THE FEC AND FEDERAL CANDIDATES' DEBATES: HOW FAR THE MANDATE TO REGULATE?

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I

INTRODUCTION

For four years, until regulations were formulated to guide the conduct of election debates,[1] the League of Women Voters Education Fund and the Federal Election Commission struggled over whether the Federal Election Campaign Act[2] (FECA) requires the FEC to regulate federal candidate debates. This struggle also encompassed the question of how the League was to proceed with debates if it was determined that regulation was mandated.

Although the League and the FEC agreed that the purpose of the FECA was to curb election abuse, the FEC viewed the FECA as a broad mandate to regulate the election process while the League insisted that the FEC's mandate was more narrow. The event that triggered this controversy was the FEC decision immediately prior to the League-sponsored 1976 Ford-Carter debates to bar the League from accepting corporate or union donations to defray the costs of political debates.[3] The FECA bars corporations and unions from making contributions to, or expenditures on behalf of, federal political candidates or political committees.[4] While the FEC admitted that corporate and union donations to the League were not contributions or expenditures under the Act's definitions of those terms,[5] the FEC said that League disbursements for debates were nevertheless "in connection with" an election and therefore could not come from corporate or union sources.[6] The League responded that to fall within the prohibitions of the Act, a corporate or union donation must not only be "in connection with" an election, but must also be made for the purpose of influencing the outcome of an election.[7]

Concluding that the debates had to be regulated, the FEC was uncertain as to exactly what was required to ensure compliance with the Act. This uncertainty was demonstrated by the FEC's changing restrictions over the

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1. 11 C.F.R. § 100 (1981).
2. 2 U.S.C. §§ 431-455 (1976 & Supp. IV 1980).
3. FEC Policy Statement, Presidential Debates (Aug. 30, 1976) (unpublished), *vacated by* FEC Notice 1978-4, 43 Fed. Reg. 16547 (Apr. 19, 1978).
4. 2 U.S.C. § 441b (1976 & Supp. IV 1980).
5. FEC Policy Statement, *supra* note 3.
6. *Id.*
7. League of Women Voters v. Federal Election Comm'n, No. 77-0235 (D.D.C. filed Feb. 11, 1977).

four-year period on who might contribute to and sponsor debates, and on how federal candidates should be selected to participate in debates.[8]

At the heart of its controversy with the FEC was the League's concern that it would not be able to continue its sixty-year tradition of providing nonpartisan information to voters and of stimulating voter interest in elections. The League believed that the result of FEC action would be to inhibit opportunities for the public to compare candidates and their positions on the issues. The League was equally concerned that complex regulations would effectively chill the free and open discussion which is at the core of the American political process.

After four years of uncertainty, the FEC finally developed a set of regulations that may satisfy most of the League's concerns. But these issues were barely settled in time for the national League to undertake the massive fundraising needed to sponsor the 1980 presidential debates, or for local and state Leagues to sponsor similar events for congressional, statewide, and local candidates.

This paper first discusses the conflicting views of the League and the FEC on whether the FECA requires the regulation of candidate debates. Secondly, it analyzes the FEC's attempt to regulate the sponsorship and funding structure of federal candidate debates. Finally, the article concludes with an assessment of the difficulties still to be faced by would-be debate sponsors.

II

Does the FECA Require Regulation of the Debates?

On August 30, 1976, the FEC issued a Policy Statement[9] based on its broad interpretation of the mandate of the Act and the FEC's concern for potential abuse in the area of federal candidate debates. This Policy Statement came just as the League was making final arrangements for the broadcasting of the first presidential debates to be held in sixteen years.[10]

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8. Between 1976 and 1980, the FEC issued an Opinion of Counsel, supplanted that opinion with a Policy Statement, vacated the Policy Statement, proposed one regulation, and then waited for a year and a half before sending the regulations to Congress. After this first set of regulations was vetoed, another set of regulations was sent to Congress which was accepted. *See* sections II & III *infra.*

9. FEC Policy Statement, *supra* note 3.

10. This effort was made possible in part by the decision of the Federal Communications Commission that broadcast coverage of debates between candidates for public office constituted on-the-spot coverage of bona fide news events within the meaning of section 315(a)(4) of the Communications Act of 1934, 47 U.S.C. § 315(a)(4) (1970), and thus did not give rise to obligations to afford other legally qualified candidates equal opportunities under that section. FCC rules require that, to conform to its ruling, a debate must (a) be arranged by a party not associated with a broadcaster; (b) take place outside a broadcast studio; and (c) be broadcast live, and in its entirety. It must be covered by the broadcaster as a result of a reasonable, good faith judgment that the event is newsworthy and not for the purpose of giving political advantage to any candidate. Aspen Institute Program on Communication and

The Policy Statement, which was apparently hurriedly issued when the FEC realized that not all presidential candidates were to be invited to the League debate, stated in part:

> [I]t 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 and are therefore not contributions as defined in 2 U.S.C. Section 431(e) or 26 U.S.C. 9003(b)(2) and 9012(b). The League may raise funds specifically earmarked for sponsorship of the debates from private individuals . . . . The disbursements by [the League] are nonetheless disbursements "in connection with" a Federal election and accordingly may not be made with funds from corporate or labor organization treasuries, . . . or made by other persons forbidden to participate in the Federal election process by the Act . . . . The Commission is further of the opinion that a separate segregated fund established by a corporation or labor organization may donate funds, without regard to amount, to [the League].[11]

The Policy Statement came as a shock to the League for several reasons. Since its founding, the League has encouraged a variety of voter education activities. Such activities have included candidate debates, in which candidates for local, state, and federal office have appeared. The purpose of these activities is to inform the voters and encourage voter participation in the electoral process. League organizations had often used corporate donations to help support such projects. These activities had never been held to violate any federal law, regulation, or statute regulating the conduct of elections. In fact, in 1972 the League sought and obtained an opinion from the Department of Justice[12] stating that its voter education activities were not prohibited under the Federal Corrupt Practices Act.[13]

The League was also surprised to find that the FEC would concern itself with the funding of nonpartisan candidate debates. League members understood that the FECA had been enacted to open up to public scrutiny the financing of federal campaigns. The nonpartisan debates sponsored by the League did not constitute the abuse the Act was designed to eliminate. The League had supported the reforms embodied in the Act; the League initiated a petition drive and lobbied intensively for the campaign financing reforms in the 1974 amendments of the Act. When the law was challenged in

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Society, 55 F.C.C.2d 697 (1975), *aff'd sub nom.* Chisholm v. FCC, 538 F.2d 349 (D.C. Cir. 1976), *cert. denied,* 429 U.S. 890 (1976).

11. FEC Policy Statement, *supra* note 3.

12. Letter to Howard Kolodny, from Henry E. Peterson, Assistant Attorney General, Criminal Division, and John C. Keeney, Chief, Fraud Section (July 10, 1972).

13. Ch. 368, § 313, 43 Stat. 1024 (1925) (codified as amended at 18 U.S.C. § 610 (1970 & Supp. II 1972)).

Buckley v. Valeo,[14] the League, together with Common Cause and the Center for Public Financing, intervened as defendants. After the Court struck down parts of the Act, the League worked for the enactment of the 1976 amendments and continued its attempts to make the financing of federal elections more open and equitable.

Moreover, the Policy Statement countermanded a November 21, 1975 Opinion of Counsel[15] in which John G. Murphy, then FEC General Counsel, responded to a League inquiry:

> The terms "contribution or expenditure" are defined in section 610 to include "any direct or indirect payment . . . to any candidate, campaign committee, or political party or organization . . . ." It is my opinion that the League of Women Voters, which is a nonprofit, educational trust and which under its bylaws is prohibited from participating or intervening in any political campaign on behalf of any candidate for public office or from being partisan in its educational activities relating to political campaigns, would not be a "political party or organization" within the meaning of 18 U.S.C. § 610. A corporation or union would not, therefore, be prohibited from contributing to the [League] as long as the [League's] activities do not have the effect of supporting or favoring particular parties or candidates.[16]

The 1976 Policy Statement had a devastating effect on League plans to fund that year's debates. While free to proceed with sponsorship of debates, the League was prohibited from accepting corporate or union support in cash or in kind for use in connection with debates. The Policy Statement allowed the League to accept contributions from political action committees (PACs). To have done so, however, would have violated the League's nonpartisan policy. The League views debates as educational in purpose; PAC money, on the other hand, is solicited and given to influence the outcome of an election. Feeling that it was therefore forced to seek contributions solely from individuals and unincorporated organizations, the League failed to raise enough money to cover the full cost of the debates.

After the 1976 debates, the League was convinced that this kind of candidate event was a useful educational service to the public. The League also knew that if the Policy Statement were to be the last word on funding for federal candidate debates, the impact would reach far beyond the

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14. 424 U.S. 1 (1976).

15. The League had sought the opinion of the General Counsel rather than a ruling from the agency itself after an earlier League request for an advisory opinion on an unrelated matter had been declined on the grounds that the agency could issue an advisory opinion only to federal officeholders, candidates, or the national committee of any political party. The League thus received a letter from the General Counsel which was noted without objection by the Commission. [1976] FEC ANN. REP. 45-46 (Mar. 1977).

16. Opinion of Counsel No. 1975-82 (Nov. 21, 1975).

League at the national level. Local and state Leagues, as well as churches, trade associations, schools, and cultural societies, would also be severely inhibited in sponsoring a debate involving a federal candidate. With this in mind, on February 11, 1977, the League of Women Voters of the United States, the League of Women Voters Education Fund, and the League of Women Voters of Los Angeles, an incorporated local League, brought suit against the FEC challenging the validity of the Policy Statement, especially the FEC's broad interpretation of the phrase "in connection with any election."[17]

In that lawsuit, the League addressed the major point of contention: Did Congress intend to give the FEC a broad mandate requiring the FEC to regulate nonpartisan educational activities designed to inform voters and to encourage them to participate in the electoral process? Although the League argued for a narrow reading of the Act, the FEC has insisted from its August 30, 1976 Policy Statement onward on the broadest possible interpretation of the Act's prohibition against the use of corporate or union funds "in connection with" any federal election. The FEC argued that its authority for this position derived from section 321 of the Act, which states that "[i]t is unlawful . . . for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any [federal] election . . . or in connection with any primary election or political convention or caucus held to select candidates for . . . [federal] offices."[18] The FEC further delineated its position on corporate and union contributions in a December 3, 1979 staff memorandum which discussed various approaches to rulemaking on candidate debates. In the memorandum, Acting General Counsel Charles Steele stated that "[e]ven where political activity does not explicitly advocate one candidate over another, Congress has determined that the danger of undue corporate or labor influence in the political process is sufficient to warrant prohibition of such activity."[19]

The League argued that the FEC construed section 321 in a way inconsistent with congressional intent and with the spirit of both the Act and the first amendment of the Constitution. In contrast to the FEC position, the League argued that section 321 was a recodification of section 313 of the Federal Corrupt Practices Act[20] and that the courts had consistently construed section 313 and specifically the phrase "in connection with," to apply only to active electioneering on behalf of a candidate or party, or

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17. League of Women Voters v. Federal Election Comm'n, No. 77-0235 (D.D.C. Feb. 11, 1977).

18. 2 U.S.C. § 441b(a) (1976).

19. Federal Election Commission Memorandum 693, to Staff Director from Charles N. Steele, Acting General Counsel (Dec. 3, 1979).

20. Ch. 368, § 313, 43 Stat. 1024 (1925) (codified as amended at 18 U.S.C. § 610 (1970)).

conduct designed to influence the public for or against a particular candidate or party.[21]

More than seventy years of judicial decisions and legislative history supported the League's claim. Discussing the statutory provisions now embodied in section 441b, Justice Frankfurter wrote in *United States v. United Auto Workers*: "[t]he evil at which Congress has struck . . . is the use of corporation or union funds to influence the public at large to vote for a particular candidate or a particular party."[22] When a new definition of "contribution" was enacted as part of the 1971 Act,[23] Representative Hansen, the sponsor of the amendment, stated that "the purpose of my amendment is to codify the court decisions interpreting section 610 of title 18 of the United States Code . . . ."[24] Representative Hansen went on to say: "The effect of this language is to carry out the basic intent of section 610, which is to prohibit the use of union or corporate funds for active electioneering directed at the general public on behalf of a candidate in a federal election."[25]

The League believed that the FEC's broad interpretation of the Act's ban on the use of corporate and union funds in connection with an election would not permit a distinction between those activities undertaken for partisan purposes—to influence the outcome of an election—and those for nonpartisan purposes—to educate and inform the voter. Such a distinction is critical. The FEC should rightfully limit corporate and union contributions to and expenditures for candidates and political parties because the purpose of the Act was to limit the influence of wealth and special interest groups in the election process. The Act, however, should not be interpreted to curb the funding of free and robust discussion of government matters unless the discussion is structured for the express purpose of promoting a candidate, a group of candidates, or a political party.

The League also maintained that the FEC's interpretation of the meaning of "in connection with any federal election" at minimum chills free discussion of government matters and at maximum violates a major protection of the first amendment. In *Mills v. Alabama,*[26] the Supreme Court stated that "there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."[27] Nonpartisan candidate debates such as those sponsored by the

21. United States v. UAW, 352 U.S. 567, 589 (1957). *See* Miller v. American Tel. & Tel. Co., 407 F.2d 759, 764-65 (3d Cir. 1974); United States v. Pipefitters Local 562, 434 F.2d 1116, 1121 (8th Cir. 1971), *rev'd in part and vacated in part on other grounds,* 407 U.S. 385 (1972).

22. 352 U.S. at 589.

23. Pub. L. No. 92-225, § 205, 86 Stat. 3, 10 (1977).

24. 117 CONG. REC. 43,379 (1971). Section 313 of the Federal Corrupt Practices Act was codified at 18 U.S.C. § 610 (1970) (repealed 1976).

25. *Id.*

26. 384 U.S. 214 (1966).

27. *Id.* at 218.

League for sixty years are designed to give the public opportunities to hear such discussions. FEC interpretations of the Act which result in decreased public access to political discussion are not a positive contribution to the election process. They conform neither to the history of campaign reform nor to the specific congressional intent underlying the Act. Nonetheless, the FEC has persisted in its claim that all political activity, even that which is educational and nonpartisan, is susceptible to abuse and must be regulated if funded by corporate and union funds.

III

FEC Regulation of the Debates

Having concluded that the source of funds triggered the need for regulation, the FEC found it necessary to devise a regulatory scheme that would provide proper guidelines for administering the debates and ensuring compliance with the FEC's interpretation of the Act. The FEC hoped that the policy it had established would not only guarantee nonpartisan debates but would also minimize the possibility that the FEC would find itself embroiled in closely monitoring every federal candidate debate for evidence of partisanship. The FEC found, however, that the American political tradition and the unique nature of each election and debate thwarted its efforts to write detailed regulations.

As a result of the League's lawsuit and the FEC's recognition of the value of debates to the electoral process, the FEC attempted to find a way to allow corporate and union funds to be used for federal candidate debates. The FEC first held hearings on the debates in September 1977. At those hearings, the League and others testified that the purpose behind the debates sponsored by the League and similar organizations was to educate and inform voters, not to influence the nomination or election of a candidate. As a result of these hearings and the League's lawsuit, the FEC decided it could draw a parallel between candidate debates and voter registration or get-out-the-vote drives. Because FEC regulations allowed corporations and unions to fund registration and get-out-the-vote drives in joint sponsorship with nonprofit organizations that did not intervene in campaigns,[28] the FEC decided to allow corporations and unions to donate funds to a special set of nonprofit organizations to be used in debate sponsorship. Those organizations, classified under section 501(c)(3) of the Internal Revenue Code, have a history of neither supporting nor endorsing candidates. The FEC agreed to adopt a regulation to this effect in December 1977, and the League's suit against the FEC was later dismissed at the request of both parties.[29]

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28. *See* 11 C.F.R. § 114.4(d) (1980).

29. This agreement was not implemented until 1979, however. *See infra* notes 30-32 and accompanying text.

The FEC, however, believed that limiting sponsors was an insufficient guarantee that debates would be nonpartisan. Its concern was stimulated by an awareness that a debate which appears unbiased on its face may nonetheless promote the candidacies of participants over nonparticipants. It was argued that the 1976 candidacy of Eugene McCarthy may have been damaged by his exclusion from the 1976 League sponsored Ford-Carter debates. The FEC considered three alternative standards for regulating the selection of candidates for debates:

(1) the discretionary standard, which would give the sponsoring organization discretion as to participants, provided that the participants were selected in a nonpartisan manner;
(2) the ballot standard, which would require that all candidates on a ballot for the same office be invited; or
(3) the party standard, which would require that candidates be invited according to level of party—major, minor, or new—as defined in the Act.[30]

The FEC could not decide which alternative to impose on sponsors. Each option had serious shortcomings. Giving discretion to sponsors while requiring them to act in a nonpartisan manner would increase the possibility that the FEC would have to review for nonpartisanship the criteria by which many, if not all, debate sponsors chose participants. A ballot standard would require the sponsor of a presidential debate, for example, to invite a substantial number of candidates, many of whom were either frivolous or insignificant. A party standard would not allow the debate sponsor the discretion to invite, for example, a significant minor party candidate to debate without inviting all minor party candidates. In addition, a party standard might have resulted in a 1976 debate limited to major party candidates—the very situation that seemed to have triggered the whole debate-fundraising controversy. When the FEC was unable to decide which standard to implement for the regulation of debates, it did nothing more to finalize the regulation of sponsors that it had proposed in December 1977.[31]

As the 1978 elections drew near, state and local Leagues that wanted to sponsor debates for federal candidates remained in limbo. The FEC had vacated the Policy Statement banning corporate or union donations for debates, but was still in the process of writing regulations. State and local Leagues were advised, albeit conservatively, to act as if the proposed funding regulations were law and therefore to fund debates through the League of Women Voters Education Fund—the charitable trust classified under 26

30. FEC Comm'r Memorandum No. 1532, prepared for meeting of December 1, 1977.

31. The Federal Election Campaign Act requires that all proposed regulations be submitted for a 30-legislative-day review by the Congress subject to a veto by either House, or, in the case of Congressional election regulations, by the appropriate House. 2 U.S.C. § 438(c) (1976).

U.S.C. § 501(c)(3)—or through similarly classified organizations at the state level. Incorporated Leagues were advised not to spend any of their general funds on federal candidate debates.

The lack of clarity from the FEC and the inability to raise funds from concerned foundations, labor organizations, and corporations thwarted state and local League attempts to sponsor debates in 1978. Some Leagues tried to hold debates without spending any money. Others were afraid that if they accepted so much as the use of an amplifying system from a local corporation it would place their League and that corporation in violation of the Act.

Knowing that the uncertainty had to be clarified before the 1980 election, League officials met in the early spring of 1979 with several FEC commissioners to underscore again the difficulties that the FEC's past actions and interpretations presented to the League's fundraising efforts. The League asked the FEC to clarify its position in a timely manner, not because the League felt that regulation of contributions to debates was necessary, but to eliminate the chilling effect of the FEC's past actions on potential donors during the 1978 campaign period.

The first regulation developed by the FEC as a result of these meetings had three key features:

(1) debate sponsors were limited to organizations that were tax exempt under 26 U.S.C. § 501(c)(3) (which prohibits exempt organizations from participating or intervening in any political campaign on behalf of any candidate for political office);
(2) only those section 501(c)(3) organizations which had a history of nonpartisanship were allowed as sponsors; and
(3) the "party standard" in selecting candidates to participate in debates had to be used.[32]

The Senate vetoed the proposed regulations in September 1979, however, because the range of permissible sponsors was too exclusive and the standards for selection of debate participants was too complex.[33]

As time was running out for organizing the 1980 debates, the FEC retreated from its stringent rules in a second proposed regulation it submitted to the Congress in December 1979.[34] This regulation allowed corporations and unions to defray debate expenses by donating funds to section 501(c)(3) and section 501(c)(4) organizations which did not endorse, support, or oppose political candidates or parties. The regulation also allowed bona fide broadcasters, newspapers, magazines, and other periodical publications to spend their own corporate funds to stage debates. This regulation

32. *See* 44 Fed. Reg. 39,350-51 (1979).
33. 125 CONG. REC. § 12,821 (daily ed. Sept. 19, 1979).
34. The text of the regulation is published in 44 Fed. Reg. 76,736 (1979), and became final on April 1, 1980. 45 Fed. Reg. 21,210 (1980).

made it clear that expenses incurred by the media in covering a debate were excluded from the regulation. It also left to the discretion of the sponsor the method by which candidates were to be selected. The FEC explained, however, that the primary tool for determining nonpartisanship would be the process of selecting candidates to participate in such debates.[35] This regulation became final on April 1, 1980.[36]

IV

Future Implications for the Debate

The FEC's regulation did not inhibit the League in its purpose, design, organization, or staging of the 1980 presidential debates. In fact, the final regulation placed the League in the same position it occupied before the August 1976 Policy Statement, although the League was weaker from the standpoint of time, energy, and funds.

It is too early to determine the extent of discretion the FEC will allow a debate sponsor to exercise in selecting debate participants. The FEC sent out mixed signals in the 1980 election. On one hand, the FEC intervened in a debate sponsored by a New Hampshire newspaper to prevent the paper's corporate parent from funding a debate in which only two of the seven Republican candidates on the presidential primary ballot were invited to take part.[37] Little can be concluded from the Commission's decision here because this debate took place before the current regulations became final. On the other hand, the FEC dismissed a complaint by Barry Commoner which charged that the League violated the nonpartisan restriction by requiring his party to show significant voter interest and support before he could be invited to participate in the 1980 presidential debates. The FEC's decision, however, was narrowly based. The thoroughness with which the FEC inspected the League's sponsorship portends continued and intensive FEC oversight of federal candidate debates.[38]

Other effects of the FEC's April 1, 1980 regulation are that it established a regulatory role for the FEC in an area that previously had not been regulated; it alerted broadcasters to the possibility that a regulatory agency, in addition to the FCC, will have jurisdiction over them when they attempt to hold candidate debates; it clarified the ambiguities as to who may con-

35. 44 Fed. Reg. 76,735 (1979).

36. *See* note 34 *supra.*

37. Candidates invited to participate in League-sponsored 1980 presidential debates were required to meet three criteria: (1) be constitutionally eligible to serve as President, (2) be on the ballot in a sufficient number of states so as to have the mathematical possibility of winning in the Electoral College, and (3) have demonstrated significant voter interest and support. A candidate could satisfy the third criterion in one of two ways, either by being the nominee of a major political party or by demonstrating a support level of 15% in several national public opinion polls. League of Women Voters Education Fund Criteria Statement (Aug. 10, 1980).

38. FEC MUR 1287 First General Counsel's Report (Sept. 16, 1980).

tribute to and sponsor debates; it created a mechanism for candidates excluded from a debate to seek a remedy before a federal administrative agency; and it retained the possibility that the FEC may substitute its judgment for that of debate sponsors as to which candidates should be invited to debate.

V

CONCLUSION

The League and the FEC remain interested in maintaining an open and equitable election process within the scope of the law. The League is equally concerned with the need to encourage spirited, open political debate in whatever manner it may develop. In a media-minded age, when candidates are sold like soap in thirty- and sixty-second commercial spots, we should be discussing how to increase, not limit, political candidates' opportunities to go beyond image-making, and to address the public and each other in a meaningful interchange on political issues.

PART FOUR

The Problems of the Independent Candidate