



FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
) MUR 5540
CBS Broadcasting, Inc.,)
Kerry-Edwards 2004, Inc., and)
Robert Farmer, in his official capacity as treasurer)

In the Matter of)
) MUR 5545
Dan Rather,)
CBS News,)
CBS, and)
Viacom, Inc.)

In the Matter of)
) MUR 5562
Sinclair Broadcast Group, Inc.)

In the Matter of)
) MUR 5570
Sinclair Broadcast Group, Inc.)
Mark Hyman)
Frederick G. Smith)

**STATEMENT OF REASONS OF COMMISSIONERS
DAVID M. MASON AND BRADLEY A. SMITH**

This statement of reasons ("SOR") addresses four matters under review ("MURs").

• The Center for Individual Freedom filed the complaint in MUR 5540 against Respondents CBS Broadcasting, Inc., Kerry-Edwards 2004, Inc., and Robert Farmer, in his official capacity as treasurer.

• Jeffrey Smith filed the complaint in MUR 5545 against Respondents Dan Rather, CBS News, CBS, and Viacom, Inc.

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- The Democratic National Committee filed the complaint in MUR 5562 against Respondent Sinclair Broadcasting Group, Inc.

- Sam Osborne filed the complaint in MUR 5570 against Respondents Sinclair Broadcast Group, Inc., Mark Hyman, and Frederick G. Smith.

The Commission unanimously found no reason to believe that any of the respondents in the four MURs violated the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 431 *et seq.*, and closed the files. We agree with the analyses of the Office of General Counsel ("OGC") in these matters and write separately to emphasize that the press exemption protects each respondent, specifically against the claims of bias, professional irresponsibility or suspect motivations raised in the complaints. Under the First Amendment of the United States Constitution, U.S. CONST. amend. I (1789), and the "news story, commentary, or editorial" exemption, designed to incorporate First Amendment press freedoms into FECA, *see* 11 C.F.R. § 100.73 (2002) (exemption from the definition of "contribution"); 2 U.S.C. § 431(9)(B) (2002) (exemption from the definition of "expenditure"); *id.* § 434(f)(3)(B) (2002) (exemption from the definition of "electioneering communication"), the government simply has no role or authority in policing alleged mendacity, bias or unprofessional conduct by the media.

I. BACKGROUND

A. CBS MURs

CBS Broadcasting, Inc., a subsidiary of Viacom, Inc., owns the CBS television network, including CBS News. On September 8, 2004 – shortly before the 2004 presidential and vice-presidential election between President George W. Bush and Vice President Dick Cheney, and Senators John Kerry and John Edwards – *60 Minutes Wednesday*, a CBS News program, broadcast a segment unfavorable toward President Bush. Subsequent reports discredited the broadcast.¹

It later came to light that there had been contact among the CBS segment's producer, a senior Kerry-Edwards advisor and a CBS source for the segment. The source "said he would be more forthcoming with documents if he were allowed to communicate with the Kerry campaign."² The producer spoke with the senior advisor, who then called the source. The senior advisor said he and the source did not discuss the documents. Rather, he said he listened to campaign advice from the source.³

None of the respondents is owned or controlled by a political party, committee or candidate.⁴

The complaint in MUR 5540 alleges (1) the broadcast was a prohibited electioneering communication that was (2) coordinated with the Kerry-Edwards campaign, and thereby became a

¹ First General Counsel's Report in MURs 5540 and 5545 ("OGC Report on CBS") at 3-4.

² *Id.* at 4 (citation omitted).

³ *Id.* (citation omitted).

⁴ *See id.* at 5.

prohibited contribution. Further, the complaint alleges (3) the campaign should have reported the broadcast as a contribution, and CBS should have reported it as an expenditure.⁵

The complaint in MUR 5545 alleges the broadcast was an independent expenditure and a prohibited contribution.⁶

Both complaints assert that the press exemption does not apply.⁷

B. Sinclair MURs

The complaint in MUR 5562 alleges Sinclair Broadcasting, Inc. ("Sinclair") was about to broadcast a film unfavorable toward Senator Kerry. The complaint alleged this would be a prohibited electioneering communication and a prohibited in-kind contribution.⁸ However, Sinclair did not broadcast the film.⁹

The complaint in MUR 5570 alleges Sinclair, as well as corporate officers Frederick G. Smith and Mark Hyman,¹⁰ made a corporate contribution by broadcasting comments unfavorable to Senator Kerry¹¹ on KGAN, a Sinclair station in Cedar Rapids, Iowa. OGC has concluded that these comments appear to have been made during a news broadcast.¹²

None of the respondents is owned or controlled by a political party, committee or candidate.¹³

II. DISCUSSION

A. Sinclair MUR 5562

Because Sinclair did not broadcast the film that is the subject of MUR 5562, OGC has correctly concluded, without investigating the substance of the complaint, that there is no reason to believe that Sinclair violated FECA, as alleged in the complaint.¹⁴ Furthermore, because the complaint was wholly speculative when filed, it should have been rejected on that basis alone, *see* 2 U.S.C. § 437g(a)(1)

⁵ *Id.* at 2.

⁶ *Id.*

⁷ *Id.* at 2-3.

⁸ First General Counsel's Report in MURs 5562 and 5570 ("OGC Report on Sinclair") at 2, 3-4.

⁹ *Id.* at 4.

¹⁰ *Id.* at 5.

¹¹ *Id.* at 2.

¹² *Id.* at 6.

¹³ *See id.* at 3.

¹⁴ *Id.* at 4-5.

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(2002); see *In the Matter of Phillip Morris Cos.*, MUR 4766, SOR of Comm'r Mason at 3-5 (Fed. Election Comm'n May 5, 2000).¹⁵

B. CBS MUR 5540, CBS MUR 5545, and Sinclair MUR 5570

1. The Statute and Regulations

a. Contributions and the Press Exemption

This MUR involves corporate respondents. FECA prohibits corporations from making contributions. 2 U.S.C. § 441b(a) (2002).

FECA defines "contribution" as:

- (i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or
- (ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.

Id. § 431(8)(A).

There are exceptions to the definition of "contribution." One exception, found in Commission regulations, provides:

Any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer or producer), newspaper, magazine, or other periodical publication is not a contribution unless the facility is owned or controlled by any political party, political committee, or candidate, in which case the costs for a news story:

- (a) That represents a bona fide news account communicated in a publication of general circulation or on a licensed broadcasting facility; and
- (b) That is part of a general pattern of campaign-related news accounts that give reasonably equal coverage to all opposing candidates in the circulation or listening area, is not a contribution.

11 C.F.R. § 100.73. In other words, for our purposes here, what may otherwise be a contribution is not a contribution if (1) it is a "cost incurred in covering or carrying a news story, commentary, or

¹⁵ While there may be some argument that the Commission may consider a complaint alleging a violation of FECA has not, but is about to occur, see 2 U.S.C. § 437g(a)(2), the Commission could not rely on a complaint, such as that in MUR 4960, with nothing more than speculation and hearsay as the basis to investigate an allegedly contemplated violation. See *In re Hillary Rodham Clinton for US Senate Exploratory Cmte*, MUR 4960, SOR of Comm'rs Mason, Sandstrom, Smith and Thomas at 2-3 (Fed. Election Comm'n Dec. 21, 2000). Doing so would amount to investigating an allegation that a broadcaster (in this case) is considering doing something that might violate the law.

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editorial[,]" (2) the news story, commentary, or editorial is carried or covered by broadcasting station, newspaper, magazine, or other periodical, and (3) the facilities are not "owned or controlled by any political party, political committee, or candidate" *Id.*

b. Expenditures and the Press Exemption

FECA also prohibits corporations, with an exception not applicable in this matter, from making expenditures. 2 U.S.C. § 441b(a).

FECA defines "expenditure" as:

- (i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and
- (ii) a written contract, promise, or agreement to make an expenditure.

Id. § 431(9)(A).

There are limits on the definition of "expenditure." For example, as a matter of statutory construction to avoid unconstitutional overbreadth and vagueness, *see McConnell v. FEC*, 540 U.S. 93, 191-92 (2003); *Anderson v. Spear*, 356 F.3d 651, 663-66 (6th Cir.), *cert. denied*, 125 S.Ct. 453 (2004), the Supreme Court has limited the term "expenditure" to words expressly advocating the election or defeat of a clearly identified candidate. *See FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 248-49 (1986) ("MCFL") (applying the express-advocacy test to corporations (citing *Buckley v. Valeo*, 424 U.S. 1, 42, 44 n.52, 80 (1976) (establishing the express-advocacy test))). Moreover, the statute itself includes the press exemption, which provides:

The term "expenditure" does not include—

- (i) any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate

2 U.S.C. § 431(9)(B). In other words, what may otherwise be an expenditure is not an expenditure if (1) it is a "news story, commentary, or editorial[,]" (2) it is "distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication," and (3) the facilities are not "owned or controlled by any political party, political committee, or candidate" *Id.*

In the context of alleged corporate expenditures, one court has held that there is an additional limit on the press exemption: The press activity must (4) "fall broadly within the press entity's legitimate press function." *Reader's Digest Ass'n, Inc. v. FEC*, 509 F. Supp. 1210, 1214 (S.D.N.Y. 1981). However, "legitimate press function" is a broad concept. For example, another court held that the press exemption applies to a solicitation letter seeking new subscribers to a publication. *FEC v. Phillips Publishing, Inc.*, 517 F. Supp. 1308, 1313 (D.D.C. 1981).

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c. Electioneering Communications and the Press Exemption

FECA prohibits corporations other than *MCFL* corporations, *see McConnell*, 540 U.S. at 209-11, from making electioneering communications. FECA defines “electioneering communication” as follows:

(i) The term “electioneering communication” means any broadcast, cable, or satellite communication which—

(I) refers to a clearly identified candidate for Federal office;

(II) is made within—

(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or

(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and

(III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

2 U.S.C. § 434(f)(3)(A).

The press exemption for electioneering communications is similar to the press exemption for expenditures. Thus, FECA provides:

The term “electioneering communication” does not include—

(i) a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate

Id. § 434(f)(3)(B). In other words, what may otherwise be an electioneering communication is not an electioneering communication if (1) it is in a “news story, commentary, or editorial[.]” (2) it is “distributed through the facilities of any broadcasting station,” and (3) the facilities are not “owned or controlled by any political party, political committee, or candidate” *Id.*

2. Applying the Press Exemption

The MUR 5440 complaint asserts that the press exemption does not apply to the *60 Minutes Wednesday* broadcast because CBS did not verify its sources. Similarly, the MUR 5445 complaint

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asserts that the press exemption does not apply to the broadcast because it, in the complainant's view, expressly advocated the defeat of President Bush.¹⁶

a. The Statute and Regulations

However, neither of these factors – verification or express advocacy – affects whether the press exemption applies. See 11 C.F.R. § 100.73 (contributions); 2 U.S.C. § 431(9)(B)(i) (expenditures); *id.* § 434(f)(3)(B) (electioneering communications). Neither the statute nor the regulations speak of a “verified news story, commentary or editorial,” nor do they speak of a “news story, commentary or editorial that does not expressly advocate.” The statute, for example, requires only that the news story, commentary or editorial be distributed through the specified facilities and that such facilities not be “owned or controlled by any political party, political committee, or candidate” *Id.* § 431(9)(B)(i); see also *id.* § 434(f)(3)(B). Nor do regulations on the press exemption speak of verification or express advocacy. See 11 C.F.R. § 100.73 (contributions); *id.* § 100.132 (2002) (expenditures); *id.* § 100.29(c)(2) (2002) (electioneering communications).

Neither the statute nor the regulations require that for the press exemption to apply, the press verify its stories, be accurate, be fair or be balanced. See *In re KBHK Channel 45, ABC News et al.*, MURs 5110 and 5162, SOR of Chairman McDonald, Vice Chairman Mason and Comm’rs Sandstrom, Smith and Wold at 3 (Fed. Election Comm’n July 24, 2001).

And even if a news story, commentary, or editorial in the press contains express advocacy, the press exemption still applies. If this were not so, then an incorporated newspaper would violate FECA every time it ran an editorial endorsing a federal candidate. That cannot be. The content of the news “is beyond the jurisdiction of this agency.” *Id.*

b. Previous MURs

SORs in several other MURs affirm these principles either directly or indirectly.

In a MUR involving the appearance of former Congressman and new congressional candidate Robert Dornan as a guest host on radio talk shows, four commissioners observed that allegations of what Congressman Dornan said on the programs are irrelevant to determining whether the press exemption applies. *In the Matter of Robert K. Dornan*, MUR 4689, SOR of Vice Chairman Wold and Comm’rs Elliott, Mason and Sandstrom at 4 (Fed. Election Comm’n Dec. 20, 1999).

A separate SOR noted the press exemption has no requirement of fairness or equal access. *Id.* SOR of Comm’r Mason at 7 and n.6 (Fed. Election Comm’n Feb. 14, 2000). The press exemption also is not limited by express advocacy or a solicitation. *Id.* at 11. Moreover, an investigation into a press entity’s editorial policies has no place. See *id.* at 6, 9. “It is difficult to imagine an assertion more contrary to the First Amendment than the claim that the FEC, a federal agency, has the authority to control the news media’s choice of formats, hosts, commentators and editorial policies” *Id.* at 6.

¹⁶ OGC Report on CBS at 2. The term “express advocacy” derives from *Buckley*, 424 U.S. at 44 & n.52.

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Five commissioners later struck a similar chord, holding that the press exemption protects unbalanced reporting and commentary. *In re ABC, CBS, NBC, New York Times, Los Angeles Times, Washington Post et al.*, MUR 4929, 5006, 5090, 5117, SOR of Chairman Wold, Vice Chairman McDonald and Comm'rs Mason, Sandstrom and Thomas at 3 (Fed. Election Comm'n Dec. 20, 2000). Allegations that Republican National Committee suggestions may have influenced coverage did not suffice to find reason to believe that the *New York Times* violated FECA, because the press exemption protected the newspaper, *id.* at 3-4, regardless of whether it credulously or recklessly accepted and reported claims by a political party or candidate. *Id.* at 4.

On another occasion, a complaint alleged that the respondents' biased news broadcasts had advocated the election of individual candidates and political groups. *In the Matter of CBS News, et al.*, MUR 4946, SOR of Chairman Wold and Comm'r Mason at 1 (Fed. Election Comm'n June 30, 2000). The SOR recalled that courts have held that the press exemption applies when the press operates within its "legitimate press function." *Id.* at 1-2 (citing *Reader's Digest*, 509 F. Supp. at 1214; *Phillips Publishing*, 517 F. Supp. at 1313). The reasoning of the SOR rejected the complaint as a threshold matter by noting that the content of any news story, commentary, or editorial is irrelevant to determining whether the press is exercising its legitimate press function. *See id.* at 2. Political bias in news reporting does not violate FECA. *See id.*

In a MUR involving candidate debates, an SOR noted that the press exemption allows the press to use whatever criteria it deems appropriate to select candidates, regardless of how slanted the debate may be. *In re Union Leader Corp., et al.*, MURs 4956, 4962 and 4963, SOR of Comm'r Mason at 2 (Fed. Election Comm'n Feb. 13, 2001). The press exemption covers express advocacy in debates. *Id.* at 3 (citation omitted).

Still another SOR noted the importance of the press exemption even in matters of lesser significance. The Commission's proper course is not merely to take no action and close the file under *Heckler v. Chaney*, 470 U.S. 821 (1985). Rather, the Commission should find no reason to believe that the respondents violated FECA, and then close the file. *See in the Matter of Clear Channel Communications, Inc., Nick Lampson for Congress and William S. Leonard, as treasurer*, MUR 5261, SOR of Vice Chairman Smith and Comm'rs Mason, McDonald and Toner at 2 (Fed. Election Comm'n Oct. 9, 2003).

c. Court Orders

The *Reader's Digest* court properly concluded that the press exemption is important because

freedom of the press is substantially eroded by investigation of the press, even if legal action is not taken following the investigation. Those concerns are particularly acute where a governmental entity is investigating the press in connection with the dissemination of political matter. These factors support the interpretation of the statutory exemption as barring even investigation of press activities which fall within the exemption.

509 F. Supp. at 1214. Thus, "until and unless the press exemption were found inapplicable, the FEC is barred from investigating the substance of the complaint." *Id.* at 1215. The press exemption "authorizes court intervention if the FEC oversteps the limit[]." *Id.* at 1214.

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That does not mean the Commission may not conduct an investigation limited to determining whether the exemption applies. It may, *see id.*, if there is a need for additional information to determine whether the exemption applies. *See Phillips Publishing*, 517 F. Supp. at 1313 (citing *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 396 (D.C. Cir. 1981) (“MNPL”)).

In addition, before any such limited investigation, there must be “a threshold showing of wrongdoing” on the part of the respondent. In assessing whether this threshold is met,

“mere ‘official curiosity’ will not suffice as the basis for FEC investigations, as it might in others,” *MNPL*, *supra* at 388, and the Supreme Court has warned that “the power of compulsory process (must) be carefully circumscribed when the investigative process tends to impinge on such highly sensitive areas of freedom of speech or press, freedom of political association, and freedom of communication of ideas.” *Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957).

Phillips Publishing, 517 F. Supp. at 1314 (alteration in original) (parallel citations omitted).

There should be no misunderstanding of the “legitimate press function” criterion of *Reader’s Digest* as somehow limiting the “news story, commentary, or editorial” exemption, 11 C.F.R. § 100.73; 2 U.S.C. § 431(9)(B); *id.* § 434(f)(3)(B), to “legitimate” news stories, commentaries or editorials. Rather, news stories, commentaries or editorials carried in broadcast programming or in the pages of publications are absolutely exempt. *Reader’s Digest*, 509 F. Supp. at 1214-15, and *Phillips Publishing*, 517 F. Supp. at 1312-14, both involved press activities outside the pages of the publications at issue. The courts held, and the Commission has long conceded, that the exemption should be construed to include such activities beyond actual broadcasts or outside the pages of a publication, including (in these cases) publicity or subscription solicitations for the publications involved. The *Reader’s Digest* court contrasted such efforts with a hypothetical example of a newspaper hiring persons to denounce alleged illegal acts of a candidate. 509 F. Supp. at 1214. Thus the “legitimate press function” criterion goes to the nature of the activity at issue, not to the veracity, professionalism or motivation of the publisher, editor, producers, reporters or writers. There is no question that investigations into past activities of political candidates is a “legitimate press function.”

d. Applying the Press Exemption Here

The assertions regarding verification and express advocacy are incorrect, and the press exemption applies.

Regarding the allegations of corporate contributions, in CBS MURs 5540 and 5545 and Sinclair MUR 5570, the respondents (1) incurred costs in carrying a news story, commentary, or editorial (2) carried or covered by a broadcasting station that is (3) not “owned or controlled by any political party, political committee, or candidate ...” *See* 11 C.F.R. § 100.73.

Regarding the allegations of corporate expenditures, in CBS MUR 5545, the MUR involves (1) a news story, commentary, or editorial (2) distributed through the facilities of a broadcasting station (3)

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not "owned or controlled by any political party, political committee, or candidate." *See* 2 U.S.C. §§ 431(9)(B)(i).

Regarding the allegations of corporate electioneering communications, in CBS MUR 5540, the MUR involves (1) a news story, commentary, or editorial (2) distributed through the facilities of a broadcasting station (3) not "owned or controlled by any political party, political committee, or candidate." *See* 2 U.S.C. §§ 434(f)(3)(B)(i).

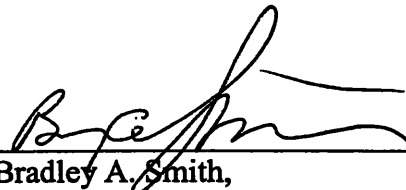
III. CONCLUSION

For the foregoing reasons, in addition to those OGC stated, the Commission was correct in finding no reason to believe and closing the files in these matters.

July 12, 2005



David M. Mason,
Commissioner



Bradley A. Smith,
Commissioner

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