



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
WCVB-TV, Channel 5;) MUR 6703
Hearst Stations, Inc.)
)

STATEMENT OF REASONS

Vice Chairman LEE E. GOODMAN, Commissioners CAROLINE C. HUNTER and MATTHEW S. PETERSEN

In the lead up to a contested election, a Boston television station, WCVB Channel 5 ("WCVB"), sought to inform the public about two congressional candidates by hosting their joint appearance on WCVB's regular, Sunday morning public affairs program *On the Record*, Boston's local version of ABC's *This Week* and NBC's *Meet the Press*. The question in this matter is whether the federal government can regulate WCVB's editorial discretion to host the two candidates in the format it believes is most informative and appropriate. We write separately to express our view that the Commission lacks authority to regulate or restrict a press entity's editorial discretion under 2 U.S.C. § 431(9)(B)(i), commonly referred to as the "press exemption."

I. Relevant Factual Context

WCVB is a local television station licensed by Hearst Stations, Inc. (collectively the "Respondents"). It is not owned or controlled by any political party, political committee, or

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candidate.¹ Its news department produces and airs a weekly public affairs program titled, *On the Record*, in the regular course of gathering and reporting news content.²

WCVB "has a long history of sponsoring candidate debates."³ According to the station's senior news producer, WCVB "sponsors and promotes candidate debates as part of its political and public affairs programming in order to educate and inform viewers about issues and candidates."⁴ In September or early October 2012, WCVB began planning to host a joint appearance of congressional candidates to air as part of its regularly scheduled broadcast of *On the Record*.⁵ WCVB's news directors decided to format the joint appearance as a thirty-minute debate.

WCVB made an editorial decision, from a "newsgathering and public interest perspective," to "focus its limited airtime on the candidates whose campaigns had generated a sufficient level of interest and support among voters and in the media."⁶ Accordingly, they adopted criteria for choosing which candidates to invite, selected two candidates, and produced the debate in WCVB's studio.⁷ The debate aired publicly on Sunday, October 28, 2012, during *On the Record*'s regularly scheduled time slot.⁸

¹ MUR 6703 (WCVB), Response at 4 (hereinafter "Resp.").

² Resp. at 2, 4.

³ Resp. at 1; MUR 6703 (WCVB), Declaration of Andrew Vrees at 1 (hereinafter "Vrees Decl.").

⁴ MUR 6703 (WCVB), Declaration of Rosemary Lappin at 1 (hereinafter "Lappin Decl.").

⁵ Lappin Decl. at 1; Vrees Decl. at 1.

⁶ Vrees Decl. at 2.

⁷ Vrees Decl. at 2.

⁸ Resp. at 1. WCVB did not incur any additional or unique costs to host the debate because the candidates "merely appeared on the Station's regularly scheduled weekly public affairs program." Resp. at 5; Vrees Decl. at 3.

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II. The Complaint & Defenses Asserted

A candidate who was not invited to appear on the program filed a complaint with the Commission, alleging that Respondents violated the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations by selecting participation requirements that "seem tailor made to exclude my campaign," and thus making illegal corporate contributions to the two invited candidates in an amount equal to the production costs and advertising value of the appearances.⁹

The Respondents asserted two defenses. First, they asserted that the debate produced and aired on WCVB's *On the Record* program was exempt from regulation by the well-established "press exemption" set forth in 2 U.S.C. § 431(9)(B)(i).¹⁰ Second, in the alternative, they contended that their editorial criteria for debate participation were both pre-established and objective, pursuant to the Commission's regulations set forth in 11 C.F.R. § 110.13. Accordingly, Respondents assert that Complainant did not meet the pre-established criteria, and that the criteria were not designed to exclude Complainant.¹¹

In its First General Counsel's Report ("FGCR"), OGC did not address WCVB's rights under the press exemption and recommended that the Commission judge WCVB's candidate selection criteria as satisfactory under the Commission's standards for debates sponsored by corporations, and dismiss the matter.¹² While we voted with our colleagues to dismiss the

⁹ MUR 6703 (WCVB), Complaint at 2.

¹⁰ Resp. at 3-4.

¹¹ Resp. at 5-9.

¹² MUR 6703 (WCVB), First General Counsel's Report. The FGCR did not discuss the press exemption except for one brief reference in footnote 5: "Since Complainant challenged the Respondent's debate criteria pursuant to 11 C.F.R. § 110.13, we analyzed whether the Respondents satisfied the requirements of the debate exemption. . . . Because we concluded that the debate exemption applied, we did not also analyze the applicability of the media exemption."

matter, we write separately to express our view that the matter should have been dismissed for lack of subject matter jurisdiction under the press exemption set forth in 2 U.S.C. § 431(9)(B)(i), and to reaffirm our position that the Commission does not have legal authority to regulate the editorial decisions of journalists.

III. The Press Exemption Limits the Commission's Jurisdiction

In the Act, Congress excluded from the definition of expenditure "any news story, commentary, or editorial distributed through the facilities of any broadcasting station . . . unless such facilities are owned or controlled by any political party, political committee, or candidate."¹³ Congress enacted the press exemption to protect the press's core First Amendment right to comment upon political matters without interference by the federal government:

[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.¹⁴

Thus, at bottom, the exemption is a statutory recognition of the First Amendment's free press clause and the profoundly important role the press plays in the political affairs of our country.¹⁵

Congress' stated intent to prohibit the Commission from "limit[ing] or burden[ing] in any way" the press's exercise of editorial decisions makes the press exemption a jurisdictional limit

¹³ 2 U.S.C. § 431(9)(B)(i). The Commission has incorporated this exemption into its regulations at 11 C.F.R. § 100.73 (defining contributions to exclude news stories and commentary) and 11 C.F.R. § 100.132 (defining expenditures to exclude news stories and commentary).

¹⁴ H.R. Rep. No. 93-1239, 93d Congress, 2d Sess. at 4 (1974).

¹⁵ U.S. Const., Amend. I ("Congress shall make no law . . . abridging the freedom of the press."); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 781 (1978) (emphasizing "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"); *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").

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upon the Commission's jurisdiction.¹⁶ The Commission can only proceed to examine a press entity's activities if it first determines the exemption is not applicable.¹⁷ Thus, if the press exemption applies, "the FEC lacks subject matter jurisdiction and is barred from investigating the subject matter of the complaint."¹⁸

Courts have established a two-step analysis for conducting this threshold inquiry:

(1) whether the press entity is owned or operated by a political party, candidate or political committee; and (2) whether the organization is operating as a press entity in taking the action complained of.¹⁹ The Supreme Court has supplied touchstones for determining whether an organization is acting as a press entity, including whether its publication, in this case television program, is published and disseminated in the ordinary course of the publisher's regular activities.²⁰

¹⁶ The substantive limit imposed upon the Commission in connection with candidate appearances on news programs is confirmed by comparison to the analogous limit Congress imposed upon the authority of the Federal Communications Commission ("FCC"). The FCC is expressly authorized to regulate broadcast television stations like WCVB (pursuant to a wholly distinct set of public policies), but Congress generally prohibited even that agency from regulating newsrooms' coverage of candidates under the Equal Time doctrine. See 47 U.S.C. § 315(a). And in the context of candidate debates specifically, the FCC has stressed how the agency "is prohibited from engaging in activities that might be regarded as censorship of programming content," including any government-imposed requirement that "a particular candidate . . . be included in a debate." *In the Matter of Emergency Complaint of Dennis J. Kucinich v. CNN and Time Warner, Inc.*, 23 F.C.C.R. 482, 484 (Jan. 18, 2008).

Here, by contrast, the Federal Election Commission may only regulate broadcast television stations under the confines of 2 U.S.C. § 431(9)(B)(i), and may not interfere with or micromanage broadcasters' editorial decisions over political and campaign-related news coverage. If Congress had intended to impose equal time principles on candidate debates, it would have vested the necessary authority to achieve this result in the agency actually empowered to regulate the broadcast industry.

¹⁷ See *Readers Digest Ass'n, Inc. v. FEC*, 509 F.Supp. 1210, 1214 (S.D.N.Y. 1981); MUR 5110 (KBHK Channel 45); MUR 5162 (ABC News); MUR 4689 (Dornan), Statement of Reasons of Vice Chairman Darryl R. Wold and Commissioners Lee Ann Elliott, David M. Mason and Karl J. Sandstrom.

¹⁸ *FEC v. Phillips Publishing, Inc.*, 517 F.Supp. 1308, 1313 (D.D.C. 1981).

¹⁹ *Readers Digest Ass'n, Inc. v. FEC*, 509 F.Supp. 1210, 1214 (S.D.N.Y. 1981); *FEC v. Phillips Publishing, Inc.*, 517 F.Supp. 1308, 1313 (D.D.C. 1981).

²⁰ *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 250-251 (1986).

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The Commission has implemented the press exemption in a wide variety of contexts. For example, the Commission has concluded that television stations and newspapers are exempt from the Act's regulation when they provide free and unfettered airtime or print space to candidates and political parties to expressly advocate their candidacies and solicit financial contributions.²¹ The Commission reasoned that even the provision of free and unfettered space to candidates is an exercise of journalistic and editorial discretion.

The Commission also has applied the press exemption to media-sponsored debates.²² In MUR 5224 (Boston Globe), the Commission dismissed a complaint similar to the one at issue here, involving a debate sponsored by Boston television station WBZ-TV and *The Boston Globe*. In that matter, four Commissioners issued 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 [the press exemption]."²³ The Statement of Reasons also observed the jurisdictional limit the press exemption imposes upon the Commission in passing upon a press-sponsored debate, noting that the "statutory language of 2 U.S.C. § 431(9)(B) is categorical, and therefore

²¹ See, AO 1998-17 (Daniels Cablevision); AO 1982-44 (Turner Broadcasting and WTBS); MUR 486 (Charles Percy).

²² There has been a historical tension between the statutory press exemption, which wholly exempts from regulation broadcast stations that "cover" news and commentary, and the Commission's debate regulation, which regulates broadcast stations that spend corporate funds to "stage" debates. One theory holds that the regulation exceeds the Commission's statutory authority and therefore is invalid as applied to press entities. Another theory harmonizes the press exemption statute with the debate regulation by drawing a distinction between what it means to "cover" a debate versus "stage" a debate. Neither term is defined in the Act or regulations. We need not resolve this question here because, by producing the debate in its regular studios and airing the debate on a regularly scheduled news program, WCVB did not "stage" a debate outside of its ordinary course or incur additional expenses beyond the normal course of producing its regular news program.

²³ MUR 5224, Statement of Reasons of Chairman David Mason, Vice Chairman Karl Sandstrom, Commissioner Bradley Smith, Commissioner Michael Toner at 2. The matter technically was dismissed on discretionary grounds, but four Commissioners issued a statement explaining their rationale for voting to dismiss.

precludes the Commission from creating requirements which a debate must meet in order to qualify for the press exemption.”²⁴

IV. Legal Analysis

A. The Press Exemption Clearly Applies to WCVB’s *On the Record*

Based on the plain language of the statute, court precedent, and the Commission’s prior actions, the press exemption clearly prohibits the Commission from sitting in judgment of WCVB’s production and airing of the debate at issue in this matter. There is no dispute that WCVB is not owned or controlled by any candidate, political party or political committee.²⁵ *On the Record* is a regularly scheduled public affairs and news program that airs every Sunday morning. It regularly hosts public officials and candidates in its studio and airs their appearances on the program. WCVB’s news department exercised its journalistic and editorial discretion, “from a newsgathering and public interest perspective,” in deciding to “focus its limited airtime on the candidates whose campaigns had generated a sufficient level of interest and support among voters and in the media” in a debate format.²⁶ The candidates “merely appeared on the Station’s regularly scheduled weekly public affairs program.”²⁷ Thus, because WCVB produced and aired the debate in the ordinary course of *On the Record* programming, it is statutorily, and indeed constitutionally, protected from Commission regulation and second-guessing.

B. The Debate Format Does Not Vitate the Press Exemption

~~The fact that WCVB chose to use a debate format to convey information in its capacity as~~
a press entity does not negate the press exemption. The statutory press exemption does not turn

²⁴ *id.* at 2.

²⁵ Resp. at 4.

²⁶ Vrees Decl. at 2.

²⁷ Resp. at 5; Vrees Decl. at 3.

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on an organization's choice of formatting (nominal or substantive) its news commentary and coverage. "The statute [2 U.S.C. § 431(9)(B)(i)] and regulations do not define the issues permitted to be discussed or the format in which they are to be presented under the 'commentary' exemption nor do they set a time limit as to the length of the commentary."²⁸ The Commission has recognized the press exemption's applicability to a wide variety of news and commentary formats, including a reality television series,²⁹ documentary films,³⁰ webcasted town halls connecting candidates directly to subscribers,³¹ gavel-to-gavel coverage of party conventions,³² on-site media-sponsored political rallies, and many others. A joint appearance or debate format is a well established, traditional news format that is utilized by press entities everywhere to compare and contrast competing candidates. Thus, WCVB's editorial decision to format the joint appearance of two candidates as a debate in no way diminished its legitimate press function or press rights.

V. The Danger of Commission Regulation of the Press

Congress prohibited the Commission from regulating the press for an obvious reason: The specter of a government agency sitting in judgment of the editorial decisions of a newsroom—at the pain of investigation, civil penalties, and even imprisonment—is a dangerous enterprise.³³ These are not academic dangers. History is rife with governmental efforts to

²⁸ Advisory Opinion 1982-44 (DNC/RNC).

²⁹ Advisory Opinion 2003-34 (Showtime).

³⁰ Advisory Opinion 2010-08 (Citizens United).

³¹ Advisory Opinion 1996-16 (Bloomberg).

³² Advisory Opinion 2000-13 (EXBTV and iNEXTV).

³³ See, e.g., *Consolidated Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n*, 447 U.S. 530 (1980) (if "the marketplace of ideas is to remain free and open, governments must not be allowed to choose 'which issues are worth discussing or debating'"); *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Justice Black, concurring) ("Both the history and language of the First Amendment support the view that the press must be left free

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meddle in, or even silence, dissenting or controversial published opinion.³⁴ As Thomas Jefferson recognized, where “the Government is the censor, administrative fiat, not freedom of choice, carries the day.”³⁵ And because “the FEC’s business is to censor, there inheres the danger that [it] may well be less responsive . . . to the constitutionally protected interests in free expression.”³⁶

Compounding this danger is the troubling trend of the Commission’s inconsistent application and interpretation of the press exemption. On the one hand, the Commission voted unanimously to recognize a technology company’s right to launch a new campaign channel on the internet devoted exclusively to pro-Democratic coverage³⁷ and a former Democratic senator’s right to launch a new online editorial publication devoted solely to pro-Democratic commentary,³⁸ all free from Commission regulation. But three Commissioners voted to punish

to publish news, whatever the source, without censorship, injunctions or prior restraints. In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government’s power to censor the press was abolished so that the press would remain forever free to censure the Government.”); *Lee v. Dep’t of Justice*, 401 F.Supp.2d 123, 141 (D.D.C. 2005) (“The transcendent importance of a free press is that reporters can report the news and express opinions without fear of Government oppression or interference.”).

³⁴ The royal government of Massachusetts colony shut down the first colonial newspaper, the *Publick Occurrences Both Forreign and Domestick*, for publishing without first obtaining their approval and a license, while other early newspapers were routinely hassled and even prosecuted for criticizing royal officials. J. Pasley, *The Tyranny of Printers* (University Press of Virginia 2001) at pp. 20-40. For decades, local review boards censored books deemed to contain inappropriate content, including *All Quiet on the Western Front* and *Animal Farm*. See Nicholas J. Karolidis, et al., *100 Banned Books: Censorship Histories of World Literature* 7, 20 (1999). See also H. Franklin Robbins and Steven Mason, *The Law of Obscenity – or Absurdity?*, 15 St. Thomas L. Rev. 517, 542 (2003) (noting history of censorship for books like *The Grapes of Wrath*, *Catch-22*, and *Of Mice and Men*). And in the 1950s, Senator Joseph McCarthy investigated hundreds of filmmakers and other artists in the pursuit of communists, resulting in the blacklisting of many. See, e.g., Bernard Weinraub, *Ideas & Trends: The Blacklist Era Won’t Fade to Black*, N.Y. Times, Oct. 5, 1997; Patricia Holt, *the Forgotten Human Cost of the 50’s Witch Hunts*, San Francisco Chronicle, Mar. 8, 1995.

³⁵ T. Jefferson, *Democracy* 150-51 (Padover ed. 1939).

³⁶ *Citizens United v. FEC*, 558 U.S. 310, 335 (2010) (internal quotation marks omitted).

³⁷ Advisory Opinion 2008-14 (Melothe).

³⁸ Advisory Opinion 2005-16 (Carnahan).

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The Sean Hannity Show when the radio program endorsed a Republican candidate for the U.S. House and emailed its endorsement to the show's distribution list.³⁹ Likewise, there were six unanimous votes on the Commission to dismiss complaints against Michael Moore, Harvey Weinstein and their production companies for expending corporate funds to produce, advertise and exhibit the liberal editorial film *Fahrenheit 9/11*,⁴⁰ but only four votes to recognize the press rights of Citizens United to make conservative documentary films.⁴¹ And the Commission deadlocked 3 to 3 when filmmaker RG Entertainment Ltd. sought to advertise and distribute a conservative documentary *I Want Your Money*.⁴²

Government officials cannot be trusted to regulate journalists fairly and without bias—i.e., by administrative fiat. For precisely these reasons, Congress prohibited the Commission from “limit[ing] or burden[ing] in any way” the press’s exercise of editorial decisions, including by sitting in judgment of a press organization’s criteria for hosting a joint appearance or debate between two candidates.

VI. Conclusion

Congress expressly prohibited the Commission from regulating press entities and their political coverage. The statute prohibits the Commission from regulating journalists in the exercise of their editorial discretion to produce and disseminate news and commentary—including candidate interviews and television appearances. Therefore, the Commission had no jurisdiction to regulate WCVB’s journalistic and editorial decision to host a joint appearance of two candidates on its regularly scheduled *On The Record* public affairs program, in debate

³⁹ MUR 6320 (John Gomez for Congress, *et al.*).

⁴⁰ MUR 5474 (Dog Eat Dog Films, Inc.); MUR 5539 (*Fahrenheit 9/11*).

⁴¹ Advisory Opinion 2010-08 (Citizens United).

⁴² Advisory Opinion 2010-24 (RG Entertainment).

format or any other format, any more than the Commission could regulate candidate interviews on NBC's *Meet the Press* or ABC's *This Week*. The complaint should have been dismissed on this jurisdictional basis.



LEE. E. GOODMAN
Vice Chairman

12/19/13
Date



CAROLINE C. HUNTER
Commissioner

12/19/13
Date



MATTHEW S. PETERSEN
Commissioner

12/19/13
Date

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