ Congress had never requested the Commission to restrict or encumber press organizations when they sponsor debates. Congress had simply asked the Commission to clarify that press organizations would not be prohibited from sponsoring debates.

⁴⁰ See 125 Cong. Rec. S12821 (daily ed. Sept. 18, 1979) (statement of Sen. Hatfield) ("Letters to both the [Senate] Rules Committee and the FEC from the Federal Communications Commission, CBS, NBC, and the National Association of Broadcasters have voiced the criticism that the regulations as they are written would prohibit the broadcast media's sponsorship of candidate debates.").

⁴¹ Now codified at 52 U.S.C. § 30101(9)(B)(i).

⁴² Now codified at 52 U.S.C. § 30118 and applicable only to corporate funded contributions and coordinated expenditures, but not independent expenditures.

⁴³ See, Letter from Hon. Frank Thompson, Jr., Chairman of the Comm. on House Administration to Chairman Robert O. Tiernan, September 12, 1979, at 2.

⁴⁴ 125 Cong. Rec. 24957-24958 (daily ed. Sept. 18, 1979).

By way of historical context, in 1979 and 1980, the Commission had little appreciation for the Act's press exemption. The Commission ignored the press exemption in a series of enforcement cases involving *Readers Digest* (published by The Readers Digest Association, Inc.) and *The Pink Sheet on the Left* (published by Phillips Publishing, Inc.), launching investigations into both publications' commentary about Senator Ted Kennedy.⁴⁵ In 1981, federal courts rebuffed the Commission's purblind assertion of regulatory jurisdiction in both cases.⁴⁶

When the Commission undertook a response to Congress' concern over press rights to sponsor debates in 1979, the Commission started with the same erroneously limited view of the press exemption. In December 1979, the Commission issued a revised debate regulation which, for the first time, regulated press organizations on the same basis as non-profit corporations funded by corporate and labor donations.⁴⁷ Henceforth, the Commission would grant permission to "[b]roadcasters, bona fide newspapers, magazines and other periodical publications" to "stage" debates subject to the condition that they included at least "two candidates" and the debates were "nonpartisan in that they do not promote or advance one candidate over another."⁴⁸

But even before the new regulation could take effect, the Commission threatened to prosecute the *Nashua Telegraph* for sponsoring a debate between presidential candidates Ronald Reagan and George H.W. Bush on the basis that its sponsorship would constitute an illegal corporate contribution to those two candidates if it excluded several other candidates.⁴⁹ Therefore, Reagan paid the debate costs and the debate ensued in a high school auditorium on February 23, 1980.⁵⁰ The *Telegraph* editor began asking questions of Reagan and Bush. But Reagan insisted, for strategic purposes, that other candidates be included in the debate and would not commence debating. When the *Telegraph* editor requested that Reagan's microphone be turned off, Reagan shot back with his now legendary response, "I am paying for this microphone." Indeed, Reagan was paying for the microphone because the Federal Election Commission had censored the *Telegraph* from sponsoring a highly newsworthy forum.⁵¹

⁴⁵ Matter Under Review 1271 (Readers Digest Association, Inc.); Matter Under Review 1190 (Phillips Publishing, Inc.).

⁴⁶ *Readers Digest Ass'n, Inc. v. FEC*, 509 F.Supp. 1210, 1211-1212 (S.D.N.Y. 1981); *FEC v. Phillips Publishing, Inc.*, 517 F.Supp. 1308, 1313 (D.D.C. 1981).

⁴⁷ *Funding and Sponsorship of Federal Candidate Debates*, 44 Fed. Reg. 76734-76736 (Dec. 27, 1979).

⁴⁸ 11 C.F.R. § 110.13(a)(2), (b); *id.* § 114.4(e)(2) (1979).

⁴⁹ See 126 Cong. Rec. H1821 (daily ed. Mar. 12, 1980); Lou Cannon, "Reagan Forced to Pay Costs of Debate With Bush," *Washington Post*, Feb. 22, 1980, at A-2; Walter Mears, "Bush, Reagan Square Off in New Hampshire Tonight," Associated Press, Feb. 23, 1980. The Commission's early efforts to restrict press sponsorship of debates was another early example of the Commission's misunderstanding of its authority with respect to press rights.

⁵⁰ See "I Paid for This Microphone," NBC Learn K-12, archives.nbclern.com/portal/site/k-12/flatview?cuecard=4511.

⁵¹ On the heels of the New Hampshire debate incident, Congress reviewed the Commission's new regulation. A pointed colloquy about press freedom ensued between Congressman William Frenzel, a member of the House

In short, instead of observing clear constitutional and statutory limits on its legal authority, the Commission had manufactured for itself extra-statutory authority to restrict press organizations in choosing how best to gather information and inform the public. The Commission did this by inventing a distinction between what it means for a press organization to “cover” a debate versus “stage” a debate. The Commission’s Explanation and Justification accompanying the new regulation made the following assertion:

The news story exemption was not intended to permit the staging of candidate debates, but rather is a limited exemption designed to insure the right of the media to cover and comment on election campaigns.⁵²

As support for this distinction—and “limited” interpretation of the press exemption—the Commission cited to the legislative record, specifically page 4 of the Report of the House Committee on Administration explaining the 1974 amendments to the Act.⁵³ But the House Report made no mention of any distinction between “staging” versus “covering” debates. More importantly, and contrary to the Commission’s narrowing interpretation, the House Report called for a broad exemption:

Those clauses [press exemption] make 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 and of association. Thus, clause (A) [press exemption] assures the unfettered right of newspapers, TV networks, and other media to cover and comment on political campaigns.

This language of the House Report contradicts the Commission’s assertion of legal authority to regulate the press when it sponsors debates. Congress spoke in broad terms to “assure[] the unfettered right” to “cover and comment” on political campaigns. It is impossible

Committee on Administration, and Congressman Lionel Van Deerlin, chairman of the House Communications Subcommittee. Chairman Van Deerlin observed the inconsistency between the press’ “already well recognized privilege of sponsoring debates” and a regulation purporting to grant them that right. Asked by Congressman 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 “Absolutely not.” 126 Cong. Rec. H1821 (daily ed. Mar. 12, 1980). Chairman Van Deerlin’s statements reflect a congressional understanding contrary to the Commission’s modern application of the regulation. Furthermore, Congress’ acquiescence in the new regulation in 1980 cannot stand as an authoritative interpretation of press rights under the First Amendment. And to the extent one might argue that congressional acquiescence reflects a snapshot of Congress’ understanding of the press exemption statute in 1980, *see Becker v. FEC*, 230 F.3d 381 (1st Cir. 2000), any such inference is unpersuasive here because judicial and Commission interpretations of the press exemption since 1980 have read it more expansively, consistent with the Act’s legislative history at the time of its passage, superseding any inference from Congress’ brief interlude in 1980. Congressional acquiescence in a number of Commission regulations later challenged successfully in courts certainly did not save the regulations from independent and searching judicial review.

⁵² 44 Fed. Reg. 76734 (Dec. 27, 1979).

⁵³ H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. at 4 (1974) (the Commission’s Explanation and Justification published in the Federal Register in December 1979 mistakenly cited to H.R. Rep. No. 93-943).

to infer from Congress' broadly worded assurance any congressional intent to restrict "in any way" the press corps' historical practice of sponsoring debates. The press had sponsored, hosted, moderated and broadcast—indeed "staged"—debates as newsworthy events, as part of its news gathering and informational function, for decades. The Commission was now limiting that historical right contrary to congressional intent—based upon an artificial distinction between "staging" versus "covering" newsworthy interviews.

The flaw in this distinction was exposed two years later, in 1983, when the FCC ruled that broadcaster-sponsored debates qualified as *bona fide* new coverage exempt from the FCC's Equal Time rules.⁵⁴ The FCC's treatment removed any predicate for the Commission to regulate press-sponsorship of debates as anything other than news gathering and news coverage. The FCC ruling afforded the Commission an opportunity to reconsider the distinction between "staging" versus "covering" news,⁵⁵ but regulatory power once asserted is seldom surrendered. The Commission declined to revise its regulation of press debates. Nevertheless, the FCC ruling underscored the weakness in the distinction the Commission invented from whole cloth in 1979.

VI. In the Current Rule, the Commission Imposed Greater Restrictions on the Press

At first blush, the 1979 regulation left wide discretion in the hands of debate sponsors. Press organizations likely did not experience practical difficulty in complying with a regulation that required nothing more than the invitation of at least two candidates (a tautology) who the press organizations would not present in a manner to promote or advance one candidate over another. But like the proverbial camel's nose, the first regulation was just the beginning.

In 1995, the Commission moved to further restrict the freedom of media organizations (and others) to make editorial decisions about candidate debates. The agency mandated use of "pre-established objective criteria to determine which candidates are allowed to participate," saying that the choice of criteria to apply is "largely"—but not exclusively—left up to the staging organization.⁵⁶ The new restrictions also attempted to regulate the amount of time that each candidate spoke during the debate and communications with candidates before the debate about the questions to be asked during the debate.⁵⁷ And the Commission's rules stretched beyond the debate and its terms to enable the Commission's regulation of the press organization's "pre-debate or post-debate commentary and analysis."⁵⁸ And in 1996, the FEC moved beyond regulation of the content of the debate and its press coverage to regulate based on

⁵⁴ See Regarding Petitions of Henry Geller and the National Association of Broadcasters and the Radio-Television News Directors Association to Change Commission Interpretation of Certain Subsections of the Communications Act ("Geller Order"), 48 Fed. Reg. 53166-53171 (Nov. 25, 1983).

⁵⁵ See Memorandum from FEC General Counsel Charles N. Steele to the Commission Re FCC Order Interpreting Equal Opportunities Requirement of § 315 of the Communications Act and Its Impact on FEC Candidate Debate Regulations, Jan. 6, 1984 (FEC Agenda Document No. 84-8 for Meeting of Jan. 12, 1984).

⁵⁶ *Corporate and Labor Organization Activity*, 60 Fed. Reg. 64,260, 64,262, 64,273 (Dec. 14, 1995).

⁵⁷ *Id.* at 64,261.

⁵⁸ *Id.*

the ownership and control of the press organization, amending the regulation to state that broadcast, cable, and print media organizations “may not stage candidate debates if they are owned or controlled by a political party, political committee or candidate.”⁵⁹

More recently, news organizations have complained that the Commission’s regulation restricts them in making decisions about who they invited to participate in their debates.⁶⁰ And two Commissioners voted to advance a petition to a rulemaking in order to “be more inclusive”⁶¹ and require “representation from third party candidates.”⁶²

VII. Continuing Regulatory Conflict

Ever since making the false distinction between “staging” what are for all practical purposes joint interviews versus “covering” or “commenting” on news, the Commission has struggled to maintain the distinction in application. There is no principled basis to distinguish between the recognized, broad, and unfettered editorial discretion of press organizations to interview one, or two, or several candidates—together or at different times—and those same organizations structuring joint candidate appearances as “debates.”

The Commission and the courts have recognized that the press is free to convey campaign and candidate information in a wide variety of news and commentary formats. Under the press exemption, media entities are free to hold rallies opposing a candidate as part of a radio show’s editorial commentary,⁶³ to provide free and unfettered airtime and print space to candidates and political parties to advocate their candidacies and solicit financial contributions,⁶⁴ to feature candidate advocacy on a reality television show⁶⁵ or a documentary film,⁶⁶ to webcast town hall forums connecting candidates directly to subscribers,⁶⁷ to stream gavel-to-gavel

⁵⁹ *Candidate Debates and News Stories*, 61 Fed. Reg. 18,049, 18,051 (Apr. 24, 1996).

⁶⁰ Ben Kamisar, *CNN Defends Debate Criteria*, August 26, 2015, <http://thehill.com/blogs/ballot-box/gop-primaries/252014-cnn-defends-debate-criteria>.

⁶¹ Draft Notice of Disposition on Regulation 2014-06 (Candidate Debates), Meeting of July 16, 2015 (statement of Commissioner Weintraub).

⁶² Draft Notice of Disposition on Regulation 2014-06 (Candidate Debates), Meeting of July 16, 2015 (statement of Commissioner Ravel).

⁶³ Matter Under Review 5569 (The John and Ken Show).

⁶⁴ Advisory Opinion 1998-17 (Daniels Cablevision); Advisory Opinion 1982-44 (Turner Broadcasting System, Inc. and WTBS); Matter Under Review 486 (Charles Percy).

⁶⁵ Advisory Opinion 2003-34 (Showtime).

⁶⁶ Advisory Opinion 2010-08 (Citizens United).

⁶⁷ Advisory Opinion 1996-16 (Bloomberg).

coverage of party conventions,⁶⁸ and to sponsor, format, gather, and report news in many other formats.

If a newspaper's editorial board interviews two candidates separately, asking them the same questions, and then publishes their answers side-by-side, how is that different from a debate? If a broadcast station does the same, and then broadcasts the candidates' respective answers back-to-back, how does the presentation of that information fundamentally differ from interviewing the candidates together in a joint interview and calling it a "debate"? All of these formats represent functionally equivalent newsroom editorial decisions, and all should be entitled to the same freedom.

Ever since taking this turn, the Commission has not been able to justify or defend in any principled way its distinction between the many varied formats through which the press covers and comments upon campaigns from the debate format.

The Commission made an inadequate, contorted attempt to reconcile the conflict when it amended the regulation in 1996. Among other changes, the Commission purported to grant permission to cable television operators to stage debates under the regulation.⁶⁹ One might have thought that cable television news networks like CNN had a right to conduct joint interviews of candidates (and call it a "debate") under the First Amendment and statutory press exemption. The Commission nevertheless announced that it had "decided to expand the types of media entities that may stage candidate debates" to include cable television operators,⁷⁰ which necessarily presumes the power to make such decisions about the activities of media entities. In its Explanation and Justification for the amendment, the Commission attempted to reconcile the debate regulation with Advisory Opinion 1982-44,⁷¹ in which the Commission opined that Turner Broadcasting's WTBS could donate unfettered free cable time to the Republican and Democratic National Committees under the press exemption.⁷² How could one format of press activity be highly regulated while the other was wholly exempt? The Commission pointed to court decisions conditioning the press exemption upon a press organization's distribution of news to "fall broadly within the press entity's legitimate press function,"⁷³ and theorized that press organizations "can satisfy this standard" by complying with the Commission's debate regulations.⁷⁴

⁶⁸ Advisory Opinion 2000-13 (EXBTV and iNEXTV).

⁶⁹ *Candidate Debates and News Stories*, 61 Fed. Reg. 18049-18052 (Apr. 24, 1996).

⁷⁰ *Id.* at 18049.

⁷¹ Advisory Opinion 1982-44 (Turner Broadcasting System, Inc. and WTBS).

⁷² 61 Fed. Reg. at 18050.

⁷³ *Id.*, citing *Readers Digest Ass'n v. FEC*, 509 F.Supp. 1210, 1214 (S.D.N.Y. 1981).

⁷⁴ *Id.*

At first blush, this explanation seems to be a *post hoc* rationalization for the Commission's attempt to regulate press-sponsored debates. The Commission never considered the press exemption when it decided to start regulating press-sponsored debates in 1979. And the case law interpreting the press exemption came later, in 1981. But more significantly, the harmonizing interpretation indicated that the regulation does not proscribe actions by press organizations. Instead, the new gloss was that the debate regulation merely defined a *safe harbor* under the press exemption for press organizations sponsoring debates. That is, so long as the press organization conforms its debate sponsorship with the criteria in the regulation, the Commission automatically will recognize the organization's conduct as a *per se* "legitimate press function" under the press exemption test set forth in *Readers Digest*. If a press entity ventures beyond the criteria, it remains free from regulation under the press exemption, but the Commission may subject the press entity's conduct to additional scrutiny to determine if it was indeed performing a "legitimate press function" exempt from regulation under the Act's press exemption. Recent cases, however, indicate it is not the current Commission's conceptualization of the debate regulation.⁷⁵

At least it did not comfort the press. In 2002, thirteen major news organizations, including *The New York Times* and CBS News, petitioned the Commission to remove the press from the debate regulation and recognize their free press rights under the statutory press exemption and First Amendment.⁷⁶ The Commission had no answer to the Petition, so it did nothing. The Petition sat idle in the Commission for seven years until, in 2009, the Commission disposed of it, by a vote of 4 to 2, on the non-substantive basis that a "significant period of time has passed since the petitions were filed" and that any further consideration of the Petition "should be based on newly filed petitions."⁷⁷ The Commission added "that its decision not to initiate a rulemaking at this time does not foreclose the Commission from considering future petitions seeking the same or similar relief."⁷⁸

In enforcement cases, the Commission also has avoided addressing the substantive legal conflict by routinely finding that press organizations complied with the debate regulation and dismissing the complaints. Where a case is dismissed, a press organization has no reason to sue the Commission to vindicate the broader statutory or First Amendment freedom. For this reason, the body of court decisions resolving third-party candidate debate participation complaints has

⁷⁵ See, e.g., Matter Under Review 6703 (WCVB-TV & Hearst Stations, Inc.) (three Commissioners rejected the press exemption's applicability to a television station's in studio debate); Matter Under Review 6493 (Fox News Channel, et al.) (dismissed based on press entity's satisfaction of the debate regulation rather than application of the press exemption). Indeed, in recent years there has been either a reluctance among some Commissioners to apply the press exemption or a concerted effort to constrict it..

⁷⁶ 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 Free Television News Directors Association; Society of Professional Journalists; Tribune Company, Apr. 10, 2002.

⁷⁷ Notice of Disposition of Petitions for Rulemaking, 74 Fed. Reg. 37179-37180 (July 28, 2009); see also Certification, July 16, 2009.

⁷⁸ *Id.* at 37180.

addressed only compliance with the debate regulation, while the broader question of the limits on the Commission's regulatory authority under the press exemption has not been litigated or decided.⁷⁹ Apparently the Commission had no incentive to assert any press organization's free press rights over the Commission's regulatory prerogatives in any court challenge to date.

This legal conflict has simmered and flared from time to time. The conflict between the press exemption and the debate regulation came to a head in a case involving a debate sponsored by *The Boston Globe* and Boston television station WBZ-TV.⁸⁰ A candidate excluded from the debate filed a complaint with the Commission.⁸¹ Like other press cases, the Commission formally dismissed the case on other grounds. But four Commissioners took the opportunity to issue a Statement of Reasons concluding that "a news organization's presentation of a debate is a 'news story' within the meaning of this provision of the FECA [press exemption]."⁸² The Statement of Reasons also observed the jurisdictional limit the press exemption imposes upon the Commission when addressing allegations involving a press-sponsored debate, noting that the "statutory language of 2 U.S.C. § 431(9)(B) is categorical, and therefore precludes the Commission from creating requirements which a debate must meet in order to qualify for the press exemption."⁸³

More recently, in the lead up to the 2012 presidential election, Fox News Channel sponsored a debate between Republican presidential candidates. A candidate who was not invited filed a complaint with the Commission alleging that Fox violated the Commission's debate regulations. Fox's counsel, a former Commission General Counsel, responded that it complied with the debate regulation, but astutely challenged the Commission's debate paradigm:

It should be noted that while Fox News Channel complied with the FEC's debate regulations in staging the Iowa debate, Fox News Channel is a media entity engaging in news and commentary within the press exemption. 2 U.S.C. § 431(9)(B)(i); 11 C.F.R. § 100.42. The FEC never suggested that a news entity cannot use its broad editorial judgment to invite one, two or six candidates to sit down for a televised interview or question and answer session unless it complies with the debate regulations.⁸⁴

⁷⁹ *Ark. Educ. TV Comm'n v. Forbes*, 523 U.S. 666 (1998); *Becker v. FEC*, 230 F.3d 381 (1st Cir. 2000); *Perot v. FEC*, 97 F.3d 553 (D.C. Cir. 1996); *Nader v. FEC*, 823 F. Supp. 2d 53 (D.D.C. 2011); *Buchanan v. FEC*, 112 F. Supp. 2d 58 (D.D.C. 2000); *Natural Law Party of the United States v. FEC*, 11 F. Supp. 2d 33 (D.D.C. 2000); *Hagelin v. FEC*, 1996 W.L. 566762 (D.D.C. 1996).

⁸⁰ Matter Under Review 5224 (Boston Globe).

⁸¹ Matter Under Review 5224 (Boston Globe), Complaint.

⁸² Matter Under Review 5224 (Boston Globe), Statement of Reasons of Chairman David Mason, Vice Chairman Karl Sandstrom, Commissioner Bradley Smith, Commissioner Michael Toner, Sept. 3, 2002, at 2.

⁸³ *Id.* at 2.

⁸⁴ Matter Under Review 6493 (Fox News Channel, et al.), Response to Complaint, Oct. 21, 2011.

As the Commission generally has done in debate cases, it avoided the press exemption by finding that Fox complied with the debate regulation and dismissed the matter.⁸⁵

The issue flared again at the Commission in late 2013. A complaint-generated enforcement matter involved another debate in Boston, this time a 2012 congressional debate. Television station WCVB-TV hosted two congressional candidates in its studio on the station's regular Sunday morning public affairs program *On the Record* and formatted the joint appearance as a "debate."⁸⁶ A candidate who was not invited to participate complained to the Commission.⁸⁷ WCVB-TV responded that it was exempt from regulation under the press exemption and, in any event, complied with the debate regulation.⁸⁸ The Commission split evenly (voted 3 to 3) on dismissing the matter under the press exemption, but agreed (by a vote of 6 to 0) to dismiss the matter on the basis that WCVB-TV complied with the debate regulation.⁸⁹ Two colleagues joined me in a separate Statement of Reasons expressing our view that the Commission lacks authority to regulate or restrict a press entity's editorial discretion under the press exemption, even to sponsor or stage a debate.⁹⁰

VIII. Conclusion

The Commission's debate regulation remains deeply problematic because the Commission's assertion of regulatory power over the press contradicts the Free Press Clause of the First Amendment, the Act's press exemption, and congressional intent.

Nonetheless, some desire to impose greater restrictions upon press organizations in order to advance certain social and political values. As I expressed at the Commission's public meeting, these may include laudatory policy objectives, but government has no authority to impose them upon the editorial judgments of a free press.

In addition to the reasons set forth in the Notice of Disposition and those I expressed at the public meeting of July 16, 2015, this Statement sets forth additional reasons why I could not support advancement of a rulemaking with the objective of imposing stricter mandates upon debate sponsors. I would not revise the current debate regulation, as proposed by the petitioner, to impose greater government restrictions on the editorial discretion of press organizations when I believe the regulation already exceeds the Commission's proper authority with respect to press organizations. As Thomas Jefferson wrote in 1793, "Considering [the] great importance to the

⁸⁵ Matter Under Review 6493 (Fox News Channel, et al.), Factual and Legal Analysis, May 30, 2012.

⁸⁶ Matter Under Review 6703 (WCVB-TV), Response to Complaint, Jan. 30, 2013, at 2-4.

⁸⁷ Matter Under Review 6703 (WCVB-TV), Complaint, Dec. 4, 2012.

⁸⁸ Matter Under Review 6703 (WCVB-TV), Response to Complaint, Jan. 30, 2013, at 3-4 and 5-9.

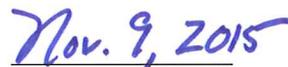
⁸⁹ Certification of FEC Meeting of Nov. 19, 2013.

⁹⁰ Matter Under Review 6703 (WCVB-TV), Statement of Reasons of Vice Chairman Lee E. Goodman, Commissioner Caroline Hunter and Commissioner Matthew S. Petersen, Dec. 19, 2013; *see also* Lee E. Goodman, *The Feds Flirt With Reining In TV Talk*, Wall Street Journal, Feb. 4, 2014.

public liberty [of the freedom of the press], and the difficulty of submitting it to very precise rules, the laws have thought it less mischievous to give greater scope to its freedom than to the restraint of it.”⁹¹



Lee E. Goodman
Commissioner



Date

⁹¹ Thomas Jefferson to the Spanish Commissioners, 1793, ME 9:165 (available at <http://famguardian.org/Subjects/Politics/thomasjefferson/jeff1600.htm>).