

The Burger Court Opinion Writing Database

FCC v. League of Women Voters of California

468 U.S. 364 (1984)

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

January 21, 1984

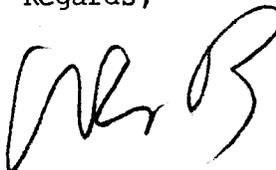
Re: 82-912 - Federal Communications Commission v. League of
Women Voters of California, et al.

Dear Bill:

At Conference I "passed" on this case. Thurgood was a
"tentative - not at rest" affirm. I am also "not at rest."
I considered assigning this case to Thurgood as a "least
persuaded" but conclude I should not make the assignment.

Will you proceed?

Regards,

A handwritten signature in black ink, appearing to be 'WB', written in a cursive style.

Justice Brennan

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

CHAMBERS OF
THE CHIEF JUSTICE

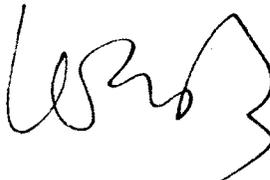
May 22, 1984

Re: 82-912 - FCC v. League of Women Voters of California

Dear Bill:

Like Byron, I will await the dissent.

Regards,

A handwritten signature in black ink, appearing to be 'W. Brennan', written in a cursive style.

Justice Brennan

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

June 20, 1984

Re: 82-912 - FCC v. League of Women Voters of California

Dear Bill:

Show me joining your dissent.

Regards,

A handwritten signature in black ink, appearing to read 'WRB', is written below the typed name.

Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

January 23, 1984

Dear Chief,

I shall undertake the opinion for
the Court in No. 82-912, FCC v. League
of Women Voters.

Sincerely,

A handwritten signature in cursive script that reads "Bill".

The Chief Justice

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: 5/20/84

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-912

**FEDERAL COMMUNICATIONS COMMISSION v.
LEAGUE OF WOMEN VOTERS OF
CALIFORNIA ET AL.**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE CENTRAL DISTRICT OF CALIFORNIA**

[May —, 1984]

JUSTICE BRENNAN delivered the opinion of the Court.

Moved to action by a widely felt need to sponsor independent sources of broadcast programming as an alternative to commercial broadcasting, Congress set out in 1967 to support and promote the development of noncommercial, educational broadcasting stations. A keystone of Congress' program was the Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365, 47 U. S. C. § 390 *et seq.*, which established the Corporation for Public Broadcasting, a nonprofit corporation authorized to disburse federal funds to noncommercial television and radio stations in support of station operations and educational programming. Section 399 of that Act, as amended by the Public Broadcasting Amendments Act of 1981, Pub. L. No. 97-35, 95 Stat. 730, forbids any "noncommercial educational broadcasting station which receives a grant from the Corporation" to "engage in editorializing." 47 U. S. C. § 399. In this case, we are called upon to decide whether Congress, by imposing that restriction, has passed a "law . . . abridging the freedom of speech, or of the press" in violation of the First Amendment of the Constitution.

I

A

The history of noncommercial, educational broadcasting in

p. 34-37

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

Circulated: _____

Recirculated: 6/6/84

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-912

**FEDERAL COMMUNICATIONS COMMISSION v.
LEAGUE OF WOMEN VOTERS OF
CALIFORNIA ET AL.**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE CENTRAL DISTRICT OF CALIFORNIA

[June —, 1984]

JUSTICE BRENNAN delivered the opinion of the Court.

Moved to action by a widely felt need to sponsor independent sources of broadcast programming as an alternative to commercial broadcasting, Congress set out in 1967 to support and promote the development of noncommercial, educational broadcasting stations. A keystone of Congress' program was the Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365, 47 U. S. C. §390 *et seq.*, which established the Corporation for Public Broadcasting, a nonprofit corporation authorized to disburse federal funds to noncommercial television and radio stations in support of station operations and educational programming. Section 399 of that Act, as amended by the Public Broadcasting Amendments Act of 1981, Pub. L. No. 97-35, 95 Stat. 730, forbids any "noncommercial educational broadcasting station which receives a grant from the Corporation" to "engage in editorializing." 47 U. S. C. §399. In this case, we are called upon to decide whether Congress, by imposing that restriction, has passed a "law . . . abridging the freedom of speech, or of the press" in violation of the First Amendment of the Constitution.

I

A

The history of noncommercial, educational broadcasting in

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 6, 1984

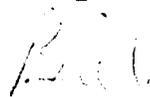
No. 82-912

FCC v. League of Women Voters

Dear Sandra,

Thanks so much for your note in the above. I gather that you may have some problems with the opinion as presently drafted that are not addressed by the revisions I have made in the most recent circulation to meet Bill Rehnquist. If there's anything at all you would like me to consider, of course, I would be very happy to do so.

Sincerely,



Justice O'Connor

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

June 11, 1984

FCC v. League of Women Voters
No. 82-912

Dear Sandra:

Thank you very much for your letter. I agree that this case raises difficult and delicate questions, and that our task is not made any easier by the fact that some of the issues now pressed upon us were never raised below. Let me try to address your concerns in order.

1. After considering your question concerning p. 15 of the opinion, I agree that the language you have cited is open to the reading that we must always require broadcast regulations to have the overall effect of enhancing rather than abridging speech. I did not intend that language to be read as establishing such a requirement, but you are right to note that this language could be viewed as erecting a somewhat more demanding standard than we have applied in the past. Would your concern be met if the sentence at p. 15 were changed to read: "... these restrictions have been upheld only when we were satisfied that the regulation is narrowly tailored to further a substantial governmental interest, such as ensuring adequate and balanced coverage of public issues"? I think this change would also helpfully clarify the opinion, since the description of the appropriate standard you have suggested is more consistent with the analysis actually followed in Part III than was my initial formulation of the test on p. 15.

2. As to your second point, I had thought that the section of the opinion addressing the Government's interest in preventing governmental propagandizing by public broadcasting stations (pp. 21-30) was sufficient to meet this concern, but upon reflection I agree with you that the opinion should deal with the point much more explicitly. I am open to specific suggestions, but I would propose something along the following lines: The Government surely has a substantial interest in ensuring that public broadcasting audiences will not be led to think that the broadcaster's editorials reflect the official view of the Government, but that interest can be fully satisfied through a less restrictive alternative that is readily available. The Government could simply require public broadcasting stations to broadcast a disclaimer every time they editorialize which would state that the editorial represents only the view of the station's management and does not in any way represent the views of the Federal Government or any of the station's other sources of funding. Such a disclaimer -- similar to that often used in commercial and non-commercial programming of a controversial nature -- would effectively and directly communicate to the audience that the editorial reflected only the views of the station rather than those of the Government. Furthermore, such

disclaimers would have the virtue of clarifying the responses that might be made under the fairness doctrine by opponents of the station's position, since those opponents would know with certainty that they were responding only to the station's views and not in any sense to the government's position.

3. With respect to your third point, I agree that the spending power argument is a troubling issue on which there are no easy answers. One solution, of course, would be to refrain altogether from reaching the issue because it was not pressed or passed upon below. Alternatively, I think it is possible to modify the opinion so as to address the Government's contentions without expressly relying upon an unconstitutional condition analysis. To clarify that point, I would be prepared to remove the references to cases such as Speiser and Sherbert which appear at p. 33 in the current draft. Instead, the opinion would simply (a) note the Government's argument that this case is controlled by Regan v. Taxation With Representation, (b) observe that in TWR we held that the Government is free to refuse to pay for constitutionally protected activities, and (c) explain that §399 is distinguishable from the statute upheld in TWR, because here the stations are not permitted to segregate their broadcasting activities according to the source of their funding. By contrast, the charitable organization in TWR was free to continue its lobbying activities by creating a §501(c)(4) affiliate and therefore the Court was able to conclude that "Congress has not infringed any First Amendment rights or regulated any First Amendment activity. Congress has simply chosen not to pay for TWR's lobbying." Slip op., at 5. The opinion would then emphasize that if Congress were to revise §399 to permit stations to create affiliates or to segregate their funds, the statute would clearly satisfy TWR. In this way, the opinion would do no more than restate the law as set forth in TWR.

4. Your suggestion that the statute could be construed to permit noncommercial stations to establish "affiliate" organizations in order to avoid the ban on editorials raises an intriguing possibility. After taking another look at the statute and its history, however, I am convinced that we have no basis for concluding that Congress contemplated, or would have wished to allow, such an easy evasion of the statutory prohibition. As I understand it, your suggestion would, in the final analysis, permit the management of a station that receives CPB grants to engage in editorializing -- a result that seems difficult to square with the plain language of §399. In this respect, the situation that we face here is strikingly different from that in TWR where we could rely on a specific and long-standing statutory alternative -- the §501(c)(4) affiliate. Here, by contrast, we can have no idea what might be the consequences of hypothesizing the availability of an affiliate mechanism. We cannot know, for instance, whether the many public stations licensed to state universities or local entities would be free to form such affiliates. Nor do we know whether Congress would wish to bear the uncertain, but undoubtedly considerable, costs of regulating

and monitoring the separate accounts of these affiliates. Furthermore, particularly in light of the absence of briefing or a decision below on this point, we can only guess at its possible impact on the complex overall scheme of broadcast regulation.

I do think, however, that your suggestion would provide Congress with another, perfectly constitutional means of achieving the legitimate objectives of §399. If it wished to adopt an affiliate mechanism, Congress could explicitly pre-empt any state law that might stand in the way and it could harmonize the concept with the remaining body of federal statutes and regulations governing broadcasting. Accordingly, if it would meet your concerns, I would be prepared to devote a new section of text to explaining that a revised version of §399 which provided for some analogue to §501(c)(4) would offer a permissible, less restrictive alternative for achieving some of the aims advanced on behalf of the current statute. That course seems to me more prudent than adopting a new interpretation of the present statute without the benefit of briefing or any indication in the legislative history that this is what Congress had in mind.

I appreciate that you have taken the time to set forth your concerns with such care and I hope that these proposed changes meet those concerns.

Sincerely,

A handwritten signature in cursive script that reads "Bill".

Justice O'Connor

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 12, 1984

FCC v. League of Women Voters
No. 82-912

Dear Sandra:

Enclosed is a draft incorporating the changes we have discussed. If these meet with your approval, I will circulate this new draft to the Conference.

Sincerely,

Justice O'Connor

p. 15, 29-30, 33, 34-36

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

Circulated: _____

Recirculated: 6/14/84

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-912

**FEDERAL COMMUNICATIONS COMMISSION v.
LEAGUE OF WOMEN VOTERS OF
CALIFORNIA ET AL.**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE CENTRAL DISTRICT OF CALIFORNIA

[June —, 1984]

JUSTICE BRENNAN delivered the opinion of the Court.

Moved to action by a widely felt need to sponsor independent sources of broadcast programming as an alternative to commercial broadcasting, Congress set out in 1967 to support and promote the development of noncommercial, educational broadcasting stations. A keystone of Congress' program was the Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365, 47 U. S. C. § 390 *et seq.*, which established the Corporation for Public Broadcasting, a nonprofit corporation authorized to disburse federal funds to noncommercial television and radio stations in support of station operations and educational programming. Section 399 of that Act, as amended by the Public Broadcasting Amendments Act of 1981, Pub. L. No. 97-35, 95 Stat. 730, forbids any "noncommercial educational broadcasting station which receives a grant from the Corporation" to "engage in editorializing." 47 U. S. C. § 399. In this case, we are called upon to decide whether Congress, by imposing that restriction, has passed a "law . . . abridging the freedom of speech, or of the press" in violation of the First Amendment of the Constitution.

I

A

The history of noncommercial, educational broadcasting in

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Stylistic changes throughout

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: _____

Recirculated: 6/22/84

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-912

**FEDERAL COMMUNICATIONS COMMISSION v.
LEAGUE OF WOMEN VOTERS OF
CALIFORNIA ET AL.**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE CENTRAL DISTRICT OF CALIFORNIA**

[June —, 1984]

JUSTICE BRENNAN delivered the opinion of the Court.

Moved to action by a widely felt need to sponsor independent sources of broadcast programming as an alternative to commercial broadcasting, Congress set out in 1967 to support and promote the development of noncommercial, educational broadcasting stations. A keystone of Congress' program was the Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365, 47 U. S. C. §390 *et seq.*, which established the Corporation for Public Broadcasting, a nonprofit corporation authorized to disburse federal funds to noncommercial television and radio stations in support of station operations and educational programming. Section 399 of that Act, as amended by the Public Broadcasting Amendments Act of 1981, Pub. L. No. 97-35, 95 Stat. 730, forbids any "noncommercial educational broadcasting station which receives a grant from the Corporation" to "engage in editorializing." 47 U. S. C. §399. In this case, we are called upon to decide whether Congress, by imposing that restriction, has passed a "law . . . abridging the freedom of speech, or of the press" in violation of the First Amendment of the Constitution.

I

A

The history of noncommercial, educational broadcasting in

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 29, 1984

No. 82-912
FCC v. League of Women Voters

MEMORANDUM TO THE CONFERENCE:

One case has been held for No. 82-912.

FCC v. League of Women Voters, No. 83-651. As the caption suggests, this case is an appeal from precisely the same judgment that we reviewed and affirmed in No. 82-912. Appellees in No. 82-912 had contended that appellate jurisdiction was lacking because the Government had not filed its notice of appeal in timely fashion. Since we had simply postponed consideration of the question of our jurisdiction to the merits in that case, the Government sought to ensure that the District Court's judgment would be reviewed by filing an appeal in No. 83-651. In its brief in No. 83-651, the Government requested that this second appeal be held until the Court decides the jurisdictional question in No. 82-912. According to the Government, if the Court decides that it has jurisdiction in that appeal, it will move to dismiss the appeal in No. 83-651 pursuant to Rule 53.2. If not, it asks that probable jurisdiction be noted in this appeal and that the briefs and arguments on the merits in No. 82-912 be deemed the relevant submissions in this case.

Given our holding in No. 82-912 that jurisdiction under 28 U.S.C. §1252 is present, it is clear that the Government's appeal in No. 83-651 should be dismissed for want of jurisdiction. Rather than waiting for the Government's motion to dismiss, therefore, I will vote to DISMISS FOR WANT OF JURISDICTION.

Sincerely,

Bull

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 21, 1984

Re: 82-912 -

FCC v. League of Women Voters of California

Dear Bill,

I await the dissent in this case.

Sincerely yours,



Justice Brennan

Copies to the Conference

cpm

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 6, 1984

Re: 82-912 - FCC v. League of Women
Voters of California

Dear Bill,

Please add the following at the foot of
your opinion:

JUSTICE WHITE: Believing that
the editorializing and candidate
endorsement proscription stand or
fall together and being confident
that Congress may condition use of
its funds on abstaining from
political endorsements, I join
JUSTICE REHNQUIST's dissenting
opinion.

Sincerely yours,



Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 21, 1984

Re: No. 82-912-Federal Communications Commission v.
League of Women Voters of California

Dear Bill:

Please join me.

Sincerely,

J.M.

T.M.

Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 18, 1984

Re: No. 82-912 - FCC v. League of Women Voters of California

Dear Bill:

Please join me.

Sincerely,

A handwritten signature in cursive script, appearing to read "Harry", with a horizontal line underneath.

Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 29, 1984

82-912 FCC v. League of Women Voters

Dear Bill:

Please join me.

Sincerely,

Lewis

Justice Brennan

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 21, 1984

Re: No. 82-912 FCC v. League of Women Voters

Dear Bill:

In due course I will circulate a dissent in this case.

Sincerely,



Justice Brennan

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: _____ 4 _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-912

FEDERAL COMMUNICATIONS COMMISSION *v.*
LEAGUE OF WOMEN VOTERS OF
CALIFORNIA ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE CENTRAL DISTRICT OF CALIFORNIA

[June —, 1984]

JUSTICE REHNQUIST, dissenting.

All but two paragraphs of the Court's lengthy opinion in this case are devoted to the development of a scenario in which the government appears as the "Big Bad Wolf," and appellee Pacifica as "Little Red Riding Hood." In the Court's scenario the Big Bad Wolf cruelly forbids Little Red Riding Hood from taking to her grandmother some of the food that she is carrying in her basket. Only two paragraphs are used to delineate a truer picture of the litigants, wherein it appears that some of the food in the basket was given to Little Red Riding Hood by the Big Bad Wolf himself, and that the Big Bad Wolf had told Little Red Riding Hood in advance that if she accepted his food she would have to abide by his conditions. Congress in enacting §399 of the Public Broadcasting Act, 47 U. S. C. (Supp.V) §399, has simply determined that public funds shall not be used to subsidize non-commercial, educational broadcasting stations which engage in "editorializing." I do not believe that anything in the First Amendment to the United States Constitution prevents Congress from choosing to spend public monies in that manner. Perhaps a more appropriate analogy than that of Little Red Riding Hood and the Big Bad Wolf is that of Faust and Mephistopheles; Pacifica, well aware of §399's condition on its receipt of public money, nonetheless accepted the public

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: Justice Rehnquist

Circulated: _____

Recirculated: _____ 5

STYLISTIC CHANGES THROUGHOUT

pg 4, 5, 6, 7

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-912

FEDERAL COMMUNICATIONS COMMISSION *v.*
LEAGUE OF WOMEN VOTERS OF
CALIFORNIA ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE CENTRAL DISTRICT OF CALIFORNIA

[June —, 1984]

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE WHITE join, dissenting.

All but three paragraphs of the Court's lengthy opinion in this case are devoted to the development of a scenario in which the government appears as the "Big Bad Wolf," and appellee Pacifica as "Little Red Riding Hood." In the Court's scenario the Big Bad Wolf cruelly forbids Little Red Riding Hood from taking to her grandmother some of the food that she is carrying in her basket. Only three paragraphs are used to delineate a truer picture of the litigants, wherein it appears that some of the food in the basket was given to Little Red Riding Hood by the Big Bad Wolf himself, and that the Big Bad Wolf had told Little Red Riding Hood in advance that if she accepted his food she would have to abide by his conditions. Congress in enacting § 399 of the Public Broadcasting Act, 47 U. S. C. (Supp.V) § 399, has simply determined that public funds shall not be used to subsidize noncommercial, educational broadcasting stations which engage in "editorializing" or which support or oppose any political candidate. I do not believe that anything in the First Amendment to the United States Constitution prevents Congress from choosing to spend public monies in that manner. Perhaps a more appropriate analogy than that of Little Red Riding Hood and the Big Bad Wolf is that of Faust and

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 22, 1984

Re: 82-912 - FCC v. League of Women Voters
of California

Dear Bill:

I shall await the dissenting opinion.

Respectfully,



Justice Brennan

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: JUN 28 1984

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-912

FEDERAL COMMUNICATIONS COMMISSION *v.*
LEAGUE OF WOMEN VOTERS OF
CALIFORNIA ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE CENTRAL DISTRICT OF CALIFORNIA

[June —, 1984]

JUSTICE STEVENS, dissenting.

The court jester who mocks the King must choose his words with great care. An artist is likely to paint a flattering portrait of his patron. The child who wants a new toy does not preface his request with a comment on how fat his mother is. Newspaper publishers have been known to listen to their advertising managers. Elected officials may remember how their elections were financed. By enacting the statutory provision that the Court invalidates today, a sophisticated group of legislators expressed a concern about the potential impact of government funds on pervasive and powerful organs of mass communication. One need not have heard the raucous voice of Adolph Hitler over Radio Berlin to appreciate the importance of that concern.

As JUSTICE WHITE correctly notes, the statutory prohibitions against editorializing and candidate endorsements rest on the same foundation. In my opinion that foundation is far stronger than merely "a rational basis" and it is not weakened by the fact that it is buttressed by other provisions that are also designed to avoid the insidious evils of government propaganda favoring particular points of view. The quality of the interest in maintaining government neutrality in the free market of ideas—of avoiding subtle forms of censorship and propaganda—outweigh the modest impact on ex-

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

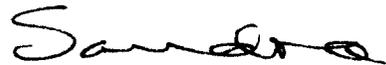
June 6, 1984

No. 82-912 FCC v. League of Women Voters

Dear Bill,

I am sorry to hold you up on this case, but it has long-range ramifications in various areas. I need a few more days to think through the consequences of the opinion as it is now drafted.

Sincerely,



Justice Brennan

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 8, 1984

No. 82-912 FCC v. League of Women Voters

Dear Bill,

Both the majority and dissenting opinions in this case raise a number of exceedingly difficult and delicate questions. Some of these issues were not decided below which makes our task even more difficult. There are significant consequences to whatever analysis we ultimately adopt.

I am troubled by some of the statements on p. 15 of your opinion. Although we may have observed in previous cases that the regulations we upheld "enhanc[ed] rather than abridg[ed]" freedom of expression, or "preserv[ed] room for the exercise of editorial discretion and initiative by the broadcaster," I do not think our prior cases turned on such effects. Where the interest at stake is First Amendment press freedom of a broadcaster, I had thought the appropriate test was whether the regulation or restriction is narrowly tailored to serve a substantial governmental interest. I am reluctant to graft on additional requirements to the basic test. As you observe, the somewhat lower level of scrutiny being applied to regulations in the field of broadcasting has been justified by the spectrum scarcity for licensing purposes.

I am quite concerned by the failure of the opinion to acknowledge one of the Government's more substantial interests in enacting §399, namely, its interest in ensuring that public broadcasting audiences will not be led to think that the broadcasters' editorials reflect the official views of the Government itself. See Reply Brief for the United States, 9-10. I think this is a sufficiently substantial governmental interest to support the statutory restriction. That means for me the analysis would then have to turn on whether the restriction is sufficiently narrowly tailored and whether there are adequate alternatives.

The dissent rests largely on the spending power argument. This is a very thorny thicket. It was not raised or addressed below and I prefer not to address it at all because of that fact. I am exceedingly chary of having to decide the issue now and of having to resolve the unconstitutional condition question.

It has occurred to me that one way to avoid reaching the difficult constitutional issues in this case is to construe §399 much like the statute at issue last term in Regan v. Taxation With Representation, 103 S.Ct. 1997 (1983), as permitting noncommercial, educational broadcasting stations to establish "affiliate" organizations which could then editorialize with non-federal funds. On this view, the station's right to editorialize is not infringed, because it is free to make known its views on matters of public importance through its non-federally funded, editorializing affiliate without losing federal grants for its non-editorializing broadcast activities. Compare id., at 2005 (Blackmun, J., concurring) (§501(c)(3) organization's right to speak is not infringed because it may lobby through its §501(c)(4) affiliate without losing tax benefits for its non-lobbying activities). In keeping with our policy of avoiding whenever possible declaring congressional action unconstitutional, a closer look at whether the statute could be so construed is certainly warranted.

Sincerely,



Justice Brennan

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 11, 1984

No. 82-912 FCC v. League of Women Voters

Dear Bill,

Thank you for your letter of June 11. If I correctly understand your proposals for modification, I think it will be possible for me to join your opinion. Specifically, the change on page 15 is very helpful. Similarly, the suggested change for pp. 21-30 is fine as far as I am concerned.

With respect to the third point, I can go along with addressing merely the TWR argument by the Government as you propose, although I would not be inclined to go further and consider a spending power argument generally or the unconstitutional condition theory.

Finally, your proposed addition of an explanation of how §399 might be revised to provide for a §501(c)(4) analog sounds reasonable to me.

I appreciate your responsiveness to my concerns.

Sincerely,



Justice Brennan

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 13, 1984

No. 82-912 FCC v. League of Women Voters

Dear Bill,

The changes you have made are fine as far as I am concerned, although I think the changes now require a couple of additional ones for consistency. Now that the draft recognizes as sufficiently substantial for First Amendment purposes the Government's interest in ensuring that the broadcasters' editorials do not reflect the official view of the government itself, the last paragraph of Part III on p. 33 needs some conforming changes. For example, it might be altered along the following lines:

"We therefore hold that even if some of the hazards at which §399 was aimed are sufficiently substantial, the restriction is not crafted with sufficient precision to remedy those dangers that may exist so as to justify the significant abridgement of speech worked by the provision's broad ban on editorializing. The statute is not narrowly tailored to address any of the government's suggested goals."

Similarly, the final paragraph on p. 37 could perhaps be changed to read in part:

"Rather, we hold only that the specific interests sought to be advanced by §399's ban on editorializing are either not sufficiently substantial or are not served in a sufficiently limited manner to outweigh the significant abridgement...."

Finally, I suggest that the word "authority" be substituted for the words "a statute" on p. 35, third line from the bottom of the text.

With these or other suitable conforming changes, I will be pleased to join your important and excellent opinion.

Sincerely,

Justice Brennan



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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 14, 1984

Re: No. 82-912 FCC v. League of Women Voters
of California et al.

Dear Bill,

Please join me.

Sincerely,



Justice Brennan

Copies to the Conference