The Burger Court Opinion Writing Database

CBS, Inc. v. FCC

453 U.S. 367 (1981)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 15, 1981

RE: 80-207,213,214 - CBS, ABC, NBC v. FCC

MEMORANDUM TO THE CONFERENCE

You will recall that, virtually without exception, we agreed this case was a "close call." That is bound to be so when the First Amendment claims of individuals seeking elective office are pitted against the First Amendment claims of broadcasters. In a number of cases, we have said that a licensee's First Amendment rights differ from those of other media who do not use a public resource as a channel of communication. Whatever the difference I doubt it cuts much ice here.

The vote was 5/4, my vote being to reverse, and I took the case on something like the "least persuaded theory." I refreshed my memory on my conference summary and find I said, "I think we could write a plausible opinion either way but, as of now, I think the "tilt" is the other way from the Court of Appeals."

I have struggled with my reservations for some time and I now conclude the Court of Appeals was as near "right" as can be achieved and that an affirmance commits us less than a reversal in this cloudy area. In reaching that conclusion, I can assume the Commission made a "wrong call" and still affirm on the basis it was a "judgment call" within the scope of the Commission's authority, i.e., possibly "wrong" but not reversible.

Before the 1972 amendment, 47 U.S.C. § 312(a)(7), office seekers had an undefined right under the "public interest" which compelled licensees to make time available to candidates. Theoretically, if a licensee did not meet the public interest criteria this could be a "demerit" if raised at a license renewal proceeding. Section 312(a)(7), however, spells out duties and remedies.

The dispute here is whether the 1972 statute created new obligations beyond the previous "public interest" standard or merely defined them more sharply. The Commission has construed the amendment to enlarge the obligations. Not surprisingly the broadcasters have complained to Congress on the burdens imposed by § 312(a)(7) and I have no doubt there are some burdensome aspects in terms of long range program commitments and time allocation. However, having heard the complaints since 1972, Congress has not amended the statute after notice of the Commission's interpretation. We have said that judicial deference to agency interpretation is "particularly appropriate [when the] agency's interpreation involves issues of considerable public controversy and Congress has not acted to correct any misconception of its statutory objectives." United States v Rutherford 442 U.S. 544, 554 (1979).

My study has just about persuaded me that CBS, Inc. v D.N.C. 412 U.S. 94 (1973) is not controlling. The observation that § 312 (a)(7) essentially codified prior law is not to be read as meaning that there was no change. So read, it is probably wrong; moreover that was not central to the issues in CBS v DNC.

I confess that I may be weighing - unconsciously but not heavily - the reality that now in the Spring of 1981, campaigns have already been underway for Congressional seats in the election of November 1982 - 18-19 months away. And John Anderson is making "candidate" sounds for 1984! Good or bad, and more likely the latter, it is a fact that campaigns are getting longer and, whether the early starter is an incumbent or outsider, the opposition is forced into an early race. Privately I believe this is "bad" but I don't think my commission allows me to condemn it judicially.

I can assume arguendo that § 312(a)(7) as construed by the Commission will produce some "bad" results by numbing the receptivity of voters and boring them into staying away from the polls, but as in other cases, I conclude that

nothing in the Constitution forbids "unwise," "bad," or "foolish" statutes. Red Lion, 395 U.S. 367, 390, tells us "it is the right of the viewers and listeners, not the right of broadcasters, which is paramount." I would not say candidates have absolute rights, but surely some First Amendment right of access to the "public airwaves" on reasonable terms, to reach the voters, however bored they may be.

In short I conclude that affirmance makes more sense than reversal if we are to give appropriate deference to the agency interpretation to which the attention of Congress has been drawn by protests of broadcasters. An affirmance can be cast in terms that leaves the subject open for future developments. I will await indications as to whether any of the Conference votes to affirm are less than solid.* If they are firm, I can have an opinion out in a week.

Regards,

WJB

*Of course I would not take any such response as a commitment to any opinion that emerges

WJB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 4, 1981

Nos. (80-207 - CBS, Inc. v. FCC et al
(
(80-213 - ABC, Inc. v. FCC et al
(
(80-214 - NBC, Inc. v. FCC et al

MEMORANDUM TO THE CONFERENCE:

Enclosed is a typescript draft of the above. It will have some added "honing" but should anyone (!) be inclined to dissent, the basic holding is here.

Regards,

WEB

4/15/81

4/28/81

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: JUN 4 1981

Recirculated: _____

Re: No. 80-207 -- CBS, Inc. v. FCC, et al.
No. 80-213 -- ABC, Inc. v. FCC, et al.
No. 80-214 -- NBC, Inc. v. FCC, et al.

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to consider whether the Federal Communications Commission correctly construed 47 U.S.C. § 312(a)(7) and determined that petitioners failed to provide "reasonable access to . . . the use of a broadcasting station" as required by the statute. ___ U.S. ___ (1980).

I

A

On October 11, 1979, Gerald M. Rafshoon, President of the Carter-Mondale Presidential Committee, requested each of the three major television networks to provide time for a 30-minute program between 8:00 p.m. and 10:30 p.m. on either the 4th, 5th, 6th, or 7th of December 1979. 1/ The Committee intended

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1/ The text of Mr. Rafshoon's letter to the three networks read as follows:

> "On behalf of the Carter/Mondale Presidential Committee, Inc., I am requesting availabilities for a thirty (30) minute program on [ABC, CBS, or NBC]

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

1st PRINTED DRAFT

From: The Chief Justice

Circulated: _____

Recirculated: JUN 25 1981

SUPREME COURT OF THE UNITED STATES

Nos. 80-207, 80-213, AND 80-214

CBS, Inc., Petitioner,
80-207 *v.*
Federal Communications Commission et al.

American Broadcasting Companies, Inc., Petitioner,
80-213 *v.*
Federal Communications Commission et al.

National Broadcasting Company, Inc., Petitioner,
80-214 *v.*
Federal Communications Commission et al.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June —, 1981]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to consider whether the Federal Communications Commission correctly construed 47 U. S. C. § 312 (a)(7) and determined that petitioners failed to provide "reasonable access to . . . the use of a broadcasting station" as required by the statute. — U. S. — (1980).

I

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On October 11, 1979, Gerald M. Rafshoon, President of the Carter-Mondale Presidential Committee, requested each of

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 26, 1981

Re: Nos. 80-207, 80-213, 80-214 -- CBS, Inc., etc. v. FCC

MEMORANDUM TO THE CONFERENCE:

I propose to add the following footnote after the last sentence of Part III-A-(3) on page 20:

> "11/ The dissent places great emphasis on the preservation of broadcaster discretion. However, giving licensees a "blank check" to determine what constitutes "reasonable access" would eviscerate § 312(a)(7)."

Regards,

WEB

CHANGES AS MARKED: 6, 7, 9, 11, 12, 15, 16, 18, 19, 20, 21, 24, 26

NEW FOOTNOTES: 8, 12

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

Recirculated: JUN 30 1981

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 80–207, 80–213, AND 80–214

CBS, Inc., Petitioner, 80–207 *v.* Federal Communications Commission et al. American Broadcasting Companies, Inc., Petitioner, 80-213 *v.* Federal Communications Commission et al. National Broadcasting Company, Inc., Petitioner, 80–214 *v.* Federal Communications Commission et al.	On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June —, 1981]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to consider whether the Federal Communications Commission correctly construed 47 U. S. C. § 312 (a)(7) and determined that petitioners failed to provide "reasonable access to . . . the use of a broadcasting station" as required by the statute. — U. S. — (1980).

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On October 11, 1979, Gerald M. Rafshoon, President of the Carter-Mondale Presidential Committee, requested each of

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 10, 1981

MEMORANDUM TO: Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun

RE: Nos. 80-207, 213 & 214 CBS, American and National Broadcasting Cos. v. Federal Communications Comm.

We four are in dissent in the above. I'll be happy to undertake the dissent.

Bill

W.J.B. Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 18, 1981

RE: Nos. 80-207, 213, 214 CBS, ABC, NBC v. FCC

Dear Chief:

You may regard my vote to affirm in the above as "solid".

Sincerely,

Bill

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 8, 1981

RE: Nos. 80-207, 213 & 214 CBS, ABC, NBC v. F.C.C.

Dear Chief:

I agree.

Sincerely,

Bill

The Chief Justice

cc: The conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 5, 1981

Re: Nos. 80-207, 80-213, 80-214,
CBS, Inc. v. FCC et al, etc.

Dear Chief,

I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

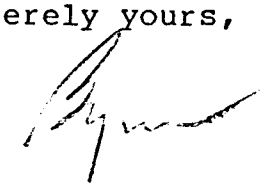
June 9, 1981

Re: 80-207 - CBS v. FCC
80-213 - ABC v. FCC
80-214 - NBC v. FCC

Dear Chief,

Unless I change my mind, which I might, I shall file a dissent in this case.

Sincerely yours,



The Chief Justice

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 12, 1981

Re: 80-207 - CBS v. FCC
80-213 - ABC v. FCC
80-214 - NBC v. FCC

Dear Chief,

This is just to let you know that I shall file a dissent in these cases and that it will take a few days.

Sincerely yours,

The Chief Justice

Copies to the Conference

cpm

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 15 JUN 1981

Recirculated: _____

80-207 - CBS v. FCC
80-213 - ABC v. FCC
80-214 - NBC v. FCC

Justice White, dissenting.

The Court's opinion is disarmingly simple and seemingly straightforward: in 1972, Congress created a right of reasonable access for candidates for federal office; the Federal Communications Commission, charged with enforcing the statute, has defined that right; as long as the agency's action is within the zone of reasonableness, it should be accepted even though a court would have preferred a different course. This approach, however, conceals the fundamental issue in this case, which is whether Congress intended not only to create a right of reasonable access but also to negate the long-standing statutory policy of deferring to editorial judgments that are not destructive to the goals of the Act. In this case, such a policy

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

1st PRINTED DRAFT

Recirculated: 19 JUN 1981

SUPREME COURT OF THE UNITED STATES

Nos. 80–207, 80–213, AND 80–214

CBS, Inc., Petitioner,
80–207 *v.*
Federal Communications Commission et al.

American Broadcasting Companies, Inc., Petitioners,
80-213 *v.*
Federal Communications Commission et al.

National Broadcasting Company, Inc., Petitioner,
80–214 *v.*
Federal Communications Commission et al.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June —, 1981]

JUSTICE WHITE, dissenting.

The Court's opinion is disarmingly simple and seemingly straightforward: in 1972, Congress created a right of reasonable access for candidates for federal office; the Federal Communications Commission, charged with enforcing the statute, has defined that right; as long as the agency's action is within the zone of reasonableness, it should be accepted even though a court would have preferred a different course. This approach, however, conceals the fundamental issue in this case, which is whether Congress intended not only to create a right of reasonable access but also to negate the long-standing statutory policy of deferring to editorial judgments that are not destructive to the goals of the Act. In this case, such a policy would require acceptance of decisions on access as

Stylistic and p. 22

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

Recirculated: 23 JUN 19

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 80–207, 80–213, AND 80–214

CBS, Inc., Petitioner,
80–207 *v.*
Federal Communications Commission et al.

American Broadcasting Companies, Inc., Petitioners,
80-213 *v.*
Federal Communications Commission et al.

National Broadcasting Company, Inc., Petitioner,
80–214 *v.*
Federal Communications Commission et al.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June —, 1981]

JUSTICE WHITE, dissenting.

The Court's opinion is disarmingly simple and seemingly straightforward: in 1972, Congress created a right of reasonable access for candidates for federal office; the Federal Communications Commission, charged with enforcing the statute, has defined that right; as long as the agency's action is within the zone of reasonableness, it should be accepted even though a court would have preferred a different course. This approach, however, conceals the fundamental issue in this case, which is whether Congress intended not only to create a right of reasonable access but also to negate the long-standing statutory policy of deferring to editorial judgments that are not destructive of the goals of the Act. In this case, such a policy would require acceptance of network or station de-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 15, 1981

Re: No. 80-207 - CBS, Inc. v. FCC, et al.
No. 80-213 - ABC, Inc. v. FCC, et al.
No. 80-214 - NBC, Inc. v. FCC, et al.

Dear Chief:

I await the dissent.

Sincerely,

T.M.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 22, 1981

Re: No. 80-207 - CBS, Inc. v. FCC, et al.
No. 80-213 - ABC, Inc. v. FCC, et al.
No. 80-214 - NBC, Inc. v. FCC, et al.

Dear Chief:

Please join me.

Sincerely,

T.M.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 20, 1981

Re: 80-207) - CBS v. FCC
80-213) - ABC v. FCC
80-214) - NBC v. FCC

Dear Chief:

My vote, as it was at the Conference, is to affirm.

Sincerely,

HAB.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 22, 1981

Re: No. 80-207 - CBS, Inc. v. FCC
No. 80-213 - ABC v. FCC
No. 80-214 - NBC v. FCC

Dear Chief:

I can, and do, join your "typescript" circulation of June 5.

Sincerely,

HAB.

The Chief Justice

cc: The Conference

Not clear whether circulated

May 18, 1981

80-207, 213, 214 - CBS, ABC, NBC v. FCC

Dear Chief:

I voted to Reverse; as did the CJ, BRW, WHR and JPS. The CJ will now vote to Affirm. I am inclined to stay with "Reverse". I suppose Byron will write or assign the dissent.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 12, 1981

80-207; 80-213; 80-214 CBS, et al v. FCC

Dear Chief:

Contrary to my vote in Conference, I am now persuaded by your opinion.

I therefore join.

Sincerely,

L. Lewis

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 16, 1981

Re: Nos. 80-207, 80-213, 80-214 CBS v. FCC

Dear Byron:

Please join me in your dissent in these cases.

Sincerely,

Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 9, 1981

Re: 80-207 - CBS v. FCC
80-213 - ABC v. FCC
80-214 - NBC v. FCC

Dear Chief:

Although I believe I could agree with the first twenty pages of your typewritten circulation of June 4, 1981, I am still not persuaded that the refusal of the request for thirty minutes of network time in December of 1979 was a denial of "reasonable access" within the meaning of the statute. I shall therefore wait for Byron's dissent.

Respectfully,

The Chief Justice

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

80-207 - CBS v. FCC
80-213 - ABC v. FCC
80-214 - NBC v. FCC

From: Mr. Justice Stevens

Circulated: JUN 23 '81

Recirculated: _____

JUSTICE STEVENS, dissenting.

In my judgment, the question whether a broadcast licensee has violated 47 U.S.C. § 312 (a)(7) by denying a political candidate reasonable access to broadcast time must be answered in the context of an entire political campaign, rather than by focusing upon the licensee's rejection of a single request for access. The licensee has a duty to act impartially and to make an adequate quantity of desirable time available. The performance of that duty cannot be evaluated adequately by focusing solely on particular requests or the particular needs of individual candidates. The approach the Federal Communications Commission has taken in this case, now adopted by the Court, creates an impermissible risk that the Commission's evaluation of a given refusal by a licensee will be biased--or will appear to be biased--by the character of the office held by the candidate making the request.[1] Indeed, anyone who listened to the campaign

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[1] The possibility that Commission decisions under § 312(a)(7) may appear to be biased is well illustrated by this case. In its initial decision and its decision on the networks' petitions for reconsideration, the Commission voted 4-3 in favor of the Carter-Mondale Presidential Committee. See 74 F.C.C.2d ___ (1979); id., at ___. In both instances, the four Democratic Commissioners concluded that the networks had violated the statute by denying

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

Circulated: _____

Recirculated: JUN 24 '81

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 80–207, 80–213, AND 80–214

CBS, Inc., Petitioner,
80–207 *v.*
Federal Communications Commission et al.

American Broadcasting Companies, Inc., Petitioner,
80–213 *v.*
Federal Communications Commission et al.

National Broadcasting Company, Inc., Petitioner,
80–214 *v.*
Federal Communications Commission et al.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June —, 1981]

JUSTICE STEVENS, dissenting.

In my judgment, the question whether a broadcast licensee has violated 47 U. S. C. § 312 (a)(7) by denying a political candidate reasonable access to broadcast time must be answered in the context of an entire political campaign, rather than by focusing upon the licensee's rejection of a single request for access. The licensee has a duty to act impartially and to make an adequate quantity of desirable time available. The performance of that duty cannot be evaluated adequately by focusing solely on particular requests or the particular needs of individual candidates. The approach the Federal Communications Commission has taken in this case, now adopted by the Court, creates an impermissible risk that the