

FILED
MAY 25 2006
CLERK OF SUPREME COURT
STATE OF WASHINGTON

RECEIVED
05 MAY 25 PM 4:37
BY C. J. HERRITT
CLERK

No. 77966-0

SUPREME COURT OF THE STATE OF WASHINGTON

SAN JUAN COUNTY, a political subdivision of the State of Washington,
CITY OF KENT, a political subdivision of the State of Washington, CITY
OF AUBURN, a political subdivision of the State of Washington, CITY
OF SEATTLE, a political subdivision of the State of Washington, *ex rel.*
the STATE OF WASHINGTON,

Respondents,

v.

NO NEW GAS TAX, a Washington Political Action Committee, and
JEFFREY DAVIS, an individual and Treasurer of NO NEW GAS TAX,

Appellants.

**APPELLANTS NO NEW GAS TAX AND JEFFREY DAVIS'S
ANSWER TO AMICUS CURIAE BRIEF OF THE ATTORNEY
GENERAL**

William R. Maurer, WSBA No. 25451
Michael Bindas, WSBA No. 31590

INSTITUTE FOR JUSTICE
Washington Chapter
811 First Avenue, Suite 625
Seattle, Washington 98104
Telephone: (206) 341-9300

TABLE OF CONTENTS

	<u>Page(s)</u>
TABLE OF AUTHORITIES	iii
INTRODUCTION.....	1
A. Wilbur And Carlson’s Commentary Was Not A Contribution Because It Was Not Political Advertising.....	3
1. Talk Radio Commentary Is Not “Political Advertising” If It Occurs During Airtime For Which The Station Does Not Normally Charge.....	4
2. This Court Should Not Temper The Regulation Defining “Political Advertising” With An Advisory Letter That Has No Legal Effect.....	5
B. Carlson and Wilbur’s Commentary Falls Squarely Within The Statutory Press Exemption	6
1. To Protect The Constitutional Guarantees Of Free Speech, Press, And Association, This Court Should Adopt The FEC’s Approach To The Press Exemption.....	7
2. Under The FEC Approach, Carlson And Wilbur’s Commentary Falls Squarely Within The Press Exemption	12
C. The Allegation Of Coordination Does Not Divest Commentary Of Protection Under The Press Exemption.....	15

	<u>Page(s)</u>
1. Allegations Of Coordination Between The Media And A Political Committee Cannot Override The Press Exemption.....	15
2. Even Under The AG’s Proposed Standard, Wilbur And Carlson’s Commentary Is Protected	17
CONCLUSION	20

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Cases</u>	
<i>Bates v. State Bar of Arizona</i> , 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977).....	11
<i>Collier v. City of Tacoma</i> , 121 Wn.2d 737, 854 P.2d 1046 (1993)	12
<i>Ino Ino, Inc. v. City of Bellevue</i> , 132 Wn.2d 103, 937 P.2d 154 (1997)....	12
<i>Landgraf v. USI Film Prods.</i> , 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994).....	6
<i>McConnell v. Fed. Election Comm'n</i> , 540 U.S. 93, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003).....	12
<i>Miami Herald Publ'g Co. v. Tornillo</i> , 418 U.S. 241, 94 S. Ct. 2831, 41 L. Ed. 2d 730 (1974)	9
<i>FEC v. Phillips Publ'g, Inc.</i> , 517 F. Supp. 1308 (D.D.C. 1981)	8, 9
<i>Reader's Digest Ass'n, Inc. v. FEC</i> , 509 F. Supp. 1210 (S.D.N.Y. 1981).....	8, 9, 17
<i>Village of Schaumburg v. Citizens for a Better Env't</i> , 444 U.S. 620, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980)	11-12
<i>Wash. Educ. Ass'n v. Wash. State Pub. Disclosure Comm'n</i> , 150 Wn.2d 612, 80 P.3d 608 (2003)	6
<u>Codes, Rules, and Statutes</u>	
RCW 42.17.020(15)(b)(iv)	7
WAC 390-05-290.....	<i>passim</i>

Page(s)

Other Authorities

In re CBS Broad., Inc., et al., MURs 5540, 5545, 5562 & 5570,
FEC, Statement of Reasons of Comm’r Weintraub
(July 12, 2005) 7-8, 11, 16

In re CBS Broad., Inc., et al., MURs 5540 and 5545, Statement of Reasons
of Commissioners Vice Chairman Toner and Comm’rs Mason and Smith
(July 11, 2005)17

In re Dornan, et al., MUR 4689, FEC, Statement of Reasons of Vice
Chairman Wold and Comm’rs Elliott, Mason, and Sandstrom (Dec. 20,
1999)10

In re Kobylt, et al., MUR 5569, FEC, First General Counsel’s Report
(Jan. 10, 2006)..... 13-15, 16

In re Kobylt, et al., MUR 5569, FEC, Statement of Reasons of Chairman
Toner and Comm’rs Mason and von Spakovsky (Mar. 17, 2006).....10

Internet Communications, 71 Fed. Reg. 18,589
(Apr. 12, 2006)..... 10-11, 15-16

INTRODUCTION

NNGT agrees with the *amicus curiae* brief submitted by the Attorney General (“AG”) on many important — indeed, critical — points.¹ Foremost is the AG’s recognition of the importance of clarity in the treatment of the press in Washington’s campaign laws. As the AG cautions, “without clearly established boundaries, the media may be subject to harassment that could have a chilling effect on important speech necessary to inform people about elections.” AG’s Br. at 2. As NNGT made clear in its briefing in this case, the Municipalities jettisoned the established constitutional, statutory, and administrative protections in Washington law, replacing certainty with vagueness.

NNGT also agrees with the AG that such a clearly established boundary exists in WAC 390-05-290, which draws a line between paid, commercial airtime and unpaid, program airtime. As the AG explains, this provision excludes from the definition of “political advertising” content time that “takes place during a program, when payment normally is not required, as opposed to during commercial advertising time, when payment normally is required.” AG’s Br. at 6. The evidence in this case

¹ The AG’s brief is limited to addressing Washington statutes and regulations. As explained in NNGT’s briefing, the United States and Washington Constitutions forbid the actions of the Municipalities, regardless of the protections of Washington statutes and regulations and especially in light of the Municipalities’ wholesale gutting of these protections.

was uncontroverted that any so-called “contributions” that occurred took place during program time and thus were not “political advertising” under Washington law.

NNGT again agrees with the AG that decisions of the Federal Election Commission (“FEC”) concerning the federal press exemption should inform this Court’s interpretation of Washington’s press exemption. *See* AG’s Br. at 6. The FEC has consistently taken the position urged by NNGT and its supporting *amici* in this case.

Finally, NNGT agrees with the AG’s rejection of the radically expansive notion of agency that the Municipalities would have this Court adopt. For instance, a host does not, as the Municipalities contend, become an agent of a political committee merely by “[s]peaking on the air at the request of the Campaign.” Municipalities’ Reply Br. at 11. Such a rule would gut the protections for the press in the Constitution and Washington law and would result in a significant and unconstitutional intrusion by the government into the editorial discretion of the press.

That said, NNGT parts ways with the AG in a few significant respects. First, the AG’s reliance on an advisory letter from the Public Disclosure Commission (“PDC”) concerning “political advertising” is inconsistent with the actual agency regulation defining that term and is therefore inappropriate. *See* AG’s Br. at 10-11.

Second, the AG avoids application of the law to the facts of this case because of an underlying “factual dispute” between the parties. *See* AG’s Br. at 3. This case was decided as a motion to dismiss based on findings determined at a preliminary injunction hearing with informal and incomplete procedures inappropriate for a final judgment on the merits. Even so, the Court has before it all the facts necessary to actually dispose of the case. As explained below, the dispositive facts — more precisely, dispositive fact — is undisputed and decidedly in NNGT’s favor.

A. Wilbur And Carlson’s Commentary Was Not A Contribution Because It Was Not Political Advertising.

The Municipalities’ alleged, and the trial court wrongly concluded, that NNGT failed to report in-kind contributions it had received in the form of “political advertising.” *See* CP 388; CP 1495; CP 1520.² Although it is true that “[t]he financing of . . . political advertising” may constitute a contribution under the Fair Campaign Practices Act (“FCPA”), the trial court did not even cite — much less apply — WAC 390-05-290, the regulation defining “political advertising,” to determine whether any of Carlson and Wilbur’s commentary was “political

² Who is supposed to have made the alleged contributions of “political advertising” is anyone’s guess. At the preliminary injunction stage, the Municipalities alleged, and the trial court held, that the contributions came from Fisher Communications. *See* RP (11/02/05) 24. At entry of final judgment, however, the court stated that the earlier holding was incorrect and that the contributions actually came from Carlson and Wilbur. *Id.* The Municipalities agreed, even though this had never been their theory of the case, and even though Carlson and Wilbur were never made parties to, and never appeared in, the case. *Id.* at 24-25.

advertising.” Had the trial court simply applied the regulation, it could have come to no other conclusion but that Carlson and Wilbur’s commentary was not “political advertising,” and, thus, not a contribution.

1. Talk Radio Commentary Is Not “Political Advertising” If It Occurs During Airtime For Which The Station Does Not Normally Charge.

The AG correctly observes that Washington’s campaign laws contain a bright line designed to protect the very kind of press commentary at issue in this case. It appears in the WAC’s definition of “political advertising,” which is the in-kind contribution that Carlson and/or Wilbur and/or Fisher supposedly provided the campaign. The WAC provides:

Political advertising does *not* include letters to the editor, news or feature articles, editorial comment or replies thereto in a regularly published newspaper, periodical, or on a radio or television broadcast *where payment for the printed space or broadcast time is not normally required.*

WAC 390-05-290 (emphasis added).

As the AG notes, this definition draws a dispositive distinction between paid commercial airtime and unpaid program airtime. It excludes from “political advertising” all “coverage about a candidate or ballot measure when it takes place during a program, when payment normally is not required, as opposed to during commercial advertising time, when payment normally is required.” AG’s Br. at 6.

Applying this regulation, there is only one conclusion: that the commentary at issue in this case was not political advertising and, thus, not a contribution. According to the un rebutted declaration of Robert Dunlop, General Manager of Fisher Broadcasting-Seattle Radio L.L.C.:

Fisher Seattle Radio *does not charge*, and *has never charged* any person or entity for the value of any content airtime associated with either Mr. Carlson's or Mr. Wilbur's talkshows and we would have no way to economically quantify the value of such content The speech that is at issue in this case occurred during content airtime.

CP 1035-36 (emphasis added).

Dunlop's declaration should have been the beginning and end of the Municipalities' case against NNGT. Under Washington law, there was no contribution of "political advertising" and the prosecution was baseless.

2. This Court Should Not Temper The Regulation Defining "Political Advertising" With An Advisory Letter That Has No Legal Effect.

Although the AG is correct that the PDC rule defining "political advertising" draws a firm line between speech that occurs "during a program, when payment normally is not required," and speech that occurs "during commercial advertising time," AG's Br. at 6, he mistakenly suggests that this bright line is somehow blurred by a 1995 PDC advisory letter. *Id.* at 10-11.

As this Court has held, PDC advisory materials “have no legal or regulatory effect and implicate no one’s legal interests.” *Wash. Educ. Ass’n v. Wash. State Pub. Disclosure Comm’n*, 150 Wn.2d 612, 615, 80 P.3d 608 (2003). “A person cannot violate an interpretive statement, and conduct contrary to the agency’s written opinion does not subject a person to penalty or administrative sanctions.” *Id.* at 619.³

It is undisputed that all of the commentary at issue occurred during Carlson and Wilbur’s programs — not during commercial advertising time. Thus, it was not “political advertising,” regardless of its content.

B. Carlson and Wilbur’s Commentary Falls Squarely Within The Statutory Press Exemption.

Even if this Court concludes that WAC 390-05-290’s definition of political advertising is not dispositive, Carlson and Wilbur’s commentary is nevertheless exempted from regulation under the FCPA because it falls squarely within the Act’s “press exemption” (also known as the “media exemption”), which removes from the definition of “contribution” any

³ It is telling that the Municipalities did not even cite the PDC’s decade-old advisory letter to the trial court. Only in preparing their response on appeal did they unearth the correspondence, which apparently had lain dormant “at the State Archives” for the last decade. *See* Municipalities’ Resp. Br. at 1. NNGT was perfectly justified in relying on a duly promulgated regulation of general applicability rather than a letter in the state archives taking a position in a dispute to which it was not a party. “Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.” *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994). Here, NNGT’s settled expectation was in the duly promulgated regulation defining “political advertising” — not in a piece of correspondence devoid of legal effect.

“news item, feature, commentary, or editorial in a regularly scheduled news medium that is of primary interest to the general public, that is in a news medium controlled by a person whose business is that news medium, and that is not controlled by a candidate or a political committee.” RCW 42.17.020(15)(b)(iv).⁴

1. To Protect The Constitutional Guarantees Of Free Speech, Press, And Association, This Court Should Adopt The FEC’s Approach To The Press Exemption.

The AG correctly urges this Court to look to FEC decisions concerning the federal press exemption “to determine what kind of conduct falls within [Washington’s] media exemption.” AG’s Br. at 6; *see also id.* (“In interpreting Washington law, the PDC consider[s] the approach of the Federal Elections Commission[.]” (alterations in original; internal quotation marks and citation omitted)). The FEC’s approach is a simple, two-question analysis:

When faced with allegations against the press, the FEC need only determine whether the press entity is owned or controlled by a party or candidate and whether the press entity was acting as a press entity in disseminating the story or commentary at issue.

⁴ The AG’s brief twice states that the press exemption “does not apply to ‘political advertising.’” AG’s Br. at 5, 9. The AG provides no support for this proposition, and the two FEC advisory opinions he discusses in this section of the brief do not even address the press exemption. This should come as no surprise, however, because the very purpose of the press exemption is to exempt from regulation speech that otherwise might constitute a “contribution” of political advertising. Moreover, and as explained below, the press exemption is *constitutionally compelled* — it *cannot* be restricted by statute or regulation. In any event, as explained above, the speech at issue in this case simply was not political advertising. *See* WAC 390-05-290.

In re CBS Broad., Inc., et al., MURs 5540, 5545, 5562 & 5570, FEC, Statement of Reasons of Comm’r Weintraub at 2 (July 12, 2005); *see also Reader’s Digest Ass’n, Inc. v. FEC*, 509 F. Supp. 1210, 1214-15 (S.D.N.Y. 1981); *FEC v. Phillips Publ’g, Inc.*, 517 F. Supp. 1308, 1312-13 (D.D.C. 1981).

The extremely limited scope of the federal press exemption inquiry is designed to ensure that the press is afforded the broadest possible protection — not because of a desire of the FEC to go easy on the press, but rather because such protection is *constitutionally required*:

No explicit reference is to be found in the statute to this two-step process. It [is] . . . the necessary accommodation between, on the one hand, the Commission’s duty to investigate possible violations and, on the other, the statutory exemption for the press combined with *a First Amendment distaste for government investigations of press functions*.

Reader’s Digest, 509 F. Supp. at 1215 (emphasis added); *see also Phillips Publ’g*, 517 F. Supp. at 1312-13 (“The procedure . . . strictly limit[s] the inquiry in order to minimize harm to First Amendment values.”). As Congress explained in adopting the press exemption, its purpose is to “assure[] the *unfettered right* of the . . . media to cover and comment on political campaigns.” *Id.* at 1312 (omission in original; emphasis added (quoting H. Rep. No. 93-943, 93d Cong., 2d Sess. at 4 (1974))).

So protective of speech is the press exemption that federal courts prohibit *any* substantive investigation of the press entity in determining whether it enjoys the exemption:

[U]ntil and unless the press exemption were found inapplicable, *the FEC is barred from investigating the substance of the complaint*. No inquiry may be addressed to sources of information, research, motivation, connection with the campaign, etc. Indeed all such investigation is permanently barred . . . unless it is shown that the press exemption is not applicable.

Reader's Digest, 509 F. Supp. at 1215; *see also Phillips Publ'g*, 517 F. Supp. at 1313 (“If the press entity is not owned or controlled by a political party or candidate and it is acting as a press entity, the FEC . . . is barred from investigating the subject matter of the complaint.”).

Thus, as a matter of constitutional necessity, the *content* of media commentary may not be considered in conducting the press exemption inquiry. *See Reader's Digest*, 509 F. Supp at 1215-16 (noting that inquiry into “the content of” a videotape distributed by a magazine publisher “go[es] beyond . . . the permitted scope of the FEC’s investigation”).⁵ The FEC pays no regard to what was said during a particular broadcast in determining whether it falls within the press exemption.

⁵ *See also Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258, 94 S. Ct. 2831, 41 L. Ed. 2d 730 (1974) (“The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, . . . constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.”).

For example, in holding that the press exemption shielded on-air commentary of talk-radio guest host Robert Dornan, the FEC explained that “[a]llegations of what Mr. Dornan said on the programs on which he was a guest host [were] . . . irrelevant.” *In re Dornan, et al.*, MUR 4689, FEC, Statement of Reasons of Vice Chairman Wold and Comm’rs Elliott, Mason, and Sandstrom at 4 (Dec. 20, 1999). Much more recently, commissioners reiterated that the inquiry “does not require any content analysis of the radio shows,” and that “the political content of the show is immaterial.” *In re Kobylt, et al.*, MUR 5569, FEC, Statement of Reasons of Chairman Toner and Comm’rs Mason and von Spakovsky at 1, 3 (Mar. 17, 2006) (footnote omitted).

It is therefore irrelevant whether the press entity expressly advocates for or against a candidate or political measure. As a unanimous FEC explained on April 12, 2006, “the press exemption applies regardless of whether the news story, commentary, or editorial contains express advocacy.” *Internet Communications*, 71 Fed. Reg. 18,589, 18,609 (Apr. 12, 2006). “Media entities routinely endorse candidates, and the media exemption protects their right to do so.” *Id.*

It is likewise irrelevant whether the commentary at issue is biased, unfair, or unbalanced. “Commissioners have repeatedly concluded that the media exemption applies without regard to whether programming is

biased or balanced.” *Id.* Commissioner Weintraub recently made the point even more bluntly:

It is not the role of the Federal Election Commission to determine whether a news story issued by a press entity is legitimate, responsible, or verified. . . .

Whether particular broadcasts were fair, balanced, or accurate is irrelevant given the applicability of the press exemption.

In re CBS Broad., Inc., et al., MURs 5540, 5545, 5562 & 5570, FEC, Statement of Reasons of Comm’r Weintraub at 2 (July 12, 2005).

Finally, and as again explained by a unanimous commission, it is irrelevant whether the press entity solicits contributions for a candidate or a political measure. “The Commission has . . . concluded that press entities do not forfeit the press exemption if they solicit contributions for candidates.” *Internet Communications*, 71 Fed. Reg. at 18,609. Indeed, the Supreme Court has long “protected speech even though it is in the form of . . . a solicitation to pay or contribute money,” *Bates v. State Bar of Arizona*, 433 U.S. 350, 363, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977) (citations omitted), because “solicitation is characteristically intertwined with . . . speech seeking support for particular causes or for particular views on . . . political . . . issues.” *Village of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 632, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980). “[W]ithout solicitation the flow of such information and advocacy would

likely cease.” *Id.*; see also *McConnell v. FEC*, 540 U.S. 93, 139-40, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003) (quoting *Schaumburg*).

In short, the FEC approach to the press exemption is limited to two simple questions: (1) Is the press entity owned or controlled by a political committee? and (2) Was the press entity acting as a press entity in disseminating the commentary at issue? The First Amendment tolerates no further investigation. Because article I, section 5 affords even greater protection to political speech than does the First Amendment, this Court’s inquiry should be, if anything, even less intrusive. See *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 116-17, 937 P.2d 154 (1997); *Collier v. City of Tacoma*, 121 Wn.2d 737, 747-48, 854 P.2d 1046 (1993).

2. Under The FEC Approach, Carlson And Wilbur’s Commentary Falls Squarely Within The Press Exemption.

In light of the FEC’s two-step inquiry, Carlson and Wilbur’s commentary falls squarely within the press exemption. First, the Municipalities never alleged, nor did the trial court ever find, that Fisher was owned or controlled by NNGT. To the contrary, the record conclusively demonstrates it was not. See CP 1035 ¶ 5 (unrebutted declaration of Rob Dunlop, stating Fisher is “not owned or controlled by any political party or political committee”).

Second, it is undisputed that Fisher was acting as a press entity in disseminating the commentary at issue. The commentary occurred during the course of Kirby Wilbur's and John Carlson's talk shows, which were regularly scheduled on Fisher's KVI-AM station from 5:00 to 9:00 a.m. and 3:00 to 6:00 p.m., respectively, Monday through Friday. CP 1035 ¶ 4. Moreover, the commentary was par for the course: the shows ordinarily consist of "commentary, editorial debate and discussion on current issues of interest to the general public." CP 1035 ¶ 4.

There is no need for this Court to go any further; in fact, the additional inquiry and investigation undertaken by the Municipalities and permitted by the trial court is *constitutionally proscribed*. Indeed, the FEC has declined to conduct such an inquiry even where the allegations in a complaint demonstrate considerable coordination between a campaign and the media. For instance, in *In re Kobylt*, an FEC enforcement case made public last month, a complainant claimed that a Los Angeles radio station made in-kind contributions to congressional candidate Cynthia Matthews by broadcasting commentary in favor of her and against her opponent, David Dreier. *In re Kobylt, et al.*, MUR 5569, FEC, First General Counsel's Report at 1-2, 6 (Jan. 10, 2006) (made public Apr. 24, 2006). Specifically, the complaint alleged that:

- Two of the station’s hosts engaged in express advocacy for Matthews and against Dreier. For example, in numerous on-air segments entitled “Political Human Sacrifice,” the hosts directly advocated for Matthews (*e.g.*, “[S]he is the one you ought to vote for”) and against Dreier (*e.g.*, “Dreier has to be taken out”). *Id.* at 3.⁶
- The two hosts engaged in on-air solicitation of funds for Matthews’ campaign. For example, the hosts had Matthews on their show and advised her to “[g]ive out a website if you want to get some volunteers, money, some support,” which Matthews did. *Id.* at 4.
- The hosts coordinated their efforts with Matthews. For example, the hosts staged and broadcasted a “Fire Dreier” rally, invited Matthews, and interviewed her live, on air, from the rally. *Id.*

Despite the allegations, the FEC concluded that these issues were *irrelevant*. Because (1) the station was “not owned or controlled by any party, candidate or committee,” and (2) because broadcast of the commentary and rally were “legitimate press functions of a media entity,”

⁶ The advocacy extended to the show’s and station’s websites, which contained, among other things, direct links to Matthews’ campaign website. *Id.* at 4.

the press exemption applied — period. *Id.* at 6, 8. The same result is warranted — indeed, constitutionally mandated — in this case.

C. The Allegation Of Coordination Does Not Divest Commentary Of Protection Under The Press Exemption.

While the AG correctly recognizes the extremely speech-protective nature of the FEC’s approach to the press exemption — *e.g.*, it “allow[s] a talk show host . . . to discuss a ballot measure; to interview sponsors or opponents; to advocate the passage or defeat of the measure; and to urge listeners to volunteer or contribute funds to the passage or defeat of the measure,” AG’s Br. at 9 — he incorrectly suggests that the exemption somehow evaporates if a host is too close to a political committee — that is, if the host effectively *is* the committee or an agent thereof. *Id.* at 9-16.

Simply put, the FEC approach and Washington’s own press exemption are more protective than the AG’s brief recognizes; they permit *no* inquiry into alleged coordination between the media and a political committee. The AG’s confusion is understandable, as many of the FEC’s most express statements on this point were issued in the last few weeks.

1. Allegations Of Coordination Between The Media And A Political Committee Cannot Override the Press Exemption.

In a rulemaking decision issued on April 12, the Commission explained that “the presence or absence of alleged coordination between a

press entity and a candidate or political party is irrelevant to determining whether the . . . press exemption applies.” *Internet Communications*, 71 Fed. Reg. at 18,609. On April 24, the Commission reiterated this point in *In re Kobylt*, the compliance case involving two Los Angeles talk radio hosts: “The media exemption, where applicable, also encompasses what otherwise would be deemed ‘coordinated communication’ between a candidate or committee and a *bona fide* corporate media entity.” *In re Kobylt, et al.*, MUR 5569, FEC, First General Counsel’s Report at 10 (Jan. 10, 2006).

The practical need for protecting coordination between the press and campaigns — and, more importantly, the *constitutional imperative* for doing so — was recently explained by Commissioner Weintraub:

Whether the media entities communicated with political parties or candidates before the airing of the broadcasts is similarly irrelevant. *Indeed, it is difficult to fathom how journalists could cover campaigns if they had to worry that communicating with campaign workers could trigger a government investigation into supposed improper coordination.* Merely *investigating* such allegations would intrude upon Constitutional guarantees of freedom of the press.

In re CBS Broad., Inc., et al., MURs 5540, 5545, 5562 & 5570, FEC, Statement of Reasons of Comm’r Weintraub at 2 (July 12, 2005) (emphasis added). Commissioners Toner, Mason, and Smith agreed:

Allegations of coordination are of no import when applying the press exemption. What a press entity says in broadcasts, news stories and editorials is absolutely protected under the press exemption, regardless of whether any activities occurred that might otherwise constitute coordination under Commission regulations.

In re CBS Broad., Inc., et al., MURs 5540 and 5545, Statement of Reasons of Commissioners Vice Chairman Toner and Comm'rs Mason and Smith at 3 (July 11, 2005).

In short, and notwithstanding the AG's suggestion to the contrary, there is a bright-line, constitutionally compelled rule: "No inquiry may be addressed to . . . connection with the campaign[.]" *Reader's Digest*, 509 F. Supp. at 1215. Thus, Carlson and Wilbur's commentary was shielded by the press exemption, regardless of their relationship with NNGT.

2. Even Under The AG's Proposed Standard, Wilbur And Carlson's Commentary Is Protected.

Under the AG's suggested approach, a radio station loses its press exemption, and therefore "make[s] an in-kind contribution to a ballot measure," if its "talk show host is a political committee or [the committee's] authorized agent." AG's Br. at 13. The AG specifies four ways in which this may occur. None applies in this case.

First, the AG asserts that "a talk show host would be a political committee if he or she had an expectation of *receiving* a contribution" — that is, if he solicits contributions "to [himself] in care of the radio station

or to [a] bank account [he] ha[d] established.” *Id.* at 14. There is no allegation in this case, nor any evidence in the record, that Carlson or Wilbur requested that contributions be sent to them in care of KVI-AM or to a bank account that they had established.

According to the AG, a talk show host “would also be a political committee if he or she had the expectation of making an expenditure in support or opposition to a ballot measure . . . with funds contributed to the campaign.” *Id.* There is no allegation in this case, nor anything in the record suggesting, that Carlson or Wilbur had any expectation of making expenditures with funds contributed to the campaign.

A third way for a talk show host “to be a political committee,” the AG maintains, “is if the host is listed on the statement of organization filed with the PDC.” *Id.* at 15. Neither Carlson nor Wilbur is listed on NNGT’s statement of organization, which is a publicly filed document available at the PDC’s website. Defendant Jeffrey Davis, NNGT’s treasurer, is the only individual listed.

Finally, the AG asserts that a radio station may lose press protection if one of its talk show hosts is an “authorized agent” of a political committee. AG’s Br. at 13. “[A] talk show host,” the AG maintains, “would be an agent of a political committee if [1] the host and

the committee agreed that the host would act on behalf of the committee and [2] the host was acting under the control of the committee.” *Id.* at 16.

As an initial matter, it is important to note that the AG’s definition of “agent” — requiring both *agreement* and *control* — is much more constrained, and much more in line with Washington law, than the Municipalities’ definition. According to the Municipalities, a talk radio host becomes a campaign’s agent merely by “[s]peaking on the air at the request of the Campaign.” Municipalities’ Reply Br. at 11. Obviously, this cannot be the law. Under this view, almost all media interaction with a campaign would make the media “agents” — for instance, reporting information contained in a campaign’s press release, or writing about an issue suggested by a campaign, would render the host an “agent” of the campaign, subject to government regulation. Such an expansive definition could not withstand even the most deferential constitutional review.⁷

The Municipalities’ definition aside, there is no evidence in the record that Carlson and Wilbur were “acting under the control of” NNGT by discussing the I-912 campaign. *Id.* at 16. In this light, even applying the AG’s suggested approach, the commentary at issue was shielded by the press exemption.

⁷ Indeed, under the Municipalities’ definition, any media entity that reported information contained in the press release that San Juan County Prosecuting Attorney Randy Gaylord issued through Keep Washington Rolling, NNGT’s opponent, (unwittingly) became an agent of Keep Washington Rolling. *See* CP 1271-72.

CONCLUSION

The Municipalities have rewritten the FCPA to introduce vagueness where there was certainty and retaliation where there was even-handedness. In so doing, they undercut the purpose and vitality of the very law they purport to implement. The AG suggests a number of ways to return the Act to its intended scope and minimize the possibility that it could be used, as it was in this case, as a bludgeon against political enemies. The approach he urges does not, however, consider the constitutional imperative behind the press exemption and, thus, does not go as far as necessary to ensure the rights of free speech, press, and association are protected. But even applying his approach, the trial court's rulings must be reversed.

RESPECTFULLY submitted this 25th day of May 2006.

INSTITUTE FOR JUSTICE
Washington Chapter

FILED AS ATTACHMENT
TO E-MAIL

By _____/s/_____
William R. Maurer, WSBA #25451
Michael Bindas, WSBA #31590
811 First Avenue, Suite 625
Seattle, Washington 98104
(206) 341-9300
Attorneys for Appellants No New Gas Tax
and Jeffrey Davis

RECEIVED

06 MAY 25 PM 4: 38

DECLARATION OF SERVICE
D. J. HERRITT

I, Yvonne Maletic, declare:

I am not a party in this action. I reside in the State of Washington and am employed by Institute for Justice in Seattle, Washington. On May 25, 2006, I caused to be served a true copy of *Appellants No New Gas Tax and Jeffrey Davis's Answer to Amicus Curiae Brief of the Attorney*

General upon the following:

ABC/Legal Messenger:

P. Stephen DiJulio
Michael K. Vaska
David S. Snyder
Ramsey Ramerman
Foster Pepper & Shefelman PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101
Attorneys for Respondents

David C. Lundsgaard
Graham & Dunn PC
Pier 70
2801 Alaskan Way, Suite 300
Seattle, WA 98121-1128
Attorneys for Amicus Washington State Association of Broadcasters

Michael E. Kipling
Kipling Law Group, PLLC
3601 Fremont Avenue N., Suite 414
Seattle, WA 98103
Attorneys for Amicus American Civil Liberties Union of Washington

Aaron H. Caplan
American Civil Liberties Union of Washington
705 Second Avenue, Suite 300
Seattle, WA 98104-1799
*Attorneys for Amicus American Civil Liberties Union of
Washington*

□ U.S. Mail:

Attorney General Rob McKenna
William B. Collins, Deputy Solicitor General
1125 Washington Street SE
Olympia, WA 98504-0100
Attorneys for Amicus Attorney General

Erik S. Jaffe
Erik S. Jaffe, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
*Attorneys for Amici Center for Competitive Politics, Cato Institute,
and Building Industry Association of Washington*

Diana M. Kircheim
Groen Stephens & Klinge LLP
11100 NE 8th Street, Suite 750
Bellevue, WA 98004
*Attorneys for Amici Center for Competitive Politics, Cato Institute,
and Building Industry Association of Washington*

I declare under penalty of perjury that the foregoing is true and

correct and that this declaration was executed this 25th day of May 2006

at Seattle, Washington.

FILED AS ATTACHMENT
TO E-MAIL

_____/s/_____
Yvonne Maletic

Rec 5-25-06

-----Original Message-----

From: Michael Bindas [mailto:mbindas@ij.org]
Sent: Thursday, May 25, 2006 4:42 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Michael Bindas; Bill Maurer; Yvonne Maletic
Subject: Filing in No. 77966-0 (San Juan County v. No New Gas Tax)
Importance: High

Attached for filing in San Juan County v. No New Gas Tax, No. 77966-0, is *Appellants No New Gas Tax and Jeffrey Davis's Answer to Amicus Curiae Brief of the Attorney General*. We are also filing, in person at the Clerk's office, the supporting *Appendix* to this document.

The information required by the Court's electronic filing protocol is contained in my signature block, below. My WSBA number is 31590.

Thank you.

<<Answer to AG's Amicus Brief.pdf>>

Michael E. Bindas

Staff Attorney

Institute for Justice Washington Chapter

811 First Avenue, Suite 625

Seattle, Washington 98104

phone: (206) 341-9300

fax: (206) 341-9311

email: mbindas@ij.org

on the web: www.ij.org/washington

Notice: This communication, including any attachments, may contain information that is confidential and protected by the attorney/client privilege or other privileges. This communication, including any attachments, constitutes non-public information intended to be conveyed to the intended recipient or recipients. If the reader or recipient of this communication is not the intended recipient, an employee or agent of the intended recipient who is responsible for delivering such communication to the intended recipient, or you believe that you have received this communication in error, please notify the sender by return e-mail and promptly delete this e-mail, including any attachments, without reading or saving such e-mail or attachments in any manner. The unauthorized use, dissemination, distribution, or reproduction of this e-mail, including any attachments, is prohibited and may be unlawful. Receipt by anyone other than the intended recipient or recipients is not a waiver of any attorney/client privilege or any other privilege.

COMPL. FILED
BY C. J. HENRITT

No. 77966-0

SUPREME COURT OF THE STATE OF WASHINGTON

SAN JUAN COUNTY, a political subdivision of the State of Washington,
CITY OF KENT, a political subdivision of the State of Washington, CITY
OF AUBURN, a political subdivision of the State of Washington, CITY
OF SEATTLE, a political subdivision of the State of Washington, *ex rel.*
the STATE OF WASHINGTON,

Respondents,

v.

NO NEW GAS TAX, a Washington Political Action Committee, and
JEFFREY DAVIS, an individual and Treasurer of NO NEW GAS TAX,

Appellants.

APPENDIX
TO APPELLANTS NO NEW GAS TAX AND JEFFREY DAVIS'S
ANSWER TO AMICUS CURIAE BRIEF
OF THE ATTORNEY GENERAL

William R. Maurer, WSBA No. 25451
Michael Bindas, WSBA No. 31590

INSTITUTE FOR JUSTICE
Washington Chapter
811 First Avenue, Suite 625
Seattle, Washington 98104
Telephone: (206) 341-9300

MAY 17 2005

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

2005 MAY 17 A 9 07

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MURs: 5540 and 5545

MUR 5540

COMPLAINANT: Center for Individual Freedom

RESPONDENTS: CBS Broadcasting, Inc.
Kerry-Edwards 2004, Inc., and Robert Farmer, in his official capacity as
Treasurer

DATE COMPLAINT FILED: 09/23/04
DATE OF NOTIFICATION: 09/30/04
DATE ACTIVATED: 02/09/05

STATUTE OF LIMITATIONS: September 8, 2009

MUR 5545

COMPLAINANT: Jeffrey S. Smith

RESPONDENTS: Dan Rather, CBS News
CBS
Viacom, Inc.

DATE COMPLAINT FILED: 09/27/04
DATE OF NOTIFICATION: 10/05/04
DATE ACTIVATED: 02/09/05

STATUTE OF LIMITATIONS: September 8, 2009

RELEVANT STATUTES: 2 U.S.C. § 431(9)(B)(i)
2 U.S.C. § 434(f)
2 U.S.C. § 441b(a)
2 U.S.C. § 441b(c)

11 C.F.R. § 100.73
11 C.F.R. § 109.21(b)

4 **INTERNAL REPORTS CHECKED:** None

6 **FEDERAL AGENCIES CHECKED:** None

8 **I. INTRODUCTION**

9 The complaints in MURs 5540 and 5545 involve the September 8, 2004, CBS
10 broadcast of a *60 Minutes Wednesday* news story ("the Broadcast") about President Bush's
11 Texas Air National Guard service. Dan Rather anchored the piece, which relied in part upon
12 documents that CBS later admitted could not be authenticated. Those documents appeared to
13 prove that President Bush received preferential treatment in connection with his service in the
14 Guard, including overlooking his failure to fulfill orders.

15 The complaint in MUR 5540 alleges that (1) the news story constituted a prohibited
16 electioneering communication under 2 U.S.C. § 434(f); (2) the electioneering communication
17 was coordinated with the Kerry-Edwards 2004, Inc., campaign and, therefore, constituted a
18 prohibited corporate contribution under 2 U.S.C. §§ 441b(a) and (c); and (3) the
19 electioneering communication should have been reported by CBS as a contribution and by
20 the campaign as an expenditure under 2 U.S.C. § 434(f). The complaint in MUR 5545
21 alleges that the Broadcast constituted an independent expenditure and a prohibited corporate
22 contribution.

23 Both complaints allege that the story is not entitled to the Commission's media
24 exemption: MUR 5540 asserts that the Broadcast was not a legitimate news story because
25 CBS failed to thoroughly verify its news sources and improperly coordinated with the Kerry
26 campaign, and MUR 5545 asserts that the Broadcast does not fit the definition of a news
27 story, commentary or editorial under 11 C.F.R. § 100.73 because it expressly advocated the

1 defeat of President Bush. Respondents counter that the media exemption applies and
2 prohibits the Commission from analyzing the complaints.

3 Because we conclude that the media exemption applies, this Office recommends that
4 the Commission find no reason to believe that Respondents violated the Federal Election
5 Campaign Act of 1971, as amended, ("the Act") in connection with the Broadcast.

6 **II. FACTUAL SUMMARY**

7 CBS Broadcasting, Inc. ("CBS") is a New York corporation and a subsidiary of
8 Viacom, Inc. CBS owns and operates the CBS broadcast television network, including its
9 news division. See MUR 5540 Complaint, at 2. *60 Minutes Wednesday* ("*60 Minutes*") is a
10 weekly news magazine program in the CBS news division and has been aired since 1998.
11 See CBS Response, at 1. The hour-long program consists of various segments, including
12 investigative reports, interviews, features and profiles. *Id.*

13 On September 8, 2004, *60 Minutes* aired a story about purported special treatment
14 President Bush received during the Vietnam War. Although the same allegations had been
15 made before, the Broadcast purported to offer "new" documents that allegedly proved the
16 allegations. See MUR 5540 Complaint, Attachment 1 (Broadcast Transcript). The
17 documents appeared to be memoranda written by President Bush's supervisor in the Texas
18 Air National Guard that revealed that then-Lieutenant Bush asked to be excused from duty
19 requirements and a scheduled physical examination to work on a political campaign in
20 Alabama. See *id.* According to the documents, despite not receiving permission to be
21 excused, President Bush did not appear for the physical and was subsequently suspended
22 from flying status. See *id.* The documents also suggested that President Bush received an
23 honorable discharge upon leaving the Guard due to preferential treatment he received as the
24 son of then-Congressman George H.W. Bush. See *id.*

1 Immediately after airing the story, questions arose on the Internet and in the media as
2 to the documents' authenticity. *See* CBS Special Report, at 20. At first, CBS defended the
3 Broadcast, but on September 20, 2004, Dan Rather apologized on behalf of CBS and himself
4 on-air for not being able to verify the authenticity of the documents and relying on a source
5 who subsequently admitted providing false information to the network. *See* MUR 5540
6 Complaint, Attachment 5 (CBS News, Sept. 20, 2004, Transcript). CBS also announced that
7 it was commissioning an independent investigation into the Broadcast and would make the
8 results public. (The investigation resulted in a report issued on January 10, 2005 ("Special
9 Report")).²

10 Soon after the CBS apology, information emerged that CBS and the Kerry-Edwards
11 Campaign ("Campaign") had been in contact a few days before the Broadcast aired. *See*
12 Special Report, at 208, 211. According to the Special Report, a few days before the
13 Broadcast aired, the Broadcast's producer, Mary Mapes, asked Joe Lockhart, a senior advisor
14 to the Campaign, to speak with Bill Burkett, the source of the National Guard documents.
15 *See id.*, at 26-27, 209. Apparently, Burkett said he would be more forthcoming with
16 documents if he were allowed to communicate with the Kerry campaign. *See id.* at 27. A
17 couple of days later, Lockhart called Burkett. *See id.* According to Lockhart, Burkett gave
18 advice on how to run the Campaign, and they did not talk about any documents. *See id.*
19 Complainants in MUR 5540 allege that the contact between Mapes and Lockhart constituted
20 coordination resulting in a prohibited corporate contribution from CBS to the Campaign.

21

² The Special Report is available at http://www.image.cbsnews.com/htdocs/pdf/complete_report/CBS_Report.pdf.

1 **III. LEGAL ANALYSIS**

2 The Act prohibits corporations from making contributions or expenditures from their
3 general treasury funds in connection with any election of any candidate for federal office. 2
4 U.S.C. § 441b(a). Notwithstanding this prohibition, the Act's media exemption excludes
5 from the definitions of contribution and expenditure, in relevant part, "any cost incurred in
6 covering or carrying a news story, commentary, or editorial by any broadcasting station ...
7 unless the facility is owned or controlled by any political party, political committee, or
8 candidate." 11 C.F.R. §§ 100.73 and 100.132. Additionally, any communication "appearing
9 in a news story, commentary, or editorial distributed through the facilities of any broadcast
10 station" is excluded from the definition of "electioneering communication." 2 U.S.C. §
11 434(f)(3)(B); *see also* 11 C.F.R. § 100.29(c)(2).

12 It is undisputed that CBS is a broadcast station, not owned by a political party,
13 committee or candidate. CBS is in the regular business of disseminating news stories,
14 commentary, and editorials to the public, and *60 Minutes* is one of its regularly scheduled
15 programs in the news division. Further, the Broadcast appeared on a regularly scheduled *60*
16 *Minutes* program.

17 Although CBS has admitted that much of the Broadcast "was wrong, incomplete or
18 unfair,"³ the Broadcast falls squarely within the legitimate press function of CBS. The media
19 exemption does not require a finding that the news story was accurate or well researched, as
20 the complainant in MUR 5540 suggests. Even seemingly biased stories or commentary by a
21 press entity can fall within the media exemption. *See, e.g.*, MUR 3624 (Walter H. Shapiro)
22 (Commission found that pro-Bush/Quayle broadcast by Rush Limbaugh fell within media

³ *See* Statement of CBS's CEO and Chairman Leslie Moonves, January 10, 2005, available at
http://www.imeag.cbsnews.com/htdocs/pdf/complete_report/cbs_response.pdf.

1 exemption); *see also* MUR 4946 (CBS, Statement of Reasons, Wold and Mason).

2 Significantly here, the Broadcast appears to have been similar in form and distributed in the
3 same manner as other *60 Minutes* news stories, and no information has been presented to the
4 contrary. *See FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 251 (1986).

5 Therefore, for this reason and the reasons previously stated, it appears that the Broadcast was
6 within the legitimate press function of CBS.

7 With respect to the coordination allegation, there is no information suggesting that the
8 contact between CBS and the Campaign, or the source and the Campaign, may have met one
9 or more of the conduct standards set forth in 11 C.F.R. § 109.21(d). In fact, available
10 information suggests that CBS contacted the Campaign for the sole reason that its source
11 insisted upon having an opportunity to speak to the campaign and that nothing discussed
12 between CBS and the Campaign, or the source and the Campaign, played any part in the
13 creation, production or distribution of the Broadcast. Nevertheless, even if the contact did
14 rise to a level meeting one or more of the conduct standards, the coordination regulations
15 exclude news stories falling with the media exemption. *See* 11 C.F.R. § 109.21(b)(1).

16 Accordingly, this Office recommends that the Commission find no reason to believe
17 that the Respondents in MURs 5540 and 5545 violated the Act in connection with the
18 Broadcast.

19 **IV. RECOMMENDATIONS**

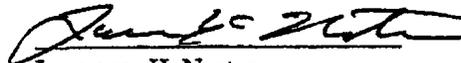
- 20 1. In MUR In MUR 5540, find no reason to believe that CBS Broadcasting, Inc.,
21 Kerry-Edwards 2004, Inc., and Robert Farmer, in his official capacity as
22 Treasurer, violated the Act in connection with the September 8, 2004 broadcast of
23 *60 Minutes Wednesday*.
24
25 2. In MUR 5545, find no reason to believe that Dan Rather, CBS News, CBS or
26 Viacom, Inc., violated the Act in connection with the September 8, 2004
27 broadcast of *60 Minutes Wednesday*.
28

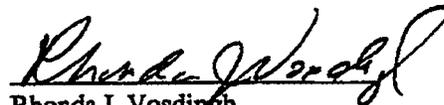
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31

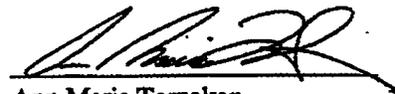
3. Approve the appropriate letters.

4. Close the files.

5/16/05
Date


Lawrence H. Norton
General Counsel


Rhonda J. Vosdingh
Associate General Counsel
for Enforcement


Ann Marie Terzaken
Assistant General Counsel


Elena Paoli
Attorney

MAY 17 2005

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

2005 MAY 17 A 9:07

FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 5562
DATE COMPLAINT FILED: October 12, 2004
DATE OF NOTIFICATION: October 19, 2004
DATE ACTIVATED: February 9, 2005

EXPIRATION OF STATUTE OF LIMITATIONS:
October 2009

COMPLAINANT: Democratic National Committee

RESPONDENT: Sinclair Broadcast Group, Inc.

RELEVANT STATUTES AND
REGULATIONS:

2 U.S.C. § 431(9)(B)(i)
2 U.S.C. § 434(f)(3)(B)(i)
2 U.S.C. § 441b(a)
11 C.F.R. § 100.29
11 C.F.R. § 100.73
11 C.F.R. § 100.132

INTERNAL REPORTS CHECKED: None

FEDERAL AGENCIES CHECKED: None

MUR: 5570
DATE COMPLAINT FILED: October 18, 2004
DATE OF NOTIFICATION: October 25, 2004
DATE ACTIVATED: February 9, 2005

EXPIRATION OF STATUTE OF LIMITATIONS:
2009 (various dates)

1
2 COMPLAINANT: Sam Osborne
3
4 RESPONDENTS: Sinclair Broadcast Group, Inc.
5 Mark Hyman
6 Frederick G. Smith
7

8 RELEVANT STATUTES AND
9 REGULATIONS: 2 U.S.C. § 431(9)(B)(i)
10 2 U.S.C. § 434(f)(3)(B)(i)
11 2 U.S.C. § 441b(a)
12 11 C.F.R. § 100.29(c)(2)
13 11 C.F.R. § 100.73
14 11 C.F.R. § 100.132
15

16 INTERNAL REPORTS CHECKED: None

17
18 FEDERAL AGENCIES CHECKED: None
19

20 I. **INTRODUCTION**

21 The complaints in MURs 5562 and 5570 allege, respectively, that Sinclair Broadcast
22 Group, Inc. ("Sinclair")² was about to make and made impermissible corporate contributions in
23 connection with certain communications damaging to presidential candidate John Kerry. MUR
24 5562 alleges that Sinclair was planning to order all of its television stations to air, commercial-
25 free, a film entitled *Stolen Honor: Wounds that Never Heal* ("Stolen Honor"), and MUR 5570
26 alleges that a local Sinclair-owned station aired "anti-Kerry" comments prior to the general
27 election.

28 Sinclair, which owns sixty-two television stations, is a publicly traded company.

29 http://www.sourcewatch.org/index.php?title=Sinclair_Broadcast_Group; <http://www.sbg.net>;

30 MUR 5562 Response at 1-2; MUR 5570 Response at 2. Approximately ninety-five percent of

² Sinclair apparently transferred ownership of most of its television stations to Sinclair Television Group, Inc., a wholly owned subsidiary of Sinclair, on September 30, 2003. Sinclair 2003 Annual Report, at 6. "Sinclair" will refer to both Sinclair Broadcast Group, Inc., and its subsidiaries, including Sinclair Television Group, Inc.

1 Sinclair's stock is reportedly controlled by four brothers, who also serve as directors and three as
2 corporate officers. http://www.sourcewatch.org/index.php?title=Sinclair_Broadcast_Group;
3 <http://www.sbgj.net>. Sinclair thus does not appear to be owned or controlled by any political
4 party, political party or candidate, and there have been no allegations to this effect. *Id.*; MUR
5 5562 Response at 1-2; MUR 5570 Response at 2.

6 As discussed in more detail below, the complaint in MUR 5562 is prospective – in fact,
7 the broadcast that was actually shown was substantially different than the one challenged – and
8 the communications that are the focus of the MUR 5570 complaint fall under the media
9 exemption. Therefore, this Office recommends that the Commission find no reason to believe
10 that the respondents in either MUR 5562 or MUR 5570 violated 2 U.S.C. § 441b(a) and close the
11 files.

12 II. DISCUSSION

13 A. MUR 5562

14 On October 9, 2004, the *Los Angeles Times* ran a front-page story reporting that,
15 according to network and station executives familiar with the plan, Sinclair was ordering its
16 sixty-two stations – many of them in so-called swing states – to preempt their regular prime-time
17 programming between October 21 and October 24, 2004, to air *Stolen Honor* commercial-free.
18 Elizabeth Jensen, *Conservative Group to Air Anti-Kerry Film*, *Los Angeles Times*, Oct. 9, 2004,
19 at A1. According to the news story, the film, allegedly funded by Pennsylvania veterans and
20 produced by a veteran and former newspaper reporter, "attacks Sen. John F. Kerry's activism
21 against the Vietnam war." *Id.* Three days later, or approximately a week before *Stolen Honor*
22 reportedly would begin airing, relying in part on the *Los Angeles Times* story, the DNC filed a
23 complaint ("DNC Complaint") with the Commission, alleging that Sinclair was "about to make

1 an unlawful corporate-funded electioneering communication and corporate in-kind contribution
2 to the Bush-Cheney '04 campaign and the Republican National Committee." DNC Complaint at
3 1.

4 In response, Sinclair maintained that the matter complained of by the DNC is moot
5 because Sinclair's television stations did not broadcast *Stolen Honor*. MUR 5562 Response at 1-
6 2. Rather, according to the response, a number of Sinclair's stations "aired an internally
7 produced news program, entitled *A POW Story: Politics, Pressure and the Media*" ("*POW*
8 *Story*"). *Id.* The response describes *POW Story* as a program "which discussed and included
9 segments of [*Stolen Honor*], but which also discussed and presented similarly lengthened
10 segments from a documentary which was very favorable to Senator Kerry." *Id.* Further, the
11 response states that *POW Story* "also focused on the controversy surrounding [*Stolen Honor*],
12 and included interviews of individuals with very disparate opinions about the subject matter of
13 the news special." *Id.* at 2. Press reports corroborate that no Sinclair television station broadcast
14 the film *Stolen Honor* and that some aired *POW Story* in the format described in the response.
15 Frank Ahrens and Howard Kurtz, *Anti-Kerry Film Won't Be Aired*, *The Washington Post*, Oct.
16 20, 2004, at A7; CBSNEWS.com, *Sinclair Amends Kerry Film Plans*, Oct. 20, 2004, available at
17 <http://www.cbsnews.com/stories/2004/10/19/politics/printable650030.shtml>.

18 There remains no allegation of prospective or actual wrongdoing before the Commission.
19 Under these circumstances, the Commission should not speculate whether there might have been
20 a violation under a set of circumstances that did not occur. *Cf.* Concurring Statement of Reasons
21 for MUR 5467 (Michael Moore), Smith and Toner, Aug. 2, 2004, at 2-3 (stressing the
22 importance of "Commission policy not to entertain speculative complaints" in order to "preserve
23 the integrity of the enforcement process and to focus its limited resources on actual violations of

1 the law."'). Accordingly, this Office recommends that the Commission find no reason to believe
2 that Sinclair Broadcast Group, Inc. violated 2 U.S.C. § 441b(a) and close the file in MUR 5562.

3 **B. MUR 5570**

4 The complaint in MUR 5570 ("Osborne Complaint") states that it is "directed toward the
5 doings" of Sinclair and corporate officers Fred Smith and Mark Hyman, as well as other
6 unnamed corporate officials who allegedly "have participated in or authorized the illegal use of
7 corporate funds to affect the 2004 election for the presidency." Osborne Complaint at 1. The
8 complaint focuses on several quoted comments concerning Senator Kerry's presidential
9 candidacy that it claims were broadcast on KGAN, a Sinclair-owned station, in Cedar Rapids,
10 Iowa, "[v]ia [Sinclair's] corporate resources and using Mark Hyman's office." *Id.* According to
11 the complaint, "In conveying its political-attack message, Sinclair uses its Vice President for
12 Corporate Relations, Mark Hyman ("Hyman')." *Id.* The complaint does not list the dates or
13 times of Hyman's alleged comments, or the programs or the contexts in which they allegedly
14 were made.

15 The response, noting the lack of specificity in the complaint, states that Sinclair believes
16 the comments quoted in the complaint all appeared during KGAN's news programming. MUR
17 5570 Response at 1-2. According to the response, thirty-nine of Sinclair's sixty-two television
18 stations, including KGAN, regularly broadcast the news, and all statements made by Hyman in
19 KGAN's news programming are clearly labeled as commentary during the broadcast. *Id.*

1 While corporations are generally prohibited from making contributions or expenditures
2 under 2 U.S.C. § 441b(a), exemptions allow for the broadcast of any "news story, commentary or
3 editorial" unless the facility(ies) distributing the broadcast are owned or controlled by any
4 political party, political committee or candidate. 2 U.S.C. § 431(9)(B)(i) and 11 C.F.R.
5 § 100.132 (regarding expenditures); 11 C.F.R. § 100.73 (regarding contributions)(collectively
6 "media exemption"). The media exemption also excludes from the definition of electioneering
7 communication "a communication appearing in a news story, commentary or editorial distributed
8 through the facilities of any broadcasting station, unless such facilities are owned or controlled by
9 any political party, political committee, or candidate." 2 U.S.C. § 434(f)(3)(B)(i); *see also*
10 11 C.F.R. § 100.29(c)(2). Hence, a news story, commentary or editorial distributed by a
11 broadcast station not owned or controlled by a political party, political committee or candidate
12 will not be considered an expenditure, a contribution, or an electioneering communication.

13 According to a press report, Hyman hosts a segment on Sinclair stations. David Zurawik,
14 *Sinclair editorials labeled as such*, The Baltimore Sun, Dec. 15, 2004, at 1, available at
15 www.baltimoresun.com/features/lifestyle/bal-to-sinclair15dec15.0.2751716.story. That segment,
16 called "The Point Commentary," is reportedly a "one-minute daily commentary that is intended
17 to stimulate public discourse," and is broadcast on approximately forty of Sinclair's sixty-two
18 stations, including KGAN. www.kgan.com; www.newscentral.tv/station/bios/mhyman.shtml.
19 The KGAN website labels the segment an "editorial." www.kgan.com. The available
20 information suggests that Hyman most likely made the statements during broadcasts of "The
21 Point Commentary." If so, the statements fall squarely within the media exemption because they
22 appear to be "commentary or editorial distributed through the facilities of" Sinclair's

1 broadcasting stations. Accordingly, this Office recommends that the Commission find no reason
2 to believe that Sinclair Broadcast Group, Inc., Mark Hyman or Frederick G. Smith violated
3 2 U.S.C. § 441b(a) and close the file in MUR 5570.

4 **III. RECOMMENDATIONS**

- 5 1. Find no reason to believe that Sinclair Broadcast Group, Inc. violated 2 U.S.C.
6 § 441b(a).
7
8 2. Find no reason to believe that Mark Hyman violated 2 U.S.C. § 441b(a).
9
10 3. Find no reason to believe that Frederick G. Smith violated 2 U.S.C. § 441b(a).
11
12 4. Close the files in MURs 5562 and 5570.
13
14 5. Approve the appropriate letters.
15
16
17
18
19

20 5/16/65
Date

Lawrence H. Norton
Lawrence H. Norton
General Counsel

Rhonda J. Vosdingh
Rhonda J. Vosdingh
Associate General Counsel
for Enforcement

Susan L. Lebeaux
Susan L. Lebeaux
Assistant General Counsel

J. Cameron Thurber
J. Cameron Thurber
Attorney



FEDERAL ELECTION COMMISSION
 WASHINGTON, D C 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
 CBS Broadcasting, Inc.)
 Kerry-Edwards 2004, Inc., and) MURs 5540 & 5545
 Robert Farmer, in his official)
 Capacity as Treasurer)
)

**STATEMENT OF REASONS OF VICE CHAIRMAN MICHAEL E. TONER AND
 COMMISSIONERS DAVID M. MASON AND BRADLEY A. SMITH**

On June 7, 2005, by a vote of 6-0 the Commission accepted the Office of General Counsel's ("OGC") recommendation to find no reason to believe that CBS Broadcasting, Inc., Kerry-Edwards 2004, Inc. ("Campaign"), and Robert Farmer, in his official capacity as Treasurer, and the remaining respondents violated the Federal Election Campaign Act of 1971, as amended ("FECA" or "Act") in connection with the September 8, 2004 broadcast of *60 Minutes Wednesday* ("Broadcast"). We voted to find no reason to believe in these matters because, even if the allegations in the complaint are true, the activities in question are protected by the Act's media exemption and require the complaints to be dismissed.

Analysis and Conclusions

These matters arose out of complaints filed by the Center for Individual Freedom ("Complainant") alleging that the broadcast of a *60 Minutes Wednesday* news story about President Bush's Texas Air National Guard Service was a prohibited electioneering communication under 2 U.S.C. § 434(f), that the electioneering communication was coordinated with the Kerry-Edwards campaign and was therefore a prohibited corporate contribution under 2 U.S.C. § 441b(a) and (c), that the electioneering communication should have been reported by CBS as a contribution and the Kerry-Edwards campaign as an expenditure under 2 U.S.C. § 434(f), and that the broadcast constituted an independent expenditure and a prohibited corporate contribution. Both complaints alleged that the broadcast was not entitled to the press exemption found at § 431(9)(B)(i) because CBS failed to thoroughly verify its news sources and improperly coordinated with the Kerry-Edwards campaign, and the broadcast did not fit the definition of a news story,

commentary, or editorial under 11 CFR §100.73 because it expressly advocated the defeat of President Bush.

FECA prohibits corporations from making contributions or expenditures from their general treasury funds in connection with any election of any candidate for federal office. 2 U.S.C. § 441b. Notwithstanding this prohibition, FECA's media exemption excludes from the definition of expenditure "any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station, newspaper, magazine or other periodical publication." 2 U.S.C. § 431(9)(B)(i). See also 11 C.F.R. §§ 100.73 and 100.132. Additionally, any communication "appearing in a news story, commentary, or editorial distributed through the facilities of any broadcast station" is excluded from the definition of an electioneering communication. 2 U.S.C. § 434(f)(3)(B).

Federal courts, when considering whether an entity is within the Act's media exemption, have held that several factors must be present: the entity engaged in the activity must be a press entity; the press entity must not be owned or controlled by a political party or candidate; and the press entity must be acting as a press entity in conducting the activity at issue (i.e., the entity must be acting within its legitimate press function). See *Reader's Digest Ass'n v. Fed. Election Comm'n*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981), *Fed. Election Comm'n v. Phillips Publ'g, Inc.*, 517 F. Supp. 1308, 1312-12 (D.D.C. 1981).

In the present case, the complaint alleged that CBS and the Kerry-Edwards campaign had been in contact a few days before the broadcast aired, and that representatives of CBS News arranged a meeting between the key source of the story and a representative of the Kerry-Edwards campaign. Complaint at 4. The complaint also alleged that because "the broadcast segment lacked all of the hallmarks of a legitimate 'news story' and responsible journalism," the press exemption should not apply. Complaint at 10.

It is not for this agency to determine what is a "legitimate news story" or who is a "responsible journalist." In reviewing the allegations in these complaints, the Commission's inquiry is limited to determining whether a "press entity charged with a violation is owned or controlled by a party or candidate and whether the distribution complained of was of the type exempted by the statute...No inquiry may be addressed to sources of information, research, motivation, connection with the campaign, etc. Indeed all such investigation is permanently barred by the statute unless it is shown that the press exemption is not applicable." *Reader's Digest*, 509 F. Supp. at 1214-15. See also MUR 3624 Walter H. Shapiro (concluding that pro-Bush/Quayle broadcast by Rush Limbaugh fell within the media exemption even though the broadcast was arguably biased).

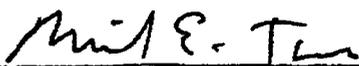
The initial inquiries as to whether CBS is owned or controlled by a party or a candidate and whether the airing of the *60 Minutes Wednesday* broadcast was within the press exemption require no further investigation. CBS is not owned by a political party, committee or candidate and is in the business of disseminating news stories, commentary, and editorials to the public. First General Counsel's Report at 5. Additionally, *60*

Minutes is one of CBS's regularly scheduled programs and the Broadcast appeared on a regularly scheduled *60 Minutes* program. *Id.* Also significant is the fact that the Broadcast appeared to be similar in form and was distributed in the same manner as other *60 Minutes* news stories. *Id.* at 6. *Contra Fed. Election Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238, 250 (1986) (noting that the publication at issue was not "comparable to any single issue of the newsletter [since] it was not published through the facilities of the regular newsletter... was not distributed to the newsletter's regular audience... [and did not have a] volume and issue number identifying it as one in a continuing series of issues").

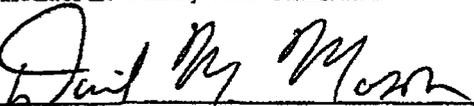
Allegations of coordination are of no import when applying the press exemption. What a press entity says in broadcasts, news stories and editorials is absolutely protected under the press exemption, regardless of whether any activities occurred that might otherwise constitute coordination under Commission regulations.

For all the foregoing reasons, we voted in favor of the General Counsel's recommendation to find no reason to believe and close the files.

July 11, 2005



Michael E. Toner, Vice Chairman



David M. Mason, Commissioner



Bradley A. Smith, Commissioner



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.

- 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.

(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'r's 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.

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).

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

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.

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.

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)

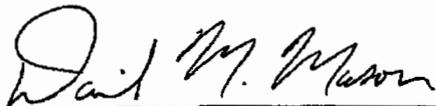
not "owned or controlled by any political party, political committee, or candidate." See 2 U.S.C. §§ 431(9)(B)(i).

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



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, and Frederick G. Smith)

**STATEMENT FOR THE RECORD OF
COMMISSIONER ELLEN L. WEINTRAUB**

I agreed with the General Counsel's conclusions and voted to approve the recommendations. I believe it important to emphasize that the press exemption shields press entities from investigations into alleged coordination. This agency cannot and should not attempt to arbitrate claims of media bias or breaches of journalistic ethics.¹

¹ It is unclear to me why commissioners who argue so persuasively in one statement that "the press exemption protects each respondent, specifically against the claims of bias, professional irresponsibility, or suspect motivations raised in the complaints" would then issue a separate statement assuming all those claims to be true.

It is not the role of the Federal Election Commission to determine whether a news story issued by a press entity is legitimate, responsible, or verified. When faced with allegations against the press, the FEC need only determine whether the press entity is owned or controlled by a party or candidate and whether the press entity was acting as a press entity in disseminating the story or commentary at issue. *Reader's Digest Ass'n, Inc. v. FEC*, 509 F. Supp. 1210, 1214-15 (S.D.N.Y. 1981). That is the absolute limit of the FEC's investigative reach into a press entity's activities. "No inquiry may be addressed to sources of information, research, motivation, connection with the campaign, etc. Indeed all such investigation is permanently barred by the statute unless it is shown that the press exemption is not applicable." *Id.*

Whether particular broadcasts were fair, balanced, or accurate is irrelevant given the applicability of the press exemption. Whether the media entities communicated with political parties or candidates before the airing of the broadcasts is similarly irrelevant. Indeed, it is difficult to fathom how journalists could cover campaigns if they had to worry that communicating with campaign workers could trigger a government investigation into supposed improper coordination. Merely investigating such allegations would intrude upon Constitutional guarantees of freedom of the press.

Ellen L. Weintraub
Ellen L. Weintraub, Commissioner

7/12/05
Date



FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)	
)	
CBS Broadcasting, Inc)	
Kerry-Edwards 2004, Inc., and)	MURs 5540 & 5545
Robert Farmer, in his official)	
Capacity as Treasurer)	
)	
)	

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

While we approve of the Counsel's recommendation to dismiss this case, and join in another Statement of Reasons¹, we wish to add one short point.

Because of the legal position taken by the Commission, which we believe is inescapable, it was not necessary to investigate the validity of the allegations in the complaint. By dismissing without a factual investigation, the Commission essentially holds that even if the allegations in the complaints are true, there is no violation of the law. Taking those allegations as true, however, would mean that there was an intentional effort by CBS to sway the election against George W. Bush, undertaken in coordination with the rival Kerry campaign. In other words, if the allegations are true, a large corporation intentionally or recklessly put false documents on the nation's airwaves, in coordination with a candidate's campaign, with the knowledge that its story would directly reach millions of voters and indirectly reach millions more, all for the purpose of influencing the election, and could do so merely because the corporation claims to be "press." Given that, we can find no statutory, constitutional, or especially, policy justification that would deny the so-called press exemption to any periodical publisher of political news or views, whether publishing in print, by broadcast, or over the internet.²

¹ See MUR 5540 & 5545 Statement of Reasons by Vice Chairman Toner and Commissioners Mason and Smith.

² With the exception of those owned by a candidate or party, for which a statutory denial might be appropriate. See 2 U.S.C. 431(9)(B)(i), excluding from the exemption publications that are "owned or controlled by any political party, political committee, or candidate."

David M. Mason
David M. Mason
Commissioner

7-15-05
Date

Bradley A. Smith/vw
Bradley A. Smith
Commissioner

7-15-05
Date



FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

SENSITIVE

OFFICE OF THE CHAIRMAN

In the matter of

**CBS Broadcasting, Inc.
Kerry-Edwards 2004, Inc., and
Robert Farmer, in his official capacity
as Treasurer**

MURs 5540 and 5545

STATEMENT OF REASONS

Chairman Scott E. Thomas

I write this Statement only to address the Statement of Reasons issued by my colleagues Commissioners Mason and Smith. They note that if the allegations in the complaints are true, CBS was involved in an "intentional effort . . . to sway the election against George W. Bush." They then deduce that if CBS can do this, they can find no justification for denying the press exemption "to any periodical publisher of political news or views."

As to the first point, an independent review of the circumstances surrounding the *60 Minutes Wednesday* segment at issue did not find any evidence of political bias on the part of CBS. The Independent Review Panel was comprised of Dick Thornburgh, former Attorney General of the United States under a Republican administration, and Louis D. Boccardi, former Chief Executive Officer and President of *The Associated Press*. In a 224 page report, the Panel stated that it "[did] not find a basis to accuse those who investigated, produced, vetted or aired the Segment of having a political bias."¹ It further noted:

60 Minutes Wednesday was hardly alone in pursuing the story. Other mainstream media, including *USA Today*, *The New York Times* and *The Associated Press*, were pursuing the same story in what was clearly a competitive race to be first. In fact, *USA Today* on September 9 published a similar story relying on the same Killian documents, but has not been as criticized for its story as CBS News has been for the September 8 Segment.²

¹ Report of the Independent Review Panel on the September 8, 2004 *60 Minutes Wednesday* Segment "For the Record" Concerning President Bush's Texas Air National Guard Service, p. 211, Jan. 5, 2005.

² *Id.*, pp. 211-212.

There are other indications CBS was politically objective in its coverage of the 2004 campaign. Indeed, a review of the major networks' political coverage in the last three days of the campaign by Media Tenor (a media monitoring group) concluded that "CBS and FOX overall were clearly more critical on Kerry than on Bush . . ." ³ I myself don't remember CBS shying away from stories challenging the legitimacy of John Kerry's war honors, questioning Al Gore's connection to the development of the Internet, and examining Bill Clinton's Whitewater transactions any more than FOX shied away from stories suggesting Clinton White House involvement in the death of a senior aide. Incidentally, the mere fact that many of the sources and allegations in those stories proved unreliable or false likewise does not prove that CBS or FOX was politically biased in running them.

As for my colleagues' suggested reach of the press exemption, I believe they overstate the law. Clearly, not every person who periodically publishes news or views qualifies for the press exemption. A "political committee" cannot escape all the federal election campaign rules simply by demonstrating that every week it puts out a newsletter referring to recent events or containing commentary about political issues. Nor can a corporation in the business of manufacturing widgets or a union whose mission is representing the economic rights of workers. As the Supreme Court indicated in *Massachusetts Citizens for Life v. FEC*, 479 U.S. 238, 251 (1986), "[a] contrary position would open the door for those corporations and unions with in-house publications to engage in unlimited spending directly from their treasuries to distribute campaign material to the general public, thereby eviscerating § 441b's prohibition."

In the case at hand, there was no doubt that CBS was entitled to the press exemption for its *60 Minutes Wednesday* segment. The analysis set forth by our Office of General Counsel was on point and, in my view, needed no further explanation.

7/15/05
Date



Scott E. Thomas
Chairman

³ *Election 2004 Make or Break: Iraq and Security*, Media Tenor, p. 1, Nov. 2, 2004, <http://www.agendasetting.com/agenda/us-elec-night.pdf> (last accessed July 13, 2005).

DECLARATION OF SERVICE

I, Yvonne Maletic, declare:

I am not a party in this action. I reside in the State of Washington and am employed by Institute for Justice in Seattle, Washington. On May 25, 2006, I caused to be served a true copy of *Appendix to Appellants No New Gas Tax and Jeffrey Davis's Answer to Amicus Curiae Brief of the Attorney General* upon the following:

ABC/Legal Messenger:

P. Stephen DiJulio
Michael K. Vaska
David S. Snyder
Ramsey Ramerman
Foster Pepper & Shefelman PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101
Attorneys for Respondents

David C. Lundsgaard
Graham & Dunn PC
Pier 70
2801 Alaskan Way, Suite 300
Seattle, WA 98121-1128
Attorneys for Amicus Washington State Association of Broadcasters

Michael E. Kipling
Kipling Law Group, PLLC
3601 Fremont Avenue N., Suite 414
Seattle, WA 98103
Attorneys for Amicus American Civil Liberties Union of Washington

Aaron H. Caplan
American Civil Liberties Union of Washington
705 Second Avenue, Suite 300
Seattle, WA 98104-1799
*Attorneys for Amicus American Civil Liberties Union of
Washington*

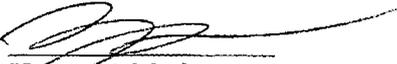
X U.S. Mail:

Attorney General Rob McKenna
William B. Collins, Deputy Solicitor General
1125 Washington Street SE
Olympia, WA 98504-0100
Attorneys for Amicus Attorney General

Erik S. Jaffe
Erik S. Jaffe, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
*Attorneys for Amici Center for Competitive Politics, Cato Institute,
and Building Industry Association of Washington*

Diana M. Kircheim
Groen Stephens & Klinge LLP
11100 NE 8th Street, Suite 750
Bellevue, WA 98004
*Attorneys for Amici Center for Competitive Politics, Cato Institute,
and Building Industry Association of Washington*

I declare under penalty of perjury that the foregoing is true and
correct and that this declaration was executed this 25th day of May 2006
at Seattle, Washington.


Yvonne Maletic

RECEIVED

05 MAY 25 PM 4:27

BY C. J. MERRITT

CLERK

SUPREME COURT OF THE STATE OF WASHINGTON
SAN JUAN COUNTY, ET AL.,

Plaintiff/Petitioner

vs

No. 77966-0

NO NEW GAS TAX, ET AL.,

DECLARATION OF
EMAILED DOCUMENT
(DCLR)

Defendant/Respondent

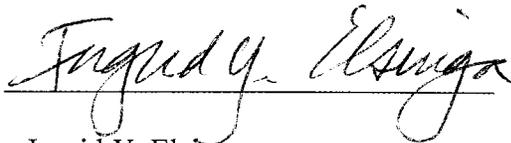
I declare as follows:

1. I am the party who received the foregoing email transmission for filing.
2. My address is: 119 W. Legion Way, Olympia, WA 98501
3. My phone number is (360) 754-6595.
4. I have examined the foregoing document, determined that it consists of 37 pages, including this Declaration page, and that it is complete and legible.

I certify under the penalty of perjury under the laws of the State of Washington that the above is true and correct.

Dated: 5/25/06 at Olympia, Washington.

Signature:



Print Name: Ingrid Y. Elsinga