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

FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 4863
DATE COMPLAINT FILED: November 20, 1998
DATE OF NOTIFICATION: November 25, 1998
DATE ACTIVATED: April 29, 1999

STAFF MEMBER: Lawrence L. Calvert Jr.

COMPLAINANT: Daniel L. Grant

RESPONDENTS: Sean Hannity
WABC-AM Radio, Inc. d/b/a WABC AM 770
ABC, Inc. (f/k/a Capital Cities/ABC)
The Walt Disney Company

RELEVANT STATUTES: 2 U.S.C. § 431(4)(A)
2 U.S.C. § 431(9)(B)(i)
2 U.S.C. § 431(11)
2 U.S.C. § 431(17)
2 U.S.C. § 433(a)
2 U.S.C. § 434(b)(6)(B)
2 U.S.C. § 441a(a)(1)(A)
2 U.S.C. § 441a(a)(3)
2 U.S.C. § 441b(a)
2 U.S.C. § 441d(a)
11 C.F.R. § 100.7(b)(2)
11 C.F.R. § 100.8(b)(2)

INTERNAL REPORTS CHECKED: Database of candidates

FEDERAL AGENCIES CHECKED: Federal Communications Commission

I. GENERATION OF MATTER

This matter was generated by a complaint filed by Daniel L. Grant of Towaco, New Jersey. The complainant alleges that a number of broadcasts of the Sean Hannity Show on radio station WABC-AM, New York City, between October 15, 1998 and November 3, 1998 were in

whole or in part in-kind contributions to, or independent expenditures on behalf of, Alfonse D'Amato's candidacy for reelection as United States Senator from New York.

II. FACTUAL AND LEGAL ANALYSIS

A. Applicable Law

The Federal Election Campaign Act of 1971, as amended ("the Act"), provides that no corporation, except through a separate segregated fund, may make a contribution or expenditure in connection with any Federal election. 2 U.S.C. § 441b. Persons who are not corporations, labor organizations, Federal contractors, foreign nationals, or multicandidate political committees may make contributions to candidates for Federal office and their authorized political committees in amounts of up to $1,000 per election. 2 U.S.C. § 441a(a)(1)(A). Moreover, no individual shall make contributions aggregating more than $25,000 in any calendar year; for purposes of the $25,000 annual limitation, any contribution made to a candidate in a year other than the calendar year in which the election is held with respect to which such contribution is made, is considered to be made during the calendar year in which such election is held. 2 U.S.C. § 441a(a)(3).

However, the Act and the Commission's regulations exclude, under certain circumstances, costs associated with the production or dissemination of news stories, commentaries or editorials from the definitions of "contribution" and "expenditure." 2 U.S.C. § 431(9)(B)(i); 11 C.F.R. §§ 100.7(b)(2) and 100.8(b)(2). In *Readers' Digest Ass'n. v. FEC,* 509 F. Supp. 1210, 1214 (S.D.N.Y. 1981), the court, interpreting the Act, stated that the media exemption applies when the distribution of news or commentary falls within the media entity's "legitimate press function." The Commission has interpreted the media exemption broadly, consistent with Congress's admonition that the Act was not intended "to limit or burden in any way the first amendment freedom of the press." H. R. Rep. No. 943, 93d Cong., 1st Sess., at 4

(1974). *See, e.g.,* Advisory Opinion 1982-44 (cable television network's donation of time to national party committees for broadcasts in which candidates and other party leaders discussed issues and solicited contributions was protected by media exemption).

Section 431(9)(B)(i) identifies only "broadcasting station[s], newspaper[s], magazine[s], or other periodical publication[s]" as press entities entitled to the exemption. The Commission has interpreted the term "broadcasting station" to include broadcasting facilities licensed by the Federal Communications Commission; networks of such facilities; or cable television operators, producers or programmers. Explanation and Justification of 11 C.F.R. § 114.4(e), 44 Fed. Reg. 76,734, 76,735 (1979) (FCC licensees and networks); 11 C.F.R. §§ 100.7(b)(2), 100.8(b)(2) (cable operators, producers or programmers).[1]

In addition to the "legitimate press function" test, the Commission must also determine whether the press entity is owned or controlled by any political party, political committee or candidate. This test is a straightforward inquiry into whether the complaint, response, or other data available to the Commission suggest that a media entity is so owned or controlled. *See, e.g.,* MUR 3645. If it is, it qualifies for the exemption only in certain narrowly defined situations described in the regulations. *See* 11 C.F.R. §§ 100.7(b)(2)(i) and (ii) and 100.8(b)(2)(i) and (ii).

The Act further states that:

> Whenever any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, or solicits any contribution through any broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing or any other type of general public political advertising, such communication –

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[1] Similarly, the Commission has effectively interpreted the exemption for newspapers, magazines, or other periodical publications as reaching entities that "act[ ]as a news and commentary provider via computer linkages, performing a newspaper or periodical publication function for computer users" by creating editorial content in a manner similar to newspapers or periodicals. Advisory Opinion 1996-16. This matter deals with a broadcast, rather than a print or quasi-print, entity.

> (1) if paid for and authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication has been paid for by such authorized political committee, or
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> (2) if paid for by other persons but authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication is paid for by such other persons and authorized by such authorized political committee;
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> (3) if not authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state the name of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee.

2 U.S.C. § 441d(a).

The Act defines a political committee as any committee, club, association, or other group of persons which receives "contributions" or makes "expenditures" aggregating in excess of $1,000 during a calendar year. 2 U.S.C. § 431(4)(A). For the purposes of the Act, the term "person" is defined as including "an individual, partnership, committee, association, corporation, labor organization or any other organization or group of persons . . . " 2 U.S.C. § 431(11). In *Buckley v. Valeo,* 424 U.S. 1 (1976), the Supreme Court, in order to avoid overbreadth, construed the Act's references to "political committee" in such a manner as to prevent their "reach [to] groups engaged purely in issue discussion." The Court recognized that "[t]o fulfill the purpose of the Act [the designation 'political committee'] should encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." 424 U.S. at 79. *But see Akins v. FEC,* 101 F.3d 731 (D.C. Cir. 1996), *vacated and remanded on other grounds*, 118 S.Ct. 1777 (1998) (D.C. Circuit concluded that the "major purpose" test for political committees should only apply to independent expenditures, and that

with regard to contributions, political committee status would be triggered whenever any organization made contributions in excess of $1,000).

All political committees that are neither the authorized committees of candidates nor separate segregated funds established under 2 U.S.C. § 441b(b) are required to register with the Commission by filing a statement of organization within ten days of becoming a political committee within the meaning of 2 U.S.C. § 431(4). 2 U.S.C. § 433(a). Subsequently, political committees are required to file periodic reports of their receipts and disbursements in accordance with the provisions of 2 U.S.C. § 434. Among the information to be disclosed on such reports are, in the case of political committees that are not authorized committees of candidates for Federal office, the name and address of each political committee which has received a contribution from the reporting committee during the reporting period, together with the date and amount of any such contribution, 2 U.S.C. § 434(b)(6)(B)(i); and the name and address of any person who receives any disbursement during the reporting period in an aggregate amount or value in excess of $200 within the calendar year in connection with an independent expenditure by the reporting committee, together with the date, amount, and purpose of any such independent expenditure and a statement which indicates whether such independent expenditure is in support of, or in opposition to, a candidate, as well as the name and office sought by such candidate, and a certification, under penalty of perjury, whether such independent expenditure is made in cooperation, consultation, or concert, with, or at the request or suggestion of, any candidate or any authorized committee or agent of such committee. 2 U.S.C. § 434(b)(6)(B)(ii). The Act defines an "independent expenditure" as an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and

which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate. 2 U.S.C. § 431(17).

B. Analysis

Information from the Federal Communications Commission's web site indicates that respondent WABC-AM Radio, Inc. holds a license from the FCC to operate radio station WABC-AM in New York, New York. One of WABC's programs appears to be a talk show hosted by Sean Hannity. Response of ABC, Inc. f/k/a Capital Cities/ABC, Inc., WABC-AM Radio, Inc., and Sean Hannity ("Joint Response") at 2. The Sean Hannity Show is apparently broadcast over WABC weekday afternoons between 3 and 6 p.m. Joint Response at 8 (Affidavit of John M. Dolan, ¶ 4); Complaint at 3. The complainant appears to be aggrieved by certain broadcasts of the Sean Hannity Show between October 15 and November 3, 1998. *Id.* at 1-2. The complaint alleges that the Hannity show provided "numerous free election advertisements" to the reelection campaign of Senator Alfonse D'Amato in that the show's host, Sean Hannity, "urged[,] exhorted and advised the listeners . . . to either vote for Alfonse D'Amato or vote against Charles Schumer [D'Amato's principal opponent]." *Id.* In particular, the complaint alleges that "no less than 5 times on or about October 27th-29th 1998" the Hannity program ran "portions of a Paid Political advertisement advocating the election of Senator D'Amato under the guise of informing the public." *Id.* at 2.[2]

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[2] The complaint's reference to "numerous free election advertisements" might also be read as an allegation that WABC simply gave free time to Senator D'Amato's committee to run its own advertisements during the Hannity program. However, in the context of the entire complaint, it appears more likely that the complainant is complaining about the editorial content of the Hannity program. The complaint contains no information that would tend to substantiate any charge that free advertising time was simply given to the D'Amato committee; the specific references in the complaint are to Hannity "exhorting and advising" voters, to the playing of portions of a D'Amato advertisement on the show itself "in the guise of informing the public," and to "the programming of the Sean Hannity Show" containing statements which "clearly advocate the election of or the defeat of Candidates [sic] for
(Footnote continued on following page)

The complainant reasons that the broadcasts were either in-kind contributions to D'Amato's campaign or independent expenditures on his behalf. If the broadcasts were in-kind contributions, the complaint alleges, they were prohibited by 2 U.S.C. § 441b(a) because WABC-AM Radio Inc., its parent ABC Inc. f/k/a Capital Cities/ABC, Inc., and ABC Inc.'s parent, the Walt Disney Company, are all incorporated; moreover, the complaint reasons, they also constituted personal in-kind contributions by Hannity of a value in excess of $25,000, in violation of 2 U.S.C. § 441a(a)(3). Complaint at 1-2.[3] Read in the light most favorable to the complainant, the complaint can also be seen as presenting an alternative theory that the broadcasts were independent expenditures, which the corporate respondents would still be prohibited from making by 2 U.S.C. § 441b(a). Complaint at 2 ("Complaint 4" and "Complaint 5"). Whether contributions or independent expenditures, the complaint reasons, the broadcasts did not contain legally required disclaimers, in violation of 2 U.S.C. § 441d. Moreover, the complaint alleges, "the Respondents as a group became a Political Committee" by making expenditures in excess of $1,000, and this unnamed committee violated 2 U.S.C. § 433 by failing to register with the Commission and 2 U.S.C. § 434 by failing to report its receipts and disbursements, and in particular its in-kind contributions to, or independent expenditures on behalf of, Senator D'Amato. Complaint at 2.

As noted, station WABC-AM is licensed by the FCC, and WABC-AM Radio, Inc. holds the license. John M. Dolan, who identifies himself as President and General Manager of WABC-

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public office." Complaint at 2, 3. Moreover, to the extent that the complaint can be read as alleging that WABC gave time to the D'Amato committee without charging for it, the Joint Response flatly denies the allegation. Joint Response at 4-5 (argument of counsel) and 9 (Dolan affidavit, ¶ 8).

[3] Although not specifically alleged in the complaint, such a violation would of necessity also constitute a violation of the $1,000 per candidate per election limitation of 2 U.S.C. § 441a(a)(1)(A).

AM, asserts in an affidavit appended to the Joint Response that neither WABC-AM Radio, Inc., ABC Inc., nor the Walt Disney Co. is owned or controlled by any political party, political committee or candidate. Joint Response at 8 (Dolan Affidavit at ¶¶ 1, 2). This Office is aware of no information to the contrary. Moreover, Commission indices show no record that Hannity was a candidate for Federal office in 1998.

An affidavit from Hannity is also appended to the Joint Response. In it, Hannity describes his program as "address[ing] a wide variety of newsworthy issues, with an emphasis on politics and current events." Joint Response at 6 (Hannity Affidavit at ¶ 2). He avers that "[r]aising issues, expressing opinions and providing commentary regarding the political questions of the day – including the D'Amato-Schumer race – are core components of my job." *Id.* at ¶ 4. Hannity admits that he "frequently discussed on air the upcoming November [1998] elections, including the New York Senatorial race" and that "[a]t times, I expressed my opinion that Mr. D'Amato was the preferable candidate. Many of my guests and callers expressed a contrary view." *Id.* at ¶ 3. He also states that during the 1998 campaign, he occasionally would "play on air segments of commercials relating to certain candidates and/or political parties, for purposes of offering and seeking comment." *Id.* at ¶ 5. He states that he has no specific recollection of playing any portions of any D'Amato or Schumer advertisements in this manner, *id.;* however, he does not specifically deny doing so.

It appears that Hannity's program on WABC consists primarily of the "opinions" and "commentary" of Hannity, his guests, and of persons who call in to the program, and that in the course of such commentary in the fall of 1998 Hannity may have expressly or implicitly advocated the reelection of Senator D'Amato and/or the defeat of Representative Schumer. He

may also have replayed portions of D'Amato advertisements and commented on them. Commentary is one of three types of content expressly protected by the "media exemption" of 2 U.S.C. § 431(9)(B)(i), news stories and editorials being the others. Thus, the commentary apparently broadcast on the Sean Hannity Show would appear to be squarely within the "legitimate press function" of WABC-AM. The Commission reached a similar conclusion in MUR 3624. There, a complainant alleged that a station's broadcast of the "Rush Limbaugh Show" provided three hours a day free advertising to then-President Bush's reelection campaign; the Commission found no reason to believe the station violated the Act because the program was within the station's legitimate press function. This conclusion is not altered by the possibility that D'Amato advertisements may have been rebroadcast on the "Sean Hannity Show" within the context of Hannity's commentary on them. Advisory Opinion 1996-48 (approving free rebroadcast of candidates' advertisements within context that "does not alter the basic nature of the programs as news stories, editorials or commentaries").[4]

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[4] One of the factors mentioned in AO 1996-48 as supporting application of the press exemption was that the requester intended to take "affirmative steps to ensure that viewers do not conclude that the airing of the program or material constitutes an endorsement." Applied strictly, this language could be read to mean that an otherwise exempt commentary that explicitly or implicitly endorsed a candidate could not contain a rebroadcast of an endorsed candidate's advertisement for the purposes of commenting on it. However, such a reading would wrench AO 1996-48 from its context. AO 1996-48 concerned C-SPAN's "Road to the White House" program on Sunday evenings, which frequently shows candidate advertisements or videotapes of candidate public appearances without *any* interruption, even to describe what the viewer is seeing. Under those circumstances, the Commission found that "Road to the White House" served a legitimate press function in part because it contained graphics and other visual content that gave the implicit message that the candidates' advertisements were being broadcast as part of a program that was essentially a news story.

This is not to say that the simple provision of advertising time to a candidate free of charge would necessarily fall within the press exemption. In approving as exempt third-party "commentary" a cable operator's proposal to provide free advertising time to House candidates within its service area, the Commission cautioned the operator "that activities by [it] which reflect an intent to advance one candidate over another, or to give any preference to any candidate [in the provision of the free time], will be deemed to fall outside the Act's media exemption." Advisory Opinion 1998-17. However, as stated *supra* at n. 2, it does not appear that the matter at hand involves the free provision of advertising time divorced from an otherwise exempt context.

Because broadcast of the "Sean Hannity Show" is within WABC's legitimate press function, and because none of the respondents appear to be candidates, or owned or controlled by any party, committee or candidate, 2 U.S.C. § 431(9)(B)(i) and 11 C.F.R. § 100.7(b)(2) apply, and the broadcasts at issue were neither expenditures nor contributions. Because no contributions were made, the complaint's allegations of prohibited and excessive contributions must fall. Because no expenditures were made, the complaint's allegations of prohibited independent expenditures, as well as its allegations pertaining to registration, reporting and disclaimers, must also fall.

Accordingly, this Office recommends the Commission find no reason to believe that Sean Hannity, WABC-AM Radio Inc., ABC Inc. (f/k/a Capital Cities/ABC, Inc.), or the Walt Disney Co. violated any provision of the Act in connection with this matter.[5]

III. RECOMMENDATIONS

1. Find no reason to believe that Sean Hannity, WABC-AM Radio Inc., ABC Inc. (f/k/a Capital Cities/ABC, Inc.), or the Walt Disney Company violated any provision of the Act in connection with this matter.

2. Approve the appropriate letters.

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[5] The Walt Disney Company filed a separate response in which it argued that it could not be held responsible for any violations committed by its subsidiaries because the corporate veil could not be pierced with respect to it under these circumstances. Because the analysis in the main text concludes that neither of the Disney subsidiaries that are respondents herein violated the Act, it is unnecessary to address Disney's argument in this report.

3. Close the file.

Lawrence M. Noble
General Counsel

5/27/99
Date

BY: [signature]
Lois G. Lerner
Associate General Counsel