



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Steven R. Ross
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Avenue, NW
Washington, D.C. 20036

DEC 15 2008

RE: MUR 5642
George Soros

Dear Mr. Ross:

On October 15, 2007, you were notified that the Federal Election Commission ("Commission") found probable cause to believe that your client, George Soros, violated 2 U.S.C. § 434(c) and 11 C.F.R. § 109.10, provisions of the Federal Election Campaign Act of 1971, as amended, and the Commission's implementing regulations. On November 18, 2008, however, the Commission was equally divided on whether to authorize the Office of General Counsel to file suit against Mr. Soros. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). A Statement of Reasons explaining the Commission's decision is will follow.

If you have any questions, please contact Tracey L. Ligon, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in cursive script that reads "Stephen A. Gura".

Stephen A. Gura
Deputy Associate General Counsel
for Enforcement

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THE FEDERAL ELECTION COMMISSION
Washington, DC 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)	
)	
George Soros)	
Fenton Communications)	MUR 5642
World Affairs Council of Philadelphia)	
Columbus Metropolitan Club)	
David Fenton)	

**STATEMENT OF REASONS OF VICE CHAIRMAN DAVID M. MASON AND
COMMISSIONER HANS A. von SPAKOVSKY**

The matter arises from a complaint filed by the National Legal and Policy Center regarding activities of Respondent George Soros.

I. BACKGROUND

In 2004, Soros gave speeches in 12 cities, including one hosted by Respondent World Affairs Council of Philadelphia and another hosted by Respondent Columbus Metropolitan Club. The speeches were not just issue-oriented, policy speeches. Rather, Soros expressly advocated the defeat of President George W. Bush and the election of Senator John Kerry.¹ In Columbus, Ohio, for example, Soros told the audience, "I came here to convince you how dangerous it would be to re-elect President Bush."²

Not even Soros claims the speeches lacked express advocacy.³ As the speaking tour began, one publication reported that "Soros will begin a 12-city tour to bolster the sagging Kerry campaign. He's written a pamphlet – with the snappy title, 'Why We Must Not Re-Elect President Bush' – that's being mailed to two million voters..."⁴ Another publication reported, after interviewing Soros, that he

¹ Proposed Factual & Legal Analysis ("FLA") at 6 (March 3, 2006); see generally *George Soros Launches Speaking Tour, Ad Campaign Against Bush Iraq Policies*, COMMON DREAMS NEWS CENTER (Sept. 28, 2004), available at <http://www.commondreams.org/news2004/0928-20.htm> (all Internet sites visited Oct. 26, 2006).

² FLA at 6; *id.* Attach. 1 at 7.

³ FLA at 7.

⁴ Don Feder, *George Soros Touts Kerry & Drug Legalization*, HUMAN EVENTS (Oct. 1, 2004), available at <http://www.humaneventsonline.com/article.php?id=5240>.

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“hired a publicist for a twelve-city, three-million-dollar speaking tour.”⁵ Soros said he “embarked on the tour because [he] was worried that the dramatic deterioration in Iraq did not produce the decisive lead for John Kerry [he] had confidently expected,”⁶ and at other times, Soros described defeating the president as the “central focus of my life” and “a matter of life and death.”⁷ He also predicted consequences that would follow a Bush victory or defeat,⁸ and said, “I decided the most important thing I could do to foster global open societies was to get Bush out of the White House....”⁹ He added, “This is the most important election of my lifetime. These aren’t normal times. The ends justify every legal means possible.”¹⁰ Furthermore, “‘I find it really difficult to conceive of a Bush victory,’ he said. ‘It would be so detrimental to the world, to the U. S., and to me personally.’”¹¹

The complaint’s allegations include one that Soros violated the Federal Election Campaign Act (“FECA”), 2 U.S.C. § 431 *et seq.*, by not reporting independent expenditures associated with his speaking tour. *See id.* § 434(c), (g) (2004).¹² FECA defines “independent expenditure” as an expenditure by a person:

- (A) expressly advocating the election or defeat of a clearly identified candidate; and
- (B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate’s authorized political committee, or their agents, or a political party committee or its agents.

Id. § 431(17) (2002).

The Office of General Counsel (“OGC”) states what it identifies as independent expenditures from the Soros speaking tour:

⁵ Jane Mayer, *The Money Man: Can George Soros’s millions insure the defeat of President Bush?*, THE NEW YORKER (Oct. 18, 2004), available at http://www.newyorker.com/printables/fact/041018fa_fact3.

⁶ Dave Eberhart, *George Soros Now Doubts a Kerry Victory*, NEWSMAX.COM (Oct. 29, 2004), available at <http://www.newsmax.com/archives/articles/2004/10/28/162046.shtml>.

⁷ Laura Blumenfeld, *Soros’s Deep Pockets versus Bush*, WASH. POST (Nov. 11, 2003), available at <http://www.washingtonpost.com/ac2/wp-dyn/A24179-2003Nov10?language=printer>; see also Julian Borger, *Financier Soros puts Millions into ousting Bush*, GUARDIAN (Nov. 12, 2003), available at <http://www.guardian.co.uk/uselections2004/story/0,13918,1083165,00.html>.

⁸ See David Greising, *George Soros takes anti-Bush campaign to U. of C.*, CHICAGO TRIBUNE (Feb. 12, 2004), available at <http://www.chicagotribune.com/news/specials/chi-0402120347feb12,1,4312541.story?coll=chi-newsspecials-hed>; Dinesh D’Souza, *Billionaire Attacks the “Cowboy”* (Oct. 6, 2004), available at <http://www.dineshdsouza.com/articles/thebillionaireattacks.html>.

⁹ Jane Mayer, *The Money Man: Can George Soros’s millions insure the defeat of President Bush?*, *supra* at 2 n.5.

¹⁰ *Id.*

¹¹ *Id.*

¹² Compl. at 19-20 (Jan. 18, 2005).

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The costs associated with these appearances would appear at a minimum to include travel expenses and accommodations. The complaint also contains the un rebutted allegations that [Respondent] Fenton Communications, as a vendor of Mr. Soros, provided public relations services and production and logistical support in connection with the speaking tour. Mr. Soros did not report any independent expenditures related to his speaking tour.¹³

OGC states that “the costs associated with the speaking tour appear to be independent expenditures that triggered a reporting duty,”¹⁴ and recommends, *inter alia*, that the Commission find reason to believe (“RTB”) that Soros violated FECA by not reporting the costs associated with the speaking tour as independent expenditures. *See id.* § 437g(a)(2) (2002).¹⁵

A motion including this finding failed on a 3-to-3 vote on April 18, 2006,¹⁶ and the Commission took no further action on this issue during the same executive session. We write separately regarding this issue and the significance of the Commission’s not finding RTB on these facts.

II. DISCUSSION

There is no allegation of coordination in this matter, *see generally* 2 U.S.C. § 431(17)(B), so not proceeding against Soros with regard to the speaking tour requires either a dismissal based on prosecutorial discretion, *see Heckler v. Chaney*, 470 U.S. 821 (1985) – which would be unusual, given the magnitude of the alleged violation, *see, e.g., In re Gallagher*, MUR 5651, Statement of Reasons (“SOR”) of Chairman Toner & Comm’rs Mason & von Spakovsky at 8 (F.E.C. Sept. 25, 2006)¹⁷ – or a conclusion that Soros made no independent expenditures that required reporting. This latter conclusion can only be the result of one (or more) of the following:

- (1) the speeches themselves contained no express advocacy;

¹³ FLA at 6 (footnote omitted).

¹⁴ *Id.* at 8.

¹⁵ *Id.*

¹⁶ Voting affirmatively in favor of an RTB finding were Commissioners Mason, Toner and von Spakovsky. Commissioners Lenhard, Walther and Weintraub dissented. OGC also recommended dismissing all allegations Complainant raised against:

- Respondents World Affairs Council of Philadelphia and Columbus Metropolitan Club based on prosecutorial discretion under *Heckler v. Chaney*, 470 U.S. 821 (1985), and
- Respondents Fenton Communications and David Fenton, because Complainant made no specific allegation that they violated FECA.

Rather than just dismiss the allegations against these four respondents, the Commission unanimously rejected these recommendations and voted to find no RTB that these four respondents violated FECA.

¹⁷ Available at <http://eqs.sdrdc.com/eqsdocs/0000573A.pdf>.

(2) any expenses incurred for the speeches themselves, plus expenses for travel, accommodations, public relations, production, and logistics did not exceed statutory-reporting thresholds; or

(3) any expenses incurred for the speeches themselves did not exceed statutory-reporting thresholds, and expenses for associated travel, accommodations, public relations, production, and logistics do not count as independent expenditures.

See 2 U.S.C. § 431(17)(A); *id.* § 434(c), (g).

As to the first alternative, the speeches contained express advocacy. *Supra* at 1. Soros himself said his speaking tour was about defeating President Bush and, in this respect, the Commission should take Soros at his word. Again, not even Soros claims the speeches lacked express advocacy. It is true, as one Commissioner has noted, that Soros discussed policy and issues. Yet even candidates do that in asking people to vote for them. That the speeches included policy and issues does not alter or diminish the conclusion that they contained express advocacy.

As to the second and third alternatives, there is no allegation that Soros incurred expenses for the speeches themselves.¹⁸ There is little doubt that the costs associated with two high-profile public speaking engagements exceeded FECA's \$250 independent-expenditure reporting threshold. *See id.* § 434(c)(1). Thus, the only issue that remains is whether expenses for travel, accommodations, public relations, production, and logistics count toward the total independent-expenditure figure. In this and all respects,

it is important that the Commission enforce FECA consistently, rather than reach different results in matters with materially indistinguishable facts. *See, e.g., In re Robert*, MUR 5321, SOR of Comm'r Mason at 1 (F.E.C. July 13, 2004) (contrasting *In re Ferguson for Congress*, MUR 5138 (F.E.C.));¹⁹ *see also id.* at 5-6.

Gallagher, SOR of Chairman Toner & Comm'rs Mason & von Spakovsky at 8 (footnote added).

This is not the first time the Commission has considered allegations of not reporting expenses associated with speeches. *See FEC v. Christian Coalition*, 52 F. Supp.2d 45, 55 n.10 (D.D.C. 1999). In *Christian Coalition*, the respondent-defendant's executive director spoke at a conference sponsored by organizations separate from the Christian Coalition. *See id.* at 50, 55. The Christian Coalition did not report as independent expenditures the expenses for the executive director's travel to, attendance at, or salaried time at the conference. The Commission, rather than declining to find RTB, pursued allegations that these expenses counted toward the Christian Coalition's total independent-expenditure figure. *Cf. id.* at 55 n.10.

The Christian Coalition eventually prevailed on this point. However, rather than holding that these expenses do not count toward total independent expenditures, the *Christian Coalition* court

¹⁸ *See, e.g., Compl.* at 7 (alleging that Respondent Columbus Metropolitan Club, not Soros, rented a hotel where Soros spoke).

¹⁹ Available at <http://eqs.sdrdc.com/eqsdocs/00001791.pdf>.

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held that the executive director's speech lacked express advocacy, *id.* at 56-57, 63, so the speeches were not independent expenditures in the first place. *See* 2 U.S.C. § 431(17)(A). Thus, there were no independent expenditures to report, *see id.* § 434(c), (g), and it was unnecessary for the court to address the Commission's position that travel, attendance, and salary expenses count toward total independent expenditures.

However, the Commission's position in *Christian Coalition* does not survive *Soros*. The *Soros* speeches, unlike the *Christian Coalition* speech, did contain express advocacy. *Supra* at 1. Therefore, consistency with the Commission's position in *Christian Coalition* would require that travel and accommodation expenses count toward total independent expenditures in this matter. Not pursuing these expenses in *Soros* therefore overrules the Commission's previous position. Further, any assertion that associated expenses, such as public relations, production, and logistical support, all count toward total independent expenditures similarly does not survive *Soros* because the Commission is not pursuing them either.

Soros contends that the costs associated with his speeches are not independent expenditures because they are not within the definition of "public communication." *See generally* 2 U.S.C. § 431(22); 11 C.F.R. § 100.26 (2002), *amended*, 71 FED. REG. 18589, 18612-13 (2006).²⁰ While status as a "public communication" has important FECA consequences,²¹ political speech need not be a "public communication" to be an "independent expenditure." Rather, an "independent expenditure" need be only "an expenditure" that has certain characteristics. *See* 2 U.S.C. § 431(17). In a matter involving Rev. Jesse Jackson Sr. and the Democratic National Committee, the Commission determined that monies spent on a multi-city public-speaking tour, similar to the one in which Soros engaged, constitute "expenditures." *See In re Jackson*, MUR 5183, First Gen. Counsel's Report at 14-16 (F.E.C. Feb. 27, 2004).²²

As noted above, the *Soros* expenses for travel, accommodations, public relations, production, and logistics likely far exceeded the statutory reporting thresholds for independent expenditures, *see* 2 U.S.C. § 434(c), (g), and also likely exceeded the analogous expenses in *Christian Coalition*. *Compare* 52 F. Supp.2d at 55 n.10 with *supra* at 1-3.²³ Thus, it does not appear that "sauce for the goose is sauce for the gander" here. *Cf. Robert*, SOR of Comm'r Mason at 9. What is even more peculiar is that the Commission would baste enforcement sauce on the little goose in *Christian Coalition* but not on the big gander in *Soros*. The Commission is willing to pursue the smaller bird but not the bigger one. *But cf. Buckley v. Valeo*, 424 U.S. 1, 49 (1976) (*per curiam*) ("The First

²⁰ FLA at 7.

²¹ Whether a particular communication is a "public communication" determines, *inter alia*, whether express advocacy, including an independent expenditure, requires a disclaimer, *see, e.g., In re Mason*, MUR 5604, SOR of Chairman Toner & Comm'rs Mason & von Spakovsky at 3 & n.16 (citing 11 C.F.R. § 110.11(a)(2) (2002 & 2006)) (F.E.C. Dec. 11, 2006), and whether political speech qualifies as Type 3 "federal election activity." *See, e.g., id.* at 5 (citing 2 U.S.C. § 431(20)(a)(iii)).

²² Available at <http://eqs.sdrdc.com/eqsdocs/0000381B.pdf>.

²³ A review of Commission records does not reveal enough information to make the same statement about the *Jackson* respondents with similar certainty.

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Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." (citing *Eastern R. Conf. v. Noerr Motors*, 365 U.S. 127, 139 (1961))), *quoted in Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 296 (1981) (opinion of Burger, C.J., joined by Brennan, Powell, Rehnquist & Stevens, JJ.), *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 705 (1990) (Kennedy, J., joined by O'Connor and Scalia, JJ., dissenting), and *McConnell v. FEC*, 540 U.S. 93, 328 (2003) (Kennedy, J., joined by Rehnquist, C.J., and Scalia, J., concurring in part and dissenting in part).

It is true, as one Commissioner noted, that *Soros* involved an individual while *Christian Coalition* involved an organization. That distinction may be significant, for example, in determining whether an entity *may make* independent expenditures, because corporations other than *MCFL* corporations may not make independent expenditures. *See, e.g., FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 256-65 (1986); *In re Jerry Falwell Ministries, Inc.*, MUR 5491, SOR of Vice Chairman Toner & Comm'rs Mason & Smith at 2-4 (F.E.C. July 22, 2005) (collecting authorities).²⁴ However, when it comes to what is included in the definition of "independent expenditure" and what FECA requires be reported to the Commission, a person *versus* organization distinction is a distinction without a difference here. *See* 2 U.S.C. § 431(17) (referring to "an expenditure by a person"); *id.* § 434(c) (reporting requirements for "[e]very person (other than a political committee)"), *id.* § 434(g) (additional reporting requirements for "a person (including a political committee)").

It is also true, as another Commissioner noted, that *Soros* is willing to donate money to educate people, and that should be encouraged. He also has a history of promoting democracy. However, such generosity does not alter or diminish the requirement of any person to report independent expenditures or the Commission's obligation to enforce FECA consistently. The civic purity of the *Soros* motives is not the issue. Many people and organizations are active in politics for selfless reasons. For better or worse, no exemption distinguishes the venal from the virtuous. This is not a standard that the Commission can apply, for it has no crystal with which to judge someone's soul.

III. CONCLUSION

Under the Supreme Court's long-established jurisprudence, government may regulate, but not limit, independent expenditures. *See, e.g., Buckley*, 424 U.S. at 39-51, 74-82. In this matter, one issue concerns regulation of independent expenditures, and the question is whether *Soros* had made independent expenditures to report and, if so, what they include. *Supra* at 4-5.

One Commissioner has astutely observed that the framers of the Constitution would find it hard to believe that the government may require those engaging in political speech to report their travel expenses: Imagine their reaction to the government's saying people could give a speech in a town square but, if the speakers went from town to town and their horses needed oats along the way, the speakers would have to report oats expenses exceeding statutory-reporting thresholds.

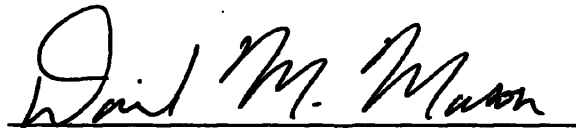
²⁴ Available at <http://eqs.sdrdc.com/eqsdocs/0000467D.pdf>.

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However, that is the consequence of the law as passed by Congress and the Commission's position in *Christian Coalition* enforcing that law. On this issue, however, *Soros* leads to different results than either *Christian Coalition* or *Jackson*.

We agree that the framers would be incredulous at such requirements. Yet Congress imposed independent-expenditure reporting requirements, the courts have upheld them, *see, e.g., Buckley*, 424 U.S. at 74-82, and this Commission enforced them in closely analogous circumstances. If we were convinced that our colleagues' reservations represented a consistent commitment to originalism, *see generally* Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (1997), we would be inclined to join them. But the only difference between *Christian Coalition* and *Jackson* on the one hand, and *Soros* on the other hand, is that, in the first instances, the speakers were acting on behalf of an organization that paid the bills while, in this instance, an individual spoke for himself and paid his own bills. Speaking on one's own behalf and paying one's own bills does not exempt a person from otherwise applicable FECA reporting requirements.

December 31, 2007



David M. Mason
Vice Chairman



Hans A. von Spakovsky
Commissioner

12-31-07

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

George Soros

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MUR 5642

**Statement of Reasons of
Chairman Robert D. Lenhard
Commissioner Ellen L. Weintraub**

Consider these hypotheticals.

Suppose a Vietnam vet from Kansas took a bus to Washington, DC in 2004 to protest the war. He walked around the Mall chanting: "End the war in Iraq. Defeat George Bush." If his bus ticket, meal, and hotel costs exceeded \$250, was he required to report to the Federal Election Commission (FEC)?

What if 316 people from Hartland, Wisconsin chartered buses to Washington, DC to advocate the defeat of a Federal candidate. Although they slept four to a room, with the hotel cost and bus charter, each spent more than \$250. Did they all violate Federal law if they did not report their expenses to the FEC?

Imagine seventy-two parents of young people serving in the Armed Forces travelled to Fort Bragg to attend a rally in support of the President. They chanted, "Protect our Troops; Re-Elect the President." Sixty-two of them spent more than \$250 getting to the rally. Did they violate Federal law if they failed to report their costs to the FEC?

Say dozens of people from New York City headed to another state to protest the anti-Semitic remarks of a candidate for Senate and to advocate his defeat in the upcoming election. If they spent more than \$250, were they required to notify the FEC of their activities?

Suppose a political science professor authored a book that evaluates U.S. Presidencies – past and present. The professor scored each presidency and, based on that score, determined whether that president should have been re-elected. Based on her scoring system, she concluded that the current president should not be re-elected in

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November. This is the only line regarding a current election in the entire 685 page \$75 book. The professor gave the book away to five colleagues to persuade them of her model. Was she required to file an independent expenditure notice with the FEC?

What if two women from the Los Angeles area go to Sacramento for the day to advocate the defeat of a state assembly member who is running for Congress? One flies coach, the other first class. Must the latter file with the FEC, although the former (having spent less than \$250) does not?

Imagine Elaine flies to Boston for her brother's wedding. While there, she advises her brother to vote for a certain Federal candidate. Since she incurred more than \$250 in travel and hotel expenses and engaged in express advocacy, should she have to file an expenditure notice with the FEC?

A well-known author of books published in numerous languages went on a 12-city speaking tour. At an event hosted by the World Affairs Council, which people paid to attend, he gave away copies of his latest book (which contains exactly four sentences constituting express advocacy) and in the course of his talk, expressed his belief that the President should not be re-elected. Must he report his meal, hotel, and incidental expenses to the FEC?

This last example is real, and a complaint was filed. The author is George Soros, and this scenario came before the FEC in this matter. The Office of General Counsel recommended that the Commission find reason to believe a violation occurred based on express advocacy in his speeches and in his book, which he gave away on the tour. Under this approach, approved by three of our colleagues, the veteran, the 316 people from Hartland, the parents of our troops, the New Yorkers, the professor, the Californians, and Elaine all would have been in violation of Federal law. Whether they were held accountable would be subject to the discretion of any four FEC commissioners.

Each of the above examples would have resulted in violations of the Federal Election Campaign Act if the Commission had passed the motion to find reason to believe that George Soros violated 2 U.S.C. § 434(c) and 11 CFR § 109.10 by failing to report independent expenditures. We voted against that motion, which failed by a vote of 3-3.

A plain reading of the General Counsel's report (GC Report) supported by our colleagues attempted to establish an independent expenditure test as follows:

1. Was any express advocacy statement made?
2. Were any costs facilitating the statement in excess of \$250?

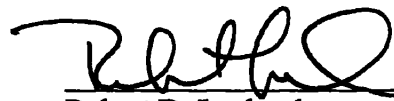
Under this proposed test, if the answers are both yes, there is a reporting obligation and failure to do so is a violation of the Federal Election Campaign Act. But this analysis is too simplistic, as the hypotheticals outlined above show.

As a general matter, individuals should not be able to assume the costs of candidates. See MUR 5020 (Gormley for Senate Primary Election Fund, *et al.*). See also AO 1998-16 (Restoring the American Dream). In the Gormley matter, the Commission determined that no matter how much an individual spent for himself and a friend to fly to a candidate fundraiser, it would not have to be reported because they were not assuming the costs of the committee, even if they advocated the candidate's election at the fundraiser. But, under the logic advanced by our colleagues in the instant matter, if Jane Doe had travelled to the same fundraiser to protest the candidate and call for his defeat, she would have to report her activities. As the Commission held in the Gormley matter, an individual's personal travel and lodging expenses are just that – they are personal, not campaign expenditures, even if the individual expresses political opinions once he or she arrives at the destination. One need not report such expenses to the Government, whether one travels by Greyhound bus or Lear jet.


Mr. Soros argued through counsel that the costs associated with the speeches were not independent expenditures because a speech is not a "public communication" within 11 C.F.R. § 100.26. He argued that only public communications need to be reported as independent expenditures. OGC points out that nothing in the definition of "independent expenditure," which predates the concept of public communication, suggests that it is limited to public communications. GC Report at 10. That is correct. Not only was the concept of public communications non-existent, but more importantly, no one seriously contemplated that such a limitation was necessary.

We concur with our colleagues that the framers of the Constitution would find it difficult to believe that a speaker would need to report to the government how much he spent on oats to feed his horse en route to the town square.¹ But we disagree that this is the result required by the law passed by Congress. While our colleagues may frame the issue as one of originalism,² we think the issue is one of *common sense*. Hence, we voted against finding reason to believe that a violation occurred.

12/31/07
Date


Robert D. Lenhard
Chairman

1/2/08
Date


Ellen L. Weintraub
Commissioner

¹See Statement of Commissioners David M. Mason and Hans A. von Spakovsky in MUR 5642 (Soros) at 6.

²See *id.* at 7.

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
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George Soros) **MUR 5642**

STATEMENT OF REASONS OF VICE CHAIRMAN MATTHEW S. PETERSEN AND COMMISSIONERS CAROLINE C. HUNTER AND DONALD F. MCGAHN II

This statement provides the basis for our vote not to authorize a lawsuit against George Soros ("Respondent") for allegations in a complaint filed by the National Legal and Policy Center. The complainant alleged that Respondent violated provisions of the Federal Election Campaign Act of 1971, as amended (the "Act") by failing to report mailing list rental expenses as part of an independent expenditure advocating the defeat of George W. Bush in the 2004 General Election.¹ For the following reasons we voted against filing suit² and to close the file.

I. BACKGROUND

The complainant in this matter alleged that Respondent failed to report as an independent expenditure the cost of a mailing list used to send two million brochures used to market Respondent's book, *The Bubble of American Supremacy: The Costs of Bush's War in Iraq*.³ This book brochure marketed Respondent's book by summarizing its themes, listing excerpts from favorable reviews, and providing a website for its purchase.⁴

Although by significant measure the book brochure summarized the themes of *The Bubble of American Supremacy* and was clearly designed to promote the purchase of the book, the book brochure also included language expressly advocating⁵ the defeat of President

¹ The complainant's other alleged violations were the subject of recommendations from the Office of the General Counsel rejected by the Commission. See MUR 5642, Robert D. Lenhard and Ellen L. Weintraub, Statements of Reasons dated Dec. 31, 2007 and Jan. 2, 2008 and MUR 5642, David M. Mason and Hans A. von Spakovsky, Statement of Reasons dated Dec. 31, 2007.

² Then-Vice Chairman Walther and Commissioners Weintraub and Bauerly voted affirmatively. The undersigned dissented. MUR 5642, Certification dated Nov. 18, 2008.

³ The brochure was attached to the complaint. Complaint, Ex. C.

⁴ Complaint, Ex. C.

⁵ Commission regulations define "expressly advocating" to mean any communication that – (a) Uses phrases such as 'vote for the President,' 're-elect your Congressman,' ... or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning other than to urge the election or defeat of one or more clearly identified federal candidate(s), such as posters, bumper stickers, advertisements, etc. which say 'Nixon's the One,' 'Carter '76,' 'Reagan/Bush,' or 'Mondale!'" 11 C.F.R. § 100.22(a).

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George W. Bush in the 2004 General Election.⁶ The title of the four pages of text reads, “Why We Must Not Re-elect President Bush.”⁷

Based on the complaint, on April 18, 2006 the Commission voted to find reason to believe that Respondent violated 2 U.S.C. § 434(c) and 11 C.F.R. § 109.10 and authorized the use of compulsory process in the matter, including the issuance of interrogatories, document subpoenas, deposition subpoenas, and orders.⁸ The basis for the Commission’s determination, as expressed in the factual and legal analysis approved at that time, was that Respondent’s alleged violation stemmed from the fact that he paid approximately \$272,000 for a mailing list used in connection with the book brochure.

The Commission’s investigation confirmed that Respondent’s independent expenditure reports filed with the Commission were correct with respect to expenses related to the creation and production of the book brochure.⁹ These expenses included \$747,680 for printing, postage, and handling; \$7,932.80 for mailing production management; and \$2,500 for brochure design.¹⁰ The payments appeared on Respondent’s FEC Form 5 filed in a timely manner in September, October, and early November 2004.¹¹ The forms, however, fail to disclose the \$272,000 cost of Respondent’s lease or rental of a mailing list, the subject of the complaint.

The Commission voted to find probable cause to believe that Respondent violated 2 U.S.C. § 434(c) and 11 C.F.R. § 109.10.¹² After the statutory period prescribed in § 437g(a)(4)(A)(i) had expired, the Office of the General Counsel recommended that the Commission authorize suit against Respondent.¹³ It is the recommendation to authorize a federal lawsuit against Respondent that is the topic of this statement.

⁶ General Counsel’s Brief dated Apr. 30, 2007 at 1.

⁷ Complaint, Ex. C.

⁸ MUR 5642, Certification dated Apr. 20, 2006.

⁹ It is not clear to us why, when reports are filed under penalty of perjury, the Commission would nonetheless investigate the accuracy of these reports without some credible information that calls them into question. *See FEC v. Machinists Non-partisan League*, 655 F.2d 380, 388 (D.C. Cir. 1981) (“Plainly, mere ‘official curiosity’ will not suffice as the basis for FEC investigations...”)(footnote omitted).

¹⁰ General Counsel’s Brief dated Apr. 30, 2007 at 1.

¹¹ The forms are available online. See <http://images.nictusa.com/cgi-bin/fecimg/?C90008004> (visited Dec. 11, 2008).

¹² MUR 5642, Certification dated Oct. 11, 2007.

¹³ General Counsel’s Report #4, dated March 10, 2008. The statutory basis for the General Counsel’s recommendation to file suit is found in 2 U.S.C. § 437g(a)(6)(A), which provides:

If the Commission is unable to correct or prevent any violation of this Act ... by methods specified in [2 U.S.C. § 437g(a)(4)], the Commission may, upon an affirmative vote of 4 of its members, institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order ... in the district court of the United States for the

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II. DISCUSSION

The Act requires that individuals must report certain independent expenditures¹⁴ within time periods provided by statute.¹⁵ For several reasons, we conclude that the Commission should not authorize suit on the theory that Respondent failed to report an independent expenditure in this matter because neither the Act nor Commission regulations required Respondent to report \$272,211.68 that he paid to rent a mailing list used in connection with his book brochure.

A. A prior Commission advisory opinion held that mailing lists are not “independent expenditures.”

The Commission considered and rejected the notion that a mailing list is an independent expenditure in an advisory opinion indistinguishable in all material aspects from the activity at issue in this matter.¹⁶ In AO 1979-80, the Commission held that the maker of an independent expenditure “is neither making any communication by renting the lists nor is it making an independent expenditure through the [list] broker.” Thus, in the only Commission advisory opinion implicating the applicability of the Act and Commission regulations to this type of activity, the mailing list expense was explicitly deemed not to be part of the cost of the independent expenditure.¹⁷ As such, no reporting obligation existed. Because the Act provides that “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,”¹⁸ the Commission is precluded from pursuing the alleged violation of the Act that formed the basis of the Office of the General Counsel’s recommendation to authorize suit.

Assuming, *arguendo*, that AO 1979-80 is distinguishable, we reject the Office of the General Counsel’s argument that the Explanation and Justification for 11 C.F.R. § 104.4(d), published in the Federal Register on January 3, 2003 after the passage of the Bipartisan Campaign Reform Act of 2002, establishes that the mailing list cost is an independent expenditure.¹⁹ In fact, this E&J contains no mention or discussion of “mailing list(s)” in the

district in which the person against whom such action is brought is found, resides, or transacts business.

¹⁴ “Independent expenditure” means an expenditure by a person “(A) expressly advocating the election or defeat of a clearly identified candidate and; (B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate’s authorized political committee, or their agents, or a political party or its agents.” 2 U.S.C. § 431(17).

¹⁵ 2 U.S.C. § 434(c).

¹⁶ Advisory Opinion 1979-80 (National Conservative Political Action Committee) (“AO 1979-80”).

¹⁷ *Id.*

¹⁸ 2 U.S.C. § 437f(c)(1)(B).

¹⁹ Explanation and Justification, Bipartisan Campaign Reform Act of 2002 Reporting, 68 Fed. Reg. 404, 407 (Jan. 3, 2003) (“E&J”).

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context of independent expenditures. On the contrary, the E&J's glancing reference to "production and distribution costs" cannot be read to reverse a prior Commission advisory opinion when the E&J has no citation to any prior advisory opinion and lacks any notation that the Commission's treatment of mailing list expenses has been materially changed.²⁰ The E&J simply provides no controlling authority in this matter. Its failure to establish a guide for valuation of lists in this context is noteworthy because if the Commission intended through this E&J to establish a new rule in this area, it did not speak to this key concept.²¹

In sum, the Commission, by statute and regulation, is prohibited from establishing new regulatory requirements through this or any enforcement matter.²² For this fundamental reason, we voted against authorizing suit against Respondent since through his actions he has violated neither the Act nor a Commission regulation.

B. The book brochure is within the Act's broad media exemption and is therefore not an expenditure.

Furthermore, although Respondent filed forms with the Commission disclosing independent expenditures, no such filings were required for what was essentially a commercial advertisement for a book covered by the Act's media exemption. The Act's media exemption provides that costs associated with "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" are exempt from the definition of "expenditure."²³ The Commission's regulations further provide that neither a "contribution" nor "expenditure" results from "any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer or producer), Web site, newspaper, magazine, or other periodical publication, including any Internet or electronic publication . . . unless the facility is owned or controlled by any political party, political committee, or candidate[.]"²⁴

²⁰In fact, a Commission determination to file suit would be vulnerable to an attack that such action is arbitrary and capricious under the Administrative Procedure Act if the agency "changed course" without a reasoned explanation. See *CBS Corp. v. F.C.C.*, 535 F.3d 167, 174 (3d Cir. 2008); 5 U.S.C. § 706(2)(A). Consistent with our vote not to authorize suit, we find no such explanation in the E&J for 11 C.F.R. § 104.4(f).

²¹ For example, in a proposed rulemaking addressing mailing lists, the Commission spent considerable effort to address and answer questions regarding valuation. See *Notice of Proposed Rulemaking, Mailing Lists of Political Committees*, 68 Fed. Reg. 52531, Sept. 4, 2003 (discussing list valuation). This rulemaking was terminated without the issuance of new regulations. *Notice Disposition, Termination of Rulemaking, Mailing Lists of Political Committees*, 68 Fed. Reg. 64571, Nov. 14, 2004.

²² 2 U.S.C. § 438(d); 11 C.F.R. § 112.4(e) ("Any rule of law which is not stated in the Act . . . or in a regulation duly prescribed by the Commission, may be initially proposed only as a rule or regulation pursuant to procedures in 2 U.S.C. § 438(d) . . .").

²³ 2 U.S.C. § 431(17); 11 C.F.R. § 100.132.

²⁴ 11 C.F.R. § 100.73, 100.132.

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The Commission has not limited the press exemption to traditional news outlets, but rather has applied it to “news stories, commentaries, and editorials *no matter in what medium they are published,*” and specifically has extended it to Internet Web sites and entities that distribute their content exclusively on the Internet. *Explanation and Justification for the Regulations on Internet Communications (“Internet Rulemaking”),* 71 FR 18589, 18608-09 (Apr. 12, 2006).²⁵

Under media exemption analysis here, costs associated with Respondent’s book do not constitute expenditures or contributions. There is no allegation that a facility owned or controlled by any political party, political committee, or candidate had anything to do with this activity. A book brochure promoting the book’s themes and directing readers how to purchase copies is as plainly within the scope of a legitimate media function as newspapers or magazines (ideological or otherwise) soliciting subscriptions.²⁶

C. In light of the foregoing considerations, the Commission’s dismissal is within its prosecutorial discretion.

Finally, in light of the analysis above and other factors, this case is not worthy of the further use of Commission resources.²⁷ The Commission has broad discretion to determine how to proceed with respect to matters before it, including dismissal.²⁸ Here, the Commission could face significant expense to litigate its case based on what we view, for the above-noted reasons, a deficient legal theory. Even if the Commission were to expend these resources, the core of Respondent’s activity around the time of the 2004 election was timely disclosed four years ago. In view of these considerations, dismissal of this matter is well within the Commission’s prosecutorial discretion.

III. CONCLUSION

George Soros, in the course of promoting his book, made disbursements for a book brochure he reported to the Commission as independent expenditures advocating the defeat of George W. Bush in the 2004 election. Because we conclude that mailing list costs associated with the book brochure need not be reported, the book brochure itself is within the Act’s media exemption, and closing the file is a proper exercise of the Commission’s prosecutorial discretion, we rejected the Office of the General Counsel’s recommendation to authorize suit against Respondent and voted to close the file in this matter.

²⁵ Advisory Opinion 2008-14 (Melothe) at 3-4 (emphasis added).

²⁶ *Id.* at 5 (citing *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), *Reader’s Digest Association, Inc. v. FEC*, 509 F. Supp. 1210 (S.D.N.Y. 1981), and Advisory Opinion 2005-16 (Fired Up!). See *Statement of Reasons, Bradley A. Smith and Michael E. Toner*, MUR 5467 (Michael Moore) dated Aug. 2, 2004 (“Historically the Courts have held that where the underlying product is covered by the press exemption, so are advertisements to promote that underlying product. See *FEC v. Phillips Publishing, Inc.*, 517 F. Supp. 1307 (1981) and *Reader’s Digest Association, Inc. v. FEC*, 509 F. Supp. 1210 (S.D.N.Y. 1981).”


²⁷ *Heckler v. Chaney*, 470 U.S. 821 (1985).

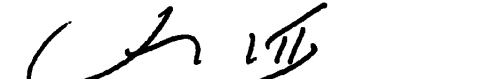
²⁸ *Id.* 2 U.S.C. § 437g(a)(1) and 11 C.F.R. § 111.6(b) and 111.7(b).

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January 23, 2009


Matthew S. Petersen
Vice Chairman


Caroline C. Hunter
Commissioner


Donald F. McGahn II
Commissioner

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