FEDERAL SUPPORT OF PUBLIC BROADCASTING: NOT QUITE WHAT LBJ HAD IN MIND

By Chris Johnson

On November 7, 1967, President Lyndon B. Johnson signed the Public Broadcasting Act into law and established the Corporation for Public Broadcasting (“CPB”), a nonprofit corporation responsible for distributing the annual federal appropriation for public broadcasting. Senator Claiborne Pell touted the newly enacted legislation and the corporation it established as placing “the voice of the American people in a productive relationship to the great medium of television.” Congress declared in the Act itself that “it furthers the general welfare to encourage public telecommunications services which will be responsive to the interests of people both in particular localities and throughout the United States, which will constitute an expression of diversity and excellence.”

In signing the bill, President Johnson remarked that the Act’s purpose was to “enrich man’s spirit” and “give a wider and stronger voice to educational radio and television by providing new funds for broadcast facilities.” Furthermore, President Johnson announced his enthusiasm for CPB, describing it as an institution that would “assist stations and broadcasters who aim for the best in broadcasting: good music, exciting plays, reports on the whole fascinating range of human activity.” Johnson predicted that public broadcasting would “try to prove that what educates can also be exciting.” More importantly, Johnson also stated that the Corporation would get “part of its support from the government” but “be carefully guarded from government or party control,” “be free and independent,” and belong “to all the [American] people.”

However, recent developments demonstrate that public broadcasting has found itself succumbing to political party control, calling into question whether public broadcasting is completely free and independent and whether it belongs to all the American people. The public is left wondering whether public broadcasting is truly an expression of diversity. For example, in a hearing before the House Commerce Committee’s Subcommittee on Telecommunications in July 1999, Subcommittee Chairman William Tauzin (R-La.) revealed that a rather significant number of public broadcasting stations had rented donor lists to the Clinton-Gore election campaign, violating a federal tax law that prevents nonprofit groups from participating in political activities. CPB subsequently conducted a survey of the 75 largest public television stations and found that more than one-third had exchanged member or donor lists with political groups and roughly more than forty percent rented lists from political groups.

Public Broadcasting System (“PBS”) President Ervin Duggan resigned less than two months after

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2 47 U.S.C. § 396(k)(3)(A)(i)–(iv) (setting out the requirements for how the annual appropriation for the Corporation for Public Broadcasting is to be distributed).
3 113 Cong. Rec. 31587 (1967).
5 113 Cong. Rec. 31587.
6 Id.
7 Id.
8 Id.
9 Id.
the list-swapping scandal broke. Although other factors may have contributed to his resignation, Duggan likely was embarrassed after he explained to Congress that thirty public stations had shared their membership lists with political groups.\textsuperscript{13} Conservative critics of public broadcasting condemned the list-swapping practices as further evidence of public broadcasting’s liberal bias.\textsuperscript{14} Further concern over the matter in Congress prompted the proposal of a bill known as the Public Broadcasting Donor Privacy Act of 1999,\textsuperscript{15} designed to prevent public broadcasting stations from sharing their donor lists with any other organization. The bill proposes to deny funding or assistance from CPB to any public broadcast station that “may make available any list, in whole or in part, of the financial contributors to such station to any person or other entity.”\textsuperscript{16}

CPB President Bob Coonrod reacted to Congress’s concerns by introducing a resolution addressing the issue, which the CPB Board of Directors passed unanimously.\textsuperscript{17} The resolution required all stations receiving a CPB grant to maintain active control and complete records of all uses of their membership and donor lists; offer all donors a means to have their names suppressed from their lists; not sell or release donor names to any candidate for public office, political parties or organizations supporting a candidate, and certify compliance in regards to their tax-exempt status, political activity and lobbying.\textsuperscript{18} In addition, Coonrod sent an open memo to all public radio and television station managers urging them to ensure that their stations do not trade member and donor lists with political parties in the interests of respecting the privacy concerns of members and donors.\textsuperscript{19}

It is clear that the public broadcasting of today is not quite what President Johnson had in mind when he signed the Public Broadcasting Act into law over thirty years ago. This comment proposes that public broadcasting is currently subject to government and party control. First, this comment will discuss the history behind the passage of the Public Broadcasting Act of 1967 (“1967 Act”) and the creation of the Corporation for Public Broadcasting (“CPB”). Next, through the description and evaluation of past and recent events in Parts II and III, this comment will show that federal support for public radio and television has not had the effect that President Johnson or the 90th Congress intended and will demonstrate that federal support for public broadcasting has in fact produced undesirable side effects contrary to the policies underlying the 1967 Act. Additionally, Parts II and III will assert that public broadcasting is currently a product of government control and is subject to numerous political interests.

Part IV will argue that continued federal support for public broadcasting is constitutionally unsound under the First Amendment and the conflicting Supreme Court decisions thereunder. Part V will discuss the executive branch’s controls and censorship pressures, linked to the annual appropriation, exerted on public broadcasting. Part VI will examine the American public’s reaction to and support for public broadcasting. Part VII will propose alternative methods for phasing out the annual federal appropriation and determine whether these methods present recurring legal and constitutional issues or instead better achieve a goal of adequately financed, noncommercial broadcasting benefiting all the American people.

Furthermore, this comment will argue that public broadcasting has lost sight of the mission the Johnson Administration originally intended for it. As a result, public broadcasting no longer conforms to constitutional standards of accountabil-

\textsuperscript{13} See Lisa de Moraes, PBS Executive Erwin Duggan Finds an Open Door Out, Wash. Post, Sept. 10, 1999, at Cl. The Public Broadcasting System (“PBS”) is a private, nonprofit organization that distributes television programming to the member stations. It receives no direct government appropriations, although it does receive substantial grants every year from CPB. See Corporation For Public Broadcasting, 1998 Annual Report 7, 28, 43, 46, 55, 58 (1999) [hereinafter CPB Annual Report].

\textsuperscript{14} See Moraes, supra note 13, at Cl.

\textsuperscript{15} Public Broadcasting Donor Privacy Act, H.R. 2791, 106th Cong. (1999). This bill is currently being debated in House subcommittee. Up-to-date status of the bill can be found on the Library of Congress’s Thomas website, <thomas.loc.gov>.


\textsuperscript{18} See CPB Press Release, supra note 17.

\textsuperscript{19} See Memorandum from Bob Coonrod, President & CEO, Corporation for Public Broadcasting, to Public Radio and Television Station General Managers (July 28, 1999).
ity, it is not in alignment with First Amendment rights and it has not generated a favorable response from the American public. This comment will conclude that, given these circumstances, there is little justification for direct annual federal subsidies for public broadcasting. Federal support of public broadcasting has produced results that reflect neither the intent of the 90th Congress, which drafted the bill, nor the Johnson Administration, which signed it into law.\textsuperscript{20}

I. HISTORY BEHIND THE ACT AND FORMATION OF THE CORPORATION

1951 marked the advent of noncommercial television, when the Federal Communications Commission (“FCC”) set aside 80 VHF and 162 UHF channels for educational purposes.\textsuperscript{21} The idea gained momentum in 1961, when FCC Chairman Newton Minnow—who regarded commercial television as a “vast wasteland”—pledged his support for educational television.\textsuperscript{22} In the year that followed, the Kennedy Administration passed the Educational Television Facilities Act,\textsuperscript{23} which provided federal funding for new television stations. That same year brought passage of the All-Channel Receiver Act,\textsuperscript{24} which required all newly built television sets to carry the UHF channels where most educational programming appeared.\textsuperscript{25}

Under the Johnson Administration, Congress created a task force on educational television, known as the Carnegie Commission on Public Television (“the Commission”).\textsuperscript{26} The Commission recommended a better-financed and directed educational television system than in existence in the United States at the time.\textsuperscript{27} In addition, the Commission recommended replacing the term “educational television” with “public television.”\textsuperscript{28} Congress responded to the Commission’s study by enacting the Public Broadcasting Act of 1967.\textsuperscript{29}

By the middle of the decade, several metropolitan-area stations in New York, Pittsburgh, Boston and Chicago had begun construction of a public television network.\textsuperscript{30} However, the passage of the 1967 Act gave birth to the CPB.\textsuperscript{31} The CPB used its initial $5 million appropriation to arrange interconnection of the 150 educational stations in operation at the time and began nationwide broadcasts on January 5, 1969.\textsuperscript{32}

The 1967 Act required the CPB to make its budgetary requests directly to Congress, because it was not an agency or an establishment of the government.\textsuperscript{33} The CPB budget is now funded by an annual appropriation from the Subcommittee on Telecommunications, Trade and Consumer Protection of the House Committee on Commerce.\textsuperscript{34} Notably, CPB enjoys greater autonomy


\textsuperscript{21} In re Amendment of Section 3.606 of the Commission’s Rules and Regulations, Sixth Report and Order, 41 F.C.C. 148, 158–73, paras. 33–84 (1952) (referencing the FCC’s Sixth Report and Order on amendment of the Commission’s rules, regulations, and engineering standards concerning television broadcast service); see also 16 Fed. Reg. 3072, 3079–90 (1951).

\textsuperscript{22} DAVID HOROWITZ & LAURENCE JARVIK, PUBLIC BROADCASTING AND THE PUBLIC TRUST 3 (David Horowitz & Laurence Jarvik eds., Second Thoughts Books 1995).


\textsuperscript{24} All Channel Receiver Act of 1962, Pub. L. No. 87-529, 76 Stat. 150 (codified as amended at 47 U.S.C. § 303(s) (1994)).

\textsuperscript{25} See HOROWITZ & JARVIK, supra note 22, at 3.

\textsuperscript{26} See WALD & MILLER, supra note 22, at 3.

\textsuperscript{27} See HOROWITZ & JARVIK, supra note 22, at 7.

\textsuperscript{28} See id. The change in terminology arose for public relations reasons and to prevent the misinterpretation that public television would be limited solely to instructional programming. See Howard A. White, Fine Tuning the Federal Government’s Role in Public Broadcasting, 46 FED. COMM. LJ. 491, 498 (1994).

\textsuperscript{29} S. Res. 1160, 90th Cong., 113 CONG. REC. 26417–18 (1967) (enacted).

\textsuperscript{30} See Television Stations in the United States, 1 BROADCASTING & CABLE Y.B. (HARRY JESSELL & MARK K. MILLER eds., R.R. Bowker 1995) at C-52, C-65, C-36, C-24–25. WNET, WQED, WGBH and WTTW were the first noncommercial television stations with the aim of airing educational programming and pioneered the public broadcasting network. See id. WNET in New York first went on the air on January 2, 1948, WQED in Pittsburgh went on the air on April 1, 1954, WGBH-TV in Boston went on the air on May 2, 1955, and WTTW in Chicago went to air that same year on September 6. See id.

\textsuperscript{31} See 47 U.S.C. § 396(b) (authorizing the "establishment of a nonprofit corporation, to be known as the ‘Corporation for Public Broadcasting,’ which will not be an agency or establishment of the United States Government").

\textsuperscript{32} See LAURENCE JARVIK, PBS: BEHIND THE SCREEN 22 (1997).


than any federal agency—or even most government corporations—because the Johnson Administration established a trust fund for the CPB in the United States Treasury, which allows funds to be advanced to the CPB directly from the Treasury.35

Yet, as will be demonstrated, public broadcasting has hardly been immune to outside political influences and special interests, as was intended.36 Ironically, public broadcasting fails to meet the true goals of educating and bringing cultural programming to the American people because of the direct funding of the CPB. Rather, this scheme has engendered intense lobbying of Congress and severe political infighting.37

II. PUBLIC BROADCASTING IN THE POLITICAL ARENA

In creating CPB, Congress maintained that it was “in the public interest to encourage the growth and development of public radio and television broadcasting, including the use of such media for instructional, educational, and cultural purposes.”38 Because public broadcasting was to be “carefully guarded from government or party control,”39 CPB was endowed with a “nonprofit and nonpolitical nature.”40 Furthermore, CPB was prohibited from contributing to or supporting any political party or candidate for elective public office.41

Although technically prohibited from directly lobbying or supporting members of Congress, CPB attempted to do so in 1995 when it was under heavy scrutiny by the Speaker of the House Newt Gingrich.42 Gingrich pushed public broadcasting stations to trim expenses and criticized the stations for encouraging public television viewers to contact their representatives when their annual appropriation was under attack by Congress’s Republican majority.43 At that time, CPB President Richard Carlson issued a $250,000 consulting contract to former Republican representative and lobbyist Vin Weber; Mr. Weber was a close friend of Gingrich and a co-founder of Gingrich’s Conservative Opportunity Society.44 Carlson claimed that the contract was not for lobbying, but to provide “strategic advice” on how CPB should deal with the recent developments in Congress.45 The only strategic duty Weber performed under the contract, however, was dining with Gingrich;46 CPB’s board of directors subsequently rescinded the contract.47

Smarter under its mistake, CPB found more discrete ways to “buy off” its right-wing critics. For example, former Reagan and Bush speechwriter Peggy Noonan landed a $100,000 CPB contract to express her opinions on “the family, faith, and culture” in a three-part miniseries; another former Bush speechwriter Tony Snow collected a $75,000 CPB grant to produce a documentary called The New Militant Center and he received an additional $80,000 grant to moderate a two-hour special focusing on welfare reform.48 In addition, Snow made regular appearances as a commentator on National Public Radio; CPB publicists make it a point to remind journalists that Snow is “Rush Limbaugh’s favorite substitute host.”49 While these contracts may be distinguishable from the Weber contract because Snow and Noonan actually produced content for PBS, they just as easily can be seen as largesse dispensed by CPB to dedicated and influential conservatives.

Furthermore, while the award of grants and contracts has often been a product of politics, many significant public broadcasting appointments and decisions have also been purely polit-


36 See Behrens, supra note 12; de Mores, supra note 13; see also Engelman, supra note 26, at 165–72 (1996).

37 The following books do an excellent job of capturing the rather interesting and sometimes frightening political history behind public broadcasting: Engelman, supra note 26; Laurence Jarvik, supra note 32; James Ledbetter, Made Possible By... The Death Of Public Broadcasting In The United States (1997); Michael Tracey, The Decline Of Public Service Broadcasting (1998).


39 113 CONG. REC. 31587 (1967).


41 See id. at § 396(f)(3).

42 See Ledbetter, supra note 37, at 199.

43 See id.


45 See Ledbetter, supra note 37, at 190.


47 See id.

48 See Ledbetter, supra note 37, at 200.

49 Id.
tical in nature.\textsuperscript{50} Even President Johnson secured for a devoted political aide a position on the Carnegie Commission, which performed the very study that recommended the establishment of a formal public television network.\textsuperscript{51} Further examples abound: Nixon nominee Thomas Curtis planned much of Nixon’s U.S. Senate campaign while on the CPB Board; Gerald Ford nominated an active Republican party fundraiser to the CPB Board, who relayed confidential public opinion results to Ford about the 1976 presidential campaign; Jimmy Carter nominated candidates that his own advisors regarded as sub-par as political favors to some of the more powerful senators of the time; Ronald Reagan appointed Sonia Landau, national chair of Women for Reagan-Bush, as well as Honey Alexander, wife of the former Republican Tennessee governor and presidential candidate, Lamar Alexander.\textsuperscript{52}

President Johnson may have envisioned an organization free of political party influences, but from the start both major political parties have transformed it into a platform for their interests. By making satisfaction of political interests a primary objective, the organization’s laudable aims of better educating the American people, making the media more accessible and using broadcasting media to enhance American culture have been compromised. The independence from government and political party control needed to promote these aims has not occurred.

Also entering the political arena are groups that depend on CPB funding, under the auspices of fighting for children’s education. One notable example is the Children’s Television Workshop (“CTW”), producer of Sesame Street and numerous other public broadcasting programs.\textsuperscript{53} Joan Cooney, producer of Sesame Street, claimed that while no television program could completely bridge the gap in education between children of different income levels, she hoped that Sesame Street and other programs created by CTW could “move all children across the basic literary line, which is key to education and later entering the mainstream of American life.”\textsuperscript{54} Although this is a praiseworthy goal, CTW has employed some dubious tactics.

CTW has worked hard to protect its objective of educating children, possibly to the point of risking its tax-exempt status as a nonprofit corporation.\textsuperscript{55} Because CTW believed the government was in control of public television, it spent a large sum to protect its interests in Congress.\textsuperscript{56} For example, CTW in 1989 reported spending approximately $4 million annually on lobbying.\textsuperscript{57} It was not apparent that CTW had so heavily lobbied Congress until 1992, when Senator Robert Dole placed CTW’s tax filings under heavy scrutiny.\textsuperscript{58} To avoid facing such scrutiny in the future, CTW hid most of its lobbying expenditures by splitting them into different categories; it is unknown what sum is spent on the activity today.\textsuperscript{59}

Had it engaged in these actions today, CTW—a nonprofit organization exempt from federal taxation—would be in violation of the Internal Revenue Code, which restricts corporations organized and operated for educational purposes from influencing legislation.\textsuperscript{60} CPB, which identifies itself as a District of Columbia nonprofit corporation, seems to fall squarely under this restriction.\textsuperscript{61}

More recent events also threaten the tax-exempt status of public broadcasting and could lead to possible violations of the 1967 Act. America’s Public Television Stations (“APTS”),\textsuperscript{62} CPB, Na-
national Public Radio ("NPR") and the Public Broadcasting System ("PBS") have discussed the possible formation of a "Grand Alliance" of public broadcasters, in which they would join forces by sharing program development, backroom operations and lobbying functions under a combined budget of $650 million. Joining forces with other organizations that are not necessarily prohibited from lobbying, supporting political candidates or influencing legislation could be a dangerous move for CPB; this involvement could also violate the terms of its establishment under the 1967 Act.

III. CONFLICTING VIEWS BETWEEN THE LEGISLATIVE AND EXECUTIVE BRANCHES ON CPB'S STATUS AS A GOVERNMENT CORPORATION

Since its formation in 1967, CPB's status as a government entity remains an unresolved issue, much like the regulations to which CPB is subject. While the Government Accounting Office ("GAO") considers CPB a government-sponsored corporation, the management and board of CPB report it as a private "District of Columbia not-for-profit corporation authorized to receive federal appropriations under Title II of the Public Broadcasting Act of 1967." According to the present annual budget of CPB, approximately 90 percent of its "support and revenues" derives from federal appropriations.

The GAO defines government-sponsored corporations as "generally federal chartered entities created to serve a public function of a predominantly business nature." CPB was chartered by an act of Congress, and its work is of a predominantly business nature. In drafting the Government Corporation Control Act ("GCCA"), Congress defined "Gov-

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as a lobbying and trade organization for public television stations around the country; it can do so because it is not engaged in any educational or programming functions. See The Association of America's Public Television Stations (visited Nov. 28, 1999) <www.apiot.org>.


64 The Public Broadcasting System, designed to provide interconnection services for member stations, serves as a "quasi-network" for public television programming. See Engel, supra note 26, at 169, 170. PBS is responsible for approving and distributing programs that appear on public television. See id. Although CPB distributes a rather substantial grant to the organization each year, unlike PBS, CPB receives no direct appropriations from the federal government. See id. Much of its funding comes from the interconnection and membership fees of the public television stations as well as some private support. See id.


67 The General Accounting Office ("GAO") completed a report in 1995 profiling 27 government corporations. See U.S. General Accounting Office, Government Corporations:Profiles of Existing Government Corporations (1995) [hereinafter 1995 GAO Report]. The report mainly looked at the reported identities (legal authority & status, objectives, budget sizes, etc.) of the various government corporations and their adherence to 15 selected federal statutes applying to the various agencies and departments of the federal government. See id. The report was compiled by surveying 58 possible government corporations, including the Corporation for Public Broadcasting. See id. Even though CPB claimed that it was not a government corporation, it was included in the profile because it has been identified in several major government corporation studies over the past 15 years and receives most of its operating expenditures from yearly federal appropriations. Because CPB claimed it was not a government corporation, the management of CPB ignored the part of the survey dealing with adherence to federal statutes. See id. at app. VI. Yet Table VI.1.1. of the report indicates that the federal government was CPB's sole source of funding from 1990 to 1994. See id. It is not entirely clear how one determines the difference between a "government corporation," subject to the provisions of the Government Corporation Control Act, 31 U.S.C. § 9101 et seq., and a "private corporation authorized to receive federal appropriations." See id.

68 See CPB Annual Report, supra note 13, at 40.

69 See id. at 38. CPB received $250 million as its general federal appropriation in 1998. See id. It received another $7.5 million to fund a satellite replacement project, passed on directly to PBS and NPR. See id. at 43. Together, these amounted to over 90 percent of CPB's annual budget, the remainder coming from interest income on its bond portfolio, grants and contracts, royalties, refunds from portions of unused grants and contracts and an annual payment coming from a specially restricted grant. See id. at 38.


72 Its function is to "facilitate the full development of public telecommunications [through] programs of high quality." See 1995 GAO Report, supra note 67, at app. VI.

73 According to its annual report, CPB's main activities include the funding of national television and radio programming, funding individual television and radio stations to produce new and original programming, providing grants to assist television and radio stations in becoming more self-sufficient and less dependent on tax dollars and providing special grants to support educational activities and produce educational materials. See CPB Annual Report, supra note 13, at 43-44. See also 47 U.S.C. § 396(g) (explaining the purposes and activities of CPB).

government Corporation" as "a mixed-ownership Government corporation and a wholly owned Government corporation." The GCCA proceeds to define "mixed-ownership Government corporation" and "wholly owned Government corporation," but CPB does not appear on either list, which reinforces CPB’s own self-reporting as a private nonprofit corporation.

Apparently, Congress and the executive branch (of which the GAO is a part) do not exactly concur on CPB’s status as a federally-funded entity. However, there are few other federally funded entities that exist under an arrangement similar to CPB’s. No other federally funded entity fails to acknowledge at least some necessity for adherence to the federal statutes that apply to various departments, agencies and corporations of the federal government. Although its funding is mostly controlled by Congress and its Board of Directors is appointed by the President, CPB somehow manages to avoid adhering to federal laws that apply to other entities like it, perhaps because its status as an entity remains unresolved. CPB’s ambiguous status makes First Amendment questions regarding its program funding difficult to answer.

IV. FIRST AMENDMENT CONCERNS AND CONFLICTING SUPREME COURT DECISIONS

Although Congress desired to establish a program funding agency that would be free from governmental influence or control in its operations, lawmakers feared that complete autonomy might lead to biases and abuses of its own as an organization and did not want it completely separate from the government. This has created an apparent conflict between federal decisions concerning First Amendment rights and those involving CPB.

In creating CPB, Congress recognized that "the encouragement and support of public telecommunications, while matters of importance for private and local development, are also of appropriate and important concern to the Federal Government." However, when the federal government involves itself in mass communication, First Amendment concerns are implicated. If CPB denies a grant to a television station, radio station or prospective program producer, is this a governmental prior restraint of free speech?

Past court decisions and current laws have conflicted on this issue. Accuracy in Media, Inc. v. FCC involved a complaint over two PBS programs, one dealing with sex education and the other with criminal justice. The court determined that Congress reserved oversight responsibility for CPB by controlling its purse strings and by implementing statutory safeguards to deter "partisan abuses." The court deemed section 396(g) (1) (A) of the 1967 Act "a guide to Congressional oversight policy," because it authorized CPB "to facilitate the full development of educational broadcasting . . . with strict adherence to objectivity and balance." The First Amendment

75 Id. at § 9101(1).
76 See id. at §§ 9101(2) & 9101(3).
78 See 1995 GAO REPORT, supra note 67, at app. VI (containing the supplementary report "Profiles of Other Federally Funded Entities"). The other entities profiled are the Inter-American Foundation ("IAF"), Legal Services Corporation ("LSC"), Neighborhood Reinvestment Corporation ("NRC") and the U.S. Postal Service ("USPS"). See id. Of these entities, CPB was the only one that claimed it was a completely private corporation with no real federal affiliation, and it would not answer the part of the GAO’s survey on adherence to federal statutes. See id. IAF reported itself as an “executive agency with a corporate form” LSC reported as a "private, nonprofit, non-membership corporation," NRC reported as a "non-profit, public corporation" and USPS reported as an "independent establishment of the executive branch of U.S. government." See id. These other four entities reported their degree of adherence to the selected 15 federal statutes in the survey. See id.
79 The 1995 GAO Report surveyed federal entity adher-
83 See U.S. CONST. amend. I (stating “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances”).
85 521 F.2d 288, 294 (D.C. Cir. 1975).
86 See Accuracy in Media, Inc. v. F.C.C., 521 F.2d at 294.
87 Id. at 290.
provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press[.]” Yet somehow CPB is able to oversee a form of speech and mandate that it strictly adhere to “objectivity” and “balance.”

In Lebron v. National Railroad Passenger Corporation, the Supreme Court held that a government corporation created by special law is, for purposes of First Amendment analysis, part of the federal government to the extent it is created to advance governmental goals and the government retains permanent authority to appoint a majority of directors. This decision may be applicable to CPB’s functioning as a government organization and may resolve the First Amendment issue. The holding of this case suggests that CPB is part of the federal government to determine where it can exercise its First Amendment rights, because a special law created CPB to advance governmental goals, and the federal government appoints all of its directors. This holding may work for other government and government-sponsored corporations, but it may not be in the interests of an organization that was intended to fund educational broadcasting for the American public—Congress and President Johnson wanted to establish an organization that would not be restrained by government or party control.

Together, the Lebron and Accuracy in Media decisions suggest that the government may regulate the programming funded by CPB to the point where the programs are strictly objective, even though CPB was originally intended to be free of government control. However, the standard for what is “objective” and “balanced” appears to be an arbitrary one, and may present problems for public broadcasting.

In FCC v. League of Women Voters of California, the Court struck down as a blatant violation of the right to free speech a section of the Communications Act of 1934 forbidding any CPB-funded noncommercial educational broadcast (“NCE”) station from “editorializing” about political candidates. Although the court acknowledged that Congress possessed Commerce Clause power to “regulate the use of broadcast communication,” and “assure that the public receives through this medium a balanced presentation of information and views on issues of public importance . . .” it found that the prohibition against editorializing was a risk to the freedom of public broadcasting. Therefore, claiming that an issue is of “public importance” and “assuring a balanced presentation of information,” Congress could enact unconstitutional regulation of public broadcasting. What can be considered of public importance and what is a balanced presentation are both subjective and not for Congress to determine. But as long as stations and programs are receiving CPB grants funded by federal appropriations, Congress will be able to use this outlet to do so. The courts remain in conflict on the issue of whether the federal government is really in control of CPB or if it is “free from government control” as President Johnson and the 90th Congress envisioned.
V. POLITICAL PARTY AND GOVERNMENT CONTROL OF PUBLIC BROADCASTING BY THE EXECUTIVE BRANCH

Although CPB may identify itself as a private corporation with the right to grant or deny funds to public broadcasters as it sees fit, it is the President who, with the advice and consent of the Senate, appoints the members of the CPB’s board of directors. Could the President indirectly influence what is shown on public television and public radio by appointing board members who are sympathetic to his political party’s agenda and interests?

In the past, this is exactly what happened. In 1971, the Nixon administration began an assault on public broadcasting, believing it to have an “entirely liberal agenda hostile to his administration.” The White House wanted to end public television’s capacity to function as a strong national network by moving for a “return to localism.” It also expressed concern over the “potential impact of public affairs programming,” which amounted to more than one-third of the PBS schedule at the time.

In response to Nixon’s attack, the CPB board voted against funding news, news analysis and political commentary, and even proposed a ban on controversial programming altogether. Shortly after CPB’s attempt to appease his Administration, Nixon vetoed a two-year authorization bill, causing the CPB president and chairman, both democratic appointees of Johnson, and several other board members to resign in 1972. Nixon appointed or re-appointed eleven of the fifteen CPB board members, including former Republican Congressman Thomas Curtis and Henry Loomis, former director of the Voice of America under Nixon. The new board voted to discontinue funding for nearly all public affairs programming and began exerting greater control over PBS, reducing it to a narrowly technical role of operating the interconnection of stations.

The Carter administration made a complete shift. A majority of the CPB board handpicked by Carter voted to stop making specific program recommendations and also established a semiautonomous Program Fund that protected the program selection process from outside influences (including the board members themselves).

Yet censorship pressure still emanated from the White House and Congress. For example, acting Secretary of State Warren Christopher intensely pressured PBS to cancel a program about the true story of the execution of a Saudi princess at a time when the Carter administration was trying to improve relations with Middle East oil exporters. Although the administration threatened no outright penalties against CPB, PBS or the individual stations, most major metropolitan stations did not air the program.

It seems that there has never been a time in public broadcasting’s history when the federal government has not exerted control in some form. As long as Congress controls the annual appropriation for CPB, the federal government will always have some influence over what is broadcast. Indeed, staffers in the House of Representatives Committee on Commerce have asserted that public broadcasting cannot be free of federal control while it continues to receive federal dollars. Whether it is oversight by congressional purse strings, or the executive branch’s appointment of the board of directors that impacts broadcast content, First Amendment issues will always arise when federal leaders demand accountability for tax dollars spent on public broadcasting.

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102 47 U.S.C. § 396(c).
103 ENGELMAN, supra note 26, at 168.
104 See id. at 169.
105 See id.
106 See id.
107 See id.
108 See ENGELMAN, supra note 26, at 169, 170. PBS, a nonprofit, non-governmental agency receiving no direct federal tax dollars, has the freedom to accept and reject programs for broadcast as it sees fit, just like a commercial network. See id. National Public Radio and Public Radio International (“PRI”) are similar organizations that are responsible for noncommercial radio programming. See id.
109 See id. at 170.
110 See id. at 173. President Ford was mostly indifferent to public broadcasting. See id.
111 See id.
112 See id. at 174.
113 See id. at 174.
115 Interview with Linda Bloss-Baum, Counsel to the House of Representatives Committee on Commerce, in Washington, DC. (Oct. 7, 1999).
116 See id.
gated project funding. Congress makes up about 1750 of public broadcasting's overall support and ninety percent of CPB's annual budget. CPB will continue to answer to the federal regulators, despite a number of laws recently passed to reduce federal control.

However, this scheme runs counter to the First Amendment. It is not what President Johnson had in mind when he approved the first funding for public broadcasting, because he intended public broadcasting to be carefully insulated from government control. Furthermore, congressional intent that CPB be a private and nonpolitical organization separate from the federal government has not been satisfied; it will never be as long as Congress retains control over the purse strings for CPB funding and responsibility for oversight of the organization.

VI. PUBLIC BROADCASTING BELONGS TO "ALL THE AMERICAN PEOPLE?"

President Johnson wanted public broadcasting to belong to "all the American people" and satisfy our "appetite for excellence." While public broadcasting continually prides itself on being a noble display of American culture in the vast wasteland of commercial television, few people in this country seem to notice it. Public broadcasters might like to claim that they reach 120 million Americans (and sometimes as many as 200 million), but this figure includes anyone who has viewed or listened for only 15 or 20 minutes per week. In reality, audiences of public television have been rather small. During the early 1980s, the average prime time rating for public television ranged from a market share of 2.6 to 2.8 percent.

In all households that have access to television—including those without any cable service at all (whose only choices are commercial networks or noncommercial television)—public broadcasting's market share currently hovers at around three percent, while there has been a near tripling of basic cable network market share in the past decade. Among households that subscribe to expanded cable service (additional channels beyond basic service), public television market share now stands at just two percent of audiences, while the market share of cable networks in this category has more than doubled over the past decade. It is estimated that nearly ninety-eight percent of all American households own a television, and over sixty percent subscribe to cable service, yet public television has captured market shares of just three percent and two percent of these groups, respectively.

Worse yet, public broadcasters admit that they can only count ten percent of their regular audience as contributing members, suggesting little support from the people claiming to support it most and even less from the American public as a whole. In addition, while there are more than 300 public television stations in this country, most of the programming is produced by production companies in four major metropolitan markets by a small number of production companies and major public broadcast stations. The small market share and narrow production base suggests that public broadcasting is not reflective of America's diverse culture or an appetite for excellence in broadcasting.

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117 See Public Broadcasting Total Revenues 1982–1997 (last modified Apr. 3, 1999) <www.current.org/moincn.html> [hereinafter Public Broadcasting Policy Base charts]. Funding from CPB grants and distributions accounts for about 16.7 percent of public broadcasting support, while the rest comes from state and local governments, university funding, foundation grants and private donations from on-air membership drives. See id. The annual appropriation from Congress makes up about 90 percent of CPB's annual budget; the rest comes from royalties, interest income, grants and deobligated project funding. See CPB Annual Report, supra note 13, at 38.

118 See 113 Cong. Rec. 31587 (1967).

119 See Accuracy in Media, Inc. v. FCC, 521 F.2d 288, 294 (D.C. Cir. 1975).

120 113 Cong. Rec. 31587 (1967).

121 This is a weekly cumulative, counted by the number of sets in homes reached by public television. See Tracey, supra note 37, at 251 (1998).

122 See id.

123 See NCTA Survey.

124 See Tracey, supra note 37, at 251.

125 See Note 37, at 22–28. The majority of public broadcasting programming has been produced in Boston, New York City, Washington and Los Angeles, with much of that programming coming from just four stations: WGBH (Boston), WNET (New York City), WETA (Washington) and KCET (Los Angeles).
public broadcasting is concentrated in just a few areas of the country, state and local tax-based sources and local private donations represent larger shares of funding for public broadcasting.\textsuperscript{128} Despite the larger base of support from state governments, local municipalities and private sources than from the federal government, these entities have little influence over what public broadcasting produces today and how it is administered.

VII. LOOKING TO THE FUTURE: HOW TO MAKE UP THE SHORTFALL

Federal funding accounts for only about seventeen percent of support for the entire public broadcasting system; even if federal support were cut off entirely, public broadcasting would not leave the airwaves.\textsuperscript{129} It is likely that many rural stations and minority program producers, who depend heavily on federal support, would suffer the most.\textsuperscript{130} Therefore, it is important to examine alternative methods. If federal funding could be concentrated exclusively on rural stations and minority programming, it would be much lower.\textsuperscript{131} However, Congress is due to increase the funding of CPB for the coming years.\textsuperscript{132}

Because funding for CPB is increasing, one strong possibility for replacing the annual congressional appropriation is creating a public trust or endowment, the interest of which could be used for public broadcasting. Funds for the endowment could come from a phase-out of the appropriation over time. Although it would take time to build up a sizeable endowment, it could be done, with no new tax dollars for public broadcasting. Congress attempted this type of scheme with the Public Broadcasting Self-Sufficiency Act of 1996, introduced during the 104th Congress by Representative Jack Fields (R-Tex.).\textsuperscript{133} The bill was rejected in committee, mainly due to concerns that the trust fund it would have established would not generate enough interest income to replace the $250 million federal appropriation CPB was to receive at that time.\textsuperscript{134} The bill recognized that public broadcasting existed to (1) "promote...
the delivery of local public telecommunications services which advance education, support culture and foster citizenship for all Americans[;]" (2) "support public broadcasting services for rural and underserved areas and audiences" and (3) "preserve and protect the editorial integrity and independence of educational and cultural programming, as well as many other functions that serve the public interest."135

This method of funding may receive renewed interest in Congress in light of recent events concerning the trading of donor lists by member stations.136 As it stands, CPB has a large portion of its assets invested in U.S. treasury bills, federal agency discount notes and commercial paper; these could be used to build the trust fund.137

Another possibility to fund the appropriation is a tax on cable television bills. Users of residential and business telephone lines already pay a tax to support rural telephone service;138 the same could be done with public broadcasting. The estimated 67 million users of cable television139 could more than make up the $300 million congressional appropriation for 1999140 by paying an additional $6 per year on their cable bills (or just 50 cents per month). This could also leave enough left over to contribute to an annual trust fund, should Congress once again desire self-sufficient public broadcasting. This method places the burden of supporting public broadcasting on those who might actually use it and benefit from it, instead of placing the burden on all taxpayers.

The Supreme Court has ruled that a nondiscriminatory taxing measure which "operates to defray the cost of a federal program by recovering a fair approximation of cost share of each beneficiary, including states, is not offensive to the constitutional scheme."141 A federal court has also ruled that taxes for public services assessed directly against the users of the services, or "user fees," do not violate equal protection and due process guarantees of the United States Constitution.142 In addition, public broadcasting funding would become a form of non-discretionary spending, such as Social Security, Medicaid or rural telephone service. It would become more difficult for Congress or the executive branch to exercise the type of control that has been exercised in the past under the premise that funding could be discontinued.

Special tax incentives could be provided for donations to public broadcasting in light of the phase-out of federal support. As it stands, donations to public television and radio are tax deductible. Special tax incentives now exist for IRA contributions (which can be deducted above your normal standard or itemized deductions)143 and educational tuition expenses (which can be credited against a tax bill up to $1000).144 Similar tax incentives for donations to public broadcasting would make such support a more personal decision for the American citizen. And such a program would be effective, as evidenced by the fact that many Americans already choose to support or not support the sponsors of commercial programming through their purchasing decisions. If public broadcasting truly belongs to all the American people as Johnson intended it to, then the fate of it should be placed more directly in their hands.

federal appropriation. See id. They proposed a $4 billion trust fund, but sponsors of the bill regarded that amount as far more than Congress should appropriate for the bill's purposes. See id. 135 See Public Broadcasting Self-Sufficiency Act of 1996, § 121(b). Besides preserving many of the functions served by the Corporation for Public Broadcasting, the bill sought greater independence for CPB as a District of Columbia Nonprofit Corporation, organized under section 29-1001 of the D.C. Code, and to "have the usual powers conferred on a nonprofit corporation by such Act." Id. 136 See Farhi, supra note 10, at C1; see also Will, supra note 10, at C7. 137 See CPB ANNUAL REPORT, supra note 13, at 37. CPB received nearly $12 million in interest income from a portfolio of well over $137 million in cash and cash equivalent holdings in 1998. This is an average interest rate of almost nine percent, an excellent return for a low-risk portfolio. If this return could be received on a trust fund of $3 billion, the income would amount to nearly $270 million, more than the 1998 Congressional appropriation. See id. at 38. 138 See In re Federal-State Joint Board on Universal Service, Report and Order, 12 FCC Rcd. 8776 (1997). 139 See NCTA Survey, supra note 123. 140 See Corporation for Public Broadcasting Authorization Act of 1999, H.R. 2384, 106th Cong. (1999). 141 Massachusetts v. United States, 435 U.S. 444 (1978) (concerning the assessment of user-based fees on state aircraft that used a federal airport). 142 See Hotel Employers Ass'n of San Francisco v. Gorsuch, 669 F.2d 1305 (9th Cir. 1982) (hotel employees association brought suit against the Environmental Protection Agency for its approval of a system of sewer service charges adopted by a city and county in California). 143 26 U.S.C. § 219 (1994). 144 26 U.S.C. § 25A (1994).
VIII. CONCLUSION

Public broadcasting is neither independent nor free of party or political control, given the history of control exercised by both Congress and executive branches and demonstrated by recent events regarding list-swapping with political parties. It does not belong to all the American people, given its small market share and past control by federal officials and broadcasters in major markets. As long as there is federal support for public broadcasting, First Amendment implications will always be a concern because the federal government will attempt to assert any control, using the funding as justification. Thus, the federal government cannot support public broadcasting through annual appropriations in a way that is constitutionally sound, and will not achieve the goals that President Johnson intended for it. The federal government should exit the broadcasting business and discontinue direct funding of public broadcasting. Federal funding could be replaced through a trust fund, user taxes on cable bills or more private donations facilitated by the appropriate tax incentives. This would allow the government to grant public broadcasting the independence from political and party control that Johnson and the 90th Congress envisioned.