

JUN 08 2000

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

SENSITIVE

FIRST GENERAL COUNSEL'S REPORT

MUR 4946

DATE COMPLAINT FILED: 11/08/99

DATE OF NOTIFICATION: 11/16/99

DATE ACTIVATED: 3/20/2000

STAFF MEMBER: Tracey Robinson

COMPLAINANT: Robert Vinson Brannum

RESPONDENTS: CBS News, Fox Network News, CNBC News, NBC News, MSNBC News, CNN (Political) and ABC News.

RELEVANT STATUTES: 2 U.S.C. § 431(9)(B)(i)
2 U.S.C. § 441b (a)
2 U.S.C. § 441b (b) (2)
11 C.F.R. 100.7 (b) (2)
11. C.F.R. 100.8 (b) (2)

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

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2000 JUN -8 P 4: 24

I. GENERATION OF MATTER

This matter was generated by a complaint filed by Robert Vinson Brannum against CBS News, Fox Network News, CNBC News, NBC News and MSNBC News ("The NBC Network"), CNN and ABC News. The complainant alleges that the Respondents made prohibited corporate contributions in the form of political news coverage and commentary. The complaint further alleges that the Respondents denied reasonable access to Federal candidates, requiring review of their broadcast licenses held by the Federal Communications Commission.

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.

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 Session, 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 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

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 broadcast and cable, rather than print or quasi-print, entities.

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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).

B. Complaint

The complaint alleges that the Respondent broadcasting stations provide selective, unbalanced and excessive political news coverage to the extent that such coverage amounts to prohibited corporate contributions. Brannum suggests that the Commission should view the Respondents' actions as that of "surrogate political action committees or affiliated political action committees." Brannum further contends that various news talk shows hosted by the Respondent stations screen telephone callers, so that only those with particular views are aired. He claims that the companies have "become inappropriate corporate electronic voter guides advocating the election of an individual or group of political candidates for Federal elective service." Brannum believes that the news coverage and talk shows advocate the election of Federal candidates.

Finally, Brannum contends that the media exemption is not applicable in this case. In an attempt to distinguish Advisory Opinion 1998-17,² he states that the "ruling contemplates fair and balanced commentary and news reporting practices." He argues that today's news organizations are more aggressive and have become less responsive to public expectation of fair news reporting, accuracy and equal access to candidates.

² *Advisory Opinion 1998-17* addressed whether the provision by Daniels Cablevision, Inc. of free advertising spot time to Federal candidates resulted in corporate contributions under the Act and Commission regulations. The Commission held that the donations of free spot time were not contributions and therefore, were permissible, provided that the cable operator did not give preference to one candidate over another.

C. Responses

1. CBS News

In response to the complaint, CBS contends that its news coverage of the 2000 presidential campaign is protected by the media exemption pursuant to 2 U.S.C. § 431(9)(A)(i). As to the allegation that CBS' news coverage of candidates fails to reflect a *bona fide* journalistic judgment as to newsworthiness, CBS states that the complaint is lacking in factual or evidentiary support. Additionally, CBS responds that there is no support for the contention that the CBS Corporation promotes favored Federal candidates by way of broadcast news coverage.

Finally, CBS argues that the Federal Election Commission lacks jurisdiction to address Brannum's accusations that CBS fails to provide "reasonable access," "equal time," or fair coverage. The Respondent references the Federal Communications Commission as the agency with exclusive primary jurisdiction over such matters.

2. Fox News

The Respondent, Fox News, responds with a general denial to the complaint. In its response, Fox News stated that it stands firm on its slogan "We Report. You Decide," and the slogan "You Decide 2000" pertaining to its coverage of the 2000 presidential elections. Fox urges the Commission take no action against it in this matter.

3. NBC News Networks

NBC, responding on behalf of NBC News, CNBC News and MSNBC News, contends that it acts as a press entity in providing the political news coverage described by Brannum, is exempt and therefore, subject to the media exemption. The Respondent states that the NBC News Networks are owned by NBC, including MSNBC, which is operated in partnership with

Microsoft. NBC further notes that it provides a fair, accurate and balanced news coverage of political campaigns.

4. CNN News

In response to the complaint, CNN News states that Brannum's allegations lack specificity in terms of any FECA violations. The respondent CNN claims that it operates within the purview of the rules and regulations of both the Federal Election Commission and the Federal Communications Commission regarding political news coverage and free air time to federal candidates.

5. ABC News

ABC News was notified of the complaint through its registered agent on November 16, 1999. No response was filed.

D. Analysis

The basis of Brannum's complaint is that the Respondents' political news coverage should be deemed prohibited corporate campaign contributions to unspecified federal candidates. Brannum contends that the media exemption does not apply in this case for various reasons.

First, Brannum argues that the Respondents' political commentary and news coverage serves to advocate the election of unnamed federal candidates. Read in the light most favorable to the complainant, it appears that Brannum is attempting to negate the "legitimate press function," the first step in determining the applicability of the media exemption. Brannum fails to support his contention. He provides no factual support for the premise that the news stations advocate the election of individual candidates or political groups through news reporting.

Additionally, Brannum claims that certain shows³ hosted by the Respondents "appear deceptively" to screen public telephone callers to advance a particular thought in favor or against Federal candidates. Likewise, this claim is unsupported and lacking in specificity. Although Brannum includes a laundry list of well-known political talk shows, he provides no examples of his claim.

Finally, Brannum claims that the "actions" of the Respondent broadcast stations should be considered "surrogate political action committees or affiliated political action committees." This claim also lacks a factual basis. There is no evidence whatsoever that the Respondents are owned or controlled by political action committees. Commission indices show no information in support of Mr. Brannum's claim.

In short, Brannum makes broad allegations without providing specific facts and the Respondents have denied the allegations. Accordingly, there are no facts from which to infer that there is a reason to believe that any of the Respondent entities violated the Act.

The complainant also claims that the Respondents failed to provide "reasonable access" and suggests a review of each Respondents' broadcasting license for possible revocation. The "reasonable access" rule directs the Federal Communications Commission to revoke a broadcaster's license "for willful or repeated failure to allow reasonable access to or permit purchase of reasonable amounts of time" by Federal candidates. *See Advisory Opinion 1998-17, citing the Communications Act at 47 U.S.C. § 315(b).* This claim falls under a provision of the

³ Brannum states that the "talk shows, include, but are not limited to Meet the Press and the Today Show - NBC News; Face the Nation - CBS News; This Week, Nightline and Good Morning America - ABC News; Talk Back Live, Larry King Show, CNN & Company, Capitol Gang, Late Edition and Inside Politics - CNN; HardBall - CNBC News; Watch It, Drudge, Internight - MSNBC News, O'Reilly Factor - Fox News."

Communications Act. It is not within the jurisdiction of the Federal Election Commission, and should be raised in the proper forum.

Accordingly, this Office recommends the Commission find no reason to believe that CBS, Fox News, NBC, CNBC, MSNBC (the NBC Network), CNN or ABC violated any provision of the Act in connection with this matter

IV. RECOMMENDATIONS


1. Find no reason to believe that any of the respondents in MUR 4946 violated any portion of the Act.
2. Approve the appropriate letters.
3. Close the file.

Lawrence M. Noble
General Counsel

Date

6/7/00

BY:


Lois G. Lerner
Associate General Counsel



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: Office of the Commission Secretary

FROM: Office of General Counsel

DATE: June 8, 2000

SUBJECT: MUR 4946- First General Counsel's Report

The attached is submitted as an Agenda document for the Commission Meeting of _____

Open Session _____

Closed Session _____

CIRCULATIONS

SENSITIVE ☒
NON-SENSITIVE ☐

72 Hour TALLY VOTE ☒
24 Hour TALLY VOTE ☐
24 Hour NO OBJECTION ☐
INFORMATION ☐

DISTRIBUTION

COMPLIANCE ☒
Open/Closed Letters ☐
MUR ☐
DSP ☐
STATUS SHEETS ☐
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Litigation ☐
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REGULATIONS ☐
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FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: LAWRENCE M. NOBLE
GENERAL COUNSEL

FROM: MARY W. DOVE/VENESHE FEREBEE-VINES *WV*
COMMISSION SECRETARY

DATE: JUNE 13, 2000

SUBJECT: MUR 4946 - First General Counsel's Report
dated June 7, 2000.

The above-captioned document was circulated to the Commission
on Friday, June 09, 2000.

Objection(s) have been received from the Commissioner(s) as
indicated by the name(s) checked below:

Commissioner Elliott	—
Commissioner Mason	<u>XXX</u>
Commissioner McDonald	—
Commissioner Sandstrom	—
Commissioner Thomas	—
Commissioner Wold	—

This matter will be placed on the meeting agenda for Tuesday,
June 20, 2000. Please notify us who will represent your Division before the
Commission on this matter.