



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.<sup>1</sup> 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."<sup>2</sup>

Not even Soros claims the speeches lacked express advocacy.<sup>3</sup> 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..."<sup>4</sup> Another publication reported, after interviewing Soros, that he

<sup>1</sup> 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).

<sup>2</sup> FLA at 6; *id.* Attach. 1 at 7.

<sup>3</sup> FLA at 7.

<sup>4</sup> 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.”<sup>5</sup> 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,”<sup>6</sup> and at other times, Soros described defeating the president as the “central focus of my life” and “a matter of life and death.”<sup>7</sup> He also predicted consequences that would follow a Bush victory or defeat,<sup>8</sup> 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....”<sup>9</sup> He added, “This is the most important election of my lifetime. These aren’t normal times. The ends justify every legal means possible.”<sup>10</sup> 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.’”<sup>11</sup>

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).<sup>12</sup> 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:

<sup>5</sup> 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](http://www.newyorker.com/printables/fact/041018fa_fact3).

<sup>6</sup> 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>.

<sup>7</sup> 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>.

<sup>8</sup> 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.dineshsouza.com/articles/thebillionaireattacks.html>.

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

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

<sup>11</sup> *Id.*

<sup>12</sup> 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.<sup>13</sup>

OGC states that "the costs associated with the speaking tour appear to be independent expenditures that triggered a reporting duty,"<sup>14</sup> 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).<sup>15</sup>

A motion including this finding failed on a 3-to-3 vote on April 18, 2006,<sup>16</sup> 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)<sup>17</sup> – 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;

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<sup>13</sup> FLA at 6 (footnote omitted).

<sup>14</sup> *Id.* at 8.

<sup>15</sup> *Id.*

<sup>16</sup> 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.

<sup>17</sup> 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.<sup>18</sup> 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.));<sup>19</sup> *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

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

<sup>19</sup> 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).<sup>20</sup> While status as a "public communication" has important FECA consequences,<sup>21</sup> 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).<sup>22</sup>

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.<sup>23</sup> 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

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<sup>20</sup> FLA at 7.

<sup>21</sup> 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)).

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

<sup>23</sup> 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).<sup>24</sup> 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.

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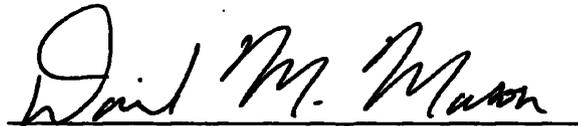
<sup>24</sup> Available at <http://eqs.sdrdc.com/eqsdocs/0000467D.pdf>.

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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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