



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)

Foundation for a Secure and Prosperous)
America and Susan Neithamer in her)
official capacity as treasurer)

MUR 6974

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

The Complaint in this matter alleged that the Foundation for a Secure and Prosperous America and Susan Neithamer in her official capacity as treasurer (“FSPA”) violated the Federal Election Campaign Act of 1971, as amended (the “Act”) because it did not file reports with the Commission disclosing its “expenditures” for six videos.¹ The videos criticized Paul’s position on then-ongoing negotiations between the United States and Iran while Senator Rand Paul was a candidate for the Republican Party’s 2016 presidential nomination. Four of the videos were posted solely to YouTube and two videos were both posted to YouTube and also aired as television advertisements.

The Commission unanimously agreed with the Office of the General Counsel that FSPA did not violate the Act because these communications did not expressly advocate Paul’s defeat and, therefore, were not independent expenditures. Accordingly, FSPA was not required to file independent expenditure reports. Because these videos did not constitute expenditures, the Commission also unanimously agreed that FSPA’s payments to produce them did not trigger a requirement for it to register with the Commission as a political committee and to file periodic disclosure reports.

However, our colleagues opposed the Office of General Counsel’s recommendation—which we approved—that FSPA’s four videos posted solely to YouTube were exempt from regulation under the well-established Internet exemption. Our colleagues voted as a bloc to reject the proposed factual and legal analysis because it referenced the Internet exemption. We are issuing this separate statement to set forth our reasons for dismissing the matter, including the application of the Internet exemption.²

¹ Compl. at 1.

² Commissioner Ravel has issued a Statement of Reasons explaining her vote against applying the Internet exemption on the basis that the Commission should obtain additional information about the use of technology in politics. This is a familiar, if tired, refrain from Commissioner Ravel, but it fails to justify a public official’s failure to apply well-established law adopted unanimously by a fully-apprised Commission in 2006. Moreover, the Commission received over 5,000 public comments on its regulation of the Internet in connection with its February

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2 **I. FACTUAL BACKGROUND**

3 FSPA was formed in 1997.³ It is registered with the Internal Revenue Service as a non-
4 profit 501(c)(4) organization,⁴ and is not registered with the Commission as a political
5 committee. It describes its mission as “informing the public and opinion leaders as to how we
6 can best assure that America remains secure and prosperous.”⁵ In 2015, President Obama’s
7 administration engaged in negotiations with Iran regarding the possibility of modifying sanctions
8 in exchange for oversight of Iran’s nuclear program, and Congress publicly weighed various
9 legislative actions. FSPA created a number of online videos and television advertisements that
10 highlighted Senator Rand Paul’s previous statements regarding the appropriate response to
11 developments in Iran’s nuclear program.
12

13 Rand Paul has been a sitting Senator from Kentucky since 2011. He currently serves on a
14 number of committees, including Homeland Security and Government Affairs as well as Foreign
15 Relations.⁶ Paul was also a candidate for the 2016 Republican presidential nomination.
16 According to its Response, FSPA and others considered Paul’s views (and potential votes) on the
17 negotiations with Iran as particularly important, especially in light of his perceived willingness to
18 stand apart from his Republican colleagues on such matters.⁷ FSPA asserts that it “sought to
19 influence the negotiations — and congressional approval of them — by persuading Senator Paul
20 to take a tougher stance on the President’s diplomatic efforts and to reject the deal when it came
21 to a vote in the Senate.”⁸
22

23 Paul declared his candidacy for President during a speech in Kentucky on April 7, 2015.
24 In the four days that followed, he visited the early primary states of New Hampshire, South
25 Carolina, and Iowa. From April 8 through April 12, 2015, FSPA broadcast “Against Sanctions,”
26 one of the television advertisements at issue in this matter, nationally with particular focus on the

2015 hearing, and Commissioners attended two forums focused on technology and politics in 2015. The clear message delivered to the Commission has been: Maintain the current regulatory approach, which has encouraged (not impeded) innovation. Indeed, not even Commissioner Ravel has submitted a proposal to amend the Commission’s Internet exemption. We remain confident the Commission’s unanimous policy judgments in 2006 continue to be constitutional, sound, democratically constructive, and fully embraced by the American public.

3 Resp. at 1 (Dec. 17, 2015).

4 *Id.*

5 *Id.*

6 See U.S. SENATOR RAND PAUL OF KENTUCKY, <https://www.paul.senate.gov/about-rand/meet>.

7 Resp. at 3.

8 *Id.* at 4. The Iran Nuclear Agreement Review Act of 2015 provided for Congressional review of any proposed agreement that the Obama administration reached with Iran. See Pub. L. No. 114-17, 129 Stat. 201.

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1 states in which Paul was making appearances.⁹ FSPA aired a second television advertisement,
2 "Consequences," from August 7 through August 14, 2015, after announcing that it would "run in
3 heavy rotation on cable and satellite TV" in Iowa and New Hampshire.¹⁰ Paul made numerous
4 appearances in those states in August 2015.
5

6 FSPA maintains a YouTube channel that currently displays six videos, all posted between
7 April 9, 2015 and August 6, 2015.¹¹ Two of them appear to be identical to the television
8 advertisements described above. The remaining videos range from 10 to 57 seconds long, and
9 each contains the same thematic content, and similar or identical images and language, as the
10 television advertisements.
11

12 The Complaint described FSPA as a "PAC" and alleges that the online videos and
13 television advertisements "represent expenditures which should have been reported to the
14 FEC."¹² The Complaint asserted that FSPA spent more than \$1 million on the two television
15 advertisements.¹³ The Complaint further alleged that FSPA solicited donations from the public
16 during 2015.¹⁴ As support for the alleged violations of the Act, the Complaint quotes FSPA's
17 website regarding the ad buys for "Against Sanctions" and "Consequences," notes that the
18 website contains a solicitation for contributions, and provides a list of videos featured on FSPA's
19 YouTube channel.
20
21

⁹ Compl. at 2 (Oct. 22, 2015).

¹⁰ *Id.* at 3.

¹¹ See Foundation for a Secure and Prosperous America, a Secure and Prosperous America, YOUTUBE, https://www.youtube.com/channel/UCzmVgN1_QZOzk1UsDlqVZA (last visited Apr. 25, 2016). The online videos are entitled "Dangerous," "In His Own Words," "Against Sanctions - 2," "Consequences," "Tick-Tick," and "Tick-Tick - Snapchat." According to the Complaint, the website previously displayed a seventh video, "Sanctions," which was removed due to a copyright claim by a photographer. Compl. at 3. The Response asserts that this video was "identical to the 'Against Sanctions' ad that ran on television, with the exception that one photographic image of Senator Paul was replaced in the version currently available online." Resp. at 8 n.4.

¹² Compl. at 1.

¹³ *Id.*

¹⁴ *Id.* at 3. The Complaint includes what is represented as quoted language from FSPA's website providing instructions for making donations online and by mail, as well as a disclaimer providing that donations to FSPA are not tax-deductible or limited by law, and that tax rules do not require the disclosure of donors. *Id.* FSPA's website does not currently provide donation instructions, but it does include the disclaimer as quoted in the Complaint. See FOUNDATION FOR A SECURE AND PROSPEROUS AMERICA, <http://www.secureandprosperous.com/> (last visited Apr. 20, 2016).

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1 **II. LEGAL ANALYSIS**

2 **A. There is No Reason to Believe that FSPA's Internet Videos were Independent**
3 **Expenditures**

4 The Complaint asserts that FSPA videos posted only on YouTube.com were expenditures
5 that should have been reported to the Commission. Entities that are not political committees
6 need not report their expenditures to the Commission. In part C, below, we explain why FSPA
7 was not a political committee. All persons who are not political committees, however, must
8 nonetheless file reports with the Commission if they spend more than \$250 on "independent
9 expenditures,"¹⁵ which are expenditures by a person for communications expressly advocating
10 the election or defeat of a clearly identified federal candidate that is not coordinated with a
11 candidate, a candidate's authorized committee, or their agents, or a political party committee or
12 its agents.¹⁶
13

14 The record before the Commission includes four videos that appear to have been
15 disseminated solely for free on YouTube, while two advertisements described below were both
16 posted on YouTube and broadcast for a fee on television. As a threshold jurisdictional matter,
17 FSPA's videos disseminated for free solely on the Internet (here YouTube.com) are exempt from
18 Commission regulation under the well-established Internet exemption. Even if FSPA's Internet-
19 only videos contain express advocacy, they are exempt from the independent expenditure
20 reporting requirements under the Internet exemption. The Internet exemption regulation
21 excludes all costs associated with uncompensated "internet activity" from the definition of
22 "expenditure."¹⁷
23

24 In any event, the FSPA videos posted solely on YouTube contain no express advocacy—
25 they do not even reference Paul's candidacy for President, much less advocate that the viewer
26 vote in a particular manner.
27

28 The Internet videos therefore do not meet the Act's definition of independent
29 expenditures and FSPA was not required to report its payments for them to the Commission. We
30 therefore agreed with the Office of General Counsel's recommendation to find no reason to
31 believe FSPA violated the Act by not filing reports with the Commission disclosing its payments

¹⁵ 11 C.F.R. § 109.10(b). Additional requirements are triggered if a person's independent expenditures aggregate to \$10,000 or more, or if they are made within 20 days of an election and aggregate to \$1,000 or more. See 11 C.F.R. § 109.10(c),(d).

¹⁶ 52 U.S.C. § 30101(17); 11 C.F.R. § 100.16. Independent expenditures must be reported to the Commission in accordance with 52 U.S.C. § 30104.

¹⁷ See 11 C.F.R. § 100.155. Although the language of the exemption focuses specifically on costs related to activities, equipment, and services used to access or distribute information online, the Commission determined in Advisory Opinion 2008-10 (VoterVoter.com) that the cost of creating an internet communication falls within the scope of the exemption "as long as the creator is not also purchasing TV airtime for the ad he or she created." Advisory Op. 2008-10 at 7.

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1 for these videos as independent expenditures.¹⁸

2 **B. There is No Reason to Believe that FSPA's Television Advertisements were**
3 **Independent Expenditures**

4 The Complaint alleges that FSPA produced two videos that were both posted on
5 YouTube and broadcast as television advertisements but did not disclose them to the
6 Commission as "expenditures." Entities that are not political committees need not report their
7 expenditures to the Commission and in part C, below, we explain why FSPA was not a political
8 committee. Persons who are not political committees may be required to disclose their
9 "independent expenditures."¹⁹ An "independent expenditure" is an expenditure by a person for
10 a communication expressly advocating the election or defeat of a clearly identified federal
11 candidate that is not coordinated with a candidate, a candidate's authorized committee, or their
12 agents, or a political party committee or its agents.²⁰

13
14 The advertisements that FSPA aired on television, "Against Sanctions," and
15 "Consequences," do not contain express advocacy.²¹ Both advertisements asserted that Paul
16 supported President Obama's negotiations with Iran, stressed that the possibility of nuclear
17 weapons in Iran posed a grave threat, told viewers that Paul was "wrong and dangerous," and
18 exhorted them to "tell him to stop siding with Obama."²² FSPA asserts that the distribution of
19 the first advertisement, "Against Sanctions," "matched the locations where Senator Paul would
20 be — and who he would be listening to — in April."²³

21
22 "Against Sanctions" contains the following content:²⁴

23

Audio	Video
Narrator: The Senate is considering tough new sanctions on Iran.	Text: "Senate Considering Tough New Negotiations on Iran"

¹⁸ See MUR 6974 (Foundation for a Secure and Prosperous America), Certification. (June 29, 2016). The Commission voted 6-0 to find No Reason to Believe, and split 3-3 on whether to accept the Office of General Council's Factual & Legal Analysis, with Chairman Petersen and Commissioners Hunter and Goodman in favor. *Id.*

¹⁹ See n.14, *supra*.

²⁰ 52 U.S.C. § 30101(17); 11 C.F.R. § 100.16. Independent expenditures must be reported to the Commission in accordance with 52 U.S.C. § 30104.

²¹ See 11 C.F.R. § 100.22.

²² Resp. at 5-7.

²³ *Id.* at 5.

²⁴ See FOUNDATION FOR A SECURE AND PROSPEROUS AMERICA, <http://www.secureandprosperous.com/sanctions.html>.

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President Obama says he'll veto them. And Rand Paul is standing with him.	Images of Obama and Paul, with launching missiles in background. Text: "He'll veto them. Rand Paul is Standing with Him."
Rand Paul supports Obama's negotiations with Iran.	Images of Obama and Paul with protestors in the background. Text: "Rand Paul Supports Obama's Negotiations with Iran."
But he doesn't understand the threat.	Text: "He doesn't understand the THREAT."
Paul: Our national security is not threatened by Iran having one nuclear weapon.	Image of Paul speaking. Text: "Our National Security is NOT THREATENED by Iran HAVING ONE NUCLEAR WEAPON"
Narrator: Rand Paul is wrong . . . and dangerous.	Images of protestors. Text: "RAND PAUL IS WRONG . . . and DANGEROUS."
Tell him to stop siding with Obama.	Images of Paul, Obama, and protestors. Text: "Tell him to STOP Siding with Obama."
Because even one Iranian bomb would be a disaster.	Images of explosions. Text: "One Iranian BOMB . . . Would be a DISASTER." Text: "PAID FOR BY FOUNDATION FOR A SECURE AND PROSPEROUS AMERICA."

1 FSPA aired the second television advertisement, "Consequences," during the August
 2 2015 recess and focused its ad buy on Iowa and New Hampshire.²⁵ FSPA acknowledges in its
 3 Response that it targeted places "where Senator Paul would be" when the advertisement aired
 4 and asserts that during this time "public and congressional debate over the vote on the final deal
 5 with Iran intensified."²⁶

6
 7 "Consequences" contains the following content:²⁷
 8

Audio	Video
Narrator: Rand Paul supported President Obama's negotiations with Iran.	Images of Paul and Obama speaking. Text: "RAND PAUL SUPPORTED NEGOTIATIONS WITH IRAN."
Paul: Well, I'm kind of one of the Senators	Video Clip of Paul interview. Text: "I'm kind

²⁵ Compl. at 3.

²⁶ Resp. at 6.

²⁷ See FOUNDATION FOR A SECURE AND PROSPEROUS AMERICA, <http://www.secureandprosperous.com/consequences.html>.

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<p>who's in favor of negotiations with Iran.</p> <p>I've been a big proponent of negotiation.</p>	<p>of one of the senators in favor of negotiations with Iran.</p> <p>Video Clip of Paul interview. Text: "I've been a big proponent of negotiation."</p>
<p>Narrator: Actions have consequences.</p> <p>Now Obama has made a nuclear deal with Iran, lifting the ballistic missile embargo and giving them a path to nuclear weapons.</p> <p>Call Rand Paul. Tell him to stop siding with Obama and to stand up to Iran.</p>	<p>Text: ACTIONS HAVE CONSEQUENCES.</p> <p>Images of Obama speaking, followed by footage of protestors. Text: "Death to America."</p> <p>Images of missile truck and launch. Text: "LIFTING MISSILE EMBARGO Source: NBC's 'Meet the Press,' 7/9/2015."</p> <p>Image of Paul and Obama. Text: "Stop Supporting Obama's Negotiations AND STOP THIS DEAL Call Sen. Rand Paul 202-224-4343</p> <p>Text: PAID FOR BY FOUNDATION FOR A SECURE AND PROSPEROUS AMERICA</p>

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 2 Although it is apparent that FSPA considered Paul's presidential campaign schedule
 3 when deciding where to target its messages, focusing its ad buys on the early primary states
 4 where Paul was making appearances at the time the advertisements aired, the advertisements
 5 themselves did not reference the presidential election or urge the viewer to vote in any manner.
 6 Instead, the advertisements encourage the viewer to attempt to influence Paul's views and votes
 7 on the Iran sanctions negotiations. Because the advertisements did not urge the election or defeat
 8 of Paul or any other candidate, they did not contain express advocacy and were not independent
 9 expenditures. We therefore agreed with the Office of General Counsel's recommendation to find
 10 no reason to believe FSPA violated the Act by not filing reports with the Commission disclosing
 11 its payments for the ads as independent expenditures.²⁸

²⁸ The Complaint alleges that the videos were "expenditures" that should have been reported to the Commission. This analysis focuses on whether the videos qualify as "independent expenditures," but it is likewise apparent that the videos do not meet that Act's definition of "electioneering communications," which also must be reported to the Commission. Such communications must be made via "broadcast, cable, or satellite" within 60 days before a general election or 30 days before a primary election. 52 U.S.C. § 30104(f)(3); 11 C.F.R. § 100.29(a). The first primary election took place in Iowa on February 1, 2016, long after the last television advertisement was aired in August 2015. See, e.g., Compl. at 3 (quoting FSPA's website regarding the ad buy for "Consequences," set to run from August 7-14, 2015).

1 **C. There is No Reason to Believe that FSPA is a Political Committee**

2 The Complaint refers to FSPA as a “PAC” and an “Independent Expenditure PAC.”²⁹
3 The Complaint thus seems to assume FSPA is as a registered political committee and therefore
4 alleges that its advertisements should have been reported in a routine periodic report.³⁰ FSPA’s
5 Response reasonably recasts this allegation as one that “FSPA should have registered and
6 reported as a political committee” when it ran the advertisements concerning Paul.³¹
7

8 The Act defines a “political committee” as any committee, club, association or other
9 group of persons that receives “contributions” or makes “expenditures” for the purpose of
10 influencing a federal election which aggregate in excess of \$1,000 during a calendar year.³² In
11 *Buckley*, the Supreme Court concluded that defining political committee status “only in terms of
12 [the] amount of annual ‘contributions’ and ‘expenditures’ might be overbroad, reaching “groups
13 engaged purely in issue discussion.”³³ To cure that infirmity, the Court concluded that the term
14 “political committee” “need only encompass organizations that are under the control of a
15 candidate or the major purpose of which is the nomination or election of a candidate.”³⁴ Political
16 committees must organize, register, and report receipts and disbursements to the Commission in
17 accordance with 52 U.S.C. §§ 30102, 30103, and 30104(a).
18

19 FSPA contends that it is not a political committee within the meaning of the Act,³⁵ and
20 the record provides no evidence to the contrary. As addressed above, FSPA’s videos should not
21 be considered “expenditures” made for the purpose of influencing a federal election. And
22 although FSPA solicits donations, the solicitation language highlighted by the Complaint does
23 not suggest that any such donations should be treated as contributions: The Complaint states that
24 FSPA’s website provides information regarding how to donate online or via mail, along with a
25 disclaimer stating that “Contributions to FSPA are not deductible as charitable contributions.
26 There is no limit on the amount that can be contributed, and there is no public disclosure under
27 the tax rules of the identity of donors.”³⁶ This language provides no basis for concluding that

29 Compl. at 1.

30 See *id.* (I am reporting that a PAC did not file for the June Deadline[sic]).

31 Resp. at 1.

32 52 U.S.C. 30101(4)(A).

33 *Buckley*, 424 U.S. at 79.

34 *Id.*

35 Resp. at 11-15.

35 Resp. at 11-15.

36 Compl. at 3. FSPA’s website does not currently appear to provide donation instructions, but it does contain the disclaimer as alleged in the complaint. See FOUNDATION FOR A SECURE AND PROSPEROUS AMERICA, <http://www.secureandprosperous.com/> (last visited Apr. 20, 2016).

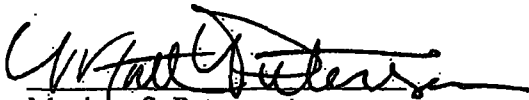
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1 FSPA solicited or received contributions for the purpose of influencing a federal election.³⁷
2 There is no available information to suggest that FSPA met the \$1,000 threshold through other
3 means.³⁸ Further, there is no basis to conclude that FSPA's "major purpose" is the nomination
4 or election of a candidate.

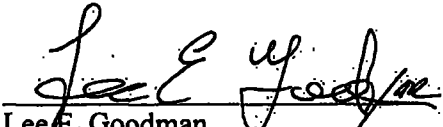
5
6 We therefore voted to approve OGC's recommendation to find no reason to believe that
7 FSPA violated the Act by failing to register and report as a political committee.

8
9 **III. CONCLUSION**

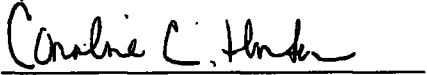
10 For the foregoing reasons, there was no reason to believe that Foundation for a Secure
11 and Prosperous America and Susan Neithamer in her official capacity as treasurer violated the
12 Act. We continue to adhere to the Commission's exemption for political speech disseminated
13 through the Internet, for all the reasons that animated a unanimous adoption of that regulation a
14 decade ago, and we invite our colleagues to join us in faithfully applying the law.

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21 Matthew S. Petersen
22 Chair

Aug. 8, 2016
Date

23
24
25
26
27 
28 Lee E. Goodman
29 Commissioner

8/8/16
Date

30
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34 
35 Caroline C. Hunter
36 Commissioner

8/8/16
Date

³⁷ See also Resp. at 14 (asserting that FSPA received no funds that would qualify as "contributions" within the meaning of the Act, and that the solicitation language on FSPA's website does not "suggest[] that funds given to FSPA will be used to support or defeat candidates or otherwise qualify as regulated 'contributions'").

³⁸ FSPA has not filed any disclosures with the Commission since 2010, when it reported a total of \$111,406.80 in independent expenditures made to support two federal candidates. See FSPA, FEC Form 5, Report of Indep. Expenditures and Contributions (Oct. 15, 2010).

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