

**FEDERAL ELECTION COMMISSION**  
**FIRST GENERAL COUNSEL’S REPORT**

MUR: 7593

DATE COMPLAINT FILED: April 8, 2019

DATE OF NOTIFICATION: April 10, 2019

LAST RESPONSE RECEIVED: May 31, 2019

DATE ACTIVATED: December 3, 2020

EXPIRATION OF SOL: November 5, 2023

ELECTION CYCLE: 2018

**COMPLAINANT:**

Michael Edelman

**RESPONDENT:**

Fox News Network, LLC

**RELEVANT STATUTES AND  
REGULATIONS:**

52 U.S.C. § 30101(8), (9)

52 U.S.C. § 30118(a)

11 C.F.R. § 100.52(d)(1)

11 C.F.R. § 100.73

11 C.F.R. § 100.132

11 C.F.R. § 114.2(b)

**INTERNAL REPORTS CHECKED:**

None

**FEDERAL AGENCIES CHECKED:**

None

**I. INTRODUCTION**

The Complaint alleges that Fox News Network, LLC (“Fox News”) made a prohibited in-kind contribution to Josh Hawley.<sup>1</sup> In particular, Complainant alleges that Sean Hannity and Jeanine Pirro, employees of Fox News, appeared on stage with President Donald J. Trump at a campaign rally and endorsed Hawley’s candidacy on behalf of Fox News.<sup>2</sup> Fox News admits that Hannity and Pirro traveled to the rally to appear on an episode of Fox News’s “Hannity” program in their professional capacities, but asserts that their subsequent appearance on the rally

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<sup>1</sup> Compl. at 1 (Apr. 8, 2019).

<sup>2</sup> *Id.* at 1-2.

stage was in their personal capacities and is protected by the volunteer exception and media exemption to the definition of “contribution.”<sup>3</sup> Because the available information does not support the allegation that Hannity and Pirro appeared on stage on behalf of Fox News and is denied by Fox News, we recommend that the Commission dismiss the allegation that Fox News Network, LLC violated 52 U.S.C. § 30118(a).

## II. FACTUAL BACKGROUND

Fox News is a television broadcaster and is a subsidiary of Fox Corporation.<sup>4</sup> Sean Hannity is the host of Fox News’s “Hannity” program, which airs on weeknights.<sup>5</sup> Jeanine Pirro is the host of “Justice with Judge Jeanine,” which airs weekly on Fox News, and she serves as a legal analyst on other Fox News programs.<sup>6</sup>

On November 5, 2018, President Trump attended a campaign rally in Cape Girardeau, Missouri, in support of Josh Hawley, a Republican candidate for the U.S. Senate.<sup>7</sup> Hannity conducted a live show from Cape Girardeau and interviewed President Trump on air before the rally, and Pirro also travelled to Missouri to appear on Hannity’s show.<sup>8</sup> Fox News aired Hannity’s show live from the rally site and then switched to another program before the rally started.<sup>9</sup> Although Fox News did not air the rally, other news organizations covered it.<sup>10</sup>

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<sup>3</sup> Resp. at 3-14 (May 31, 2019).

<sup>4</sup> Resp. at 2.

<sup>5</sup> *Id.* Hannity is also the host of Premiere Radio Networks’ The Sean Hannity Show. *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Compl. at 1; Resp. at 3.

<sup>8</sup> Resp. at 3. Additional guest commentators also appeared on Hannity’s show. *Id.* at 5.

<sup>9</sup> *Id.* at 7, 9.

Following the conclusion of Hannity's show, President Trump made some introductory remarks at the rally, and he invited first Hannity and then Pirro onstage to speak to the audience.<sup>11</sup> Fox News asserts that neither Hannity nor Pirro came to the stage with prepared written remarks.<sup>12</sup> Following the rally, Fox News subsequently issued a statement that it "does not condone any talent participating in campaign events....This was an unfortunate distraction and has been addressed."<sup>13</sup>

The Complaint alleges that Hannity's and Pirro's appearances on stage at the rally amounted to an endorsement of Hawley that was provided in their roles as agents of Fox News, and constitutes an illegal corporate in-kind contribution from Fox News to the Hawley committee.<sup>14</sup> Fox News denies that it provided an in-kind contribution to the Hawley Committee and claims that the activity is covered under either the volunteer exception or the media exemption.<sup>15</sup>

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<sup>10</sup> See, e.g., Resp. at 3 (citing John Bennett, *Live Blog: Updates from Trump's Final Day on Campaign Trail*, ROLL CALL, Nov. 5, 2018, available at <https://www.rollcall.com/news/politics/live-blog-updates-trumps-final-day-campaign-trail>; Chris Cillizza, *The 31 Most Over-the-Top Lines from Donald Trump's Final 2018 Campaign Rally*, CNN, Nov. 6, 2018, available at <https://www.cnn.com/2018/11/06/politics/donald-trump-missouri/index.html>; Amy Davidson Sorkin, *Donald Trump's Final, Bitter Midterm Rallies*, THE NEW YORKER, Nov. 6, 2018, available at <https://www.newyorker.com/news/daily-comment/donald-trumps-final-bitter-midterm-rallies>; Aaron Rupar, *Trump's Final Preelection Speeches Featured Vicious Attacks on Kavanaugh Accusers*, VOX, Nov. 6, 2018, available at <https://www.vox.com/midterm-elections/2018/11/6/18066958/trump-attacks-kavanaugh-accusers-indiana-missouri-midterm-elections>).

<sup>11</sup> *Id.* at 8-9.

<sup>12</sup> *Id.* at 9. There is also no indication in the record that either Hannity or Pirro referenced Hawley during their remarks at the rally. *Id.* at 8-9 (citing Trump Holds Campaign Rally in Missouri, WASHINGTON POST, Nov. 5, 2018, available at [https://www.youtube.com/watch?v=8\\_PoP-q26K8](https://www.youtube.com/watch?v=8_PoP-q26K8)).

<sup>13</sup> *Id.* at 10; see also *id.* (citing Alex Thomas, *Fox News Calls Sean Hannity's Campaign Appearance with Trump 'An Unfortunate Distraction'*, INDEPENDENT JOURNAL REVIEW, Nov. 6, 2018, available at <https://ijr.com/fox-news-sean-hannity-trump-campaign/>).

<sup>14</sup> Compl. at 1-2.

<sup>15</sup> Resp. at 1.

### 1     **III.     LEGAL ANALYSIS**

2             The Federal Election Campaign Act of 1971, as amended (the “Act”), and Commission  
 3 regulations prohibit any corporation from making contributions or expenditures to candidates and  
 4 their authorized committees.<sup>16</sup> A “contribution” includes “any gift, subscription, loan, advance,  
 5 or deposit of money or anything of value”<sup>17</sup> and an “expenditure” includes “any purchase,  
 6 payment, distribution, loan, advance, deposit, or gift of money or anything of value.”<sup>18</sup> The term  
 7 “anything of value” includes in-kind contributions, defined as the provision of any goods or  
 8 services without charge or at a charge that is less than the usual and normal charge for such  
 9 goods and services.<sup>19</sup> The definition of “contribution” under the Act excludes uncompensated  
 10 personal services provided by volunteers.<sup>20</sup>

11            The Act and Commission regulations also 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  
 14 publication, including any Internet or electronic publication, unless such facilities are owned or  
 15 controlled by any political party, political committee, or candidate.<sup>21</sup> The Commission conducts  
 16 a two-step analysis to determine whether the media exemption applies. First, the Commission  
 17 considers whether the entity in question is a media entity, focusing on whether the entity

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<sup>16</sup> 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(b).

<sup>17</sup> 52 U.S.C. § 30101(8)(A)(i).

<sup>18</sup> *Id.* § 30101(9)(A)(i).

<sup>19</sup> 11 C.F.R. § 100.52(d)(1).

<sup>20</sup> 52 U.S.C. § 30101(8)(B)(i) (exempting from the definition of contribution “the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee”).

1 produces, on a regular basis, a program that disseminates news stories, editorials, and/or  
 2 commentary.<sup>22</sup> Second, the Commission considers two factors in determining the scope of the  
 3 exemption: (a) whether the media entity is owned or controlled by a political party, political  
 4 committee, or candidate; and, if not, (2) whether the media entity is acting as a media entity in  
 5 conducting the activity at issue (*i.e.*, whether the entity is acting in its “legitimate press  
 6 function”).<sup>23</sup> A corporation may be held responsible for the acts of an employee that are within  
 7 the scope of the employment and that benefit the corporate employer.<sup>24</sup>

8 Here, Hannity's and Pirro's participation in the rally does not constitute an illegal  
 9 corporate in-kind contribution from Fox News to the Hawley committee because the available  
 10 information supports the conclusion that Hannity and Pirro were acting in their personal  
 11 capacities, and not as agents of Fox News. Neither Hannity nor Pirro mentioned Fox News in  
 12 their comments, Fox News did not cover or broadcast their comments, and it disavowed their  
 13 appearances the very next day.<sup>25</sup> Even if their association with Fox News was mentioned, the

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<sup>21</sup> 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”).

<sup>22</sup> Factual and Legal Analysis at 5-6, MUR 7206 (Bonneville International Corp., et al.) (“Bonneville F&LA”); Advisory Op. 2016-01 (Ethiq) at 2 (“AO 2016-01”); Advisory Op. 2010-08 (Citizens United) at 2 (“AO 2010-08”).

<sup>23</sup> Bonneville F&LA at 5; AO 2016-01 at 3; AO 2010-08 at 3. 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. Bonneville F&LA at 6-7; AO 2016-01 at 3; AO 2010-08 at 6. If the media entity is not owned or controlled by any political party, political committee, or candidate, and if it is acting as a media entity with respect to the conduct in question, then the Commission's inquiry is at an end. However, the media exemption “does not afford *carte blanche* to media companies generally to ignore FECA's provisions.” Advisory Op. 2008-14 (Melothe, Inc.) at 3 (citing *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 208 (2003), *overruled by Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010)).

<sup>24</sup> *See, e.g.*, Factual and Legal Analysis at 4-5, MUR 6143 (Galen Capital Group).

<sup>25</sup> Resp. at 8-9; *see also id.* at 7 (citing Trump Holds Campaign Rally in Missouri, WASHINGTON POST, Nov. 5, 2018, available at [https://www.youtube.com/watch?v=8\\_PoP-q26K8](https://www.youtube.com/watch?v=8_PoP-q26K8)).

1 use of endorsers who are identified by their corporate positions does not violate the Act, provided  
 2 that the employee volunteers his or her time and the campaign pays for any associated  
 3 expenses.<sup>26</sup>

4 Fox News asserts, and there is no information to the contrary, that Hannity and Pirro's  
 5 work for Fox News concluded before the Josh Hawley rally started.<sup>27</sup> Moreover, there is no  
 6 available information suggesting that Fox News directed Hannity or Pirro to speak at the rally,  
 7 and Fox News quickly distanced itself from their appearances with a statement that it "does not  
 8 condone any talent participating in campaign events" and calling the event "an unfortunate  
 9 distraction."<sup>28</sup> Accordingly, we conclude that the volunteer exception applies to the specific  
 10 facts of this case. As such, it is unnecessary to resolve Fox News's argument that the media  
 11 exemption applies.<sup>29</sup>

12 Accordingly, we recommend that the Commission dismiss the allegation that Fox News  
 13 Network, LLC violated 52 U.S.C. § 30118(a) and close the file.

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<sup>26</sup> See, e.g., Factual and Legal Analysis at 5-6, MUR 7508 (Whirlpool Corporation) (dismissing allegation that Whirlpool made a corporate contribution when Whirlpool employees appeared in a campaign advertisement that used the Whirlpool logo because the advertisement was filmed on public property and the featured employees appeared in their personal capacities on their personal time); Advisory Op. 1984-43 (Brunswick) at 1-2 (permitting corporate employee to appear in campaign advertisement and be identified as a corporate official when he volunteers his time for the advertisement and when no corporate funds were used); Advisory Op. 1978-77 (Aspin) at 1 (permitting corporate officer to appear in campaign advertisement and be identified as a corporate official when he volunteers his time for the advertisement and the advertisement is paid for by the committee).

<sup>27</sup> Resp. at 12.

<sup>28</sup> *Id.* at 10.

<sup>29</sup> Assuming as true the contention that Hannity and Pirro were acting as Fox News' agents, there would be a significant question whether Fox News was acting within its legitimate media function when its agents agreed to become active participants at a partisan political rally. The Commission has previously acknowledged that the media exemption does not apply if media entities engage in core election-related activities unrelated to their ordinary press function. See, e.g., Advisory Opinion 2011-11 (Colbert) at 9 (concluding that the media exemption does not apply to producing independent expenditure advertisements for a political committee); Advisory Opinion 2008-14 (Melothe, Inc.) at 5-6 (concluding that the media exemption does not apply if a company's staffers were to prepare and deliver daily briefings to campaign volunteers). However, the available information does not support the allegation that Hannity and Pirro were acting as Fox News's agents when President Trump invited them onto the rally stage.

**IV. RECOMMENDATIONS**

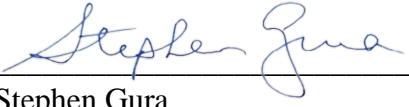
1. Dismiss the allegation that Fox News Network, LLC violated 52 U.S.C. § 30118(a);
2. Approve the attached Factual and Legal Analysis;
3. Approve the appropriate letters; and
4. Close the file.


Lisa J. Stevenson  
Acting General Counsel


Charles Kitcher  
Acting Associate General Counsel for Enforcement

02.27.20

Date

  
Stephen Gura  
Deputy Associate General Counsel for Enforcement

  
Jeff Jordan  
Assistant General Counsel

  
Kristina M. Portner  
Attorney