

FEC Commissioners Split Over Regulating Fox News, Breadth of Media Freedom in Recent Enforcement Action

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Fireworks came early at the FEC this year, as Republican and Democratic Commissioners vigorously sparred with one another in public right before the July 4th holiday. The source of the dispute was the resolution and public release of an enforcement matter involving the decision-making process Fox News used when hosting the first Republican presidential debate of the 2016 election cycle.

The matter arose out of a complaint filed by Mark Everson, a relatively unknown candidate for the Republican presidential nomination, who was upset at his exclusion from the August 6, 2015 debate at Cleveland's Quicken Loans Arena. Originally, Fox News had announced that debate participants would be chosen, in relevant part, based upon whether a particular candidate was in the top ten of the five most recent national polls recognized by Fox News. Two months before the debate, however, Fox News announced that it wanted to stage a separate undercard debate, consisting of candidates who did not qualify for the main debate but were otherwise polling at 1% or better in the polling data. Then, a little more than a week before the debate, the criteria for inclusion in the undercard debate was expanded to include all candidates whose names were "consistently offered to respondents in major national polls (as recognized by Fox News) leading up August 4." This was reportedly done by Fox News in "a concerted effort to include and accommodate the now 16 Republican candidate field."

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Federal campaign finance law prohibits corporate contributions to candidates, and corporations that help stage debates and provide free air time to participating candidates are potentially making prohibited contributions. In the late 1970s, however, the Commission created a regulatory exception to the corporate prohibition that permitted the League of Women Voters Educational Fund, a 501(c)(3) non-profit corporation, and certain other corporations to host debates and accept funds from other corporations to do—provided that various conditions were met. Among other things, the regulations require that debates must include at least two candidates, must not be structured to prefer one candidate over another, and debate organizers must employ “pre-established objective criteria to determine which candidates may participate in a debate.” In a controversial move that drew congressional scrutiny and potentially conflicted with the First Amendment’s press freedom guarantees, the Commission required media corporations to comply with these same requirements.

Applying this existing legal framework to the Fox News matter, the Commission’s Office of General Counsel recommended that the six commissioners find that the cable news network violated the law because it had altered the criteria for the undercard debate specifically to ensure that all six of the desired candidates (including Carly Fiorina, George Pataki, and Lindsey Graham) would be eligible to participate. The General Counsel’s recommendation did not sit well with the three Republican FEC Commissioners, who argued that the “Commission’s debate regulation cannot be used to impose government restrictions on newsroom decisions and to punish, and even censor, American press organizations.” In a subsequent interview with *Politico*, GOP Commissioner Lee Goodman pressed the point further:

“[n]ewsrooms everywhere should be concerned when the federal government asserts regulatory jurisdiction over their newsroom decision[s], and this is what this was.”

The Commission’s three members holding Democratic seats disagreed with their Republican colleagues, with Commissioners Ravel and Walther voting to find a legal violation and to fine Fox News thousands of dollars for its violation. Commissioner Ravel subsequently issued her own statement explaining her vote, calling the factual record “undisputed” and the regulatory violation “clear,” while chastising her Republican colleagues for “aggrandizing the boundaries of the press exemption.” For her part, Democratic Commissioner Ellen Weintraub voted to dismiss the case as an exercise of “prosecutorial discretion,” a term that often connotes a belief that the law was violated but otherwise terminating further enforcement proceedings. Before closing the matter, the commissioners also split three-to-three on a separate, formal Republican motion to dismiss the case without finding a legal violation.

The Commission’s 3-3 split raises a number of important questions for media outlets going forward:

What happens to other media organizations (like CNN) who adjusted their criteria specifically to allow other candidates (like Carly Fiorina) to participate in a debate? It is not known whether similar complaints are working their way through the FEC’s confidential enforcement process, but if they are, a 3-3 split among commissioners seems likely. A corollary to this, however, is that a change in the Commission’s composition could result in a different outcome.

More broadly, what does this vote mean for newsrooms covering or participating in the political process in the remainder of this presidential election cycle? In addition to the Fox News matter, in late 2013 the Commission split 3-3 on whether it had authority under the debate regulations to scrutinize editorial decisions involving a *Meet the Press*-style program airing on WCVB Channel 5 in Boston. Will these matters chill television, radio, and newspaper coverage of candidate appearances this fall, as editors worry about the second-guessing of their decisions by federal regulators? Or are any concerns overblown and these decisions merely outliers that are unlikely to affect newsroom judgments?

Finally, some in the media and elsewhere have raised questions about whether regulators are singling out Fox News for special scrutiny. They cite not only the recent debate-related matter, but also prior matters where Democratic commissioners voted to enforce the law against Sean Hannity but supported dismissing cases against individuals—like Michael Moore—who are perceived to be on the opposite side of the political spectrum. For his part, when speaking out on the Fox News matter, Commissioner Goodman stressed that the point he was making was not a partisan one, but rather a concern that media entities of all kinds would be subject to regulation. If so, the consequences would be significant.