



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
) MUR 6357
 American Crossroads)
)
)

**STATEMENT OF REASONS
OF VICE CHAIR ELLEN L. WEINTRAUB AND
COMMISSIONERS CYNTHIA L. BAUERLY AND STEVEN T. WALTHER**

American Crossroads, an independent expenditure-only political committee ("IEOPC"), spent more than \$450,000 on a television advertisement that supported the candidacy of Rob Portman for U.S. Senate in Ohio. As much as half of the 30-second ad contained footage that the Portman for Senate Committee ("the Portman Committee") had produced, created, and posted online. The Office of General Counsel ("OGC") recommended that the Commission find reason to believe that the use of such footage by American Crossroads in its advertisement qualifies as "republishing" of campaign materials, and that American Crossroads therefore made an excessive in-kind contribution to the Portman Committee by spending over \$450,000 on the ad. We agreed.¹

Under the Act and Commission regulations, republishing, "in whole or *in part*," of any campaign materials prepared by the candidate or his campaign is considered an in-kind contribution. 2 U.S.C. § 441a(a)(7)(B)(iii) (emphasis added); *see also* 11 C.F.R. § 109.23(a). Republishing of campaign materials is akin to paying the campaign's media bills, which the Supreme Court has found is "virtually indistinguishable" from simply

¹ Vice Chair Weintraub and Commissioners Bauerly and Walther voted: (1) to find reason to believe that American Crossroads made an excessive in-kind contribution by republishing campaign material and failed to properly disclose that contribution, in violation of 2 U.S.C. §§ 441a(a) and 434(b); (2) to exercise the Commission's prosecutorial discretion and dismiss the allegation that American Crossroads made contributions in violation of its status as an IEOPC; (3) to seek a civil penalty calculation consistent with the recommended penalty in MUR 5879 (Democratic Congressional Campaign Committee) ("DCCC"). *See* Amended Certification in MUR 6357, dated January 26, 2012. Chair Hunter and Commissioners McGahn and Petersen voted against that motion. In a subsequent vote, Vice Chair Weintraub and Commissioners Bauerly and Walther voted for items (1) and (2) above, and for a lower civil penalty. Chair Hunter and Commissioners McGahn and Petersen voted against. *Id.*

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making a contribution. *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 624 (1996). Given the potential for corruption and the appearance of corruption that could result from unlimited contributions, Congress chose to treat republication, in whole or in part, as an in-kind contribution subject to the contribution limitations and prohibitions of the Act. See 2 U.S.C. §§ 441a, 441b.

The language of both the statute and regulation is simple and unambiguous, and its application to the advertisement produced by American Crossroads is equally straightforward. American Crossroads' ad republished, in part, campaign footage produced by the Portman for Senate Committee. The footage was part of two longer videos produced, created, and posted on public domain internet sources, including YouTube, where a label indicated that it was uploaded by the Portman campaign. The original videos displayed a "Paid for by the Portman Committee" disclaimer. American Crossroads downloaded the videos and used the footage in 10-15 seconds of its 30-second advertisement, along with additional graphics, text, and audio narration. In light of these facts, the funds used to produce and distribute the advertisement are an in-kind contribution made by American Crossroads.² The ad cost American Crossroads over \$450,000,³ which far exceeds the limits on political committees' contributions to candidates. See 2 U.S.C. § 441a.

The facts in this matter closely resemble the facts in MUR 5879 (DCCC). In that matter, an advertisement aired by the DCCC republished footage produced and provided to the DCCC by Harry Mitchell's authorized campaign committee. For about half of the 30-second ad, the backdrop showed footage of Mitchell talking to supporters, along with additional graphics, text, and audio narration added by the DCCC. The Commission voted *unanimously* to find reason to believe that the DCCC made an excessive in-kind contribution by republishing campaign materials.⁴ Like the American Crossroads

² A communication that republishes campaign materials may also be, but is not necessarily, a "coordinated communication," depending on whether it meets the payment, content and conduct prongs of 11 C.F.R. § 109.21. Regardless of whether there has been a coordinated communication, however, republication of campaign materials is always treated as an in-kind contribution *from* the person financing the campaign's republished materials because republication provides something of value to the campaign. See 2 U.S.C. § 441a(a)(7)(B)(iii); 11 C.F.R. § 109.23(a). But the campaign that produced the materials is only considered to have *received* the in-kind contribution if the communication was a coordinated communication. 11 C.F.R. § 109.23(a). Campaigns may not always be aware of, or consent to, republication of their materials, and therefore the regulation do not penalize campaigns that are uninvolved in actions taken to republish their material. Here, for the reasons explained in the First General Counsel's Report ("FGCR"), the Commission unanimously agreed that there was insufficient information to determine whether the conduct prong of section 109.21 was met. See FGCR at 13-18. Accordingly, the Commission found based on the available information that there was no reason to believe that the Portman Committee accepted an excessive in-kind contribution from American Crossroads. See Amended Certification in MUR 6357, dated January 26, 2012.

³ American Crossroads filed an independent expenditure report on August 17, 2010 indicating that the committee spent \$454,341.80 on this advertisement, including \$14,341.80 for production costs and \$440,000 for television placement.

⁴ Commissioners Lenhard, Mason, von Spakovsky, Walther, and Weintraub voted affirmatively to find reason to believe. Certification in MUR 5879, dated October 11, 2007; See also Notification with Factual

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advertisement, which uses a "mash-up" of two longer videos produced, and made available online, by the Portman Committee, the DCCC's advertisement used brief segments of video footage from longer videos produced by the Mitchell Committee and made available to the DCCC.⁵ In our opinion, the Commission's determination to find reason to believe that the DCCC republished the Mitchell Committee's campaign materials was correct in 2007, and we see no reason to reach a contrary conclusion as to American Crossroads in 2012.

American Crossroads argues that the use of footage produced by the Portman Committee is not republication because the footage was not obtained *directly* from the Committee, but rather, was accessed online via a publicly available source. American Crossroads Response at 1-2. While this may be relevant to an analysis of whether the republished campaign materials qualified for the "publicly available source" safe harbor in the Commission's coordinated communications regulations, 11 C.F.R. § 109.21(d)(2), it is not relevant to the analysis of whether it was republished under 11 C.F.R. § 109.23.⁶ In fact, in a 2003 rulemaking the Commission specifically considered but declined to adopt an exception to the republication regulation for materials in the public domain.⁷ See Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 442-3 (Jan. 3, 2003). Reflecting that regulatory choice, section 109.23(a) makes no mention of how campaign material is obtained.

Moreover, section 109.23(b) does contain an exhaustive list of exceptions to the general rule that republication of campaign materials constitutes a contribution. The exceptions include: (1) republication of campaign materials by the candidate or campaign that produced originally them; (2) republication of campaign materials in a communication that advocates for the defeat of the candidate or party that produced

and Legal Analysis, dated October 23, 2007. OGC subsequently recommended that the Commission enter into pre-probable cause cancellation. General Counsel's Report #2 in MUR 5879, dated December 1, 2009. The Commission failed, by a vote of 3-3, to adopt OGC's recommendation, with Commissioners Bauerly, Walther, and Weintraub voting affirmatively, and Commissioners Hunter, McGahn, and Petersen dissenting. Certification in MUR 5879, dated April 15, 2010.

⁵ The one notable difference between the facts in MUR 5879 and the facts in this matter is that the footage aired in the DCCC's ad was aired in an ad by the Mitchell Committee 24-hours later. However, the campaign's subsequent use of the republished footage is not material to the republication analysis.

⁶ In instances where campaign material is obtained with the involvement of a campaign, the separate provision governing coordinated communications will often be triggered, because the communication accompanying the transfer of the material may satisfy one of the conduct prongs of 11 C.F.R. § 109.21(d). See also note 2, above.

⁷ In 2006, the Commission adopted an unrelated exemption for uncompensated internet communications by individuals. 11 C.F.R. §§ 100.94 and 100.155; See also Internet Communications, 71 Fed. Reg. 18589, 18604 (Apr. 12, 2006). However, the Commission specifically noted "that 11 CFR 100.94(e) would not exempt from the definition of 'contribution' any 'public communication' that arises as the result of the republication of such materials. For example, if an individual downloaded a campaign poster from the Internet and then paid to have the poster appear as an advertisement in The New York Times, the advertisement in the New York Times would not be within the exemption of the final rules." *Id.*

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them; (3) republication of campaign materials in a news story, commentary, or editorial which is within the media exemption; (4) republication where the use of the campaign materials consists of a "brief quote of materials that demonstrate a candidate's position as part of a person's expression of its own views," and (5) republication that is paid for by a political party under its coordinated party expenditure authority. 11 C.F.R. § 109.23(b). None of those exceptions provides any basis to believe that the Commission has exempted all publicly available campaign material.

Nonetheless, American Crossroads argues that the Commission has acknowledged, albeit not "formally," that the exception for "brief quote[s]" has the same practical effect as a "fair use" exception. American Crossroads Response at 2. In support of its argument, American Crossroads cites a statement by Commissioners Weintraub and von Spakovsky stating that the exception "appears to contemplate exempting from regulation the incidental use of campaign materials." The statement quoted by American Crossroads was made in regard to MUR 5743 (Betty Sutton), a matter in which a political committee included photographs of a candidate, obtained from the candidate's website, as an incidental element of its mailers. There were eight separate multi-page mailers that generally only used a "head shot" photo of the candidate on one page in each mailer. Nonetheless, the Commission voted 4-2 to send the political committee an admonishment letter and to dismiss the case based on the *de minimis* value of the campaign materials used.⁸ Commissioners Weintraub and von Spakovsky wrote separately to state that they did not think an admonishment letter should have been sent, emphasizing that the size of the photographs was "a small portion of the mailers" and noting a paragraph from the 2003 coordination rulemaking which stated that the use of a "picture or quote" would not constitute a contribution. Statement of Reasons of Commissioners Hona A. von Spakovsky and Ellea L. Weintraub in MUR 5743 at 3-4; See also Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 443 (Jan. 3, 2003).⁹

In contrast, the republished material used by American Crossroads in this matter is not a "brief quote," or a stock photograph of the candidate, and is not an incidental part of American Crossroads' advertisement. To the contrary, the material is a central part of American Crossroads' ad, appearing for 10-15 seconds of the 30-second ad.

⁸ Commissioners Lenhard, Mabac, Tozer, and Walther voted to dismiss with admonishment and Commissioners Weintraub and von Spakovsky dissented. See Amended Certification in MUR 5743 (Betty Sutton), dated December 5, 2006.

⁹ The Commission has recently considered one other matter involving the republication of campaign material. While the Commission was unable to agree in MUR 5996 (Tim Bee) as to whether a group's use of a candidate's photo constituted republication, the Commission decided to exercise its prosecutorial discretion and dismiss the allegations that the group made an excessive or prohibited contribution because any republication was *de minimis* in value. See Factual and Legal Analysis in MUR 5996, dated November 19, 2007. In that matter, the republication consisted of a "head shot" photograph of the candidate obtained from the candidate's website that was included in only two seconds of a 30-second ad. See General Counsel's Report in MUR 5996, dated June 16, 2009. Like MUR 5743 (Betty Sutton), MUR 5996 (Tim Bee) involved only the incidental use of campaign material, and therefore is distinguishable from the American Crossroads ad.

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MUR 6357 (American Crossroads)
Statement of Reasons of Vice Chair Weintraub and Commissioners Bauerly and Walther

The facts of this case demonstrate why the republication of campaign materials is considered a contribution and the importance of enforcing this law. The ad cost only \$14,000 to produce, but American Crossroads spent \$440,000 broadcasting the ad containing Portman's footage. The campaign has unique access to its candidate to film the most favorable footage. One can easily see what a boon this could become to candidates if they need only incur the low cost of producing video and posting it to the internet, and then IEOPCs could download the images and spend hundreds of thousands of dollars broadcasting them to a wider audience, magnifying the impact of the campaign's spending many times over.

The Portman campaign created footage that supports the campaign's message and then made that footage available to the public online. Republication of campaign materials provides a campaign with something of value by subsidizing the campaign's own message. For this reason, Congress found that even partial republication is subject to the contribution limitations of the Act. We cannot choose to disregard statutory provisions of the Act.

2/27/12
Date

Ellen L. Weintraub
Ellen L. Weintraub
Vice Chair

2/27/12
Date

Cynthia L. Bauerly
Cynthia L. Bauerly
Commissioner

2/27/12
Date

Steven T. Walther
Steven T. Walther
Commissioner

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