



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**BEFORE THE FEDERAL ELECTION COMMISSION**

In the Matter of )  
 )  
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.<sup>1</sup> For the following reasons we voted against filing suit<sup>2</sup> 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*.<sup>3</sup> This book brochure marketed Respondent's book by summarizing its themes, listing excerpts from favorable reviews, and providing a website for its purchase.<sup>4</sup>

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 advocating<sup>5</sup> the defeat of President

<sup>1</sup> 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.

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

<sup>3</sup> The brochure was attached to the complaint. Complaint, Ex. C.

<sup>4</sup> Complaint, Ex. C.

<sup>5</sup> 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).

29044223841

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

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.<sup>8</sup> 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.<sup>9</sup> These expenses included \$747,680 for printing, postage, and handling; \$7,932.80 for mailing production management; and \$2,500 for brochure design.<sup>10</sup> The payments appeared on Respondent’s FEC Form 5 filed in a timely manner in September, October, and early November 2004.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> It is the recommendation to authorize a federal lawsuit against Respondent that is the topic of this statement.

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<sup>6</sup> General Counsel’s Brief dated Apr. 30, 2007 at 1.

<sup>7</sup> Complaint, Ex. C.

<sup>8</sup> MUR 5642, Certification dated Apr. 20, 2006.

<sup>9</sup> 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).

<sup>10</sup> General Counsel’s Brief dated Apr. 30, 2007 at 1.

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

<sup>12</sup> MUR 5642, Certification dated Oct. 11, 2007.

<sup>13</sup> 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 expenditures<sup>14</sup> within time periods provided by statute.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> 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,”<sup>18</sup> 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.<sup>19</sup> In fact, this E&J contains no mention or discussion of “mailing list(s)” in the

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

<sup>14</sup> “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).

<sup>15</sup> 2 U.S.C. § 434(c).

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

<sup>17</sup> *Id.*

<sup>18</sup> 2 U.S.C. § 437f(c)(1)(B).

<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup>

In sum, the Commission, by statute and regulation, is prohibited from establishing new regulatory requirements through this or any enforcement matter.<sup>22</sup> 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."<sup>23</sup> 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[.]"<sup>24</sup>

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<sup>20</sup>In 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).

<sup>21</sup> 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.

<sup>22</sup> 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) . . .").

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

<sup>24</sup> 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).<sup>25</sup>

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.<sup>26</sup>

**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.<sup>27</sup> The Commission has broad discretion to determine how to proceed with respect to matters before it, including dismissal.<sup>28</sup> 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.

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<sup>25</sup> Advisory Opinion 2008-14 (Melothe) at 3-4 (emphasis added).

<sup>26</sup> *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).”


<sup>27</sup> *Heckler v. Chaney*, 470 U.S. 821 (1985).


<sup>28</sup> *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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