



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

OFFICE OF THE CHAIRMAN

ADVISORY OPINION 2004-30

CONCURRING STATEMENT OF REASONS CHAIRMAN BRADLEY A. SMITH

On September 9, 2004, the Commission adopted this advisory opinion, which applied the Federal Election Campaign Act of 1971, as amended (the Act) to the proposed activities of Citizens United. That group planned to buy television time to air a documentary critical of presidential candidate John Kerry and his running mate John Edwards, and to advertise the film and a book critical of Mr. Kerry. These broadcast activities would occur within 60 days of the presidential election, raising the question whether they would be prohibited electioneering communications under 2 USC 434(f)(3)(A)(i) and 11 CFR 100.29, or whether they qualified for the exemption for news, commentary or opinion – the “press exemption” at 2 USC 434(f)(3)(B)(i) and 11 CFR 100.29(c)(2).

The Commission has advised Citizens United that the proposed broadcasts are in fact “electioneering communications” and as a corporation Citizens United may not make them. I joined my colleagues in approving this advice because I believe this is how our courts would presently construe the exemption for a “news story, commentary, or editorial distributed through the facilities of any broadcast, cable, or satellite television or radio station . . .” I write separately to indicate yet again that a strict construction of the press exemption could implicate a variety of independent activities.¹

The scope of the press exemption has been considered in only a handful of cases. Most recently, the Supreme Court, in rejecting an argument that the McCain-Feingold campaign law unfairly favored the press over other speakers, construed the exception narrowly: “The provision exempts news and commentary only; it does not afford carte blanche to media companies generally to ignore FECA’s provisions. The statute’s narrow exemption is wholly consistent with First Amendment principles” *McConnell v. FEC*, 124 S. Ct. 619, 697 (2003). More to the point, in *Massachusetts Citizens for Life* the Court interpreted the exemption in light of other “considerations of form” so that the press exemption would not provide corporations and labor organizations with a way around the expenditure ban. *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986). Accordingly, our Advisory Opinion finds that Citizens United may not benefit

¹ See Concurring Statement of Reasons of Chairman Bradley A. Smith and Commissioner Michael E. Toner, MUR 5467 (Michael Moore, *Lion’s Gate et al.*) August 2, 2004.

from the press exemption for broadcasting its documentary because of a lack of record producing documentaries, and because it was to pay for the broadcasting of the documentary, rather than be paid by broadcasters for the right to use it. Also, Citizens United may not pay for advertisements for Mr. Bossie's book because those expenditures would not "appear in a news story, commentary or editorial" and would not be part of a normal media function. The protection of the press exemption is thus more accessible to traditional, established media than to other groups, and more likely to protect "news, commentary and editorials" by those entities than other kinds of activities.

As the documentary and book advertisements are not protected by the press exemption of 2 U.S.C. 434(f), it would appear that they are also not protected by the general press exemption of 2 U.S.C. 431(9)(B)(i), which uses substantially identical language. That being the case, if they were to expressly advocate the election or defeat of a federal candidate, the production and distribution costs would seem to entail numerous violations of the law, including the ban on corporate expenditures, 2 U.S.C. 441b; the disclosure provisions of 2 U.S.C. 441d; reporting requirements of 2 U.S.C. 434; and perhaps various organizational and registration requirements of 2 U.S.C. 432 & 433.

Authors, their publishers, and the public at large should consider the implications of applying the press exemption in this narrow fashion. Documentaries and books as such are not specified as exempted activities in the Act, which refers in pertinent part specifically to, "a news story, commentary, or editorial distributed through the facilities of any broadcast station...;" 2 U.S.C. 434(f)(3)(B)(i), and, "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication..." 2 U.S.C. 431(9)(B)(i). Thus, under a narrow approach, it may be that the publication and promotion of a number of popular books are vulnerable to a similar result, for instance Bill Press, *Bush Must Go: The Top Ten Reasons Why George Bush Doesn't Deserve a Second Term* (Dutton Books), or John E. O'Neill and Jerome R. Corsi, *Unfit for Command: Swift Boat Veterans Speak Out Against John Kerry* (Regnery Publishing). These could be subject to government regulation (and potentially suppression) under the campaign finance laws, because they appear to expressly advocate the defeat of a clearly identified federal candidate, and are produced and promoted by corporations. Books by politicians could meet the same fate. See Howard Dean, *Winning Back America* (Simon and Schuster); John F. Kerry, *A Call to Service: My Vision for a Better America* (Viking). The same could be said of politically charged documentaries – to the extent they expressly advocate the election or defeat of a candidate for federal office, their production and promotion may violate the corporate expenditure ban.

Other proposed legal standards not present before us now, which have been prominently advocated, could lead to more aggressive regulation of such activities. For example, under the expansive definition of "express advocacy" favored by some of my colleagues, the production and promotion of Michael Moore's movie *Fahrenheit 911* may have been banned completely, if these activities were financed by corporations. Similarly, a recent regulatory proposal before the Commission, supported by many prominent campaign finance regulatory advocates, including Democracy 21, the

Campaign Legal Center, and Senator John McCain, could potentially have censored Moore's movie regardless of whether or not it contained "express advocacy," if it was found to be produced and distributed by corporations with the "major purpose" of influencing a federal election. See Federal Election Commission, Minutes, August 19, 2004, at 9 (vote on motion to approve Agenda Document No. 04-75-A, *Alternative Proposal for Final Rules Regarding "Political Committee" Status*, Submitted by Commissioners Thomas and Toner.)

As noted above, the courts' present approaches to the press exemption consider aspects of the speaker's business that raise the issue of whether it is a "bona fide" media company, even though such an inquiry is not obviously entertained under the Act.² Here, the fact Citizens United planned to pay for the time, and hence not make a profit from the enterprise was a "consideration of form" of note,³ as was its minimal record in media.⁴ The exemption extends to establishment media, which are generally owned by large corporations, and which are large, powerful operations in and of themselves, more easily than to small, upstart, independent outlets of expression. This general result is ironic, if only because the original rationale for the Progressive-Era corporate expenditure ban was to limit the power of large corporations in the political arena.



Bradley A. Smith, Chairman

9/8/04

Date

² The Act simply exempts "commentary," with no regard to whether or not it is paid. Taken literally, this would seem to exempt all political advertising from the restrictions of FECA. Of course, nobody advocating a narrow statutory construction wants to take a strict approach in this regard, and it is generally presumed that the exemption doesn't apply to citizens who are not part of the established press corps.

³ However, note that the statute does not require that periodicals seek to turn a profit, and a great many prominent political periodicals are published with no intention that they ever break even. A few periodicals published by non-profits, usually at a loss, include Reason, Commentary, National Review, Tikkun, Foreign Policy, and Foreign Affairs.

⁴ This criteria would have resulted in the censorship of Phyllis Schlafly's influential 1964 political tract, *A Choice, Not an Echo*, and any self-published books some enterprising individual may decide to publish and sell.