

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)

MUR 7218)

The New York Times Company,)

Nick Corasaniti,)

Patrick Healy)

MUR 7224)

News Corp (d.b.a. The Wall Street Journal),)

Janet Hook)

MUR 7231)

Cable News Network (CNN),)

Ashley Killough,)

Jeremy Diamond)

MUR 7236)

Time, Inc.,)

Ryan Teague Beckwith)

MUR 7237)

Thomson Reuters Corporation (d.b.a. Reuters),)

Yahoo! News a product of Yahoo! Inc.,)

James C. Smith,)

Marissa Mayer)

MUR 7238)

Gannett Co., Inc. (d.b.a. USA TODAY),)

Catalina Camia,)

David Jackson)

MUR 7239)

The Washington Post,)

Philip Bump,)

Frederick J. Ryan)

MUR 7240)

Newsweek Media Group, Inc.,)

James M. Lindsay)

MUR 7241)

Comcast Corporation,)

NBC UNIVERSAL MEDIA, LLC,)

Andrew Rafferty,)

Mark Murray,)

Carrie Dann)

CASE CLOSURE UNDER THE
ENFORCEMENT PRIORITY
SYSTEM

14044424000

GENERAL COUNSEL'S REPORT

Under the Enforcement Priority System, the Commission uses formal scoring criteria as a basis to allocate its resources and decide which matters to pursue. These criteria include, without limitation, an assessment of the following factors: (1) the gravity of the alleged violation, taking into account both the type of activity and the amount in violation; (2) the apparent impact the alleged violation may have had on the electoral process; (3) the complexity of the legal issues raised in the matter; and (4) recent trends in potential violations of the Federal Election Campaign Act of 1971, as amended (the "Act"), and developments of the law. It is the Commission's policy that pursuing relatively low-rated matters on the Enforcement docket warrants the exercise of its prosecutorial discretion to dismiss cases under certain circumstances and where appropriate, to find no reason to believe that a violation occurred.

The Office of General Counsel has scored MURs 7218, 7224, 7231, 7236, 7237, 7238, 7239, 7240, and 7241 as low-rated matters and has determined that they should not be referred to the Alternative Dispute Resolution Office.¹ For the reasons set forth below, we recommend that the Commission find no reason to believe that the Respondents listed in the case caption above (collectively, the "Respondents") violated the Act or Commission regulations.

The Complaints were all filed by Kelly Dale Bowers and allege nearly identical claims: that Respondents violated the Act and Commission regulations by making in-kind contributions to the presidential campaign of Senator Ted Cruz. Specifically, the alleged contributions came in the form of reporting on Cruz's announcement of his candidacy between March 22-28, 2015, and

¹ The EPS rating information is as follows: Complaints Filed: February 27, 2017 (MUR 7218); March 20, 2017 (MUR 7224); April 3, 2017 (MUR 7231); April 21, 2017 (MURs 7236, 7237, 7238, 7239, 7240); April 24, 2017 (MUR 7241). Responses Filed: April 6, 2017 (MUR 7224); May 12, 2017 (MURs 7236, 7237 (Thomson Reuters), 7240, 7241); May 17, 2017 (MUR 7237 (Yahoo! Inc.)); May 18, 2017 (MUR 7238); June 1, 2017 (MUR 7239). No responses were filed in MURs 7218 or 7231.

1 characterizing Cruz as the first Republican to announce a presidential candidacy, the first “major”
2 candidate, the first “legitimate” candidate, or the first “official” candidate for President in 2016.
3 Compl. at 1-3.² Bowers states that he had announced his candidacy for nomination as the
4 Republican Presidential candidate on September 13, 2013, and claims that Respondents’ reference to
5 Cruz as the first Republican candidate led listeners and readers to believe that no other candidates
6 existed at the time.³ *Id.* at 1, 2. Bowers raised nearly identical claims in MUR 7230 (National
7 Public Radio). On June 14, 2017, the Commission found, based on the press exemption, there was
8 no reason to believe those respondents violated the Act.⁴ As explained below, the Commission
9 should do likewise here.

10 The Respondents in MURs 7224, 7236, 7237, 7238, 7239, 7240, and 7241 filed responses to
11 the Complaints (the “Responses”). The Responses assert that the Respondents are members of the
12 news media, and describe the Respondents in the respective matters as press entities, journalists,
13 news magazines, and news sources, whose reporting falls squarely within the Act’s media

² The Complainant filed nearly identical complaints in all nine matters. The complaints differed from each other only in the name of media organization that reported the Cruz announcement and, when applicable, the name of the journalist(s) that wrote the story, the quoted text from each separate article at issue, and in each complaint’s Exhibit A, which was a copy of the news article at issue. Exhibits B-F are identical in each of the Complaints. *See* MUR 7218 Compl., MUR 7224 Compl., MUR 7231 Compl., MUR 7236 Compl., MUR 7237 Compl., MUR 7238 Compl., MUR 7239 Compl., MUR 7240 Compl., MUR 7241 Compl. As such we refer to the complaints collectively (the “Complaints”) in this report.

³ Complainant Kerry Dale Bowers filed a Statement of Candidacy with the FEC on April 28, 2014, and Kerry Bowers for President (“the Bowers Committee”) filed a Statement of Organization on May 5, 2014. The Bowers Committee raised and spent a total of \$1,868, which falls below the \$5,000 minimum threshold to become a candidate under the Act and Commission regulations. *See* 52 U.S.C. § 30101(2). The Bowers Committee’s request for termination was approved on October 8, 2015. The Complaints also state that fifty-five other Republican candidates had filed Statements of Candidacy with the FEC prior to the Cruz filing. According to FEC filings, only eight of those fifty-five candidates reported raising or spending more than \$5,000 during the campaign, and none were among the seventeen Republican candidates that were involved in the Republican Party’s 2015-2016 Presidential debates and forums. The Complainant concludes that the news reports were fabricated and limited his ability to raise funds or retain the status he had prior to the Respondents’ news reports.

⁴ *Certification* MUR 7230 (National Public Radio; Audie Cornish) June 14, 2017.

1 exemption.⁵ The Responses further state that the Respondents are independent media organizations
2 that are not owned or controlled by a political party, political committee, or federal candidate.^{6, 7}

3 The Act and Commission regulations exclude from the definitions of “contribution” and
4 “expenditure” the cost incurred in covering or carrying a news story, commentary, or editorial by
5 any broadcasting station, newspaper, Web site, magazine, or other periodical publication, including
6 any Internet or electronic publication, unless such facilities are owned or controlled by any political
7 party, political committee, or candidate.⁸

8 The Commission uses a two-step analysis to determine whether the media exemption applies.
9 First, the Commission considers whether the entity in question is a media entity, focusing on
10 whether the entity produces, on a regular basis, a program that disseminates news stories, editorials,
11 and/or commentary.⁹ Second, the Commission considers two factors in determining the scope of the
12 exemption: (1) whether the press entity is owned or controlled by a political party, political
13 committee, or candidate; and, if not, (2) whether the media entity is acting as a media entity in

⁵ MUR 7224 Resp. at 2; MUR 7236 Resp. at 1; MUR 7237 (Thomson Reuters) Resp. at 1-2; MUR 7237 (Yahoo! Inc.) Resp. at 1-3, Ex. A at 1; MUR 7238 Resp. at 1, 3-4; MUR 7239 Resp. at 2; MUR 7240 Resp. at 2-3; MUR 7241 Resp. at 2. No response was filed in MURs 7218 and 7231, however it appears that the respondents in MURs 7218 and 7231 are members of the media whose reports fall squarely within the Act's media exemption.

⁶ MUR 7224 Resp. at 2; MUR 7236 Resp. at 1-2; MUR 7237 (Thomson Reuters) Resp. at 2; MUR 7237 (Yahoo! Inc.) Resp. at 1-3, Ex. A at 1; MUR 7238 Resp. at 3; MUR 7239 Resp. at 2; MUR 7240 Resp. at 2-3; MUR 7241 Resp. at 2. There is no allegation in the Complaints that the respondents in MURs 7218 (The New York Times Company) and 7231 (Cable News Network (CNN)), which are recognized as independent press entities, are owned or controlled by a political party, political committee, or federal candidate.

⁷ Respondents in MURs 7224 and 7239 also assert First Amendment defenses in their responses. *See* MUR 7224 Resp. at 3; MUR 7239 Resp. at 3-4. Because the communications at issue are clearly covered by the media exemption, the Commission does not need to reach these secondary arguments. Respondents in MUR 7237 (Yahoo! Inc.) also cite 52 U.S.C. § 30104(f)(3)(B)(i), asserting that the news story was not an independent expenditure or electioneering communication, and state that “no reasonable reader” could interpret the story as an appeal to vote for or against a specific candidate. *See* MUR 7237 (Yahoo! Inc.) Resp. at 2-3.

⁸ *See* 52 U.S.C. § 30101(9)(B)(i); *see also* 11 C.F.R. §§ 100.73 (excluding *bona fide* news coverage from the definition of “contribution”); 100.132 (same as to the definition of “expenditure”).

⁹ *See* Advisory Opinions 2010-8 (Citizens United); 2005-16 (Fired Up!); and 1996-16 (Bloomberg).

conducting the activity at issue (*i.e.*, whether the entity is acting in its "legitimate press function").¹⁰

With respect to the second factor, when determining whether an entity is engaging in a legitimate media function, the Commission examines (1) whether the entity's materials are available to the general public; and (2) whether they are comparable in form to those ordinarily issued by the entity.¹¹

It is unrefuted, and the record indicates, that the Respondents produce news stories on a regular basis; the Respondents are not owned or operated by a political party, political committee, or candidate; and when the Respondents disseminated the news stories at issue, they were operating within a legitimate press function. Therefore, the Respondents' activities in this matter fall within the media exemption, and we recommend that the Commission find no reason to believe as to all Respondents.

RECOMMENDATIONS

1. Find no reason to believe that The New York Times Company, Nick Corasaniti, or Patrick Healy violated the Act and Commission regulations;
2. Find no reason to believe that News Corp (d.b.a. The Wall Street Journal) or Janet Hook violated the Act and Commission regulations;
3. Find no reason to believe that Cable News Network (CNN), Ashley Killough, or Jeremy Diamond violated the Act and Commission regulations;
4. Find no reason to believe that Time, Inc. or Ryan Teague Beckwith violated the Act and Commission regulations;
5. Find no reason to believe that Thomson Reuters Corporation (d.b.a. Reuters), Yahoo! News a product of Yahoo! Inc., James C. Smith, or Marissa Mayer violated the Act and Commission regulations;
6. Find no reason to believe that Gannett Co., Inc. (d.b.a. USA TODAY), Catalina Camia, or David Jackson violated the Act and Commission regulations;

¹⁰ See *Reader's Digest Association v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981).

¹¹ *Id.*

7. Find no reason to believe that The Washington Post, Philip Bump, or Frederick J. Ryan violated the Act and Commission regulations;
8. Find no reason to believe that Newsweek Media Group, Inc. or James M. Lindsay violated the Act and Commission regulations;
9. Find no reason to believe that Comcast Corporation, NBC UNIVERSAL MEDIA, LLC, Andrew Rafferty, Mark Murray, or Carrie Dann violated the Act and Commission regulations;
10. Approve the attached Factual and Legal Analysis and the appropriate letters; and
11. Close the files as to all respondents.

Lisa J. Stevenson
Acting General Counsel

Kathleen M. Guith
Associate General Counsel

6.30.17
Date

BY:


Stephen Gura
Deputy Associate General Counsel


Jeff S. Jordan
Assistant General Counsel


Donald E. Campbell
Attorney

Attachment:
Factual and Legal Analysis

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2 criteria as a basis to allocate its resources and decide which matters to pursue.

3 II. FACTUAL AND LEGAL ANALYSIS

4 A. Factual Background

5 The Complaints were all filed by Kelly Dale Bowers and allege nearly identical claims:
6 that Respondents violated the Act and Commission regulations by making in-kind contributions
7 to the presidential campaign of Senator Ted Cruz. Specifically, the alleged contributions came
8 in the form of reporting on Cruz's announcement of his candidacy between March 22-28, 2015,
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6 entities, journalists, news magazines, and news sources, whose reporting falls squarely within
7 the Act’s media exemption.⁴ The Responses further state that the Respondents are independent
8 media organizations that are not owned or controlled by a political party, political committee, or
9 federal candidate.^{5, 6}

10 **B. Legal Analysis**

11 The Act and Commission regulations exclude from the definitions of “contribution”
12 and “expenditure” the cost incurred in covering or carrying a news story, commentary, or
13 editorial by any broadcasting station, newspaper, Web site, magazine, or other periodical

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1 publication, including any Internet or electronic publication, unless such facilities are owned or
2 controlled by any political party, political committee, or candidate.⁷

3 The Commission uses a two-step analysis to determine whether the media exemption
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5 focusing on whether the entity produces, on a regular basis, a program that disseminates news
6 stories, editorials, and/or commentary.⁸ Second, the Commission considers two factors in
7 determining the scope of the exemption: (1) whether the press entity is owned or controlled by a
8 political party, political committee, or candidate; and, if not, (2) whether the media entity is
9 acting as a media entity in conducting the activity at issue (*i.e.*, whether the entity is acting in its
10 “legitimate press function”).⁹ With respect to the second factor, when determining whether an
11 entity is engaging in a legitimate media function, the Commission examines (1) whether the
12 entity’s materials are available to the general public; and (2) whether they are comparable in
13 form to those ordinarily issued by the entity.¹⁰

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15 regular basis; the Respondents are not owned or operated by a political party, political committee,
16 or candidate; and when the Respondents disseminated the news stories at issue, they were
17 operating within a legitimate press function. Therefore, the Respondents’ activities in this matter
18 fall within the media exemption, and the Commission finds no reason to believe that the
19 Respondents violated the Act and Commission regulations.

⁷ See 52 U.S.C. § 30101(9)(B)(i); *see also* 11 C.F.R. §§ 100.73 (excluding *bona fide* news coverage from the definition of “contribution”); 100.132 (same as to the definition of “expenditure”).

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