



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
Joel Gilbert, Highway 61 Entertainment, LLC,) MUR 6779
and DFMRF, LLC)

**STATEMENT OF REASONS OF
CHAIRMAN MATTHEW S. PETERSEN AND
COMMISSIONERS LEE E. GOODMAN AND CAROLINE C. HUNTER**

The Constitution and Congress have limited the Federal Election Commission's regulatory jurisdiction over the press. Yet, once again, our colleagues on the Commission have voted as a bloc to regulate press entities, while we continue to recognize the constitutional limits on regulating the press.

A complaint was filed alleging that a filmmaker violated the Federal Election Campaign Act of 1971, as amended (the "Act"), by producing and distributing a politically-themed documentary film entitled *Dreams from My Real Father: A Story of Reds and Deception* ("Dreams"). Specifically the complaint alleged that the filmmaker violated the Act by: (1) mailing free DVD copies of the film to millions of viewers in "swing" states immediately before the 2012 general election without reporting the cost of doing so as an independent expenditure; (2) failing to report as an independent expenditure the cost to run an advertisement for the film in the *New York Post*; and (3) omitting disclaimers in the text of the film and the *New York Post* advertisement.¹

As discussed below, the record reflects that a legitimate filmmaking entity—unconnected to any political committee, candidate, or party—produced and distributed the film. Further, the costs incurred to produce, sell, and distribute the film through commercial channels, as well as to place the challenged advertisement, all constitute legitimate press activity within the scope of the Act's media exemption. As to the Respondents' alleged distribution of free copies of the film before the election, the Respondents assert that the distribution was designed to market the film and was promotional in nature. The filmmaker's contemporaneous statements are consistent with that representation. Further, Respondents' free distribution of the film is consistent with the free distribution of political commentary by other filmmakers and press organizations which the Commission and federal courts have consistently approved. Indeed, Respondents are entitled to the protection of Advisory Opinion 2010-08 (Citizens United), which concluded that the press exemption applied to a filmmaker's distribution of political documentary films through a wide

¹ See Compl. ¶¶ 26, 51-60.

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variety of channels—including free dissemination. Because Respondents are *bona fide* media entities and their production and distribution of a documentary film are exempt from Commission regulation, we voted to find no reason to believe that the Respondents violated sections 30104(c) and 30120(a) of the Act² and to dismiss the complaint.

I. FACTUAL BACKGROUND

Joel Gilbert is a filmmaker and producer.³ He is the sole owner and President of Highway 61 Entertainment, LLC (“Highway 61”),⁴ which was registered as an LLC with the state of California on January 4, 2005.⁵ Since its inception, Highway 61 has produced at least five political documentaries and seven musical documentaries.⁶ In addition, Highway 61 has produced fictional films in documentary format, including *Elvis Found Alive* and *Paul McCartney Really Is Dead*.⁷ Gilbert wrote and directed *Dreams*, and Highway 61 completed production of *Dreams* in April 2012.⁸ In July 2012, Gilbert established DFMRF, LLC, for the purpose of distributing and promoting *Dreams*.⁹

A. The Nature and Content of the Film

The slip cover of the *Dreams* DVD describes the film as “the alternative Barack Obama ‘autobiography,’ offering a divergent theory of what may have shaped our 44th President’s life and politics.” The film is narrated by an actor impersonating Obama, recited from a first-person perspective. The design elements of the film and its marketing materials mirror Obama’s authorized autobiographical account, *Dreams of My Father: A Story of Race and Inheritance*, first published in 1995 and re-released in the fall of 2004 after the nomination of Obama as a Democratic candidate for the U.S. Senate in Illinois.

The film’s narration commences with the statement, “Everywhere you look in my background, you’ll find people who despise America and want to transform it radically. Americans often wonder: Why am I so comfortable with anti-American extremists, and why are they so comfortable with me?”¹⁰ The film then generally asserts that Obama sought to deceive the American public through a web of lies and concealed relationships, all stemming from the central allegation that Franklin Marshall Davis, an American communist, was Obama’s real

² Formerly 2 U.S.C. §§ 434(c) and 441d(a).

³ Resp. at 1.

⁴ *Id.*

⁵ CAL. SEC’Y OF STATE, <http://kepler.sos.ca.gov/> (business search for “Highway 61”).

⁶ Resp. at 1, 2.

⁷ *Id.* at 2.

⁸ *Id.*

⁹ *Id.*

¹⁰ Corrected Transcript of *Dreams* at 1 (“Corrected Transcript”).

II. LEGAL ANALYSIS

The Act and Commission regulations define the terms “contribution” and “expenditure” to include any gift of money or “anything of value” for the purpose of influencing a federal election.³² But the Act exempts from the definition of expenditure “any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate.”³³ Congress explained that this provision was included in the Act because Congress did not intend to “limit or burden in any way the First Amendment freedoms of the press and of association. [The exemption] assures the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns.”³⁴ This exclusion is generally referred to as the “press exemption” or “media exemption.”³⁵

To determine whether the media exemption applies, the Commission first assesses whether the entity that engaged in the challenged activity is a press entity.³⁶ If so, the exemption applies so long as the entity (1) is not owned or controlled by a political party, political committee, or candidate and (2) is acting within its “legitimate press function” in conducting the activity that is the subject of the complaint.³⁷ If the exemption applies, the entity’s publication of political news and commentary is exempt from the Act’s disclosure, disclaimer, and reporting requirements.³⁸ The Commission has long recognized that an entity otherwise eligible for the exemption “would not lose its eligibility merely because of a lack of objectivity in a news story, commentary, or editorial, even if the news story, commentary, or editorial expressly advocates the election or defeat of a clearly identified candidate for Federal office.”³⁹

³² 52 U.S.C. § 30101(8)(A), (9)(A) (formerly 2 U.S.C. § 431(8)(A), (9)(A)); 11 C.F.R. §§ 100.52(a), 100.111(a).

³³ 52 U.S.C. § 30101(9)(B)(i) (formerly 2 U.S.C. § 431(9)(B)(i)).

³⁴ H.R. Rep. No. 93-1239 at 4 (1974).

³⁵ Advisory Op. 2010-8 (Citizens United) at 3 (“AO 2010-08”).

³⁶ See, e.g., AO 2010-08; Advisory Op. 2005-16 (Fired Up!) (“AO 2005-16”); Advisory Op. 1996-16 (Bloomberg).

³⁷ *Reader's Digest Ass'n v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981); *FEC v. Phillips Publishing, Inc.*, 517 F.Supp. 1308, 1313 (D.D.C. 1981).

³⁸ AO 2010-08 at 7.

³⁹ AO 2005-16 at 6; Factual & Legal Analysis at 3, MUR 6579 (ABC News, Inc.) (July 5, 2012); see also AO 2010-08 (“While Citizens United’s films may be designed to further its principal purpose as a non-profit advocacy organization, an entity otherwise eligible for the press exemption does not lose its eligibility merely because of a lack of objectivity in a news story, commentary, or editorial.”).

A. The Activity in This Matter Is Protected from Enforcement by Commission Advisory Opinion 2010-08

The Commission had occasion to apply the press exemption to a filmmaker's production and distribution of a political documentary film in Advisory Opinion 2010-08. The Commission concluded that Citizens United, a non-profit advocacy organization with an ideological perspective that made films, was a press entity. The Act provides that "[a]ny advisory opinion rendered by the Commission . . . may be relied upon by . . . any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered."⁴⁰ For the reasons set forth below, we conclude that the Respondents' film production and distribution activities are indistinguishable in all material aspects from the film production and distribution activities approved by the Commission in AO 2010-08, and therefore are entitled to the protection of that opinion and the media exemption.

When it submitted its advisory opinion request, Citizens United had distributed 14 films and documentaries with another four films in production.⁴¹ Upon receiving Citizens United's request for an advisory opinion, the Commission issued inquiries to Citizens United soliciting specific information about how it distributed its films.⁴² In response, Citizens United represented that it used a wide "variety of means to market and distribute its films," including free theatrical screenings and "on one occasion, Citizens United attempted to stimulate sales of a film by providing a free DVD insert in newspapers in select markets."⁴³ Citizens United also represented that it planned to disseminate a film free of charge to the public on the Military Channel for no monetary payment or royalty (only free advertising time).⁴⁴ Based upon these representations, the Commission noted in its advisory opinion that "in 2008, [Citizens United] provided free DVDs of one film, *HYPE: The Obama Effect*, as a newspaper insert in five newspapers in Florida, Nevada, and Ohio."⁴⁵ So informed, the Commission determined that

⁴⁰ 52 U.S.C. § 30108(c)(1)(B).

⁴¹ AO 2010-08 at 5. Because each documentary film is a unique production, unlike daily newspapers or monthly periodicals, the Commission's focus on a film producer's "track record" of making documentary films and distributing them in a similar way is of limited utility in the documentary film context. However, here the filmmaker has a track record and the track record is a strong indicator of the film producer's status as a *bona fide* filmmaker.

⁴² Advisory Opinion Request 2010-08 (Letter from Robert M. Knop to Theodore B. Olson, Apr. 16, 2010, at 2) ("Please describe whether CU films are (or will be) shown, or copies of such films distributed, free of charge, the approximate value of those free showings and distributions, and to what extent the costs to CU associated with such free showings and distributions constitute part of the approximately 25% of CU's budget devoted to documentary film production and distribution. Please specify whether CU charges a usual and normal rate for those copies and screenings of such films that are provided for a charge. Please explain the extent to which the information requested in this paragraph differs according to whether such film or films refer (or will refer) to a clearly identified candidate for Federal office.").

⁴³ Advisory Opinion Request 2010-08 (Letter from Theodore B. Olson to Robert M. Knop, Apr. 26, 2010, at 5).

⁴⁴ *Id.* at 7.

⁴⁵ AO 2010-08 at 2.

Citizens United's distribution of its documentary films by broadcast, cable, and satellite television, DVD, and in theaters, for compensation and free of charge, qualified for the media exemption.⁴⁶

Like Citizens United, Respondents have produced and distributed numerous documentary films, and have employed similar marketing strategies to promote their films, including releasing their films in selective markets free-of-charge. And Respondents, like Citizens United, have sought and obtained wide distribution of their films for public consumption.

In all material respects, therefore, Respondents' activities are indistinguishable from the film production and distribution activities that the Commission determined were covered by the press exemption in AO 2010-08. Accordingly, AO 2010-08 similarly shields Respondents' activities here from enforcement action.

B. The Activity in This Matter Is Protected from Enforcement by the Press Exemption

As noted above, the press exemption applies to a press entity that is not owned or controlled by a political party, political committee, or candidate and which acted within its "legitimate press function" when conducting the activity that is the subject of the complaint.⁴⁷

1. Respondents are Press Entities

As the Commission has observed, "[n]either the Act nor Commission regulations use or define the term 'press entity.' Therefore, when determining whether the term applies to a particular entity, the Commission has focused on whether the entity in question produces on a regular basis a program that disseminates news stories, commentary, and/or editorials."⁴⁸ The exemption covers a broad array of media entities and types of publications, including entities that

⁴⁶ *Id.* at 7. More recently, the Tenth Circuit held that the Colorado Secretary of State violated the First Amendment when it failed to treat Citizens United the same as other media entities that are exempt from Colorado's disclosure laws. *Citizens United v. Gessler*, No. 14-1387, 2014 WL 5422920 at *8 (10th Cir. Oct. 27, 2014). Like the Commission in its advisory opinion, the appellate panel noted that, "Citizens United has provided free DVDs inserted into newspapers and allowed its films to be screened free of charge to educational institutions and select members of the public and news media." *Id.* at *1. Notwithstanding that activity, the court rejected the argument that Citizens United was merely a "'drop-in' advocate" and found that Citizens United was entitled to the same protections as exempt media entities. *Id.* at *13.

⁴⁷ *Reader's Digest Ass'n v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981); *FEC v. Phillips Publishing, Inc.*, 517 F.Supp. 1308, 1313 (D.D.C. 1981).

⁴⁸ AO 2010-08 at 5.

produce documentaries and other films.⁴⁹ The Supreme Court has ruled that filmmakers are the press for purposes of First Amendment protection.⁵⁰

As noted above, the Commission determined in AO 2010-08 that Citizens United, a non-profit advocacy organization with an ideological perspective, was a press entity because it had produced and distributed 14 documentary films with another four in production. Here, Highway 61, Gilbert's production company, produced at least 13 films and documentaries prior to the release of *Dreams* in 2012. Unlike Citizens United, Highway 61 does not appear to engage in any other activity besides producing films, a factual distinction that tends to further support the conclusion that Highway 61 is a *bona fide* press entity. We therefore concluded that Highway 61 is a media entity entitled to the same protection as other press entities. Further, because Gilbert is the sole owner of Highway 61 and the founder and manager of DFMRF, LLC, which he established for the purpose of distributing *Dreams*, DFMRF, LLC appears to be an affiliate of Highway 61 and also qualifies as a press entity under Commission guidance.⁵¹

2. Respondents are Not Owned or Controlled By a Political Party, Candidate, or Political Committee

In his affidavit, Gilbert states that, like Citizens United, neither he, Highway 61, nor DFMRF are "owned, controlled or affiliated with a political party, candidate, or political committee."⁵² The Commission is aware of no evidence to the contrary.

3. Respondents Engaged in a Legitimate Press Function

The last question in the analysis is whether Respondents produce and distribute their films, including *Dreams*, as a legitimate press function. That question turns on (1) whether the press entity's materials were available to the general public and (2) whether the challenged

⁴⁹ *Id.* at 4 (documentary filmmaker); Advisory Op. 2003-34 (Showtime) at 3 (reality television program).

⁵⁰ *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948) ("We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment.").

⁵¹ *Cf.* AO 2010-08 at 2 n.1 (finding that because Citizens United maintained ownership and control over its affiliated entities which produced and distributed its films, "the Commission assumed[d] that all films produced and/or distributed by a Citizens United affiliate [were] produced and distributed by Citizens United."). The Commission notes that establishing a separate entity to distribute a film does not appear to be an uncommon practice in the film-production industry. For example, in MURs 5474 and 5539 (Dog Eat Dog Films, Inc.), while Michael Moore's production company, Dog Eat Dog Films, Inc., produced *Fahrenheit 9/11*, a separate company, Fellowship Adventure Group, was formed for the specific purpose of distributing the film. *See* First General Counsel's Report at 6, MURs 5474, 5539 (May 25, 2005). Nor is it unusual in the industry to solicit investors in connection with the production and marketing of a film. *See, e.g.*, AO 2010-08 at 2 n.1 (noting that a non-candidate investor helped form Citizens United Productions No. 1, LLC); First General Counsel's Report at 12, MURs 5474, 5539 (stating that *Fahrenheit 9/11* was "financed entirely by others" than Michael Moore or Dog Eat Dog Films, Inc.).

⁵² Gilbert Aff. ¶¶ 6-7.

materials were comparable in form to those ordinarily issued by the entity.⁵³ Both of those considerations are met here.

First, *Dreams* was made publicly available on DVD and over websites such as Netflix and Amazon. Second, the publisher here, like Citizens United, “regularly produces” materials similar in form to *Dreams*. The same production company that produced *Dreams*, Highway 61, also produced other films and documentaries consistent in form with that film, including *Atomic Jihad*, *Farewell Israel*, and *Paul McCartney is Really Dead*. Accordingly, the second element of the Commission’s test is satisfied as well.

Additionally, although the Complaint specifically challenges the Respondents’ distribution of free copies of *Dreams* before an election to millions of households in so-called “swing” states,⁵⁴ the Commission has concluded that a press entity’s free distribution of films—on DVDs inserted in newspapers, on television, and in theatres in “select markets”—was a legitimate press function. In AO 2010-08, as discussed above, Citizens United represented that it “attempted to stimulate sales of a film by providing a free DVD insert in newspapers in select markets.”⁵⁵ Likewise, Respondents here represent that circulating free copies of *Dreams* was legitimate press activity because doing so promoted the film by attracting media attention and obtaining grassroots interest, which thus improved the producer’s ability to negotiate a theatrical or broadcast release.⁵⁶

⁵³ See, e.g., AO 2010-08 at 6 (citing *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 250-51 (1986)); AO 2005-16.

⁵⁴ Compl. ¶ 52.

⁵⁵ Advisory Opinion Request 2010-08 (Letter from Theodore B. Olson to Robert M. Knop, Apr. 26, 2010, at 5).

⁵⁶ Resp. at 6. Respondents compare the strategy to that employed to market *The Passion of the Christ*, which sought to create grassroots demand after initial difficulties in obtaining interest in a large theatrical release. Gilbert’s contemporaneous statements concerning his plan to distribute free DVDs to the public in certain states further tend to support the Respondents’ contention here that those mailings promoted the commercial success of the film, a legitimate press undertaking. See *LaBotz v. FEC*, 889 F. Supp. 2d 51, 62 (D.D.C. 2012) (recognizing that the “best evidence of why a decision was made as it was is usually an explanation, however brief, rendered at the time of the decision”) (citing *Ponte v. Real*, 471 U.S. 491, 509 (1985) (emphasis in original)). In September 2012, Gilbert explained that “the 1 million DVD mailing to Ohio households and 100,000 to New Hampshire[] should force the mainstream media to pay attention. *This will help expand the market for the film into television, video on demand and even internationally.*” Jerome R. Corsi, *Media Bypass: Dreams Mailed to 1 Million*, WND.com (Sept. 18, 2012) (attached as Exhibit 12 to the Complaint) (emphasis added). And as a result of the mass distribution effort, the *New York Times* published an article concerning *Dreams* and Gilbert’s dissatisfaction with “mainstream media for not looking deeper in the story he uncovered,” further publicizing the film as a result. Jeremy W. Peters, *Strident Anti-Obama Messages Flood Key States*, N.Y. TIMES (Oct. 23, 2012) (attached as Exhibit 30 of the Complaint). Cf. *FEC v. Phillips Publ’g, Inc.*, 517 F. Supp. 1308, 1312-13 (D.D.C. 1981) (finding that a newsletter’s mailing that solicited subscriptions and advocated against the election of a federal candidate was a legitimate press function because publicizing a newsletter is a customary practice of the press); *Reader’s Digest*, 509 F. Supp. at 1215 (noting that, “if [Reader’s Digest] was acting in its magazine publishing function, if, for example, the dissemination of the tape to television stations was to publicize the issue of the magazine containing the Chappaquiddick article, then it would seem that the exemption is applicable and that the FEC would have no occasion to investigate whether the dissemination or the publication constituted an attempt to influence an election.”).

For these reasons, Respondents' costs relating to the production, sale, and distribution of the film are covered by the media exemption.⁵⁷ Moreover, the Commission has previously concluded that "where the underlying product is covered by the press exemption, so are advertisements to promote that underlying product."⁵⁸ Therefore, the challenged advertisement also satisfies the media exemption and is not subject to any Commission disclosure obligation.

III. CONCLUSION

Because Respondents' activity is protected by both Advisory Opinion 2010-08 and the press exemption, we voted to find no reason to believe that the filmmaker violated 52 U.S.C. §§ 30104(c) or 30120(a)⁵⁹ by producing and distributing a political documentary film. To have found otherwise would have threatened the free press rights of all press organizations everywhere. Indeed, it has been acknowledged that even well-established daily newspapers should take heed of the threat of government regulation when they disseminate free copies of their editorials and political coverage. We previously have observed efforts within the Commission to restrict the exercise of free press rights by television news stations and book publishers.⁶⁰ This matter adds documentary filmmakers to the press entities within the sights of Commission regulation.⁶¹ Because the Commission previously concluded that a documentary filmmaker was exempt from regulation, this case represents a setback for free press rights. Of course, this is not the first time in American history that government officials have targeted

⁵⁷ Cf. *Reader's Digest*, 509 F. Supp. at 1215 (noting that "only the dissemination to other media of the video tapes was within the FEC's reason to believe finding, suggesting a recognition by the FEC that the research and the publication of the article were on their face exempt functions").

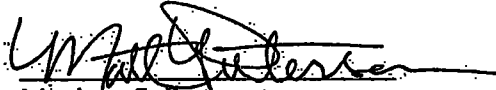
⁵⁸ AO 2010-08 at 7.

⁵⁹ Formerly 2 U.S.C. §§ 434(c) and 441d(a).

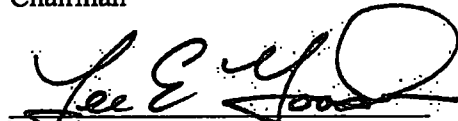
⁶⁰ See MUR 6703 (WCVB-TV), Statement of Reasons of Vice Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen; Advisory Opinion 2014-06 (Paul Ryan), Concurring Statement of Chairman Lee E. Goodman and Commissioners Matthew S. Petersen and Caroline C. Hunter; Concurring Statement of Commissioner Lee E. Goodman on Notice of Disposition of Petition for Rulemaking on Candidate Debates.

⁶¹ See also Advisory Opinion Request 2010-25 (RG Entertainment Ltd.) (three Commissioners would not recognize a *bona fide* filmmaker's right to produce and distribute a documentary film in over 500 theatres nationwide pursuant to the press exemption).

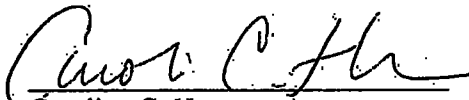
filmmakers, even in the name of public disclosure, as the film *Trumbo* recently reminded us. But in matters like this one, the Constitution,⁶² Congress,⁶³ and federal courts⁶⁴ expressly instruct the Commission not to tread, and we should comply.


Matthew S. Petersen
Chairman

Apr. 14, 2016
Date


Lee E. Goodman
Commissioner

April 14, 2016
Date


Caroline C. Hunter
Commissioner

April 14, 2016
Date

⁶² Constitution of the United States, Amend. I (“Congress shall make no law . . . abridging the freedom of . . . the press . . .”).

⁶³ See H.R. Rep. No. 93-1239 at 4 (1974) (stating that Congress did not intend to “limit or burden in any way the First Amendment freedoms of the press and of association. [The exemption] assures the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns.”).

⁶⁴ See, e.g., *Phillips Publ'g, Inc.*, 517 F. Supp. at 1313 (admonishing the Commission not to violate the free press rights of a publisher by investigating its financial and marketing activities); *Reader's Digest*, 509 F. Supp. at 1214 (“[F]reedom of the press is substantially eroded by investigation of the press, even if legal action is not taken following the investigation. Those concerns are particularly acute where a governmental entity is investigating the press in connection with the dissemination of political matter.”).