# King Makers?: Talk Radio, the Media Exemption, and Its Impact on the Washington Political Landscape

### Joshua M. Duffy $^{\dagger}$

The First Amendment protects five freedoms—[those] of religion, speech, press, assembly and petition. All are precious, but why is the political class so piously careful to exempt the press—the journalists who cover the political class—from restrictions the political class writes for others? The question answers itself.\(^1\)

#### I. INTRODUCTION

Political talk radio is a lucrative and influential business. Rush Limbaugh, the most powerful voice in talk radio<sup>2</sup> signed an eight-year contract extension in 2008 for a total value of about \$400 million.<sup>3</sup> Limbaugh's weekly listeners number somewhere between 14 and 20 million.<sup>4</sup> Limbaugh was so influential in the Republican congressional elections of 1994, in which the Republicans took control of the House of Representatives for the first time in 54 years, that the congressional Republicans made him an honorary member of the freshman class.<sup>5</sup>

Limbaugh, and other radio talk show hosts like him throughout the country, exercise their influence in each political season. For instance, in the 2008 presidential primaries, Limbaugh designed a radio campaign to

<sup>&</sup>lt;sup>†</sup> J.D. Candidate, Seattle University School of Law, 2009; B.A., History, University of Washington, 1999. The author would like to thank his primary editor, Ryan Espegard, whose suggestions, encouragement, and dedication made this Comment possible. He would also like to thank Gabriella Wagner and her editing team for their thoughtful and thorough editing. Lastly, the author would like to thank his wife, Rebecca, for her assistance and unending support.

<sup>1.</sup> George Will, Editorial, *Journalism Exemption Is Not Good for the Gander*, SEATTLE POST-INTELLIGENCER, May 24, 2001, at 24, *available at* http://seattlepi.nwsource.com/opinion/24362 will24.shtml.

<sup>2.</sup> Michael Harrison, 2009 Talkers 250 Featuring the Heavy Hundred: The 100 Most Important Radio Talk Show Hosts In America, TALKERS MAGAZINE, http://talkers.com/online/?p=267 (last visited July 15, 2009).

<sup>3.</sup> Brian Stelter, *A Lucrative Deal for Rush Limbaugh*, N.Y. TIMES, July 3, 2008, at C1, *available at* http://www.nytimes.com/2008/07/03/business/media/03radio.html? r=1.

 $<sup>4.\</sup> Zev\ Chafets,\ \textit{Late-Period\ Limbaugh},\ N.Y.\ TIMES\ MAGAZINE,\ July\ 6,\ 2008,\ at\ MM,\ \textit{available\ at\ http://www.nytimes.com/2008/07/06/magazine/06Limbaugh-t.html?pagewanted=2&hp.}$ 

<sup>5.</sup> *Id*.

encourage Republicans to vote for Hillary Clinton in an effort to prolong the bitter primary contest between Clinton and Barack Obama.<sup>6</sup> though the effect of Operation Chaos, as Limbaugh named this campaign, was difficult to measure, Senator John Kerry accused Limbaugh of "tampering with the [Indiana] primary" and causing Obama's defeat in the primary. Since President Obama's election, Limbaugh has continued to speak both for and against a number of political issues.8 For example, Limbaugh endorsed the President's selection of Hillary Clinton as Secretary of State and called it "a brilliant stroke by Obama."

Some have argued that because of its influence upon the electorate and upon particular campaigns, such radio commentary should fall within applicable campaign finance regulations. 10 They argue that if this type of commentary is not regulated as a form of campaign contribution or expenditure, media corporations could become king makers, providing their favored candidates and ballot measure advocates with unlimited access to the airwaves.<sup>11</sup>

The ability to provide an unlimited and undocumented platform for selected issues or candidates would seem to be contrary to the policies behind campaign finance regulations. Such regulations have admirable goals: reducing the cost of political campaigns; equalizing the ability of lesser-funded candidates to be heard; and reducing the possibilities for corruption and the appearance of corruption.<sup>12</sup> In spite of these laudable policies, however, opponents of campaign finance regulations have warned that such laws are subject to abuse and may have the result of chilling or otherwise limiting socially useful and constitutionally protected political speech.<sup>13</sup>

It is here, in the conflict between the competing policies of the First Amendment and campaign finance regulations, that the media exemption exists, protecting talk radio from the reach of those regulations. <sup>14</sup> As the

<sup>6.</sup> Id.

<sup>7.</sup> Id. Ten percent of Democratic primary voters in Indiana admitted to exit pollsters that they were actually Republicans. Id.

<sup>8.</sup> Katie Escherich, Limbaugh Calls Clinton Pick 'Brilliant Stroke' by Obama, ABC NEWS, Dec. 1, 2008, http://www.abcnews.go.com/Entertainment/Politics/story?id=6368280.

<sup>10.</sup> Randall Gaylord & Mike Vaska, Opinion, Even Radio Shock Jocks Must Obey Campaign Laws, SEATTLE TIMES, Nov. 9, 2005, available at http://community.seattletimes.nwsource .com/archive/?date=20051109&slug=vaska09.

<sup>11.</sup> San Juan County v. No New Gas Tax, 157 P.3d 831, 840 n.10 (Wa. 2007).

<sup>12.</sup> Brief of Amicus Curiae ACLU of Washington, San Juan County v. No New Gas Tax, 157 P.3d 831 (Wa. 2007) (No. 77966-0), 2006 WL 1893968.

<sup>13.</sup> Id; see also Cecil C. Kuhne III, The Diminishing Sphere of Political Speech: Implications of an Overbearing Election Bureaucracy, 3 GEO. J.L. & PUB. POL'Y 189 (2005).

<sup>14.</sup> See, e.g., Respondents/Cross-Appellants' (1) Response Brief to NNTG's Appeal; and (2) Opening Brief in Support of Respondents/Cross-Appellants' Cross-Appeal, San Juan County v. No

name suggests, the media exemption, or press exemption, exempts press and media entities from campaign finance regulations on contributions and expenditures.<sup>15</sup>

The conflict between the protection of the press and the goals of campaign finance regulations reached a crescendo in Washington State during the 2006 election cycle, culminating with the Washington State Supreme Court 2007 decision in *San Juan Island v. No New Gas Tax.*<sup>16</sup> The Supreme Court held that there is no limit on the extent to which talk radio hosts may advocate or speak against a particular candidate or issue and that their influence is not subject to any campaign finance restrictions.<sup>17</sup> However, the Federal Elections Commission (FEC), the Washington State Public Disclosure Commission (PDC), and the United States Supreme Court have each taken positions regarding the application of the media exemption that are seemingly at odds with aspects of the court's ruling.

This Comment argues that despite the holding of the No New Gas Tax court, Washington's version of the media exemption should be narrowed in its application to talk show hosts, allowing it to more fully realize the goals of campaign finance regulations. Although it is difficult to draw a line that balances the competing interests of First Amendment protection and campaign finance regulations, it would be possible to narrow the media exemption so that First Amendment rights are protected, while also better achieving the goals of campaign finance reform. This Comment does not suggest that the individual conduct of a radio talk show host should force the removal of the shield of the media exemption and mandate that the broadcasting station disclose such conduct as an inkind contribution or expenditure of a political campaign, subject to the same limits and restrictions as other contributions. Rather, this Comment argues that talk show hosts who do not equally present both sides of campaign issues should file a report with the Washington State Public Disclosure Commission showing the duration and value of the air time provided. This approach would protect the purpose of campaign finance disclosures by revealing the equivalent amount of money an opponent would have to spend to buy air time to promote their views or candidacy, while also protecting free speech interests.<sup>18</sup>

New Gas Tax, 157 P.3d 831 (Wa. 2007) (No. 77966-0), 2005 WL 4049964 [hereinafter "Response Brief"].

<sup>15.</sup> Id.

<sup>16.</sup> San Juan County v. No New Gas Tax, 157 P.3d 831 (Wa. 2007).

<sup>17.</sup> Id. at 841.

<sup>18.</sup> This approach, it appears, was first suggested in a 1999 letter to the PDC. Letter from Vicki L. Rippie, Assistant Director Public Information and Policy Development, Public Disclosure Commission, to Mr. and Mrs. Michael J. Brewer, July 1, 1999, available at

Part II discusses the legislative history of federal and Washington State campaign finance laws and the media exemption. Part III examines the media exemption and its application by the Federal Elections Commission. Part IV examines Washington State's application of the media exemption. Part V examines the ramifications of the decision in *No New Gas Tax* on the media exemption and its application to the conduct of radio talk show hosts. Finally, the argument is made that the media exemption could be narrowed to more effectively achieve the policy objectives of campaign finance regulations while preserving the First Amendment protections of the press.

### II. LEGISLATIVE HISTORY OF FEDERAL AND WASHINGTON STATE CAMPAIGN FINANCE LAW AND THE MEDIA EXEMPTION

Section A of this part looks to the history of campaign finance legislation to illustrate how the desire for disclosure of campaign contributions and expenditures and the desire to limit the influence of money shaped the current campaign regulatory system. Section B examines the media exemption in federal and Washington State campaign finance regulations. Finally, Section C examines the manner in which the media exemption spans the gap between the policy objectives of campaign finance regulations and the protections of the First Amendment.

The purpose of this part is not to detail each phase of the evolutionary process of Washington State and federal campaign finance law. Rather, the purpose is to provide a framework through which to better understand how campaign finance legislation has been an attempt to control the influence of money on the political process and why such regulations are considered necessary. As will be seen, these regulations are often seemingly at odds with constitutional protections of speech and the press. <sup>19</sup> The regulation of funds to support a political campaign, according to the United States Supreme Court, is the equivalent of regulating speech. <sup>20</sup> It is this tension between the policies behind the regulation of campaign finance and the protection of speech and the press that is at the heart of the media exemption.

\_

http://www.pdc.wa.gov/archive/commissionmeetings/meetings/pdfs/2007/09.27.07.SanJuan CountyDocs.pdf, at 47. In its response to the proposal, the author stated that the PDC did not have the legal authority to undertake such action because of the media exemption. *Id.* The response further stated that while not unsympathetic to the concerns raised, the situation was not one into which the PDC could interject any reporting responsibilities under current law. *Id.* at 48.

<sup>19.</sup> The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

<sup>20.</sup> Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 657 (1990).

#### A. A Brief History of Federal Campaign Finance Legislation

Although modern campaign finance legislation is often considered to have started with the 1971 Federal Election Campaign Act (FECA), campaign finance restrictions have existed in the United States since the nineteenth century. The first federal campaign finance legislation was a narrow 1867 law that prohibited federal officers from requesting contributions from Navy Yard workers. Prior to 1971, Congress enacted multiple laws that sought broader regulation of federal campaign financing. The policies behind these laws included a desire to limit contributions to ensure that certain groups did not have a disproportionate influence on elections, a desire to prohibit certain sources of funds for campaign purposes, a desire to control spending, and a desire to require public disclosure of campaign finances to deter abuse and to educate the electorate.

The campaign finance provisions enacted before 1971, however, were largely ineffective at achieving their policy objectives. Not only did the provisions fail to provide an adequate administrative framework to ensure compliance, but the provisions also contained a number of specific flaws that allowed campaigns to avoid the intended regulatory effect. Congress, reacting to the evasion of the campaign finance and disclosure requirements that had accompanied earlier regulations, passed the more stringent disclosure provisions of the FECA in 1971.

The FECA of 1971 initiated fundamental changes in federal campaign finance laws, requiring full disclosure of campaign contributions and expenditures and limiting spending on media advertisements.<sup>28</sup> The Act, signed into law by President Nixon in 1972, was not without its own

<sup>21.</sup> For a detailed history of campaign finance reform before 1971, see Melvin I. Urofsky, Campaign Finance Reform Before 1971, 1 ALB. GOV'T L. REV. 1 (2008).

<sup>22.</sup> The Federal Election Commission, Thirty Year Report (2005), at 3 n.3, http://www.fec.gov/info/publications/30vear.pdf.

<sup>23.</sup> Urofsky, *supra* note 21, at 33. Additionally, by 1959, forty-three states had some requirements for reporting campaign finance expenditures by candidates, their committees, or committees run by the parties, and thirty-one states had some limits on expenditures. *Id.* 

<sup>24.</sup> See id. at 1.

<sup>25.</sup> Id.

<sup>26.</sup> *Id.* at 34. For example, under the 1925 Federal Corrupt Practices Act, a candidate could avoid the spending limit and disclosure requirements altogether because a candidate who claimed to have no knowledge of spending on his behalf was not liable under the act. *Id.* at 20–21.

<sup>27.</sup> Id. at 33.

<sup>28.</sup> *Id.* at 49. The law broadened the definitions of both "contributions" and "expenditures" in order to include almost any donation and cost associated with a political campaign. *Id.* The FECA set up specific rules for reporting contributions and expenditures, requiring that the names of all donors or lenders who gave \$100 or more be reported and requiring that the names of all committee officials be listed. *Id.* Additionally, candidates now had limits on all media spending, both broadcast and print. *Id.* at 50.

shortcomings, however, as it failed to provide for an independent body to monitor and enforce the law.<sup>29</sup> Ironically, these shortcomings were brought into sharp focus by the Watergate scandal surrounding the 1972 presidential election.<sup>30</sup>

Although most of the crimes related to Watergate had little or nothing to do with campaign financing, public outrage grew as the facts of how Nixon had raised and used money became known.<sup>31</sup> The disclosures of Watergate fed the demand for more effective campaign finance reform.<sup>32</sup> The failure of the FECA of 1971 to provide for effective oversight of campaign finance laws was corrected in 1974 with establishment of the Federal Election Commission (FEC) as part of the 1974 Amendments to the FECA.<sup>33</sup> The FEC was given jurisdiction in civil enforcement matters, authority to write regulations, and responsibility for monitoring compliance with the FECA.<sup>34</sup>

In addition to creating the FEC, the 1974 Amendments established strict disclosure requirements for campaign contributions and set specific limits for those donations.<sup>35</sup> Also, the amended FECA prohibits corporations from making contributions or expenditures from their general treasury funds "in connection with" the election of any candidate for federal office.<sup>36</sup> Under the amendments, a contribution or expenditure includes "direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value."<sup>37</sup> The Act defines "contribution" and "expenditure" to include "anything of value" made for the purpose of influencing any election for federal office. <sup>38</sup> The term "anything of value" includes in-kind contributions.<sup>39</sup> Based on the plain meaning of this portion of the Act, it could be argued that a talk radio

<sup>29.</sup> The Federal Election Commission, Thirty Year Report (2005), at 4, http://www.fec.gov/info/publications/30year.pdf.

<sup>30.</sup> Watergate was far more than a botched burglary; it was a worst-case scenario of a badly flawed campaign finance system that failed to forestall corruption or prevent out-and-out criminal activity. President Nixon's reelection committee funneled illegal corporate contributions into slush funds, paid for break-ins, and traded cash for favors. *Id.* at 50–55.

<sup>31.</sup> Id. at 55.

<sup>32.</sup> Id. at 53.

<sup>33.</sup> *Id.* at 56. Although known as amendments, the 1974 measure addressed not only the perceived shortcomings of the 1971 FECA, but it also addressed almost every major provision within the 1971 FECA. *Id. See also*, Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended at 2 U.S.C. §§ 431–55 (2000)).

<sup>34.</sup> Urofsky, supra note 21, at 56.

<sup>35.</sup> *Id.* at 60–61. In addition, the 1974 Amendments to the FECA also instituted the system of public financing of presidential elections that is used today. *Id. See also* 2 U.S.C. §§ 432, 434 (2000)

<sup>36. 2</sup> U.S.C. § 441b(a) (2008).

<sup>37. 2</sup> U.S.C. § 441b(b)(2) (2000).

<sup>38.</sup> Id. § 431(8)–(9).

<sup>39. 11</sup> C.F.R. § 100.52(d)(1) (2005).

host's endorsement of a candidate or solicitation of support for a ballot initiative would be a contribution to the respective campaign because that support would be of value to the candidate.

Key portions of the 1974 amendments were struck down by the Supreme Court in 1976 in its controversial landmark decision, *Buckley v. Valeo.*<sup>40</sup> In *Buckley*, the Supreme Court upheld individual contribution limits to a federal candidate in each election, <sup>41</sup> but it struck down the FECA's limits on expenditures by candidates as violating the First Amendment. <sup>42</sup> The *Buckley* Court held that campaign finance regulations may burden the exercise of political speech but must be narrowly tailored to serve compelling government interests and must "satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression."<sup>43</sup> Untouched by *Buckley*, however, was the media exemption.

Despite the fact that *Buckley* did not specifically address the media exemption, the Court's reasoning seems to provide an avenue to a possible narrowing of the media exemption. Because *Buckley* held that campaign finance regulations may burden the exercise of political speech, the media exemption could be narrowed to better serve the legitimate government interests of campaign finance regulations. This narrowing of the media exemption would be possible so long as it is able to satisfy the exacting scrutiny that would be given to limitations on rights of political expression.

#### B. The Current Washington State and Federal Media Exemption

The federal media exemption, as well as its Washington State incarnation, was intended to preserve the First Amendment protections of the press from the regulatory effect of campaign finance laws.<sup>44</sup> As campaign finance regulations have been amended and augmented in an effort to more fully achieve their policy objectives, those regulations have continued to exempt the media.<sup>45</sup> To understand more fully how

<sup>40.</sup> Buckley v. Valeo, 424 U.S. 1 (1976).

<sup>41.</sup> Id. at 23-25. See also id. at 35-36, 38.

<sup>42.</sup> See id. at 39–51. For a detailed examination of the distinction between contributions and expenditures recognized in *Buckley*, see Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1, 26 (1996).

<sup>43.</sup> *Buckley*, 424 U.S. at 44–45. *See also* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 659 (1990) (recognizing that "the compelling governmental interest in preventing corruption supports the restriction of the influence of political war chests funneled through the corporate form").

<sup>44.</sup> See H.R. REP. No. 93-1239, at 4 (1974); San Juan County v. No New Gas Tax, 157 P.3d 831, 839 (Wa. 2007).

<sup>45.</sup> The federal media exemption excludes from the definition of "expenditure": "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, news-

the media exemption impacts talk radio, as well as to understand what changes would be necessary to effectively realize the policy objectives of campaign finance regulations, it is necessary to examine the federal and Washington State interpretations of the exemption.

The legislative history of the media exemption makes it clear that Congress, in adopting the media exemption, recognized the tension between the First Amendment and campaign finance limits. Congress expressed that its intent was to preserve the media's traditional function of public commentary and not to present legislation to limit or burden the First Amendment freedoms of the press and of association. The exemption would assure the unfettered rights of the newspapers, TV networks, and other media to cover and comment on political campaigns. The United States Supreme Court has also recognized that exempting the media from campaign finance regulations legitimately protects the press's unique role in "informing and educating the public, offering criticism, and providing a forum for discussion and debate."

In an attempt to correct perceived flaws in the campaign finance system, Congress passed the Bipartisan Campaign Reform Act of 2002 (BCRA).<sup>50</sup> The BCRA substantially amended campaign finance regulations by creating new regulations on "electioneering communication."<sup>51</sup> The BCRA adopts a broad definition of electioneering communication in an effort to regulate more of certain types of speech than under the traditional FECA framework.<sup>52</sup> The BCRA also exempts media entities from its electioneering communication definition.<sup>53</sup> While there was little debate about extending the media exemption to the newly formed provisions on electioneering communication,<sup>54</sup> some argue that this extension signified Congress's commitment to the media exemption.<sup>55</sup>

paper, magazine, or other periodical publications, unless such facilities are owned or controlled by any political party, political committee, or candidate." 2 U.S.C. § 431(9)(B)(i) (2000).

<sup>46.</sup> H.R. REP. No. 93-1239, at 4 (1974).

<sup>47.</sup> *Id*.

<sup>48.</sup> *Id*.

<sup>49.</sup> Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 667 (1990) (holding that a state may exempt media entities from otherwise generally applicable campaign finance regulations).

<sup>50.</sup> Christopher P. Zubowicz, *The New Press Corps: Applying the Federal Election Campaign Act's Press Exemption to Online Political Speech*, 9 VA. J.L. & TECH. 6, 8 (2004).

<sup>51.</sup> Id.

<sup>52.</sup> Id.

<sup>53.</sup> *Id*.

<sup>54.</sup> See id. at 94 ("It was simply understood [by Congress] that the media should continue to get special protection in order to ensure that they are unfettered in the exercise of their First Amendment rights.").

<sup>55.</sup> Joshua L. Shapiro, Comment, Corporate Media Power, Corruption, and the Media Exemption, 55 EMORY L.J. 161, 173–174 (2006).

Washington State campaign finance regulations have largely mirrored federal legislative intent and policy. In 1972, Washington voters passed Initiative 276, later enacted as Washington Revised Code § 42.17, which regulates the financing of political campaigns. In adopting Initiative 276, Washington voters consciously chose to implement campaign contribution disclosure requirements similar to those of the 1971 FECA. The purpose of the measure was to promote "public confidence in government at all levels" through a system of compelled disclosure of campaign contributions and expenditures. Additionally, the public's right to know the financing of political campaigns and the financial affairs of elected officials and candidates was deemed to far outweigh "any right that these matters remain secret and private."

In 1992, Washington voters approved Initiative 134, the Fair Campaign Practices Act (FCPA), which amended Washington Revised Code § 42.17.<sup>60</sup> The FCPA supplemented the previously existing disclosure requirements with certain limitations on campaign contributions and expenditures.<sup>61</sup> The FCPA defines "contribution," in relevant part, as

[a] loan, gift, deposit, subscription, forgiveness of indebtedness, donation, advance, pledge, payment, transfer of funds between political committees, or anything of value, including personal and professional services for less than full consideration;<sup>62</sup>

The financing by a person of the dissemination, distribution, or republication, in whole or in part, of broadcast, written, graphic, or other form of political advertising or electioneering communication

<sup>56.</sup> San Juan County v. No New Gas Tax, 157 P.3d 831, 834 (Wa. 2007). See also 1973 Wash. Sess. Laws. ch. 1 § 1.

<sup>57.</sup> WASH. REV. CODE § 42.17.010(8) (2008). In adopting Initiative 276, Washington voters declared that the "concepts of disclosure and limitation of election campaign financing are established by the passage of the [FECA] of 1971 by the Congress of the United States, and in consequence thereof, it is desirable to have implementing legislation at the state level." *Id.* 

<sup>58.</sup> Id. § 42.17.010(1),(5) (2008).

<sup>59.</sup> Id. § 42.17.010(10) (2008). See also Fritz v. Gorton, 517 P.2d 911 (1974). In Fritz, the Washington Supreme Court affirmed the FECA against free speech and other constitutional challenges. The court noted: "The electorate . . . has the right to know of the sources and magnitude of financial and persuasional influences upon government." Id. at 931. In rejecting the challenge, the court said: "We accept as self-evident . . . that the right to receive information is the fundamental counterpart of the right of free speech. . . . [The Act] seeks to enlarge the information base upon which the electorate makes its decisions." Id. at 924–25.

<sup>60.</sup> No New Gas Tax, 157 P.3d at 834. See also 1993 Wash. Sess. Laws. ch. 2 §§ 1–36.

<sup>61.</sup> Among other changes mandated by Initiative 134, the FCPA made it illegal to either give or receive a contribution of more than \$5,000 to any campaign within twenty-one days of an election. WASH. REV. CODE § 42.17.105(8) (2008).

<sup>62.</sup> Id. § 42.17.020 (15)(a)(i) (2008).

prepared by a candidate, a political committee, or its authorized agent. <sup>63</sup>

At the same time, however, the definition of "contribution" was amended to expressly exempt certain press activities:

"Contribution" does not include: . . . A news item, feature, commentary or editorial in a regularly scheduled news medium that is of primary interest to the general public, that is in a news medium controlled by a person whose business is that news medium, and that is not controlled by a candidate or political committee. 64

Following the passage of the BCRA and the United States Supreme Court's decision upholding the new federal regulations of "electioneering communication," the Washington legislature adopted similar regulations of "electioneering communications" and likewise incorporated the media exemption for

[a] news item, feature, commentary, or editorial in a regularly scheduled news medium that is: (i) Of primary interest to the general public; (ii) In a news medium controlled by a person whose business is that news medium; and (iii) Not a medium controlled by a candidate or a political committee.<sup>66</sup>

Although the federal and Washington State media exemptions have textual differences, Washington's statute expressly incorporated the federal courts' construction of the media exemption. The Washington State Supreme Court found that by adopting the federal courts' construction, the voters intended the state media exemption to be functionally equivalent to, and to be interpreted in accordance with, the federal media exemption. The washington state of the sta

## C. Protection of the Press and the Interpretation of the Media Exemption

The media exemption spans the gap between speech protected by the First Amendment and the regulation of campaign contributions and expenditures. Because the media's role in society is unique, courts have been steadfast in their protection of the press. Such steadfast protection,

<sup>63.</sup> Id. § 42.17.020(15)(a)(iii) (2008).

<sup>64.</sup> Id. § 42.17.020(15)(b)(iv) (2008).

<sup>65.</sup> McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003).

<sup>66.</sup> WASH. REV. CODE § 42.17.020(21)(c) (2008). See also supra note 38.

<sup>67.</sup> San Juan County v. No New Gas Tax, 157 P.3d 831, 838 (Wa. 2007).

<sup>68.</sup> *Id.* The state media exemption differs from the federal media exemption in that the language "distributed through the facilities of" any media source is replaced with "in a regularly scheduled news medium that is of primary interest to the general public." *Id.*. *See also* 2 U.S.C. § 431(9)(B)(i) (2000).

however, does not mean that the media exemption is the necessary means of maintaining such protection. While recognizing the necessary function of the press, the courts have repeatedly indicated that certain limits would be permissible.

The Supreme Court has championed the role of the press as fundamental to the protection of free society. In *New York Times v. Sullivan*, <sup>69</sup> for example, the Court stated that there is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." Two years later, in *Mills v. Alabama*, <sup>71</sup> the Court held that "[s]uppression of the right of the press to praise or criticize government agents and to clamor and contend for or against change, . . . muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free." Any efforts that might limit the media function, whether by means of campaign finance regulations or some other mechanism, must therefore be prevented from impinging on the constitutional standing of the press. <sup>73</sup>

The constitutionality of the media exemption is premised upon the special role of press endorsements during elections. In *Austin v. Michigan Chamber of Commerce*, for example, the Court examined a Michigan campaign finance law that barred corporations from engaging in campaign expenditures from corporate treasury funds in support of or in opposition to candidates for state office. The plaintiffs argued that the law's ban on corporate campaign expenditures was a violation of the

<sup>69.</sup> New York Times v. Sullivan, 376 U.S. 254 (1964).

<sup>70.</sup> Id. at 270.

<sup>71.</sup> Mills v. Alabama, 384 U.S. 214, (1966). In *Mills*, Birmingham held an election regarding which form of city government the voters preferred. *Id.* at 215. The editor of a local paper was arrested after he ran an editorial on election day supporting a mayor-council form of government. *Id.* at 215–16.

<sup>72.</sup> Id. at 219

<sup>73.</sup> It is worth noting, however, that the framers did not design, nor has the United States Supreme Court recognized, a protection for the press that extends beyond the protection of other speech. In his concurring opinion in *First National Bank v. Bellotti*, 435 U.S. 756 (1978), for example, Chief Justice Burger stated that "the history of the [Press] Clause does not suggest that the authors contemplated a 'special' or 'institutional' privilege." *Id.* at 798. *See also* Richard L. Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 TEX. L. REV. 1627, 1657–58 (1999) (noting that "there is scant evidence that the framers' original intent in writing the Constitution was to give the media greater constitutional protection through the Press Clause than society was to receive through the Speech Clause of the First Amendment").

<sup>74.</sup> Hasen, supra note 73, at 1658.

<sup>75.</sup> Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990).

<sup>76.</sup> Id. at 654.

Equal Protection Clause because the law contained a media exemption very similar to the FECA's media exemption.<sup>77</sup>

The Court noted, however, that it had consistently recognized the unique role of the press. The Court held that "[a]lthough all corporations enjoy the same state-conferred benefits inherent in the corporate form, media corporations differ significantly from other corporations in that their resources are devoted to the collection of information and its dissemination to the public." Writing for the majority, Justice Marshall noted that without the media exemption, the Act's definition of "expenditure" could conceivably be interpreted to encompass election related news stories and editorials.<sup>79</sup> Therefore, the Court found that although the Act's restriction on independent expenditures might otherwise discourage news broadcasters or publishers from serving their crucial societal role, the media exemption ensures that the Act does not hinder or prevent the institutional press from reporting on, and publishing editorials about, newsworthy events.<sup>80</sup> Justice Marshall continued: "Although the press' unique societal role may not entitle the press to greater protection under the Constitution, it does provide a compelling reason for the State to exempt media corporations from the scope of political expenditure limitations."81

While Marshall's discussion of the unique role of the press suggests that the media's exemption from campaign finance restrictions might be a constitutional requirement, 82 the Court noted that regulations that impinge on the right to engage in political expression may be permissible if narrowly tailored to serve a compelling governmental interest. 83 Additionally, Justice Scalia, in his dissent in *Austin*, suggested that it would be constitutional to end the media exemption entirely. Justice Scalia

<sup>77.</sup> *Id.* at 666. The Michigan law regulating corporate expenditures excluded from the definition of an expenditure any "expenditure by a broadcasting station, newspaper, magazine, or other periodical or publication of any news story, commentary, or editorial in support of or opposition to a candidate for elective office . . . in the regular course of publication or broadcasting." Mich. Comp. Laws Ann. 169.206(3)(d) (West 1989). The court, after quoting this provision, noted that the FECA "contains a similar exemption." *Austin*, 494 U.S. at 667 n.5.

<sup>78.</sup> Austin, 494 U.S. at 667.

<sup>79.</sup> Id. at 668.

<sup>80.</sup> *Id*.

<sup>81.</sup> *Id.* It should be noted that the narrowing of the media exemption suggested by this Comment would continue to exempt media entities from the scope of any political contribution or expenditure limitations.

<sup>82.</sup> See Hasen, supra note 73, at 1651–52.

<sup>83.</sup> Austin, 494 U.S. at 666. The Court specifically held that Michigan's decision to regulate only corporations is precisely tailored to serve the compelling state interest of eliminating from the political process the corrosive effect of political "war chests" amassed with the aid of the legal advantages given to corporations. *Id.* 

noted that the Court did not hold that the media exception was constitutionally required, only permissible. 84

In his dissent, Justice Scalia noted the media exemption's inherent contradictions to the purposes of campaign finance regulations. <sup>85</sup> He noted that while the majority found Michigan's campaign regulations constitutional because of the compelling state need to prevent amassed corporate wealth from skewing the political debate, the unique role of the press would seem to provide an especially strong reason to include it in Michigan's corporate restrictions. <sup>86</sup>

Amassed corporate wealth that regularly sits astride the ordinary channels of information is much more likely to produce [too much of one point of view] than amassed corporate wealth that is generally busy making money elsewhere. Such media corporations not only have vastly greater power to perpetrate the evil of overinforming, they also have vastly greater opportunity.<sup>87</sup>

While Justice Scalia wrote for the dissenting justices, his comments ought to give pause as the application of the media exemption to talk radio hosts is considered. As Justice Scalia noted, one of the purposes of campaign finance regulations is to prevent the amassed wealth of corporations from skewing political debate. <sup>88</sup> One must also assume that the amassed power of the media, and of talk radio in particular, is also able to skew political debate.

Although *Austin* reached the Court long before *McConnell v. Federal Election Commission*, <sup>89</sup> the justices' rationale in *Austin* seemed to remain intact even after the BCRA. <sup>90</sup> While the BCRA adopted a broad definition of electioneering communication to regulate even more speech than under the traditional FECA framework, the Court in *McConnell* 

<sup>84.</sup> *Id.* at 691 (Scalia, J., dissenting) ("The Court today holds merely that media corporations may be excluded from Michigan law, not that they must be."). Justice Scalia stated that "[T]he Court's holding on [the media exemption] must be put in the following unencouraging form: 'Although the press' unique societal role may not entitle the press to greater protection under the Constitution, . . . it does provide a compelling reason for the State to exempt media corporations from the scope of political expenditure limitations.' One must hope, I suppose, that Michigan will continue to provide this generous and voluntary exemption." *Id.* at 691–92.

<sup>85.</sup> Id. at 691.

<sup>86.</sup> Id. at 690-91.

<sup>87.</sup> Id. at 691.

<sup>88.</sup> Id. at 690-91.

<sup>89.</sup> McConnell v. Federal Election Commission, 540 U.S. 93 (2003).

<sup>90.</sup> Bipartisan Campaign Reform Act of 2002, PUB. L. No. 107-155, 116 Stat. 81, 88-90 (codified at 2 U.S.C. § 431 (Supp. III 2003)). *See also* Zubowicz, *supra* note 50, at 8 (noting that the broad aims of the BCRA were to reduce the perceived influence of non-federal funds on federal elections, to regulate certain electioneering communications, and to alter the government's approach to certain coordinated expenditures).

continued to exempt the media from such restrictions. 91 Justices Stevens and O'Connor, writing for the majority, dismissed a challenge that the BCRA was fatally under-inclusive because the electioneering communication provisions discriminated in favor of media corporations and gave "free reign to media companies to engage in speech without resort to PAC money."92 They explained that Congress had the authority to act incrementally in regulating this area. 93 The majority cited Austin for the proposition that a valid distinction exists between corporations that are part of the media industry and other corporations that are not involved in the regular business of imparting news to the public. 94 The Court, while affirming Congress's ability to protect the political speech expressed in media commentary, did not state, however, that such a distinction was constitutionally required. 95 Instead, the Court echoed Austin, indicating that it did not consider the media exemption a constitutional requirement, that such an exemption was permissible, 96 and that Congress had the authority to proceed in incremental steps in the area of campaign finance regulation.9

As was the case with *Buckley*, the Court in *McConnell* seems to have left the door open to a possible narrowing of the media exemption by Congress. Because the exemption is permissible, but not constitutionally required, Congress could narrow the exemption to better achieve the goals of campaign finance regulations without chilling political speech. The Washington State Supreme Court, as will be discussed in Part V, chose to take the further step of directly stating that a narrower exception would be within the power of the legislature. <sup>98</sup>

#### IV. THE MEDIA EXEMPTION AND ITS APPLICATION BY THE FEC

Given the protection of speech and of the press within the First Amendment, and given the competing policy objectives of campaign finance regulations, it is necessary to understand when the media exemption is applicable to what would otherwise be a campaign contribution. If a media outlet is acting within the requirements of the exemption, conduct that would otherwise be a violation of campaign finance regulations is protected. By looking at the manner in which the FEC determines the applicability of the media exemption, it is possible to understand why

<sup>91.</sup> McConnell, 540 U.S. at 208.

<sup>92.</sup> Id.

<sup>93.</sup> See id.

<sup>94.</sup> *Id*.

<sup>95.</sup> See McConnell, 540 U.S. 93.

<sup>96.</sup> Id. at 108.

<sup>97.</sup> Id. at 158.

<sup>98.</sup> San Juan County v. No New Gas Tax, 157 P.3d 831, 840 n.10 (Wa. 2007).

talk radio commentary can present particular challenges to the application of the exemption. Also, an examination of the aspects of particular instances in which the FEC applied the exemption helps in understanding how a narrowing of the media exemption would better serve the policy objectives of campaign finance regulations.

To determine whether the media exemption applies in individual cases, the FEC must evaluate whether the entity engaging in the activity is a media entity within the meaning of the FECA and the FEC's regulations. As previously noted, the FECA's media exemption applies to "any broadcasting station, newspaper, magazine, or other periodical publication."

After the FEC concludes that there is a qualifying press entity for the purposes of the exemption, the Commission must determine whether the activity at issue was a legitimate press function. To answer this question, the FEC considers two criteria: (1) whether the press entity is owned or controlled by a political party, political committee, or candidate; and (2) whether the press entity is operating within its legitimate press function. It is media entity is independent of any political party, committee, or candidate, and if it was acting as a legitimate media entity at the time of the alleged violation, it is exempt from the FECA's restrictions on corporate contributions and expenditures, and the FEC's inquiry should end. In applying this analysis, the FEC considers whether the entity's materials are available to the general public and are comparable in form to those ordinarily issued by the entity."

<sup>99.</sup> See, e.g., FEC, Advisory Op. 2005-16, 5 (2005), available at http://saos.nictusa.com/saos/searchao. From this link, enter the Advisory Opinion number in the "Go to AO number" box. See also FEC, Advisory Op. 2004-07 (2004), available at http://saos.nictusa.com/saos/searchao.

<sup>100. 2</sup> U.S.C. § 431(9)(B)(i) (2000). For a comprehensive look at the FEC process for determining a press entity, see *Fed. Election Comm'n v. Mass. Citizens For Life, Inc.*, 479 U.S. 238 (1986).

<sup>101.</sup> Fed. Election Comm'n v. Phillips Publ'g, Inc., 517 F. Supp. 1308, 1312-13 (D.D.C. 1981).

<sup>102.</sup> See, e.g., FEC, Advisory Op. 2005-16, 5 (2005), available at http://saos.nictusa.com/saos/searchao.

<sup>103.</sup> See id.

<sup>104.</sup> *Id.* This test was first promulgated in *Reader's Digest Ass'n v. FEC*, 509 F. Supp. 1210 (1981). The district court noted that "[n]o explicit reference is to be found in the statue to this two-step process. It seems to me, however, to be the necessary accommodation between, on the one hand, the Commission's duty to investigate possible violations and, on the other, the statutory exemption for the press combined with a First Amendment distaste for government investigations of press functions." *Id.* at 1215. *See also* Fed. Election Comm'n v. Phillips Publ'g, Inc., 517 F. Supp 1308 (D.D.C. 1981). The court in *Phillips* outlined a similar two-part test to determine whether the media exemption is available with respect to a particular communication. The court explained:

<sup>[</sup>T]he initial inquiry is limited to whether the press entity is owned or controlled by a political party or candidate and whether the press entity was acting as a press entity with respect to the conduct in question. If the press entity is not owned or controlled by a political party of the conduct in question.

#### A. Political Control and Legitimate Press Function

To be exempt from contribution or expenditure requirements under the media exemption, an organization must be engaged in legitimate media activity. This does not mean, however, that for the exemption to apply, the press entity must function exactly as it usually does, for nor does legitimate media activity depend on an objective presentation. The Commission that it is a genuine press entity that is not under political control, then the commission will not subject its conduct to rigorous scrutiny as to the nature of the press function and likely will conclude that the entity's activity is covered by the exemption. The FEC will determine that the exemption does not apply only if it is clear that the conduct of the press entity was inappropriate.

#### B. In re Dave Ross

In an analysis of the FEC's application of the media exemption to talk radio hosts involved in political campaigns, the tension between the policy objectives of campaign finance regulations and the protections of the First Amendment is plainly apparent. It is clear that talk radio hosts could engage in conduct that would otherwise be subject to campaign finance regulations but for the media exemption. It is equally apparent, however, that certain conduct should continue to be protected by the media exemption because it does not conflict with the goals of campaign finance legislation. In these cases, the application of the media exemption successfully balances the competing interest of campaign finance regulations with the First Amendment protections.

The FEC has received many complaints and has issued a number of advisory opinions that set out the breadth of the federal media exemption

cal party or candidate and is acting as a press entity, the FEC lacks subject matter jurisdiction and is barred from investigating the subject matter of the complaint. *Id.* at 1313.

<sup>105.</sup> McConnell v. Fed. Election Comm'n, 540 U.S. 93, 208 (2003).

<sup>106.</sup> Dave Ross, MUR 5555, 4 (FEC Mar. 17, 2006) (statement of reasons), available at http://eqs.sdrdc.com/eqsdocs/000050CC.pdf. See also Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 251 (1986) (holding that the press exemption did not apply to a special edition of a newsletter because it was not comparable to any single issue of newsletter).

<sup>107.</sup> FEC, Advisory Op. 2005-19, 5 (2005), available at http://saos.nictusa.com/saos/searchao. Therefore, a media entity otherwise eligible for the media exemption would not lose its eligibility merely because of a lack of objectivity in a news story, commentary, or editorial, even if the content expressly advocates the election or defeat of a clearly identified candidate for federal office.

<sup>108.</sup> Zubowicz, supra note 50, at 19.

<sup>109.</sup> Id.

as applied to broadcast media. The Commission has also specifically addressed the issue of whether the on-air conduct of talk radio hosts, and talk radio station ownership, falls within the media exemption, or whether such conduct should be considered an in-kind contribution or expenditure. An understanding of the rationale used by the FEC aids not only in the understanding of the application of the media exemption in Washington State, but also aids in an understanding of how and why the media exemption might be narrowed for certain on-air commentary.

In a recent Washington State case, the FEC issued an opinion about the on-air conduct of a radio talk show host who was also a congressional candidate. Dave Ross, host of a talk show on radio station KIRO-AM in Seattle, Washington, was a candidate for Washington's Eighth Congressional District in 2004. The Washington State Republican Party filed a complaint with the FEC, alleging that KIRO-AM knowingly and willfully made, and Ross and his campaign committee knowingly and willfully accepted, illegal in-kind contributions. The FEC concluded that the media exemption applied, and it found no reason to believe that the FECA had been violated.

In that case, Ross had hosted "The Dave Ross Show" on KIRO-AM since 1987. The show aired in Washington's Eighth Congressional District five days a week for three hours a day. On it, Ross discussed news, current events, politics, entertainment, technology, and other sub-

<sup>110.</sup> See, e.g., FEC, Advisory Op. 2000-13 (2000), available at http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=656 (considering whether the media exemption applied to gavel-to-gavel coverage of the Republican and Democratic national conventions; concluding that "gavel-to gavel-coverage of national party conventions that includes interviews and commentary by journalists, by an entity that covers governmental and political affairs, readily fits into the categories of news story and commentary set out in the Act"). See also, FEC, Advisory Op. 2005-19 (2005), available at http://saos.nictusa.com/saos/searchao. The FEC considered three scenarios: (1) a program host mentions a candidate on the air, (2) a candidate is interviewed on a program, and (3) a person calling into a program mentions a candidate. The FEC concluded that all of these activities "would be legitimate press functions; [and] would come within the press exemption[.]" Id.

<sup>111.</sup> See, e.g., Dave Ross, MUR 5555, (FEC, Jan. 10, 2006) (First General Counsel's Report), available at http://eqs.sdrdc.com/eqsdocs/000050C7.pdf.

<sup>112.</sup> Id.

<sup>113.</sup> Id. at 2.

<sup>114.</sup> Id. at 1.

<sup>115.</sup> Dave Ross, MUR 5555, 1 (FEC Mar. 17, 2006) (statement of reasons), available at http://eqs.sdrdc.com/eqsdocs/000050CC.pdf.

<sup>116.</sup> The Dave Ross Show, http://www.mynorthwest.com/?sid=21762&nid=130 (last visited Mar. 23, 2009). Dave Ross has also had a daily commentary on CBS Radio Network since 1983, which is heard nationally. He also substitutes regularly for Charles Osgood on "The Osgood File" on CBS News Radio, which is carried on approximately 240 stations nationwide, including KIRO-AM. *Id.* 

<sup>117.</sup> Dave Ross, MUR 5555, 4 (FEC, Nov. 19, 2004) (Joint Response of Friends of Dave Ross et al. to the Complaint by Chris Vance), available at http://eqs.sdrdc.com/eqsdocs/000050C2.pdf.

jects. 118 The complaint alleged that on May 5, 2004, during his show, Ross first publicly contemplated a run for Congress by stating: "I can just assume that [State Democratic Party Chairman Paul Berendt] thinks my name recognition would be a good thing." Additionally, between May 5th and May 20th, 2004, a guest host on the Dave Ross Show asked listeners whether Ross should run for Congress. An online survey on the same topic ran on the station's website; the website also reportedly "heralded Ross's candidacy with headlines stating 'Dave for Congress' and a prominent link to his campaign website." Although Ross announced his decision to run for Congress on May 20, 2004, he remained on the air and continued to host The Dave Ross Show until July 23, 2004. 121 From the time Ross stopped hosting his show, through the general election in November 2004, KIRO-AM continued referring to Ross' daily time slot as "The Dave Ross Show," using a guest host to run it. 122 On September 14, 2004, Dave Ross won the primary election. The next day, the Dave Ross Show featured Dave Ross as a special guest to discuss his primary victory. 123

In its evaluation of the facts alleged in the complaint and answer, the FEC looked specifically at the alleged corporate contributions and the media exemption. The FEC concluded that the broadcasting station is the type of media entity covered by the media exemption and is not owned or controlled by a political party, committee or candidate. The FEC concluded that the sole question, then, was whether the station was acting within its legitimate press function.

The FEC found that KIRO-AM was acting within its legitimate press function. 127 The Commission found that the format, distribution,

<sup>118.</sup> Id.

<sup>119.</sup> Dave Ross, MUR 5555, 2 (FEC, Oct. 5, 2004) (Complaint Against Mr. Dave Ross et al.), available at http://eqs.sdrdc.com/eqsdocs/000050BF.pdf.

<sup>120.</sup> Dave Ross, MUR 5555, 3, (FEC, Jan. 10, 2006) (First General Counsel's Report), available at http://eqs.sdrdc.com/eqsdocs/000050C7.pdf.

<sup>121.</sup> *Id.* The FEC, in its First General Counsel's Report, did note, however, that Ross announced his candidacy during an event called "Battle of the Talk Show Hosts," broadcast on KIRO-AM in the evening of May 20, 2004. The station's response to the FEC stated that Ross's announcement was in response to a direct question asked of him by the emcee of the evening concerning rumors she had heard. Neither KIRO nor [its corporate owner] had prior knowledge that such an event would occur. *Id.* at 3 n.2. Ross officially became a candidate for federal office on June 2, 2004, when he received contributions aggregating in excess of \$5,000. *Id.* at 3 n.3.

<sup>122.</sup> *Id.* at 3. Also, during August 2004, Ross gave nineteen commentary pieces for CBS News radio, which may have aired in Washington's Eighth Congressional district on CBS affiliate KIRO-AM. *Id.* at 3–4.

<sup>123.</sup> Id. at 4.

<sup>124.</sup> Id. at 5.

<sup>125.</sup> Id.

<sup>126.</sup> Id.

<sup>127.</sup> Id. at 7.

and production of the show were not altered during the period in question. In addition to avoiding discussion of his candidacy, Mr. Ross specifically avoided any solicitation of or response to any questions by listeners regarding his candidacy during the call-in portions of the show. Additionally, the FEC noted that other on-air personalities were also given strict directives by the station, prohibiting them from referring to Ross's campaign on the air. Regarding the broadcasts of the Dave Ross Show with guest hosts, the Commission found no indication that those shows were anything other than regularly scheduled programs of news, editorials, or commentary.

The FEC also found that KIRO's broadcasts of the Dave Ross Show within the electioneer communications period<sup>132</sup> qualified for the media exemption for electioneering communications under the same rationale by which they qualified for the media exemption from the definition of "expenditure." <sup>133</sup>

<sup>128.</sup> *Id.* Although the Commission stated that the issue in *Ross* did not turn on the question of whether anything about Ross's talk show changed after Ross became a candidate and stayed on the air, the FEC found little indication that anything about the Dave Ross Show changed after Ross became a candidate and stayed on the air. *See* Dave Ross, MUR 5555, 5 (FEC Mar. 17, 2006) (statement of reasons), *available at* http://eqs.sdrdc.com/eqsdocs/000050CC.pdf, and Dave Ross, MUR 5555, 6, (FEC, Jan. 10, 2006) (First General Counsel's Report), *available at* http://eqs.sdrdc.com/eqsdocs/000050C7.pdf.

<sup>129.</sup> Dave Ross, MUR 5555, 7, (FEC, Jan. 10, 2006) (First General Counsel's Report), available at http://eqs.sdrdc.com/eqsdocs/000050C7.pdf.

<sup>130.</sup> *Id.* As to the two instances that Ross did in fact reference his candidacy or potential candidacy (one statement that he was considering running, and a second acknowledging that he was running), the FEC concluded that "these incidents do not appear to take either [of those two specific shows] outside the station's legitimate press function." *Id.* With regard to the poll taken on the KIRO website asking whether Ross should become a candidate, the Commission also found that to fall within the media exemption. *Id.* at 8. Because the show regularly featured discussions about news, politics, and current events, "it falls within the range of what qualifies as 'legitimate press activity' for such a show to post on its web site surveys regarding issues in politics, current events, and popular culture." *Id.* The FEC concluded that because there was no apparent attempt to use the results in an actual determination of Ross' possible candidacy, the poll should not be treated as a "testing the waters" contribution or expenditure. *Id.* at 8–9. *See also* 11 C.F.R. §§ 100.131(a), 101.3 (2003). It is worth noting that the FEC found that the same media exemption analysis it applied with regard to Ross's appearance on KIRO-AM also applied to his appearance on CBS News Radio. Dave Ross, MUR 5555, 10, (FEC, Jan. 10, 2006) (First General Counsel's Report), *available at* http://egs.sdrdc.com/egsdocs/000050C7.pdf.

<sup>131.</sup> Dave Ross, MUR 5555, 8, (FEC, Jan. 10, 2006) (First General Counsel's Report), available at http://eqs.sdrdc.com/eqsdocs/000050C7.pdf.

<sup>132.</sup> An electioneering communication occurs where a broadcast, cable, or satellite communication targeted to the relevant electorate clearly identifies a federal candidate within thirty days of a primary election or sixty days of a general election. 11 C.F.R. § 100.29(a) (2005). The FEC noted that Ross stopped hosting the Dave Ross show more than thirty days before the primary election and more than sixty days before the general election. Dave Ross, MUR 5555, 11, (FEC, Jan. 10, 2006) (First General Counsel's Report), *available at* http://eqs.sdrdc.com/eqsdocs/000050C7.pdf.

<sup>133.</sup> Dave Ross, MUR 5555, 11, (FEC, Jan. 10, 2006) (First General Counsel's Report), available at http://eqs.sdrdc.com/eqsdocs/000050C7.pdf.

The FEC's conclusion regarding the Dave Ross Show was not unique, as the FEC reached similar conclusions in other opinions. In 1992, for example, the FEC was asked for an advisory opinion concerning the application of the FECA of 1971, as amended, and FEC regulations about "the airing of your radio show while you are a candidate for Federal office." In that case, the candidate, Randall Terry, had been the host of a daily radio talk show, the "Randall Terry Show," that dealt with "all major contemporary issues . . . in which the news of the day is discussed." Is sufficiently the contemporary issues . . . in which the news of the day is discussed."

While the candidate asked the FEC whether he might continue to host his radio show while running for office, the FEC specifically addressed the issues of whether the expenses incurred by Randall Terry Live, Inc., or by the radio stations or network carrying the show, would be in-kind corporate contributions to the campaign. The Commission concluded that the candidate could continue hosting his talk show, without receiving an in-kind contribution, based on the candidate's representations that he did not intend to use the show to promote or raise funds for his candidacy and that no ads raising funds for or promoting his candidacy would be run during the show.

Although the FEC found the radio stations to be acting within their legitimate press function in *Ross* and *Terry*, it is significant that the FEC issued its opinions based on the fact that neither Ross nor Terry were engaged in on-air commentary about their respective campaigns. Since the hosts were not directly promoting their respective campaigns, they were arguably not making in-kind contributions to those campaigns. Where there are no such contributions, the policy objectives behind campaign finance regulations are not stifled by First Amendment protections. Thus, the application of the media exemption in these cases successfully balanced the competing First Amendment interest and campaign finance purposes. A narrowing of the media exemption to require disclosure of

<sup>134.</sup> FEC, Advisory Opinion 1992-37 (1992), available at http://saos.nictusa.com/saos/searchao.

<sup>135.</sup> *Id.* The show, entitled "Randall Terry Live," was broadcast on approximately ninety-five stations nationwide, but on only one station in New York State, where Terry was a candidate. In his letter to the FEC, Terry stated that the signal from the state station reached areas west of the district for which he was a candidate, but that "the signal is almost extinct" at the district boundary. *Id.* Additionally, Terry informed the FEC that he was a contractual employee of Randall Terry Live, Inc., and not an owner in any form, a family member was the sole incorporator, and neither the family member nor the corporation had made any donations or in-kind contributions to the campaign. *Id.* 

<sup>136.</sup> Id.

<sup>137.</sup> *Id.* The Commission also stated that it interpreted the candidate's representation to include a commitment to refrain from attacks on his opponents and from soliciting funds or airing ads for those purposes. *Id.* 

on-air contributions would seemingly not have applied to the conduct of either Ross or Terry.

#### V. WASHINGTON STATE'S APPLICATION OF THE MEDIA EXEMPTION

An analysis of Washington State's application of the media exemption to the on-air conduct of radio talk show hosts highlights the trouble-some aspects of the media exemption's conflict with the policies of campaign finance regulations. Such an analysis also suggests the manner in which the media exemption might be narrowed to more fully achieve the goals of campaign finance regulations while not limiting the speech of the press in any substantial manner. By looking first to Washington State law, and then to the PDC's application of the media exemption to radio talk show hosts, and finally to the courts' application of the exemption, the complexities of the issue can be clearly understood.

In Washington State, "political advertising" is not included within the media exemption. Political advertising includes, in part, "radio or television presentations, or other means of mass communication, used for the purpose of appealing, directly or indirectly, for votes or for financial or other support in any election campaign." The PDC has further defined the term "political advertising" as it relates to the media exemption. Washington Administrative Code § 390-05-290 provides:

Political advertising does not include letters to the editor, news or feature articles, editorial comments or replies thereto in a regularly published newspaper, periodical, or on a radio or television broadcast where payment for the printed space or broadcast time is not normally required.

Therefore, the media exemption would apply to coverage about a ballot measure or candidate when it takes place during the content portion of a program, when payment is normally not required.

Additionally, in interpreting Washington law, the PDC "consider[s] the approach of the Federal Elections Commission[.]" As previously noted, federal interpretations of the federal media exemption are helpful because the Washington statute expressly incorporated the federal courts' construction of the media exemption. However, the PDC is not bound by the FEC decisions, "given the different history and text of the Washington State statute." <sup>141</sup>

<sup>138.</sup> WASH. REV. CODE § 42.17.020(15)(b)(iv) (2008).

<sup>139.</sup> WASH. REV. CODE § 42.17.020(38) (2008).

<sup>140.</sup> Edelman v. State ex rel. Pub. Disclosure Comm'n, 99 P.3d 386, 393 (2004).

<sup>141.</sup> *Id*.

### A. Is There an In-Kind Contribution When a Radio Station Provides Broadcast Time to a Talk Show Host?

Although the FEC found in *In Re Ross* that the media exemption applied and that the station did not make an in-kind contribution to the Dave Ross campaign, it did not address the question of whether such an in-kind contribution is made by a talk show host who is a candidate and who voices his support for himself as candidate. In Washington State, this question has been addressed by both the PDC and the Washington State Supreme Court. This section examines the approach taken by each.

While the position adopted by the PDC was overruled by the court in *No New Gas Tax*, the PDC's analysis and determination that a radio station broadcasting a talk show whose host was a candidate for office would make an in-kind contribution to the candidate not only highlights the need for reform in this area, but it also offers a method to determine when such a contribution is made. For a narrowing of the media exemption to be effective in more fully realizing the goal of campaign finance reform, there must be a method to determine what constitutes a contribution that should be disclosed. The PDC has suggested such an approach. 142

In the context of a radio talk show host who was a candidate for office, the PDC concluded that a radio station would be making an in-kind contribution to the candidate if the candidate used his or her radio show to conduct political advertising. In an advisory opinion, the PDC specifically addressed the question of "whether a radio/television talk show host who becomes a candidate for state office under the Public Disclosure Law must report the time he is regularly on the air after becoming a candidate as an in-kind contribution from his employer." In its opinion, the PDC recognized that the law does exclude a news item, feature, commentary, or editorial given as part of a broadcast media program from the definition of contribution, assuming that certain standards are met. The PDC stated, however, that a news item, feature, or commentary must be contrasted with "political advertising," "which is defined to

<sup>142.</sup> PDC, Advisory Op., 45 (Aug. 29,1995), available at http://www.pdc.wa.gov/archive/commissionmeetings/meetings/pdfs/2007/09.27.07.SanJuanCountyDocs.pdf.

<sup>143.</sup> Id. at 44.

<sup>144.</sup> *Id.* at 43. The PDC also addressed the issue of whether the on-air time would be a contribution subject to limit pursuant to Initiative 134, which stated, inter alia, that no person may give a candidate for statewide office more than \$1,000 per election. *Id.* The PDC's opinion was specifically addressed with regard to a "station employee who, as a talk show host, expresses his opinion and invites listener comments about the policies and performance of public officials, including officials who may be his opponents in the campaign, and about state and local issues that may be campaign issues." *Id.* at 44.

include any radio . . . presentation used for the purpose of appealing, directly or indirectly, for votes or for financial or other support in any election campaign." The PDC concluded that "the donation or transfer at less than full market value of political advertising, or the resources to produce and disseminate political advertising (such as free airtime), would be considered a contribution." <sup>147</sup>

In its analysis, the PDC found five factors to be pertinent, and it advised that "persons relying on the conclusions herein should determine whether their circumstances are consistent with these underlying facts."148 First, the PDC found that the radio host was a long-time employee of the station and clearly not hired in anticipation of his candidacy. <sup>149</sup> Second, neither the station nor its parent company was owned or controlled by the candidate, and no one associated with control of the station would be associated with the candidate's campaign. <sup>150</sup> Third, the talk show host would be on the air as part of his regularly scheduled program, and no changes in the production, nature, format, length, or time slot of the show were to take place after he became a candidate or in anticipation of his candidacy. 151 Fourth, no changes in the terms and conditions of the host's employment or compensation were to occur after he became a candidate or in anticipation of his candidacy. <sup>152</sup> And finally, the PDC relied on the fact that no paid political ads supporting the talk show host's candidacy or opposing the candidacy of any of his opponents would air during his program. 153

Under the PDC's Advisory Opinion, a talk show host, as a candidate, would receive a contribution from the radio station if, while on the air, the host

Solicits votes, expressly advocates or expressly discusses his candidacy, or expressly discusses the candidacy of any of his opponents;

Solicits or accepts contributions or campaign volunteers;

Expressly advocates the defeat of opposing candidates. 154

<sup>146.</sup> Id. See also Wash. Rev. Code § 42.17.020(32) (2008); Wash. Admin. Code § 390-05-290 (2008) (defining "political advertising").

<sup>147.</sup> PDC, Advisory Op., 44 (Aug. 29,1995), available at http://www.pdc.wa.gov/archive/commissionmeetings/meetings/pdfs/2007/09.27.07.SanJuanCountyDocs.pdf.

<sup>148.</sup> Id. at 43-45.

<sup>149.</sup> Id. at 44.

<sup>150.</sup> *Id*.

<sup>151.</sup> *Id*.

<sup>152.</sup> *Id.* at 44–45.

<sup>153.</sup> Id. at 45.

<sup>154.</sup> *Id*.

The Commission found that such airtime would be a contribution because it constituted something of value to the campaign for which the candidate did not provide consideration. "Furthermore, the use of airtime by a candidate to promote his candidacy does not fall within the exception for news, features, commentaries, and editorials provided in the public interest." Such airtime, the Commission continued, would be considered "political advertising." <sup>157</sup>

The talk show host referenced in the PDC opinion worked for radio station KVI AM, owned by Fisher Communications.<sup>158</sup> Fisher stated that the Commission's Opinion requiring such disclosure "strikes a reasonable balance between important public policies" and "provides a relatively clear rule that is easily applicable by broadcasters."<sup>159</sup>

While the PDC opinion would provide a relatively clear rule that could be applied by broadcasters, such an approach was rejected by the Washington State Supreme Court in *No New Gas Tax*. However, if the media exemption were narrowed such that talk show hosts who do not equally present both sides of campaign issues were required to file a report with the PDC showing the duration and value of the air time provided, the public would know the equivalent amount of money an opponent would have to spend to buy air time to promote their views or candidacy. As long as contribution limits do not apply, political speech would not be chilled, and free speech interests would be protected.

#### B. San Juan County v. No New Gas Tax

Whereas the PDC looked at the use of airtime in support of a candidate, the issue in *No New Gas Tax* concerned the use of airtime in support of a ballot measure. The proposal suggested in this Comment would be equally applicable regardless of whether the airtime was used to support a candidate or a ballot measure because the disclosure of a contribution would be based upon unequal promotion of an issue or candidate.

156. Id.

<sup>155.</sup> *Id*.

<sup>157.</sup> *Id.* The PDC stated that airtime that constituted a contribution in this context must be valued in the amount of its fair market value. *Id.* at 46. *See also* WASH. ADMIN. CODE § 390-16-206(3) (2008).

<sup>158.</sup> Response Brief, supra note 14, at 2.

<sup>159.</sup> Id.

<sup>160.</sup> San Juan County v. No New Gas Tax, 157 P.3d 831, 840 (Wa. 2007).

<sup>161.</sup> Prior to *No New Gas Tax*, the PDC had not been asked to adopt a rule or issue an advisory opinion about how the media exemption applied to a talk show host who could potentially be a political committee supporting or opposing a ballot measure. Amicus Curiae Brief of the Attorney General, at 13 n.2, San Juan County v. No New Gas Tax, 157 P.3d 831 (Wa. 2007) (No. 05-2-01205-3), 2005 WL 4158306.

Subsection 1 briefly examines the events leading to the dispute in *No New Gas Tax*, and specifically, the on-air conduct of two radio talk show hosts. Subsection 2 discusses the initial allegations against the No New Gas Tax political committee and also looks at the initial Superior Court ruling. Subsection 3 examines the legal ramifications of the ruling and surveys the reaction to the Superior Court decision. Finally, Subsection 4 discusses the reasoning and the holding of the Washington State Supreme Court in *No New Gas Tax*.

#### 1. Background

In the spring of 2005, the Washington legislature adopted a 9.5-cent-per-gallon increase in the state gasoline tax to pay for improvements in the state's roads and highway system. During that time, Kirby Wilbur and John Carlson were radio talk show hosts with regularly scheduled programs on 570 KVI AM, a radio station owned by Fisher Communications. As a part of their broadcasts, Wilbur and Carlson typically discussed their view on political and social issues. Fisher charged for political advertising during the commercial segments of its radio programs, but it did not charge for the value of any content time associated with either Wilbur's or Carlson's talk shows.

Wilbur and Carlson strongly criticized the legislature's enactment of the fuel tax<sup>166</sup> and worked to support its repeal. In addition to their support of the repeal of the tax, Wilbur and Carlson's on-air comments indicated that they were involved in the formation of an initiative campaign to repeal the tax.<sup>167</sup>

On May 6, 2005, No New Gas Tax (NNGT) registered with the PDC as a political committee. The purpose of the committee was to support a ballot measure, Initiative 912, that would have repealed the

<sup>162.</sup> Response Brief, supra note 14, at 4.

<sup>163.</sup> No New Gas Tax, 157 P.3d at 834.

<sup>164.</sup> *Id*.

<sup>165.</sup> *Id*.

<sup>166.</sup> Id.

<sup>167.</sup> In early May 2005, Wilbur told his listeners: "[Carlson] and I have been meeting with a number of people . . . . We a group of people have established an organization known as No New Gas Tax. We have a website nonewgastax.com." "[Carlson] and I got together based on our experiences and some others, we said okay look we are going to ask the audience to step forward and pledge money and time at nonewgastax.com and that's a website, nonewgastax.com, and we said if we got 25,000 dollars of seed money and 1,000 volunteers [the campaign would be launched]." Several days later, Wilbur and Carlson told their listeners that "according to the numbers uh that we got over the weekend, over 81,000 dollars was raised in three and a half days." Response Brief, supra note 14 at 5

<sup>168.</sup> No New Gas Tax, 157 P.3d at 834.

statewide fuel tax approved by the Washington legislature. The campaign had until July 8, 2005, to gather the required signatures.

Once NNGT had registered as a political committee, Wilbur and Carlson addressed their role in starting the campaign to repeal the tax increase in a newspaper interview. They stated: "Our legal team is writing the initiative . . . . We hope to file it this week." Additionally, a KVI press release discussed Wilbur and Carlson's role in forming the initiative campaign, stating: "KVI Country Delivers a Resounding 'No' to New Gas Tax. KVI's Wilbur and Carlson raise funds and support for 'No New Gas Tax' effort." During the first several weeks of the campaign, Wilbur and Carlson repeatedly asked their listeners for contributions. 174

#### 2. Legal Action

On June 22, 2005, the prosecuting authorities for San Juan County and the cities of Auburn, Kent, and Seattle filed an action against NNGT. They alleged that NNGT violated the disclosure provisions of the FCPA by, in part, failing to report "valuable radio announcer professional services and valuable commercial radio airtime" as a campaign contribution under Washington Revised Code § 42.17.020(15)(a) and seeking an injunction to prevent NNGT from accepting in-kind contributions from Fisher Communications until it complied with the disclosure requirements. The plaintiffs argued that Wilbur and Carlson were spokespersons, officers, and agents for NNGT and that their conduct constituted advertising for the campaign. The properties of the campaign.

<sup>169.</sup> Id.

<sup>170.</sup> Response Brief, supra note 14, at 4.

<sup>171.</sup> *Id.* at 5. *See also* Richard Roesler, *Anti-gas-tax activists encounter legal hurdles*, SPOKESMANREVIEW.COM, July 2, 2005, *available at* http://www.spokesmanreview.com/tools/story\_pf.asp?ID=78291.

<sup>172.</sup> Response Brief, *supra* note 14, at 5.

<sup>173.</sup> *Id.* KVI's general manager acknowledged in an internal memorandum the role Wilbur and Carlson played in the campaign, stating that "the press release sent this week gives the appearance that we [KVI] are sponsoring this No New Gas Tax initiative." *Id.* at 5–6.

<sup>174.</sup> *Id.* at 6. For example, Carlson told his listeners: "So, if you're with me, check out this website here... and sign up make a donation and let's undue this thing. We got six weeks to get the signatures and make this thing happen." *Id.* 

<sup>175.</sup> San Juan County v. No New Gas Tax, 157 P.3d 831, 834 (Wa. 2007). The complaint further alleged that NNGT failed to adequately disclose the identities of Internet contributors and that it made material misstatements regarding the fuel tax at issue. Id. at 834 n.2.

<sup>176.</sup> Id. at 834.

<sup>177.</sup> *Id.* NNGT asserted fourteen counterclaims against the plaintiffs, alleging that they violated its civil rights by bringing the enforcement action and obtaining the preliminary injunction. *Id.* at 835–36 n.5. NNGT sought a declaratory judgment that the prosecutors violated its constitutional rights, injunctive relief prohibiting the prosecutors from continuing to commit the alleged

In October 2005, the superior court granted the plaintiffs' motion for a preliminary injunction, "Requiring Compliance with Fair Campaign Practices Act." The court ruled that NNGT was required to disclose the value of air time supporting the initiative campaign because it constituted an in-kind contribution of political advertising by Fisher Communications.<sup>179</sup> The trial court issued an oral opinion and entered specific findings in support of the preliminary injunction. 180 The court found: (1) that Wilbur and Carlson were principles in the campaign; (2) that Wilbur and Carlson had intentionally promoted the campaign by advertising on their radio shows; (3) that the on-air advertising was in addition to and different from any editorializing, comment, or discussion by the hosts on their shows; (4) that it had value to the campaign similar to advertising the campaign could have purchased on air; (5) that the value of the advertising had not been disclosed to the PDC in the manner of any other in-kind contribution; and (6) that requiring reporting of that value would not restrict Wilbur or Carlson in their on-air speech in any way. 181 The preliminary injunction required disclosure of contributions prior to May 31, 2005.<sup>182</sup>

The I-912 campaign substantially complied with the preliminary injunction by identifying the source of its unreported monetary contributions and by disclosing the value of in-kind contributions of broadcast time. The campaign disclosed a \$20,000 contribution from Fisher Broadcasting. On July 8, 2005, the I-912 campaign delivered the ne-

violations, vacation of the preliminary injunction order, and an award of attorneys' fees. *Id.* at 835–36.

<sup>178.</sup> Response Brief, *supra* note 14, at 8. The trial court found that there was "inadequate time or opportunity for [the county and city prosecutors] to resolve this matter through the PDC." *Id.* at 7. Also, in response to questions from the I-912 campaign attorney, the court stated that it was not requiring the campaign to do anything other than comply with existing disclosure laws. *Id.* at 8. The trial court dismissed NNGT's counterclaims and denied the plaintiffs' request for attorneys' fees. Additionally, the trial court granted the prosecutors' motion for voluntary dismissal of its remaining claims. *No New Gas Tax*, 157 P.3d 831, 835–36.

<sup>179.</sup> No New Gas Tax, 157 P.3d at 837.

<sup>180.</sup> Response Brief, supra note 14, at 8.

<sup>181.</sup> San Juan County v. No New Gas Tax, No. 05-2-01205-3, 2005 WL 5167975 (Wash. Super. Ct. Oct. 26, 2005).

<sup>182.</sup> No New Gas Tax, 157 P.3d at 835.

<sup>183.</sup> Response Brief, supra note 14, at 10.

<sup>184.</sup> No New Gas Tax, 157 P.3d at 835. The preliminary injunction provided that if the campaign could not provide an exact valuation of the in-kind contribution, it should make a reasonable and good-faith effort to make such a valuation. Response Brief, *supra* note 14, at 10. The trial court declined to further clarify its order, stating: "you have the same problem that any other candidate or campaign has in trying to understand how to make full reporting." No New Gas Tax, 157 P.3d at 835.

cessary signatures to the Secretary of State to have the initiative placed on the November 8, 2005 ballot, where it was rejected by the voters. 185

Pending its petition for discretionary review,<sup>186</sup> NNGT filed a request for an emergency stay, in which NNGT claimed that it would have no way to assess whether or when Washington's \$5,000 limit on contributions within twenty-one days prior to an election would be crossed by Wilbur and Carlson's discussion of the initiative on the air.<sup>187</sup> The court of appeals denied the stay but expedited the hearing for NNGT's motion for discretionary review.<sup>188</sup>

#### 3. Reaction to the Superior Court Ruling

To many of those who worried about the possible abuse of campaign finance regulations, the superior court ruling in *No New Gas Tax* served to justify their fears. Characterizing the radio hosts' speech as a contribution had two important legal consequences under the campaign finance provisions of the Fair Campaign Practices Act (FCPA). First, the initiative campaign was required to assign a dollar value to the speech and report it to the PDC. Second, the hosts would be precluded from making more than \$5,000 worth of such contributions to a candidate or initiative during the twenty-one days immediately preceding the election. <sup>191</sup>

\_

<sup>185.</sup> I-912 was rejected by margin of 54.6% to 45.4%. *See* Wash. Secretary of State 2005 Initiative Measures, *available at* http://www.vote.wa.gov/Elections/Results/Measures.aspx?e=816913c8-43d7-4b77-be19-3d794615271e.

<sup>186.</sup> NNGT first sought discretionary review of the trial court order and requested a stay pending its resolution. A court of appeals commissioner denied the request, finding that NNGT was not harmed by the lack of stay because the order required NNGT to disclose only the contributions received before May 31, 2005, and NNGT had complied with the order. *No New Gas Tax*, 157 P.3d at 835

<sup>187.</sup> *Id.* at 835. Fisher Communications' general manager stated that he "will have to direct Mr. Carlson and Mr. Wilbur to not discuss I-912 during the content portions on their programs to avoid [the risk of violating the contribution limit] because Fisher Seattle Radio does not wish to face a possible prosecution for violation of the Fair Campaign Practices Act." *Id.* In its opening brief to the Washington State Supreme Court, the plaintiffs argued that the lack of any limitation on free speech or "chilling" was demonstrated by events during the twenty-one days prior to the general election. The plaintiffs noted that the talk show hosts continued to raise money for the campaign, asking listeners to donate in the name of Judge Christopher Wickham, the trial court judge. Response Brief, *supra* note 14, at 17.

<sup>188.</sup> No New Gas Tax, 157 P.3d at 835.

<sup>189.</sup> Brief of Amicus Curiae ACLU of Washington at 3, San Juan County v. No New Gas Tax, 157 P.3d 831 (Wa. 2007) (No. 77966-0), 2006 WL 1893968. The FCPA is also known as the Public Disclosure Act. *Id.* 

<sup>190.</sup> Id.; see also WASH.REV.CODE § 42.17.090 (2008).

<sup>191.</sup> Brief of Amicus Curiae ACLU of Washington, *supra* note 189, at 3. *See also* WASH.REV.CODE § 42.17.105(8) (2008).

Reaction to the superior court decision was swift and national in its scope. Noted columnist George Will wrote in *Newsweek*: "What has happened in Seattle prefigures what a national Democratic administration might try to do—perhaps also by reviving the 'fairness doctrine' (an 'equal time' regulation)—to strangle conservative talk radio. And what has happened here—the use of campaign regulations as a weapon of partisanship—is spreading." A *Wall Street Journal* editorial cautioned: "Consider what's going on in Washington State as an early warning." An editorial in the *Pittsburgh Tribune-Review* declared: "A cold front is blowing in from Washington State. Calling it 'chilling' does not do it justice. It should send a shudder down the spine of anyone who still believes in the First Amendment."

Although political talk radio is largely dominated by conservative voices, <sup>195</sup> the legal reaction against the trial court's decision in *No New Gas Tax* came from all sides of the political and ideological spectrums. <sup>196</sup> When the case reached the Washington State Supreme Court, amicus briefs were submitted from the American Civil Liberties Union of Washington, the Cato Institute, the Washington Association of Broadcasters, the Building Industry Association of Washington, and the Center for Competitive Politics. <sup>197</sup>

#### 4. Supreme Court Ruling

The Washington State Supreme Court accepted review of the case based on the trial court's CR 12(b)(6) dismissal of NNGT's counterclaim that the plaintiffs had violated several of the NNGT's constitutional rights by obtaining a preliminary injunction order requiring it to disclose the value of radio broadcasts. Although the propriety of the preliminary injunction was not directly before the court (as the plaintiffs had

<sup>192.</sup> George F. Will, Speechless in Seattle: What has Happened in Seattle Prefigures What a National Democratic Administration Might Try to Do to Stifle Conservative Talk Radio, NEWSWEEK, at 24, Oct. 9, 2006, available at http://www.newsweek.com/id/44879/page/1.

<sup>193.</sup> Brian C. Anderson, Commentary, *Shut Up, They Explained*, WALL St. J., Jan. 25, 2006, at E4, *available at* http://www.opinionjournal.com/extra/?id=110007867.

<sup>194.</sup> Dimitri Vassilaros, Editorial, *Well, Shut My Mouth!*, PITTSBURGH TRIBUNE-REVIEW, Nov. 28, 2005, at D2, *available at* http://www.pittsburghlive.com/x/pittsburghtrib/s\_398015.html.

<sup>195.</sup> See Michael Harrison, 2009 Talkers 250 Featuring the Heavy Hundred: The 100 Most Important Radio Talk Show Hosts in America, TALKERS MAGAZINE, http://talkers.com/on line/?p=267 (last visited July 15, 2009). Talkers Online Magazine annually ranks the top 100 "most important" talk radio hosts in America. The majority of that list is composed of conservative talk show hosts. Id.

<sup>196.</sup> Michael Bindas, Editorial, *Preserving the Right to Free Speech*, SEATTLE POST-INTELLIGENCER, May 25, 2006, at E3, *available at* http://seattlepi.nwsource.com/opinion/271432\_freespeech25.html.

<sup>197.</sup> Id.

<sup>198.</sup> San Juan County v. No New Gas Tax, 157 P.3d 831, 833 (Wa. 2007).

voluntarily dismissed their complaint against NNGT and NNGT did not appeal), the court stated that it was necessary to review the issue in order to resolve whether the trial court properly dismissed NNGT's counterclaims. <sup>199</sup>

In its analysis, the court looked to whether the application of the media exemption should have prevented the trial court from issuing the preliminary injunction.<sup>200</sup> The court first considered whether the trial court correctly construed the statutory term "contribution," noting that the definition of contribution included the media exemption.<sup>201</sup> The court rejected the prosecutors' argument that Wilbur and Carlson's broadcasts fell outside the media exemption because the broadcasts constituted "political advertising."<sup>202</sup> Instead, the court stated that it would follow the approach taken by federal courts in applying the media exemption, looking first to whether the media exemption applies to the communication at issue before considering whether the communication fits within the otherwise broad definition of contribution.<sup>203</sup>

To determine whether the media exemption applied to the communication at issue, the court looked at whether the news medium was controlled by a candidate or political committee and whether it was functioning as a regular news medium with respect to the conduct in question. The court found that the phrase "not controlled by a candidate or political committee" modifies "news medium" and does not modify "news item, feature, commentary, or editorial." Therefore, the applicability of the media exemption did not turn on Wilbur and Carlson's relationship to the campaign. The question is whether the news medium—here, the ra-

<sup>199.</sup> *Id.* at 836–37. The court stated that because many of NNGT's counterclaims originated from the preliminary injunction order, and the trial court dismissed the counterclaims based on legal determinations it made in the preliminary order, it must determine whether the trial court erred in entering the injunction. *Id* at 836.. The court also noted that the standard of review regarding the grant or denial of preliminary injunctions is the abuse of discretion standard. *Id*. at 837.

<sup>200.</sup> Id.

<sup>201.</sup> Id..

<sup>202.</sup> Id. at 839.

<sup>203.</sup> *Id.* The court stated that this approach accords with the purpose of the media exemption, which is to avoid burdening the First Amendment right of the press. *Id.* 

<sup>204.</sup> Id.

<sup>205.</sup> *Id.* In its amicus brief to the court in support of *No New Gas Tax*, the Washington State Association of Broadcasters noted that this distinction was critical because it provides a clear rule whereby the entity that provides the financing, i.e., the broadcaster, may also control compliance with the exemption. By way of contrast, if the person who controls the news medium were deemed to be the talk show host, then the broadcasting corporation might find itself in the position of having unwittingly financed illegal contributions if the host is later determined by a court to have been a "principal" of a campaign. Brief of Amicus Curiae Washington State Association of Broadcasters at 18–19, San Juan County v. No New Gas Tax, 157 P.3d 831 (Wa. 2007) (No. 77966-0), 2006 WL 2303733

<sup>206.</sup> No New Gas Tax, 157 P.3d at 839.

dio station—is controlled by a political committee, not whether a political committee authored the content of a particular communication."<sup>207</sup> The court noted that, as with the federal media exemption, control does not change from hour to hour depending on who may be hosting a particular radio program.<sup>208</sup>

Although the PDC had interpreted the applicability of the media exemption differently, the court was not bound by such interpretations. <sup>209</sup> The opinion quickly dismissed reliance on the previous PDC declarations and opinions that stated that the use of air time to solicit votes or funds or to expressly advocate either in favor of one's own campaign or for the defeat of one's opponent constitutes a reportable contribution. <sup>210</sup> The court stated that: "We will not defer to a PDC declaratory order that conflicts with a statute." <sup>211</sup> In their opinion, however, the justices did not examine the rationale employed by the PDC in reaching its conclusions regarding the statute; rather, the court merely rejected PDC's interpretations as contrary to the statutory media exemption. <sup>212</sup>

In ruling on its interpretation of the law, the court gave little consideration to the possible ramifications of its ruling. At oral argument, the prosecutors argued that without the limiting construction imposed by the PDC, media corporations could become "king makers," providing their favored candidates and ballot measure advocates with unlimited access to the airwaves. Instead, the court found that while the term "commentary" is not defined, it plainly encompassed advocacy for or against an issue, candidate, or campaign, whether or not that involved the solicitation of votes, money, or "other support." Such express advocacy, the court continued, is "a core aspect of the media's traditional role."

In ruling that the media exemption applied, the court declared that it was not appropriate to draw distinctions between commentary and political advertising in this context.<sup>216</sup> The court stated that content was largely irrelevant in deciding whether a media entity is exercising its valid press function; the media exemption applied regardless of the content of the publication or the speaker's motivations, intent, sources of informa-

<sup>207.</sup> Id.

<sup>208.</sup> Id.

<sup>209.</sup> Id. at 840.

<sup>210.</sup> Id.

<sup>211.</sup> Id.

<sup>212.</sup> *Id.* The court further declared that there "is no express advocacy or solicitation limitation to the media exemption." *Id.* 

<sup>213.</sup> Id. at 840 n.10.

<sup>214.</sup> Id. at 840.

<sup>215.</sup> Id.

<sup>216.</sup> Id.

tion, or connection with a campaign.<sup>217</sup> Additionally, the media exemption could apply regardless of whether exercise of the media function was fair, balanced, or expressed advocacy.<sup>218</sup>

The court did find, however, that the distinction between "political advertising" and "commentary" might be relevant in deciding whether a media entity was performing a legitimate press function, but it stated that this distinction did not turn on the content of the communication. <sup>219</sup> Instead, the court reasoned that the distinction turned on whether that communication occurred during the period of the broadcast where payment is normally required. <sup>220</sup> The court explained that if the coverage of a candidate or ballot measure occurred during the content period of a broadcast, as opposed to during the commercial advertising period, the media exemption would apply. <sup>221</sup> Therefore, the mere fact that a broadcast has value to a campaign, or includes solicitation of funds, votes, or other support, does not convert commentary into advertising when it occurs during the content portion of a broadcast for which payment is not normally required. <sup>222</sup>

The court found that this reasoning "appropriately creates a bright-line rule by distinguishing paid and unpaid broadcast time." Such a rule would limit judicial inquiry into the content of the speech and focus instead on the content-neutral question of whether the radio station ordinarily would collect a fee for the broadcast. Because the broadcasts in question occurred during the regularly scheduled content portion of Wilbur and Carlson's radio programs, not during the commercial advertising time for which Fisher ordinarily collected a fee, the court found that Wilbur and Carlson's broadcasts supporting the initiative campaign did fall within the media exemption, "regardless of whether the talk show

<sup>217.</sup> Id.

<sup>218.</sup> *Id*.

<sup>219.</sup> Id. at 841.

<sup>220.</sup> *Id.* The court cited the PDC definition of political advertising as it relates to the media exemption: Political advertising does not include letters to the editor, news or feature articles, editorial comment or replies thereto in a regularly published newspaper, periodical, or on a radio or television broadcast where payment for the printed space or broadcast time is not normally required. *Id. See also* WASH. ADMIN. CODE § 390-05-290 (2008).

<sup>221.</sup> No New Gas Tax, 157 P.3d at 841.

<sup>222.</sup> Id.

<sup>223.</sup> *Id.* (citing *Wash. State Republican Party v. Wash. Pub. Disclosure Comm'n*, 4 P.3d 808, 821–22 (Wa. 2000), which rejected "context" analysis in favor of Buckley's bright-line express advocacy test to avoid excessive "regulatory and judicial assessment of the meaning of political speech").

<sup>224.</sup> Id.

hosts acted at the behest of NNGT or solicited votes and financial support for the initiative campaign."

Because the media exemption applied, the court held that the trial court erred in ruling that the radio broadcasts were contributions subject to disclosure under the FCPA. As the broadcasts were not contributions subject to disclosure, the court held that the trial court improperly granted the preliminary injunction because the prosecutors failed to establish a clear and equitable right to disclosure of the value of the radio broadcasts supporting the initiative campaign."

### VI. WHERE DOES THE DECISION IN *NO NEW GAS TAX* LEAVE WASHINGTON AND THE MEDIA EXEMPTION?

Although the ruling of the Washington State Supreme Court in *No New Gas Tax* answered the specific issues regarding the NNGT campaign, it is the position of this Comment that the Court failed to satisfactorily resolve the larger questions involved. Campaign finance regulations seek to shed the bright light of publicity on the abuses and excesses of campaign finance through the disclosure of contributions and expenditures. The in-kind contributions made when the media venture beyond the reporting of news and editorial commentary to provide direct political advertising or other support to a campaign are of value to that campaign and should be disclosed.

After the November 2005 election, but prior to the Washington State Supreme Court ruling in *No New Gas Tax*, Randall Gaylord, the prosecutor for San Juan County in the case, wrote an editorial for *The Seattle Times* in which he said: "Radio talk-show hosts want you to believe the judge trampled their free-speech rights. But [the trial judge] was just confirming that anyone running an initiative campaign, no matter how prominent or powerful, must tell the public who is funding their campaign."

<sup>225.</sup> *Id.* While the court articulated this bright-line rule, it thought it important to note in its findings that the broadcasts in question were typical of Wilbur's and Carlson's regularly scheduled programs. *Id.* 

<sup>226.</sup> Id. at 842.

<sup>227.</sup> *Id.* Because it held that the radio broadcasts were not a contribution, the court did not address the issue of whether the disclosure requirements of the FCPA were unconstitutional as applied to NNGT. *Id.* The court also reversed the order dismissing NNGT's counterclaims and remanded to the trial court for further proceedings. *Id.*. The Court affirmed the trial court's denial of attorneys' fees to San Juan County. *Id.* 

<sup>228.</sup> Randall Gaylord & Mike Vaska, Opinion, Even Radio Shock Jocks Must Obey Campaign Laws, SEATTLE TIMES, Nov. 9, 2005, available at http://community.seattletimes.nwsource.com/archive/?date=20051109&slug=vaska09. Mike Vaska is an attorney with Foster Pepper & Shefelman who represented the plaintiffs in the No New Gas Tax litigation. Id.

Gaylord stated that the sponsors of Initiative 276 decided that when the media step outside their traditional news-gathering and editorial roles to provide outright political advertising or other support to a campaign, the contribution should be disclosed, just like in-kind corporate contributions of free software, cell phones, or office space.<sup>229</sup> The First Amendment, Gaylord continued,

is not a shield that can be used to conceal campaign contributions—no matter their source or form. . . . The citizens who drafted our public-disclosure laws understood the importance of openness and accountability, and thus required media companies to comply when they step into the fray by giving valuable support to a political campaign. <sup>230</sup>

In the *No New Gas Tax* decision, the Washington State Supreme Court articulated a bright-line rule regarding application of the media exemption to what would otherwise be a contribution. As bright a line as the court drew, however, the court was not looking to the question of whether the media exemption should be narrowed; it merely interpreted the law as it existed.

As FEC and PDC opinions indicate, there are other considerations that might apply to an evaluation of the media exemption as it applies to talk radio. In *In re Ross*, for example, to answer the question of whether the station was acting within its legitimate press function, the FEC looked to whether there was any indication that an aspect of the radio show was different because of the nature of the host's candidacy.<sup>231</sup> Likewise, with regard to the Randall Terry program, the FEC concluded that the candidate could continue to host his talk show, without receiving an in-kind contribution, based on the candidate's representation that he did not intend to use the show to promote his candidacy.<sup>232</sup> Similarly, in Washington State, the PDC advised that a talk show host who was a candidate would receive an in-kind contribution from the radio station if, while on the air, the host solicited votes or contributions.<sup>233</sup>

The rulings and opinions of the FEC, the PDC, and even the superior court in *No New Gas Tax*, further highlight the conflict that exists between the application of the media exemption and the policy objectives of campaign finance regulations. Given the court's holding in *No New Gas Tax*, there is seemingly no barrier to the extent to which a candidate with a radio talk show might use his access to public airwaves to solicit

<sup>229.</sup> Id.

<sup>230.</sup> Id.

<sup>231.</sup> See supra note 111 and accompanying text.

<sup>232.</sup> See supra note 134 and accompanying text.

<sup>233.</sup> See supra note 144 and accompanying text.

votes, contributions, or other forms of support. In theory, a corporation that owned a radio station and had a particular political leaning could seek to give support to a candidate by providing that candidate with a radio show. So long as the corporation was not controlled by a political committee and the function of the host was viewed as a legitimate press activity, <sup>234</sup> there is presumably no limit to the unregulated self-promotion that such a candidate could do on air.

In a footnote, the *No New Gas Tax* court stated that nothing in its decision foreclosed the state legislature, or the people via the initiative process, from limiting the statutory media exemption.<sup>235</sup> This Comment proposes the form that such a limit should take.

While the elimination of the media exemption might be possible, it is not desirable. Given state and federal limits on corporate contributions, and Washington's imposition of a \$5,000 cap on contributions in the final three weeks before an election, <sup>236</sup> if media commentary were an in-kind contribution subject to those limits, broadcasters who chose to air content qualifying as a contribution would, at some point, be required by law to halt their speech. In addition to the possibility that some speech would actually be stopped, the elimination of the media exemption would also likely chill political speech if broadcasters chose to steer clear of topics or hosts that could be seen as subjecting them to such contribution requirements. Also, it has largely been the established press, such as The New York Times, The Washington Post, and the Los Angeles Times nationally, and The Seattle Times and Seattle Press Club in Washington State, that have supported campaign finance reform. <sup>237</sup> As one commentator noted, "there is no surer way to turn the press against campaign finance reform than to subject the press to new restrictions."<sup>238</sup>

It has been argued that the scope of the media exemption should be narrowed by removing endorsements from the exemption's coverage.<sup>239</sup> Removing endorsements would, one author suggested, satisfy two competing interests: maintaining a free press and preventing corruption or the

<sup>234.</sup> As previously noted, the standard for what constitutes legitimate press activity is very low. *See* Zubowicz, *supra* note 50, at 19.

<sup>235.</sup> San Juan County v. No New Gas Tax,, 157 P.3d 831, 840 n.10 (Wa. 2007) (stating that whether and to what extent the media exemption is constitutionally required is beyond the scope of its opinion).

<sup>236.</sup> Wash. Rev. Code § 42.17.105(8) (2008).

<sup>237.</sup> Hasen, *supra* note 73, at 1664. *See also* Randall Gaylord & Mike Vaska, Opinion, *Even Radio Shock Jocks Must Obey Campaign Laws*, SEATTLE TIMES, Nov. 9, 2005, *available at* http://community.seattletimes.nwsource.com/archive/?date=20051109&slug=vaska09 (stating that *The Seattle Times* endorsed Initiative 276 and the Seattle Press Club was one of its sponsors).

<sup>238.</sup> Hasen, supra note 73, at 1664.

<sup>239.</sup> Shapiro, supra note 55, at 188.

appearance of corruption.<sup>240</sup> While this proposal might prevent some corruption, removing endorsements from the scope of the exemption would seemingly have much the same chilling effect as doing away with the media exemption as a whole. Bias is inherent in commentary and opinion, and there is no bright line between biased opinion and support or endorsement. The removal of endorsements from the protection of the media exemption would undoubtedly lead to the removal of some comment as well.<sup>241</sup>

In talk radio, such a restriction would have broad application. Regardless of whether Wilbur and Carlson were principals in the NNGT campaign, it is common for talk show hosts to express opinions about controversial topics and to support or oppose candidates and initiatives.<sup>242</sup>

Additionally, if endorsements were subject to contribution or expenditure limits, a question of the value of each in-kind contribution for on-air commentary would need to be made. For example, in a national campaign, an endorsement from Rush Limbaugh would be worth more than an endorsement from Kirby Wilbur.<sup>243</sup> If their support was subject to contribution limits, those talk radio hosts who were more popular or powerful would actually be most affected by such contribution limits. The political speech of Rush Limbaugh, for instance, would be more likely to be chilled than the political speech of Kirby Wilbur.

Just as a narrowing of the media exemption to remove endorsements from its scope would have a chilling effect on protected speech, so too would a narrowing of the media exemption to remove the commentary of candidates or principals in a campaign from the exemption. If the existence of contributions turns on whether the host might be considered a principal of a campaign, then broadcasters would be forced to start monitoring the political behavior of their employees before letting them advocate for or against controversial topics.<sup>244</sup> If broadcasters did not,

241. Would removing endorsements from the protections of the media exemption actually make a difference? Professor Hasen has argued that it is the slant of the news, rather than endorsements, that gives the media unequal power to influence political outcomes. Thus, one can end special treatment for the press, but it will not affect the power of the media to follow an electoral or legislative strategy. Hasen, *supra* note 73, at 1659.

<sup>240.</sup> Id.

<sup>242.</sup> See supra text accompanying notes 4-7.

<sup>243.</sup> See Michael Harrison, 2009 Talkers 250 Featuring the Heavy Hundred: The 100 Most Important Radio Talk Show Hosts In America, TALKERS MAGAZINE, http://talkers.com/online/?p=267 (last visited July 15, 2009).

<sup>244.</sup> Brief of Amicus Curiae Washington State Association of Broadcasters at 5, San Juan County v. No New Gas Tax, 157 P.3d 831 (Wa. 2007) (No. 77966-0), 2006 WL 2303733.

they would run the risk of finding out after the fact that otherwise apparently legal broadcasts were actually illegal contributions. <sup>245</sup>

The media exemption could, however, be narrowed to more fully achieve the policy objectives of campaign finance reform, while still preserving the fundamental First Amendment protections of the press. The narrowing could take the form of a requirement that talk show hosts who do not equally present both sides of campaign issues must file a report with the PDC or an alternate regulatory agency. The report would show the duration and value of the air time provided so that the public would know the equivalent amount of money an opponent would have to spend to buy air time to promote their views or candidacy. The report would be spend to buy air time to promote their views or candidacy.

Although the question of the valuation of on-air time would need to be resolved, such valuation could easily be made based on advertising rates for the particular host's program and the time the host spent commenting on a particular issue. Using this method of valuation, the calculation would be relatively easy to make. If the reported duration and value were not considered part of the contribution limits, the approach would not conflict with current campaign regulations and would not dampen constitutional rights.

Under this proposal for narrowing the media exemption, a corporation that owned a radio station and had a particular political leaning could still seek to give support to a candidate by providing that candidate with a radio show. That support, however, would be disclosed to the public and have a dollar value for that contribution. Thus, while the public would know who was contributing to a campaign, the corporation would not be limited in its support, nor would the talk show host be limited in his commentary.

As a whole, this approach preserves the policies of campaign finance reform without the result of chilling or otherwise limiting socially useful and constitutionally protected campaign speech. "The electorate . . . ha[s] the right to know of the sources and magnitude of financial and persuasional influences upon government." By narrowing the media exemption as suggested in this Comment, the information base upon which the electorate may make its decisions is enlarged without weakening our First Amendment protections.

<sup>245.</sup> Id.

<sup>246.</sup> See supra note 18 and accompanying text.

<sup>247.</sup> Id.

<sup>248.</sup> Fritz v. Gorton, 517 P.2d 911, 931 (1974).

#### VII. CONCLUSION

One can imagine many circumstances in which the conduct of a radio talk show host should, in some form, be disclosed as a contribution to or expenditure of a political campaign. Given current federal and state limits on expenditure and contributions at various points within a campaign, including the conduct of talk show hosts as a contribution or expenditure would certainly have the effect of limiting that speech. Without question, public disclosure of campaign contributions is a worthy goal, but if achieving such a goal comes at the expense of political speech, such a goal would be both difficult to achieve and undesirable. If not subject to those limits, however, such disclosure would be desirable.

The FEC, PDC, and Washington State courts have taken alternate, and sometimes conflicting, approaches in their efforts to determine the extent of the media exemption as it applies to talk radio. By attempting to shoehorn the particular host's activity into a form of advertising or into a legitimate press function, however, the underlying issues at the heart of the tension between the goals of campaign finance regulations and First Amendment protections are often neglected.

Campaign finance regulations have existed since the nineteenth century and have had, at their core, the notion that the public should know who is contributing to political campaigns. Campaign finance regulations are a policy choice—a choice to control the influence of money in the political process at the expense of a degree of constitutional protection on speech and the press. Likewise, the media exemption is a policy choice—a choice to accord full protection to the First Amendment rights of the press at the expense of countervailing social interests that may be served by campaign finance regulations. If the goals of campaign finance reform are served by requiring disclosure of corporate contributions, they will be better served by requiring the disclosure of inkind contributions from radio talk show hosts who do not equally present both sides of an issue.

It is possible to more fully achieve campaign-finance policy objectives without further sacrificing those protections we hold dear. By narrowing the media exemption such that disclosure of on-air contributions would be required as part of campaign finance regulations, while continuing to exempt the media from strict campaign contribution and expenditure limits, it would be possible to better balance the competing interests of campaign finance regulations and the protection of the press. Such a plan would not chill political speech. Instead, the knowledge of who was contributing to political campaigns would be increased and the policy objectives of campaign finance reform would be more fully achieved.