FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

CONCURRING OPINION

CHAIRMAN SCOTT E. THOMAS
COMMISSIONER DANNY LEE MCDONALD

ADVISORY OPINION 2005-19

At issue in Advisory Opinion 2005-19 was whether a radio program proposed by Paradigm Shift Productions, a for-profit corporation, would be exempt from the prohibition on corporate funding of an "electioneering communication" or a "contribution or expenditure" under the so-called 'press exemption.' The program would involve discussion and/or interviews of federal candidates on occasion. We agreed with the Commission's conclusion that "Paradigm Shift Productions is a press entity," Advisory Opinion 2005-19 at 4, and that its proposed activity was exempt from the relevant statutory restrictions under the press exemption. As we recently pointed out in Advisory Opinion 2005-16,[1] though, qualification for the press exemption is a fact-specific determination. Accordingly, we found the activity at issue permissible because of the specific facts presented by this requestor.

The Federal Election Campaign Act ("FECA" or "the Act") prohibits corporations from making or financing "electioneering communications," which generally include radio or TV communications within 30 days of a primary election or 60 days of a general election that mention a federal candidate. 2 U.S.C. §§ 434(f)(3); 441b(a), (b)(2). The Act also prohibits corporations from making any "contribution or expenditure" from corporate treasury funds in connection with a federal election. 2 U.S.C. § 441b(a). The Act defines a "contribution or expenditure" to include "any direct or indirect payment, . . . loan , advance, . . . or gift of money, or any services, or anything of value . . . in connection with" a federal election. 2 U.S.C. § 441b(b)(2).

The Act, nonetheless, specifically excludes certain press activities from the definition of "electioneering communication" as well as from the definition of "contribution or

[1] *See* Advisory Opinion 2005-16, Concurring Opinion of Chairman Scott E. Thomas and Commissioner Danny Lee McDonald at 4 (November 29, 2005).

expenditure." *See* 2 U.S.C. § 434(f)(3)(B)(i) and 2 U.S.C. § 431(9)(B)(i).[2] Qualification for this press exemption is reserved for:

> 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.

2 U.S.C. § 431(9)(B)(i); *see also* 2 U.S.C. § 434(f)(3)(B)(i). The Supreme Court has warned that the press exemption should be narrowly construed. In rejecting a press exemption claim by an incorporated entity the Court stated, "A contrary position would open the door for those corporations and unions with in-house publications to engage in unlimited spending directly from their treasuries to distribute campaign material to the general public, *thereby eviscerating § 441b's prohibition*." *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 251 (1986)(emphasis added).

The facts presented by requestor, Paradigm Shift Productions, are somewhat different from the traditional situation where a media entity, such as a radio or television station, buys a program from a production company and then itself is responsible for selling advertising for the program. In its request, Paradigm Shift Productions indicates that it is a production company that wishes to buy airtime from KJLL, an Arizona radio station, and then "resell[] some of that airtime for third party advertisements." Advisory Opinion 2005-19 at 4.

Obviously, corporate activity normally covered by the prohibitions of the electioneering communication restriction, § 441b(a) and (b)(2), or the general corporate prohibitions of the Act, § 441b(a), should not be shielded through the artifice of a production company hastily constructed in the heat of a political campaign. For example, a candidate's supporters should not be able to use corporate or labor money to set up a production company that buys blocks of airtime for what is, essentially, an 'infomercial' advocating a federal candidate's election or defeat. In our view, this sort of activity would be akin to traditional political advertising and clearly would be prohibited. The mere fact that a 'production company' was used or that the message was communicated via a broadcasting station would not warrant application of the statutory press exemption.

The request indicates the activity proposed by Paradigm Shift Productions is not of the sort just described. Rather than simply buying airtime, Paradigm Shift Productions will be, in turn, reselling some of that time for third party advertisements. Further, "Paradigm Shift Productions is in the business of producing on a regular basis a radio program that disseminates news stories, commentary and/or editorials." Advisory Opinion 2005-19

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[2] The Act also separately defines "contribution" and "expenditure" at 2 U.S.C. § 431(8) and (9). Because these definitions are built into the definition of "contribution or expenditure" at § 441b(b)(2), the relevant exceptions also are built into this latter term. Thus, the press exemption at § 431(9)(B)(i) applies to § 441b(b)(2). Further, because the statute treats coordinated "expenditures" as "contributions," 2 U.S.C. § 441a(a)(7)(B)(i), the Commission by regulation has built a press exemption into the definition of "contribution" at 11 CFR 100.73.

at 4. Finally, "[n]either Paradigm Shift Productions nor KJLL is in any way owned or controlled by any political party, political committee, or candidate." *Id.* at 2. As a result, it appears there are legitimate commercial considerations underlying both its operation and the purchase of advertising time by its sponsors. Based on the specific facts presented in this advisory opinion request, we agreed with the Commission's conclusion that Paradigm Shift Productions' proposed activity fits within the press exemption.

As a separate matter, we wish to discuss briefly the treatment of certain communications under the electioneering communication provisions and the coordination rules. While a particular communication may, on its face, appear to satisfy the general definition of electioneering communication (because it is a radio or television communication run close to an election that mentions a federal candidate), if it is coordinated with a candidate, it would not qualify as an electioneering communication because of a separate exemption in the law for reportable "expenditures." Specifically, the statute exempts from the definition of electioneering communication "a communication which constitutes an expenditure or independent expenditure under this Act." 2 U.S.C. § 434(f)(3)(B)(ii). The Commission, in turn, by regulation interpreted this exemption to reach an expenditure or independent expenditure "provided that [it] is required to be reported under the Act or Commission regulations." 11 CFR 100.29(c)(3). Because a "coordinated communication" is an in-kind contribution that must be reported by the benefiting candidate as an "expenditure," 11 CFR 109.21(b)(1), it is exempt from the definition of electioneering communication.

In circumstances where the press exemption is not in play, this becomes important because under the in-kind contribution rules the person paying for the communication may be subject to more rigorous funding restrictions. For example, an individual or unincorporated entity would have to adhere to a contribution limit on the amount spent ($2,100 per election on behalf of a federal candidate; 2 U.S.C. § 441a(a)(1)(A); Price Index Increases for Expenditure and Contribution Limitations, 70 Fed. Reg. 11658, 11659 (Mar. 9, 2005)). By contrast, if a communication by such person fits under the electioneering communication rules, there is no overall limit on the amount spent.[3]

We would have preferred that the opinion issued to Paradigm Shift Productions somehow reference these rules so no one would conclude the Commission will disregard

[3] Of course, if the spender is a corporation or labor organization, the communication is prohibited altogether, whether characterized as an electioneering communication or as an in-kind contribution. *See* 2 U.S.C. § 441b(a), (b)(2).

For reporting purposes, the distinction between electioneering communications and in-kind contributions can be significant. For example, an individual making an electioneering communication would have to report such spending if it exceeded $10,000 in a calendar year, 2 U.S.C. § 434(f)(1), but would not have to report such an amount if it were an in-kind contribution. In the latter case, though, the benefiting candidate's committee would have to report the in-kind contribution as if it had received a contribution and made an expenditure. 11 CFR 104.13, 109.21(b).

them in circumstances where the press exemption is not available.[4] Moreover, because of the press exemption from the definition of "contribution," 11 CFR 100.73, the result would have been the same if the facts involving candidate appearances on the radio program were analyzed as coordinated communications. We hope this concurring opinion will help preserve the important legal distinctions in this area.

12/30/05
Date

Scott E. Thomas
Chairman

12/30/05
Date

Danny Lee McDonald
Commissioner

[4] In Advisory Opinion 2004-33, the Commission mistakenly implied that a Ripon Society TV ad in which a federal candidate would appear would constitute an electioneering communication notwithstanding the fact that it would have constituted a coordinated communication required to be reported as an in-kind contribution (and hence as an "expenditure") by the candidate involved. The Commission simply neglected to apply the exception to the electioneering communication definition for "expenditures" that must be reported under the Act. 11 CFR 100.29(c)(3). While some commissioners may see a distinction between "expenditures" that have to be reported by the *spender* (*e.g.*, an in-kind contribution made by a reporting "political committee") and "expenditures" that only would have to be reported by the *benefiting candidate* (*e.g.*, an in-kind contribution by an individual), we see no such distinction in the statute or Commission regulations. As it turned out in the Ripon Society opinion, the group was incorporated, so the communication would have been prohibited whether treated as an electioneering communication or an in-kind contribution. Nonetheless, anticipating other circumstances arising, we believe the Commission should clarify whenever possible that a coordinated communication cannot escape regulation as such through disregard of the 'reportable expenditure' exemption in the electioneering communication rules.