FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: The Commission
Staff Director
General Counsel

FROM: Mary W. Dove/Veneshe Ferebee-Vines
Acting Secretary of the Commission

DATE: February 14, 2000

SUBJECT: Additional Statement of Reasons for MUR 4689

Attached is a copy of the Additional Statement of Reasons for MUR 4689 signed by Commissioner David M. Mason.

This was received in the Commission Secretary's Office on Monday, February 14, 2000 at 12:20 p.m.

cc: Vincent J. Convery, Jr.
Press Office
Public Information
Public Records

Attachments

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

In the Matter of)
)
Robert K. Dornan, et. al.)

MUR 4689

Additional Statement of Reasons

Commissioner David M. Mason

Introduction

While in complete agreement with the joint statement I signed with my colleagues Commissioners Elliott, Sandstrom and Wold, I write this additional statement to emphasize my view that this matter (involving former Congressman Robert K. Dornan's employment as a guest host for several radio talk shows) did not constitute a close call. The media exemption, 2 USC § 431(9)(B)(i), so clearly applies that pursuing this matter would not have been substantially justified. The First General Counsel's Report (*GC Report*) proceeds on the basis of fundamental methodological errors, in part, due to the misapplication of Commission advisory opinions, which are themselves confusing if not ill-founded. These errors caused the General Counsel to recommend proceeding with an investigation that I believe is prohibited by the congruent limitations on this Commission's jurisdiction imposed by the FECA's media exemption and the First Amendment to the Constitution.

Because the media exemption, when applicable, prohibits any inquiry into the content of the broadcasts at issue, there is no reason, contrary to the General Counsel's argument, to conduct an investigation to discover precisely what was said during the broadcasts, *see GC Report* at 23, or to fix precisely when Dornan may have become a candidate within the meaning of Section 431(2). *Id.* at 23-24. Indeed, discussion of these issues was unnecessary to the disposition of the matter, and our inquiry into the circumstances of hiring Dornan as a guest host, *GC Report* at *14*, or into any connection the broadcasts may have had with an election is prohibited under judicial rulings regarding the FECA's media exemption. *See, e.g., Reader's Digest Association v. FEC*, 509 F. Supp. 1210, 1215 (1981).

I. The FECA's Media Exemption

The text of the media exemption commands a broad[1] reading -- "*any* news story, commentary or editorial distributed through the facilities of *any* broadcasting station" shall not be considered an expenditure regulated by the FECA -- that includes but a single exception -- "unless such facilities are owned or controlled by any political party, political committee, or candidate." 2 USC § 431(9)(B)(i) (emphasis added).[2] By clear implication there are no exceptions other than that regarding ownership or control.

The legislative history also supports a broad reading of the media exemption:

> [I]t is not the intent of the Congress in the present legislation to limit or burden *in any way* the first amendment freedoms of the press and of association. Thus [the media exemption] assures the *unfettered* right of the newspapers, TV networks, and other media to cover and comment on political campaigns.

H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 4 (1974) (emphasis added); *also* cited in *FEC v. MCFL*, 479 US 238, 250 (1986); *Austin v. Michigan Chamber of Commerce*, 494 US 652, 668 (1990) (construing a "similar [state] exemption"); *FEC v. Phillips Publishing*, 517 F. Supp., 1308, 1312 (D. D.C. 1981) (similarly adding emphasis so as to apply a "broad" construction).

Notable in both reported judicial opinions bearing principally on the FECA's media exemption (*Readers Digest* and *Phillips*) is the extension of the exemption beyond the pages of the publications involved into promotional activities such as direct mail subscription solicitations and publicity-seeking video tapes. The *Phillips* court appears to acknowledge that "the questioned communication is not a news story, commentary or editorial," 517 F. Supp. at 1310, but nonetheless follows *Readers Digest* in extending protection of the media exemption to promotional activities "in its capacity as the publisher of a newsletter." *Id.* at 1313. The *Readers Digest* court contrasts such "legitimate press functions" with conjectural anonymous election day distribution of charges against a candidate "in a manner unrelated to the sale of its newspapers." 509 F. Supp. at 1214.

In direct contrast to this expansive reading commanded by the courts, the General Counsel attempts to invert the "press capacity" analysis to restrict application of the media exemption and to extend jurisdiction to the substance of communications made during the radio broadcasts, which appear to be the core media function of the radio broadcasters (Salem Radio Networks and Premiere Radio Networks) responsible for the programs at issue. *GC Report* at 19-21.

---

[1] See First General Counsel's Report in MUR 3483 et. al. at 3 and First General Counsel's Report in MUR 4863 at 2 for descriptions of the Commission's broad interpretation of the media exemption.

[2] This provision is essentially reiterated in parallel fashion in the Commission's regulations at 11 CFR § § 100.8(b)(2) (expenditure) and 100.7(b)(2) (contribution).

The radio programs at issue were clearly "in a continuing series," *MCFL*, 479 US at 251,[3] produced "through the facilities of the regular [programs]," *id.* at 50, "by a staff which prepared . . . previous [and] subsequent [programs]," *id.*, following a loose but standard format, and "distributed to the [program's] regular audience," *id.*, at regularly scheduled times. In *MCFL*, the Court concluded that "it is precisely such factors that in combination permit the distinction of campaign flyers from regular publications." *Id.* at 251. Selecting a guest host for such regularly-scheduled programming does not take the shows out of the realm of regular media functions. The radio networks presumably have a contractual obligation to provide a specified type and amount of programming to radio station subscribers, *see GC Report* at 11; *Response of ABC, Inc., affidavit of Frank L. Raphael, Vice President* at para. 4, and routinely use guest hosts when regular hosts are unavailable. *Response of Salem Radio Network* at 2, and *Declaration of Greg R. Anderson, President.* Indeed, the selection of hosts, authors and commentators is quintessentially a media function: broadcasters accept programming from independent producers, magazines and newspapers accept articles from freelance authors, and newspapers select opinion articles from their own staff, syndicates and individual submissions.

The FECA's media exemption does not protect any activity by a media corporation, but it does apply to material "distributed through the facilities of any broadcasting station." That the programs at issue were distributed through the facilities of Salem, Premiere and various individual radio broadcasting stations is uncontested. *GC Report* at 10-11.

The principal issue in *Readers' Digest* and *Phillips* was how far *beyond* the normal pages of a publication the media exemption extends. Under these precedents, the radio networks could have promoted the programs at issue by distributing video tapes reenacting alleged voter fraud in Dornan's 1996 election, purchasing newspaper ads shortly before the election criticizing Dornan's opponent and warning readers not to vote before listening to the radio programs at issue, and engaging in a direct mail campaign promoting Dornan's guest host appearances, *see Phillips*, 517 F. Supp. at 1311-1312, and still have enjoyed the protection of the media exemption. Since the programs at issue were in the ordinary course of the radio networks' broadcast operations, *GC Report* at 10-11, it is beyond question that the media exemption applies.

[3] Though the appeal was vacated as moot due to the Commission's abandonment of its investigation, the district court opinion in *FEC v. Multimedia Cablevision, Inc.*, No. 94-1520-MLB, slip. op. at 13 (D. Kan. Aug. 16, 1995), helpfully summarized case precedents regarding the media exemption as applying "where a news story, commentary or editorial is published by a press entity in the ordinary course of a continuing series of publications."

The Two-Stage Process for Media Exemption Inquiries

The focus of the statute on facilities and of the courts on press functions or capacity are designed to exclude any inquiry or consideration of the substance of a communication in determining whether the media exemption applies. *See, e.g., Response of ABC, Inc.* at 5-6. While this restriction is clear from the statute, courts have mandated a two-stage structural approach to protect the media from inquiries into the substance of or motivation for their editorial content when the media exemption may apply. Courts have insisted that the Commission restrict its initial inquiry to whether the media exemption applies. *Readers Digest*, 509 F. Supp. at 1214-1215; *Phillips*, 517 F. Supp. at 1312-1313. Only after concluding that the media exemption does not apply may the commission commence an inquiry under its otherwise applicable "in connection with" or "purpose of influencing" standards.

This two-stage process was mandated because the media exemption represents a fundamental limitation on the jurisdiction of this agency. As the *Reader's Digest* court expressed it:

> freedom 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. These factors support the interpretation of the statutory exemption as barring even investigation of press activities which fall within the exemption. [509 F. Supp. at 1214.]

I agree with the General Counsel that the radio networks involved are qualified media entities, that the subject broadcasts were distributed through the facilities of various broadcasting stations, and that neither Salem nor Premiere are owned or controlled by a political party or candidate. *GC Report* at 20. Contrary to the General Counsel's reading of Commission precedent (proposed factual and legal analysis to Salem at 17), I find it beyond dispute that talk radio programs of the kind at issue constitute commentaries within the meaning of the FECA's media exemption,[4] and equally indisputable that the production and distribution of such programs represent actions as a media entity. This should have ended the matter.

---

[4] This conclusion is consistent with Advisory Opinion 1982-44, in which the Commission observed that "commentary" was broad in scope:

> Although the statute and regulations do not define "commentary," the Commission is of the view that commentary cannot be limited to the broadcaster. The exemption already includes the term "editorial" which applies specifically to the broadcaster's point of view. In the opinion of the Commission, "commentary" was intended to allow third persons access to the media to discuss issues. The statute and regulations do not define the issues permitted to be discussed or the format in which they are to be presented under the "commentary" exemption nor do they set a time limit as to the length of the commentary.

Order of Analysis

As a threshold matter, the General Counsel's Report reverses the order of analysis required by *Reader's Digest* and *Phillips*. The "analysis" section of the report (Part C, pp. 11-21) begins with a six-page discussion of "purpose of influencing" (numbered 1) and then proceeds to a four-page discussion of the media exemption (numbered 2). This is far more than a question of editing; the inversion reveals a fundamental misconception that the degree or nature of the relationship of a broadcast to a campaign has anything whatsoever to do with whether the media exemption applies. This mode of analysis and inquiry flies directly in the face of *Reader's Digest*:

> until and unless the press exemption were found inapplicable the FEC is barred from investigating the substance of the complaint. No inquiry may be addressed to sources of information, research, motivation, connection with the campaign, etc. Indeed all such investigation is permanently barred by the statute unless it is shown that the press exemption is not applicable. [509 F. Supp. at 1215.]

The General Counsel proceeds precisely in opposite fashion, ending the "purpose of influencing" discussion with the conclusion that

> Given the nature and purposes of these programs, it is unlikely, as next discussed, that the aforementioned instances of express advocacy could be exempted under the press exemption. [*GC Report* at 17]

In other words, the General Counsel would grant or withhold the media exemption based on the Commission's judgment as to the purpose of a program. Because the exemption is intended to protect programming which otherwise might be determined to be for the purpose of influencing an election, the General Counsel's methodology would render the exemption a complete nullity.

Stripped to its essentials, General Counsel's argument is: (1) that candidate-controlled appearances are generally campaign related, *GC Report* at 14-15; (2) that "neither SRN nor Premiere took any affirmative steps to prevent Dornan . . . from engaging in any election related activity on the shows," *id.* at 20; and, therefore, (3) the media exemption is not applicable. *Id.* at 21.

Prohibited Inquiries

Given the judicial command that inquiry into "connection with the campaign" is "permanently barred by the statute unless it is shown that the press exemption is not applicable," *Readers Digest* 509 F. Supp. at 1215 (thus removing step (1) above), the General Counsel's argument can be further distilled to the startling assertion that candidate appearances in the media are not protected by the media exemption unless they comport with FEC-approved formats and editorial policies, including "affirmative steps

to ensure that viewers do not conclude that the airing of the programs or material constitutes an endorsement." *GC Report* at 19. The General Counsel admits that candidates may serve as hosts of radio programs in some circumstances, *GC Report* at 12-13, concluding that "the fact that the host is a candidate is not by itself dispositive" and urging examination of "all circumstances...in order to determine the purpose of the communication." *Id.* at 14. Underlining this focus on motivation (purpose), the General Counsel proposes to advance an investigation by an inquiry into the radio networks' editorial policies. *GC Report* at 20 n.22, 23.

It is difficult to imagine an assertion more contrary to the First Amendment than the claim that the FEC, a federal agency, has the authority to control the news media's choice of formats, hosts, commentators and editorial policies in addressing public policy issues. Yet, the General Counsel appears to contend that the FEC has the authority to approve or prohibit candidate appearances in the media based on what candidates say, *id.* at 13, and that the Commission has the authority to require the media to censor or edit candidates to comply with the Commission's rulings. *Id.* at 20. (See further discussion of the purported basis for this authority in advisory opinions *infra*.) It is equally difficult to fathom why the General Counsel believes it is appropriate under any circumstances for this agency to inquire into the editorial policies of what are, uncontestedly, legitimate media entities ("press entities as set forth in the exemption," *GC Report* at 20).[5]

The media exemption would clearly allow a broadcaster to air a Dornan campaign rally replete with express advocacy, to bracket the broadcast with favorable commentary, to follow it with an editorial endorsing Dornan, and to cap it off with an appeal for listeners to contribute funds to Dornan. *See, e.g.*, AO 1980-109. Thus, the relationship of a broadcast to a campaign (e.g. whether it includes express advocacy or constitutes an endorsement) can have no bearing on whether the media exemption applies. It was the obligation of the General Counsel in this matter to determine whether the media exemption applied without reference to any connection with the election. By inverting the stages of the mandated two-stage inquiry under the media exemption, proposing indefensible government-approval requirements on media formats, reaching an indefinite conclusion ("the Shows may not be protected by the 'press exemption'" *GC Report* at 21), and proposing to investigate media editorial policies, the General Counsel failed to present even a plausible argument that the radio networks' broadcast of radio programs was anything other than a protected media function.

Given the directives of *Reader's Digest* and *Phillips*, it would be helpful for the General Counsel to clarify in future cases bearing on the media exemption whether he is recommending reason to believe for the limited purpose of discovering whether the media exemption applies, or whether he has concluded that the media exemption does not apply

---

[5] In addition to the weighty First Amendment concerns forbidding such inquiries, it is unclear how any inquiry into a radio station's editorial policies would help establish whether or not certain broadcasts were within the scope of its media functions. The FEC would either have to conclude that the editorial policies themselves were so deficient as to disqualify the station as a legitimate media entity or to argue that the station had failed to follow its own policies and to impose a government sanction for the failure.

and is recommending a more complete investigation. In this instance, the General Counsel was not precise, stating that there was "reason to believe that SRN and Premiere" were "not acting in their [press] capacities," that they "may have" given free time to a Federal candidate, and that Dornan's appearances "may not be protected by the 'press exemption.'" *Id.* at 21. However, the discussion of the "purpose of influencing" standard and express advocacy along with the proposal to seek transcripts of the programs at issue can only be read as a rejection of the media exemption, for surely that exemption cannot be held to fit or fail based on the content of a communication.

II. Counsel's Arguments Against the Media Exemption

The General Counsel advances a number of arguments and authorities against application of the media exemption to the programs at issue. None overcome the weight of a proper interpretation and direct application of the media exemption. In addition, each of the proffered arguments are deficient on their own grounds.

Free Advertising

The General Counsel argues that Dornan's appearances are "akin to free advertising time" and, therefore, "within the realm of mere in-kind contributions." *GC Report* at 21. I agree that the distinction between advertising and editorial content or regular programming may be useful in construing the scope of the media exemption. In this case, despite wiggle-words such as *akin to* and *within the realm of*, the Dornan-hosted shows clearly represented regular programming of the broadcasters, *id.* at 10-11, and cannot fairly or even reasonably be described as advertising. Of particular note is the General Counsel's own description of both radio networks' business operations as exchange or barter-based. The radio networks provide programming (including the programs which Dornan hosted) "in exchange for commercial air time," which the networks then "resell[] to advertisers." *Id.* at 11. If the networks made the commercial time, which they routinely receive in exchange for programming, available to a campaign without charge, an in-kind contribution would clearly result. I find it equally clear that the programming which generates advertising income is a "legitimate press function." *Readers Digest*, 509 F. Supp. at 1214.

In addition, the Commission has already somewhat eroded the distinction between advertising and regular programming in Advisory Opinion 1998-17. While that opinion was predicated on equal access, there is no equal access requirement in the FECA's media exemption[6] and, therefore, we cannot use the specific condition proffered and approved in AO 1998-17 to limit or encumber the media exemption with regard to other

[6] During Commission discussion a question was raised about whether some standard akin to the FCC's Fairness Doctrine or equal-time requirements might apply in this matter. The FECA's media exemption is not conditioned in any way on fairness or equal access. To the extent that special considerations may apply to broadcast media, those issues are within the jurisdiction of the FCC, not of this Agency: "the 'equal opportunity' rule under communications law, 47 USC § 315(a), ordinarily resolves disputes like this." Statement of Reasons of Commissioners Thomas and McGarry in MUR 3366.

media entities. (See further discussion of the attempt to cite advisory opinions as limiting the scope of the media exemption *infra*.)

Programming Control

The General Counsel argues that the media exemption is inapplicable in this matter because "SRN and Premiere did not retain control over the context in which Dornan's campaign discussions were used." *Id.* at 21. Having concluded that neither of the networks are "controlled, in whole or in part, by any political party, committee or candidate," *id.*, I do not read the General Counsel as arguing that "control" for purposes of the FECA's media exemption changes from program to program and hour to hour based on the program content, format and personnel.[7] The Commission should not confuse or conflate the analysis of whether a media entity is owned or controlled by a party or candidate with the inquiry into whether a corporation is acting in its media capacity in distributing specific material: these are consistently stated as separate questions in court precedents and the Commission's own documents. *See Readers Digest*, 509 F. Supp. at 1214-15.

The "control over the context" conclusion appears to be derived from a purpose of influencing analysis. This analysis commences with citations to advisory opinions that fail even to mention the media exemption while approving candidate-hosted broadcasts. *GC Report* at 12. The analysis then shifts to advisory opinions addressing newsletters published by candidates or political committees (for which the media exemption is not applicable), concluding that "*By analogy* the media activity of a candidate host is held to a different standard than the media activity of a third party host or commentator discussing or interviewing a candidate." *Id.* at 13 (emphasis added). The report then analyzes Dornan's appearances pursuant to a "purpose of influencing" standard.[8] *Id.* at 14-17. In other words, the General Counsel would treat programs hosted by candidates as if they were owned or controlled by the candidate. In this matter, however, the programs were clearly owned (copyrighted) and distributed by radio broadcasters who chose to hire a politically prominent host.

Assuming that this "control over the context" concept is intended as a test of whether an entity is acting in its media capacity, *see Proposed Factual and Legal Analysis to Salem Broadcasting* at 17, it should be rejected. The fact that Dornan's commentaries during the broadcasts were not scripted, edited or censored by the radio networks is irrelevant. The normal editorial function of a radio network in relation to talk radio programs is to select a host. Networks do not normally require those hosts to work

[7] In fact, it is precisely issues such as content, format and personnel into which courts have prohibited the Commission from inquiring prior to a determination that the media exemption does not apply. *See Reader's Digest*, 509 F. Supp. at 1214-15, and *Phillips*, 517 F. Supp. at 1313-14. Control of a facility akin to ownership requires an ongoing direction of operations extending to various operations of the media entity, similar to the position of publisher for a print publication.

[8] As noted above, this mode of analysis represents an implicit but unmistakable rejection of the media exemption before that exemption is even analyzed.

from scripts, have topics pre-approved, or to subject themselves to real-time editorial control. In this respect, Dornan functioned in the same fashion as any other talk radio host or guest host. If it is permissible at all for radio broadcasters to allow candidates on the air (as it clearly is), I do not see how this Commission could claim any authority to require broadcasters to censor candidates' comments.

The selection of Dornan as a guest host was well within the reasonable editorial judgment of the radio networks. Dornan worked as a radio commentator prior to his entry into politics,[9] and contemplated a permanent return to the field during the very broadcasts at issue.[10] However, even if Dornan had no prior experience in radio, it would be inappropriate for the Commission to second guess a broadcaster's editorial judgment in choosing a host for a regularly scheduled program. Under the two-stage process mandated by the courts for this agency's investigations of media entities, unless we have determined that the media exemption is inapplicable "No inquiry may be addressed to ... motivation, connection with the campaign, etc." *Reader's Digest*, 509 F. Supp. at 1215.

Content Limitations in Advisory Opinions

The General Counsel argues that the Commission, through the advisory opinion process, has limited application of the media exemption when candidates or political committees are involved based on a variety of factors specific to individual programs and which appear to be purely editorial decisions, including: "control over the means of presentation," the manner in which campaign material is used, and affirmative steps to ensure that viewers do not conclude that programs constitute endorsements.[11] *GC Report* at 19. Each of the opinions cited for these limiting factors (1996-41, 1996-48 and 1996-16) approved the proposed broadcasts. Thus, the General Counsel is arguing that programs which feature candidates but which fail to adhere to FEC-approved formats are not eligible for the media exemption. Taking a factual statement (such as an intent to provide equal access or to avoid endorsements) included in an advisory opinion submission and then citing that voluntary factual proffer as limiting the media generally represents a gross abuse of the advisory opinion process. Facts presented by one entity in an advisory opinion request should not be held as binding on different entities in different situations. *See* Statement of Reasons of Vice Chairman Wold and Commissioners Elliott,

---

[9] GC Report, Attach. 3 at 2., Response of Salem Radio Network at 3, and attached sworn declaration of Greg R. Anderson, President.

[10] *Id.* at 13.

[11] The most troubling of the proposed AO-derived restrictions, affirmative steps to avoid the impression of an endorsement from AO 1996-48, was clearly never intended to be generally applicable. Most notably, that opinion addressed the rebroadcast of campaign commercials, subject of a specific restriction at 441a(a)(7)(B)(ii). Further, as noted in the First General Counsel's Report in MUR 4863 (at 9, n. 4):

> 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.

Even if we accept the amazing claim that the Commission has any authority to place conditions or limitations on a media entity's political coverage or endorsements, construing AO 1996-48 to place conditions on candidate appearances generally would wrench the opinion from its context.

Mason and Sandstrom in Clinton and Dole Audits. In any case, advisory opinions cannot be used to support an interpretation plainly in conflict with the statute. The cited factors are not useful either in determining whether a media entity is owned or controlled by a candidate or in determining whether particular programming or articles are within normal media functions.

Even more troubling are citations to advisory opinions involving candidate appearances in the media which themselves fail even to mention the media exemption. (GC Report at 12-13 citing AOs 1977-42, 1992-5 and 1992-37). By definition these opinions are of no use in determining whether the media exemption applies to the programming at issue in this (or any other) matter. It is difficult to discern why the Commission avoided even mentioning the media exemption in the cited opinions (or in similar AOs 1981-37 and 1994-15), which plainly involved broadcast activity. Some of the AO requests raised issues related to funding or production by unions, corporations or non-media entities; others presented questions of candidate control far more obvious than this matter. Again, each cited opinion approved the proposed broadcasts. One might argue (though these opinions did not) that having concluded that the proposed programs were not for the purpose of influencing any election an analysis of the media exemption was unnecessary. However, that mode of analysis is explicitly prohibited by *Readers' Digest* and *Phillips*, which command that the exemption be analyzed prior to any inquiry into "purpose" when the media exemption is arguably applicable.

This matter shows the wisdom of the courts' reasoning, for even if the various advisory opinions cited are not used in an attempt to place editorial restrictions on broadcasting stations, they are clearly invoked as speech restrictions on candidates themselves. Candidates may appear in the media, say the opinions as cited, as long as they do not say anything about their campaigns or anything uncomplimentary about their opponents *Id.* at 13. While such restrictions might be endorsed by some reformers as having the potential to improve political discourse, they are hardly consistent with the First Amendment or with the nature of politics.

Reaching the summit of inappropriate citations are the General Counsel's references to opinions involving newsletters published by candidates or political committees (1990-5 and 1988-22, *GC Report* at 13). Since candidate-owned publications fall outside the media exemption, opinions addressing them can have no bearing on the application of the exemption to other publications or broadcasters, nor would they elucidate what might constitute legitimate media functions. Since both of the cited opinions present ownership and control of the publications as undisputed facts, they are of no value in determining whether the programs at issue in this matter were owned or controlled (within the meaning of the media exemption) by a candidate (assuming the General Counsel is even disputing the issue).

General Counsel urges some sort of content test, perhaps applying exclusively to candidate appearances in the media. I understood the General Counsel to contend, in the course of Commission discussion of this Matter, that the media exemption might not

apply, for instance, if a broadcaster or publisher opened its pages or facilities to a candidate who then made solicitations for his campaign. There is, however, no express advocacy or solicitation limitation to the media exemption.[12] In fact, it is plain that one purpose of the media exemption is to permit explicit endorsements of candidates by the media. Having determined that the talk shows at issue were within the ordinary course of the radio networks' broadcasting functions, the Commission has no authority to inquire into what was said or by whom. *Cf. GC Report* at 23 (discussing discovery of program transcripts and station policies). The Commission has no authority to condition candidate appearances on broadcasts to Commission-specified format limitations or content controls.

III. Express Advocacy and the "Campaign-related" Test

While not directly relevant to my analysis of this matter, I feel it necessary to express my strong disagreement with two additional features of the *General Counsel's Report*: its invocation of a definition of express advocacy derived from *Furgatch* (at 17) and its reliance on a "campaign-related" content analysis (at 12).

The *VSHL* opinion is merely the latest in an unbroken string of judicial rebukes to this agency's tendentious efforts to redefine the Supreme Court's express advocacy doctrine.[13] I believe that the rationale presented in *Furgatch,* 807 F 2nd 857, is itself

---

[12] This position is fully consistent with previous Commission interpretations in this regard. For instance, in Advisory Opinion 1980-109, the Commission held that a publication's editorial endorsement and solicitation of contributions for a Federal candidate was protected by the media exemption as long as the publication did not act as a conduit but instructed readers to send contributions directly to the campaign. In Advisory Opinion 1982-44, the Commission approved a broadcasting station's provision of two-hour blocks of free time to the Democratic and Republican National Committees when at least one of the programs included an express solicitation of funds for the committee and to support that party's candidates, concluding that "the distribution of free time to both political parties is within the broadcaster's legitimate broadcast function and, therefore, within the purview of the media exemption." This position was even extended in Advisory Opinion 1998-17 to free advertising time, given assurances of equal access in that instance.

[13] *Buckley v. Valeo*, 424 U.S. 1, 80 (1976); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 248-49 (1986); *North Carolina Right To Life, Inc. v. Bartlett*, 168 F.3d 705, 712-13 (4th Cir. 1999); *Virginia Soc'y For Human Life, Inc. v. Caldwell*, 152 F. 3d 268, 270 (4th Cir. 1998); *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049, 1051 (4th Cir. 1997); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 968-70 (8th Cir. 1999); *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503, 505-06 (7th Cir. 1998); *Maine Right To Life Comm., Inc. v. FEC*, 914 F. Supp. 8, 12 (D. Me. 1996), aff'd per curiam, 98 F.3d 1 (1st Cir. 1996) ("[W]e affirm for substantially the reasons set forth in the district court opinion."); *Faucher v. FEC*, 928 F.2d 468, 472 (1st Cir. 1991); *FEC v. Central Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 53 (2d Cir. 1980) (en banc); *Florida Right To Life, Inc. v. Mortham*, No. 98-770-CIV-ORL-19A, slip op. at 10-17 (M.D. Fla. Dec. 15, 1999); *Perry v. Bartlett*, No. 2:98-CV-43-BR(2), slip op. at (E.D. N.C. 1999); *Kansans for Life, Inc. v. Gaede*, 38 F. Supp.2d 928 (D. Kan. 1999); *Right to Life of Mich., Inc. v. Miller*, 23 F. Supp.2d 766 (W.D. Mich. 1998); *Planned Parenthood Affiliates of Mich., Inc. v. Miller*, 21 F. Supp.2d 740 (E.D. Mich. 1998) (same); *Vermont Right to Life, Inc. v. Sorrell*, 19 F. Supp.2d 204, 212-16 (D. Vt. 1998); *Right To Life of Dutchess County, Inc. v. FEC*, 6 F. Supp.2d 248 (S.D. N.Y. 1998); *Clifton v. FEC*, 927 F. Supp. 493, 496 (D. Me. 1996), aff'd on other grounds, 114 F.3d 1309 (1st Cir. 1997); *FEC v. Christian Action Network*, 894 F. Supp. 946 (W.D. Va. 1995), aff'd per

contrary to the Supreme Court's holdings in *Buckley* and *MCFL*. But part (b) of the Commission's express advocacy regulation is far more expansive than even the *Furgatch* opinion. First, the Commission's regulation omits what is arguably the most critical of three steps outlined in *Furgatch's* proffered test: the requirement for an explicit call to action. Nothing "express" or "explicit" is required under part (b), it covers statements which merely "encourage[] actions." Second, part (b) is cast as a "reasonable person" test, generally implying a jury determination of a commonly accepted meaning. The *Furgatch* opinion, however, holds that a statement must have "no other reasonable interpretation," "[o]nly one plausible meaning," and excludes "any reasonable alternative reading" 807 F 2nd at 864. *Furgatch* requires "no ambiguity," *Id.* at 865, clearly a different test than what a reasonable person might take a statement to mean. Especially in the context of *Buckley*, the *Furgatch* phrase must be read as more akin to a "beyond a reasonable doubt" standard than to the "reasonable person" test embodied in part (b) of our regulation. Moreover, presence or absence of express advocacy is "a pure question of law," *Christian Coalition*, 52 F. Sup. 2nd at 62 *and cases cited therein*, determined by judges and not by a jury as a reasonable person test might imply.

The *GC Report* in this matter is even less clear than §100.22(b), stating in the text only that "speech should be read as a whole," even if there are no express words or phrases, though a footnote does add an element not explicit in the regulation, noting that "an exhortation through some form of [unambiguous] call to action" is required. (at 17, n. 17). The radio excerpts cited (at 15 and 16), however, focus on the 1996 election, Sanchez's performance in office, and a challenge to the 1996 results brought in the House of Representatives, failing to support the conclusory analysis of express advocacy as to any future election.

The General Counsel also analyzed the content of available program transcripts pursuant to a "campaign-related" standard derived from several advisory opinions (*GC Report* at 12-13). For reasons nearly identical to those detailed in rejecting the "electioneering message" standard in the Statement of Reasons of Vice Chairman Wold and Commissioners Elliott, Mason and Sandstrom in the Clinton and Dole audits, I conclude that the Commission may not use "campaign-related" as a substantive standard and it should not be used as a shorthand phrase for describing various statutory provisions of the FECA.

---

curiam, 92 F.3d 1178 (4th Cir. 1996); *FEC v. Survival Educ. Fund, Inc.*, 1994 WL 9658, at *3 (S.D. N.Y. Jan. 12, 1994), aff'd in part and rev'd in part on other grounds, 65 F.3d 285 (2d Cir. 1995); *FEC v. Colorado Republican Fed. Campaign Comm.*, 839 F. Supp. 1448, 1456 (D. Colo. 1993), rev'd, 59 F.3d 1015 (10th Cir. 1995), vacated and remanded on other grounds, 116 S. Ct. 2309 (1996); *West Virginians For Life, Inc. v. Smith*, 919 F. Supp. 954, 959 (S.D. W.Va. 1996); *FEC v. NOW*, 713 F. Supp. 428 (1989); *FEC v. AFSCME*, 471 F. Supp. 315, 317 (D. D.C. 1979); *Osterburg v. Peca*, 1999 WL 547849, at *15-17 (Tex. July 29, 1999); *State v. Proto*, 526 A.2d 1297, 1310-11 (Conn. 1987).

Conclusion

The media exemption is not rendered inapplicable simply because the media entity makes time or space available to a candidate. (In fact, the exemption exists precisely to protect such appearances.) It is commonplace for newspapers to open their op ed pages to candidates to discuss important public issues.[14] Various publications publish election guides, sometimes including unedited statements of candidates (usually subject to length restrictions). If such directly election-related material is protected by the media exemption (as it beyond doubt is), how can the types of broadcasts at issue here, which occurred long before the election and of uncertain relation to it, fail to be protected? If candidate appearances on broadcast media are protected by the exemption, this agency has no authority to inquire into the details of the editorial judgment of who was invited or what conditions were placed upon Dornan's comments.

Regardless of the complexities of Dornan's election challenge and candidacy status, and despite the plethora of arguments for imposing conditions and limitations on the FECA's media exemption, this case is simple and straightforward. Salem and Premiere are media entities within the meaning of the FECA's media exemption. Neither are owned or controlled by a candidate or political party. The production of radio talk shows is one, if not the principal, core element of their media functions. The production and distribution of the programs at issue was part of these normal media functions. Under *Reader's Digest* and *Phillips*, these findings end our inquiry.

It would have been inappropriate for the Commission to pursue an investigation of these matters. Indeed, it is unfortunate that their resolution took more than a cursory review by the Office of General Counsel. The length of the General Counsel's Report (and of this statement) only demonstrate the lengths to which it would be necessary to go to conjure a violation of the FECA out of the clear facts and simple law at issue in the matter.

David M. Mason 2/14/00

DAVID M. MASON, Date
Commissioner

[14] See, e.g., "George W. Bush, the Betrayer, Troubles the Republican Soul," by Gary Bauer in the October 7, 1999 New York Times. The article's byline explicitly identifies Bauer as "a Republican candidate for President." Because the FECA's media exemption does not differentiate between print and broadcast media, any standard proposed to apply to radio broadcasters would apply equally to newspapers.