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March 20, 1997

Federal Election Commission
General Counsel's Office
999 E Street, NW
Washington, DC 20463

attn: Thomas J. Andersen, Esq.

RE: MUR 4305 - RTB Response and Answers to Interrogatories
Forbes, Inc. and Malcolm S. Forbes, Jr. as Chief Executive Officer

Dear Mr. Andersen:

Enclosed please find the response to interrogatories and RTB response in the above-referenced matter from Forbes, Inc. and Malcolm S. Forbes, Jr. as Chief Executive Officer.

Thank you for your attention to this matter. If you have any further questions, please contact me at my Washington-based business office at (202) 682-4725.

Very truly yours,

Paul E. Sullivan, Esq.
Counsel to Respondent

w/enclosure

cc: Chairman McGarry
Vice-Chairman Aikens
Commissioner Elliott
Commissioner McDonald
Commissioner Thomas

BEFORE THE FEDERAL ELECTION COMMISSION

IN RE: Forbes, Inc.	)	
and	)	MUR 4305:
Malcolm S. Forbes, Jr. as	)	RTB Response and Answers
Chief Executive Officer	)	to Interrogatories

This response is filed by and on behalf of Forbes, Inc., and Malcolm S. Forbes, Jr., as an officer of Forbes, Inc. ("Respondents")[1]. By a letter dated December 11, 1996, and received by Respondents on January 13, 1997, Respondents were notified that the Federal Election Commission ("FEC" or "Commission"), found Reason To Believe ("RTB") that Forbes, Inc., and *Forbes* magazine[2] and Malcolm S. Forbes, Jr., in his capacity as a corporate officer, may have violated the Federal Election Campaign Act of 1971 as amended, ("FECA" or "Act") specifically 2 U.S.C. §441b(a). Accompanying the notice of the RTB finding was a copy of the General Counsel's factual and legal analysis ("OGC Brief") and interrogatories that were propounded to Forbes, Inc. Responses to those Interrogatories are attached hereto and incorporated into this Response ("Interrogs. Resp."). (Exhibit "A")

I. SUMMARY OF ARGUMENT

The "Fact and Comment" column published during the time period in question in this MUR represented a long and continued practice, dating to January 1983, of *Forbes* magazine providing Mr. Forbes a forum to voice concern on a broad spectrum of domestic and international issues.

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[1] Neither of the Respondents received a copy of the Complaint prior to a finding of Reason to Believe by the Commission and therefore they were not able to submit a response in accordance with 2 U.S.C. § 437g(a)(1). This answer constitutes the first response submitted to the Commission by the Respondents. Malcolm S. Forbes, Jr. in his individual capacity did receive a copy of the original complaint and filed a timely response with the Commission.

[2] Respondents note to the General Counsel that *Forbes* magazine is a division of Forbes, Inc., and not a separate entity. Therefore, the alleged violation of §441b should be confined only to Forbes, Inc., and not include *Forbes* magazine.

This is the type of speech which historically has received the highest level of protection under the First Amendment to the United States Constitution. As will be presented herein, the courts have recognized an unqualified right of individuals to speak on issue-oriented matters, to be limited only in the most extreme situation. In this case, the censorship proposed by the Commission is not justified by the facts.

Given those basic principles of the First Amendment and the undisputed facts in this MUR, it is perplexing how the Commission has found the remotest argument that a potential violation of the Act has occurred. As will be discussed below, the Commission's finding is even more perplexing in light of the numerous court opinions, which have universally and unequivocally stated that the standard of review for an alleged §441b violation, is that the text of the message must either expressly advocate the election or defeat of a clearly identified candidate or that there be a solicitation of contributions for a federal committee. The OGC Brief acknowledges there is no such expressed advocacy, nor any solicitation contained in any of the "Fact and Comment" columns. It is a point to which the OGC Brief completely acquiesces and does not suggest to the Commission that the issue requires further investigation. At that point in the analysis, the Commission had a duty under the statute and the numerous court opinions to make a finding of no reason to believe and close the file.

After acknowledging the "Fact and Comment" columns contain no express advocacy, the OGC Brief awkwardly proffers a "campaign-related" standard as a foundation upon which it relies to commence an investigation into this matter. As will be shown, the footings for that foundation are so weak, the Counsel's entire argument completely falls when tested. The analysis below

will demonstrate that the "campaign-related" standard is vague and relies on no objective criteria, but rather an arbitrary and subjective case-by-case assessment by the FEC.

In addition, the facts in this MUR are quite distinguishable from the stronger fact patterns in those cases involving issue advocacy which the Commission has recently sought to litigate -- and yet the courts have ruled against the Commission even in those matters. (See discussion of cases cited at pages 13-15 *supra.*)

What is most telling in this matter is what is not presented in the OGC Brief: the Counsel's brief cites to no case law at any level to support this "campaign-related" standard; nor to any provision of the Act or any regulation which references the proposed criteria to be used to determine the applicability of the "campaign-related" standard. Further, there is no substantive reference or analysis in the OGC Brief regarding the applicability of the new regulations at 11 CFR 114.2[3]. In addition, the list of advisory opinions proffered by the General Counsel as authority to support their position are holdings in which the Commission either *permitted* the type of issue advocacy in question in this MUR, or the opinions are so factually distinguishable, that they become irrelevant to the discussion. Respondents also submit that the Commission's 1997 Legislative Recommendations to Congress include a request for a *statutory* change to restrict issue advocacy which is "coordinated" with a candidate. Respondents submit such a request constitutes an

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[3] The OGC Brief's only reference to any portion of those regulations is contained in footnote 2, at page 5 of the Brief. However, it only indicates 11 C.F.R. §100.22 was held to be unconstitutional by the District Court of Maine in Maine Right to Life Committee v. FEC, 914 F. Supp. 8 (D. Me., 1996).

admission by the Commission that they have no jurisdiction to enforce the very action they are pursuing in this matter.

As if that were not enough, the single enforcement action cited as authority (MUR 2268) is a matter in which the General Counsel presented an argument to support Respondent's position *permitting issue advocacy* and made a recommendation of no RTB!

The fact the case law on point is ignored and the advisory opinions and enforcement authorities cited are contrary to the proposition for which they are being tendered raises a substantial credibility issue with the very argument which the Counsel attempts to present to the Commission. It is Respondent's respectful request that the investigation which the Commission has authorized in this matter be expeditious. This MUR involves pure issue-advocacy and is coupled with the First Amendment rights of a long-established and highly reputable magazine which has demonstrated no intent to influence any candidate's election. The case fails woefully from a factual and a legal posture and should be dismissed.

II. FACTUAL BACKGROUND

The material facts in this matter are not in dispute. Forbes, Inc., is a domestic corporation and at all times during the periods relevant to this matter, Mr. Forbes maintained a greater than fifty percent (50%) interest of the voting shares of Forbes, Inc. (*Forbes Affidavit*, Para. 2, Exhibit "B".) As he has done since January of 1983 (Interrog. Resp. 4) Mr. Forbes continued to write his long-standing "Fact and Comment" column for *Forbes* magazine during which time he was also a candidate seeking the 1996 Republican Party presidential nomination. The "Fact and

Comment" column discussed contemporary domestic and international issues and did not reference, in any of the columns, Mr. Forbes' candidacy, let alone advocate his election. Similarly, a review of those columns shows that Mr. Forbes did not make a call to action for the readers to either elect, defeat, support, or oppose any of the other 1996 Republican presidential candidates, the election or defeat of any other federal or state candidate, nor advocate the election of any political party candidates. Similarly, there is no call for solicitation of contributions or funding in any fashion for Mr. Forbes' candidacy or for any other federal candidate. The OGC Brief agrees there was no advocacy or solicitation for any federal candidate (OGC Brief, p. 8.)

Respondents draw the Commission's attention to two new material facts not contained in the OGC Brief. The first is relevant and dispositive of the issue raised in the OGC Brief pertaining to The Hills-Bedminster (New Jersey) Press issue (OGC Brief, p.9). The single factual cornerstone upon which the OGC Brief relies to move forward with the RTB finding in this case is that portions of the "Fact and Comment" column were reprinted in The Hills-Bedminster newspaper and, in one particular edition, the paper contained a story pertaining to the announcement of Mr. Forbes as a presidential primary candidate. The newspapers in question are distributed only within the state of New Jersey (Interrog. Resp. 6) Mr. Forbes, however, did not seek the nomination in New Jersey and did not have his name appear on the ballot in the state of New Jersey as a candidate for the presidential nomination (*Forbes Aff.*, Para. 3.) Therefore, the fact that Mr. Forbes was not "seeking the nomination" in the state of New Jersey precludes the newspapers from allegedly making expenditures to influence his election (2 U.S.C. §431(9)). Second, Mr. Forbes exercised total control over the "Fact and Comment" column (Interrog.

Resp. 3) and the campaign was not consulted in any fashion as to the subject matter or text of the "Fact and Comment" columns. (Interrog. Resp. 9) (*Dal Col. Aff.*, Paras.3 & 4, See Exhibit "C".)

III. LEGAL ANALYSIS AND ARGUMENTS

A. The FEC attempt to censure Forbes magazine's First Amendment right to publish the "Fact and Comment" column fails to meet the rigorous standards set by the courts to justify such government action.

The analysis presented in the OGC Brief fails to discuss or even recognize the strong First Amendment rights of *Forbes* magazine to publish the "Fact and Column" column. The FEC appears to argue that *Forbes* magazine was required to cease presentation of "Fact and Comment" or portions of it because "some" of the subjects may be viewed as being "campaign-related." The very fact that the FEC cannot specify which portions of the column would cross this "campaign-related" threshold (which the OGC brief does not do) is sufficient on its face to cause that standard to be held overbroad, and to cause a "chilling" affect on *Forbes* magazine's First Amendment rights. On that basis alone, the "campaign-related" standard must fall. (Buckley v. Valeo, 429 U.S. 1 (1976), and Maine Right to Life Committee, Inc. v. FEC, 914 F. Supp. 8 (D. ME 1996))

The First Amendment speech rights of *Forbes* magazine mandates that any attempt by the government to enforce a regulation which causes a chill or complete censure, as is the case in this MUR, on its right to speech must be reviewed with the highest level of scrutiny and the regulation must be construed in the most narrow fashion. (Connick v. Myers, 461 U.S. 138

(1983) (Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the "highest rung of the hierarchy of First Amendment values and is entitled to special protection". at page 145.) (See also Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)

There was no attempt in the OGC Brief to address or analyze the First Amendment rights of *Forbes* magazine and, in view of those rights, justify the censorship of the magazine's "Fact and Comment" column caused by the proposed "campaign-related" standard. These are strong constitutional rights of *Forbes* and there is no justification for the FEC to summarily ignore them. Respondents submit the reason for failing to raise these basic constitutional issues is the inability of the Commission to mount any type of credible defense for the rationale employed in this case.

B. At issue is a disbursement of corporate funds which allegedly constitutes an "expenditure" in violation of 2 U.S.C. §441b.

The allegation contained in the complaint involves disbursement of corporate treasury funds by Forbes, Inc., allegedly for purposes of benefitting Mr. Forbes' presidential campaign. The action at issue is a disbursement of corporate treasury funds by Forbes, Inc. and thus requires that it be categorized as an "expenditure." Specifically, §441b[4] defines expenditure as:

> "any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national bank or state bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political

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[4] Unless otherwise noted, statutory citations are to Title 2 of the United States Code, Annotated.

party or organization, in connection with any election to any of the offices referred to in this section . . ." (2 U.S.C. §441b(b)(2))

The OGC Brief ultimately relies entirely upon the "coordination" of the Forbes, Inc. disbursement with the candidate as the basis for claiming the "Fact and Comment" was "campaign-related" and thus a violation of the Act. (*OGC Brief*, p. 8.) Citing to this "coordination" in the legal analysis, the OGC Brief cites to 11 C.F.R. § 109 as the regulatory authority for this prohibited "coordination." Yet those are the regulations governing independent expenditures. The OGC Brief therefore specifically acknowledges the alleged activity at issue is to be classified as an "expenditure," and by virtue of citing to the §109 regulations, acknowledges that as an independent expenditure, it must be an "express advocacy" communication to be so classified. (See p. 15, *supra.*) The OGC Brief goes on to argue that as an expenditure which was "coordinated", the communication need only meet the "campaign-related" standard to constitute a violation of the Act. The OGC Brief initially uses this expenditure analysis and then re-classifies the communication as a "contribution" due to the coordination of the disbursement to justify application of the lower "campaign-related" threshhold rather than the express advocacy needed, even by Counsel's admission, for an expenditure violation.

This selective reliance on the terms "expenditure" and "contribution" to conveniently serve a particular segment of the legal argument is a veiled attempt to dance around application of expressed advocacy. This case will prove to be a very poor selection upon which to justify what the Counsel considers, (though Respondents disagree) the last vestige to avoid application of the

express advocacy standard.[5] The OGC Brief utilized an expenditure analysis to justify its coordination theory, yet makes a leap to a contribution classification in order to avoid the express advocacy standard. As will be discussed below, this is why the OGC argument is so apparently strained and circular in nature.

C. The Commission acknowledges a jurisdictional concern by virtue of its 1997 Legislative Recommendations which include a request for statutory authority to deem candidate-coordinated issue advocacy to be an in-kind contribution.

The Commission appears to recognize a jurisdiction problem with these issue advocacy cases by virtue of their 1997 Legislative Recommendations (2 U.S.C. §438(a)(9)) which requests Congress to enact a *statutory* amendment stating that issue advocacy paid for by a corporation and coordinated with a candidate committee is an in-kind contribution:

> ". . . Congress should stipulate when coordination of an issue advocacy advertisement with a candidate or campaign would be considered an in-kind contribution. Additionally Congress should state that coordination of such a public communication with a corporation or a labor organization would be prohibited activity. Such a prohibition would help the Commission address the public's concern about soft money . . ." 1997 Federal Election Commission Legislative Recommendations to the President and Congress, pages 21-22).

The fact that the Commission deems it necessary for Congress to enact an amendment to the Act to authorize the FEC to deal with the type of legal issues presented in this MUR, leads to the undisputable conclusion that the Commission does not presently have jurisdiction under the Act to determine if such coordinated issue advocacy is in violation of the Act. If a statutory basis for

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[5] For example, the Explanation and Justification for the new regulations at 11 CFR 114.2 acknowledges corporations are prohibited from making communications to the general public, which expressly advocate the election or defeat of a candidate. However, it goes on to argue the MCFL case did not affect the standard for a corporation making a "contribution" to federal candidates 1 Fed. Elec. Camp. Fin. Guide (CCH ¶ 923, at p. 1599)

exercising jurisdiction over such issue advocacy presently existed, the Commission could *sua sponte*[6] issue a Notice of Proposed Rulemaking and deal with the coordination issue rather than be forced to seek an amendment to the Act. The request to Congress for a statutory amendment is an admission by the Commission that they do not have jurisdiction under the Act to prohibit the type of issue advocacy (even if it was coordinated with the candidate), which is the basis of the complaint in this MUR. Absent jurisdiction, this case must be dismissed.

At minimum, this legislative request by the Commission is an admission that the present Act and regulations provide insufficient guidance to the Commission to enforce these types of alleged violations. It must then also be read that Respondent did not have sufficient notice through the Act or regulations as to what would or would not constitute a violation of the Act relative to issue advocacy.

D. The only applicable legal standard of review for an alleged violation of 2 U.S.C. §441b is the "expressed advocacy" standard, a standard which OGC Brief acknowledges is not met in this case.

The "campaign-related" standard which the OGC Brief proposes in this case is ambiguous, overly broad, and one which is contrary to the long line of §441b cases before the Supreme Court, Circuit Courts, and numerous District Courts. Those opinions have continually recognized the need for clear and unambiguous standards to identify speech which is to come under the jurisdiction of the FECA. Attempts to apply a standard of review which mandates an arbitrary and subjective analysis,

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[6] 11 C.F.R. § 200.2(d)

as does the "campaign-related" standard, rather than the "bright line" test as articulated by the Courts, causes a substantial and chilling effect upon the First Amendment rights of Respondent.

The "campaign-related" standard based on "coordination with the candidate" is one which finds no definition in the Act, nor in the regulations; the OGC Brief points to no authority citing to a list of predetermined criteria against which the speech can be measured to determine if it violates the FECA; nor is there a reference to that term in any of the relevant court opinions pertaining to §441b violations. Absent expressed advocacy, the Commission must speculate as to the intent of the writer for promoting certain policy and issue positions. Void of plain and unambiguous language advocating a candidate's election, the Commission is left to the role of second-guessing, in essence, viewing a crystal ball to determine the authors' intent, precisely the situation the Courts find unjustifiable when it conflicts with one's right to speech. It is that type of arbitrary standard which the Courts have time and again refused to accommodate when it is used to limit speech. The standard for the evaluation of such speech must be clear and unambiguous. That standard must be an expressed advocacy standard. (See cases cited in Section E, below.)

E. The Courts have remained steadfastly clear; express advocacy is the only standard of review for determining a §441b violation.

An exhaustive review of the court opinions on this point would serve little purpose at this stage. The Commission is well aware of the litany of cases on this issue. However, the point must be underscored that the courts have consistently recognized that it is the expressed advocacy standard, and only that standard, which is to be utilized in the review of a §441b violation.

Noticeably absent from any of these court cases is any reference to a "campaign related" test which is proffered by the OGC Brief.

The court, in Buckley v. Valeo, 424 U.S. 1 (1976), laid the foundation for the expressed advocacy standard and the importance of it when they indicated that, to justify regulating political speech, it must explicitly and clearly advocate the election or defeat of a candidate. In FEC v. Massachusetts Citizens for Life, Inc., ("MCFL") 479 US 238 (1986), the court continued the Buckley rationale and recognized the expressed advocacy standard for determining whether or not a §441b violation had occurred.

> "The distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in the practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and government action. Not only do candidates campaign on the basis of their position on various issues but campaigns themselves generate issues of public interest ... Buckley adopted the expressed advocacy requirement to distinguish discussion of issues and candidates from more pointed exonerations to vote for particular persons" (at page 249.)

In FEC v. Furgatch, 807 F 2d 857 (9th Cir. 1987) cert. denied 484 U.S. 850 (1987) the court dealt with the §441b issue and recognized the need for the expressed advocacy standard. The court expanded upon the specific advocacy words found in Buckley but recognized the speech must expressly advocate for it to come within the restrictions of the FECA. The message is required to be unmistakable and unambiguous and suggestive of only one plausible meaning. The speech will only be termed "advocacy" if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act. Such speech cannot constitute expressed advocacy when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action (Furgatch at page 864.)

That case is especially informative and applicable to the factual situation at bar. A review of the "Fact and Comment" columns does not lead one to an unmistakable and unambiguous conclusion that they are being written for the advocation of Mr. Forbes' candidacy. To the contrary, Respondent submits reasonable minds clearly would not draw such an inference from the plain text of the articles - at worst they would differ as to the plain meaning and purpose of the messages contained in those columns. Mr. Forbes is identified as editor-in chief, not as a candidate, and based on that identification coupled with the text of the columns, no reasonable person would conclude any of the columns were in support of Mr. Forbes' candidacy. The message in each column is candidate-neutral. Therefore, no reasonable reading of those columns could subscribe an unmistakable and unambiguous advocacy for the election of Mr. Forbes.

In FEC v. National Organization for Women,(NOW) 713 F. Supp. 428(D.D.C. 1989), the court invoked the expressed advocacy standard in determining whether the text of a direct mail letter sent to the general public was in violation of the Act. The court concluded the letters, paid for by NOW corporate treasury funds, advocated issues, not the express advocacy of a candidate or any federal committee; thus the mailings did not come within the parameters of the FECA.

In Faucher v. Federal Election Commission 928 F. 2d 468 (1st Cir., 1991), cert. denied 502 U.S. 820 (1991), the Court of Appeals upheld a district court decision against the FEC pertaining to the use of corporate treasury funds to publish voter guides, allegedly in violation of §441b. The lower court, citing to MCFL stated the FEC standard failed to apply the narrow express advocacy standard of MCFL and rather used a "nonpartisan" standard which could include issue advocacy.

Therefore, the standard was unacceptable. (See also, Maine Right to Life summary, at p. 15, *supra*.)

The United States Supreme Court in FEC v. Colorado Republican Federal Campaign Committee 116 S. Ct. 2308 (1996) reaffirmed that the expressed advocacy standard is the applicable level of review to determine whether disbursements, such as those in the case at bar, come within the control and prohibitions of the FECA.

The most recent line of district court opinions recognizes the application of this standard in ruling time again against the Commission.

In FEC v. Christian Network, 894 F. Supp. 946 (W.D. Va, 1995) the Court, in a thorough analysis[7] of the issue, applied the expressed advocacy standard and held that television and

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[7] Judge Turk lays out a succinct chronology of cases in which the courts have insisted upon express advocacy and the universal acknowledgment that such a standard was absolutely necessary to maintain the bright-line rule required by the Supreme Court. "In the nineteen years since the Supreme Court's ruling in Buckley v. Valeo, the parameters of the "express advocacy" standard have been addressed by several federal courts in a variety of circumstances. Faucher v. Federal Election Com., 928 F.2d 468 (1st Cir.), *cert. denied*, 112 S. Ct.79 (1991) (pro-life voter guide); Federal Election Com. v. Furgatch, 807 F. 2d 857 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987) (newspaper advertisements criticizing President Carter); Federal Election Com. V. Central Long Island Tax Reform Immediacy Committee, 616 F. 2d 45 (2nd Cir. 1980) ("Central Long Island Tax Reform") (bulletin criticizing voting record of local congressman); Federal Election Com. V. Survival Education Fund Inc., No. 89 Civ. 0347 (TPG), 1994 WL 9658 (S.D.N.Y. Jan. 12, 1994) ("SEFI") (letters criticizing the Reagan Administration's military involvement in Central America); Federal Election Com. v. Colorado Republican Fed. Campaign Comm., 839 F. Supp. 1448 (D. Colo. 1993) ("Colorado Rep. C.C.") (radio advertisement attacking Senate candidate's alleged positions on defense spending and balanced budget issues); Federal Election Com. v. National Organization for Women, 713 F. Supp. 428 (D.D.C. 1989) ("NOW") (mailings attacking certain members of Congress for their political views in opposition to abortion rights and the ERA); Federal Election Com. v. American Federation of State, County & Municipal Employees, 471 F. Supp. 315 (D.D.C. 1979) ("American Federation") (Nixon-Ford poster distributed to union members criticizing the Watergate pardon)."

"Acknowledging that political expression, including discussion of public issues and debate on the

newspaper advertisements[8] which referenced and criticized the Clinton-Gore campaign failed to meet the express advocacy standard and was deemed not to constitute a §441b violation.

In Maine Right to Life Committee, Inc. v. FEC, 914 F. Supp. 8 (D. Me 1996), aff'd 98 F. 3d. 1 (1st Cir., 1996) the court declared as unconstitutional the Commission's new regulations defining "express advocacy" (11 CFR 100.22) because they were deemed too broad and exceeded the Commission's authority. The *Explanation and Justification* for 11 CFR §100.22 (b) states the Commission would consider the timing of communications on a case-by-case basis. This policy was found by the Court to cause a sufficient "chill" of the plaintiff's First Amendment rights that required relief be provided to plaintiff. The same Court, in Clifton v. FEC 927 F. Supp., 493 (D. Me., 1996), held that a voter guide paid for by a corporation did not expressly advocate the election of a candidate and therefore was not a §441b violation.

The courts have been universally and unequivocally clear on this point, and yet the OGC Brief makes no attempt to raise and distinguish the facts at bar with any one of these cases. This litany of case law supporting Respondent cannot be summarily dismissed as Counsel attempts to do. They have a duty to address and distinguished the present MUR from those cases. In none of those cases cited above do the courts reference, let alone apply, this campaign-related standard of

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qualifications of candidates, enjoys extensive First Amendment protection, the vast majority of these courts have adopted a strict interpretation of the "express advocacy" standard." (*See* Central Long Island Tax Reform, 616 F. 2d at 53.) Christian Action Network, p.956.

[8] The facts in this case would appear to be very compelling for the FEC argument, yet the Court ruled against them. The TV and newspaper advertisements reference Clinton-Gore as candidates, neither of whom were incumbents, and the ads which aired during the 1992 presidential debate called for the "Clinton-Gore campaign committee" to retract their commitment to gay rights.

review. Rather the various courts' analysis is consistent: if there is no expressed advocacy, there is no §441b violation. Failure to reconcile the Counsel's "campaign-related" standard against this long and clear list of case law is reckless. The OGC Brief makes a finding that, "Nothing in the attached columns (Fact and Comment columns attached to the complaint) appears to constitute expressed advocacy and there appear to be no solicitations for contributions." (OGC Brief, page 8.) That finding should have been the conclusion of the analysis with a recommendation of no RTB and close the file.

F. The "coordination" concept is not applicable to general issue advocacy but only to those activities referenced at 11 CFR 114.3 and 114.4.

The OGC Brief states that, notwithstanding the absence of expressed advocacy or solicitation for contributions, the activity in question is "campaign- related" if that activity is coordinated with the candidate or campaign. The OGC Brief draws this conclusion, citing as authority AO 1990-5 and MUR 2268. Specifically they argue that, due to Mr. Forbes' (who was also a presidential candidate) direct involvement in the creation and dissemination of the communications, (the "Fact and Comment" columns,) a corporate contribution occurred (OGC Brief, p.11). These two "authorities" will be addressed later in this brief. Though Respondent disagrees with application of the "campaign-related" standard, the facts in this MUR and their application of the "coordination" policy do not measure up even to that level of review.

First, a review of the applicable regulations must be undertaken as an initial step in the analysis. Though not analyzed by the OGC Brief, the basis for this "coordination" theory apparently lies at 11 CFR§114 regulations.[9] Those regulations state:

> "Disbursements by corporations and labor organizations for the *election-related activities described in 11 CFR 114.3 and 114.4* will not cause *those activities* to be contributions or expenditures, even when coordinated with any candidate, candidate's agent, candidate's authorized committee(s) or any party committee to the extent permitted in those sections. Coordination beyond that described in 11 CFR 114.3 and 114.4 shall not cause subsequent activities directed at the restricted class to be considered contributions or expenditures. However, such coordination may be considered evidence that could negate the independence of subsequent communications to those outside the restricted class by the corporation, labor organization, or its separate segregated fund, and could result in an in-kind contribution. *See* 11 CFR 109.1 regarding independent expenditures and coordination with candidates." (11 C.F.R. 114.2(c), emphasis added.)

These regulations specifically reference "...election-related[10] activities described in 11 CFR 114.3 and 114.4 ..." when discussing corporate disbursements coordinated with a candidate. Those specific activities, and only those activities, if paid for by a corporation, would not violate the Act, provided the activities are only directed to the corporation's restricted class (11 C.F.R. § 114.3(a).) Further, if the candidate coordinates those activities with a corporation and the activities are communicated outside the restricted class, then that coordination could taint the "independent expenditure" classification (see the reference at 114.2(c) to 11 C.F.R. § 109) of

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9 These new regulations, specifically at 114.2, 114.3 and 114.4 became effective on March 13, 1996 (61 FR 10269). Thus, they were not in effect at the time of the alleged violations and Respondent, by virtue of discussing this issue do not acknowledge or agree to their applicability, nor waive their objection to the applicability of those regulations to this case nor related defense, and specifically reserve the right to raise as a defense the fact that these regulations do not control the activity at issue because they were not in effect at the time of the alleged violation.

10 The OGC Brief uses the phrase "campaign-related" whereas the regulations in question use the term "election-related." For the sake of this argument, Respondent must conclude the OGC Brief deems those to be synonomous, although such conclusion cannot be stated with certainty by Respondent because the OGC Brief fails to undertake an analysis of the applicability of the 11 C.F.R. 114 regulations.

such subsequent *expenditures* and cause them to be classified as in-kind contributions, per the regulations at §109.1(c). This same concept is carried forward at 11 C.F.R. §114.3:

> "Corporations and labor organizations may make communications on any subject, including communications containing express advocacy, to their restricted class or any part of that class. Corporations and labor organizations may also make the *communications permitted under 11 C.F.R. §114.4* to their restricted class or any part of that class. The *activities permitted under this section* may involve election-related coordination with candidates and political committees. See 11 C.F.R. §109.1 and §114.2(c) regarding independent expenditures and coordination with candidates." (11 C.F.R. 114.3(a)(1), emphasis added.)

Given the plain reading of these two sets of regulations, the first twist in the OGC Brief's coordination argument is that the "election-related" activities could be permissible and classified as "independent expenditures" if they were not coordinated with the candidate and were communicated to the general public. (See §114.2(c) and 114.3(a)(1) reference to 11 C.F.R. §109.1.) Yet, in order for an activity or communication to be considered an "independent expenditure," it must be

> "... for a communication *expressly advocating* the election or defeat of a clearly identified candidate ..." (11 C.F.R. §109.1(a).) (emphasis added)

Therefore, only those communications which first qualify as "express advocacy" are at issue; they are either exempt under 114.3 when communicated to the restricted class or, if communicated to the general public, they are either (1) independent expenditures, or (2) if coordinated with the candidate, they are "tainted" as independent expenditures, and are considered "in-kind" contributions (11 C.F.R. § 109.1(c)) subject to the Acts limits (2 U.S.C. §441a). Try as they may, the road the Counsel attempts to take us down once again leads back to the fact that a disbursement must first meet the definition of an "expenditure" (specifically "express advocacy communications") even for a "coordination" analysis under 11 C.F.R. §114.

If the communication does not meet that threshold, the analysis is concluded, and no violation occurs.

Secondly, those regulations state the coordination with the candidate applies only to "election-related activities described in 11 CFR §114.3 and §114.4." (11 C.F.R. 114.2(c)) This is a closed universe of specified activities and the facts in this MUR reveal none of those enumerated activities at §114.3 or §114.4 are alleged to have occurred in this MUR. Those activities are:

(1) Publications expressly advocating election or defeat of a candidate (§114.3(c)(1))

(2) Candidate or Party appearances (114.3(c)(2); 114.4(b)(1); 114.4(c)(7))

(3) Phone Banks (114.3(c)(3))

(4) Registration and Get Out the Vote (114.3(c)(4); 114.4(c)(2) and (3); 114(d))

(5) Voting Records (114.4(c)(4))

(6) Voter Guides (114.4(c)(5))

(7) Endorsements (114.4(c)(6))

Absent one of those specific activities, there is no "election-related activity" which could be tainted by the coordination with the candidate, to cause it to become an in-kind contribution.

Third, the §114.3 activities are specifically exempt from the definition of expenditure. (11 C.F.R. 114.1 (a)(2)(i). Therefore, but for that exemption, the activities which are intended to be covered by this regulation would constitute an expenditure based on the substance of the communication; specifically *express advocacy* (11.C.F.R. 114.3(a)(1)[11]. A communication

[11] This point is buttressed by the requirement that disbursements meeting the 114.3 requirements must be reported to the Commission on Form 7. The regulations only require reporting of communications expressly advocating a candidate's election. (See *E & J*, 114.3, CCH ¶ 923, p.

would not need to be included in the 114.3 exemption to the definition of expenditure if it did not otherwise consist of an express advocacy message. The inescapable conclusion is that communications not expressly advocating need not be exempt since they would not otherwise constitute an expenditure.

Correspondingly, the regulations at 11 C.F.R. §114.4 also state that only communications which contain express advocacy are prohibited from being communicated to the general public when paid for by a corporation; alternatively, a prohibition may occur if one of the specified activities at 11 C.F.R. §114.4 (see p. 18, *supra.*) are impermissibly coordinated with the candidate[12]. Neither of those situations is alleged to have occurred in this MUR, thus the "coordination" / "campaign-related" argument is misplaced by OGC in this matter.

To argue that any non-expressed advocacy communication or activity not specified in 114.3 or 114.4 which is "coordinated" by a candidate outside the scope of his or her campaign would result in prohibited "campaign-related" activities, would make no sense. Certainly, an activity or communication which is neutral on its face would not be campaign-related because it was "coordinated" with the candidate or his committee. What if Mr. Forbes, as a corporate CEO, authored a proxy vote announced in *The Wall Street Journal*, or endorsed a vacation spot or hotel

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1601-4.

12 See also the *Explanation and Justification* for section 114.3: "However, in light of the MCFL decision, the references to 'partisan' activities have been replaced with narrower provisions that only apply to communications containing express advocacy. . . Similarly, the revisions delete the more restrictive language in previous section 114.3(a)(1) that had prohibited corporate and labor organizations expenditures for 'partisan' communications to the general public because revised 114.4 establishes that such communications are only prohibited if they contain express advocacy or are impermissibly coordinated with candidates or political committees." (FEC *Explanation and Justification* ("*E & J*"), (CCH) ¶923, pages 1601-4.)

in a magazine, either or which were known or worked on by common corporate and campaign vendors with the assistance of Mr. Forbes? Certainly such coordination would not constitute a "campaign-related activity" regulated by the FECA. These are examples of neutral communication, as were the "Fact and Comment" columns which do not come within the specified activities at 114.3 or 114.4, and are therefore, not intended to be regulated by the Act. To argue neutral-based communications come under the control of the FECA would be contrary to a long line of court opinions previously addressed and numerous Commission advisory opinions and enforcement cases as presented below.

G. The Advisory Opinions cited as authority for the OGC position specifically authorize the type of issue advocacy at issue in this MUR or are based on facts which are substantially distinguishable from this MUR.

In justifying this "campaign-related" standard, the OGC Brief states, "Statements, comments, or references regarding *clearly identified candidates* which appear in (a publication) and are made with the cooperation, consultation, or prior consent of or at the request or suggestion of, the candidates or their agents regardless of whether such references contain 'expressed advocacy' or solicitation for contributions, then the payment for *allocable costs* incurred in making the communications will constitute ... in-kind contributions to identified candidates'. Advisory Opinion 1988-22 (footnotes omitted.)" (emphasis added.) (OGC Brief, p. 5)

The facts in AO 1988-22 involved a group called "Republican Associates" who wanted to undertake political activities, including the distribution of a monthly newsletter to discuss political events and activities that could be of interest to supporters of the Republican party,

including discussions of candidates, campaigns for federal office and opportunities for involvements in such campaigns. Those facts are not on point with the facts at bar. Forbes, Inc. is not a political committee, the "Fact and Comment" column did not discuss partisan activities, promotion of Republican party principles, discussion of candidates, or political campaign activities. More importantly, nowhere in "Fact and Comment" is there reference to a "clearly identified candidate", which is the prerequisite for the opinion in AO 1988-22. Reliance on that Advisory Opinion is completely misplaced, as is the case with the other authorities cited by the OGC Brief in support of this "campaign related" standard.

The OGC Brief at page 5 cites in footnote 3 to a variety of Advisory Opinions as authority for their position that activity is "campaign-related" when it is coordinated with a candidate's campaign or the candidate. However, a close review of those Advisory Opinions cited reveals they are factually distinguishable, as is the case of AO 1988-22, or they present situations in which the *Commission permitted the issue advocacy* concluding it did not constitute a violation of the FECA.

The OGC Brief cites to AO 1992-6, in which David Duke, then a candidate for president, was permitted to accept an honoraria and travel expenses reimbursement from a university, for a speech which Mr. Duke was to deliver on the topic of affirmative action. The speech was not to include a reference to his campaign, advocacy of his election, nor a solicitation of contributions. The Commission concluded,

> "Based on its review of all the foregoing facts and circumstances presented in this request and in reliance on the representation made, the Commission concludes that the described event and Vanderbilt's payment of an honoraria and related travel

> expenses would not constitute a contribution or expenditure for purposes of the Act and Commission regulations. However, any reference by Mr. Duke to his campaign, or to the campaign or qualifications of another presidential candidate, either during the speech or during any question and answer period (held just before or after the speech) will change the character of the appearance to one that is for purposes of influencing a federal election." (AO 1992-6, CCH ¶ 6043 at p. 11, 772.)

Even more surprising, the Duke speech centered on affirmative action, a subject which clearly was at the bedrock of the Duke for President campaign. This speech was also "coordinated" by Mr. Duke, yet neither of these points caused the Commission to rule the University's payment to Mr. Duke to be considered a violation of the Act. This holding *supports* Respondent and Respondent is surprised it is cited as an authority that Forbes, Inc. and Mr. Forbes, in writing "Fact and Comment", went beyond the subject matter parameters provided by the Commission in the David Duke opinion.

It is also interesting to note that Commissioner Aikens filed a concurring opinion stating that she disagreed with that portion of the Opinion discussing the analysis of Advisory Opinion 1990-5. (An opinion heavily relied upon on the OGC Brief.) Commissioner Aikens noted that she dissented from the final draft of 1990-5,

> " . . . because I found particularly troubling language in the draft regarding the discussion of public policy issues wherein an 'inference of campaign purpose could be drawn' that would result in the newsletter being considered as campaign-related. I believe we too broadly infringe on free speech rights by implying that the underlying intent and purpose of anything said or printed by or about a candidate - at differing and uncertain time frames before an election - become solely election-related. I do not accept the position that there could be no other reason or purpose except electioneering for undertaking such activities." (Aikens concurring, AO 1992-26, CCH ¶6043, pp. 11,772)

Respondent agrees with Commissioner Aikens opinion and submits the same principles, if applied in this MUR, require a finding that no violation occurred.

Counsel next cites to Advisory Opinion 1992-5, yet in this opinion, the Commission *approved* the proposed issue advocacy activity of Congressman Moran participating in a cable-television program discussing public policy issues. In concluding that the proposed cable program would not constitute a contribution or expenditure, the opinion states:

> "In the video of 'A Capital Report from Congressman James P. Moran', no mention is made of your campaign or election to federal office nor did the program contain any otherwise promotional elements such as banners or campaign decorations. Furthermore, the program did not include any message that solicits contributions. The content of the program was strictly limited to issues before the congress or issues of relevance to your district. The 'fact sheet' of a 'conversation with Jim Moran' likewise indicates that these programs will be issue-oriented and devoid of campaign-related material or content." (AO 1992-5; CCH ¶6049, p. 11,796)

This Advisory Opinion stands for a proposition that issue advocacy, even when made by or coordinated by the candidate, is not a violation of the Act. It supports Respondent's position and flies in the face of the position for which it is cited in the OGC Brief.

In the next opinion cited in the OGC Brief, AO 1988-27, *a corporation was permitted* by the Commission to make a payment to a candidate who was an incumbent congressman, to speak before a corporation's group of stockholders. This opinion is not on point because it involves only communications to the restricted class and not the general public and it is unclear as to its relevance to the issue in this MUR. Notwithstanding, the Commission found the corporate expenditure permissible.

The next set of Advisory Opinion authorities cited by the OGC Brief in footnote 3 are clearly distinguishable based on the facts. AO 1986-37, AO 1986-26, and AO 1984-13 each involved candidate forum events at which individuals *in their capacity as a candidate* came and discuss their campaign, campaign issues, promoted their candidacy, etc. Clearly, that is not the situation involving the issue advocacy of *Forbes* magazine. "Fact and Comment" was not paid for or sponsored by a political committee, Mr. Forbes was not identified as a candidate, and no reference was made to his candidacy. As such, those AO authorities cited in the OGC Brief are materially distinguishable and are not relevant to the discussion.

The OGC Brief relies heavily upon Advisory Opinion 1990-5, which sets forth a three-prong test to determine whether a newsletter published by a congressional candidate would be considered a contribution or expenditure under the FECA. The three-prong test articulated in the Advisory Opinion is the following:

(1) Direct or indirect references made to the candidacy, campaign, or qualification for public office of (the candidate) or (the candidate's) opponent;

(2) Articles or editorials are published referring to (the candidate's) review on public policy issues or those (the candidate's) opponent or referring to issues raised in the campaign, whether written by (the candidate) or anyone else; or

(3) Distribution of the newsletter is expanded ... in the manner that indicates utilization of the newsletter for campaign communication. (Advisory Opinion 1990-5.)

In that opinion, the Commission concluded that a case-by-case review of each of the newsletters would be required to determine whether or not the content constituted an expenditure for the benefit of this campaign. The Commission noted that, (1) the newsletter originated at a time when the individual was a candidate for federal office; (2) it was inspired by his experiences as a

candidate for Congress; (3) it was sent out primarily to individuals whom he encountered during his prior campaign, many of whom had been supporters of his candidacy, and (4) people involved in the campaign were also involved in the publication of the newsletter.

Contrast that with the facts in this MUR, and it is substantially distinguishable . (1) "Fact and Comment" did not originate at a time when Mr. Forbes was a candidate. Mr. Forbes has been editing this column in *Forbes* magazine for over 15 years, a time which was clearly prior to his candidacy for federal office; (2) the columns were not inspired by Mr. Forbes' candidacy since they discussed the same type of issues as had been discussed for years in the column and the columns did not reference his presidential candidacy; (3) the magazine was not sent out primarily to those supporters Mr. Forbes encountered in the campaign. The magazine has for years reported a subscribership of over 765,000 -- no evidence is even remotely proffered by Counsel that any increase in the level of subscribers resulted from or was increased because of Mr. Forbes' candidacy; and (4) the campaign was not involved in any fashion regarding the "Fact and Comment" columns. (See *Dal Col Aff.* 3 and 4.)

Clearly, the facts in this MUR do not remotely meet the criteria set forth in AO 1990-5. Citing to this AO as authority is misplaced by the OGC Brief.

II. Counsel fails to bring to the Commission's attention the long list of Advisory Opinions which permit the specific type of issue advocacy by entities, including candidates for federal office, as found in Forbes magazine.

The ability of individuals, who are also federal candidates, to speak on a variety of subject matters, without causing such advocacy to be considered an expenditure, is a long-established and recognized proposition in numerous Commission advisory opinions. The following are examples of such Commission holdings.

In AO 1977-54 (CCH ¶5301), Congressman Gingrich, while a candidate, was permitted to head a petition drive and direct mail campaign pertaining to stopping the ratification of the Panama Canal treaty. The Commission held that the expenses associated with the newsletters, mass mailings, radio and television advertisements, public appearances, all of which identified Mr. Gingrich by name, would not be considered a contribution or expenditure to his congressional campaign, because no reference was made to his candidacy.

In AO 1977-42 (CCH ¶5313), a congressional candidate was permitted to host an interview program on a radio station which aired one hour in length for five days a week. The program was paid for and sponsored by business enterprises and the employee, who was also a candidate, was paid by the radio station. In holding that such an activity would not constitute a contribution or expenditure, the Commission noted that there was an absence of a communication expressly advocating the election or defeat of the candidate and the solicitation of contributions.

Moving several years ahead, in AO 1992-37 (CCH ¶6075), the FEC permitted a candidate to continue working as a radio broadcaster, the text of his show primarily consisting of criticism of public and political figures and discussion of controversial contemporary issues. The Commission noted that there was no expressed advocacy nor reference to his candidacy, and therefore the compensation he received from the radio station did not constitute a prohibited expenditure. (See also Commissioner Elliot's concurring opinion.)

In AO 1994-15 (CCH ¶6118), the Commission permitted Congresswoman Leslie Byrne, while a candidate, to host a cable-TV program which aired in her district, involving public affairs issues. The Commission concluded as follows:

> "Based on a review of the information submitted by you, the Commission concludes that production and broadcasting of the proposed series will not result in a contribution or expenditure and are, therefore, permissible under the Act. This series does not appear to be controlled by your campaign and it will not include campaign or election-related references. It will entail discussions on public issues moderated by a federal officeholder acting in her capacity as an officeholder, with the special purpose of focusing on one issue per segment in depth. (See Advisory Opinion 1992-5.) The Commission also assumes that the scheduling and duration of the series, or the selection of individual topics, will not be made with reference to the timing of your nomination or election to office." (AO 1994-15; CCH ¶6118, p. 11,985)

Most recently, in Advisory Opinion 1996-11 (CCH ¶6194), the Commission permitted candidates to have their travel and hotel expenses paid for by National Right-to-Life, Inc. to enable those candidates to come and speak to the general public on issues pertaining to right-to-life. In permitting the reimbursement of expenses to the candidates, the Commission indicated that no corporate contribution would result since there was no reference to the individuals as candidates or advocacy of their candidacy while speaking to the general public.

This is but a sampling of the long and consistent approach which the Commission has applied in permitting individuals to advocate issue and policy positions even during the time in which they are also candidates for federal office. The fact pattern in MUR 4305 clearly comes within the parameters set forth in the advisory opinions cited in this section.

I. The single enforcement action referenced in the OGC Brief, MUR 2268, is a matter in which the General Counsel, concludes the issue-advocacy was permissible and recommended no reason-to-believe should be found.

In the single enforcement action cited by the OGC Brief, MUR 2268 involving Neighbors for Epperson, the RTB brief lays out a 19-page analysis thoroughly discussing the applicability of the expressed advocacy standard and a long list of relevant advisory opinions concluding the *issue advocacy involving Epperson was not a violation of the Act.* Respondent is again surprised that this case is cited by the OGC Brief to substantiate and justify their position in the present matter. In Respondents' opinion, the analysis in MUR 2268 is so well articulated that a copy of that brief is attached hereto and incorporated herein as Exhibit "D". Therefore, the Respondents submit it for consideration along with the other authorities cited herein.

Respondents also submits that the Commission review the analysis and applicable opinions cited in MUR 3855/3937, involving Friends of Andrea Seastrand. Therein, the Commission found no violation of the Act when Mrs. Seastrand, who at the time was a candidate and not an incumbent congresswoman, aired radio advertisements in the Congressional district for which she was seeking election, advocating that individuals register as Republicans. The Counsel found no

express advocacy and cited applicable authorities to reach that conclusion which Respondent would submit to the Commission as authorities in this matter.

J. Since Mr. Forbes was not seeking election in the state of New Jersey, The Hills-Bedminster "Fact and Comment" reprint could not be considered an expenditure under the Act.

The OGC Brief bases its justification for an RTB finding upon the allegation that the Hills-Bedminster Newspapers carried the "Fact and Comment" column.

> "If Mr. Forbes reprinted his "Fact and Comment" columns in all of the Forbes Newspapers after announcing his candidacy as alleged in the complaint this may suggest utilization of these publications as campaign communications by increasing the distribution of the columns." (OGC Brief, p. 10.)

First, the "Fact and Comment" columns were not reprinted in the Forbes papers as a result of his presidential announcement. Those columns had been reprinted in those papers for many years. As noted earlier, those papers are only circulated in New Jersey and yet Mr. Forbes was not seeking election, nor was his name on the 1996 Republican Presidential ballot in the state of New Jersey (*Forbes Aff.*, Para. 3.) Since Mr. Forbes did not have his name on the New Jersey Republican presidential primary ballot, he was not "seeking" election in that state and thus not a "candidate" as defined by the Act (2 U.S.C. §431(2)). (See also Advisory Opinion 1982-49; CCH ¶5693: "Since Mr. Bush did not file petitions, under Connecticut law there is no primary election held unless a candidate satisfies that requirement"; Advisory Opinion 1989-15, CCH ¶5964: "Because Mrs. Ros-Lehtinen will not be on the ballot in the primary run-off election, the

Commission considers that you and Mrs. Ros-Lehtinen may not take advantage of the separate constitution limitations applicable to that election.")

Therefore, since Mr. Forbes was not a candidate in New Jersey, the disbursements by The Hills-Bedminster, including payment for the "Fact and Comment" column, fails to meet the definition of contribution or expenditure (2 U.S.C. § 431(8)(A); (9)(A). Since Mr. Forbes was not seeking election in the state of New Jersey, the newspapers distributed could not have been published for purposes of influencing the election of Mr. Forbes. Thus, no expenditure by The Hills-Bedminster could have occurred.

K. A review of the "Fact and Comment" column fails to show common themes with the Forbes Campaign.

A review of the "Fact and Comment" columns during the time in question evidences the impossible task of assessing which, if any of the columns contain "campaign themes" as suggested by the OGC Brief. That Brief states:

> "Mr. Forbes appears to have repeatedly offered his opinions on campaign issues in his columns since becoming a presidential candidate. The primary example raised in the complaint is his promotion of the "flat tax" in at least two separate "Fact and Comment" columns. The flat tax is closely identified with Mr, Forbes; indeed, he has championed its enactment in previous columns and specifically mentioned it several times during his formal candidacy announcement. News reports covering the Republican Presidential Primary Election regularly referred to Mr. Forbes's flat tax proposals, some even going so far as to label him "Mr. Flat Tax." Mr. Forbes has also discussed, both on the campaign trail and in *Forbes*, his positions on term limits, a gold standard, abortion, and US involvement in Bosnia." (OGC Brief, p. 10.)

The above-cited paragraph from the OGC Brief exemplifies the arbitrary selection and assessment of issues which they contend are "campaign themes" versus mere reporting by Forbes magazine on issues. For example, promotion of the flat tax issue was one of Mr. Forbes' primary issues during the presidential campaign; yet it was also promoted and agreed to by other Republican candidates (e.g., Richard Lugar and Patrick Buchanan). Would Mr. Forbes' comments in "Fact and Comment" be deemed an expenditure by either *Forbes* magazine or FPC for the benefit of Mr. Lugar's or Mr. Buchanan's campaign?

And this all-important flat-tax "theme" as cited in the complaint, is alleged to have appeared but *twice* in the "Fact and Comment" column; October 16, 1995 and October 23, 1995. Yet look at the context of the October 23, 1995 reference to flat tax -- it is an article entitled, "Stop this Strong-Arming", regarding the use of private sector collection agencies for delinquent taxes - it contains a mere passing reference to flat tax. How would Counsel assess how to allocate the value of that reference? All or only a portion of the column inches?

The reference in the complaint to the October 16, 1995 column does not contain the cited reference to the flat tax. However, even if it does appear in another column, do those two references to flat tax constitute promotion of Mr. Forbes' primary campaign theme? I think not. If that were the intent, surely there would be many more references to the flat tax - not merely those two cited in the complaint.

The next question is which of the numerous issues presented in "Fact and Comment" would Counsel suggest constitutes an expenditure because they were also referenced in the campaign?

Perhaps the obsolete economic policies of Brazil (November 6, 1995), baseball owners (February 12, 1996), the ugly new $100.00 bill and Megan's Law (May 6, 1996) or the telecommunications bill (March 11,1996); not exactly a list of prominent themes in Mr. Forbes' campaign. If the column inches dedicated to those subjects are not to be considered allocable expenditures, where is the demarcation for the allocable "campaign-related" subjects, who could make such an assessment, and upon what criteria? None of those subject matters was "coordinated" any more or less with FPC then was the column which referenced "flat tax." The assessment is made no easier if the column referenced Bosnia or the gold standard. For example, take the reference in the previously-mentioned October 23rd column to enacting a flat tax in Israel. Query: is promoting or referencing a flat tax in Israel an allocable expenditure under the OGC Brief's theory? If not, on what FECA basis is it not allocable to FPC? What other columns would also be exempt from allocation based on that same rationale?

Absent the clear delineation called for by the express advocacy standard, such judgements become arbitrary. If *Forbes* magazine, after reviewing the Act and Regulations, cannot clearly determine the applicable subject-matter threshold and what subjects constitute allocable expenditures, then it causes a substantial chilling effect upon their First Amendment rights. Due to their concern of prosecution, prompted solely by a potential FEC action, Forbes, Inc. would require the entire "Fact and Comment" column to be censured. That is unconstitutional and no government agency should permit to stand a vague regulation, let alone a policy position, as is the case in the matter, which is the basis for denying any person's right to speech.

I. The OGC Report provides a thorough discussion of the "press exemption"; however, it is irrelevant to the discussion because the communications at issue do not measure up to a contribution and expenditure and therefore, the press exemption to those respective definitions does not apply.

The OGC Brief is consumed by an extensive discussion of the "press exemption" (11 C.F.R. §100.7(b)(2) and §100.8(b)(2).) However, the press exemption is a premature discussion in the analysis, since that discussion is only relevant in the event that the Counsel first demonstrates that the disbursements by Forbes, Inc. constituted contributions or expenditures. As articulated and substantiated by the Act, case law and advisory opinions, Respondents submit that the activities in question do not constitute an expenditure or contribution and therefore the issue of the press exemption need not be addressed.

IV. CONCLUSION

For the reasons stated above, Respondents respectfully request that the Commission expeditiously conclude its investigation in this matter and make a finding of no probable cause and close the file.

Respectfully submitted,

Paul E. Sullivan, Esq.
Counsel to Respondents

w/enclosures

EXHIBIT "A"

BEFORE THE FEDERAL ELECTION COMMISSION

IN RE: Forbes, Inc.	)	
	)	MUR 4305:
	)	Response to Interrogatories
	)	

In response to interrogatories propounded by the Federal Election Commission by letter dated December 11, 1996, in conjunction with the above-referenced matter, Forbes, Inc., submits the following, testimony and answers to those interrogatories.

Response to Interrogatory No. 1.

Forbes, Inc. objects to the disclosure of the specific amount of Mr. Forbes' voting stock in Forbes, Inc., on the basis it is confidential and proprietary information which cannot be protected from public disclosure once this matter is concluded and documentation is placed on the public record. Mr. Forbes, however, has submitted an affidavit in this matter in which he attests to the fact that during the time periods pertaining the facts involved in MUR 4305, he maintained an ownership interest in excess of fifty percent (50%) of the outstanding voting shares of Forbes, Inc.

Response to Interrogatory No. 2

Forbes, Inc., objects to this interrogatory on the basis that this is confidential and proprietary information which cannot be protected from public disclosure once this matter is closed and the documentation is placed on the public record. Forbes, Inc. also objects on the basis that the question is not material to the issues of this case. Forbes, Inc. is a corporation and the specific

type of corporation is not material to the Commission's investigation and determination of whether or not a violation of §441b of the Federal Election Campaign Act of 1971, as amended, has occurred.

Response to Interrogatory No. 3

Mr. Forbes has been Editor-in-Chief of Forbes magazine and Forbes Newspapers since March, 1990. The duties and powers of this position are as follows: As Editor-in Chief, the Editor as well as other senior management report to Steve Forbes. The nature and the extent of the control that Mr. Forbes exercises or may exercise over the content of these publications is as follows: Mr. Forbes exercises total control over his column.

Response to Interrogatory No. 4

Mr. Forbes has been writing the "Fact and Comment" column in Forbes magazine since March 19, 1990. Prior to that, he wrote a one-page column entitled, "Fact and Comment II" which commenced on January 3, 1983. There have been no issues of Forbes magazine published during that time period in which Mr. Forbes did not write a column, nor in which the column was not printed. This answer includes publications of the Forbes magazine up until the date that these responses are submitted to the Commission.

Response to Interrogatory No. 5

Attached hereto please find copies of the "Fact and Comment" columns appearing in Forbes magazine from January 1, 1995 through January 27, 1997.

Response to Interrogatory No. 6

The following is a list of publications owned or controlled by Forbes Newspapers and the total circulation current to December 31, 1996. Each of the publications listed below are weekly newspapers circulated only in the state of New Jersey.

Newspaper	Circulation
1. Somerset Messenger-Gazette	12,467
2. Hills-Bedminster Press	6,216
3. Bound Brook Chronicle	2,166
4. Green-Brook-North Plainfield Journal	2,103
5. Warren-Watchung Journal	1,305
6. Franklin Focus	2,350
7. Somerset Buyer's Guide	16,102
8. Central Buyer's Guide	6,670
9. The Chronicle	2,716
10. South Plainfield Reporter	3,140
11. Piscataway Review	3,040
12. Metuchen-Edison Review	4,900
13. High Park Herald	1,374
14. Middlesex Buyer's Guide Zone 1	11,244
15. Middlesex Buyer's Guide Zone 2	13,128
16. Central Buyer's Guide	2,536
17. Cranford Chronicle	6,241
18. Scotch Plains-Fanwood Press	2,349
19. Westfield Record	4,790

6a/b: The Hills-Bedminster Press was the only newspaper publication to carry (and continues to carry) Mr. Forbes' "Fact and Comment" column. It has been carried on a weekly basis since 1989 and contains excerpts from the Forbes magazine "Fact and Comment" column.

6c: As noted above, only a portion of the "Fact and Comment" column appears in the Hills-Bedminster Press and the editor of the Hills-Bedminster Press makes the decision as to which

excerpts from "Fact and Comment" would appear in the weekly issue. This decision is solely his and is based upon available space he elects to dedicate to the "Fact and Comment" column.

6d: Attached hereto are copies of the "Fact and Comment" columns carried in the Hills-Bedminster Press from January 1, 1995 through January 1997.

Response to Interrogatory No. 7

Attached hereto are the 1995 and 1996 rate cards utilized by Forbes magazine and Forbes' newspapers. Forbes magazine and newspapers does not have a policy which prohibits paid advertising for political matters; however, it is subject to the same rate cards as attached hereto and the same criteria which would be considered for commercial advertising.

Response to Interrogatory No. 8

Effective January 1, 1996, the circulation rate base for Forbes magazine was 765,000, the same circulation rate base effective January 2, 1995. Forbes magazine does not produce foreign language versions of the magazine; however, there is a Japanese version produced by a third party licensee and the circulation for that publication is 81,923.

Response to Interrogatory No. 9

No individual or group of individuals from Forbes for President, Inc. was involved in any fashion with the creation or dissemination or any "Fact and Comment" column, including suggestions as to the column topics, research of the topics chosen, or assistance in developing, writing, or publishing any of the columns.

Response to Interrogatory No. 10

Documents referenced in the above-testimony are attached hereto and incorporated herein.

The undersigned, having reviewed the interrogatories propounded by the FEC in MUR 4305 by letter dated December 11, 1996, has reviewed the afore-referenced testimony and responses to those same interrogatories and swears that the information contained therein is true and correct to the best of the knowledge of the undersigned.

Forbes, Inc.

BY: Sean P. Hegarty

Sean P. Hegarty
Vice President/Secretary

SWORN to and **SUBSCRIBED**
before me this 14th day of March, 1997.

Carol S. Katz
NOTARY PUBLIC

My Commission Expires: 3/25/97

CAROL S. KATZ
Notary Public, State of New York
No. 4975321
Qualified in Nassau County
Certificate Filed in New York County
Commission Expires March 25, 1997

MUR 4305

FORBES, INC.

SUPPORTING DOCUMENTS
FOR
RESPONSE TO INTERROGATORIES
SUBMITTED UNDER
SEPARATE COVER

EXHIBIT "A"

BEFORE THE FEDERAL ELECTION COMMISSION

AFFIDAVIT OF MALCOLM S. FORBES, JR.
REGARDING MUR 4305

The undersigned affiant, being duly sworn, does declare as follows:

1. I am Malcolm S. Forbes, Jr., a resident of the State of New Jersey, and I have personal knowledge regarding the facts set forth below in this affidavit.

2. I am the Chief Executive Officer of Forbes Inc. and Editor-in-Chief of FORBES Magazine, a division of Forbes Inc. I am now, and was at all time periods involving the facts involved in MUR 4305, the majority voting stockholder in Forbes Inc., with an ownership interest in excess of 50% (fifty percent) of the outstanding voting shares of Forbes Inc.

3. Although I was a candidate for the 1996 Republican Presidential nomination, I did not seek the nomination in the State of New Jersey and my name did not appear on the 1996 New Jersey presidential ballot.

4. I swear that the aforementioned facts are true and correct to the best of my knowledge, so say I.

Malcolm S. Forbes, Jr.
Affiant

Feb. 21, 1997
Date

SWORN to and SUBSCRIBED
before me this 21st day of
February, 1997.

Carol S. Katz
NOTARY PUBLIC

CAROL S. KATZ
Notary Public, State of New York
No. 4979321
Qualified in Nassau County
Certificate Filed in New York County
Commission Expires March 25, 1997

EXHIBIT "B"

BEFORE THE FEDERAL ELECTION COMMISSION

AFFIDAVIT OF WILLIAM DAL COL
REGARDING MUR 4305

The undersigned affiant, being duly sworn, does declare as follows:

1. I am William Dal Col, and I have personal knowledge regarding the testimony and facts set forth in this affidavit.

2. At all times during the duration in which Malcolm S. Forbes, Jr., was a candidate for the 1996 Republican presidential nomination, I served in the capacity of campaign manager for Mr. Forbes' authorized presidential committee and the campaign. In that capacity, I was responsible or was privy to all decisions regarding issues presented in the campaign's direct mail, media -- whether radio, or television -- press releases, and similar public communications.

3. During my tenure as campaign manager, neither Mr. Forbes nor any representative of Forbes magazine ever referenced or suggested to me that the subject of any type of campaign communication to the general public should involve any specific subject because it was also the subject of a "Fact and Comment" column in Forbes magazine.

4. In addition, at no time was I requested, nor did I ever attempt, to coordinate any themes or subject matter of the campaign with Forbes magazine based on any subject contained in any portion of the magazine, including "Fact and Comment."

5. I swear that the aforementioned testimony is true and correct to the best of my knowledge, so say I.

William A Dal Col — 2/26/97

William Dal Col — *Date*
Affiant

SWORN to and **SUBSCRIBED**
before me this 26th day of February, 1997.

Sharon R. Jackson
NOTARY PUBLIC

My Commission Expires: March 14, 1998

EXHIBIT "C"

Before the Federal Election Commission

In the Matter of	)	
	)	
Neighbors for Epperson	)	MUR 2268
Stephen C. Mathis, treasurer	)	
Salem Media of North Carolina, Inc.)		
	)	

General Counsel's Report

I. Background

On October 15, 1986, the Office of General Counsel received a signed, sworn and notarized complaint from James Van Hecke, Chairman of the Democratic Party of North Carolina, alleging violations of the Federal Election Campaign Act of 1971 ("Act"), as amended, by Neighbors for Epperson ("Committee") and WTOB, Inc. 1/ The Committee is the principal campaign committee for Stuart W. Epperson, the 1986 Republican candidate for the United States House of Representatives from the fifth congressional district of North Carolina. WTOB's radio broadcasts originate from Winston-Salem, North Carolina, within the fifth district.

Specifically, complainant alleges that WTOB made and the Committee accepted prohibited corporate contributions in violation of 2 U.S.C. § 441b, in the form of free air time provided to the candidate for the broadcast of editorials.

1/ Although the complaint in this matter makes allegations against WTOB, Inc., counsel has informed this Office that the correct name of the corporate licensee of radio station WTOB is Salem Media of North Carolina, Inc. Accordingly, this report will hereinafter refer to respondent as "Salem Media" or "WTOB."

Additionally, complainant alleges that the aggregate value of the free radio time exceeded $10,000, giving rise to the making and accepting of contributions in excess of the Act's limitations, in violation of 2 U.S.C. § 441a(a)(1)(A) and 2 U.S.C. § 441a(f).

On October 16, 1986, the Office of General Counsel circulated to the Commission an Expedited First General Counsel's Report without recommendations, in order to give respondents an opportunity to respond to complainant's allegations. After notification of the complaint in this matter, counsel for both the Committee and Salem Media requested extensions of time to respond to the complaint. On November 18, 1986, a written response was received in the Office of General Counsel from Salem Media. On November 25, 1986, a written response was received from the Committee.

On February 3, 1987, the Commission remanded this matter to the Office of General Counsel for further analysis.

II. Legal Analysis

Complainant alleges that, after filing his Statement of Candidacy with the Commission on December 30, 1985, Stuart Epperson was given free air time to broadcast editorials on a variety of subjects. According to complainant, the editorials were presented five times daily, Monday through Friday, and were repeated at various times on Saturday until July 7, 1986, when the presentations were discontinued. Complainant states that the Committee did not report the receipt of any air time, the value of which complainant claims exceeds $10,000. Complainant concludes that the editorials, in that they were something of value intended to influence the outcome of a federal election, are contributions.

Complainant claims,

> The commentaries provided by Mr. Epperson, while not all expressly advocating his election or the defeat of Congressman Stephen T. Neal all provide to Mr. Epperson and to the Epperson Committee a thing of value, radio air time, which constitutes and is a thing of value within the meaning of the Federal Election Campaign Act. The commentaries are intended to influence the outcome of the Fifth District Congressional election. Furthermore, and to the extent that such commentaries focus on issues of a political nature, particularly matters presently pending before the Congress or to come before the Congress, the expression of the candidates [sic] views on such issues have a clear and direct tendency to promote the election of Mr. Epperson, a clearly identified candidate, or the defeat of Congressman Neal, a clearly identified candidate.

Accordingly, complainant alleges that WTOB made unlawful corporate and excessive contributions to the Committee and that the Committee knowingly accepted unlawful corporate and excessive contributions from WTOB.

Attached to the complaint are transcripts of a variety of editorials purportedly delivered by Mr. Epperson and the subject matter of this MUR. The transcripts clearly reflect a wide variety of topics covered by the editorials, including Father's Day, Thomas Jefferson, tax reform, foreign affairs and the importance of voting. Thirty-four transcripts are included. The editorials identify the presenter as WTOB President Stuart Epperson.

Salem Media, in its response, urges the Commission to take no action against it in this matter. Salem Media denies that

WTOB's editorials were broadcast either in connection with any election or for the purpose of influencing any election. In March 1985, Stuart Epperson purchased the radio station. The editorials were begun in May 1985, as, claims respondent, an important component of WTOB's public service programming. Respondent states that the editorials are part of its effort to comply with the requirements of the Federal Communications Commission ("FCC") to operate as a responsible licensee by promoting the discussion of issues of public concern. Salem Media states that because it is bound to provide public service programming, if it did not broadcast the editorials, it would still have used the time for another type of public service programming.

In addition to arguing that there was no intent to influence any election, Salem Media also claims that nothing of value was provided to Mr. Epperson's campaign. In a sworn affidavit accompanying the response, Mr. Epperson states

> I never used, nor did I ever intend to use, the WTOB "Point of View" editorials to promote any campaign or influence any election. In my mind, there was no relationship between my Congressional campaign and the "Point of View" program on WTOB. I broadcast "Point of View" because I felt (and I still feel) that station editorials are a way of fulfilling WTOB's public service obligations. I broadcast the editorials myself because I am the owner of the station and an editorial is, by definition, the expression of the owner's opinion. I would have editorialized on WTOB whether or not I was a candidate for office.

In its response to the complaint, the Committee argues that Mr. Epperson's editorials lack any political motivation, as demonstrated by the absence of any language in the transcripts expressly advocating either the election of Mr. Epperson or the defeat of his opponent, Congressman Stephen Neal. Additionally, the Committee notes that the broadcasts ceased on July 7, 1986, well before the general election, and did not start up again until after the election, further evidence of the lack of political intent.

Moreover, the Committee argues that the Act should not "penalize candidates from making a living in their chosen professions..." According to respondent, Mr. Epperson has made his living for many years as a broadcaster, station operator and station owner, editorializing on WTOB, as well as on other stations. Respondent contends that Mr. Epperson was merely attempting to discharge his duties as a broadcaster.

Pursuant to 2 U.S.C. § 441b, it is unlawful for any corporation to make a contribution in connection with any election to political office, or for any candidate knowingly to accept or receive such a contribution. The term "contribution" includes anything of value, 2 U.S.C. § 431 (8)(A), and the term "anything of value" includes all in-kind contributions, 11 C.F.R. § 100.7(a)(1)(iii)(A).

Further, any cost incurred in carrying an editorial by any broadcasting station is a contribution where the facility is owned or controlled by a candidate unless (1) the news story

represents a bona fide news account communicated on a licensed broadcasting facility and (2) the news story is part of a general pattern of campaign-related news accounts which give reasonable equal coverage to all opposing candidates in the listening area. 11 C.F.R. § 100.7(b)(2).

In a number of past Advisory Opinions, as discussed below, the Commission has addressed several similar issues relevant to the disposition of the matter at hand.

First, the Commission has considered the role of a candidate within the broadcasting context in several different Opinions. In Advisory Opinion 1977-31, the Commission concluded that a corporation's employment of a candidate as an announcer for a series of corporate sponsored radio announcements constituted something of value, and therefore, a corporate contribution to the candidate. In that situation, the candidate was identified by name twice within the public service announcement, at a time when he had a registered political committee and was a candidate under the Act. The Commission considered payment by the corporate sponsor of the costs of the messages a "gift of anything of value," in violation of 2 U.S.C. § 441b.

However, in Advisory Opinion 1977-42, the Commission considered the situation whereby a registered candidate hosted two radio interview programs dealing with a variety of issues. The candidate there was an employee of one of the broadcasting radio stations. The Commission, in concluding that neither the radio stations nor the program sponsors had made a

contribution to the candidate, enunciated a test to be used in such a situation: in certain specific circumstances, a contribution will not necessarily occur where the major purpose of activities involving appearances of candidates for federal office was not to influence their election. The Commission in examining the circumstances involved, focused on the absence of any communication expressly advocating the election of the candidate involved or the defeat of any other candidate, and the avoidance of any solicitation, making, or acceptance of campaign contributions for the candidate in connection with the activity.

The above test was also applied in Advisory Opinion 1982-56, in which an incumbent Congressman appeared in a series of television advertisements on behalf of a candidate for local office. The Commission concluded that even though a media appearance by a candidate may benefit his/her campaign, the entity defraying the costs of the appearance will not be deemed to have made an in-kind contribution to the candidate, absent the intent to influence the candidate's election to federal office. In AO 1982-56, the content of the advertisement did not reflect an intent to influence the appearing Congressman's election. Although the ad identified the Congressman by name and office, it contained no mention of his candidacy, did not advocate his election or the defeat of his opponent, and contained no solicitation of funds to his campaign. Thus, the Commission concluded that the payment of costs for the Congressman's appearance would not constitute an in-kind contribution to his

campaign.

Second, the Commission has considered and recognized that an individual may pursue gainful employment at the same time he or she is a candidate for federal office. In Advisory Opinion 1977-45, an individual was employed, in part, as an editorial writer, prior to "officially announcing" his federal candidacy. Such an arrangement was found not to give rise to a contribution from the employer, since it reflected a "bona fide" employment situation. In Advisory Opinion 1982-15, a prospective candidate's law firm was permitted to advertise because no purpose to influence a federal election would arise. The advertisement did not mention any candidacy and was for the purpose of promoting the individual's gainful employment, rather than a candidacy for federal office.

In one final relevant instance, the Commission previously applied the major purpose test. In Advisory Opinion 1981-37, a corporation was permitted to sponsor, and an incumbent Congressman to participate in, a series of public affairs forums, in and near the Congressman's home district. The Commission recognized that certain diverse activities may have election-related aspects but would still not be considered as connected with or influencing an election. Because the "major purpose" of the proposed activity was not the election of any candidate to federal office, the Commission concluded "that corporate and/or union purchases of tickets or advertising for television or radio presentation for this proposed series of public forums would not

be prohibited under the Act." 2/ In issuing this Opinion, the Commission expressly followed its conclusion in AO 1977-42 and qualified its conclusion in AO 1977-31, as discussed above.

Thus, in light of past Commission actions on this subject, it appears that the fact that the speaker is himself a candidate is not by itself dispositive of the issue, but rather all circumstances are to be examined in order to determine the major purpose of the communication. In the present matter, Stuart Epperson purchased WTOB in March 1985. In May 1985, he began presenting radio editorials five times daily, Monday through Friday. On December 30, 1985, Stuart Epperson filed his Statement of Candidacy for federal office. On July 7, 1986, Epperson ceased presenting his daily editorials. Following the general election on November 4, 1986, Epperson again began presenting his daily editorial broadcast.

From the above chronology of events, it appears that radio station WTOB had an editorial policy and practice conceived and carried out months prior to Epperson becoming a candidate for federal office. There is no evidence that the editorial policy and practice of the station was in any way

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2/ The Commission did condition this conclusion on (i) the absence of any communication expressly advocating the Congressman's election or the defeat of any other candidate, and (ii) the avoidance of any solicitation, making or acceptance of campaign contributions in connection with this activity.

altered after Epperson became a candidate until the broadcasts' cessation on July 7th. According to WTOB's General Manager, the five time slots for the daily editorials were 8:25 am, 10:31 am, 12:25 pm, 3:31 pm, and 5:12 pm. Epperson himself states that he would have presented the editorials whether or not he was a candidate for federal office.

In addressing the major purpose of the editorial presentations, both respondents deny there was an intent, through the editorial process, to influence the outcome of a federal election. Instead, both respondents assert that the major purpose of the editorials was and is the fulfillment of Salem Media's obligations as a licensee to present programming in the public interest, specifically, public service items. Respondents indicate that the intent behind the editorials was to provoke public discussion of issues. Respondents assert that the FCC encourages editorials and considers such programming a critical element of the licensee's duties. The chronology of events above supports these assertions in that the editorial presentations were a practice of the station almost initially from Mr. Epperson's acquisition and continue today.

Respondents' contentions that the major purpose of the editorials was not to influence Epperson's election are further supported by the absence of the factors cited by the Commission in its Advisory Opinions. 3/ The editorials may not involve the

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3/ The recent holding of the United States Supreme Court in FEC v. Massachusetts Citizens for Life, No. 85-701 (December 15, 1986) will not alter this analysis.

solicitation, making or acceptance of campaign contributions for Epperson's candidacy. From the transcripts attached to the complaint, it is apparent that no solicitation was delivered in conjunction with these editorials. Further, there is no evidence of any contributions made in connection with the editorials.

A second factor is the presence or absence of express advocacy for the election of Stuart Epperson or for the defeat of Congressman Neal. Here, a review of the content of the editorial transcripts reveals no obvious election influencing aspects. Although Stuart Epperson is mentioned by name twice in each editorial as President of WTOB, he is never identified as a candidate for federal office. The transcripts contain no words of advocacy such as "vote for," "elect," "vote against," or "defeat." However, in a discussion of express advocacy by the Ninth Circuit Court of Appeals in FEC v. Furgatch, ____F.2d____ (9th Cir. 1987), the Court indicated that communications do not have to contain certain key words or phrases to expressly advocate, but instead the speech should be read as a whole. If that speech conveys an exhortation through some form of a call to action, and that call to action is unambiguous, in that it cannot be reasonably interpreted to mean anything else, the requirement

of express advocacy is satisfied. Conversely, if the speech is ambiguous as to what sort of action is called for, the Ninth Circuit's standard is not fulfilled.

Even under the analysis of Furgatch, none of the transcripts submitted by complainant can be said to expressly advocate the election of Stuart Epperson. A fair reading of all of these transcripts indicate that they are subject to reasonable differing interpretations. The action called for is not obvious. Three of the more conventionally political topics provide examples of this. The transcript on the Strategic Defense Initiative ("SDI"), for example, asks whether the demise of the "Salt II" treaty is good or bad for the United States. It goes on to explain that past U.S. treaties may have restrained American technology, and then to quote from a letter drafted by thirty former Soviet scientists which expresses the view that the U.S. should develop SDI. Assuming arguendo, that this editorial calls for action, that call is not unambiguous. The editorial language does not use words of exhortation or any type of command. Many different interpretations of the message are possible. Some of these might include: that the listener should support the SDI program; that the listener should oppose U.S. treaties with the Soviet Union; that the listener should be aware of the Soviet position on SDI; that the demise of Salt II is

good; that the demise of Salt II is bad; or that the listener should support the broadcaster, i.e. Epperson, for any of these reasons.

Another example is the editorial on AIDS. This transcript discusses the threat posed by AIDS, "[o]ur number one health problem...," as well as its "causes," which the editorial says are not being talked about by the politicians. Again, assuming arguendo, that the editorial calls for action, that call is not unambiguous. Reasonable interpretations of this editorial might include: that the listener should engage in open and frank discussion of AIDS; that the listener should support politicians who are willing to talk about AIDS; that the listener should support Epperson since he is willing to talk about AIDS; or that stronger action is required to combat the spread of AIDS.

A third example is the editorial on tax reform. The topic here is the tax reform bill and its purported effect. The transcript observes that most people are interested in how they will benefit from tax reform, when the question should really be how the legislation will impact on the country, especially in light of the trade and productivity problems being experienced by the economy. The transcript asks a series of questions which should be posed by Congress and closes by stating, "[w]e need to think very seriously in our tax reform what this does to our competitiveness with other nations." A variety of interpretations of this editorial are possible. Among these might be: that the listener should not view tax reform solely through its individual impact; that the listener should be

primarily concerned with how tax reform impacts on the U.S. economy; that Congress should be primarily concerned with how tax reform impacts on the U.S. economy rather than special interest groups; that we as a country need to start asking the right questions; that the broadcaster, if he were a member of Congress would be asking the appropriate questions; or that the listener should support Epperson because he will ask the appropriate questions.

The three transcripts discussed above serve only as examples for purposes of analysis of the more conventionally political editorials delivered by Epperson. However, they are typical of all of the transcipts in that numerous interpretations of the messages are possible. The editorials are marked by a lack of certain items which are characteristic of express advocacy. There is no mention of Epperson as a candidate. There is no mention of Epperson's party affiliation. The editorials contain no obvious solicitation for contributions or other support for Epperson's candidacy. The speech is issue-oriented. By definition, not all issue-oriented speech expressly advocates. Under the Furgatch standard, the key factor distinguishing issue-oriented speech from express advocacy is an unambiguous call to action. Here, in the opinion of the Office of General Counsel, as exemplified by the transcripts discussed above, the Epperson editorials are subject to alternative interpretations by the listener, and are in fact, examples of the type of issue discussion which are not coincidental with express advocacy.

Moreover, Epperson's decision to cease broadcasting the editorials some four months prior to the general election does not alter this conclusion. That decision, whatever its motivation, does not in and of itself retroactively change the character of Epperson's prior activity, or provide a sufficient nexus with a federal election for it to fall within the Act's prohibitions.

Finally, a remaining issue exists as to the applicability of the press exemption to the activities herein. The definitions of both "contribution" and "expenditure" contain such an exemption. See 2 U.S.C. § 431(9)(B)(i), 11 C.F.R. § 100.7(b)(2) and § 100.8(b)(2). For example, the exemption from the definition of contribution states

> Any costs incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station, 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 (i) which represents a bona fide news account communicated in a publication of general circulation or on a licensed broadcasting facility, and (iii) which is part of a general pattern of campaign-related news accounts which give reasonably equal coverage to all opposing candidates in the circulation or listening area, is not a contribution.

The Commission has in several past Advisory Opinions examined the applicability of the press exemption to a variety of

corporate activities. These Advisory Opinions tend to support an analysis which first seeks to ascertain whether certain activity meets the definitional sections of the Act and in doing so falls within the broad prohibition against corporate activity. Specifically in applying the press exemption in Advisory Opinions 1980-109 and 1982-44 the Commission's analysis begins with the definition of contribution under the general prohibition of 2 U.S.C. § 441b and then seeks to determine if the limited press exemption applies to the activity in question. This approach is also consistent with that taken by the Commission in Advisory Opinion 1979-70, in determining the applicability for a corporation of certain other specific exemptions to the definition of contribution and expenditure.

In this particular matter the key inquiry would then focus on whether the activity was undertaken in connection with an election to federal office. If under the threshold question, a sufficient nexus was said to exist between Epperson's activity and his campaign to establish that the activity was "in connection with a federal election," Salem Media would not be entitled to avail itself of the press exemption from the definition of contribution. Although the exemption applies to those costs incurred in carrying an editorial by a broadcasting station, which is the situation here, this exemption is in turn subject to its own limitation, that the broadcasting facility may not be owned or controlled by any candidate. Here, WTOB which is

the broadcasting facility is owned by the corporate entity Salem Media, Inc. which is in turn owned by Epperson, the candidate. Where a candidate owns the broadcasting station, the press exemption will not apply except in the limited circumstance of a news story that is a bona fide news account and part of a general pattern of campaign-related news accounts giving reasonably equal coverage to all opposing candidates in the listening area. In those circumstances, the press exemption will apply despite candidate-ownership, and the activity in question will not be considered a contribution. Further, this situation appears to be specifically limited to a "news story" rather than the broader type of activity of "news story, commentary or editorial" covered by the original exemption. Presumably, by the language of the statute and regulations, a distinction is made between a news story and an editorial, and if the facility is candidate-owned, editorial activity cannot qualify for the press exemption.

Therefore in applying the press exemption in the instant matter, the key factors are Epperson's ownership of the station and the fact that editorials rather than news stories were the subject of broadcast. Under the above analysis, the editorials delivered by Epperson cannot qualify for the press exemption. Moreover, even if the Commission were not to recognize the apparent distinction created in the regulation between news stories and editorials, the Epperson activity would still have to be part of a general pattern of campaign-related news accounts

which give reasonably equal coverage to all opposing candidates. Here, Epperson offered his opponent a chance to "participate" in the editorials, which was apparently declined. A mere offer to participate would presumably not satisfy the requirement of reasonably equal coverage by opposing candidates, since that coverage was lacking. Therefore, the Epperson activity would, under either interpretation, not qualify for the press exemption.

Under this analysis, where specific activity, having met the threshold definition of contribution or expenditure, does not qualify for the press exemption to those definitions, it then becomes subject to the Act's prohibitions and limitations. As a result, the provision of the broadcast time at no charge by Salem Media to Epperson would be an in-kind contribution to the Epperson Committee, pursuant to 11 C.F.R. § 100.7(a)(1)(iii)(A) and § 109.1(c). Because Salem Media is incorporated, this activity would be in violation of 2 U.S.C. § 441b.

However, in the opinion of the Office of the General Counsel, as noted earlier, an insufficient nexus exists between Epperson's editorials and his campaign, which prevents this activity from rising to the level required to be considered in connection with an election to federal office. Therefore, the definition of contribution is not satisfied, and in turn, the press exemption is not triggered. In the opinion of the Office of General Counsel, under the guidance provided by the Commission in its past Advisory Opinions, the Commission should find no

reason to believe that Salem Media violated 2 U.S.C.§ 441b and § 441a(a)(1)(A) and also find no reason to believe that the Committee and Stephen C. Mathis, as treasurer, violated 2 U.S.C. § 441b and § 441a(f).

III. Recommendations

The Office of General Counsel recommends that the Commission:

1. Find no reason to believe that Salem Media of North Carolina, Inc. violated 2 U.S.C. § 441b and § 441a(a)(1)(A).

2. Find no reason to believe that Neighbors for Epperson and Stephen C. Mathis violated 2 U.S.C. § 441b and § 441a(f).

3. Approve the attached letters.

4. Close the file.

Sincerely,

Charles N. Steele
General Counsel

Date 3/11/87

By: Lawrence M. Noble
Associate General Counsel

Attachments
1. Response of Salem Media
2. Response of the Committee
3. Letters (3)

EXHIBIT "B"

BEFORE THE FEDERAL ELECTION COMMISSION

AFFIDAVIT OF MALCOLM S. FORBES, JR.
REGARDING MUR 4305

The undersigned affiant, being duly sworn, does declare as follows:

1. I am Malcolm S. Forbes, Jr., a resident of the State of New Jersey, and I have personal knowledge regarding the facts set forth below in this affidavit.

2. I am the Chief Executive Officer of Forbes Inc. and Editor-in-Chief of FORBES Magazine, a division of Forbes Inc. I am now, and was at all time periods involving the facts involved in MUR 4305, the majority voting stockholder in Forbes Inc., with an ownership interest in excess of 50% (fifty percent) of the outstanding voting shares of Forbes Inc.

3. Although I was a candidate for the 1996 Republican Presidential nomination, I did not seek the nomination in the State of New Jersey and my name did not appear on the 1996 New Jersey presidential ballot.

4. I swear that the aforementioned facts are true and correct to the best of my knowledge, so say I.

Malcolm S. Forbes, Jr.
Affiant

February 21, 1997
Date

SWORN to and SUBSCRIBED
before me this 21st day of
February 1997.

Carol S. Katz
NOTARY PUBLIC

CAROL S. KATZ
Notary Public, State of New York
No. 4978321
Qualified in Nassau County
Certificate Filed in New York County
Commission Expires March 25, 1997

EXHIBIT "C"

BEFORE THE FEDERAL ELECTION COMMISSION

AFFIDAVIT OF WILLIAM DAL COL
REGARDING MUR 4305

The undersigned affiant, being duly sworn, does declare as follows:

1. I am William Dal Col, and I have personal knowledge regarding the testimony and facts set forth in this affidavit.

2. At all times during the duration in which Malcolm S. Forbes, Jr., was a candidate for the 1996 Republican presidential nomination, I served in the capacity of campaign manager for Mr. Forbes' authorized presidential committee and the campaign. In that capacity, I was responsible or was privy to all decisions regarding issues presented in the campaign's direct mail, media -- whether radio, or television -- press releases, and similar public communications.

3. During my tenure as campaign manager, neither Mr. Forbes nor any representative of Forbes magazine ever referenced or suggested to me that the subject of any type of campaign communication to the general public should involve any specific subject because it was also the subject of a "Fact and Comment" column in Forbes magazine.

4. In addition, at no time was I requested, nor did I ever attempt, to coordinate any themes or subject matter of the campaign with Forbes magazine based on any subject contained in any portion of the magazine, including "Fact and Comment."

5. I swear that the aforementioned testimony is true and correct to the best of my knowledge, so say I.

William Dal Col — 2/26/97

William Dal Col — *Date*
Affiant

SWORN to and **SUBSCRIBED**
before me this 26th day of February, 1997.

Sharon R. Jackson
NOTARY PUBLIC

My Commission Expires: March 14, 1998

EXHIBIT "D"

Before the Federal Election Commission

In the Matter of	)	
	)	
Neighbors for Epperson	)	MUR 2268
Stephen C. Mathis, treasurer	)	
Salem Media of North Carolina, Inc.	)	
	)	

General Counsel's Report

I. Background

On October 15, 1986, the Office of General Counsel received a signed, sworn and notarized complaint from James Van Hecke, Chairman of the Democratic Party of North Carolina, alleging violations of the Federal Election Campaign Act of 1971 ("Act"), as amended, by Neighbors for Epperson ("Committee") and WTOB, Inc. 1/ The Committee is the principal campaign committee for Stuart W. Epperson, the 1986 Republican candidate for the United States House of Representatives from the fifth congressional district of North Carolina. WTOB's radio broadcasts originate from Winston-Salem, North Carolina, within the fifth district.

Specifically, complainant alleges that WTOB made and the Committee accepted prohibited corporate contributions in violation of 2 U.S.C. § 441b, in the form of free air time provided to the candidate for the broadcast of editorials.

1/ Although the complaint in this matter makes allegations against WTOB, Inc., counsel has informed this Office that the correct name of the corporate licensee of radio station WTOB is Salem Media of North Carolina, Inc. Accordingly, this report will hereinafter refer to respondent as "Salem Media" or "WTOB."

Additionally, complainant alleges that the aggregate value of the free radio time exceeded $10,000, giving rise to the making and accepting of contributions in excess of the Act's limitations, in violation of 2 U.S.C. § 441a(a)(1)(A) and 2 U.S.C. § 441a(f).

On October 16, 1986, the Office of General Counsel circulated to the Commission an Expedited First General Counsel's Report without recommendations, in order to give respondents an opportunity to respond to complainant's allegations. After notification of the complaint in this matter, counsel for both the Committee and Salem Media requested extensions of time to respond to the complaint. On November 18, 1986, a written response was received in the Office of General Counsel from Salem Media. On November 25, 1986, a written response was received from the Committee.

On February 3, 1987, the Commission remanded this matter to the Office of General Counsel for further analysis.

II. Legal Analysis

Complainant alleges that, after filing his Statement of Candidacy with the Commission on December 30, 1985, Stuart Epperson was given free air time to broadcast editorials on a variety of subjects. According to complainant, the editorials were presented five times daily, Monday through Friday, and were repeated at various times on Saturday until July 7, 1986, when the presentations were discontinued. Complainant states that the Committee did not report the receipt of any air time, the value of which complainant claims exceeds $10,000. Complainant concludes that the editorials, in that they were something of value intended to influence the outcome of a federal election, are contributions.

Complainant claims,

> The commentaries provided by Mr. Epperson, while not all expressly advocating his election or the defeat of Congressman Stephen T. Neal all provide to Mr. Epperson and to the Epperson Committee a thing of value, radio air time, which constitutes and is a thing of value within the meaning of the Federal Election Campaign Act. The commentaries are intended to influence the outcome of the Fifth District Congressional election. Furthermore, and to the extent that such commentaries focus on issues of a political nature, particularly matters presently pending before the Congress or to come before the Congress, the expression of the candidates [sic] views on such issues have a clear and direct tendency to promote the election of Mr. Epperson, a clearly identified candidate, or the defeat of Congressman Neal, a clearly identified candidate.

Accordingly, complainant alleges that WTOB made unlawful corporate and excessive contributions to the Committee and that the Committee knowingly accepted unlawful corporate and excessive contributions from WTOB.

Attached to the complaint are transcripts of a variety of editorials purportedly delivered by Mr. Epperson and the subject matter of this MUR. The transcripts clearly reflect a wide variety of topics covered by the editorials, including Father's Day, Thomas Jefferson, tax reform, foreign affairs and the importance of voting. Thirty-four transcripts are included. The editorials identify the presenter as WTOB President Stuart Epperson.

Salem Media, in its response, urges the Commission to take no action against it in this matter. Salem Media denies that

WTOB's editorials were broadcast either in connection with any election or for the purpose of influencing any election. In March 1985, Stuart Epperson purchased the radio station. The editorials were begun in May 1985, as, claims respondent, an important component of WTOB's public service programming. Respondent states that the editorials are part of its effort to comply with the requirements of the Federal Communications Commission ("FCC") to operate as a responsible licensee by promoting the discussion of issues of public concern. Salem Media states that because it is bound to provide public service programming, if it did not broadcast the editorials, it would still have used the time for another type of public service programming.

In addition to arguing that there was no intent to influence any election, Salem Media also claims that nothing of value was provided to Mr. Epperson's campaign. In a sworn affidavit accompanying the response, Mr. Epperson states

> I never used, nor did I ever intend to use, the WTOB "Point of View" editorials to promote any campaign or influence any election. In my mind, there was no relationship between my Congressional campaign and the "Point of View" program on WTOB. I broadcast "Point of View" because I felt (and I still feel) that station editorials are a way of fulfilling WTOB's public service obligations. I broadcast the editorials myself because I am the owner of the station and an editorial is, by definition, the expression of the owner's opinion. I would have editorialized on WTOB whether or not I was a candidate for office.

In its response to the complaint, the Committee argues that Mr. Epperson's editorials lack any political motivation, as demonstrated by the absence of any language in the transcripts expressly advocating either the election of Mr. Epperson or the defeat of his opponent, Congressman Stephen Neal. Additionally, the Committee notes that the broadcasts ceased on July 7, 1986, well before the general election, and did not start up again until after the election, further evidence of the lack of political intent.

Moreover, the Committee argues that the Act should not "penalize candidates from making a living in their chosen professions..." According to respondent, Mr. Epperson has made his living for many years as a broadcaster, station operator and station owner, editorializing on WTOB, as well as on other stations. Respondent contends that Mr. Epperson was merely attempting to discharge his duties as a broadcaster.

Pursuant to 2 U.S.C. § 441b, it is unlawful for any corporation to make a contribution in connection with any election to political office, or for any candidate knowingly to accept or receive such a contribution. The term "contribution" includes anything of value, 2 U.S.C. § 431 (8)(A), and the term "anything of value" includes all in-kind contributions, 11 C.F.R. § 100.7(a)(1)(iii)(A).

Further, any cost incurred in carrying an editorial by any broadcasting station is a contribution where the facility is owned or controlled by a candidate unless (1) the news story

represents a bona fide news account communicated on a licensed broadcasting facility and (2) the news story is part of a general pattern of campaign-related news accounts which give reasonable equal coverage to all opposing candidates in the listening area. 11 C.F.R. § 100.7(b)(2).

In a number of past Advisory Opinions, as discussed below, the Commission has addressed several similar issues relevant to the disposition of the matter at hand.

First, the Commission has considered the role of a candidate within the broadcasting context in several different Opinions. In Advisory Opinion 1977-31, the Commission concluded that a corporation's employment of a candidate as an announcer for a series of corporate sponsored radio announcements constituted something of value, and therefore, a corporate contribution to the candidate. In that situation, the candidate was identified by name twice within the public service announcement, at a time when he had a registered political committee and was a candidate under the Act. The Commission considered payment by the corporate sponsor of the costs of the messages a "gift of anything of value," in violation of 2 U.S.C. § 441b.

However, in Advisory Opinion 1977-42, the Commission considered the situation whereby a registered candidate hosted two radio interview programs dealing with a variety of issues. The candidate there was an employee of one of the broadcasting radio stations. The Commission, in concluding that neither the radio stations nor the program sponsors had made a

contribution to the candidate, enunciated a test to be used in such a situation: in certain specific circumstances, a contribution will not necessarily occur where the major purpose of activities involving appearances of candidates for federal office was not to influence their election. The Commission in examining the circumstances involved, focused on the absence of any communication expressly advocating the election of the candidate involved or the defeat of any other candidate, and the avoidance of any solicitation, making, or acceptance of campaign contributions for the candidate in connection with the activity.

The above test was also applied in Advisory Opinion 1982-56, in which an incumbent Congressman appeared in a series of television advertisements on behalf of a candidate for local office. The Commission concluded that even though a media appearance by a candidate may benefit his/her campaign, the entity defraying the costs of the appearance will not be deemed to have made an in-kind contribution to the candidate, absent the intent to influence the candidate's election to federal office. In AO 1982-56, the content of the advertisement did not reflect an intent to influence the appearing Congressman's election. Although the ad identified the Congressman by name and office, it contained no mention of his candidacy, did not advocate his election or the defeat of his opponent, and contained no solicitation of funds to his campaign. Thus, the Commission concluded that the payment of costs for the Congressman's appearance would not constitute an in-kind contribution to his

campaign.

Second, the Commission has considered and recognized that an individual may pursue gainful employment at the same time he or she is a candidate for federal office. In Advisory Opinion 1977-45, an individual was employed, in part, as an editorial writer, prior to "officially announcing" his federal candidacy. Such an arrangement was found not to give rise to a contribution from the employer, since it reflected a "bona fide" employment situation. In Advisory Opinion 1982-15, a prospective candidate's law firm was permitted to advertise because no purpose to influence a federal election would arise. The advertisement did not mention any candidacy and was for the purpose of promoting the individual's gainful employment, rather than a candidacy for federal office.

In one final relevant instance, the Commission previously applied the major purpose test. In Advisory Opinion 1981-37, a corporation was permitted to sponsor, and an incumbent Congressman to participate in, a series of public affairs forums, in and near the Congressman's home district. The Commission recognized that certain diverse activities may have election-related aspects but would still not be considered as connected with or influencing an election. Because the "major purpose" of the proposed activity was not the election of any candidate to federal office, the Commission concluded "that corporate and/or union purchases of tickets or advertising for television or radio presentation for this proposed series of public forums would not

be prohibited under the Act." 2/ In issuing this Opinion, the Commission expressly followed its conclusion in AO 1977-42 and qualified its conclusion in AO 1977-31, as discussed above.

Thus, in light of past Commission actions on this subject, it appears that the fact that the speaker is himself a candidate is not by itself dispositive of the issue, but rather all circumstances are to be examined in order to determine the major purpose of the communication. In the present matter, Stuart Epperson purchased WTOB in March 1985. In May 1985, he began presenting radio editorials five times daily, Monday through Friday. On December 30, 1985, Stuart Epperson filed his Statement of Candidacy for federal office. On July 7, 1986, Epperson ceased presenting his daily editorials. Following the general election on November 4, 1986, Epperson again began presenting his daily editorial broadcast.

From the above chronology of events, it appears that radio station WTOB had an editorial policy and practice conceived and carried out months prior to Epperson becoming a candidate for federal office. There is no evidence that the editorial policy and practice of the station was in any way

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2/ The Commission did condition this conclusion on (i) the absence of any communication expressly advocating the Congressman's election or the defeat of any other candidate, and (ii) the avoidance of any solicitation, making or acceptance of campaign contributions in connection with this activity.

altered after Epperson became a candidate until the broadcasts' cessation on July 7th. According to WTOB's General Manager, the five time slots for the daily editorials were 8:25 am, 10:31 am, 12:25 pm, 3:31 pm, and 5:12 pm. Epperson himself states that he would have presented the editorials whether or not he was a candidate for federal office.

In addressing the major purpose of the editorial presentations, both respondents deny there was an intent, through the editorial process, to influence the outcome of a federal election. Instead, both respondents assert that the major purpose of the editorials was and is the fulfillment of Salem Media's obligations as a licensee to present programming in the public interest, specifically, public service items. Respondents indicate that the intent behind the editorials was to provoke public discussion of issues. Respondents assert that the FCC encourages editorials and considers such programming a critical element of the licensee's duties. The chronology of events above supports these assertions in that the editorial presentations were a practice of the station almost initially from Mr. Epperson's acquisition and continue today.

Respondents' contentions that the major purpose of the editorials was not to influence Epperson's election are further supported by the absence of the factors cited by the Commission in its Advisory Opinions. 3/ The editorials may not involve the

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3/ The recent holding of the United States Supreme Court in FEC v. Massachusetts Citizens for Life, No. 85-701 (December 15, 1986) will not alter this analysis.

solicitation, making or acceptance of campaign contributions for Epperson's candidacy. From the transcripts attached to the complaint, it is apparent that no solicitation was delivered in conjunction with these editorials. Further, there is no evidence of any contributions made in connection with the editorials.

A second factor is the presence or absence of express advocacy for the election of Stuart Epperson or for the defeat of Congressman Neal. Here, a review of the content of the editorial transcripts reveals no obvious election influencing aspects. Although Stuart Epperson is mentioned by name twice in each editorial as President of WTOB, he is never identified as a candidate for federal office. The transcripts contain no words of advocacy such as "vote for," "elect," "vote against," or "defeat." However, in a discussion of express advocacy by the Ninth Circuit Court of Appeals in FEC v. Furgatch, ____F.2d____ (9th Cir. 1987), the Court indicated that communications do not have to contain certain key words or phrases to expressly advocate, but instead the speech should be read as a whole. If that speech conveys an exhortation through some form of a call to action, and that call to action is unambiguous, in that it cannot be reasonably interpreted to mean anything else, the requirement

of express advocacy is satisfied. Conversely, if the speech is ambiguous as to what sort of action is called for, the Ninth Circuit's standard is not fulfilled.

Even under the analysis of Furgatch, none of the transcripts submitted by complainant can be said to expressly advocate the election of Stuart Epperson. A fair reading of all of these transcripts indicate that they are subject to reasonable differing interpretations. The action called for is not obvious. Three of the more conventionally political topics provide examples of this. The transcript on the Strategic Defense Initiative ("SDI"), for example, asks whether the demise of the "Salt II" treaty is good or bad for the United States. It goes on to explain that past U.S. treaties may have restrained American technology, and then to quote from a letter drafted by thirty former Soviet scientists which expresses the view that the U.S. should develop SDI. Assuming arguendo, that this editorial calls for action, that call is not unambiguous. The editorial language does not use words of exhortation or any type of command. Many different interpretations of the message are possible. Some of these might include: that the listener should support the SDI program; that the listener should oppose U.S. treaties with the Soviet Union; that the listener should be aware of the Soviet position on SDI; that the demise of Salt II is

good; that the demise of Salt II is bad; or that the listener should support the broadcaster, i.e. Epperson, for any of these reasons.

Another example is the editorial on AIDS. This transcript discusses the threat posed by AIDS, "[o]ur number one health problem...," as well as its "causes," which the editorial says are not being talked about by the politicians. Again, assuming arguendo, that the editorial calls for action, that call is not unambiguous. Reasonable interpretations of this editorial might include: that the listener should engage in open and frank discussion of AIDS; that the listener should support politicians who are willing to talk about AIDS; that the listener should support Epperson since he is willing to talk about AIDS; or that stronger action is required to combat the spread of AIDS.

A third example is the editorial on tax reform. The topic here is the tax reform bill and its purported effect. The transcript observes that most people are interested in how they will benefit from tax reform, when the question should really be how the legislation will impact on the country, especially in light of the trade and productivity problems being experienced by the economy. The transcript asks a series of questions which should be posed by Congress and closes by stating, "[w]e need to think very seriously in our tax reform what this does to our competitiveness with other nations." A variety of interpretations of this editorial are possible. Among these might be: that the listener should not view tax reform solely through its individual impact; that the listener should be

primarily concerned with how tax reform impacts on the U.S. economy; that Congress should be primarily concerned with how tax reform impacts on the U.S. economy rather than special interest groups; that we as a country need to start asking the right questions; that the broadcaster, if he were a member of Congress would be asking the appropriate questions; or that the listener should support Epperson because he will ask the appropriate questions.

The three transcripts discussed above serve only as examples for purposes of analysis of the more conventionally political editorials delivered by Epperson. However, they are typical of all of the transcipts in that numerous interpretations of the messages are possible. The editorials are marked by a lack of certain items which are characteristic of express advocacy. There is no mention of Epperson as a candidate. There is no mention of Epperson's party affiliation. The editorials contain no obvious solicitation for contributions or other support for Epperson's candidacy. The speech is issue-oriented. By definition, not all issue-oriented speech expressly advocates. Under the Furgatch standard, the key factor distinguishing issue-oriented speech from express advocacy is an unambiguous call to action. Here, in the opinion of the Office of General Counsel, as exemplified by the transcripts discussed above, the Epperson editorials are subject to alternative interpretations by the listener, and are in fact, examples of the type of issue discussion which are not coincidental with express advocacy.

Moreover, Epperson's decision to cease broadcasting the editorials some four months prior to the general election does not alter this conclusion. That decision, whatever its motivation, does not in and of itself retroactively change the character of Epperson's prior activity, or provide a sufficient nexus with a federal election for it to fall within the Act's prohibitions.

Finally, a remaining issue exists as to the applicability of the press exemption to the activities herein. The definitions of both "contribution" and "expenditure" contain such an exemption. See 2 U.S.C. § 431(9)(B)(i), 11 C.F.R. § 100.7(b)(2) and § 100.8(b)(2). For example, the exemption from the definition of contribution states

> Any costs incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station, 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 (i) which represents a bona fide news account communicated in a publication of general circulation or on a licensed broadcasting facility, and (iii) which is part of a general pattern of campaign-related news accounts which give reasonably equal coverage to all opposing candidates in the circulation or listening area, is not a contribution.

The Commission has in several past Advisory Opinions examined the applicability of the press exemption to a variety of

corporate activities. These Advisory Opinions tend to support an analysis which first seeks to ascertain whether certain activity meets the definitional sections of the Act and in doing so falls within the broad prohibition against corporate activity. Specifically in applying the press exemption in Advisory Opinions 1980-109 and 1982-44 the Commission's analysis begins with the definition of contribution under the general prohibition of 2 U.S.C. § 441b and then seeks to determine if the limited press exemption applies to the activity in question. This approach is also consistent with that taken by the Commission in Advisory Opinion 1979-70, in determining the applicability for a corporation of certain other specific exemptions to the definition of contribution and expenditure.

In this particular matter the key inquiry would then focus on whether the activity was undertaken in connection with an election to federal office. If under the threshold question, a sufficient nexus was said to exist between Epperson's activity and his campaign to establish that the activity was "in connection with a federal election," Salem Media would not be entitled to avail itself of the press exemption from the definition of contribution. Although the exemption applies to those costs incurred in carrying an editorial by a broadcasting station, which is the situation here, this exemption is in turn subject to its own limitation, that the broadcasting facility may not be owned or controlled by any candidate. Here, WTOB which is

the broadcasting facility is owned by the corporate entity Salem Media, Inc. which is in turn owned by Epperson, the candidate. Where a candidate owns the broadcasting station, the press exemption will not apply except in the limited circumstance of a news story that is a bona fide news account and part of a general pattern of campaign-related news accounts giving reasonably equal coverage to all opposing candidates in the listening area. In those circumstances, the press exemption will apply despite candidate-ownership, and the activity in question will not be considered a contribution. Further, this situation appears to be specifically limited to a "news story" rather than the broader type of activity of "news story, commentary or editorial" covered by the original exemption. Presumably, by the language of the statute and regulations, a distinction is made between a news story and an editorial, and if the facility is candidate-owned, editorial activity cannot qualify for the press exemption.

Therefore in applying the press exemption in the instant matter, the key factors are Epperson's ownership of the station and the fact that editorials rather than news stories were the subject of broadcast. Under the above analysis, the editorials delivered by Epperson cannot qualify for the press exemption. Moreover, even if the Commission were not to recognize the apparent distinction created in the regulation between news stories and editorials, the Epperson activity would still have to be part of a general pattern of campaign-related news accounts

which give reasonably equal coverage to all opposing candidates. Here, Epperson offered his opponent a chance to "participate" in the editorials, which was apparently declined. A mere offer to participate would presumably not satisfy the requirement of reasonably equal coverage by opposing candidates, since that coverage was lacking. Therefore, the Epperson activity would, under either interpretation, not qualify for the press exemption.

Under this analysis, where specific activity, having met the threshold definition of contribution or expenditure, does not qualify for the press exemption to those definitions, it then becomes subject to the Act's prohibitions and limitations. As a result, the provision of the broadcast time at no charge by Salem Media to Epperson would be an in-kind contribution to the Epperson Committee, pursuant to 11 C.F.R. § 100.7(a)(1)(iii)(A) and § 109.1(c). Because Salem Media is incorporated, this activity would be in violation of 2 U.S.C. § 441b.

However, in the opinion of the Office of the General Counsel, as noted earlier, an insufficient nexus exists between Epperson's editorials and his campaign, which prevents this activity from rising to the level required to be considered in connection with an election to federal office. Therefore, the definition of contribution is not satisfied, and in turn, the press exemption is not triggered. In the opinion of the Office of General Counsel, under the guidance provided by the Commission in its past Advisory Opinions, the Commission should find no

reason to believe that Salem Media violated 2 U.S.C.§ 441b and § 441a(a)(1)(A) and also find no reason to believe that the Committee and Stephen C. Mathis, as treasurer, violated 2 U.S.C. § 441b and § 441a(f).

III. Recommendations

The Office of General Counsel recommends that the Commission:

1. Find no reason to believe that Salem Media of North Carolina, Inc. violated 2 U.S.C. § 441b and § 441a(a)(1)(A).

2. Find no reason to believe that Neighbors for Epperson and Stephen C. Mathis violated 2 U.S.C. § 441b and § 441a(f).

3. Approve the attached letters.

4. Close the file.

Sincerely,

Charles N. Steele
General Counsel

Date 3/11/87

By: Lawrence M. Noble
Associate General Counsel

Attachments
1. Response of Salem Media
2. Response of the Committee
3. Letters (3)