A Glimpse of the Future?
Campaign Finance Laws and Government Regulation of the Press

*By William Maurer**

In April 2007, the Washington Supreme Court issued an important decision for the First Amendment rights of freedom of speech and of the press in the face of burdensome campaign finance regulations. In a unanimous decision, the court used the "media exemption" in Washington's campaign finance laws to strike down an effort by four Washington municipalities to force an initiative campaign to disclose on-air commentary by two talk-radio hosts as "in-kind" contributions by their radio station.[1] The court held that the media exemption protects the press's unique role of providing information and editorial commentary to the public.

The court noted the clear link between the exemption and free speech, free press, and free association protections, but it also recognized that the exemption is legislatively created. That is, the Legislature could remove it if it chose.

The facts of this case prove, however, that whatever temptation exists for removing the media exemption, a free society requires that, at the least, it remain in place. Removing the press exemption will not result in a more egalitarian marketplace of ideas, as some proponents of campaign finance regulations argue, but will simply provide the government with a powerful tool to silence and harass media messages and speakers with which it disagrees. If a media exemption is "unfair" because it excludes some, but not all, corporations (media enterprises) from campaign finance regulations, the solution is to permit all Americans to communicate without government restriction, not to restrict the First Amendment so that everyone's speech is equally suppressed.

Facts of the Case

The case began in 2005, when the Washington Legislature passed a gas tax increase.[2] Outraged by the increase, two talk-radio hosts at 570 KVI in Seattle, Kirby Wilbur and John Carlson, began strongly criticizing the measure. A political committee named No New Gas Tax (NNGT) formed to collect signatures to qualify an initiative to repeal the increase, Initiative 912 (I-912), for the ballot. Wilbur and Carlson began devoting a substantial portion of their respective radio shows to helping NNGT obtain enough signatures to qualify I-912 for the ballot. They encouraged listeners to contribute funds to NNGT, obtain petitions, and circulate them to gather signatures.[3]

This activity did not go unnoticed by supporters of the gas tax increase. In particular, a Seattle law firm, Foster Pepper PLLC ("Foster"), had a special interest in the survival of the gas tax. Foster serves as bond counsel for the state of Washington, meaning that it stood to gain fees when the state issued bonds based on the tax. Indeed, Foster contributed significantly to the political committee opposing I-912.[4]

On June 22, 2005, the prosecuting authorities of San Juan County and the cities of Seattle, Kent, and Auburn, represented by Foster, filed a complaint in Washington's superior court, alleging that NNGT had failed to disclose the receipt of "'valuable radio announcer professional services and valuable commercial radio airtime'" that constituted "in-kind" contributions to the campaign from the owner of KVI, Fisher Communications ("Fisher").[5]

About two weeks prior to the deadline for qualifying the initiative, the municipalities sought a preliminary injunction to prevent NNGT from accepting any additional in-kind contributions—that is, the commentary of the radio hosts—from Fisher Communications until it disclosed the value of the on-air commentary NNGT had purportedly already received. The motion for a preliminary injunction alleged that "'the constant exposure on the radio is more than simply reporting the news and constitutes advertising'" for NNGT, the value of which is required to be reported under Washington law.[6]

Washington's Fair Campaign Practices Act (FCPA) defines "contribution" and "political advertising" extremely broadly and would, absent some specific exemption, require campaigns that received anything of value—including media coverage—to report such coverage as a campaign contribution. In order to keep campaign regulations from reaching media commentary, however, Washington law (like federal law) also contains a media exemption, which excludes from the definition of "contribution" "[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 a political committee."[7]

The media exemption did not deter the municipalities, however. Rather than argue that the media exemption was unconstitutional because it treated media corporations differently than other corporations (as some have done in the past), the municipalities instead proffered a convoluted and textually dubious argument as to why the exemption did not apply in this case.[8] Specifically, the municipalities argued that because Wilbur and Carlson had had "too much" contact (in the eyes of the prosecutors) with the campaign, they were "'officers and agents'" of NNGT. Therefore, Fisher had improperly allowed their facilities to be "controlled by a… political committee."[9]

Incredibly, the trial court agreed and granted the motion for a preliminary injunction, forcing NNGT to place dollar values on the hosts' commentary and "disclose" these amounts to the state. This was no mere reporting requirement, however, because Washington law states that in-kind campaign contributions in excess of $5,000, within twenty-one days of the general election, violate the FCPA.[10] This threatened to shut off discussion of the initiative by Wilbur and Carlson in the crucial three weeks before the election.

* *William Maurer is an attorney with the Institute for Justice, which represented No New Gas Tax in the case discussed. On May 16, 2007, the municipalities filed a motion for consideration with the Washington Supreme Court. At date of press, the court had yet to rule on the motion.*

NNGT then filed a constitutional challenge to the municipalities' actions, arguing that the municipalities' case and the preliminary injunction violated numerous provisions of the state and federal constitutions; most notably, the First Amendment rights of the campaign to speak and associate freely with the media. The trial court dismissed NNGT's lawsuit for having failed to state a claim and permitted the municipalities to dismiss their own complaint against NNGT after they claimed to have achieved their goals with the issuance of the preliminary injunction order.[11]

NNGT sought direct review in the Washington Supreme Court. The court granted direct review and, in April 2007, reversed the trial court.

The Court's Decision

The Washington Supreme Court unanimously reversed the trial court's order and remanded the case for consideration of NNGT's constitutional claims. In the main decision, Justice Barbara Madsen meticulously and thoroughly rebuked the municipalities' arguments for limiting the media exemption.

The court began by noting that the drafters of Washington's FCPA patterned that act after the Federal Election Campaign Act of 1971 (FECA) and that the court could therefore look to federal authorities for guidance in interpreting the FCPA.[12] The court quoted the U.S. Supreme Court's holding in *Austin v. Michigan Chamber of Commerce* that the federal media exemption "legitimately protects the press's unique role in 'informing and educating the public, offering criticism, and providing a forum for discussion and debate.'"[13] The court also quoted the legislative history of the federal exemption, noting Congress's intent to not "limit or burden in any way the first amendment freedoms of the press and of association. Thus, the exclusion assures the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns."[14]

The court rejected the municipalities' argument that Wilbur and Carlson's broadcasts fell outside the media exemption because the broadcasts constituted "political advertising" rather than "commentary":

> When considering complaints relating to media entities, the initial inquiry is whether the media exemption applies to the communication at issue. Only if the court concludes that the media exemption does not apply, is it appropriate to consider whether the communication fits within the otherwise broad definition of "contribution." This approach accords with the statute's focus on whether a media entity is controlled by a candidate or political committee, and with the purpose of the media exemption, which is to avoid burdening the First Amendment rights of the press.[15]

The court also rejected the argument that Wilbur and Carlson's interaction with the campaign had any relevance to whether their commentary constituted a political contribution. "[T]he applicability of the media exemption does not turn on Wilbur and [Carlson's] relationship to the campaign. The question is whether the news medium—here, the radio station—is controlled by a political committee, not whether a political committee authored the content of a particular communication. As with the federal media exemption, 'control' does not change from hour to hour, depending on who may be hosting a particular radio program."[16]

The court made clear that, under the media exemption, governmental consideration of the content of a media communication was inappropriate.

> Although the term "commentary" is not defined, we believe that it plainly encompasses advocacy for or against an issue, candidate or campaign, whether that involves the solicitation of votes, money, or "other support." Indeed, such activities are a core aspect of the media's traditional role.
>
> In deciding whether the media exemption applies, it is inappropriate to draw distinctions between "commentary" and "political advertising" based on the content of the publication, or the speaker's motivations, intent, sources of information, or connection with a campaign. Indeed, the content of a news story, editorial, or commentary is largely irrelevant in deciding whether a media entity is exercising its valid press functions.[17]

The court concluded that, "for the media exemption to apply, the publication need not be fair, balanced, or avoid express advocacy or solicitations."[18]

In rejecting the municipalities' interpretation of the media exemption, the court noted the court's job is not to examine the content of the media's message:

> 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. But this is an argument more appropriately directed to the legislature. The media exemption represents a policy choice to accord full protection to the first amendment rights of the press even at the expense of countervailing societal interests that may be served by campaign finance regulations. We note that nothing in our decision today forecloses the legislature, or the people via the initiative process, from limiting the statutory media exemption. Whether, and to what extent, a media exemption is constitutionally required is beyond the scope of this opinion.[19]

The court thus rejected the municipalities' case against the campaign, reinstated NNGT's constitutional claims, and ordered the trial court to hear its case on the merits.[20]

Justice Johnson's Concurrence

Justice James M. Johnson concurred, but in a strongly-worded opinion laid bare the threat to the First Amendment from the municipalities' case: "Today we are confronted with an example of abusive prosecution by several local governments. San Juan County and the cities of Seattle, Auburn, and Kent… determined to file a legal action ostensibly for disclosure of radio time spent discussing a proposed initiative. This litigation was actually for the purpose of restricting or silencing political opponents…."[21] He characterized the municipalities' efforts as "a transparent attempt to block filing of an initiative, which is also a constitutional right in Washington."[22] Further, he suggested that the state auditor and attorney general investigate the municipalities and set out guidelines for the trial court in its consideration of NNGT's constitutional claims and its entitlement to attorney's fees on remand. Justice Johnson concluded that the "lawsuit was not justified under the law

(the majority so holds) and was offensive to the notion of free and open debate."[23]

A Glimpse Into the Future?

This case is the latest battle in a continuing war over the ability of government to regulate political discourse, and particularly media commentary, in this country. For proponents of campaign finance reform, the existence of the media exemption has always presented a significant problem. If, as the proponents claim, the purpose of campaign finance regulations is to prevent "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas,"[24] then the government would appear to have a greater interest in regulating a media corporation than it would, say, a medium-sized corporation that markets computer software.[25]

Proponents of using campaign finance regulations to achieve political equality have therefore urged Congress to do away with the media exemption. They argue that in order to achieve "political equality" and thus ensure that "each individual have roughly equal political capital," Congress should remove the media exemption and permit media corporations to engage in political advocacy only under the same restrictions and regulations that apply to other corporations.[26] Without such restrictions, proponents argue, the media exemption "undermines equality indirectly by sending an important symbolic message that the media are entitled to a special position in society as candidate-makers."[27] This language, of course, mirrors the municipalities' arguments that the Washington court should have limited the media exemption to prevent radio stations from becoming "kingmakers."

The Washington case demonstrates why legislatively repealing the media exemption would be a dangerous and ill-considered step towards creating a system of governmental regulation of the press. That step, if taken, will simply result in political censorship of dissenting views. The municipalities' actions highlight a significant flaw in the argument for using campaign finance restrictions to achieve some amorphous concept of "political equality,"[28] "participatory self-government,"[29] eliminating "undue influence,"[30] or whatever phrase reformers use to push for the creation of government censors. That flaw is that these reformers assume that the power to censor will be wielded by objective regulators committed, like the reformers themselves, to highly refined notions of "participatory self-government" or "active liberty." This case shows that giving the government the power to censor means it can restrict speech that threatens the political or financial interests of those in power. When those in power can decide when media voices have accrued "undue influence" in elections, we should not be surprised when that decision has the result of suppressing speech the political establishment would rather not have you hear.

The Washington municipalities have demonstrated, with a significant degree of success, that under a system of government regulation of the media, prosecutors with political and financial motivations will not hesitate to use the ability to censor to try to shut down speech with which they disagree. Prosecutors are, after all, human—as Justice Johnson found, the municipalities here were motivated by a desire for tax money. In the hands of unscrupulous government officials, the ability to drag a campaign or media figure into court because they have crossed the line from "reporting the news" to providing a "contribution" to a campaign will be a powerful tool for the establishment to harass or threaten voices with which they disagree. This ability to use campaign finance laws to shut down dissenting voices is only intensified by laws that permit private parties to file complaints or even prosecute those complaints themselves.

As part of their case against NNGT, government agents monitored radio broadcasts they suspected of going too far. They wrote down the words and phrases they did not like and marched into court to have the force of government dictate that such commentary be broadcast only subject to the government's restrictions and regulations. Although they justified their intrusion into fundamental First Amendment rights with such noble sounding theories as "disclosure" and preventing "kingmakers," in the end the case was little more than crass political bullying.

Having the government directly regulate the content of a media communication is inconsistent with the First Amendment's protections of a free press, free association between the press and campaigns, and the free speech rights of campaigns to access media sources that may help disseminate their political message. Doing away with the media exemption would create, in short order, governmental agencies whose purpose is to ensure that messages upon which the government frowns are quarantined and silenced. San Juan County and the cities of Seattle, Auburn and Kent have given us a glimpse into the future urged by the reformers. They have shown that, absent the media exemption, government suppression of the media will have more to do with bureaucratic greed than abstract notions of political equality.

While the concern for consistency may be a persuasive argument for some to do away with the media exemption, creating a governmental monitoring board for newspapers, the Internet, radio, and television seems like a steep price to pay for even-handed regulation. If the concern is consistency, our Constitution, history, and traditions dictate that instead of shutting down the speech of all equally the government should simply stay out of the business of regulating political discourse altogether. Even-handed freedom is better than even-handed oppression.

Endnotes

1 San Juan County v. No New Gas Tax, __ P.3d __, 2007 WL 1218207 (Wash. Apr. 26, 2007).

2 *Id.* at *2.

3 *Id.*

4 *Id.,* at *2, *11 n.2 (Johnson, J.M., J., concurring).

5 *Id.* at *2.

6 *Id.*

7 Wash. Rev. Code § 42.17.020(15)(b)(iv).

8 *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 667, 110 S. Ct. 1391, 108 L. Ed. 2d 652 (1990) (business group challenged Michigan's campaign finance laws as violating the Equal Protection Clause because such laws exempted media corporations from restrictions otherwise applicable to corporate entities); Brief of Appellant National Rifle Association at 44-50, Nat'l Rifle Assoc. v. FEC, No. 02-1675 (U.S. July 8, 2003), 2003 WL 21649660 (claiming that § 201 of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified as amended in scattered sections of 2, 28, and 47 U.S.C.) violated Equal Protection Clause by treating media corporations and non-profits differently).

9 *San Juan County,* 2007 WL 1218207 at *2; Wash. Rev. Code § 42.17.020(15)(b)(iv).

10 Wash. Rev. Code § 42.17.105(8).

11 *San Juan County,* 2007 WL 1218207 at *3-4. The initiative qualified for the ballot, but was rejected by the people in the November 2005 election.

12 *Id.* at *5.

13 *Id.* at *6 (quoting *Austin,* 494 U.S. at 667).

14 H.R. Rep. No. 93-1239, at 4 (1974).

15 *San Juan County,* 2007 WL 1218207 at *7.

16 *Id*.

17 *Id.* at *8 (citations omitted).

18 *Id.* at *9.

19 *Id.* at *8 n.10.

20 *Id.* at *11.

21 *Id.* at 11 (Johnson, J.M., J., concurring).

22 *Id.*

23 *Id.* at *15.

24 *Austin,* 494 U.S. at 660.

25 Opponents of campaign finance restrictions make this argument as well, as a means of pointing out the inconsistency and futility of the government's attempts to ration the speech of those whose voice may become "unduly" influential. *See Austin,* 494 U.S. at 691 (Scalia, J., dissenting).

26 Richard Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem,* 77 Tex. L. Rev. 1627, 1646-47 (1999) (arguing that the government should make it illegal for media corporations to endorse candidates unless such corporations set up separate segregated funds to pay for advertisements containing endorsements). For other articles discussing proposals to limit or eliminate the media exemption, *see* Joshua L. Shapiro, *Corporate Media Power, Corruption, and the Media Exemption,* 55 Emory L.J. 161 (2006); Victoria S. Shabo, *Money, Like Water…": Revisiting Equality in Campaign Finance Regulation after the 2004 "Summer of 527s,"* 84 N.C. L. Rev. 221, 270-71 (2005); Arthur N. Eisenberg, *Buckley, Rupert Murdoch, and the Pursuit of Equality in the Conduct of Elections,* 1996 Ann. Surv. Am. L. 451.

27 Hasen, *supra* note 26, at 1646.

28 145 Cong. Rec. S12,575, S12,606 (Oct. 14, 1999) (Statement of Sen. Wellstone) ("The last criterion is political equality. Everybody ought to have an equal opportunity to participate in the process…. One person, one vote; no more, no less; one person, same influence. Each person counts as one, no more than one.").

29 Stephen Breyer, Active Liberty 46 (2005) ("To understand the First Amendment as seeking in significant part to protect active liberty, 'participatory self-government,' is to understand it as protecting more than the individual's modern freedom.").

30 McConnell v. FEC, 540 U.S. 93, 143-44, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003) (extending the anti-corruption rationale to preventing "undue influence").