



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**BEFORE THE FEDERAL ELECTION COMMISSION**

In the Matter of

WMTW-TV

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MUR 7835

**STATEMENT OF REASONS OF  
COMMISSIONER SEAN J. COOKSEY**

I joined my colleagues in finding no reason to believe that WMTW-TV (“WMTW”), a Maine-based television station, violated the Federal Election Campaign Act of 1971, as amended (“the Act”), in connection with its staging of a debate in October 2020 for U.S. Senate candidates in Maine.<sup>1</sup> The Commission unanimously concluded that WMTW complied with the regulations on staging candidate debates by employing “pre-established objective criteria” to select participants,<sup>2</sup> and therefore did not make any prohibited corporate contribution.<sup>3</sup>

I write separately, however, to explain why the better course would have been to find no reason to believe under the Act’s media exemption, and to observe the serious constitutional problems with the Commission’s debate regulations. Although not brought to bear in this matter, the Commission’s debate regulations—and the agency’s policing of press entities’ journalistic and editorial decisions—remain a foreboding threat to the guarantees of the First Amendment’s Free Press Clause. The Commission would be well advised to reconsider these regulations in their entirety and to simply apply the media exemption to future cases like this one.

**WMTW’s Debate Was Protected Under FECA’s Media Exemption**

When formulating the 1974 amendments to the Act, Congress did not intend to “limit or burden in any way the first amendment freedoms of the press and of association.”<sup>4</sup> Thus, Congress categorically excluded from the definition of “expenditure” the costs of “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

<sup>1</sup> Certification (May 24, 2022), MUR 7835 (WMTW-TV).

<sup>2</sup> 11 C.F.R. § 110.13(c).

<sup>3</sup> *See* 52 U.S.C. § 30118(a).

<sup>4</sup> H.R. Rep. No. 93-1239, at 4 (1974).

political party, political committee, or candidate.”<sup>5</sup> This exemption is known as the “media exemption” or the “press exemption,” and it 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.”<sup>6</sup>

Because “freedom of the press is substantially eroded by investigation of the press, even if legal action is not taken following the investigation,” courts have instructed the Commission to limit its initial inquiry into allegations against press entities to whether the media exemption is applicable.<sup>7</sup> To make that threshold determination, the Commission assesses: (1) whether the entity is owned or controlled by a candidate, political committee, or political party; and (2) whether the activity in question is a “legitimate press function.”<sup>8</sup> “Only after concluding that the media exemption does not apply may the Commission commence an inquiry under its otherwise applicable . . . standards.”<sup>9</sup>

No one disputes that WMTW is a bona fide press entity not owned or controlled by any candidate, committee, or political party.<sup>10</sup> Likewise, WMTW’s publicly broadcast debate between the two most competitive candidates in Maine’s 2020 Senate race constituted a “legitimate press function.” As past Commissioners recognized in a nearly identical case, “[t]he fact that [a television station] chose to use a debate format to convey information in its capacity as a press entity does not negate the press exemption.”<sup>11</sup> Indeed, pre-election debates are “a well established, traditional news format that is utilized by press entities everywhere to compare and contrast

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<sup>5</sup> See 52 U.S.C. § 30101(9)(B)(i); 11 C.F.R. § 100.132. Commission regulations likewise exempt “[a]ny cost incurred in covering or carrying a news story, commentary, or editorial” from the meaning of “contribution.” 11 C.F.R. § 100.73.

<sup>6</sup> Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman at 7 (June 28, 2016), MUR 6952 (Fox News Network, LLC). See H.R. Rep. No. 93-1239, at 4 (explaining that the media exemption “assures the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns”).

<sup>7</sup> *Reader’s Digest Ass’n v. FEC*, 509 F. Supp. 1210, 1214 (S.D.N.Y. 1981).

<sup>8</sup> *Id.* at 1214–15; *FEC v. Phillips Publ’g, Inc.*, 517 F. Supp. 1308, 1313 (D.D.C. 1981). See also Advisory Op. 2011-11 (Colbert) at 7 (“The Commission considers two factors in determining whether a press entity is acting in its legitimate press function. They are (1) whether the press entity’s materials are available to the general public, and (2) whether the materials are comparable in form to those ordinarily issued by the press entity.”); Advisory Op. 2010-08 (Citizens United) at 6.

<sup>9</sup> Statement of Reasons of Chairman David M. Mason, Vice Chairman Karl J. Sandstrom, and Commissioners Bradley A. Smith and Michael E. Toner at 1 (Sept. 3, 2002), MUR 5224 (Boston Globe, *et al.*). See also *Reader’s Digest Ass’n*, 509 F. Supp. at 1215 (finding that “until and unless the press exemption were found inapplicable, the FEC is barred from investigating the substance of the complaint.”).

<sup>10</sup> WMTW is owned by Hearst Television, Inc. Complaint at 1 (Oct. 23, 2020), MUR 7835 (WMTW-TV); Response at 5 (Dec. 8, 2020), MUR 7835 (WMTW-TV).

<sup>11</sup> Statement of Reasons of Vice Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 7 (Dec. 19, 2013), MUR 6703 (WCVB-TV, Channel 5, *et al.*); see also Advisory Op. 1982-44 (DNC/RNC) at 3 (“The statute 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.”).

competing candidates.”<sup>12</sup> WMTW itself has “a long history of broadcasting political debates and public affairs programming,” and the presentation of such content to the public is an “integral part” of its media business that provides the critical service of better informing voters about candidates.<sup>13</sup>

As a result, WMTW’s candidate debate easily satisfies the requirements for the media exemption, and therefore it cannot be considered a corporate contribution or expenditure. This is true irrespective of the editorial decisions WMTW made or might have made concerning the debate’s content, questions, format, or participants. Those decisions are central to WMTW’s operation as a press entity, and the First Amendment and the Act’s media exemption restrict the government’s power to micromanage and regulate that activity. For that reason, I supported finding no reason to believe the station violated 52 U.S.C. § 30118(a) under the media exemption.<sup>14</sup>

### **The Commission’s Problematic Debate Regulations**

Rather than applying the media exemption, the Office of General Counsel and the Commission instead judged this case under our debate regulations. And while the Commission found that WMTW complied with the regulations here,<sup>15</sup> the Office of General Counsel has, in other cases, recommended pursuing enforcement against press entities it concluded did not comply with the Commission’s debate rules.<sup>16</sup>

The Commission’s regulations governing candidate debates are in serious tension with the Free Press Clause. Those regulations seek to dictate how entities structure and run their debates by imposing a neutrality standard on the staging organization,<sup>17</sup> and by requiring the use of “pre-established objective criteria” that are “free of content bias” for selecting participating candidates.<sup>18</sup> In other words, through its rules, the Commission regulates the editorial decision-making process for organizations staging debates and imposes its own standards of journalistic objectivity.

This “assertion of regulatory power over the press contradicts the Free Press Clause of the First Amendment, the Act’s press exemption, and congressional intent.”<sup>19</sup> The debate regulations

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<sup>12</sup> Statement of Reasons of Vice Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 8 (Dec. 19, 2013), MUR 6703 (WCVB-TV, Channel 5, *et al.*).

<sup>13</sup> Response at 1 (Dec. 8, 2020), MUR 7835 (WMTW-TV).

<sup>14</sup> *See* Certification (May 24, 2022), MUR 7835 (WMTW-TV). Three of my colleagues abstained from the motion to find no reason to believe based on the media exemption, and consequently it was not agreed to. *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *See, e.g.*, First General Counsel’s Report at 10 (Mar. 30, 2016), MUR 6952 (Fox News Network, LLC) (recommending enforcement against Fox News Network based on its candidate-selection criteria in a presidential primary debate).

<sup>17</sup> 11 C.F.R. § 110.13(b)(2).

<sup>18</sup> 11 C.F.R. § 110.13(c); First General Counsel’s Report at 6–7 (Aug. 11, 2021), MUR 7835 (WMTW-TV).

<sup>19</sup> Concurring Statement of Commissioner Lee E. Goodman on Notice of Disposition of Petition for Rulemaking on Candidate Debates at 16 (Nov. 9, 2015) [hereinafter *Goodman Concurring Statement*]. Pursuant to the Commission’s regulations, when an organization, including a press entity, uses its funds “to defray costs incurred in staging candidate debates,” it must satisfy all of the following conditions to avoid treatment as a

create an “artificial distinction” between a press entity’s staging of a debate versus its coverage of one, with no “principled basis” for distinguishing “between the many varied formats through which the press covers and comments upon campaigns,” which receive the full protection of the statute’s media exemption, and the debate format, which does not.<sup>20</sup> It also authorizes the Commission to “sit[ ] in judgement of a press organization’s criteria for hosting a joint appearance or debate between two candidates,”<sup>21</sup> despite Congress’s clear intention to exclude press activity from the FEC’s regulatory ambit.<sup>22</sup>

Past Commissioners have articulated these same concerns at length.<sup>23</sup> I do not need to repeat their thorough analyses, but I join them in concluding that the debate regulations “exceed[ ] the Commission’s proper authority with respect to press organizations.”<sup>24</sup> The Act’s media exemption and the First Amendment’s Press Clause preclude the Commission from regulating press entities’ journalistic and editorial discretion in connection with the staging of candidate debates. And I will continue to press the Commission to dismiss complaints raising this issue on that basis.

  
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 Sean J. Cooksey  
 Commissioner

June 28, 2022

Date

contribution: (i) the debate must feature at least two candidates; (ii) the organization must not “structure” the debate to favor one candidate over others; and (iii) the organization must use “pre-established objective criteria to determine which candidates may participate in [the] debate.” 11 C.F.R. §§ 100.92, 110.13(b)–(c); *see also* 11 C.F.R. § 114.4(f).

<sup>20</sup> *Goodman Concurring Statement, supra* note 19, at 11, 12.

<sup>21</sup> Statement of Reasons of Vice Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 10 (Dec. 19, 2013), MUR 6703 (WCVB-TV, Channel 5, *et al.*).

<sup>22</sup> *See* H.R. Rep. No. 93-1239, at 4 (“[The press exemption] clauses 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.”); *Goodman Concurring Statement, supra* note 19, at 10–11 (“It is impossible to infer from Congress’ broadly worded assurance any congressional intent to restrict ‘in any way’ the press corps’ historical practice of sponsoring debates.”).

<sup>23</sup> *See, e.g.*, Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman at 16 (June 28, 2016), MUR 6952 (Fox News Network, LLC) (concluding “the Commission lacks jurisdiction to investigate or punish Fox News’ activity with respect to the debate” because it “was engaged in legitimate press activity when it organized, moderated, and televised the [ ] debate”); Statement of Reasons of Vice Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 7–8 (Dec. 19, 2013), MUR 6703 (WCVB-TV, Channel 5, *et al.*) (“The statutory press exemption does not turn on an organization’s choice of formatting (nominal or substantive) its news commentary and coverage.”); Statement of Reasons of Chairman David M. Mason, Vice Chairman Karl J. Sandstrom, and Commissioners Bradley A. Smith, and Michael E. Toner at 2 (Sept. 3, 2002), MUR 5224 (Boston Globe, *et al.*) (“The statutory language of [the press exemption] is categorical, and therefore precludes the Commission from creating requirements which a debate must meet in order to qualify for the press exemption.”).

<sup>24</sup> *Goodman Concurring Statement, supra* note 19, at 16.