

FREE SPEECH AND THE MASS MEDIA IN RUSSIA:  
LESSONS FROM THE DECEMBER 1993  
ELECTION AND  
CONSTITUTIONAL REFERENDUM

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INTRODUCTION

On December 12, 1993, Russian voters approved a new constitution, the first Russian constitution to be adopted since the collapse of communism in August 1991. This constitution proclaims a commitment to freedom of thought and speech<sup>1</sup> and forbids censorship,<sup>2</sup> thus elevating principles already embodied in Russian law<sup>3</sup> to the constitutional level. It also provides that citizens may not be compelled to express opinions<sup>4</sup> and guarantees the right to seek out, obtain, and transmit information (not including state secrets).<sup>5</sup> At the same time, the Russian constitution prohibits "propaganda or campaigning that instigates social, racial, national or religious hatred and enmity," as well as "propaganda of social, racial, national, religious or linguistic superiority."<sup>6</sup> It allows for the adoption of federal constitutional laws restricting speech in a state of emergency<sup>7</sup> or when otherwise "necessary to protect the foundations of the constitutional system, morals, health and rights and legitimate interests of other persons, and to ensure the defense of the country and the security of the state."<sup>8</sup> Thus, the Russian constitution envisions drawing a balance between free speech and other competing values. This balancing process will be heavily

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<sup>1</sup> KONST. RF art. 29, § 1 (1993).

<sup>2</sup> *Id.* § 5.

<sup>3</sup> Zakon Rossiiskoi Federatsii o sredstvakh massovoi informatsii [hereinafter Russian Law on the Mass Media] art. 1, 3, reprinted in ROSSIISKAYA GAZETA [ROS. GAZ.], Feb. 8, 1992, at 3.

<sup>4</sup> KONST. RF art. 29, § 3.

<sup>5</sup> *Id.* § 4.

<sup>6</sup> *Id.* § 2.

<sup>7</sup> *Id.* art. 56, § 1 (providing that "[u]nder conditions of a state of emergency, specific restrictions on rights and liberties may be established, in accordance with federal constitutional law, in order to ensure the safety of citizens and the protection of the constitutional system . . .").

<sup>8</sup> *Id.* art. 55, § 3.

influenced by the particular vision of democracy held by those entrusted with interpreting the constitution.

The decisions and recommendations issued by the Information Arbitration Tribunal ("IAT") provide a valuable opportunity to learn about the Russian conception of the role of free speech in a democracy. The IAT was a quasi-judicial body formed specifically to address issues relating to the media and speech which arose during the period leading up to the December 12, 1993 election. This election was called after the dissolution of the Russian parliament earlier that fall in order to select a new parliament and to ratify the draft constitution.

At the time the IAT was created, Boris Yeltsin faced a tense political situation. Many were critical of Yeltsin's handling of the crisis that followed his dissolution of the parliament in September, which in early October culminated in a bloody confrontation between the army and a group of deputies who refused to disband. In particular, critics pointed to the temporary imposition of censorship and the shutting down of several newspapers at the time of the crisis as an indication that Yeltsin had strayed from the democratic path.<sup>9</sup> Many also believed that Yeltsin's success in a referendum held the previous April, reaffirming popular support for his presidency, was attributable to the strong pro-Yeltsin bias in the me-

<sup>9</sup> Censorship was introduced during a brief state of emergency, between October 4 and 18, under the Law on the State of Emergency. *Press Briefing by RF First Deputy Press and Information Minister Dmitri Tsubriia* (Official Kremlin Int'l News Broadcast, Nov. 10, 1993) [hereinafter *Tsubriia Briefing*]. Yeltsin's government also closed down a number of newspapers in the aftermath of the October events, announcing that it would file criminal charges against them for "direct calls for bloodshed which contributed to destabilization and rebellion." Jamey Gambrell, *Moscow: Storm Over the Press*, N.Y. REV. BOOKS, Dec. 16, 1993, at 69, 71. Among the newspapers which were closed down were *Den'*, *Russkii Porjadok* (*Russian Order*), and *Russkoe Slovo* (*Russian Word*). According to Vladimir Shumeiko, who was appointed as Minister of the Press soon after the October events, "[a]ll these newspapers [had] a fascist orientation and their suspension [was] perfectly in line with . . . the [Russian Law on the Mass Media]." *The Newspaper May Continue Investigation, If It Is Interested In It* (Interview with Russian Vice-Prime Minister Vladimir Shumeiko) (Official Kremlin Int'l News Broadcast, Nov. 3, 1993). In addition, *Pravda*, *Sovetskaiia Rossiia*, and *Narodnaia Pravda* were temporarily closed because, according to Shumeiko, the chief editors of these newspapers had called for the overthrow of legitimate bodies of state power. Thus, these newspapers were allowed to reopen when they agreed to install new chief editors. *Id.*

The effects of the October events were felt in television as well. Aleksandr Nevzorov's anti-Yeltsin (and many would argue, fascist) show "600 Seconds" was pulled off the air, Sonni Efron, *Pravda's Presses Run Again After Yeltsin Crackdown; Russia: The Opposition Newspaper, Shut Down for a Month, Takes on the President in First Issue*, L.A. TIMES, Nov. 3, 1993, at A9, and the popular television anchors Aleksandr Lubimov and Aleksandr Politkovskiy were fired from the Ostankino television company after telling people to go home and go to bed rather than heeding the call of Yegor Gaidar to rally around the Moscow City Soviet building in support of Yeltsin during the October confrontation with parliament. Julia Wishnevsky, *The Role of the Media in the Parliamentary Election Campaign*, RADIO FREE EUR./RADIO LIBERTY RES. REP., Nov. 19, 1993, at 11.

dia.<sup>10</sup> Thus, it was important for Yeltsin to ensure the legitimacy of the December election by guaranteeing that the media treated candidates fairly.

In the Statute on the Election of Deputies to the State Duma, which set forth the general parameters for the election of deputies to the lower house of the new Russian Parliament, Yeltsin included several provisions guaranteeing candidates equal access to the media and forbidding unlawful government interference with media coverage of the election campaign.<sup>11</sup> These provisions were expanded in the Statute on Information Guarantees for the Election Campaign, adopted October 29, 1993.<sup>12</sup> According to its preamble, this statute was to protect

[f]ree, democratic elections and the citizens' exercise in full measure of their right to vote, [which] demand[ed] that all candidates and parties be assured of the opportunity freely to set forth their viewpoints through the use of the mass media and also of the prevention of unlawful interference in the activity of the editorial offices of the media during the period of the election campaign.<sup>13</sup>

This statute provided detailed guidelines governing the behavior of the candidates and the mass media during the election campaign and created the nine-member Information Arbitration Tribunal to ensure adherence to these guidelines.<sup>14</sup>

The Statute on Information Guarantees was developed by a long-standing advocate of the protection of free speech rights, Yuri Baturin, along with a group of law students who specialized in the legal rights of the mass media.<sup>15</sup> Baturin participated in the writing of both the Soviet Press Law of 1990 and the Russian Law on the Mass Media of 1991. Similarly, many of the individuals ap-

<sup>10</sup> According to one source, in the weeks leading up to the April 25 referendum, 80% of television programming was pro-Yeltsin, while only 20% represented the views of parliament. Wishnevsky, *supra* note 9, at 8-9.

<sup>11</sup> *Polozhenie o vyborakh deputatov gosudarstvennoi dумы v 1993 Godu* [Statute on the Election of Deputies to the State Duma in 1993], ch. 5, art. 26-30 (adopted by Presidential Decree Number 1557 (Oct. 1, 1993)), *reprinted in* ROS. GAZ., Oct. 8, 1993, at 3-5 [hereinafter *Statute on Elections*].

<sup>12</sup> *Polozhenie ob informatsionnykh iarantiakh predvybornoi agitatsii* [Statute on Information Guarantees During the Election Campaign] (adopted by Presidential Decree Number 1792 (Oct. 29, 1993)), *reprinted in* ROS. GAZ., Nov. 2, 1993, at 4 [hereinafter *Statute on Information Guarantees*].

<sup>13</sup> *Id.* pmb1.

<sup>14</sup> *Id.* art. 26.

<sup>15</sup> A. B. Vengerov (head of the IAT), *Pravovoi Avangardizm v Informatsionnom Prostranstve Demokraticheskoi Rossii* [Legal Vanguardism in the Information Sphere of Democratic Russia], in TREITSKII INFORMATSIONNYI SUD I PERYVE SVOBODNYE BYBORY [THE INFORMATION ARBITRATION TRIBUNAL AND THE FIRST FREE ELECTIONS] 33 (1994) [hereinafter *IAT READER*].

pointed by Yeltsin to the IAT were well-known advocates of free speech rights.<sup>16</sup>

Because the IAT did not have any binding authority, its power derived largely from the legitimacy of its decisions. Thus, the IAT sought to base its decisions on widely held Russian values concerning the role of the media in a democracy.<sup>17</sup> At the same time, the IAT was expected to play a more active role than a traditional court in monitoring the Russian media. Rather than waiting for disputes to be brought before it, the IAT had the power to consider a wide range of issues at its own discretion without receiving a complaint from any of the parties involved.<sup>18</sup> The IAT members were "to watch and listen day and night, day and night, to listen and to read."<sup>19</sup> The IAT also had the option of referring criminal violations to the public prosecutor's office.<sup>20</sup>

This paper will examine the conception of the role of free speech in a democracy that emerges from the IAT's decisions. I will compare the IAT's approach to that of Alexander Meiklejohn and a growing number of students of the First Amendment who question the market-oriented, laissez-faire approach that the United States Supreme Court has taken toward free speech during recent decades.<sup>21</sup> Following in the tradition of Meiklejohn, who

<sup>16</sup> The following members were appointed to the IAT in October 1993: Anatolii Vengerov, head of the Theory of State and Law Department at the Moscow Legal Academy; Aleksei Voinov, student at the School of Mass Media Law; Anatolii Ezhelev, Chairman of the Saint Petersburg Union of Journalists and member of the International Commission on Television and Radio Policy; Igor' Eremin, member of the Committee on Mass Media of the former Russian Supreme Soviet; Aleksandr Kopeika, member of the Committee on Mass Media of the former Russian Supreme Soviet; Viktor Monakhov, head of the regional State Inspectorate for the Defense of Free Press and Mass Media of the Russian Federation; Mariana Paniarskaia, student of the School of Mass Media Law; Aleksei Simonov, chairman of the board of the Fund for the Defense of Glasnost; Vladimir Sukhomlinov, first deputy chairman of the International Confederation of Journalist Unions. *Sostav treiteiskogo informatsionnogo suda [Make-Up of the Information Arbitration Tribunal]* (adopted by Presidential Decree Number 1792 (Oct. 29, 1993)), reprinted in IAT READER, *supra* note 15, at 19-20.

<sup>17</sup> M. V. Paniarskaia & A. E. Voinov (IAT members), *Rol' Reshenii i Rekomendatsii Treiteiskogo Informatsionnogo Suda v Izbiratel'noi Kampanii 1993 Goda [Role of the Decisions and Recommendations of the Information Arbitration Tribunal in the 1993 Election Campaign]*, in IAT READER, *supra* note 15, at 44.

<sup>18</sup> *Reglament Treiteiskogo Informatsionnogo Suda [Regulations of the Information Arbitration Tribunal]* art. 2 (confirmed at Nov. 3, 1993 session of IAT), reprinted in IAT READER, *supra* note 15, at 29 [hereinafter *Regulations of the IAT*].

<sup>19</sup> *Tsabria Briefing*, *supra* note 9.

<sup>20</sup> *Regulations of the IAT*, *supra* note 18, art. 24, at 28.

<sup>21</sup> See generally CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993); CASS R. SUNSTEIN, *Free Speech Now*, 59 U. CHI. L. REV. 255 (1992); OWEN M. FISS, *Why the State*, 100 HARV. L. REV. 781 (1987); OWEN M. FISS, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986); MARK A. GRABER, *TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM* (1991); STEPHEN HOLMES, *LIBERAL CONSTRAINTS ON PRIVATE POWER?: REFLECTIONS ON THE ORIGINS AND RATIONALE OF ACCESS REGULATION IN DEMOCRACY AND THE MASS MEDIA* (1990).

focused on the social value of free speech and its importance for achieving enlightened self-governance, these scholars argue that certain types of regulation which the Court considers antithetical to the First Amendment in fact are permitted, if not required, by the First Amendment. Further, these "new Meiklejohnians" point out that the legal framework which has evolved in the United States with respect to free speech is poorly equipped to address the issues of access to the mass media and the effects of disparities in economic resources among potential speakers.

The decisions of the IAT reflect certain fundamental values that are consistent with the democratic vision of Meiklejohn and his followers. In particular, the IAT focused on the social value of free speech rather than on free speech as an individual right. Thus, it emphasized the listener's right to hear rather than the speaker's right to express himself. To the extent that the IAT protected free speech, it sought to ensure a healthy deliberative process and wise decision-making in the election, primary goals of free speech in the Meiklejohnian model of democracy. Consistent with the Meiklejohnian approach, the IAT condemned the efforts of local Russian officials to suppress the speech of certain candidates and sought to provide all candidates with an opportunity to be heard in the mass media.

Even as the IAT appeared to be motivated by goals that were consistent with the Meiklejohnian vision of democracy, some of the means by which it sought to ensure a constructive deliberative process were seriously at odds with the Meiklejohnian approach to speech. One of the most striking examples of this was the IAT's efforts to eliminate journalistic bias, which led it to become heavily involved in scrutinizing the content of journalists' speech, censuring a great deal of speech that would be considered valuable in the Meiklejohnian model. These decisions raise a question as to whether free speech in a political campaign is supposed to protect journalists or candidates.

Further, in seeking to prevent the pre-election debate from degenerating into mudslinging between the candidates, the IAT advanced a notion of civility that arguably impeded discussion of important political issues. In some cases, the IAT made pronouncements that amounted to accusations of sedition. The IAT's involvement in making content-based determinations as to what speech is useful and what is not is troubling from a democratic perspective because of the potential for governmental abuse of such power.

After briefly discussing the Meiklejohnian approach to free speech, I will examine the IAT's decision-making in two areas.

First, I will address the provisions and decisions aimed at ensuring fair treatment of candidates and parties by the media, including positive access rights, government censorship, and media bias. Secondly, I will address the speech limitations that the IAT imposed on the candidates during their campaigning. Finally, I will discuss some of the theoretical and practical issues that the Russian model of free speech raises for those concerned with the role of free speech in a democracy.

## I. THE GOVERNMENTAL PROCESS MODEL

### A. *The Meiklejohnian Model*

The governmental process model derives its approach to speech from the fundamental principle that in a democracy, the citizens themselves, rather than an "alien" government, must make decisions concerning public policy.<sup>22</sup> Alexander Meiklejohn, one of the key figures in this school of thought, argues that in order to make wise public policy decisions, citizens must be provided with all possible perspectives on the issues and be given the opportunity to deliberate.<sup>23</sup> The emphasis, then, is on the right of the listener to become informed about the issues, rather than on the right of the speaker to express himself. According to this approach, the judiciary must play an active role in protecting free speech in order to ensure a democratic political process. So long as the political process is democratic, the economic policy choices made by the citizens will be valid, allowing the judiciary to defer to them.<sup>24</sup>

In contrast to those who argue that an adversarial marketplace of ideas ultimately will lead to the discovery of truth, Meiklejohn envisions citizens as deliberating with the objective of achieving the common good. He rejects the notion that the common good will result from an adversarial process in which all simply fight to advance their own personal preferences,<sup>25</sup> and argues that the marketplace metaphor is destructive because it provides citizens with a justification for ignoring the general welfare in their political decision making.<sup>26</sup> Further, he notes that the goal of free speech is not so much to produce new truths as to allow citizens to deliberate and inform themselves in order to participate effectively in the pro-

<sup>22</sup> ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 9 (1948).

<sup>23</sup> *Id.* at 116-18.

<sup>24</sup> *Id.* at 83.

<sup>25</sup> *Id.* at 80.

<sup>26</sup> *Id.* at 73.

cess of democratic self-government.<sup>27</sup>

Meiklejohn draws on the metaphor of democracy as a town meeting to illustrate his approach to speech. Like a town meeting, all are free to come, and all come as political equals, with a "duty to think [their] own thoughts, to express them, and to listen to the arguments of others."<sup>28</sup> This town-meeting approach also contains built-in limits to speech:

The final aim of the meeting is the voting of wise decisions. The voters, therefore, must be made as wise as possible. . . . As the self-governing community seeks, by method of voting, to gain wisdom in action, it can find it only in the minds of its individual citizens. . . . What is essential is not that everyone shall speak, but that everything worth saying shall be said.<sup>29</sup>

Thus, the moderator of a town meeting may refuse to give the floor to someone who will merely make a point that has been made already, but he must not refuse the floor to a speaker because the idea which that speaker will express is distasteful to the moderator or to the community.<sup>30</sup> Further, speech that is abusive or threatening should be suppressed, as this is likely to hinder fruitful debate rather than contribute to it.<sup>31</sup> However, with respect to the criticism of public officials, Meiklejohn recognizes that the crime of sedition is inconsistent with democratic self-governance.<sup>32</sup>

The narrowness of the limits to freedom of speech that may arise from the governmental process approach are clearly demonstrated in the work of Robert Bork. Based on Meiklejohn's argument that freedom of speech is intended to protect the governmental process, Bork argues that "the protection of the First Amendment must be cut off when it reaches the outer limits of political speech."<sup>33</sup> Thus, he would decline the invitation of Meiklejohn and many others to extend protection of speech to "[f]orms of thought and expression within the range of human communications from which the voter derives the knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgement which, so far as possible, a ballot should

<sup>27</sup> *Id.* at 75.

<sup>28</sup> *Id.* at 24.

<sup>29</sup> *Id.* at 26.

<sup>30</sup> *Id.* at 25.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 21.

<sup>33</sup> Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 27 (1971).

express."<sup>34</sup>

### B. Meiklejohn's Followers

Alexander Meiklejohn wrote in an era in which government suppression of dissent was the main threat to free speech in the United States. Thus, in *Political Freedom*, Meiklejohn expresses deep concern about the implications of McCarthyism on democracy and devotes much of his attention to refuting the arguments of those who seek to suppress "dangerous" speech.<sup>35</sup> Although stating that the First Amendment does not preclude Congress from legislating to "enlarge" or "enrich" speech,<sup>36</sup> Meiklejohn devotes little attention to the issue of positive regulations to enrich speech. While at one point he comments that commercial radio does not deserve the First Amendment's protection because it is in the business of making money, he does not satisfactorily address the implications for his model of the impact of economic factors on speech. Arguing that the Constitution allows either as much or as little government regulation to achieve the common good as the citizenry desires, Meiklejohn shows little concern with these issues.

As the threat of direct government suppression of speech has declined under the Supreme Court's strict standard in *Brandenburg v. Ohio*,<sup>37</sup> issues involving the relationship between speech and property rights have begun to receive increased attention from some First Amendment scholars. Many of these scholars have drawn on Meiklejohn's self-governance model, but have criticized the failure of Meiklejohn and of the entire "Free Speech Tradition" to address the negative impact upon the democratic process of disparities in wealth among speakers.<sup>38</sup> Shifting their attention away from the traditional focus on government suppression of speech, these scholars emphasize the positive role that government can play in enacting regulations to enrich the democratic deliberation process by, for example, adopting campaign finance reforms<sup>39</sup>

<sup>34</sup> *Id.* at 26 (quoting Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 256-57 (1961)).

<sup>35</sup> MEIKLEJOHN, *supra* note 22, at 4-5, 29-50.

<sup>36</sup> *Id.* at 19.

<sup>37</sup> 395 U.S. 444, 447 (1969) (holding that speech advocating the use of force or illegal acts may be limited only when "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

<sup>38</sup> See, e.g., FISS, *Free Speech and Social Structure*, *supra* note 21, at 1408; SUNSTEIN, *Free Speech Now*, *supra* note 21, at 261; GRABER, *supra* note 21, at 2.

<sup>39</sup> SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH, *supra* note 21, at 94-101; J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 642-45 (1982).

or guaranteeing media access in specific circumstances.<sup>40</sup> They suggest that "what seems to be government regulation of speech actually might promote free speech," while "what seems to be free speech in markets might, in some selected circumstances, amount to an abridgement of free speech."<sup>41</sup> Thus, these scholars are critical of Supreme Court decisions striking down Congressional attempts to make the deliberative process more fair and to redress inequalities in citizens' abilities to make their message heard due to disparities in wealth.<sup>42</sup>

Among the scholars who have explored these issues in some depth is Cass Sunstein, who shares many of Meiklejohn's basic beliefs concerning free speech. Like Meiklejohn, Sunstein argues that in order to understand the role of free speech in a democracy, one must look to the placement of sovereignty in the people rather than in the government.<sup>43</sup> Free speech in a democracy allows for meaningful popular sovereignty by giving citizens the opportunity to become fully informed on issues of public policy and to engage in broad debate, which provides a foundation for wise decision-making. In order for free speech to accomplish these objectives, Sunstein argues, certain conditions must be met. Among these conditions are "adequate information; a norm of political equality, in which arguments matter but power and authority do not; an absence of strategic manipulation of information . . . and a broad public orientation toward reaching right answers rather than serving self-interest, narrowly defined."<sup>44</sup>

Sunstein, like Meiklejohn, sees the crime of sedition as inconsistent with freedom of speech in a democracy because it prevents citizens from becoming fully informed concerning the relative merits of candidates for public office.<sup>45</sup> Also like Meiklejohn, Sunstein recognizes that his focus on popular sovereignty means affording speech relevant to public affairs a greater degree of protection than other types of speech.<sup>46</sup> However, in contrast to Meiklejohn, Sunstein does not equate free speech with a lack of government interference. He points out that even when the government ostensibly does not regulate speech at all, by upholding existing economic and legal structures that have significant impact on the relative ability of different speakers to be heard, the govern-

<sup>40</sup> SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH, *supra* note 21, at 103-05.

<sup>41</sup> *Id.* at 267.

<sup>42</sup> FISS, *Free Speech and Social Structure*, *supra* note 21, at 1407.

<sup>43</sup> Sunstein, *Free Speech Now*, *supra* note 21, at 257.

<sup>44</sup> *Id.* at 19.

<sup>45</sup> *Id.* at xvii.

<sup>46</sup> *Id.* at 301-12.

ment is in fact regulating speech.<sup>47</sup> Thus, the relevant question becomes not whether the government should regulate speech but rather how it should regulate speech.<sup>48</sup>

Focusing mainly on the mass media, Sunstein answers that speech should be regulated in order to achieve a broad debate that will best realize the principal of popular sovereignty.<sup>49</sup> Regulation of the media is necessary to achieve this objective, he argues, because public information and broad debate are public goods that will be underprovided if left to market forces.<sup>50</sup> Sunstein recognizes that some types of regulations may pose a danger to the deliberative process rather than enhancing it. For instance, he is cautious about direct regulation of content, noting the risk of government abuse of such regulation.<sup>51</sup> He is also critical of "command-and-control" regulation, and instead advocates incentive-based strategies that do not entirely suppress the market.<sup>52</sup> Ultimately, however, the regulation should seek to influence media content in order to foster broader and more fruitful debate than would result from a market-based media system. Thus, he argues that pornography and hate speech should not be protected forms of speech because they actually impede healthy debate.<sup>53</sup> He also advocates the provision of free media time to all political candidates in periods leading up to elections<sup>54</sup> and favors guaranteeing rights of reply for both candidates and commentators.<sup>55</sup>

Sunstein is not alone in arguing that the United States market-based approach to free speech leads to distortion in the democratic deliberation process. For instance, Mark Graber argues that "individuals have the constitutional right to convert their material resources into expression as long as the average member of the community can afford to invest similarly in politics."<sup>56</sup> Further, citizens have the right to combine their resources to afford more expensive means of communicating their ideas. However, "[n]o one has a constitutional right to use economic privilege to magnify otherwise relatively weak political skills."<sup>57</sup> He continues, "[a]ffluent Americans have no First Amendment right that permits

<sup>47</sup> *Id.* at 39.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 67-68.

<sup>50</sup> *Id.* at 68-71.

<sup>51</sup> *Id.* at 35.

<sup>52</sup> *Id.* at 82-83.

<sup>53</sup> Cass Sunstein, *Preferences and Politics*, 20 PHIL. & PUB. AFF. 3, 31-32 (1991).

<sup>54</sup> SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH*, *supra* note 21, at 85.

<sup>55</sup> *Id.* at 88.

<sup>56</sup> GRABER, *supra* note 21, at 232 (emphasis added).

<sup>57</sup> *Id.* at 233.

them to achieve political success through constant repetition of relatively unwanted ideas."<sup>58</sup> Similarly, Judge Skelly Wright argues that the government should regulate campaign spending in order to ensure that elections are not skewed by disproportionate financial resources.<sup>59</sup> He contends that "when media mastery weighs more heavily than appeals to judgment, when opportunities to communicate with voters are extremely unequal, the result is a cynical distortion of the electoral process."<sup>60</sup> These arguments rely on the assumption that it is the role of the government to manage societal debate in order to protect political equality and thereby ensure robust debate and wise, democratic decision making.

## II. FAIR MEDIA TREATMENT OF CANDIDATES DURING THE RUSSIAN ELECTION CAMPAIGN

One of the main goals of the IAT was to ensure that all candidates received fair treatment by the media. This goal was embodied in two types of provisions in the Statute on Information Guarantees and the Statute on Elections (hereinafter referred to collectively as the "election statutes"). First, these statutes contained provisions regulating the terms on which candidates and parties could gain access to the media, especially television and radio. Second, the statutes included provisions aimed at ensuring that the coverage itself would be fair and objective by eliminating media bias and government interference.

### A. Access to the Media

#### 1. Television and Radio

An important question with respect to free speech is when, and on what terms, an individual should have the opportunity to appear on television or radio in order to advance his political views or respond to an attack. In the Anglo-American context, advocates of positive access rights such as Cass Sunstein argue that a fair political process requires that all groups be given an equal chance to present their views in the mass media.<sup>61</sup> Opponents argue that such rights entail too much government interference with the editorial choices of the media and therefore pose a threat to free speech.<sup>62</sup> In the Russian case, however, this debate must take into

<sup>58</sup> *Id.*

<sup>59</sup> Wright, *supra* note 39, at 642-45.

<sup>60</sup> *Id.* at 631.

<sup>61</sup> See *supra* text accompanying note 40.

<sup>62</sup> ERIC BARENDT, *FREEDOM OF SPEECH* 98 (1985).

account the fact that the vast majority of television and radio companies are state owned or subsidized,<sup>63</sup> with many key positions occupied by government appointees.<sup>64</sup> As a result, a failure to grant positive access rights to candidates in the 1993 election campaign probably would have meant that pro-Yeltsin candidates would have received a great deal of media coverage while opposition candidates were shut out.<sup>65</sup>

The election statutes sought to counteract this imbalance by giving each candidate and political party one free broadcast on state-owned television and on state-owned radio,<sup>66</sup> to be used during the course of the election campaign as the candidate or party chose.<sup>67</sup> Candidates and parties were entitled to at least twenty minutes for each broadcast.<sup>68</sup> The Statute on Elections also required that between November 22 and December 12, state-owned television and radio companies devote an additional hour of free air time every morning and evening to parties and candidates, to be administered in such a way that each party would receive the

<sup>63</sup> According to Deputy Press and Information Minister Dmitri Tsubriia, Russia provides financial support to more mass media than any other country in the world, with direct government financing going to over 600 newspapers and television companies. In 1993, 40 to 50 billion rubles were allocated in the state budget to newspapers and magazines alone. *Tsubriia Briefing, supra* note 9.

<sup>64</sup> As a result of the dissatisfaction of many television journalists with this situation, a new independent television company, NTV, was set up in October, 1993, with private funding from three Russian banks. NTV is Russia's first commercial television news company. Andrew Higgins, *Russians Grapple With Changing Broadcast News*, INDEPENDENT (European News Page), Nov. 27, 1993, at 11, available in LEXIS, World Library, Majpap File. During the election campaign, however, NTV was still waiting to be allocated air time, an issue which appeared to be the subject of an internal battle between various officials of the Yeltsin government. For technological reasons, Russia has only a very limited number of channels, making allocation of the airwaves an extremely contentious issue. Lidia Pol'skaia, *War for Channel Four*, in FOREIGN BROADCAST INFO. SERV.: CENT. EURASIA, Dec. 1, 1993, at 16, 17; see also Rustam Narzikulov, *Power: Independent Television Forgot to Clear its Interests with Mikhail Poltoranin: Federal Information Center Head "Rescinds" Presidential Decree*, SEGODNIA, Nov. 25, 1993, at 1, in CURRENT DIG. POST-SOVIET PRESS, Dec. 22, 1993, at 20.

<sup>65</sup> In fact, to a certain extent this is what happened. A study conducted by the Russian-American Press and Information Center found that between November 9 and November 21, news programs broadcast on the three state-owned television companies devoted five hours and seven minutes to pro-Yeltsin candidates, one hour and thirty-five minutes to centrist candidates, and twenty-five minutes to conservative candidates. *Russian Television Favors Yeltsin Backers: Study*, AGENCE FRANCE PRESSE, Dec. 9, 1993, available in LEXIS, World Library, Allwld File.

<sup>66</sup> Statute on Elections, *supra* note 11, art. 23, § 3.

<sup>67</sup> Polozhenie o poriadke ispol'zovaniia sredstv massovoi informatsii izbiratel'nyimi ob'edineniami i kandidatami v deputaty pri provedenii agitatsii v khode vyborov v federal'noe sobranie rossiiskoi federatsii [Statute on the Manner of Use of the Mass Media by Parties and Parliamentary Candidates in Carrying Out Campaigning in the Course of the Elections to the Federal Assembly of the Russian Federation] art. 11 (confirmed in Resolution number 18 by the Central Election Commission of the Russian Federation (Nov. 1, 1993)), *reprinted in IAT READER, supra* note 15, at 26.

<sup>68</sup> *Id.* art. 8.

same amount of air time on equal terms.<sup>69</sup>

All candidates and parties also were entitled to purchase a limited amount of additional air time which was to be offered to them on equal terms.<sup>70</sup> In order to assure that access was affordable, article 6 of the Statute on Information Guarantees stipulated that the rates charged for broadcasting election-related speeches, press conferences, interviews, debates, and round tables could not exceed the broadcasting company's costs.<sup>71</sup> However, in the case of private television companies, it provided for compensation from the state budget for any disparity between this rate and the company's usual rate.<sup>72</sup>

In addition to negotiating with the major state television and radio companies to work out the scheduling of free air-time devoted to candidates and parties, the IAT addressed numerous complaints from candidates alleging that they had been wrongly denied the free air time on public television and radio stations to which they were entitled. These complaints were generally upheld by the IAT,<sup>73</sup> except in cases in which candidates had not met the basic requirements for receiving free air time; for example, where the candidate was not included on the official all-Russia list of candidates.<sup>74</sup>

<sup>69</sup> Statute on Elections, *supra* note 11, art. 28, § 4.

<sup>70</sup> Statute on Information Guarantees, *supra* note 12, art. 3 (providing that paid air time must be offered to all political candidates for the same price) and art. 5 (providing that all television and radio companies were required to offer an equal amount of paid air time to candidates, but not exceeding two minutes a day per candidate or party for political commercials, 70 minutes a week per candidate or party for the broadcast of speeches, news conferences and interviews, and 350 minutes a week per candidate or party for the broadcast of election debates and round tables; and also providing that paid air time for political commercials could not exceed two percent of a candidate's total paid air time).

<sup>71</sup> *Id.* art. 6.

<sup>72</sup> *Id.* art. 8.

<sup>73</sup> See, e.g., *O zhalobakh kandidatov v deputaty gosudarstvennoi dумы federal'nogo sobraniia rossiiskoi federatsii yurkus A. I. i pashchenko A. V. po zaprosu predsedatelia okruzhnoi izbiratel'noi komissii kirovskogo izbiratel'nogo okruga no. 93 minina S.A.* [On the Inquiry of the Chairman of the Regional Election Commission of the Kirov Electoral District S. A. Minin No. 93 about the Complaints of Candidates to the Duma of the Federal Assembly A. I. Yurkus and A. V. Pashchenko] (decided Nov. 24, 1993), *reprinted in IAT READER, supra* note 15, at 57 [hereinafter Decision 2]; *O zhalobe kandidata v deputaty gosudarstvennoi dумы yankova K. V. (g. Moskva)* [On the Complaint of Duma Candidate K. V. Yankov (city of Moscow)] (decided Nov. 26, 1993), *reprinted in IAT READER, supra* note 15, at 58 [hereinafter Decision 3]; *O zhalobe kandidatov v deputaty gosudarstvennoi dумы nikiforenko yu. V. i orlova E. I. (g. Orenburg)* [On the Complaint of Duma Candidates Yu. V. Nikiforenko and E. I. Orlov (city of Orenburg)] (decided Dec. 1, 1993), *reprinted in IAT READER, supra* note 15, at 61 [hereinafter Decision 5]; *O zhalobe kandidata v deputaty gosudarstvennoi dумы ogorodnikova A. I. (g. Moskva)* [On the Complaint of Duma Candidate A. I. Ogorodnikov] (decided Dec. 3, 1993), *reprinted in IAT READER, supra* note 15, at 66 [hereinafter Decision 9].

<sup>74</sup> *O zhalobe zamestitelia predsedatelia okruzhnoi izbiratel'noi komissii i varshavskogo izbiratel'nogo okruga No. 192 (g. Moskva)* [On the Complaint of the Deputy Chairman of the Regional Election Commission and the Varshavskii Electoral District No. 192 (city of

The IAT also issued a number of clarifications and recommendations concerning the provision of free air time to candidates. For instance, the IAT declared that a candidate should not be denied free air time to which he was entitled as an individual candidate merely because he also appeared in a broadcast that aired as part of his party's free air time.<sup>75</sup>

The IAT also explained that for the purpose of determining which broadcasting companies were required to offer free air time to candidates, state-funded media included any media that had received funding from a state or local budget in the last quarter of 1993.<sup>76</sup> Finally, the IAT emphasized on a number of occasions that candidates had the right to use their free air time as they wished, without interference from the television or radio company,<sup>77</sup> so long as candidates did not violate the "legal and ethical norms" governing the election campaign.<sup>78</sup>

Further, the IAT issued several clarifications with respect to the terms on which paid air time would be available to candidates. For instance, it held that article 6 of the Statute on Information Guarantees did not apply to "political advertisements."<sup>79</sup> Article 6 provided that in the case of paid air time to be used for the broadcast of debates, round tables, and interviews related to the election, television and radio companies could charge only the cost of their expenses.<sup>80</sup> But in its decision the IAT did not provide a specific

Moscow)] (decided Dec. 3, 1993), reprinted in IAT READER, *supra* note 15, at 65 [hereinafter Decision 8].

<sup>75</sup> O Nekotorykh aspektakh ispol'zovaniia regional'nykh teleradiokompanii dlia predvybornoi agitatsii [On Some Aspects on the Use of Regional Television and Radio for Election Campaigning] (decided Nov. 24, 1993), reprinted in IAT READER, *supra* note 15, at 85 [hereinafter Clarification 7].

<sup>76</sup> O Tolkovanii nekotorykh terminov, ispol'zuemykh v normativnykh aktakh o vyborakh ("Gosudarstvennye," SMI, Skrytaia Politicheskaiia Reklama i T.D.) [On the Interpretation of Some Terms Used in the Election Laws ("Governmental," SMI, Hidden Political Commercial and so on)] (decided Dec. 1, 1993), reprinted in IAT READER, *supra* note 15, at 89 [hereinafter Clarification 9].

<sup>77</sup> See, e.g., O pravakh kandidatov v deputaty pri ispol'zovanii besplatnogo efirmnogo vremeni [On the Rights of Duma Candidates in Using their Free Air Time] (decided Dec. 7, 1993), reprinted in IAT READER, *supra* note 15, at 93 [hereinafter Clarification 13].

<sup>78</sup> These norms include the impermissibility of inflaming nationalist sentiments, insulting the honor and dignity of other candidates, and provocation of civil war. *Id.*; see also O soderzhanii predvybornoi agitatsii na zavershaiushchem etape izbiratel'noi kampanii v vystupleniakh po televideniiu i radio predstavitelei izbiratel'nykh ob'edinenii i kandidatov v deputaty [On the Contents of Election Campaigning in the Final Stage of the Election Campaign in the Television and Radio Broadcasts of Parties and Candidates] (decided Dec. 10, 1993), reprinted in IAT READER, *supra* note 15, at 67 [hereinafter Decision 10].

<sup>79</sup> O Tolkovanii otdel'nykh norm polozeniiia ob informatsionnykh garantiakh predvybornoi agitatsii [On the Interpretation of Particular Provisions of the Statute on Information Guarantees in the Election Campaign] (decided Nov. 17, 1993), reprinted in IAT READER, *supra* note 15, at 79 [hereinafter Clarification 2].

<sup>80</sup> Statute on Information Guarantees, *supra* note 12, art. 6.

test to distinguish political advertisements from other election material presented during air time purchased by candidates and parties. Article 2 of the Statute on Information Guarantees defined a political advertisement as "material paid for by the candidate, election association, or other person acting in the interests of the candidate, prompting and calling on the citizens to perform proposed actions."<sup>81</sup> However, as campaigning is almost by definition the act of prompting citizens to vote for a candidate, this definition might well be applied to any of the activities described in article 6. Unfortunately, no published IAT decisions address the line between political advertising and campaign activities that fall under article 6.

In addition to protecting the rights of access to the broadcast media specifically granted in the election statutes, the IAT also addressed the right of a candidate to air time in order to rebut untrue information broadcast about him.<sup>82</sup> In Decision 4, the IAT addressed a case in which three television companies (Ostankino, Russian Television, and a local television station) broadcast information that candidate V. N. Diankov had been removed from the official list of candidates because of a finding that many of the signatures offered in support of his candidacy were falsified.<sup>83</sup> Although Diankov had in fact been removed from the list of candidates, this decision was later canceled by the election commission, which placed Diankov back on the list several hours before the broadcasts.<sup>84</sup> The IAT awarded Diankov the same amount of air time on the three channels to rebut the negative publicity as had been devoted to the negative material by each station.<sup>85</sup>

## 2. Newspapers and Periodicals

In contrast to its approach to the broadcast media, the Statute on Information Guarantees did not grant candidates free access to space in newspapers and periodicals. The Statute on Information Guarantees did, however, require newspapers receiving state funds that granted column space to one candidate also to grant space to all other candidates on the same terms.<sup>86</sup> (Privately owned newspapers that did not receive any government support, a small minority

<sup>81</sup> *Id.* art. 2.

<sup>82</sup> O zhalobe kandidata v deputaty soveta federatsii d'iankova V. N. (g. Krasnodar) [On the Complaint of Federation Council Candidate V. N. Diankov (city of Krasnodar)] (decided Nov. 29, 1993), reprinted in IAT READER, *supra* note 15, at 59 [hereinafter Decision 4].

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> Statute on Information Guarantees, *supra* note 12, art. 22.

of publications, were not subject to this requirement.) The Statute did not address the question of paid advertising in newspapers, setting no upper limit on political advertising in the print media. Because candidates were not entitled to any free access to the print media under the election statutes (in contrast to television and radio) only a few of the IAT's decisions involved access to newspapers and periodicals. The IAT did hold that newspapers could devote as much space to paid political advertising as they chose, but upheld the requirement that periodicals offer space to all candidates on the same terms.<sup>87</sup>

The IAT denied positive access rights in two cases where candidates sought apologies or retractions by a newspaper. In one of these cases,<sup>88</sup> the IAT found that the newspaper *Izvestiia* had printed an article that insulted a candidate two days before the election in violation of article 30 of the Statute on Elections.<sup>89</sup> The IAT required *Izvestiia* to publish its decision declaring that *Izvestiia* had violated the Statute on Information Guarantees.<sup>90</sup> The IAT also recommended that the editor of *Izvestiia* place the journalist who wrote the article on leave for the duration of the election campaign (only two days).<sup>91</sup> However, the IAT did not grant space directly to the candidate to rebut the article, in contrast to the Diankov case, in which it granted equal air time to the candidate to rebut incorrect information broadcast about him.<sup>92</sup>

In another case, the IAT declined to require that *Izvestiia* print a public apology to candidate Andrei Razin, who claimed that the newspaper had printed an article that placed him in "an unequal position with respect to the other candidates."<sup>93</sup> The court said that without evidence showing that the article was untrue, there

<sup>87</sup> O poriadke opublikovaniia politicheskoi reklamy v periodicheskikh pechatnykh izdaniakh [On the Rules for Publishing Political Advertisements in the Periodical Press] (decided Dec. 3, 1993), reprinted in IAT READER, *supra* note 15, at 91 [hereinafter Clarification 10].

<sup>88</sup> O narusheniakh redaktsii gazety "Izvestiia" chasti 2 stat'i 30 polozheniia o vyborakh deputatov gosudarstvennoi dumy v 1993 godu [On the Violation of Article 30, section 2 of the Statute on the Election of Deputies to the State Duma in 1993 by the Editorial Board of the Newspaper *Izvestiia*] (decided Dec. 10, 1993), reprinted in IAT READER, *supra* note 15, at 69 [hereinafter Decision 11].

<sup>89</sup> Statute on Elections, *supra* note 11, art. 30, § 2 (prohibiting the "dissemination of information that harms the dignity and worth of a candidate" within seven days of the election).

<sup>90</sup> Decision 11, *supra* note 88, at 70.

<sup>91</sup> *Id.* at 69.

<sup>92</sup> Decision 4, *supra* note 82.

<sup>93</sup> O zhalobe kandidata v deputaty gosudarstvennoi dumy razina A. A. (Stavropol'skii Krai) [On the Complaint of Duma Candidate A. A. Razin (Stavropol Region)] (decided Dec. 3, 1993), reprinted in IAT READER, *supra* note 15, at 64 [hereinafter Decision 7].

was no basis for the complaint.<sup>94</sup> It added that if *Izvestiia* received material in response to the article from Razin, it was up to the editorial board to decide if it wanted to provide space in the newspaper for the material.<sup>95</sup>

Although these cases can be distinguished from the Diankov case in that the first involved an insult rather than incorrect information and the second was held to be unfounded, the failure of the IAT to require that *Izvestiia* grant space to either candidate suggests that it may have been more reluctant to grant positive access rights in the print media than in the broadcast media. One possible reason for this reluctance was a perception by the framers of the election statutes and IAT members that such rights were less necessary in the print media than in the case of television and radio. Whereas Russian television and radio are still quite centralized and are largely state-run, Russian print media are more independent from the government, even though the majority receive government subsidies. Thus, there is a proliferation of newspapers and periodicals in Russia representing a wide spectrum of political views. On the other hand, the IAT's decision in the Razin case was based on the fact that Razin submitted no evidence at all that the article in question was false, suggesting that perhaps if he had, the IAT's response might have been different.<sup>96</sup> Thus, the distinction between the IAT's approach to rebuttal rights in the broadcast media as opposed to the print media should not be exaggerated.

## B. Objective Coverage of Candidates

### 1. Journalistic Bias

One of the most unusual aspects of the IAT's approach to speech, from the perspective of democratic theory, was the approach it took toward the role of journalists in the election campaign. The election statutes included numerous provisions designed to ensure that coverage of the elections would not be distorted by journalistic bias, in many cases suppressing journalistic commentary about the election altogether. Journalists were forbidden in their coverage of the elections to express support for a particular candidate or to provide more favorable coverage to one candidate than another.<sup>97</sup> Journalists were also required to sus-

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> Statute on Information Guarantees, *supra* note 12, art. 20 (providing that "[d]uring the period of the election campaign journalists shall on their programs and also on ap-

pend their journalistic activities during the course of the election campaign if they were running as candidates in the election.<sup>98</sup> Another provision required news programs to provide all election-related information at the beginning of their broadcasts in a block, without any commentary.<sup>99</sup> Finally, to avoid distortion of the election results, the Statute on Elections prohibited the dissemination by the mass media of results from opinion polls in the ten days immediately preceding the election.<sup>100</sup>

In carrying out these provisions, the IAT became deeply involved in evaluating the content of media coverage to determine when coverage was biased. In its decisions, the IAT identified a number of journalistic practices it found objectionable. For instance, in one decision it criticized journalists for violating the Statute on Information Guarantees by inserting their own opinions of the candidates and parties in their coverage.<sup>101</sup> It offered as an example a case in which candidate Nikolai Travkin was making an election trip to the Russian provinces.<sup>102</sup> Instead of simply reporting that Travkin had left on a campaigning trip, the journalist also provided statistics concerning the low level of support for Travkin's party in the region Travkin was visiting.<sup>103</sup> Although the IAT gave no hint that this statistical information was incorrect, it blamed the journalist for biased coverage because the statistics "clearly discredit[ed]" the candidate.<sup>104</sup>

As an additional example of a journalist inserting his own opinion into his coverage, the IAT cited a case in which, after broadcasting a speech by candidate Arkadii Volski in favor of "stability, honesty and progress," a commentator appeared and proceeded to criticize the speech.<sup>105</sup> Again, the IAT gave no indication that the commentator uttered any false or insulting statements about the candidate. Rather, the mere fact that the

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pearances on other television and radio programs disseminated by state television and radio companies refrain from support for one candidate or election association or election platform or another."); *id.* art. 22 (providing that "during the period of the election campaign, the media shall not show preference for one candidate, party or election platform or another.").

<sup>98</sup> *Id.* art. 23.

<sup>99</sup> *Id.* art. 7.

<sup>100</sup> Statute on Elections, *supra* note 11, art. 28.

<sup>101</sup> Ob ustraneniі v sredstvakh massovoi informatsii narusheniі zakonodatel'stva o predvybornoі agitatsii [On the Elimination in the Mass Media of Violations of the Laws on Election Campaigning] (decided Nov. 17, 1993), *reprinted in* IAT READER, *supra* note 15, at 70 [hereinafter Recommendation 1].

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

journalist had expressed negative opinions about the candidate's speech was considered objectionable.

As a particularly egregious example of media bias, the IAT singled out for criticism the decision of the Ostankino television company to air a film about candidate Vladimir Zhirinovskii on the eve of the election.<sup>106</sup> The film, "The Hawk," used archival footage and interviews in order to expose Zhirinovskii's ultra-nationalism, anti-semitism, and xenophobia. The IAT held that Ostankino had violated article 30 of the Statute on Elections, prohibiting the dissemination of material that damaged the honor and dignity of a candidate within seven days prior to the election.<sup>107</sup>

The IAT also deplored the practice of turning news coverage into "hidden political advertisements."<sup>108</sup> In particular, it noted that journalists often used interviews of officials who were also running as political candidates to give the official an opportunity to campaign on behalf of his or her party under the guise of news.<sup>109</sup> As an example, the IAT pointed to a case in which, while being interviewed in his capacity as a government official, Deputy Prime Minister Alexander Shokhin was asked a question about his relationship with the Party of Russian Unity and Accord, a party which was advancing Shokhin as a candidate in the election.<sup>110</sup> In the eyes of the IAT, this question was not a legitimate question to pose to a government official running in an election and reflected the interviewer's bias in favor of Shokhin. The IAT's confidence that it could determine what constituted appropriate contents of media coverage could also be seen in its criticism of the practice of running stories about candidates that were unrelated to the themes of the television programs on which they were shown. According to the IAT, such broadcasts were also hidden political advertisements.<sup>111</sup>

As in the case of political advertising in general, the IAT was unable to provide a satisfying definition for "hidden political advertisement." In attempting to define the term, the IAT said that hidden political advertisements had "all the characteristics of political advertisements" described in article 2 of the Statute on Informa-

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<sup>106</sup> Ob otdel'nykh faktakh narusheniia zakonodatel'stva o predvybornoі agitatsii [On Particular Facts Concerning the Violation of the Laws on Election Campaigning] (issued Dec. 17, 1993), *reprinted in* IAT READER, *supra* note 15, at 94 [hereinafter IAT Declaration].

<sup>107</sup> *Id.*

<sup>108</sup> Recommendation 1, *supra* note 101.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

tion Guarantees but were not designated as advertisements.<sup>112</sup> Given that this definition included any paid material that promoted a particular candidate, it encompassed a wide variety of material, especially as the IAT applied the term "hidden political advertisement" to material that was not paid for by the candidate, removing the possibility of a bright-line test based on whether the candidate had paid to air the material.

In fact, the IAT's decisions reflected a "we'll-know-it-when-we-see-it" approach that appeared to be based on its instincts as to the motivations of journalists in particular cases. The IAT was particularly suspicious (and perhaps rightly so) of journalists who, in violation of the Statute on Information Guarantees, continued to work as journalists while also running as candidates in the elections. The IAT blamed much of the bias in the media on these journalists, singling out in particular Viacheslav Bragin, who was appointed by Yeltsin to head the Ostankino television company and continued to hold his position while campaigning as a candidate.<sup>113</sup>

## 2. Government Interference

The IAT also scrutinized the behavior of government officials to determine when their acts constituted unacceptable interference with the media. In addition to prohibiting government authorities or government bodies from "influencing or exerting pressure on a journalist for the purpose of inducing him to present unobjective, biased coverage of the activity of candidates and election associations,"<sup>114</sup> the Statute on Elections prohibited public officials from even endorsing candidates,<sup>115</sup> considering such endorsements to constitute an unacceptable influence on the election campaign.

In censuring local officials for interference, the IAT went beyond cases of blatant interference, such as the shutting down of a private television company by local authorities in the Primorskii region.<sup>116</sup> It also criticized local government officials for attempting

<sup>112</sup> Clarification 9, *supra* note 76, at 90.

<sup>113</sup> Recommendation 1, *supra* note 101 (listing eight candidates who were also high-placed media officials and who were continuing to occupy their media positions during the elections).

<sup>114</sup> Statute on Information Guarantees, *supra* note 12, art. 21.

<sup>115</sup> Statute on Elections, *supra* note 11, art. 26, § 2.

<sup>116</sup> O nepravomernom prekrashchenii deiatel'nosti predpriiatiia kommercheskogo televideniia (g. Vladivostok) [On the Illegal Termination of the Activities of Commercial Television (city of Vladivostok)] (decided Dec. 7, 1993), *reprinted in IAT READER*, *supra* note 15, at 77 [hereinafter Recommendation 4].

to influence the outcome of the elections by expressing their own opinions with respect to the candidates. In its final assessment of the campaign, for instance, issued just after the election, it noted that many officials had campaigned actively for and against candidates, in spite of the prohibition in article 26 of the Statute on Elections.<sup>117</sup> It gave as an example a case in which a local official had accused a candidate of having committed a criminal act.<sup>118</sup> In another example, the IAT censured a judge who commented in the press about the merits of a civil case brought by one of the candidates.<sup>119</sup>

Thus, the IAT's decisions reflected a broad definition of interference, encompassing not only acts of censorship or attempts by officials to explicitly pressure the media, but also more subtle interference, in the form of endorsements of candidates by public officials or even the expression of opinions about candidates by public officials.

## III. LIMITS ON THE SPEECH OF CANDIDATES

In addition to monitoring the media's treatment of candidates, the IAT interpreted and applied provisions in the election statutes limiting candidates' speech. For instance, one provision required that the bulk of a campaign speech made by a candidate during free air time be used to lay out his or her own platform.<sup>120</sup> Another provided that candidates would be subject to legal sanctions for abusing the "right to engage in campaigning" by disseminating material "not corresponding to reality and demeaning the honor, dignity and business reputation of other candidates."<sup>121</sup> Similarly, article 30 of the Statute on Elections prohibited the dissemination of material that damaged the honor and dignity of a candidate within seven days prior to the election.<sup>122</sup> Finally, the IAT invoked the language of article 4 of the Russian Law on the Mass Media (although not actually citing it), prohibiting the use of the mass media "for . . . inflaming national, class, social, religious intolerance or hatred, or for the propaganda of war."<sup>123</sup> This prin-

<sup>117</sup> IAT Declaration, *supra* note 106, at 95.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* art. 18 (providing that "[t]he candidate or party should devote the bulk of its speech to illustration of its own election platform; criticism of the election platforms of other candidates or election associations should not be the main content of its speech.")

<sup>121</sup> *Id.* art. 25.

<sup>122</sup> Statute on Elections, *supra* note 11, art. 30.

<sup>123</sup> Russian Law on the Mass Media, *supra* note 3, art. 4.

ciple was also embodied in article 29 of the draft constitution.<sup>124</sup> Below, I will address the decisions of the IAT limiting candidates' speech in three areas: criticism of the draft constitution, criticism of other candidates, and speech inflaming racial and national hatred.

#### A. *Limits on Criticism of the Draft Constitution*

In late November, the IAT was faced with a new challenge when Yeltsin, along with members of his government, sought to limit criticism of the draft constitution by political candidates. At a meeting called by Yeltsin that included representatives of the thirteen political parties competing in the election, Yeltsin reportedly asked the candidates "not to touch" the constitution and threatened to take away their free air time if they deviated from their own platforms to criticize the constitution.<sup>125</sup> Officials of Yeltsin's State and Law Administration went even further, saying that political parties and candidates who criticized the constitution in the mass media would not only lose their free air time but also have to withdraw from the elections.<sup>126</sup>

According to the head of the State and Law Administration, Aleksandr Kotenkov, in collecting signatures to participate in elections to a body created by the draft constitution, the parties and candidates had essentially promised those who signed in their support that they would uphold the new constitution.<sup>127</sup> Thus, calls for the electorate to vote against the draft constitution would be a "distortion of the electorate's will expressed during the signature collecting campaign and [a] formal refusal to stand in elections to the new legislature."<sup>128</sup> The same argument was made by First Deputy Prime Minister and Minister of the Press Shumeiko (also a deputy candidate), who filed an official complaint with the IAT and the Central Election Commission asking that both the Communist Party and the Democratic Party of Russia be eliminated from the election campaigns because of their criticism of the draft constitu-

<sup>124</sup> KONST. RF art. 29.

<sup>125</sup> Richard Boudreaux, *Yeltsin Threatens to Pull Opponents' TV Time; Russia: In a Sign of How Much the President Values his Constitution, He Forbids Campaigning Against it on the Air*, L.A. TIMES, Nov. 27, 1993, at A5.

<sup>126</sup> *Hold the Front Page! Will They Exclude You from Criticizing the Draft Constitution?*, MOSKOVSKII KOMSOMOLET, Nov. 27, 1993, at 1, in FOREIGN BROADCAST INFO. SERV.—CENT. EURASIA, Nov. 29, 1993, at 36.

<sup>127</sup> *Candidates Not to Call for Votes Against New Constitution*, INTERFAX NEWS AGENCY, in FOREIGN BROADCAST INFO. SERV.—CENT. EURASIA, Nov. 29, 1993, at 36.

<sup>128</sup> *Id.*

tion in the mass media.<sup>129</sup> Shumeiko also asked for "clarification" with respect to four other parties whose members had publicly criticized the draft constitution.<sup>130</sup>

Those who called for limits on criticism of the constitution also argued that they were necessary to avert the instability that might result if a new Federal Assembly was elected while the constitution that created that body was rejected.<sup>131</sup> Yeltsin repeatedly warned that "the future of peace and tranquility in Russia" depended on the adoption of the draft constitution.<sup>132</sup> The specter of civil war was raised by many others as well, especially within the Yeltsin government. Prime Minister Viktor Chernomyrdin warned of "new shocks and rising tension" if the draft constitution were rejected.<sup>133</sup> Sergei Stankevich, a prominent Moscow politician, said that postponing the adoption of a new constitution would mean "mounting crime and uncontrollable conflicts."<sup>134</sup>

But this scenario was rejected by many. Grigorii Yavlinsky, one of the leaders of the Yavlinsky-Boldyrov-Lukin bloc (a key competitor against Russia's choice for the democratic vote) dismissed the danger of rejecting the draft, saying, "I do not believe that anything supernatural or awful would take place [if it were rejected]."<sup>135</sup> And one of the framers of the draft constitution sharply criticized the attempts to limit discussion of it, saying it would be "political hypocrisy" to hold the referendum on the constitution without allowing real debate.<sup>136</sup> Further, numerous parties openly rejected the constitution, arguing that its adoption would do more harm than good. Among these were the Christian Democratic Movement of Russia,<sup>137</sup> the Russian Communist Party, headed by Ziuga-

<sup>129</sup> Sonni Efron, *Yeltsin Yields on Constitutional Criticism; Politics: Court Frowns on Russian President Forbidding Rivals from Faulting his Proposal*, L.A. TIMES, Dec. 2, 1993, at A9.

<sup>130</sup> O kritike proekta konsütutsii rossiiskoi federatsii (v sviazi s zaavlenniem V. F. Shumeiko) [On Criticism of the Draft Constitution of the Russian Federation (in Connection with the Declaration of V. F. Shumeiko)] (decided Dec. 1, 1993), reprinted in IAT READER, supra note 15, at 86 [hereinafter Clarification 8].

<sup>131</sup> Boudreaux, supra note 125.

<sup>132</sup> *Address of President Boris Yeltsin of the Russian Federation* (Official Kremlin Int'l News Broadcast, Dec. 9, 1993), available in LEXIS, World Library, Sovnws File.

<sup>133</sup> *Russian PM says Constitution or Presidential Rule*, REUTER LIBR. REP., Dec. 11, 1993, available in LEXIS, World Library, Allwld File.

<sup>134</sup> Sergei Stankevich, *Why I Will Vote Aye*, ROS. GAZ., Dec. 11, 1993 at 2, in RUSSIAN PRESS DIG., Russica Information Inc.—RusData DiaLine, available in LEXIS, World Library, Spd File.

<sup>135</sup> *Leading Representatives of Blocs Discuss Draft Constitution and Referendum*, Ostankino Channel 1 TV, Dec. 10, 1993, in BBC SUMMARY WORLD BROADCASTS, Dec. 13, 1993, available in LEXIS, World Library, Bbcswb File, SU/1870/B.

<sup>136</sup> Leonid Nikitinsky, *Without New Constitution, There Will be No New Parliament*, IZVESTIJA, Dec. 9, 1993, at 4, in RUSSIAN PRESS DIG., Russica Information Inc.—RusData DiaLine, available in LEXIS, World Library, Spd File.

<sup>137</sup> *Christian Democratic Leader Calls for Convocation of Constituent Assembly*, RIA News

nov,<sup>138</sup> and numerous small parties.<sup>139</sup> Conversely, the constitution was supported by Zhirinovskii's Liberal Democratic Party not so much out of a fear of civil war, but because of the strong presidency it would create.<sup>140</sup>

The IAT also apparently rejected the argument that any criticism of the draft constitution posed a threat of civil war sufficient to justify limiting debate, unanimously holding that merely criticizing the draft constitution did not disqualify candidates from participating in the election.<sup>141</sup> The IAT reiterated the right of candidates to determine the contents of their campaigning as they chose, including using some of their free air time to criticize the draft constitution.<sup>142</sup> At the same time, it made clear that it did not expect candidates to devote an inordinate amount of time to criticizing the draft constitution, reminding candidates that they were required under article 18 of the Statute on Information Guarantees to devote the bulk of their campaign speeches to their own platforms.<sup>143</sup> In addition, the IAT drew on the language of the Law on the Mass Media in cautioning that criticism of the draft constitution was not to inflame national or religious enmity, appeal for civil war, or disclose state secrets.<sup>144</sup>

But the IAT went beyond the explicit requirements of the election statutes and the Law on the Mass Media by imposing the additional requirement that criticism of the constitution should also be "well-founded" and that candidates who criticized the draft should "provide the voters with the candidate's or party's concrete proposals concerning the content of the constitution."<sup>145</sup> It went even further by adding that candidates should not engage in "vulgar" criticism of the constitution.<sup>146</sup> As an example of such vulgar criticism, it cited an earlier decision in which it had censured candidate Stanislav Govorukhin of the Democratic Party of Russia for

Agency, Dec. 3, 1993, in BBC SUMMARY WORLD BROADCASTS, Dec. 7, 1993, available in LEXIS, World Library, Bbcswb File.

<sup>138</sup> *Communist Leader Says Draft Constitution Gives President Unlimited Rights*, Russia TV Channel, Dec. 4, 1993, in BBC SUMMARY WORLD BROADCASTS, Dec. 9, 1993, available in LEXIS, World Library, Bbcswb File.

<sup>139</sup> *Fifty Russian Parties and Organizations Call for Cancellation of Referendum*, ITAR-TASS News Agency, Dec. 6, 1993, in BBC SUMMARY WORLD BROADCASTS, Dec. 10, 1993, available in LEXIS, World Library, Bbcswb File.

<sup>140</sup> Vitalii Tretiakov, *Gospodin Zhirinovskii Konstitutsiinu Odobril: Znachit, Teper' ee Mozhno Prinimat'* [Mr. Zhirinovskii Has Approved of the Constitution: So Now We Can Adopt it], NEZAVISIMAYA GAZ., June 30, 1993, at 1.

<sup>141</sup> Clarification 8, *supra* note 130, at 88.

<sup>142</sup> *Id.* at 87.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 88.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

saying during a television appearance that the draft constitution was "stained by the blood spilled October 4 [during the storming of the Russian parliament building]."<sup>147</sup>

In imposing these limits on criticisms of the draft constitution, the IAT once again involved itself in drawing subtle distinctions between different types of speech based on what it considered the usefulness of its content and the tastefulness of its phrasing. The IAT provided little guidance for determining when criticism was well-founded or vulgar, but seemed to assume that these terms were understandable to all.

#### B. *Civility and Limits on Criticism of Candidates and Officials*

The negative reaction of the IAT to official attempts to limit discussion of the constitution was in marked contrast to its response to efforts by Yeltsin and many candidates to encourage more "civilized" campaigning, a goal which the IAT shared.<sup>148</sup> Thus, in a number of decisions the IAT invoked article 25 of the Statute on Information Guarantees, which prohibits abuse of the right to campaign through dissemination of false information that demeans the honor or dignity of other candidates and parties, in order to censure candidates whose campaigning crossed the bounds of civility. In some of these decisions, the IAT also relied on article 18 of the Statute on Information Guarantees, requiring that candidates devote the bulk of their speeches to their respective platforms.

In one case involving civility, the IAT found a violation of article 25 of the Statute on Information Guarantees when candidate Yegor Gaidar said that candidate Vladimir Zhirinovskii had gone beyond the "Hitler of Soviet films" to become the "real Hitler of 1992."<sup>149</sup> The IAT said in its decision that even though it was unable to determine whether the statement was false (one of the requirements of article 25), it could say that the statement was an

<sup>147</sup> *Id.* (referring to O narushenii otdel'nymi kandidatami v deputaty pravovykh polozhenii predvybornoi agitatsii i eticheskikh norm (N. I. Travkin, S. S. Govorukhin, V. V. Zhirinovskii) [On the Violations by Particular Candidates of the Laws on Election Campaigning and of Ethical Norms (N. I. Travkin, S. S. Govorukhin, V. V. Zhirinovskii)] (decided Nov. 26, 1993), reprinted in IAT READER, *supra* note 15, at 73 [hereinafter Recommendation 3]); Govorukhin, quoted in Boudreaux, *supra* note 125.

<sup>148</sup> On November 26, Yeltsin called a meeting with the leaders of all of the parties in which a gentlemen's agreement was reached to limit mud-slinging and insults in campaigning. *Yeltsin Reaches 'Gentlemen's Agreement' on Election Conduct*, ITAR-TASS News Agency, Nov. 26, 1993, in FOREIGN BROADCAST INFO. SERV.—CENT. EURASIA, Nov. 29, 1993, at 28.

<sup>149</sup> O zaivlenii kandidata v deputaty V. V. zhirinovskogo (Zhirinovskii Protiv Gaidar) [On the Declaration of Deputy Candidate V. V. Zhirinovskii (Zhirinovskii Against Gaidar)] (decided Dec. 7, 1993), reprinted in IAT READER, *supra* note 15, at 77 [hereinafter Recommendation 5].

insult to Zhirinovskii, and therefore violated article 25.<sup>150</sup> In reaching this conclusion, the IAT simply presumed the statement was false and placed the burden of proving truth on the speaker. Thus, a violation of article 25 existed when the speaker could not rebut this presumption.<sup>151</sup> Still, the IAT did not require Gaidar to apologize to Zhirinovskii, saying that the IAT did not have the power to do this,<sup>152</sup> even though the Statute on Information Guarantees gave the Tribunal the power to make recommendations to candidates concerning the content of their campaigning.<sup>153</sup>

In another decision, the IAT found that several candidates had violated article 25 of the Statute on Information Guarantees by insulting one another.<sup>154</sup> Among the politicians who were warned were Stanislav Govorukhin, Nikolai Travkin, and Vladimir Zhirinovskii.<sup>155</sup> In this decision, the IAT provided no details about the actual insults and did not seek to determine whether any of them might be true. Once again, in applying article 25, the IAT seemed much more concerned about the insulting nature of the statements than their falsity.

In the same decision, the IAT also expressed concern about the violation of article 18, requiring that candidates devote the bulk of their speeches to their own platforms.<sup>156</sup> In invoking article 18, the IAT pointed out that the candidates had denied voters "the constitutional right . . . to receive essential and reliable information about the platforms of the candidates and parties" and to gain an understanding of how each of the candidates planned to implement his or her program.<sup>157</sup> There was no indication that the IAT had actually measured the time devoted by the candidates to insulting each other or calculated the percentage of each candidate's time devoted to criticizing one another. Rather, the IAT's reliance on article 18 appeared to reflect its sense that the election campaign should be devoted to debate over issues rather than personal insults.<sup>158</sup>

<sup>150</sup> *Id.*

<sup>151</sup> This approach is consistent with the traditional approach to the English common law tort of defamation, which until the early twentieth century presumed that a defamatory statement was false. Defendants were held liable unless they could rebut the presumption of falsity, which was virtually impossible when the communication did not contain a factual statement. Robert C. Post, *Defaming Public Officials: On Doctrine and Legal History*, 1987 AM. B. FOUND. RES. J. 539, 618-19.

<sup>152</sup> Recommendation 5, *supra* note 149.

<sup>153</sup> Statute on Information Guarantees, *supra* note 12, art. 30, § 1.

<sup>154</sup> Recommendation 3, *supra* note 147.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 74.

<sup>157</sup> *Id.*

<sup>158</sup> In fact, complaints about "dirty" campaign tactics were rampant in the Russian me-

Finally, in another decision the IAT found that statements by candidates Vladimir Zhirinovskii, Alexander Nevzorov, and Yuri Kuznetsov violated ethical norms by insulting President Yeltsin and other members of his government.<sup>159</sup> As none of the statements were quoted in the decision, it is difficult to assess the seriousness of the insults. However, in singling out insults directed at the president as a discrete ethical violation, the IAT's decision suggested that it saw no need to relax the requirements of civility with respect to public officials.

### C. *Limits on Inflammatory Speech*

The IAT also frequently reminded candidates that in their campaigning they must not make appeals for civil war or engage in speech that inflamed nationalist or racial enmity. In particular, it warned that criticism of political opponents or of the draft constitution should not be used for any of these purposes.<sup>160</sup> The prime offender in this area appears to have been Vladimir Zhirinovskii, who was criticized for "inflaming nationalist animosity" and "inciting to infringe on human rights."<sup>161</sup> Candidates Bondarik, Nevzorov, and Kuznetsov were also criticized for using their free television air time for "the propaganda of nationalist discrimination and inflaming of nationalist animosity."<sup>162</sup> In its decision, however, the IAT did not cite the language it found to be offensive,

dia. As one commentator wrote, "scoring points by ridiculing and denigrating your adversary . . . is tomfoolery not politics: After all, you will not increase your own merits by taking them away from someone else, like clowns at the circus stealing each others' pants!" Nikita Vainonen, *Rejoinder: Isn't Travkin Playing on the Others' Turf?*, ROSSISKIE VESTI, Nov. 26, 1993, in FOREIGN BROADCAST INFO. SERV.—CENT. EURASIA, Nov. 29, 1993, at 31, 32. Another wrote, "[t]he speakers' plan is simple to the point of being primitive: to make unrestrained promises and hurl shameless abuse. In other words, to take the voters for some sort of half-wits." The writer went on to berate several candidates for their "incriminatory lies" about one another. Yuri Feofanov, *Messrs. Zhirinovskii and Govorukhin Take Voters for Complete Idiots*, IZVESTIYA, Nov. 26, 1993, at 1, in CURRENT DIG. POST-SOVIET PRESS, Dec. 22, 1993, at 4, available in LEXIS, World Library, Cdsp File.

<sup>159</sup> Decision 10, *supra* note 78, at 68.

<sup>160</sup> O nekotorykh aspektakh predvybornoi agitatsii na gosudarstvennom televidenii (Rol' Vedushchego-Zhurnalista, Kritika Opponentov) [On a Few Aspects of the Election Campaign on State Television (Role of the Television Moderator, Criticism of Opponents)] (decided Nov. 24, 1993), reprinted in IAT READER, *supra* note 15, at 83 [hereinafter Clarification 5]; Clarification 8, *supra* note 130.

<sup>161</sup> Decision 10, *supra* note 78. Soon after the elections, criminal charges were also filed against Zhirinovskii under article 71 of the Criminal Code, forbidding the propagandizing of war. While the charges were partially based on his book, *The Final Drive to the South* (in which he argues Russia should expand to the Indian Ocean), it is also likely that his campaign statements concerning the retaking of the former Soviet Republics provided further basis for the complaint. Petr Zhuravlev, *LPDR Leader Could be Charged with Propagandizing War*, SEGODNIA, Jan. 27, 1994, in CURRENT DIG. POST-SOVIET PRESS, Feb. 23, 1994, at 20, available in LEXIS, World Library, Cdsp File.

<sup>162</sup> Decision 10, *supra* note 78.

thus failing to provide examples that would help to define the sweeping terms of the prohibition. Rather, the IAT seemed to assume that all could recognize inflammatory speech.

#### IV. PROBLEMS AND ISSUES RAISED BY THE IAT'S APPROACH TO FREE SPEECH

In the decisions discussed in the sections above, the IAT's approach to free speech generally reflected a commitment to ensuring high-quality debate that would allow voters to become as well informed as possible about the candidates and issues in order to make wise political choices on election day. This is a crucial goal of free speech for Alexander Meiklejohn, and many of the methods used by the IAT to accomplish it, including guaranteed access rights for candidates and limited rights of rebuttal, were similar to the types of regulations advocated by followers of Meiklejohn, such as Cass Sunstein. As discussed below, the Russian experience in the fall of 1993 illustrates some of the difficult issues that those who advocate these types of regulations must address. Other decisions adopted by the IAT, however, ran directly against the basic tenets of the governmental process model and raised questions about some aspects of the IAT's vision of democracy. Among these decisions were the IAT's efforts to eliminate journalistic bias, its statements that criticism of the draft constitution must be well-founded and not "vulgar," and its protection of the "honor and dignity" of candidates.

##### A. Fair Media Treatment

###### 1. Access to Media

The IAT protected three types of positive access rights for candidates with respect to the Russian mass media. First, it protected the right of all candidates to each receive a free television and radio appearance of at least twenty minutes during the campaign, with a certain amount of additional free air time during morning and evening broadcasts devoted to the campaign in the last three weeks of the election. Second, it allowed candidates to purchase limited amounts of air time for only the cost to the television or radio station of the broadcast. Third, it granted air time to rebut incorrect information that had been broadcast about a candidate. It might have been willing to grant such a right of rebuttal in the print media if a case had arisen in which there was evidence that a printed statement about a candidate was false.

In protecting these three types of positive access rights, the

IAT sought to ensure a degree of political equality among the candidates and foster diverse debate. Nonetheless, the IAT was not entirely satisfied with the results of its efforts. In his final assessment of the election coverage, for instance, the head of the IAT, Anatolii Vengerov, expressed disappointment at the infrequency with which candidates used free and low-cost air time for debates in the form of moderated round-tables.<sup>163</sup> The negative reaction of the IAT to what it perceived to be mere "political advertisements," as opposed to more substantive messages, reflected a similar dissatisfaction with candidates' use of their free air time.<sup>164</sup>

The failure of positive access rights to live up to the expectations of the IAT in the fall 1993 election campaign suggests that the provision of positive access rights to candidates does not by itself necessarily guarantee the kind of fruitful debate that is often advanced as a justification for such rights. One of the dangers of guaranteed access rights is that they will be used to convey slick but superficial messages instead of contributing to serious, high-quality debate. This raises a question for advocates of positive access rights in the United States as to whether these rights can be structured so as to avoid this phenomenon, perhaps by conditioning them on a requirement of face-to-face debate among candidates. If this approach were taken, however, the government would become a moderator in almost a literal sense, posing a question concerning who sets the agenda for societal debate.

Another difficult issue is raised by the IAT's approach to rebuttal rights. If candidates are to be granted a right of rebuttal when false information has been broadcast or printed about them, who decides when information is false? Although this determination appeared relatively straightforward in the Diankov case,<sup>165</sup> there are numerous scenarios in which a decision concerning the truth or falsity of information broadcast or printed about a candidate would require that subjective conclusions be drawn from a particular set of facts. In the world of Alexander Meiklejohn, it is the role of the electorate to draw its own conclusions concerning what is true and what is false. To vest the power to make such determinations in the government is, in a sense, to undercut the electorate's right in a democracy to draw its own conclusions concerning what

<sup>163</sup> *Otchet o Rabote Treteiskogo Informatsionnogo Suda za Noiabr'—Deibr' 1993 g. v Izbratel'noi Kampanii po Vyboram v Federal'noe Sobranie i po Referendumu o Proekte Konstitutsii* [Assessment of the Work of the Information Arbitration Tribunal on the November-December Campaign for Election to the Federal Assembly and on the Referendum on the Draft Constitution], in IAT READER, *supra* note 15, at 105.

<sup>164</sup> See *supra* text accompanying notes 79-81, 108-12.

<sup>165</sup> See *supra* text accompanying notes 83-85.

is true or false. It could be argued that this problem would be avoided if rebuttal rights were granted whenever a candidate was criticized, regardless of truth or falsity. Such a broad right of rebuttal, however, would entail a significant loss of editorial control and might well lead the mass media to avoid criticizing political candidates, thereby chilling much valuable discussion of candidates. This dilemma needs to be addressed by those who argue for a right of rebuttal in the United States.

Finally, it is interesting to note that although the IAT's approach to access rights reflected a commitment to political equality, the Tribunal did not insist upon complete equality of media access. Instead, it was willing to tolerate the inequality that arose in the broadcast media from unequal financial resources by allowing parties and candidates to purchase air time.<sup>166</sup> In fact, a number of commentators expressed concern about the inequality in media access resulting from disparate financial resources. One warned that

there is not going to be equality between the candidates or between the blocs, and . . . given the desire and a certain degree of ability, one bloc is going to be rolling in bags of money while another is going to have to rest content with pennies, and we will see some candidates on television around the clock but only get a brief glimpse of others or never see them at all.<sup>167</sup>

These commentators warned that paid political advertising would allow candidates to buy the election.<sup>168</sup>

## 2. Objective Coverage

Beyond providing access to the candidates so that their messages could be heard by the Russian electorate, the IAT also sought to ensure that voters would have the opportunity to evaluate the candidates without being influenced by government interference or media bias. Thus, the IAT condemned not only government censorship, but also any expression of personal polit-

<sup>166</sup> In fact, the amount of paid air time purchased by candidates and parties varied widely because of the disparities in resources of the various parties. Thus, Russia's Choice and Zhirinovskii's Liberal Democratic Party spent two and one billion rubles, respectively, while most other parties participating in the elections spent substantially less on campaigning. Rustam Narzikulov, *The Zhirinovskiy Optimum—Or Why the Wealthiest Political Bloc Lost the Elections*, SEGODNIA, Dec. 28, 1993, at 11, in CURRENT DIG. POST-SOVIET PRESS, Jan. 26, 1993, at 8.

<sup>167</sup> Alexander Shalnev, IZVESTIA, Nov. 3, 1993, at 4, in CURRENT DIG. POST-SOVIET PRESS, Dec. 1, 1993, at 15, available in LEXIS, World Library, Cdsp File.

<sup>168</sup> Aleksandr Shalnev quoted the director of the financial group "Most" (Bridge) as saying, "[w]e will give exactly as much—strictly within the limits of the law, of course—as is needed to get the people we support elected." *Id.*; see also Georgi Ivanov-Smolenskii, IZVESTIA, Nov. 2, 1993, at 4, in CURRENT DIG. POST-SOVIET PRESS, Dec. 1, 1993, at 14.

ical views concerning the candidates by government officials and journalists. This aspect of the IAT's approach to free speech represents a significant deviation from the governmental process model, although the commitment to allowing citizens to draw their own conclusions about the candidates at first seems consistent with the spirit of that model. From the Meiklejohnian perspective, the problem with this approach is that it suppresses core political speech by focusing on the speech of candidates while providing little protection for the speech of journalists. As a result, the IAT's approach denied the electorate the opportunity to be fully informed of all information and opinions worth hearing.

In treating the mass media (particularly the broadcast media) as a mere conveyor belt for transmitting the messages of candidates, the IAT denied Russian journalists a role in the election debate and deprived Russian voters of potentially valuable commentary. As Vsevolod Vilchek, head of Ostankino's Sociology Center complained, "television journalists [were] virtually excluded from the airwaves and deprived of the right to perform their professional duty as seekers of the truth and exponents of the audience's interests."<sup>169</sup> Rather than playing a watch-dog role, as they had in the era of glasnost', during the fall 1993 election campaign the broadcast media were expected simply to convey information and refrain from actively engaging in the societal deliberation process.

The IAT's approach to media bias is disturbing from the perspective of the governmental process model not only because it limited valuable debate, but also because of the intimate government involvement it entailed in evaluating the speech of journalists. As the Travkin decision illustrates,<sup>170</sup> the determination of what constitutes bias is highly subjective. Even the presentation of facts without any overt expression of opinion may constitute bias because of the journalist's selection of facts. Thus, it is almost impossible to formulate a bright-line rule for evaluating bias. As a result, any effort on the part of the government to eliminate bias will involve the government in evaluating the content of each particular case, with little possibility for consistency and great danger of abuse. The government, after all, has its own interests in the outcome of the election that may not coincide with those of the electorate as a whole.

<sup>169</sup> Vsevolod Vilchek, *The Preelection Television Screen is Optum for the People*, IZVESTIA, Nov. 25, 1993, at 1, 4, in CURRENT DIG. POST-SOVIET PRESS, Dec. 22, 1993.

<sup>170</sup> See *supra* text accompanying notes 102-04.

On the other hand, the IAT's approach to the involvement of government officials in the election reflected concern about government interference with societal debate. In many regions of Russia, local officials remain powerful and sometimes corrupt. By limiting the speech of government officials with respect to candidates, the IAT may have been acting on the belief that even an endorsement by an official of a particular candidate could discourage those whose livelihood depended on that official's from criticizing that candidate or openly supporting another candidate. At the same time, by silencing government officials, the IAT deprived voters of information that may have been an important consideration.

### B. 'Limits on Candidates' Speech

#### 1. Criticism of the Draft Constitution

The IAT rejected attempts to ban all criticism of the draft constitution, thus allowing Russian society to carry on some degree of debate concerning the constitution's merits. However, while the IAT upheld the right of candidates to criticize the draft constitution, it made clear that criticism should be well-founded and should not be vulgar. In imposing such a requirement, the IAT took upon itself the role of evaluating the validity of criticisms of the constitution, thus restricting speech in a manner that was inconsistent with the governmental process model. The governmental process model does not allow government to limit speech because it does not like its content. As it did in cases involving media bias, the IAT limited core political speech in the name of ensuring a fair and constructive debate.

#### 2. Civility

While the protection of a minimal level of civility is required to allow for orderly debate under Meiklejohn's model of free speech, the protection of the honor and dignity of candidates by the IAT goes far beyond what is envisioned by the governmental process model.<sup>171</sup> By placing such limits on criticism of candidates for public office, the IAT essentially sought to enforce a law against sedition. Under the governmental process model, it is recognized that no such crime can exist in a democracy because it means limiting debate concerning a crucial policy choice, the selection of public officials. Because it is so important for the electorate to be as

<sup>171</sup> See *supra* text accompanying note 45.

informed as possible about its elected officials, limits on speech that might harm the dignity and honor of political candidates are impermissible.

Further, the IAT's presumption of falsity in defamation cases under article 25 of the Statute on Information Guarantees<sup>172</sup> made it even more difficult to criticize a candidate without censure. Because of this presumption, any insult that could not be proven true was considered to be in violation of the statute. Given the evident political content of insults such as Gaidar's comparison of Zhirinovskii with Hitler, it is very likely that this approach led to the suppression of political speech. Proponents of the public discourse model would also point out that limits on speech that harm the honor or dignity of candidates are detrimental to democracy because they involve the imposition of a single, governmental conception of civility. As a result, no opportunity exists for competition between different notions of civility in society and the ability of society to define itself is limited.

Finally, the IAT's insistence that candidates must devote the bulk of their speeches to their own platforms rather than to criticism of other candidates was often used by the IAT to impose its views concerning what speech was useful and what was not. In seeking to control the focus of public debate, the IAT again imposed its own conception of what constituted valuable debate, rather than allowing Russian society to set the agenda for political debate. Although such an agenda-setting role on the part of the government may sometimes be acceptable to Meiklejohn and his followers, who allow the government to act as a moderator of public debate, the Russian case raises the question of whether the government, in acting as moderator, may sometimes become too actively involved in framing political issues.

#### 3. Limits on Inflammatory Speech

In a number of decisions, the IAT criticized candidates for racist or nationalist speech that "inflame[d] national enmity" or "provoke[d] civil war" but did not include examples of such speech. As a result, it is difficult to know the limits of these categories and how much speech the IAT is willing to suppress on these bases. Nevertheless, the IAT's decisions indicate that it apparently accepts the concept of group libel as a valid one. Group libel is a troubling concept from the perspective of the public discourse model. In this model, one of the dangers of group libel is its effect

<sup>172</sup> Statute on Information Guarantees, *supra* note 12.

of imposing conceptions of group identity rather than allowing groups to define their own identities through public discourse. These constantly changing identities may be frozen by government imposition of official group identities, thereby preventing the healthy development of democratic society. Although limits on speech that inflames nationalist enmity might be justified in the public discourse model to the extent that such speech poses a real and immediate threat of civil war, there is no indication that the IAT imposes any requirements of imminent threat or incitement to action.

In contrast, the limits imposed by the IAT on speech that inflamed nationalist enmity are consistent with the governmental process model, to the extent that that model aims at ensuring the expression of diverse viewpoints by different groups within society. Because racist speech by one group may impede the ability of another group to engage in public debate, such speech may decrease the ability of society to make wise political choices. This result, in turn, signifies a reduction in the degree of democracy in society, according to the public discourse model. Thus, the IAT's approach to inflammatory speech is beneficial to democracy, from the perspective of the governmental process model.

#### CONCLUSION

The IAT's implementation of the election statutes during the fall 1993 election campaign marked the first attempt of the Russian government to deal comprehensively with media and speech issues arising during the course of a democratic election. (The election was the first general election held since the collapse of communism in August 1991.) The common theme running through the IAT's decisions was the importance of ensuring constructive debate in order to allow citizens to make informed choices at the polls. Free speech was considered important for advancing societal welfare rather than the individual interests of speakers. Thus, at a general level, the IAT's approach was consistent with the philosophy underlying the governmental process model. Further, in many ways, the IAT was a success for democracy in Russia. Although the body was created by Yeltsin and filled with government appointees, it did not give in to the government's position that all who criticized the draft constitution should be disqualified from the election. The IAT also ensured that all candidates had the opportunity to convey their messages in the mass media, and appeared to carry out its mission in an even-handed manner.

However, the IAT was unwilling to tolerate what it viewed as the excesses of free speech—vulgarity, insults, and unfounded opinions. In limiting these types of speech, the IAT deviated from a fundamental tenet of Alexander Meiklejohn's model that voters should have the opportunity to be exposed to all possible positions concerning issues of public importance and make their own determinations about the validity of those positions. The IAT's experience illustrates the risk that certain types of government regulation of the mass media may detract from rather than enhance the electorate's ability to make its own determinations on issues of public importance. In particular, the IAT's close involvement in evaluating the content of speech most likely chilled important political debate during the election campaign. In fact, a poll carried out by Russian Television found that only thirteen percent of viewers had found the political broadcasts useful.<sup>173</sup> Vsevelod Vilchek expressed concern that "no mechanisms were provided for in the broadcasting structure [to protect the voter]; rather, mechanisms against demagoguery, lies and manipulation of viewers' minds by all kinds of commercial advertising and political propaganda have been deliberately blocked."<sup>174</sup>

Alexander Meiklejohn characterized citizens in a democracy as "courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of self-government."<sup>175</sup> It is possible that citizens must gain experience with democracy in order for this confidence to develop. It was not until 1964, after all, that the crime of sedition was finally rejected outright by the United States Supreme Court. In Russia, it is likely that this confidence will build slowly, especially in light of the political instability throughout the former Soviet Union and the very real threats of pro-government bias and abuse by government officials resulting from the media's dependence on government subsidies.<sup>176</sup>

However, we should not expect Russia to follow a path to democracy that is identical to that of the United States. The deci-

<sup>173</sup> David Ljunggren, *Election Clash Over Russian Media Might be in Vain*, REUTER LIBR. REP., Dec. 7, 1993, available in LEXIS, World Library, Allwld File.

<sup>174</sup> Vilchek, *supra* note 169.

<sup>175</sup> MEIKLEJOHN, *supra* note 22, at 48.

<sup>176</sup> According to many observers, the election coverage that state-owned television provided was biased in favor of pro-Yeltsin candidates notwithstanding the IAT and the election statutes. See, e.g., *Russian Television Favors Yeltsin Backers*, AGENCE FRANCE PRESSE, Dec. 9, 1993. Allegations of bias in the print media were also widespread. As one member of the IAT noted, it was "hard to guarantee total freedom from bias because television, radio and newspapers depend on the government for funding." Ljunggren, *supra* note 173 (quoting Alexei Simonov, member of the IAT).

sions of the IAT suggest a vision of free speech that is more limited than that of Meiklejohn and his followers, allowing a greater role for government in regulating the content of speech and restricting the voices that can be heard by Russian voters. At the same time, the dissatisfaction of many Russian commentators with the fall 1993 election coverage could lead to a revision of the government's approach to free speech in the next Russian election. The lesson of the fall election campaign may be that Russian society must continue to develop an approach to free speech that will satisfactorily accommodate its vision of democracy with competing values and practical concerns.