

Agenda

Item #4



STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0135

To: Commissioners

From: Jonathan Wayne, Executive Director

Date: December 17, 2010

Re: Cutler Files Website

Initiation of Investigation

The Cutler Files website (www.cutlerfiles.com) was posted to the Internet on or about Monday, August 30, 2010. On September 7, the gubernatorial campaign of Eliot Cutler submitted the attached request for an investigation concerning the website. On September 9, you authorized the staff to investigate the website. Soon after the investigation started, the website authors obtained legal counsel, Daniel I. Billings, Esq., who raised the First Amendment objections outlined below.

Potential Violations

Disclaimer Requirement (21-A M.R.S.A. § 1014)

Under 21-A M.R.S.A. §§ 1014(1) and (2), “whenever a person makes an expenditure to finance a communication expressly advocating the election or defeat of a clearly identified candidate through broadcasting stations, newspapers, magazines, campaign signs or other outdoor advertising facilities, publicly accessible sites on the Internet, direct mails or other similar types of general public political advertising...,” the communication must include a statement of the name and address of the person who made or financed the expenditure. It also must state whether or not any candidate authorized the communication.

The same attribution and disclaimer statements are required, pursuant to subsection 2-A of § 1014, if the communication “names or depicts a clearly identified candidate and ... is disseminated” through the types of media described in subsection 1 during the 35 days before a general election.

Independent Expenditure Reporting Statute (21-A M.R.S.A. § 1019-B)

If a person or committee makes an expenditure greater than \$100 for a communication that expressly advocates for the defeat of a candidate, the sponsor is required to file an independent expenditure report (21-A M.R.S.A. § 1019-B).

Staff's Investigation

For this investigation, the staff interviewed seven individuals, inspected payment records for the research and for the website, and briefly looked at the research notebook that was the basis for the website. A summary of the investigation and our staff findings are contained in a memo that has been provided to you confidentially, in accordance with 21-A M.R.S.A. § 1003(3-A). Our conclusion is that the attached redacted affidavit is mostly correct. The Cutler Files website is the work of two individuals. One of them performed most of the research that is shown on the website during the period of August 2009 to February 2010, after learning that Eliot Cutler was running for the office of governor. He was intent on exposing Eliot Cutler's background, as he understood it. We suspect that this individual intended the research to be used some day in the 2010 general election. He was not compensated for this work.

The two individuals were frustrated that Cutler's background, as they saw it, was not being explored by the press. In July or August 2010, they decided to create a website to publicize the research. Both individuals contributed writing for the website. No candidate in the 2010 general election directed or authorized them to create the website. They expressed that their goal was to get the information they found into the open, so that it would be covered by the press. The other individual in the team (not the researcher) was experienced in creating websites. That person performed the editing and graphics for the website, purchased the domain name, and paid the hosting fee.

The staff's investigation has concluded that the total cost of the website (including the research shown on the site) is \$91.38. It appears that no one was compensated for conducting the research for the website or for creating the website.

Argument by Cutler Files Counsel Daniel I. Billings

The staff refers you to the September 26, 2010 letter from attorney Daniel I. Billings, who is representing the two Cutler Files authors. He argues that the Cutler Files authors wish to remain anonymous because “they do believe that their identities might detract from the impact of the information set forth in the blog.” (September 26, 2010 letter, at 2) Also, his clients state that they are fearful of litigation by Mr. Cutler. (Id.) The letter relies on two U.S. Supreme Court decisions to argue that anonymous speech is protected by the First Amendment of the U.S. Constitution, including McIntyre v. Ohio Elections Commission 514 U.S. 334 (1995). Mr. Billings contends that 21-A M.R.S.A. § 1014

is not narrowly tailored because it applies to all expenditures that expressly advocate the election or defeat of a candidate. Certainly, Maine law cannot have an overriding interest that trumps the broad protections that the Constitution provides political speech when such communication is not done by a party, candidate or committee and such communication cost[s] merely a de minimis amount of money.

(September 26, 2010 letter, at 4) (underlining in original) He also contends that the website constitutes a form of citizen journalism that should be covered by the media exception to the definition of expenditure.¹ For all of these reasons, which are more fully articulated in his letter, Mr. Billings argues that the Commission should not enforce 21-A M.R.S.A. § 1014 against the Cutler Files.

At the December 20, 2010 meeting, Mr. Billings would like to offer some final comments to the Commission, including a response to the Cutler campaign’s most recent written submission.

Comments by Advocacy Groups

We have also received written materials from the Maine Civil Liberties Union and the Electronic Frontier Foundation urging the Commission not to investigate the Cutler

¹Title 21-A, § 1012(3)(B)(1) exempts “Any news story, commentary or editorial distributed through the facilities of any broadcasting station, newspaper, magazine or other periodical publication, unless the facilities are owned or controlled by any political party, political committee, candidate, or candidate’s immediate family”

Files or take other action that would identify its authors. Their submissions are attached for your continued consideration.

Submissions by the Cutler Campaign

Counsel for the Cutler campaign made a final written submission on December 15, which stresses the informational interest of Maine voters in knowing who is speaking to them to influence their choices in candidate elections. The campaign argues that the balance of interests (an informed public versus a speaker's right to privacy) is much different here, when compared to the plaintiff in McIntyre (an individual with no connection to a larger campaign who wished to express her personal point of view on school funding in a local election). The campaign argues that the particular individuals responsible for the Cutler Files website do not have the same right to anonymity as the plaintiff in McIntyre.

The Cutler campaign also refers to the state's interest in preventing negative campaign practices. Finally, the campaign contends that the U.S. Supreme Court's affirmation of the value of disclaimer and disclosure statutes earlier this year in the Citizens United decision changes the legal landscape.

For your reference, I have also included in the materials earlier letters from attorneys representing the Cutler campaign dated October 19, 2010 (Drummond Woodsum) and October 6, 2010 (Norman Hanson & DeTroy).

Staff Recommendations

With respect to the independent expenditure reporting requirement in section 1019-B, the evidence does not show that any violation occurred. Our investigation concludes that the two individuals did not spend more than \$100 on research and the website that would trigger independent expenditure reporting. Thus, the staff recommends taking no action.

With respect to 21-A M.R.S.A. § 1014(2), the Commission staff believes that the Cutler Files website meets the standard for express advocacy, as defined in the Commission's rules (Chapter 1, Section 10(2)(B)), particularly during the first 10 or 11 days that it was publicly accessible. Throughout its public posting, the website contained

a number of sharply negative statements about the candidate that question his qualifications for office (trustworthiness, competence, *etc.*). During its first 10 or 11 days on the Internet, (approximately August 30, 2010 to September 9), the site also contained such phrases as "You'll see why Eliot Cutler is unfit to be Maine's next governor," "[Cutler] would make a lousy governor," "Eliot Cutler, alleged independent candidate for Maine governor." The website did not include any statement of who paid for the website or that it was not authorized by any candidate.

On September 9-10, the language on the Cutler Files website changed. The material quoted above was removed, and language was added stating that the authors "do not advocate for or against the election of any particular candidate." The authors also inserted a statement that the website was "not paid for or authorized by any candidate." This version of the website remained publicly accessible on the Internet during the entire 35-day period prior to the general election.² Pages with new topics were added closer to the election. A printout of the final version of the website is included in your materials for your reference.

Because the website expressly advocated against the election of Eliot Cutler and did not include a statement of who paid for the website or that it was not authorized by any candidate, the Commission could find that the persons who made the expenditures to finance the website violated 21-A M.R.S.A. § 1014(2). In addition, the Commission could find that maintaining the website on the Internet after the 35th day prior to the general election, without identifying the persons who made the expenditure to finance it violated 21-A M.R.S.A. § 1014(2-A). Nevertheless, at this time the staff declines to recommend whether you should take any action in this matter because of the constitutional issues involved. Applying the disclaimer requirements in Section 1014 requires the Commission to weigh two important public values:

² It is a closer question whether the revised website fits the definition of "express advocacy" in the Commission's rules, but staff believes it is the "functional equivalent" of express advocacy as articulated in U.S. Supreme Court case law. *E.g.*, *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2667 (2007); *Citizens United*, 130 S. Ct. 876, 889-90 (2010).

- (1) the clear intention of the Maine Legislature that when individuals or groups finance communications to members of the general public advocating for or against the election of a candidate, the public should be informed who is doing the speaking and whether the speech was – or was not – authorized by another candidate in the election; and
- (2) the protection that the courts afford to anonymous speech, because of the recognition that some speakers will not come forward to discuss candidates and ballot questions if the government insists that their identities be public.

From the staff's point of view, the Maine public had a strong informational interest in knowing in September and October 2010 who was financing the Cutler Files website, seeking to influence Maine voters in the gubernatorial race. The press and the public were less able to engage with the Cutler Files authors and to assess the reliability of their allegations because of the authors' determination to remain anonymous.

Nevertheless, the Commission's ability to regulate in the area of First Amendment activity is not as broad as some candidates, advocates, and governmental actors (like myself) would like. The courts routinely caution administrative agencies regarding application of statutes that impose burdens on core political speech. The Commission received such a warning a couple of years ago (the Mowles decision by the Maine Supreme Judicial Court) when it applied a statute regulating candidates' uses of endorsements in campaign literature, even though the statute merely required candidates to obtain permission of the endorser before using the endorsement. Accordingly, the Commission staff recommends that at the December 20 meeting you hear the final advice from your Counsel concerning the risks that a finding of violation could exceed constitutional limits before deciding whether to take any action with respect to § 1014(2) or § 1014(2-A).

Thank you for your consideration of this memorandum.

21-A MRSA § 1014. PUBLICATION OR DISTRIBUTION OF POLITICAL COMMUNICATIONS

1. Authorized by candidate. Whenever a person makes an expenditure to finance a communication expressly advocating the election or defeat of a clearly identified candidate through broadcasting stations, newspapers, magazines, campaign signs or other outdoor advertising facilities, publicly accessible sites on the Internet, direct mails or other similar types of general public political advertising or through flyers, handbills, bumper stickers and other nonperiodical publications, the communication, if authorized by a candidate, a candidate's authorized political committee or their agents, must clearly and conspicuously state that the communication has been so authorized and must clearly state the name and address of the person who made or financed the expenditure for the communication. The following forms of political communication do not require the name and address of the person who made or authorized the expenditure for the communication because the name or address would be so small as to be illegible or infeasible: ashtrays, badges and badge holders, balloons, campaign buttons, clothing, coasters, combs, emery boards, envelopes, erasers, glasses, key rings, letter openers, matchbooks, nail files, noisemakers, paper and plastic cups, pencils, pens, plastic tableware, 12- inch or shorter rulers, swizzle sticks, tickets to fund-raisers and similar items determined by the commission to be too small and unnecessary for the disclosures required by this section. A communication financed by a candidate or the candidate's committee is not required to state the address of the candidate or committee that financed the communication. A communication in the form of a sign that clearly identifies the name of the candidate and is lettered or printed individually by hand is not required to include the name and address of the person who made or financed the communication.

2. Not authorized by candidate. If the communication described in subsection 1 is not authorized by a candidate, a candidate's authorized political committee or their agents, the communication must clearly and conspicuously state that the communication is not authorized by any candidate and state the name and address of the person who made or financed the expenditure for the communication. If the communication is in written form, the communication must contain at the bottom of the communication in print that is no smaller in size than 10-point bold print, Times New Roman font, the words "NOT PAID FOR OR AUTHORIZED BY ANY CANDIDATE."

2-A. Other communications. Whenever a person makes an expenditure to finance a communication that names or depicts a clearly identified candidate and that is disseminated during the 21 days before a primary election or 35 days before a general election through the media described in subsection 1, the communication must state the name and address of the person who made or financed the communication and a statement that the communication was or was not authorized by the candidate. The disclosure is not required if the communication was not made for the purpose of influencing the candidate's nomination for election or election.

3. Broadcasting prohibited without disclosure. No person operating a broadcasting station within this State may broadcast any communication, as described in subsections 1 to 2-A, without an oral or written visual announcement of the disclosure required by this section.

3-A. In-kind contributions of printed materials. A candidate, political committee or political action committee shall report on the campaign finance report as a contribution to the candidate, political committee or political action committee any contributions of in-kind printed materials to be used in the support of a candidate or in the support or defeat of a ballot question. Any in-kind contributions of printed materials used or distributed by a candidate, political

committee or political action committee must include the name or title of that candidate, political committee or political action committee as the authorizing agent for the printing and distribution of the in-kind contribution.

3-B. Newspapers. A newspaper may not publish a communication described in subsections 1 to 2-A without including the disclosure required by this section. For purposes of this subsection, "newspaper" includes any printed material intended for general circulation or to be read by the general public, including a version of the newspaper displayed on a website owned or operated by the newspaper. When necessary, a newspaper may seek the advice of the commission regarding whether or not the communication requires the disclosure.

4. Enforcement. An expenditure, communication or broadcast made within 20 days before the election to which it relates that results in a violation of this section may result in a civil fine of no more than \$200. The person who financed the communication or who committed the violation shall correct the violation within 10 days after receiving notification of the violation from the commission. An expenditure, communication or broadcast made more than 20 days before the election that results in a violation of this section may result in a civil fine of no more than \$100 if the violation is not corrected within 10 days after the person who financed the communication or other person who committed the violation receives notification of the violation from the commission. If the commission determines that a person violated this section with the intent to misrepresent the name or address of the person who made or financed the communication or whether the communication was or was not authorized by the candidate, the commission may impose a fine of no more than \$5,000 against the person responsible for the communication. Enforcement and collection procedures must be in accordance with section 1020-A.

5. Telephone calls. Prerecorded automated telephone calls and scripted live telephone communications that name a clearly identified candidate during the 21 days before a primary election or the 35 days before a general election must clearly state the name of the person who made or financed the expenditure for the communication, except for prerecorded automated telephone calls paid for by the candidate that use the candidate's voice in the telephone call and that are made in support of that candidate. Telephone calls made for the purposes of researching the views of voters are not required to include the disclosure.

21-A MRSA § 1019-B. REPORTS OF INDEPENDENT EXPENDITURES

1. Independent expenditures; definition. For the purposes of this section, an "independent expenditure":

A. Is any expenditure made by a person, party committee, political committee or political action committee, other than by contribution to a candidate or a candidate's authorized political committee, for any communication that expressly advocates the election or defeat of a clearly identified candidate; and [2003, c. 448, §3 (NEW) .]

B. Is presumed in races involving a candidate who is certified as a Maine Clean Election Act candidate under section 1125, subsection 5 to be any expenditure made to design, produce or disseminate a communication that names or depicts a clearly identified candidate and is disseminated during the 21 days, including election day, before a primary election; the 35 days, including election day, before a general election; or during a special election until and on election day. [2007, c. 443, Pt. A, §20 (AMD) .]

2. Rebutting presumption. A person presumed under this section to have made an independent expenditure may rebut the presumption by filing a signed written statement with the commission within 48 hours of making the expenditure stating that the cost was not incurred with the intent to influence the nomination, election or defeat of a candidate, supported by any additional evidence the person chooses to submit. The commission may gather any additional evidence it deems relevant and material and must determine by a preponderance of the evidence whether the cost was incurred with intent to influence the nomination, election or defeat of a candidate.

3. (TEXT EFFECTIVE UNTIL 8/1/11) (TEXT REPEALED 8/1/11) Report required; content; rules. A person, party committee, political committee or political action committee that makes independent expenditures aggregating in excess of \$100 during any one candidate's election shall file a report with the commission. In the case of a municipal election, a copy of the same information must be filed with the municipal clerk.

A. A report required by this subsection must be filed with the commission according to a reporting schedule that the commission shall establish by rule that takes into consideration existing campaign finance reporting requirements and matching fund provisions under chapter 14. Rules adopted pursuant to this paragraph are routine technical rules as defined in Title 5, chapter 375, subchapter 2- A. [2009, c. 524, §6 (RPR) .]

B. A report required by this subsection must contain an itemized account of each expenditure aggregating in excess of \$100 in any one candidate's election, the date and purpose of each expenditure and the name of each payee or creditor. The report must state whether the expenditure is in support of or in opposition to the candidate and must include, under penalty of perjury, as provided in Title 17- A, section 451, a statement under oath or affirmation whether the expenditure is made in cooperation, consultation or concert with, or at the request or suggestion of, the candidate or an authorized committee or agent of the candidate. [2009, c. 524, §6 (RPR) .]

C. A report required by this subsection must be on a form prescribed and prepared by the commission. A person filing this report may use additional pages if necessary, but the pages must be the same size as the pages of the form. [2009, c. 524, §6 (RPR) .]

This subsection is repealed August 1, 2011.

4. (TEXT EFFECTIVE 8/1/11) Report required; content; rules. A person, party committee, political committee or political action committee that makes independent expenditures aggregating in excess of \$100 during any one candidate's election shall file a report with the commission. In the case of a municipal election in a town or city that has chosen to be governed by this subchapter, a copy of the same information must be filed with the municipal clerk.

A. A report required by this subsection must be filed with the commission according to a reporting schedule that the commission shall establish by rule that takes into consideration existing campaign finance reporting requirements and matching fund provisions under chapter 14. Rules adopted pursuant to this paragraph are routine technical rules as defined in Title 5, chapter 375, subchapter 2- A. [2009, c. 524, §7 (NEW) .]

B. A report required by this subsection must contain an itemized account of each expenditure aggregating in excess of \$100 in any one candidate's election, the date and purpose of each expenditure and the name of each payee or creditor. The report must state whether the expenditure is in support of or in opposition to the candidate and must include, under penalty of perjury, as provided in Title 17- A, section 451, a statement under oath or affirmation whether the expenditure is made in cooperation, consultation or concert with, or at the request or suggestion of, the candidate or an authorized committee or agent of the candidate. [2009, c. 524, §7 (NEW) .]

C. A report required by this subsection must be on a form prescribed and prepared by the commission. A person filing this report may use additional pages if necessary, but the pages must be the same size as the pages of the form. [2009, c. 524, §7 (NEW) .]

This subsection takes effect August 1, 2011.

**AFFIDAVIT OF
IN RESPONSE TO QUESTIONS FROM THE STAFF OF MAINE COMMISSION ON
GOVERNMENTAL ETHICS & ELECTION PRACTICES**

I, _____, after being duly sworn, do hereby depose and say as follows:

QUESTION No. 1 How many individuals conducted the research, writing, editing, and graphics of the Cutler Files website? Include any consultants or other individuals who were paid. Please provide a breakdown between (A) individuals in a "core group," and (B) individuals whose contributions were less significant or were peripheral.

ANSWER: Two individuals primarily conducted the research, writing, editing, and graphics of the Cutler Files website. Others provided suggestions which were incorporated into the content. No person or entity has been paid, directly or indirectly, for any work related to the site.

QUESTION No. 2 Please describe the work (e.g., research, graphics, writing, editing) performed by each individual counted in question (1), referring to them by whatever convention you prefer (e.g., Person 1 . . .).

ANSWER: One individual primarily completed the research and the second individual primarily completed the writing and graphics for the website. The second individual also conducted a small amount of additional research and checked the references for some information. Both individuals have been involved with the editing of the site content.

QUESTION No. 3 Of the individuals counted in question (1), please identify those who were compensated for their labor.

ANSWER: None of the individuals counted in question (1) were compensated in any way for their labor.

QUESTION No. 4 Did any candidate authorize the development of the website or an expenditure for the website?

ANSWER: No candidate authorized the development of the website or an expenditure for the website. No candidate was involved in the development of the website or had knowledge that it was being developed.

QUESTION No. 5 Did any party committee authorize the development of the website or an expenditure for the website?

ANSWER: No party committee authorized the development of the website or an expenditure for the website. No party committee was involved in the development of the website or had knowledge that it was being developed.

QUESTION No. 6 Did any political action committee authorize the development of the website or an expenditure for the website?

ANSWER: No political action committee authorized the development of the website or an expenditure for the website. No political action committee was involved in the development of the website or had knowledge that it was being developed.

QUESTION No. 7 Please describe the process by which the research for the site was conducted or obtained. Include any response you wish to make to the October 6, 2010 letter from the Cutler campaign's counsel.

ANSWER: The research was conducted online, often at night, from our home computers. Most of the material was uncovered using Google to search for information accessible online. When Mr. Cutler first announced his campaign, there were limited online references to him, which made the research easier than it would be today due to the many online sources that now reference his campaign. It should be noted that the research was not done with

any specific purpose or outcome in mind – the research was a project for purely personal reasons. The idea of a website did not emerge until the summer of 2010.

Our sources cited in an October 5, 2010 memo by Mr. Cutler's pollster are inaccurately characterized to serve their own narrow purposes of portraying our work as something it's not.

For example:

- The Bates interview is accessible online through the Muskie Archives and easily found using Google;
- Cutler's law firm website and press releases are also online and easily found using Google;
- Local property tax records are online and readily available through municipal websites;
- No foreign language newspapers were cited in our work. Perhaps the pollster is referring to the 2009 article titled "Firsthand lobbying lessons from a Washington lawyer" which appeared in the Global Times, an ENGLISH LANGUAGE newspaper published in China, readily found online using Google. As a side note, Google has a TRANSLATE button which handily converts any foreign language website, even one in Mandarin Chinese, into English automatically; and
- The 1977 letter from the President's Office of Science and Technology Policy to OMB when Cutler was an associate director was quoted directly from a Los Angeles Times PULITZER PRIZE-WINNING article published in December 1977, titled "Mid-Level Budget Officials Block Dam Inspections", and found using Google.

QUESTION No. 8 Describe when the research was compiled or obtained. If a major portion of the research was obtained during a specific time period, please identify that period.

ANSWER: We began the research when Mr. Cutler announced his candidacy in August of 2009 and continued sporadically until approximately February of 2010. Additional research and checking of sources was conducted in the summer of 2010.

QUESTION No. 9 Were payments of money made in connection with the research included in the site? If yes, please provide the amounts and dates of the payments with as much specificity as is possible within the time limitation of this request.

ANSWER: During the initial period of research from August 2009 through February 2010, I paid for three or four articles that I obtained online. I estimate that each of those articles cost no more \$3.99 each. I am unable to provide any more detail because the research was conducted some time ago without any anticipation of ever having to account for the costs. Two additional online articles were obtained more recently – one on August 5th for \$2.95 and one on September 6th for \$3.95. We also obtained a copy of Mr. Cutler's mortgage from the Cumberland County Registry of Deeds. Based on the number of pages in the mortgage as listed online and the cost of \$1.50 per page, my best estimate for the cost for obtaining the mortgage is \$39.00.

QUESTION No. 10 Was anyone compensated for the labor of gathering the research displayed on the site? If so, who was compensated and how much.

ANSWER: No person was compensated for the labor of gathering the research displayed on the site.

QUESTION No. 11 Provide an actual or estimated total of payments for research (including compensation) that is included on the site.

ANSWER: The total of the costs detailed in the answer to Question No. 9 is \$61.86.

QUESTION No. 12 Did you receive research for the site from some other source?

ANSWER: No. The allegation that the site is a result of paid research provided by a political campaign is false.

QUESTION No. 13 How much has been spent to date on the domain name for the site? Please provide the date of the purchase.

ANSWER: The domain name was registered on August 4, 2010. The cost of registering the domain name was \$15.87.

QUESTION No. 14 How much has been spent to date on the hosting of the site?

ANSWER: \$9.82. A monthly hosting fee of \$4.83 was paid on August 29, 2010 and a monthly hosting fee of \$4.99 was paid on September 20, 2010.

QUESTION No. 15 Please describe any other payments made in connection with the website?

ANSWER: None.

QUESTION No. 16 What is the total anticipated cost of the website, including payments for research?

ANSWER: \$92.54.

QUESTION No. 17 Please state which individuals referred to in question (2) made payments for the site.

ANSWER: Both made payments from personal funds.

QUESTION No. 18 Please state whether any payments were made in connection with the site (including research) by any other individuals or organizations.

ANSWER: There have been no other payments than those detailed above.

Dated:

STATE OF MAINE

COUNTY OF _____, ss.

Dated:

Personally appeared the above named
foregoing.

and swore to the truth of the

Before me,

PUBLIC

Printed name: _____

My Commission expires: _____

**MARDEN, DUBORD,
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September 26, 2010

Jonathan Wayne, Executive Director
Maine Commission on Governmental Ethics & Election Practices
135 State House Station
Augusta, Maine 04333-0135

RE: Investigation of the Cutler Files

Dear Mr. Wayne:

Thank you for the opportunity to submit legal arguments on behalf of the Cutler Files. Given the important constitutional issues involved with this matter, my client(s) very much appreciate(s) the Commission's respect for his/her/their wish to cooperate with the Commission while retaining anonymity. While it is certainly unusual for the Commission to consider a matter without the identity of one of the parties being known, moving forward in such fashion is appropriate and legally justified.

FACTS

www.Cutlerfiles.com (hereinafter "the Cutler Files") was created approximately one month ago to provide information to the public about Eliot Cutler that has been largely ignored by the mainstream media. While the author(s) would certainly admit to not supporting Mr. Cutler's bid for Governor, the blog was not intended as a campaign vehicle but rather an exercise in citizen journalism – researching, reporting, and analyzing information about a candidate for major office. Just like the mainstream media, the blog both reports facts and offers analysis and opinion based on those facts.

The total amount spent to create and maintain the Cutler Files has been less than \$100.00. No person or entity has been compensated, directly or indirectly, to create the content or design of the site. Technology has advanced so that people with modest technical expertise can create websites and blogs easily and inexpensively. The major expense in creating the blog was the cost of registering and hosting the URL.

The blog is not owned, operated or controlled by any political party, political committee, candidate or candidate's immediate family.

Your conclusion in your September 21, 2010 memo that the website is anonymous by choice and not by accident is correct. In fact, the issue of anonymity has been addressed on

the front page of the blog since it was originally posted. The person(s) behind the blog do not claim to be unsophisticated. The person(s) simply claim that the blog, whether sophisticated or unsophisticated, is protected by the First Amendment and does not fall within the jurisdiction of the Ethics Commission.

ANONYMOUS SPEECH IS PROTECTED BY THE FIRST AMENDMENT

“Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind.” Talley v. California, 362 U.S. 60, 64, 80 S.Ct. 536, 538 (1960). American history illustrates a respected tradition of anonymity in the advocacy of political causes going back to the founding of our Republic. The most famous example of this practice is the Federalist Papers, authored by James Madison, Alexander Hamilton, and John Jay, but signed “Publius.” The Anti-Federalists also tended to publish under pseudonyms: prominent among them were “Cato,” believed to be New York Governor George Clinton; “Centinel,” likely Samuel Bryan or his father, Pennsylvania judge and legislator George Bryan; “The Federal Farmer,” who may have been Richard Henry Lee, a Virginia member of the Continental Congress and a signer of the Declaration of Independence; and “Brutus,” who may have been Robert Yates, a New York Supreme Court justice who walked out on the Constitutional Convention. 2 H. Storing, ed., The Complete Anti-Federalist (1981).

People may choose to speak anonymously to avoid persecution or “an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity.” McIntyre v. Ohio Elections Commission, 514 U.S. 334, 342 115 S.Ct. 1511, 1517 (1995). “Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent.” Id. In the case of the Cutler Files, though the authors certainly don’t consider themselves “unpopular”, they do believe that their identities might detract from the impact of the information set forth on the blog. In addition, Mr. Cutler, the subject of the blog and the complaining party in this matter, has shown a willingness to spend hundreds of thousands of dollars of his own money to advance his political aspirations; it is certainly plausible that he might turn his resources towards seeking vengeance on the authors of the Cutler Files.

The United States Supreme Court has left no doubt that anonymous speech is protected by the First Amendment. In Talley v. California, the Supreme Court invalidated a city ordinance prohibiting all anonymous leafleting, holding that the First Amendment protected the distribution of unsigned handbills urging readers to boycott certain Los Angeles merchants who were allegedly engaging in discriminatory employment practices. 362 U.S. 60, 80 S.Ct. 536. California defended the Los Angeles ordinance at issue as a law “aimed at providing a way to identify those responsible for fraud, false advertising and libel.” 362 U.S. at 64, 80 S.Ct., at 538. The Supreme Court rejected that argument because nothing in the text or legislative history of the ordinance limited its application to those unlawful acts. Id.

Anonymous political speech is afforded the First Amendment’s broadcast protection. McIntyre, 514 U.S. at 346, 115 S.Ct. at 1519. In McIntyre v. Ohio Elections Commission, the

Supreme Court held unconstitutional an Ohio statute prohibiting anonymous political campaign literature. *Id.* at 357, 115 S.Ct. at 1524. The plaintiff in *McIntyre* had distributed leaflets at a public meeting in which the local schools superintendent was discussing a school tax levy proposal. *Id.* at 337, 115 S.Ct. at 1514. In the leaflets, plaintiff advocated against the tax proposal, and she left some of the leaflets unsigned. *Id.* After a complaint was lodged against the plaintiff by a supporter of the tax levy, Ohio's Elections Commission fined the plaintiff for failing to sign the leaflets in violation of an Ohio statute prohibiting anonymous political campaign literature. *Id.* at 338, 115 S.Ct. at 1514. The Supreme Court found that the law burdened core political speech and applied "exacting scrutiny" which required the law to be narrowly tailored to serve an overriding state interest. *Id.* at 347, 115 S.Ct. at 1519. In holding the statute unconstitutional, the Supreme Court found that Ohio's informational interest in providing relevant information to the electorate was insufficient to support the disclosure requirement. *Id.* at 348-49, 115 S.Ct. at 1519-20. The Supreme Court also held that while the state had an interest in preventing fraud and libel, the statute was not narrowly tailored to serve those interests. *Id.* The Supreme Court also emphasized the importance of anonymous publications in our national political discourse, noting that "[a]nonymity is a shield from the tyranny of the majority." *Id.* at 357, 115 S.Ct. 1511. The Court found that Ohio had "not shown that its interest in preventing the misuse of anonymous election-related speech justifies a prohibition of all uses of that speech." *Id.*

MAINE'S DISCLOSURE STATUTE IS NOT NARROWLY TAILORED

21-A M.R.S.A. §1014 prohibits anonymous political communications that advocate the election or defeat of a clearly identified candidate¹ and, during the 21 days before a primary or 35 days before a general election prohibits anonymous political communications that merely names or depicts a clearly identified candidate². Like the statute at issue in *McIntyre*, Maine law imposes a broad ban on anonymous political speech which cannot survive the exacting scrutiny imposed on laws that burden core political speech.

It is certainly true that courts have upheld laws that require disclaimers on political communications by a candidate, party or political committee. However, it is important to note that Federal law does not impose a broad ban on anonymous speech like Maine law. Federal law has much more limited disclaimer requirements which take into consideration the identity of the speaker and the nature of the communication namely, whether they are associated with

¹ It is the position of the Cutler Files that the site does not, and has not, expressly advocated the election or defeat of a clearly identified candidate. However, the owner(s) of the site do intend to keep the site online during the 35 days before the general election and there is no question that the site names a clearly identified candidate. As a result, whether or not the site does now, or formerly, expressly advocated the election or defeat of a candidate is immaterial to the issue now before the Commission.

² The statute does not require a disclaimer on items which are so small that including the name and address of the person making the expenditure would not be legible or feasible. This limited exception to Maine's broad ban on anonymous political speech is not sufficient to make the law "narrowly tailored" and is not material to the constitutional analysis of the law.

a party, candidate or committee and such communication was associated with more than a de minimis expenditure of money. See Exhibit A, Special Notices on Political Ads and Solicitations, Federal Election Commission, October 2006.

Assuming *arguendo* that the State of Maine has an overriding interest to require disclaimers on certain political communications, Maine's law is not narrowly tailored because it applies to all expenditures that expressly advocate the election or defeat of a candidate. Certainly, Maine law cannot have an overriding interest that trumps the broad protections that the Constitution provides political speech when such communication is not done by a party, candidate or committee and such communication cost merely a de minimis amount of money. For example, if an individual spends \$5.00 to make 100 copies of a home-made leaflet advocating for a named candidate, seemingly, Maine law requires that the leaflet include the individual's name and address and the words "NOT PAID FOR OR AUTHORIZED BY ANY CANDIDATE." It is extremely unlikely that a court would find that a law with such a broad application is narrowly tailored³ and would more likely find that application to be a constitutional violation.

21-A M.R.S.A. §1014 SHOULD BE INTERPRETED AS TO NOT APPLY TO INTERNET ACTIVITY CONDUCTED BY INDIVIDUALS AND BLOGGERS

21-A M.R.S.A. §1014 requires disclaimers to be included when "an expenditure" is made to finance a communication. As a result, only communications which constitute "an expenditure" as defined by Maine law require a disclaimer. Expenditure is defined by 21-A M.R.S.A. §1012(3). If a communication does not constitute "an expenditure" as defined no disclaimer is required.

21-A M.R.S.A. §1012(3)(B)(1) states that the term "expenditure" does not include:

Any news story, commentary or editorial distributed through the facilities of any broadcasting station, newspaper, magazine or other periodical publication, unless the facilities are owned or controlled by any political party, political committee, candidate or candidate's immediate family;

This exact language also appears in federal law. See 2 U.S.C. §431(9)(B)(i) and 11 CFR 100.73 and 100.132. This exemption, commonly known as the "news story exemption" or the "media exemption" has been interpreted by the Federal Elections Commission (hereinafter "the FEC") to apply to media entities on the Internet, including websites or any other Internet or electronic publication. See Exhibit B, Internet Communications and Activity, Federal Election Commission, May 2006. The FEC has also ruled that the media exemption applies to entities with only an online presence and to bloggers. Id. The same exemption applies to internet activity conducted by individuals. Id. This interpretation

³ Federal law would not require a disclaimer on such a flyer produced by an individual advocating the election of a candidate for federal office. See Exhibit A.

recognizes that today the Internet is the distribution method for information that was traditionally distributed through broadcast outlets, newspapers, magazines, and other periodicals⁴. In fact, in several national polls, the majority of respondents report that they seek their political information primarily from online sources.

As a result of the FEC's ruling, if the person(s) behind the Cutler Files had instead devoted their time to researching and anonymously writing about the background of First District Congressional Candidate Dean Scontras and published the material on a site called the Scontras Files, the site would be exempt from regulation under federal law⁵.

The Ethics Commission is not required to interpret Maine law in the same manner as the FEC has interpreted federal law. However, there is a strong justification that Maine law should be interpreted the same as the exact language has been interpreted at the federal level. If the Commission decides to regulate blogs like the Cutler Files, there are literally dozens of Maine political websites, online editorials, blogs, facebook pages and postings that would be impacted⁶. The FEC has wisely decided not to get bogged down in such a morass and the Ethics Commission should do the same.

There are many Maine based political sites that discuss candidates including online editorials associated with bricks and mortar publications, often in a harsh and partisan manner. Most political websites have a clear, ideological point of view and could certainly be characterized as express advocacy. I am not aware of a single site that includes the disclaimer required by 21-A M.R.S.A. §1014. The only substantive difference between the Cutler Files and the other Maine political sites and blogs is that the Cutler Files is the subject of a complaint by a candidate that would prefer, for obvious reasons, the information contained on the blog not be available for public consumption and the others, so far, are not. If the Commission decides its jurisdiction extends to political websites and blogs, assuming it survived a legal challenge in the courts, the Commission will be asked regularly to investigate complaints against political websites and blogs by wealthy thin-skinned candidates. In this instance, this presumption is especially outrageous where the complaining party, Mr. Cutler, an attorney, has not challenged the veracity of the facts reported, and thoroughly cited, on the blog. And furthermore, has stated dismissively, when asked by the press about the Cutler Files that it is merely a byproduct of the Internet age.

⁴ Any other interpretation would have created significant constitutional issues. The First Amendment would not allow a government agency to decide what entities are and are not legitimate media entities or for media entities to be treated differently based on the method used for distributing content.

⁵ There is an actually an anonymous blog that focuses on the activities of Senator Susan Collins. See <http://collinswatch.blogspot.com/>. The Collins Watch blog was very critical of Susan Collins during her 2008 campaign without complaint from the Collins campaign or any investigation by the FEC.

⁶ See, e.g., <http://www.pinetreepolitics.com/>; <http://www.asmainegoes.com/>; <http://www.asmainegoeslolz.com/>; <http://www.dirigoblue.com/>; & <http://www.mainepolitics.net/>.

Beyond the fact that the authority of both the Ethics Commission and the FEC are limited by the Constitution, interpreting Maine law in the same manner as the FEC interprets federal law will promote uniformity. Many entities located outside of Maine's borders take interest in, and comment on, Maine politics. Such entities which are familiar with FEC policy on online activities would likely assume that similar rules apply in Maine. For example, video from a recent press conference by Republican gubernatorial candidate Paul LePage was posted on many political websites around the country and this resulted in considerable online commentary about Mr. LePage, including comments on Mr. LePage's fitness for office. None of this commentary included the disclosures required by Maine law.

The Ethics Commission can avoid the constitutional conflict discussed above, and the litigation that is likely to ensue, by interpreting Maine law as the FEC has interpreted federal law. Under such an interpretation, websites owned or controlled by a political party, political committee, candidate or candidate's immediate family, and paid online advertising, would be required to meet the requirements of 21-A M.R.S.A. §1014 but all other sites and blogs, such as the Cutler Files, would not.

CONCLUSION

The United States of America was founded on the premise of free political speech. We wage wars to protect the rights of others to challenge their governments or those seeking to govern. Issues relating to free speech should never be taken lightly, especially when the only reason they are subject to an investigation is because of the complaints of a wealthy candidate for higher office and his legal team. The First Amendment of the U.S. Constitution protects the content published on the Cutler Files. The Cutler Files is a political blog expressly excluded from the jurisdiction of the FEC and, for the sake of both uniformity and in respect of the tenets of free speech, not within the jurisdiction of the Maine Ethics Commission. A contrary holding would put at risk of investigation every online blog, posting, editorial or biased article that seeks to report facts about a candidate for office in a partisan manner. As such, on behalf of my client(s), I respectfully request that the Commission vote to end the investigation of the Cutler Files and to take no further action in this matter.

I will be present at Thursday's meeting and will be prepared to address the Commission as the Commissioners see fit.

Very truly yours,

electronically /s/ 9/26/10

Daniel I. Billings



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Special Notices on Political Ads and Solicitations

Published in October 2006

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Introduction

This brochure has been developed to help clarify the rules relating to the following types of special notices:

- Disclaimer notices;
- Federal election purpose notification;
- Best efforts notifications; and
- IRS disclosure notices.

Each notice may be required (as appropriate) when persons finance communications related to federal elections or solicit funds for federal political committees. ¹ A section-by-section explanation of these rules is provided within.

Please be advised that this brochure is not intended to provide an exhaustive discussion regarding this area of the election law. The citations refer to the [Federal Election Campaign Act \(FECA\)](#), as amended by the [Bipartisan Campaign Reform Act of 2002 \(BCRA\)](#), [Federal Election Commission Regulations \(11 CFR\)](#) and [Advisory Opinions \(AOs\)](#). If you have any questions after reading the brochure, please contact the FEC:

Federal Election Commission
 999 E Street, NW
 Washington, DC 20463
 (202) 694-1100 (local)
 (800) 424-9530 (toll free)
 (202) 219-3336 (for the hearing impaired)

Disclaimer Notices

What is a Disclaimer Notice?

For the purpose of this brochure, a "disclaimer" notice is defined as a statement placed on a public communication that identifies the person(s) who paid for the communication and, where applicable, the person(s) who

authorized the communication.

When is a Disclaimer Required?

Basic Rule

Political Committees

Political committees must include a disclaimer on (1) all "public communications" (defined below), (2) bulk electronic email (defined as electronic mail with more than 500 substantially similar communications) and (3) web sites available to the general public, regardless of whether the communication expressly advocates the election or defeat of a clearly identified candidate, or solicits funds in connection with a federal election (i.e., contributions for a federal candidate or federal political committee).²

Individuals and Other Persons

A disclaimer must appear on any "electioneering communication" (defined below) and on any public communication by any person that expressly advocates the election or defeat of a clearly identified candidate or solicits funds in connection with a federal election.

Application

Specific examples of public communications that would require a disclaimer include:

- Public communications coordinated with a federal candidate (i.e., in-kind contributions or coordinated party expenditures) that are paid for by a political committee or that contain express advocacy or a solicitation;
- Independent expenditures;
- Electioneering communications;
- A communication that solicits funds for a federal candidate or a federal political committee or that contains express advocacy; and
- Political committees' web sites.

Definitions

Public Communications

As defined in FEC regulations, the term "public communication" includes:

- Broadcast, cable or satellite transmission;
- Newspaper;
- Magazine;
- Outdoor advertising facility (e.g., billboard);
- Mass mailing (defined as more than 500 pieces of mail matter of an identical or substantially similar nature within any 30-day period);
- Telephone banks (defined as more than 500 telephone calls of an identical or substantially similar nature within any 30-day period); or
- Any other general public political advertising. General public political advertising does not include Internet ads, except for communications placed for a fee on another person's web site

11 CFR 110.11(a).

Electioneering Communications

As defined in FEC regulations, an "electioneering communication" is a broadcast, cable or satellite communication that fulfills each of the following conditions:

- Refers to a clearly identified federal candidate;
- Is publicly distributed within 30 days before a primary election or within 60 days before a general election; and
- In the case of Congressional candidates only, is "targeted to the relevant electorate"(can be received by 50,000 or more persons in the

district or state the candidate seeks to represent)

11 CFR 100.29. See also Federal Register notice 2005-29 [PDF].

Independent Expenditures

An independent expenditure is an expenditure for a communication that expressly advocates the election or defeat of a clearly identified candidate and is not made in cooperation, consultation, or concert with, or at the request or suggestion of, any candidate, authorized committee or their agents, or a political party committee or its agents. 11 CFR 100.16.

Coordinated Party Expenditures

Coordinated party expenditures are expenditures made by national or state party committees on behalf of their nominees in connection with the general election. Such expenditures may be coordinated with the candidate, but are reported only by the party committee that makes the expenditure. These expenditures are subject to a special monetary limit. 11 CFR 110.11(d)(1).

Exempt Party Activities

State and local party committees may engage in certain candidate-support activities without making a contribution or expenditure provided specific rules are followed. These "exempt" party activities refer to the three types of communications listed below:

- Registration and get-out-the-vote drives on behalf of the Presidential ticket;
- Campaign materials distributed by volunteers on behalf of federal candidates; and
- Certain slate cards, sample ballots and palm cards listing at least 3 candidates for public office.

11 CFR 100.80, 100.87 and 100.89; 100.140, 100.147 and 100.149 and 110.11(e).

What must the Disclaimer Say?

The actual wording of the disclaimer depends on the type of communication, as explained below. In each example, it is presumed that the ad qualifies as a "public communication" in connection with a federal election.

Messages Authorized and Financed by a Candidate

On a public communication that is authorized and paid for by a candidate or his/her campaign committee, the disclaimer notice must identify who paid for the message. 11 CFR 110.11(b)(1).

Example: "Paid for by the Sheridan for Congress Committee."

Messages Authorized but Not Financed by a Candidate

On a public communication that is authorized by a candidate or his/her campaign committee, but is paid for by another person, the disclaimer notice must identify who paid for the communication and indicate that the candidate authorized the message. 11 CFR 110.11(b)(2).

Example: "Paid for by the XYZ State Party Committee and authorized by the Sheridan for Congress Committee." ³

Messages Not Authorized by a Candidate

On a public communication that is not authorized by a candidate or his/her

campaign committee, the disclaimer notice must identify who paid for the message, state that it was not authorized by any candidate or candidate's committee and list the permanent street address, telephone number or World Wide Web address of the person who paid for the communication. 11 CFR 110.11(b)(3).

Example: "Paid for by the QRS Committee (www.QRScommittee.org) and not authorized by any candidate or candidate's committee."

Coordinated Party Expenditures

Pre-nomination Period

On a public communication that is made as a coordinated party expenditure before a nominee is chosen, the disclaimer notice must identify the committee that paid for the message, but need not state whether the communication was authorized. 11 CFR 110.11(d)(1).

Example: "Paid for by XYZ State Party Committee."

Post-nomination Period

Once a candidate has been nominated for the general election, the disclaimer notice must also state who authorized the communication.

Example: "Paid for by the XYZ State Party Committee and authorized by the Sheridan for Congress Committee."

The committee that actually makes the expenditure is considered to be the person who paid for the public communication even when the committee is acting as the designated agent of a different party committee.

Exempt Party Activities

On exempt activity communications (for example, campaign materials) the disclaimer notice must identify the committee that paid for the message. 11 CFR 110.11(e).

Example: "Paid for by the XYZ State Party Committee."

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How and Where must the Disclaimer Appear?

In order to give the reader sufficient notice about the person(s) paying for or authorizing a public communication regardless of its medium, the disclaimer notice must be "clear and conspicuous" on the committee's communications, solicitations and response materials. The notice will not be considered to be "clear and conspicuous" if:

- It is difficult to read or hear; or
- The notification is placed where it can be easily overlooked.

11 CFR 110.11(c)(1).

Additional requirements are described below.

Printed Materials

On printed materials, the disclaimer notice must appear within a printed box set apart from the other contents in the communication. The print must be of a sufficient type-size to be clearly readable by the recipient of the communication, and the print must have a reasonable degree of color contrast between the background and the printed statement. 11 CFR 110.11(c)(2)(i), (ii) and (iii).

Example:

Paid for by the Save the Seahorses
Committee and authorized by the
McKay for Senate Committee.

As long as the disclaimer appears somewhere within the communication it does not have to appear on the front page or cover of multiple-paged documents. However, in the case of single-sided documents and billboards, the disclaimer must appear on the front. 11 CFR 110.11(c)(2)(iv).

Safe Harbor for "Clearly Readable"

The regulations contain a safe harbor that establishes a fixed, 12-point type size as a sufficient type size for disclaimer text in newspapers, magazines, flyers, signs and other printed communications that are no larger than the common poster size of 24 inches by 36 inches. 11 CFR 110.11(c)(2)(i). Please note, disclaimers for larger communications will be judged on a case by case basis.

Safe Harbor for "Reasonable Degree of Color Contrast"

The regulations additionally provide two safe harbor examples that would comply with color contrast requirement:

- The disclaimer is printed in black on a white background; or
- The degree of contrast between the background color and the disclaimer text color is at least as great as the degree of contrast between the background color and the color of the largest text in the communication.

11 CFR 110.11(c)(2)(iii).⁴

Packaged Materials

When communications are distributed in a package or as a group, the distributing entity must evaluate each item separately in order to determine whether a disclaimer notice is required on that item. A message or ad that would require a disclaimer notice if it were distributed separately must still display the notice when it is included in a package of materials. 11 CFR 110.11(c)(2)(v). Example: A campaign poster is mailed with a campaign brochure and solicitation letter. A disclaimer notice must appear on each of these items.

Radio and Television Communications Authorized by the Candidate**Radio**

A radio broadcast must include an audio statement that is spoken by the candidate. The statement must identify the candidate, and state that he or she has approved the communication. 11 CFR 110.11(c)(3)(i).

Television

Like radio broadcasts, televised communications must include an oral disclaimer spoken by the candidate in which the candidate identifies himself or herself and states that he or she has approved the communication. 11 CFR 110.11(c)(3)(ii).⁵

This disclaimer can be conveyed in one of two ways:

- A full-screen view of the candidate making the statement (11 CFR 110.11(c)(3)(ii)(A)); or

- A "clearly identifiable photographic or similar image of the candidate" that appears during the candidate's voice-over statement. (11 CFR 110.11(c)(3)(ii)(B)).

The communication must also include a "clearly readable" written statement that appears at the end of the communication "for a period of at least four seconds" with a "reasonable degree of color contrast" between the background and the disclaimer statement. 11 CFR 110.11(c)(3)(iii).

Radio and Television Messages Not Authorized by the Candidate

Radio

The disclaimer notice must include the name of the political committee or person responsible for the communication and any connected organization. Example, "ABC is responsible for the content of this advertising." 11 CFR 110.11(c)(4).

Television

The disclaimer described above must be conveyed by a "full-screen view of a representative of the political committee or other person making the statement," or a "voice-over" by the representative. 11 CFR 110.11(c)(4)(ii) and 2 U.S.C. §441d(d)(2).

The disclaimer statement must also appear in writing at the end of the communication in a "clearly readable manner" with a "reasonable degree of color" contrast between the background and the printed statement "for a period of at least four seconds." 11 CFR 110.11(c)(4).

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When is a Disclaimer Not Required?

Although the FEC recommends that disclaimer notices be included on all campaign materials, the notices are not required in the following situations.

Disclaimer Placement is Inconvenient

In situations where a disclaimer notice cannot be conveniently printed, the notice is not required. This provision affects items such as pens, bumper stickers, campaign pins, campaign buttons and similar small items. Further, a disclaimer notice is not required for communications using skywriting, clothing, water towers or other forms of advertisement where it would be impracticable to display the disclaimer notice. 11 CFR 110.11(f) (See also AO 2002-9)

Internal Corporate/Labor Communications

A disclaimer notice is not required for solicitations or communications made by a separate segregated fund or connected organization to its "restricted class." 11 CFR 110.11(f)(2).

Materials Used for Administrative Purposes Only

A disclaimer notice is not required on checks, receipts or similar items of minimal value that do not include a political message and are used only for administrative purposes. 11 CFR 110.11(f)(1)(iii).

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Additional Statements Required in Fundraising Solicitations

Federal Election Purpose Notification

In order to deposit undesignated contributions into its federal account, a federal committee must inform donors that their contributions will be used in connection with federal elections or that they are subject to the limits and prohibitions of the Act. The committee may satisfy this requirement by including that information in its solicitation materials. 11 CFR 102.5(a)(2)(ii) and (iii).

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"Best Efforts" Notification

Under the Act and FEC regulations, political committees must report the name, address, occupation and employer of any individual who contributes more than \$200 in a calendar year (or in an election cycle, in the case of an authorized committee) (11 CFR 104.3(a)(4)). Committees must make their "best efforts" to obtain and report this information.

To satisfy the "best efforts" requirement, a political committee must include a statement on its solicitations explaining that it is required to make its best efforts to obtain and report contributor information. This statement is referred to as the "best efforts" notification; two examples are listed below:

- Federal law requires us to use our best efforts to collect and report the name, mailing address, occupation and name of employer of individuals whose contributions exceed \$200 in a calendar year, or
- To comply with Federal law, we must use our best efforts to obtain, maintain, and submit the name, mailing address, occupation and name of employer of individuals whose contributions exceed \$200 per calendar year.

If the committee does not receive the required contributor information, it must make a follow-up request within 30 days. Any contributor information provided or otherwise available to the committee must be disclosed on FEC reports. In some cases, it may be necessary for the committee to amend previous reports. 11 CFR 104.7.

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IRS Disclosure Requirements

Under the Internal Revenue Service Code (26 U.S.C. §6113), certain tax-exempt organizations that are not eligible to receive tax deductible charitable contributions, and whose gross annual receipts normally exceed \$100,000, must disclose in an "express statement (in a conspicuous and easily recognizable format)" that contributions to the organization are not deductible for Federal income tax purposes as charitable contributions. For more information, contact the IRS at (800) 829-3676, (202) 622-7352.

Safe Harbor for "Format of Disclosure Statement"

Print Medium

In the case of a solicitation by mail, leaflet, or advertisement in a newspaper, magazine or other print medium, the following four requirements are met;

- The solicitation includes whichever of the following statements the organization deems appropriate:
 - "Contributions or gifts to [name of organization] are not

- deductible as charitable contributions for Federal income tax purposes,"
- "Contributions or gifts to [name of organization] are not tax deductible," or
- "Contributions or gifts to [name of organization] are not tax deductible as charitable contributions";
- The statement is in at least the same size type as the primary message stated in the body of the letter, leaflet or ad;
- The statement is included on the message side of any card or tear off section that the contributor returns with the contribution; and
- The statement is either the first sentence in a paragraph or itself constitutes a paragraph.

Telephone

In the case of solicitation by telephone the following three requirements are met:

- The solicitation includes whichever of the following statements the organization deems appropriate:
 - "Contributions or gifts to [name of organization] are not deductible as charitable contributions for Federal income tax purposes,"
 - "Contributions or gifts to [name of organization] are not tax deductible," or
 - "Contributions or gifts to [name of organization] are not tax deductible as charitable contributions";
- The statement is made in close proximity to the request for contributions, during the same telephone call, by the telephone solicitor; and
- Any written confirmation or billing sent to a person pledging to contribute during the telephone solicitation complies with the requirements under Print Medium Solicitations.

Television

In the case of solicitation by television the following two requirements are met:

- The solicitation includes whichever of the following statements the organization deems appropriate:
 - "Contributions or gifts to [name of organization] are not deductible as charitable contributions for Federal income tax purposes,"
 - "Contributions or gifts to [name of organization] are not tax deductible," or
 - "Contributions or gifts to [name of organization] are not tax deductible as charitable contributions";
- If the statement is spoken, it is in close proximity to the request for contributions; if the statement appears on the television screen, it is in large easily readable type appearing on the screen for at least five seconds.

Radio

In the case of a solicitation by radio the following two requirements are met:

- The solicitation includes whichever of the following statements the organization deems appropriate:
 - "Contributions or gifts to [name of organization] are not deductible as charitable contributions for Federal income tax purposes,"
 - "Contributions or gifts to [name of organization] are not tax deductible," or
 - "Contributions or gifts to [name of organization] are not tax deductible as charitable contributions";
- The statement is made in close proximity to the request for contributions during the same radio solicitation announcement.

These safe harbors will remain in effect until further notice from the IRS. Please refer to the IRS by phone at (800) 829-3676, (202) 622-7352 for changes to these safe harbors and with any questions you might have

pertaining to the safe harbors.

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FOOTNOTES:

1 This brochure serves as the small entity compliance guide to Commission regulations regarding Communications and Solicitations, as required by section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

2 The FEC recommends placing disclaimer notices on all campaign materials.

3 Please note that for communications listing several candidates, the disclaimer notice may state that the message was authorized by the candidates identified in the message or, if only certain candidates have authorized it, by those candidates identified with an asterisk ([AO 2004-37](#))

4 These examples do not constitute the only ways to satisfy the color contrast requirement.

5 For additional information on broadcast advertising (e.g., radio, TV), please contact the [Federal Communications Commission](#) at (202) 418-1440 or (202) 418-7096 (for cable broadcasts).

6 The restricted class includes the executive and administrative personnel of the organization, its stockholders, or its members (noncorporate), and their families. See [11 CFR 114.1\(f\)](#). See also [11 CFR 114.5 \(g\)\(1\) and \(2\)](#); [114.7 \(a\) and \(c\)](#).

This publication provides guidance on certain aspects of federal campaign finance law. This publication is not intended to replace the law or to change its meaning, nor does this publication create or confer any rights for or on any person or bind the Federal Election Commission (Commission) or the public. The reader is encouraged also to consult the Federal Election Campaign Act of 1971, as amended (2 U.S.C. 431 et seq.), Commission regulations (Title 11 of the Code of Federal Regulations), Commission advisory opinions, and applicable court decisions. For further information, please contact:

Federal Election Commission
999 E Street, NW
Washington, DC 20463
(800) 424-9530; (202) 694-1100
info@fec.gov
www.fec.gov

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Internet Communications and Activity

Published in May 2006 (updated June 2007)

Introduction

On March 27, 2006, the Commission approved regulations governing certain types of Internet communications. The rules took effect May 12, 2006. [71 FR 18589 \(4/12/06\)](#) [PDF]. The questions and answers that follow address not only those regulations, but also past Commission precedents regarding use of the Internet in connection with federal elections. Copies of both the regulations and the cited advisory opinions (AOs) are available via the [FEC's web site](#).

If you have any questions after reading this, please call or write:

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Internet Activity Conducted by Individuals

Can I use my computer for political activity in connection with federal elections? How about a library computer, school computer, or neighbor's computer?

Yes. An uncompensated individual or group of individuals may engage in Internet activities for the purpose of influencing a federal election without restriction. The activity would not result in a "contribution" or an "expenditure" under the Act, and would not trigger any registration or reporting requirements with the FEC. This exemption applies to individuals acting with or without the knowledge or consent of a campaign or a political party committee.¹ 11 CFR [100.94](#) and [100.155](#). Possible Internet activities include, but are not limited to, sending or forwarding electronic mail, providing a hyperlink to a web site, creating, maintaining or hosting a web site and paying a nominal fee for the use of a web site. [11 CFR 100.94\(b\)](#). Please note that these exemptions apply regardless of whether the individual owns the computer he/she is using.

What are the rules for sending personal e-mails regarding political topics or federal elections?

Basically, there are no rules for individuals. Individuals may send unlimited e-mails on any political topic without identifying who they are or whether their messages have been authorized by any party or campaign committee. 11 CFR 110.11(a).

May I post comments to a blog in connection with a federal election?

Yes. Uncompensated blogging, whether done by individuals or a group of individuals, incorporated or unincorporated, is exempt from regulation. See 11 CFR 100.94 and 100.155. This exception applies even in those cases where a nominal fee is paid. See also "**How has the Commission applied the Act to online news media?**" under Press Entities below.

Are the rules different if I pay to place an ad on someone else's web site?

Yes. Internet communications placed on another person's web site for a fee are considered "general public political advertising," and are thus "public communications" under the law. 11 CFR 100.26. As such, State, district and local party committees, and State and local candidates, must use federally-permissible funds to pay for them if the communications promote, support, attack, or oppose a candidate for Federal office. Paying to place a communication on another person's website may result in contributions or expenditures under the Act. Other regulations regarding coordinated communications, 11 CFR 109.21 and 109.37, and disclaimer requirements, 11 CFR 110.11(a), would also apply.

May I use my work computer for online political activity?

Yes, subject to your employer's rules for personal use of computers and Internet access, and so long as you are not compensated for the activity. 11 CFR 100.94 and 114.9(a) and (b). See "**May a corporation or union allow its employees or members to use their work computers for individual volunteer activity?**" under Internet Activity by Corporations/Labor Organizations/Trade Associations, see below.

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Internet Activity Conducted by Federal Political Committees

Is a disclaimer required on e-mail or our web site?

Yes. The Act and regulations require FEC-registered political committees to place disclaimers on their public web sites. Moreover, if a political committee sends more than 500 substantially similar e-mails, each message must include a disclaimer. 11 CFR 110.11(a). For specific disclaimer requirements, see 11 CFR 110.11(b) and the Commission's brochure "**Special Notices on Political Ads and Solicitations**."

Do the new regulations affect online fundraising by our committee?

No. Over the years, the Commission has issued several opinions concerning online fundraising by political committees. The AOs make it clear that political committees must adapt online fundraising to comply with the Act's recordkeeping and reporting provisions.

First, committees using the Internet for fundraising must make "best efforts" to obtain and report the identification of donors who contribute more than \$200 during a calendar year. Committees must maintain electronic records and contributor data for three years after the date on which it reported the

contributions. AOs [1999-22](#) and [1995-09](#).

Second, to avoid receiving prohibited contributions, web sites soliciting contributions in connection with a federal election must inform potential contributors of all of the Act's prohibitions, including the prohibitions on contributions from corporations, labor organizations, federal government contractors and foreign nationals,² and the restrictions at [11 CFR 110.19](#) on contributions from minors. AOs [1999-22](#), [1999-09](#) and [1995-09](#) contain detailed examples of Commission-approved language and mechanisms for vetting contributors.

Third, in several AOs, the Commission has said that online contributions may be made via credit card or electronic checks. Such contributions are acceptable for publicly funded Presidential campaigns and are matchable provided that the correct documentation is provided to the Commission. See [11 CFR 9034.2\(c\)\(8\)](#) and AOs [1999-36](#), [1999-22](#), [1999-09](#) and [1995-09](#). The Commission has also permitted businesses to administer online fundraising for political committees, so long as they provide their services at the usual and normal charge and in their ordinary course of business. See below.

Finally, separate segregated funds established by corporations, labor organizations or trade associations should consult "[Are there special rules concerning online fundraising for corporate/labor/trade association PACs?](#)" under Internet Activity by Corporations/Labor Organizations/Trade Associations, see below.

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Internet Activity Conducted by Corporations/Labor Organizations/Trade Associations

Our corporation normally provides commercial services online – may we do so for candidates and political committees?

Yes, this is permissible as long as the corporation charges the usual and normal fee for its services. Failure to do so could result in a prohibited contribution. For example, in [AO 2004-06](#), an online service offering a web platform for arranging local gatherings was permitted to provide both its free and fee-based services to federal candidates and political committees as long as it did so on the same terms it offered to all similarly situated persons in the general public. In contrast, in [AO 1996-2](#), the Commission concluded that a corporation could not provide online accounts--for which it normally charged a fee--to candidates free of charge.

May our corporation/labor union/trade association send out an e-mail to endorse a federal candidate or place an endorsement on its web site?

It depends. As has long been the case, a corporation, union or trade association may only direct express advocacy communications to its restricted class. So, if the organization addressed its e-mail endorsing a federal candidate only to individuals within its restricted class, it would be permissible. By contrast, the organization generally cannot place endorsements or solicitations for a candidate on its web site, unless access to those portions of the site is limited to members of the restricted class.³ See [AO 1997-16](#), [2 U.S.C. §441b\(b\)\(2\)\(A\)](#) [PDF] and [11 CFR 114.3](#).

Are there special rules concerning online fundraising for corporate/labor/trade association PACs?

Yes. Since a corporate/labor/trade association PAC may only solicit contributions from its restricted class, access to online solicitations must be limited to members of that group (e.g., password protected).⁴ [2 U.S.C. §441b\(b\)\(4\)](#) [PDF]. Alternatively, a corporation/labor organization/trade association could maintain an e-mail listserv--i.e., mailing list--to send PAC solicitations to members of the organization's restricted class. [AO 2000-07](#).

May a corporation or union allow its employees or members to use their work computers for individual volunteer activity?

Yes, a corporation or a labor organization may permit its employees, shareholders, officials and members to use its computer and Internet facilities for individual volunteer Internet activity, without making a prohibited contribution. This exemption is contingent on the individual completing the normal amount of work for which the employee is paid, or is expected to perform, that the activity would not increase the overhead or operating costs of the organization, and that the activity is not coerced. The organization may not condition the availability of the Internet or the computer on their being used for political activity or for support for or opposition to any particular candidate or political party. Revised [11 CFR 114.9\(a\)\(2\) and \(b\)\(2\)](#).

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Activity Conducted By Press Entities and Bloggers

How has the Commission applied the Act to online news media?

Under the Act and FEC regulations, a media entity's costs for carrying news stories, commentary and editorials are not considered "contributions" or "expenditures." See [2 U.S.C. 5431\(9\)\(B\)\(i\)](#) [PDF] and [11 CFR 100.73](#) and [100.132](#). This exemption, commonly known as the "news story exemption" or the "media exemption" now extends to media entities that cover or carry news stories, commentary and editorials on the Internet, including web sites or any other Internet or electronic publication. See also AOs [2005-16](#), [2004-07](#) and [2000-13](#).

The media exemption applies to the same extent to entities with only an online presence as those media outlets that maintain both an offline and an online presence. See the explanation and justification for revised regulations [11 CFR 100.73](#) and [100.132](#).

Are bloggers considered press entities?

Bloggers and others who communicate on the Internet are entitled to the press exemption in the same way as traditional media entities. However, the Commission has decided not to change its rules regarding the media exemption so as to specifically include **all** blogging activity within the "media exemption." Many bloggers may also be entitled to the new Internet activities exemptions for individuals. [11 CFR 100.94](#) and [100.155](#). This includes incorporated blogs that are wholly-owned by an individual, are engaged primarily in Internet activities and derive a substantial portion of their income from their Internet activities. See the [explanation and justification](#) for revised regulations [11 CFR 100.73](#) and [100.132](#) and [AO 2005-16](#). Whether covered by the media exemption or the individual activity exemption, blogging will generally not be subject to FEC regulation.

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Footnotes

1. Because the activity is exempt from the definitions of "contribution" and "expenditure," a group of individuals that spends more than \$1,000 on such activity does not trigger political committee status under the Act and FEC regulations. See [11 CFR 100.5](#).

2. See [2 U.S.C. §§441b, 441c and 441e](#) [PDF].

3. If the organization routinely posts press releases on its web site, it may post a release announcing its endorsement of a federal candidate in the same manner. 11 CFR 114.4(c)(6).

4. See 11 CFR 114.5(g), 114.7(a) and 114.8(c).

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This publication provides guidance on certain aspects of federal campaign finance law. This publication is not intended to replace the law or to change its meaning, nor does this publication create or confer any rights for or on any person or bind the Federal Election Commission (Commission) or the public. The reader is encouraged also to consult the Federal Election Campaign Act of 1971, as amended (2 U.S.C. 431 et seq.), Commission regulations (Title 11 of the Code of Federal Regulations), Commission advisory opinions, and applicable court decisions. For further information, please contact:

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December 15, 2010

Walter F. McKee, Esq.

Chairman

Governmental Ethics Commission

Maine Commission on Governmental Ethics and Election Practices

135 State House Station

Augusta, ME 04333

RE: Cutlerfiles Website

Dear Chairman McKee and Members of the Maine Governmental Commission
on Governmental Ethics and Election Practices:

I am writing to request that the Commission act on the results of its investigation of the Cutlerfiles website and carry out its statutory responsibility to take action on the clear violations of Maine's campaign laws including 21-A M.R.S. §§ 1014 and 1019-B.

To the extent that the people behind the Cutlerfiles website are arguing that Section 1014 is facially unconstitutional, they are incorrect as a matter of law. Furthermore, the Courts, not the Commission, are the sole tribunals with the power to make that determination. *Colonial Pipeline Co. v. Morgan*, 263 S.W. 3d 827, 843 (Tenn. 2008). If, as seems possible, the Commission concludes that the research for the Cutlerfiles site was conducted by a person in the inner circle of a gubernatorial primary campaign, and the site was aided by a paid consultant to that campaign, and another gubernatorial campaign, then those speakers are public figures with regard to speech about other candidates for the same public office, and they do not have any protected right to anonymity. On those facts, the Commission should not hesitate to enforce the clear facial violations of Maine's campaign laws.

The Supreme Court has explicitly recognized that "the public has an interest in knowing who is speaking about a candidate shortly before an election." *Citizens United v. FEC*, 130 S. Ct. 876, 915 (2010). Thus, the government has an overriding interest "in providing information to the electorate and permitting the electorate to make informed choices" and the requirement for mandatory on-speech disclaimers is narrowly tailored to that interest. *National Organization for Marriage v. McKee*, ___ F. Supp. 2d ___, 2010 WL 3270092, *12

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(D. Me., 2010) (holding that 21-A M.R.S. § 1014 survives exacting scrutiny). Disclaimer provisions which apply only to candidate elections are also narrowly tailored to the governmental interest “in promoting a civil and dignified level of campaign debate.” See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 382 (1995) (Scalia, J. dissenting). Furthermore, while the Supreme Court has recognized a right to anonymity in some instances, it has never recognized a right to anonymous character assassination and mudslinging during candidate elections, regardless of whether or not that character assassination rises to the level of actionable libel. To the contrary, Justice Scalia, joined by Justice Rehnquist presciently cautioned against just such a broad application of any protected right to anonymity in candidate elections:

Observers of the past few national elections have expressed concern about the increase of character assassination-“mudslinging” is the colloquial term-engaged in by political candidates and their supporters to the detriment of the democratic process. Not all of this, in fact not much of it, consists of actionable untruth; most is innuendo, or demeaning characterization, or mere disclosure of items of personal life that have no bearing upon suitability for office. Imagine how much all of this would increase if it could be done anonymously. The principal impediment against it is the reluctance of most individuals and organizations to be publicly associated with uncharitable and uncivil expression.

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 382-83 (1995) (Scalia, J. dissenting). The majority responded to this warning by emphasizing that their holding did not reach the type of character assassination addressed by Scalia’s hypothetical. *McIntyre*, 514 U.S. at 351 (“As this case demonstrates, the prohibition [on anonymous speech] encompasses documents that are not even arguably false or misleading.”). The majority further made clear that different speakers have differing interests in anonymity, and an enforcement scheme should take into account the “character or strength of the author’s interest in anonymity.” *Id.* Furthermore, in an 8-1 decision the majority in *Citizen’s United* effectively adopted this portion of the *McIntyre* dissent. *Citizens United*, 130 S. Ct. at 915 (for communications that “refer[] to [a candidate] by name shortly before a primary and contained pejorative references to her candidacy [on-speech disclaimers] provide the electorate with information, and insure that the voters are fully informed about the person or group who is speaking. Identification of the source ... may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected.”) (internal quotations and citations omitted). This precise informational interest in candidate elections has been used by other courts to uphold disclaimer provisions similar to Section 1014. See, e.g., *State v. Acey*, 633 S.W.2d 306 (Tenn., 1982); *State v. Petersilie*, 432 S.E.2d 832 (N.C., 1993).

Maine’s legislature has explicitly recognized Maine’s governmental interest in discouraging negative campaign practices in candidate elections and further recognized that “the reluctance of most individuals and organizations to be publicly associated with uncharitable and uncivil expression” is the most effective enforcement mechanism. It has implemented a narrowly tailored scheme to achieve this goal through the Section 1014 disclaimer provisions and through the Maine Code of Fair Campaign Practices legislation also overseen by this Commission. See

Statement of Fact to LD 2158, An Act to Discourage Negative Campaign Practices, (establishing the Maine Code of Fair Campaign Practices, codified at 21-A M.R.S. § 1101 *et seq*):

The purpose of this bill is to provide a mechanism to identify and discourage the use of negative campaign practices which by distorting the truth, unfairly influence the voters and skew the election process.

This governmental interest is not tied to the expenditure of any amount of money, but is instead tied to the governmental interest in discouraging character assassination and mudslinging by requiring those speaking about candidates shortly before an election to identify themselves to the public.

Circuit Courts asked to address the application of on-speech disclaimer requirements in light of *McIntyre*, and another recent Supreme Court decision, *McConnell v. FEC*, 540 U.S. 93 (2003), were split on the issue of constitutionality of these disclaimer provisions prior to more recent guidance from the Supreme Court's *Citizens United* decision. Compare *ACLU v. Heller*, 378 F.3d 979 (2004) (striking down an on-speech disclaimer statute applying to issue ads under strict scrutiny on the grounds that the governmental information interest was not a sufficiently compelling interest in light of *McIntyre*) with *Majors v. Abell*, 361 F.3d 349 (2004) (upholding under exacting scrutiny, an on-speech disclaimer provision tailored to the governmental informational interest in candidate elections). *Citizens United* made clear that the proper level of scrutiny was the less demanding "exacting scrutiny" and that on-speech disclaimers were narrowly tailored to that interest. *Citizens United v. FEC*, 130 S. Ct. at 914-16. This caused Judge Hornby to conclude that "*Citizens United* has effectively disposed of any attack on Maine's attribution and disclaimer requirements." *National Organization for Marriage v. McKee*, 2010 WL 3270092 at *12. Monetary thresholds are not relevant to disclaimer provisions that serve the informational interest in the manner that such thresholds are relevant to disclosure provisions tailored to the interest in preventing corruption or the appearance thereof.

Maine's entire statutory scheme for preventing character assassination and mudslinging in candidate elections is dependent in part on the Commission's enforcement of the disclaimer provision of Section 1014. A candidate who signs a pledge to follow the Maine Code of Fair Campaign Practices pledges not to "use or authorize and [to] condemn material relating to my campaign that falsifies, misrepresents, or distorts the facts, including but not limited to malicious or unfounded accusations creating or exploiting doubts as to the morality, patriotism or motivations of any party or candidate." The candidate pledges "to repudiate any individual or group that resorts ... to methods in violation of the letter or spirit of [the] Code." 21-A M.R.S. § 1101. Thus, the Maine Code of Fair Campaign Practices' voluntary candidate pledge only has meaning if the disclaimer provision of Section 1014 is enforced with respect to each political candidate, members of a candidate's immediate family, a candidates paid consultants, and other prominent supporters.¹ In the absence of the disclaimer required by 1014, it is not possible to

¹ As is discussed in more detail below, such individuals are public figures with regard to issues surrounding the candidate elections in which they participate and First Amendment analysis makes clear that such individuals therefore have a reduced interest in privacy and anonymity. *Hemenway v Blanchard*, 294 SE2d 603, (Ga., 1982) (the husband of a candidate for political, was a public figure because he actively participated in her campaign);

determine when a candidate, a member of that candidate's immediate family, or a candidate's paid political consultant is engaging in a practice that "falsifies, misrepresents or distorts the facts." 21-A M.R.S. § 1101. In the absence of enforcement of the disclaimer requirement, the public, and in some cases even the candidates themselves, have no way to ensure adherence to their pledge to uphold "the letter or spirit of this code." *Id.*

Furthermore, because there is no penalty for a candidate violating the pledge, the only way a candidate is held accountable for a violation of the pledge is that the signed code forms are accepted by the Commission and retained as public records. This allows the public to determine for itself when the candidate has violated the pledge. Thus, in order for the signed pledge forms to have any effect, the disclaimer requirement must be enforced with respect to communications of the candidate, the candidate's immediate family and paid consultants, and other prominent supporters. This is true even when a primary candidate loses the primary election, and the candidate, members of the candidate's immediate family or the candidate's paid consultants engage in such prohibited practices in the general election because the candidate's pledge contemplates violations of both the letter and the spirit of the code. It is also true in a situation where a paid consultant to another candidate in the general election is engaging in these practices during the general election campaign. In order for Section 1101 to serve its purpose of furthering the government's stated interest in "provid[ing] a mechanism to identify and discourage the use of negative campaign practices which by distorting the truth, unfairly influence the voters and skew the election process," the Commission must disclose to the public any information that the Commission has obtained through its investigation which may involve a facial violation of section 1014 that has been committed by a candidate, a candidate's immediate family, or a candidate's paid consultants. This should be particularly true in the event that persons failing to include a disclaimer under Section 1014 also attempt to mislead the public by misrepresenting their identity in statements published on the website itself, or thereafter by denying their involvement in the website in subsequent statements to the press or the public.²

Scalia's warnings in *McIntyre* become even more prescient when compared to the actual methodology used by the people behind Cutlerfiles. Scalia warns, "Consider, moreover, the increased potential for 'dirty tricks' ... How much easier-and sanction free!-it would be to circulate anonymous material (for example, a really tasteless, though not actionably false, attack upon one's own candidate) with the hope and expectation that it will be attributed to, and held against, the other side." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. at 383 (1995) (Scalia, J. dissenting). Scalia's comments were made in contemplation of a two-candidate election. In this multi-candidate election, the Cutlerfiles authors attempted to target those who might be swayed by the character assassination and mudslinging and simultaneously mislead those who might be turned off by the "really tasteless" attack into believing that the authors of the website were from

Buchanan v Associated Press, 398 F Supp 1196 (1975, DC Dist Col) (paid consultant to a campaign is a public figure for issues relating to that campaign).

² 20-A MRS §1014(4) authorizes the Commission to impose a fine of not more than \$5,000 if the Commission determines that a person violated section 1014 with the intent to misrepresent the name or address of the person responsible for the communication. If the person responsible for the Cutlerfiles website communication made a false or misleading assertion about their identity on the website with the intent to deceive the public as to who they were, that intentional misrepresentation constitutes a violation of Section 1014(4) for which the Commission may impose a fine of up to \$5,000.

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the opposite of their own political party. For example, part of the language of the site stated that “Cutler calls himself an ‘independent,’ even claims to have once been a Republican. But a lifetime of working for big name Democrats, at a Democratic law firm and supporting and contributing to Democratic causes and candidates – including Barack Obama – shows otherwise.” Should the Commission have evidence that this statement was made by an immediate family member, or the paid consultant to a candidate in the Democratic gubernatorial primary, or a paid consultant to a general election gubernatorial candidate, it would be clear that the authors were hoping to mislead any voter alienated by the character assassination attack so that voters would “attribute[it] to and h[o]ld [it] against the other side,” i.e. supporters of the Republican candidate.

Notwithstanding the importance of the governmental interest in discouraging this type of anonymous character assassination, and the Maine legislature’s clear statement that its campaign laws should serve to discourage this type of negative campaign practice by exposing it to the light of public scrutiny, there has been some suggestion that enforcing the disclaimer provision to the facts of this case could be subject to an as-applied constitutional challenge due to the allegedly small amounts of money spent on the Cutlerfiles website. In contrast to disclaimer provisions in candidate elections, disclaimer and disclosure requirements relating to issues referenda must be tailored toward the government’s interest in preventing large sums of money from influencing the election, and are therefore more vulnerable to an as-applied constitutional challenge as the value of the expenditure approaches zero. *Contrast Citizens United*, 130 S. Ct. at 915 (where the purpose of the disclaimer is to “provide the electorate with information, and insure that the voters are fully informed about the person or group who is speaking. . . . so that the people will be able to evaluate the arguments to which they are being subjected.”) (internal quotations and citations omitted) *with Canyon Ferry Road Baptist Church v. Helena*, 556 F.3d 1021, 1033 (9th Cir. 2009) (in initiative referenda disclosure requirements “the relevant informational goal is to inform voters as to who backs or opposes a given initiative financially, so that the voters will have a pretty good idea of who stands to benefit from the legislation.”) (internal quotation marks omitted); *Sampson v. Buescher*, __ F. 3d __, 2010 WL 4456970 (10th Cir., Nov 9, 2010) (The purpose of ballot referenda disclosure provisions “is not to inform the electorate about all who believe that a particular result is in the public interest; . . . Rather, their only purpose is to identify those who (presumably) have a financial interest in the outcome of the election”).

There are a number of factors that would preclude an as-applied constitutional challenge to enforcement in this case from being successful. The Commission has gone out of its way to respect the potential privacy concerns of the anonymous speakers during its investigation. If the Commission has now made determinations based on credible evidence with regard to the identity of the speakers, that information alone may be enough to preclude a successful de minimis challenge to enforcement of the provision. *McIntyre* tells us that an enforcement scheme should take into account the “character or strength of the author’s interest in anonymity.” Those speakers that participate in the control group of a primary candidate’s campaign and those speakers that are paid consultants to a primary and general election candidate give up their right to anonymity in regard to any communication they disseminate attacking other candidates for the same public office. *See Brown v Socialist Workers '74 Campaign Committee*, 459 US 87, 111-12

(1982) (O'Connor, J., concurring in part and dissenting in part) ("Once an individual has openly shown his close ties to the organization by campaigning for it," the individual's privacy and anonymity concerns are reduced and "the governmental concerns are greatest precisely for the actions of campaign workers that might improperly influence voters."); *Seegmiller v. KSL, Inc.*, 626 P.2d 968, 973-74 (Utah, 1981) ("information concerning public officials and public figures is more likely to be relevant in the decision-making process of self-government, and it may be assumed that one who forsakes the anonymity of private life and enters the limelight of the public arena is prepared to engage in a full-blown discussion of public issues with the attendant personal risks. No such assumption is appropriate with respect to a private figure."); *Griset v. Fair Political Practices Com.*, 884 P.2d 116, 123 (Cal., 1994.) (A candidate, whose identity is known and who is seeking public office, has a lesser interest in anonymity.)

The immediate family members of candidates who participate in the candidate's campaign, and paid consultants of candidates are also public figures with a reduced interest in anonymity. *Hemenway v Blanchard*, 294 SE2d 603, (Ga., 1982) (the husband of a candidate for political, was a public figure because he actively participated in her campaign); *Burns v Times Argus Asso.* 430 A2d 773 (Vt. 1981) (wife of political candidate public figure for issues relating to office); *Buchanan v Associated Press*, 398 F Supp 1196 (1975, DC Dist Col) (paid consultant to a campaign is a public figure for issues relating to that campaign); *See also, Time Inc. v. Hill*, 38 US 374, 384 n. 8 (recognizing "the rule that a public figure ... is subject to the often searching beam of publicity and that, in balance with the legitimate public interest, the law affords his privacy little protection.") *New York Times Co. v Sullivan*, 376 US 254, 279-83 (1964); *see also State v. Petersilie*, 432 S.E.2d 832, 842 (N.C., 1993) ("In the context of a campaign it is necessary for accusers of candidates to identify themselves, even if they speak the truth, in order for the electorate to be able to assess the accusers' bias and interest."). A primary candidate or other public figure during the primary campaign remains a public figure with regard to the general election campaign for that same office. *See, e.g., Redmond v Sun Pub. Co.* 716 P2d 168,171 (Kan. 1986) (rejecting argument that "after an election, unsuccessful candidates for public office have ceased to voluntarily expose themselves to be the subject of communications regarding their candidacy" and finding that for election related matters they remain a public figure); *Briggs v Channel 4, KGBT*, 739 SW2d 377 (1987, Tex App Corpus Christi).

If, as seems possible, the Commission concludes that the research for the Cutlerfiles site was conducted by a person in the inner circle of a gubernatorial primary campaign, and the site was aided by a paid consultant to that campaign, and another gubernatorial campaign, then those speakers are public figures with regard to speech about other candidates for the same public office, and they do not have any right to anonymity under *McIntyre*.

Furthermore, the Commission may properly consider evidence as to whether those individuals involved in the Cutlerfiles website placed a financial value of tens of thousands of dollars on the "opposition research" material that they used in preparing the misrepresentations and distortions that were published on the Cutlerfiles website in violation of Section 1014. Although the Section 1019-B requirements are triggered by an independent expenditure threshold of \$100, the Section 1014 provisions are not. Therefore, with regard to Section 1014, the Commission may consider evidence of value placed on the opposition research used to prepare the misrepresentations and

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distortions on the website, even if that value is not reflected in the amount of their actual out-of-pocket expenditures. Evidence of the attachment of such a value to the opposition research conducted in this case clearly takes this case out of the *de minimis* realm with regard to the disclaimer, even if that value might not technically be subject to disclosure under Section 1019-B.

These facts implicate another government interest in disclaimer provisions in addition to its informational interest: that of avoiding *quid pro quo* corruption and the appearance of such corruption. See *Buckley v. Valeo*, 424 U.S. 1, 67 (1976). Just as large corporations or private donors buy influence with candidates through large monetary contributions, the campaigns of failed primary candidates can buy influence with those of successful candidates in the hope of gaining appointment to an office of political influence. If the facts suggest a primary campaign had "opposition research" that it valued for sale purposes in the range of tens of thousands of dollars, and it was indeed something that could be purchased from a professional opposition research firm at a similar cost, then that evidence weighs in favor of disclosure of the identity of the individuals involved and weighs against application of a *de minimis* exception. With regard to internet communications, many commentators have suggested that input costs (such as the cost of registering the domain name, etc.) are not an appropriate means of assigning costs, but that a better measure "is to calculate value based on an activity's worth to the recipient" similar to the valuation methodology for in-kind expenditures. See, eg., Lindsey Powell, *Getting Around Circumvention: A Proposal for Taking FECA Online*, 58 Stan. L. Rev. 1499, 1513-15 (2006).

There is no real dispute that the Cutlerfiles website authors engaged, at a minimum, in a clear facial violation of Sections 1014(2) and (2-A). However, in an email dated September 15, 2010, signed by "The Cutler Files," the anonymous creators assert that "As we understand the law, a violation does not technically occur until 10 days after notification of the potential violation, and only if the potential violation is not corrected." This position finds no support in the actual language of Section 1014(4). The law is clear that a violation of Section 1014 is a violation at the time the communication is initially disseminated. Correcting that violation within 10 days of receiving notice of the violation from the Commission merely affects whether the violator is subject to a fine by the Commission; it does not retroactively eliminate the existing violation, nor does it prevent the Commission from publicly finding a violation without imposing a fine. Any constitutional balancing of the right to anonymity with the "public right to know who is speaking about a candidate shortly before an election" must take place with regard to the website as it existed at the time the initial complaint was filed, and should not take into account any partial disclaimer belatedly added to the site after a complaint was filed, the only effect of which may be to reduce the penalty. This is especially true if the Commission's investigation suggests that the identity of the individuals involved makes it clear that they were, or should have been, well aware of the requirements of Section 1014.

The Commission should also find a violation of Section 1019-B if the Commission's investigation has led to reliable evidence that one of the individuals involved was paid over \$50,000 by candidates running for Governor in Maine, during the same period that he may have been developing a website containing personal attacks on Eliot Cutler who was also a candidate for Governor of Maine. Even a minimal allocation of these payments would put the Cutlerfiles

website far above the \$100 reporting threshold. Thus, the people behind the Cutlerfiles may only avoid a violation of Section 1019-B if the Commission chooses not to allocate any portion of these payments to the Cutlerfiles website, in which case the Commission should publicly explain its decision not to allocate any portion of the payments to that consultant to his work on the development and implementation of the website. If the Commission decides that no violation of 1019-B has occurred, the Commission should also publicly explain how an individual who is at all relevant times a paid consultant to a candidate in the primary or general election campaign, may claim the right to anonymously volunteer his time to a character assassination website, which attempts to destroy the candidacy of a competing candidate for that same office.

There has also been some suggestion that the media exception might apply to the Cutlerfiles website. Section 21-A M.R.S. 1014 explicitly applies to “publicly accessible sites on the internet.” Thus, application of the media exception to all “publicly accessible sites on the internet” would exceed the agency’s statutory authority. *See Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004) (FEC can’t decide to exempt the internet from regulation). The Supreme Court addressed the attributes of a legitimate press entity in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986). The Court considered two factors to determine whether an entity functions as a legitimate press entity: (1) whether the entity has made its materials available to the general public, and (2) whether the publication is comparable in form to a publication the entity ordinarily issues. The *Shays* court expressly cautioned against broad application of the Media Exemption which could result in “rampant circumvention of the campaign finance laws.” *Shays*, 337 F. Supp. At 70. Indeed, the Cutlerfiles would not be subject to the federal media exemption because it could not satisfy either of the required prongs of 11 CFR §§ 100.73, and 100.132, namely that it “represents a bona fide news account communicated in a publication of general circulation or on a licensed broadcasting facility;” or that it “is part of a general pattern of campaign-related news account that give reasonably equal coverage to all opposing candidates in the circulation or listening area, is not an expenditure.” The actual provisions under which a blog such as the Cutlerfiles might be exempt under federal law are 11 CFR §§ 100.26, 100.94, and 100.155, provisions which, unlike the media exemption, have no counterpart in Maine Law. These provisions are not constitutionally mandated, nor are they sound policy for the State of Maine.

In summary, the Maine Legislature has charged this Commission with enforcement of the disclaimer and disclosure provisions of Section 1014, and Section 1019-B, and with oversight of the Maine Code of Fair Campaign Practices. The Legislature has explicitly articulated that the State of Maine has a governmental interest in preventing the type of character assassination engaged in by the people behind the Cutlerfiles website. The Supreme Court has recognized the importance of this governmental interest, as well as the governmental interest in ensuring that voters know “who is speaking about a candidate shortly before an election.” Candidates, immediate family members of candidates participating in their campaigns, and paid consultants of a candidate are public figures, particularly with regard to candidate elections for the same public office. As such, those individuals have a reduced right to privacy and lesser protection for their anonymity as compared to individuals who are not public figures. Even private individuals may constitutionally be made subject to disclaimer requirements on their covered communications in candidate elections.

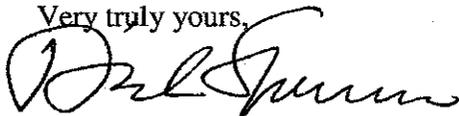
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On behalf of Cutler 2010, and the future integrity of the electoral process in Maine, we request that the Commission report the results of its investigation to the public, and that the Commission take appropriate enforcement action against those responsible for violating Maine's campaign laws in connection with the Cutlerfiles website.

Thank you for your consideration of this request.

Very truly yours,

A handwritten signature in black ink, appearing to read "Richard A. Spencer". The signature is written in a cursive, flowing style.

Richard A. Spencer, and
David M. Kallin
Attorneys for Cutler 2010.

RAS/kmr

cc: Eliot Cutler
Jonathan Wayne
Phyllis Gardiner, Esq.
Dan Billings, Esq.



MAINE CIVIL LIBERTIES UNION FOUNDATION

October 6, 2010

VIA ELECTRONIC MAIL

Phyllis Gardiner, Esq.
Assistant Attorney General
Office of the Attorney General
General Government Div.
6 State House Station
Augusta, ME 04333-0006
Phyllis.Gardiner@maine.gov

Re: The Cutler Files and Anonymous Speech

Dear Ms. Gardiner:

On behalf of the Maine Civil Liberties Union, thank you for the opportunity to provide comments on the request for an investigation into the Cutler Files (www.cutlerfiles.com). The MCLU is a nonpartisan advocacy organization that does not endorse political candidates, and we do not represent any party in this dispute. Hopefully, our submission will aid you, and the Commission, in the resolution of this issue.

The Maine Commission on Governmental Ethics and Election Practices has been requested to initiate an investigation into the Cutler Files blog for violation of 21-A M.R.S.A. §1014, and it has shown admirable caution about doing so. The statute undeniably serves a public interest in illuminating the dimensions of political debate. But, as you have recognized, the constitutional protection of freedom of speech includes, in some instances, protection against the disclosure of one's identity. Requiring the public disclosure of the author(s) of the Cutler Files would violate that First Amendment protection, and the Commission ought to decline to intrude in this protected area.

Commission Authority

As an initial matter, the commission's authority as a body and as individual commissioners is circumscribed by both the United States Constitution and the Constitution of

the State of Maine, and it cannot act beyond its limits. The question of an administrative body's authority to make constitutional determinations is not an easy one. The Maine Supreme Judicial Court has not yet provided clear guidance on this issue, but the Supreme Court of Tennessee recently provided a helpful roadmap for consideration of this issue. While administrative bodies are generally not authorized to invalidate statutes on constitutional grounds (because of separation of powers principles), such bodies can and should exercise discretion to ensure that the application of otherwise-valid statutes does not intrude into constitutionally-protected territory.

Administrative tribunals do not lack the authority to decide every constitutional issue. It is essential, however, to distinguish between the various types of constitutional issues that may arise in the administrative context. In *Richardson*, we developed three broad categories of constitutional disputes: (1) challenging the facial constitutionality of a statute authorizing an agency to act or rule, (2) challenging the agency's application of a statute or rule as unconstitutional, or (3) challenging the constitutionality of the procedure used by an agency. Administrative tribunals have the power to decide constitutional issues falling into the second and third categories, but the first category falls exclusively within the ambit of the judicial branch.

Colonial Pipeline Co. v. Morgan, 263 S.W. 3d 827, 843 (Tenn. 2008) (internal citations omitted). This categorization safeguards three principles: first, the separation of power principle, that agencies (as part of the Executive branch) are to enforce the law; second, the constitution principle, that all government actors take an oath to uphold the constitution; and third, the agency principle, that agencies are delegated both the authority and the discretion to act. Sometimes, the agency principle leads to the adoption of rules and procedures (the third category recognized by the Tennessee court in *Colonial Pipeline*), but it is no less pressing when the agency action at issue is whether to initiate an investigation or an enforcement action. See also *Prince George's County v. Ray's Used Cars*, 398 Md. 632, 651 (Md. 2007) (recognizing the authority of Maryland administrative agencies to consider the constitutionality of statutes). State Supreme Courts are nearly unanimous in holding that an administrative agency lacks the authority to facially invalidate a statute, but that is not what is being urged here. The Cutler Files, as we understand it, is only urging you to consider, at this point, the constitutionality of the application of §1014, in light of the facts presented.

The Right to Anonymous Speech

The First Amendment protects the right to anonymous speech. See *Watchtower Bible & Tract Soc’y v. Vill. of Stratton*, 536 U.S. 150, 160, 166–67 (2002); *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 199–200 (1999); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342 (1995); *Talley v. California*, 362 U.S. 60, 64–65 (1960). Anonymous speech, whether artistic or political, has played an “important role in the progress of mankind.” *McIntyre*, 514 U.S. at 341. Speakers choose anonymity for a variety of reasons—fear of retaliation, concern about ostracism, or an interest in preserving privacy. *Id.* at 342. Whatever the reasons, courts are broadly protective of the right of authors to remain anonymous. Such anonymity protects speakers from persecution, while allowing them to criticize oppressive practice and laws. See *Talley*, 362 U.S. at 64. There is a “rich tradition of First Amendment protection for anonymous political discourse” and “unpopular viewpoints would often not be expressed if attribution were always required.” *Yes for Life Political Action Committee v. Webster*, 74 F.Supp.2d 37, 39 (D.Me. 1999) (enjoining enforcement of disclosure requirements against a PAC).

Mr. Cutler has suggested that *McIntyre* has been overruled, but that view finds no support in the case law. The right to anonymity is, like almost all areas of First Amendment protection, subject to limits, but the right has not by any stretch been eliminated, nor has the case law supporting it been overruled. Supreme Court cases, such as *McIntyre*, are not overruled until the Supreme Court says they are overruled. See *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989) (“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”). That Justice Thomas, as a lone dissenter, perceives a contradiction between *McIntyre* and portions of the Court’s opinion in *Citizens United* does not even hint that four more Justices see the same contradiction; in fact, the failure of any justices to join Justice Thomas’s dissent is more strongly suggestive of the opposite view. See *Citizens United v. FEC*, 130 S.Ct. 876, 980 (Thomas, J. dissenting) (suggesting that the Court undermines *McIntyre* by recognizing the validity of disclaimer/disclosure requirements as applied to well-funded corporate contributors).

Regulating Speech vs. Regulating Mechanics

The right to anonymity is strongest when the speaker is engaged in “pure speech,” and it weakens as the activity become more remote from communicative acts. *See Doe v. Reed*, 130 S.Ct. 2811, 2828 (2010) (“Regulations of this nature [requirement that an individual use their real name when voting or disclose their identity on a publicly reviewable signature petition], however, stand ‘a step removed from the communicative aspect of petitioning,’ and the ability of States to impose them can scarcely be doubted.”) (internal citations omitted); *see also McIntyre* 514 U.S. at 345 (contrasting measures to “control the mechanics of the electoral process” with the “regulation of pure speech”). Here, as compared with other recent issues before this commission, the regulation concerns pure speech: views about a candidate for public office. That speech is entitled to the highest level of protection. *See Roth v. United States*, 354 U.S. 476, 484 (1957). In the regulation of political speech (as opposed to, for example, commercial speech), the government is even foreclosed from preventing or punishing false speech, as the First Amendment does not allow the government to substitute its view (however well-formed) for that of the public. *See Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J. concurring) (“The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.”); *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 791 (1988) (the State “cannot substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government.”)

Balancing Anonymity and the Public’s Right to Know

The Public has an interest in knowing the identity of individuals participating in the political process, and at times that interest comes into conflict with the desire of individuals to remain anonymous. The Supreme Court has provided some guidance for reconciling these conflicts through its application of “exacting scrutiny”—which requires a ‘substantial relation’ between the disclosure requirement and a ‘sufficiently important’ governmental interest” to

uphold the statutory disclosure requirement. *See Citizens United v. FEC*, 130 S.Ct. 876, 914 (2010) (internal citations omitted).

Specifically, the Court has identified three interests that justify disclaimer and disclosure requirements: “[p]reserving the integrity of the electoral process, preventing corruption, and sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of the government.” *McConnell*, 540 U.S. at 206 n.88 (internal citations omitted). These interests were well served by the application of the disclosure requirement to large-scale corporate spending on election material. *See Citizens United*, 130 S.Ct. at 916 (noting the appropriateness of pairing of “corporate independent expenditure” with “effective disclosure”). But, that is not the case here, and the Court has made it clear that, while a disclosure requirement may be constitutional on its face, “as-applied” challenges must remain available. *See id.* at 914. Here, unlike in *Citizen’s United*, the speaker is not a large corporation with the potential to corrupt elected officials. Maine’s economy is small, but no governor will be corrupted by a forty dollar website. And, the expressed concern of the creator(s) of the Cutler Files of a fear of retaliation or reprisal is entirely believable. If, for example, the creator(s) are either journalists or government employees, it could be disastrous professionally to be linked to such comments about the (potential) Governor. The Supreme Court has ensured protection for such individuals, even against valid statutes. *See id.* (recognizing that as-applied challenges to disclosure requirements are available to protect anonymous speakers from “threats, harassment, or reprisals from either Government officials or private parties.”) (internal citations omitted). The author(s) of the Cutler files are not shielded by the corporate form, and counsel has suggested that they are (at most) a small group. There is undeniable safety in numbers, and a small group or an individual is more deserving of the protection from potential retaliation that comes with anonymity.

A large entity spending a great deal of money, then, has the weakest claim to the protections of anonymity, because the public interest in preventing corruption is high and the need for protection from retaliation is low. But, in the case of the Cutler Files, the public has little or no anti-corruption interest in learning the identity of an individual or small group who has spent a minimal amount of money on a website, and the need for protection is the highest because the creator(s) is either an individual or a small group, which leaves them exposed to reprisal.

The Commission ought to decline the invitation to initiate an investigation into the identity of the author(s) of the Cutler files and urge Mr. Cutler to avail himself of alternative remedies for speech that he finds disagreeable. *See Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J. concurring) (recommending “discussion” to expose “falsehoods and fallacies” and “the process of education” to “avert evil.”).

The MCLU appreciates the opportunity to comment on this dispute, and I would welcome the chance to discuss the matter further with you and the commission.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Zachary L. Heiden', written in a cursive style.

Zachary L. Heiden
Legal Director
Maine Civil Liberties Union Foundation

cc: Jonathan Wayne, Esq.
Daniel Billings, Esq.
Peter J. DeTroy, Esq.
Richard A. Spencer, Esq.



ELECTRONIC FRONTIER FOUNDATION
Protecting Rights and Promoting Freedom on the Electronic Frontier

October 8, 2010

Phyllis Gardiner, Esq.
Assistant Attorney General
Office of the Attorney General
General Government Div.
6 State House Station
Augusta, ME 04333-0006

**Re: Governmental Ethics Complaint Filed on Behalf of Cutler 2010
Seeking Identifying Information for Internet Speaker at
CutlerFiles.com**

Dear Ms. Gardiner,

I am the Legal Director of the Electronic Frontier Foundation (“EFF”). EFF is a non-profit, member-supported civil liberties organization working to protect rights in the digital world. EFF actively encourages and challenges industry, government and the courts to support free expression, privacy, and openness in the information society.

EFF writes in support of CutlerFiles.com, and to provide some perspective on the proper First Amendment legal analysis that should be applied in situations, as this one, where the question is whether to breach anonymity of an online speaker on a matter of public concern. EFF has handled well over a dozen similar cases, all across the country, and has helped developed the caselaw addressing such situations.¹

As we understand it, in response to a complaint from counsel for the Cutler 2010 campaign (“Campaign”), the Maine Commission on Governmental Ethics and Election Practices (“Commission”) is considering whether to use its subpoena power to require the host of the website www.CutlerFiles.com to reveal the identity of the individuals whose speech is hosted on the website. The basis for this request is the suspicion of the Campaign that the speech on the website is the result of “opposition research” by Mr. Cutler’s political opponents (presumably in the upcoming election) and so be subject to Maine’s disclosure laws. In effect, the Campaign seeks to have the Commission use its subpoena power to determine whether its suspicions are correct.

With respect, we do not believe that suspicion that speech is “opposition research” is a sufficient basis under the First Amendment to breach the anonymity of the speakers on CutlerFiles.com.² To assist you in your evaluation, and to support our conclusion, please allow us to review the relevant First Amendment law.

¹ A sampling of the cases on anonymous online speech where EFF has participated is available at <http://www.eff.org/related/3005/case>.

² Alternatively it appears that the Campaign may believe that Maine’s disclosure laws require the

1. The Right to Speak Anonymously Is Constitutionally Guaranteed.

The United States Supreme Court has consistently defended the right to anonymous speech in a variety of contexts, noting that “[a]nonymity is a shield from the tyranny of the majority . . . [that] exemplifies the purpose [of the First Amendment] to protect unpopular individuals from retaliation . . . at the hand of an intolerant society.” McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 357 (1995). See also, e.g., *id.* at 342 (“[A]n author’s decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.”); Talley v. California, 362 U.S. 60, 64 (1960) (finding a municipal ordinance requiring identification on hand-bills unconstitutional, noting that “[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind.”). Anonymity receives the same constitutional protection whether the means of communication is a political leaflet or an Internet message board. See Reno v. ACLU, 521 U.S. 844, 870 (1997) (there is “no basis for qualifying the level of First Amendment protection that should be applied to” the Internet). See also, e.g., Doe v. 2theMart.com, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001) (“The right to speak anonymously extends to speech via the Internet. Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas.”). And as discussed below, these fundamental rights protect anonymous speakers from forced identification, be they from overbroad statutes or unwarranted discovery requests.

This strong First Amendment right is especially critical when the anonymous speaker is expressing political views. NAACP v. Alabama, 357 U.S. 449, 461 (1958)) (“The effect of broadly compelling disclosure of the identities of persons expressing political views is ‘unconstitutional intimidation of the free exercise of the right to advocate.’”); NAACP, 357 U.S. at 460 (“Freedom to engage in association for the advancement of beliefs is an inseparable aspect of the liberty assured by the due process clause of the First Amendment”). Thus, the fact that the speech at issue here is an expression of political views increases the need for serious First Amendment scrutiny.

2. Anonymous Speakers Enjoy a Qualified Privilege Under the First Amendment.

Because the First Amendment protects anonymous speech and association, efforts to use the power of the courts³ to pierce anonymity are subject to a qualified privilege. Courts must “be vigilant . . . [and] guard against undue hindrances to . . . the exchange of ideas.” Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 192 (1999). This

identification of anyone speaking about an election or a candidate for election. Such an interpretation is even more inconsistent with the First Amendment right to anonymous speech, for the reasons discussed below, than the claim that the website is actually the work of one of Mr. Cutler’s opponents in the upcoming election.

³ A subpoena, even if granted to a private party, is state action and hence subject to constitutional limitations. See, e.g., New York Times v. Sullivan, 376 U.S. 254, 265 (1964); Shelley v. Kraemer, 334 U.S. 1, 14 (1948).

vigilant review “must be undertaken and analyzed on a case-by-case basis,” where the court’s “guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue.” Dendrite Int’l v. Doe No. 3, 775 A.2d 756, 761 (N.J. App. 2001). Just as in other cases in which litigants seek information that may be privileged, courts must consider the privilege before authorizing discovery. See, e.g., Sony Music Entm’t Inc. v. Does 1-40, 326 F. Supp. 2d 556, 565 (S.D.N.Y. 2004) (“Against the backdrop of First Amendment protection for anonymous speech, courts have held that civil subpoenas seeking information regarding anonymous individuals raise First Amendment concerns.”); Grandbouche v. Clancy, 825 F.2d 1463, 1466 (10th Cir. 1987)

The constitutional privilege to remain anonymous is not absolute, however. Identity information may be necessary to pursue meritorious litigation. Id. at 578 (First Amendment does not protect anonymous Internet users from liability for tortious acts such as defamation); Doe v. Cahill, 884 A.2d 451, 456 (Del. 2005) (“Certain classes of speech, including defamatory and libelous speech, are entitled to no constitutional protection.”). The same is true for investigations necessary to enforcing regulation such as Maine’s disclosure laws. However, subpoena power may not be used to uncover the identities of people who have simply made statements that are critical of a person. Accordingly, courts evaluating attempts to unmask anonymous speakers in cases similar to the one at hand have adopted standards that balance one person’s right to speak anonymously with a litigant’s legitimate need to pursue a claim.

3. The Test for Removing Anonymity.

The seminal case setting forth First Amendment restrictions upon the ability to compel an online service provider to reveal an anonymous party’s identity is Dendrite Int’l, Inc. v. Doe No. 3, supra, in which the New Jersey Appellate Division adopted a test for protecting anonymous speakers that has been followed by courts around the country:⁴

- (1) make reasonable efforts to notify the accused Internet user of the pendency of the identification proceeding and explain how to present a defense;
- (2) set forth the exact statements that Petitioner alleges constitutes actionable speech;
- (3) allege all elements of the cause of action and introduce prima facie evidence within the litigant’s control sufficient to survive a motion for summary judgment; and,
- (4) “[f]inally, assuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant’s First Amendment right of anonymous free speech against the strength

⁴ See, e.g., Independent Newspapers, Inc. v. Brodie, 966 A.2d 432, 457 (Md. 2009); Mobilisa, Inc. v. John Doe 1, 170 P.3d 712, 717-721 (Ariz. App. 2007); Greenbaum v. Google, Inc., 845 N.Y.S.2d 695, 698-99 (N.Y. Sup. Ct. 2007); see also Highfields Capital Mgmt. v. Doe, 385 F. Supp. 2d 969, 974-76 (N.D. Cal. 2005); Cahill, 884 A.2d at 459-60 (applying a modified Dendrite test).

of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.”

Dendrite, 775 A.2d at 760-61.

4. Applying the First Amendment Test, the Request Here Fails.

Applying the Dendrite test, the request for a subpoena here clearly fails both the third and fourth prong.

First, the Campaign presents no evidence supporting its suspicion that the speaker on CutlerFiles.com is indeed subject to the disclosure laws, much less evidence to support a prima facie claim that the website operator has violated the disclosure laws sufficient to survive a motion for summary judgment. Instead the Campaign presents only its own suspicions that the website operator is somehow affiliated with Mr. Cutler's political opponents and a memo from a campaign operative that expresses similar suspicions based on the assertion that the website appears to be “opposition research.” Such suspicions, even when couched in a memorandum from a political operative, are simply not admissible evidence sufficient to survive a motion for summary judgment.

Second, even if the statements of suspicion were sufficient, they would not be sufficient to survive the balancing test of the fourth prong of Dendrite. The free speech interests of the speakers on www.CutlerFiles.com are very strong – this is political speech at the heartland of the First Amendment. Moreover, necessity of the disclosure of the identity of the speaker by the website host is not great because, as noted below, the Commission has other tools to use if it suspects that the website is actually run by one of Mr. Cutler's opponents in the upcoming elections.

EFF has handled several similar cases in which the basis for the subpoena is suspicion that an anonymous speaker is actually someone covered by a particular regulation or who is otherwise legally liable for the speech. For instance, in USA Technologies v. Doe 2010 WL 1980242 (N.D.Ca 2010) the court rejected a claim that the identity of a speaker was needed to determine whether the speaker was engaged in the sale or purchase of a security at the time of his speech and so had violated securities laws. Similarly in Town of Manalapan v. Moskovitz, the court rejected a claim that an anonymous speaker must be unmasked because they suspected he was actually the defendant in a legal malpractice case brought by the town against its former town counsel. Ruling from the bench, the Court noted:

There are First Amendment issues with regard to disputes with the past administration [of the town of Manalapan] and anyone has a right to make their feelings clear . . . and . . . not to be intimidated by the issuance of discovery requests . . . and the blogger, . . . has a right not to be

drawn into the litigation and forced to reveal identity or to impede on his or her First Amendment rights simply on a suspicion, however founded or unfounded.⁵

Finally in Burd v. Cole, the plaintiff sought to issue a subpoena seeking the identities of speakers on a political message board based on the suspicion that they were actually the defendant in a defamation case. The subpoena was withdrawn after EFF filed a motion to quash on behalf of the anonymous speakers.⁶

The pattern is clear – in each case the complainant sought to unmask anonymous speakers in order to determine whether they were in fact someone else who has some special duty or legal exposure under the law. And the correct response in each is equally clear – mere suspicion that a speaker may have violated the law is not a sufficient basis to unmask an anonymous speaker consistent with the First Amendment protection for freedom of speech.

Also similar to these other cases, the refusal to directly unmask the speaker does not eliminate the possibility of a further investigation by the Commission. It remains concerned that the website is actually “opposition research” funded by one of Mr. Cutler’s opponents, as the Campaign indicates, the Commission can direct a subpoena to the campaigns or agents of Mr. Cutler’s opponents directly and require that they state under penalty of perjury whether they are affiliated with CutlerFiles.com. This would allow the investigation to continue but would ensure that the inquiry is not merely a fishing expedition. It would also prevent the Commission’s investigation from unwittingly becoming a method by which lawful critics are intimidated and legitimate political speech is chilled.

⁵ Transcript of Motions, Manalapan v. Moskovitz, Superior Court of New Jersey, Monmouth County, Docket No.: Mon-L02895-07 (December 21, 2007), available at <http://www.eff.org/files/filenode/manalapan/1221moskovitzpmp.pdf>.

⁶ The Burd v. Cole case file is available at <https://www.eff.org/cases/burd-v-cole>.

Phyllis Gardiner, Esq.
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Thank you for considering this letter. We hope that the Commission will ensure that the First Amendment rights of anonymous speakers are protected even as it exercises its authority to investigate claims arising from Maine's disclosure laws. Please feel free to contact me with any questions or concerns at 415-436-9333 x108 or Cindy@eff.org.

Sincerely,

ELECTRONIC FRONTIER FOUNDATION

A handwritten signature in black ink, appearing to read "C.A. COHN", with a long horizontal flourish extending to the right.

CINDY A. COHN

Legal Director

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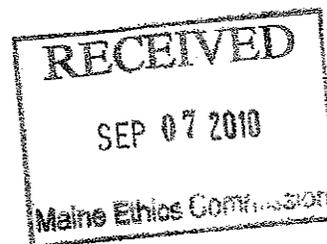
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David M. Kallin*
John S. Kaminski*
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Mark A. Paige†
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William L. Plouffe*
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E. William Stockmeyer*†
Amy K. Thao*†
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* Admitted In Maine

† Admitted In New Hampshire

By E-Mail @ Jonathon.Wayne@Maine.gov
and U.S. Mail

September 3, 2010

Jonathan Wayne
Ethics Director
Maine Commission on Governmental Ethics
135 State House Station
Augusta, ME 04333

RE: Governmental Ethics Complaint filed on behalf of Cutler
2010

Dear Jonathan:

I am writing on behalf of Cutler 2010 to request that the Maine Commission on Governmental Ethics conduct an investigation to determine who has made and financed the anonymous express advocacy communications found on the Cutlerfile website which I brought to your attention earlier this week. This anonymous website contains express advocacy communications that include untruths, half-truths, and are malicious and defamatory as well. We request that the Commission take appropriate legal action against the person or persons who made and/or financed these express advocacy communications for violation of Maine's election laws, including but not limited to:

1. Failure to disclose the name and address of person or persons who made and/or authorized the expenditures for express advocacy communications as required by 21-A MRS §1014;
2. Failure to disclose whether the express advocacy communications were or were not authorized by a candidate, a candidates authorized political committee or their agents as required by 21-A MRS §1014(1)(2);
3. Violation of 21-A MRS §1014 with the intent to misrepresent whether the express advocacy communications were or were not authorized by a candidate as prohibited by 21-A MRS §1014(4);

MERITAS

September 3, 2010

Page 2

4. Failure to comply with the reporting requirements of 21-A MRS §§1017 through 1020-A; and/or
5. Failure to comply with the limitations on contributions and expenditures established by 21-A MRS §1015.

Please direct any response to this governmental ethics complaint to Ted O'Meara, the Campaign Manager for Cutler 2010, as I will be out of the office through September 15th.

Thank you for your attention to this matter.

Very truly yours,



Richard A. Spencer

RAS/kmr

cc: Ted O'Meara

DrummondWoodsum

ADDITIONAL MATERIALS

Agenda Item #1

Richard A. Spencer

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October 19, 2010

Walter F. McKee, Esq.

Chairman

Governmental Ethics Commission

Maine Commission on Governmental Ethics and Election Practices

135 State House Station

Augusta, ME 04333

RE: Cutlerfiles Website

Dear Chairman McKee and Members of the Maine Governmental Commission
on Governmental Ethics and Election Practices:

I am writing to follow up on my discussions with Jonathon Wayne of the Commission staff and with Phyllis Gardiner, Esq., of the Maine Attorney General's office to request that the Commission continue its investigation of the Cutlerfiles website. The Cutler campaign is making a fairly simple request of the Commission: That the Commission carry out its statutory responsibility to continue its investigation until it determines on the basis of reliable and credible evidence (1) whether or not the reporting requirements for independent expenditures of 21-A M.R.S. §1019-B have been violated in connection with the Cutlerfiles website, and if so, that the Commission require those involved to comply with the reporting requirements of Maine law; and (2) whether the facts of this case justify an exercise of the Commission's enforcement discretion to pursue the clear facial violation of 21-A M.R.S. § 1014. The Cutler campaign and the voters of Maine are entitled to know how much has really been spent on the Cutlerfiles website, who is making these expenditures to defeat the candidacy of Eliot Cutler, and whether they have been acting in concert with a political campaign, a political party, or a political action committee.

While we believe that it is the Commission's job to enforce all of Maine's election laws and to let the courts decide their constitutionality, as we have previously argued, we would emphasize to the Commission does not yet have reliable facts on which to base an exercise of its enforcement discretion of 21-A M.R.S. §1014. Furthermore, we would like to emphasize that the more difficult legal issues which may be raised by the

Daniel Amory*
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S. Campbell Badger*
Jerrol A. Crouter*
George T. Dilworth*
Jessica M. Emmons*
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 MERITAS

Commission's enforcement of 21-A M.R.S. §1014 (the "disclaimer" statute) will not be significantly implicated by continuing the Commission's investigation of a possible violation of 21-A M.R.S. §1019-B (the "independent expenditure reporting requirement"). There is a clear distinction in recent first amendment jurisprudence between the burden on the exercise of free speech posed by disclaimer statutes with no *de minimis* exception and the burden of such exercise by independent expenditure reporting statutes which require after-the-fact reporting of independent expenditures with a statutory threshold, such as 21-A M.R.S. §1019-B with its minimum reporting threshold of \$100.

After-the-fact financial reporting requirements that result in the disclosure of the identity of a speaker do not impose as great a burden on an individual's First Amendment rights as a concurrent disclaimer requirement that becomes a part of the speaker's message because the after-the-fact reporting allows the speaker to convey his or her message with the benefits of anonymity at the time of the speech while more narrowly serving important government interests. This distinction was highlighted by the Supreme Court in *McIntyre v. Ohio Elections Comm'n* when it contrasted a disclosure requirement that became part of a leaflet with an after-the-fact reporting requirement functionally identical to Maine's Section 1019-B:

True, in [a] portion of the *Buckley [v. Valeo]*, 424 U.S. 1, (1976) opinion we expressed approval of a requirement that even "independent expenditures" in excess of a threshold level be reported to the Federal Election Commission. But that requirement entailed nothing more than an identification to the Commission of the amount and use of money expended in support of a candidate. Though such mandatory reporting undeniably impedes protected First Amendment activity, the intrusion is a far cry from compelled self-identification on all election-related writings. A written election-related document-particularly a leaflet-is often a personally crafted statement of a political viewpoint. Mrs. McIntyre's handbills surely fit that description. As such, identification of the author against her will is particularly intrusive; it reveals unmistakably the content of her thoughts on a controversial issue. Disclosure of an expenditure and its use, without more, reveals far less information. It may be information that a person prefers to keep secret, and undoubtedly it often gives away something about the spender's political views. Nonetheless, even though money may "talk," its speech is less specific, less personal, and less provocative than a handbill-and as a result, when money supports an unpopular viewpoint it is less likely to precipitate retaliation.

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 354-56, (1995) (internal citations removed). As the Ninth Circuit articulated after reviewing this and other precedents:

As these precedents indicate, requiring a publisher to reveal her identity on her election-related communication is considerably more intrusive than simply requiring her to report to a government agency for later publication how she spent her money. The former necessarily connects the speaker to a particular message directly, while the latter may simply expose the fact that the speaker spoke.

Am. Civil Liberties Union of Nevada v. Heller, 378 F.3d 979, 991 (9th Cir. 2004); *See also Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 198-99 (1999) (contrasting an unconstitutional time-of-speech requirement that a petition circulator wear a name tag with the less burdensome requirement that the petitioner later submit an affidavit containing his or her name to a state agency); *Cf. Buckley v. Valeo*, 424 U.S. 1, 82-84 (1976) (upholding a reporting requirement for expenditures above \$100 that expressly advocate for a particular election result). Thus, the anonymity concerns raised under Section 1014 are not significant concerns under the reporting requirements of Section 1019-B. The fact that these requirements apply equally to expenditures on a website and expenditures on other forms of communication is not legally significant.

Similarly the *de minimis* threshold concerns that may be present in Section 1014 do not exist in Section 1019-B. Judge Hornby has held that Maine's reporting requirements for independent expenditures over \$100 meet the exacting scrutiny standard because the requirement is substantially related to important government interests of insuring the integrity of the electoral process by providing information to voters, protecting against corruption or the appearance of corruption, and as an essential means for a state to gather data necessary to ensure compliance with its campaign finance laws. *Nat'l Org. for Marriage v. McKee*, CIV 09-538-B-H, 2010 WL 3270092, *9-11 (D. Me. Aug. 19, 2010). Furthermore, Judge Hornby held that Maine's legislative threshold of \$100 satisfies the *de minimis* requirement that has been recognized by courts in other jurisdictions. *Id.* at *11 (upholding Maine's \$100 threshold and stating that "the judgment about the threshold is still best left to the legislature"); *Cf. Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1033 (9th Cir. 2009) (overturning Montana's "zero dollar" threshold).

In this case, it would be a serious abdication of the Commission's enforcement responsibilities under 21-A M.R.S. §1019-B for the Commission to discontinue its investigation on the basis of an anonymous affidavit which only appears to tell part of the story and which may contain significant misrepresentations of fact.

The anonymous affidavit asserts that the aggregate cost of the Cutlerfiles website to date has been only \$92.54. This sum includes a monthly hosting fee of \$4.83 paid on August 29, 2010 and a monthly hosting fee of \$4.99 paid on September 20, 2010. If the people behind the website pay a third monthly hosting fee of \$4.99 for October, the total spent on the Cutlerfiles website according to the anonymous affidavit will be \$97.53 or \$2.47 below the \$100.00 reporting threshold of Section 1019-B. The Commission should not accept the accuracy of this figure at face value on the basis of an unsupported anonymous affidavit without further investigation. Even the anonymous affidavit itself contains language designed to protect the affiant if the Commission's investigation shows that the affidavit understates the amount of the independent expenditures that have been made on the website. In answer to Question 9 the anonymous affiant states:

During the initial period of research from August, 2009 through February, 2010, I paid for three or four articles that I obtained on line. I estimate that each of those articles cost no more than \$3.99 each. I am unable to provide any more detail

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because the research was conducted some time ago without any anticipation of ever having to account for the costs.

This statement does not actually say that no other costs were incurred by the anonymous affiant and it does not even say that he or she reviewed his or her credit card records, checkbooks, emails and other financial records to determine how much he or she actually expended on the website. The anonymous affiant does not include any information about expenditures that may have been made by the other individual who according to the affiant also "primarily conducted" the research, writing, editing and graphics for the website. The affidavit does not describe that person's expenditures or state clearly that none were made. Furthermore, the anonymous affidavit does not speak to any expenditures that may have been made by the "others" who according to the anonymous affiant also provided suggestions which were incorporated into the website. The Commission should investigate whether those behind the website made expenditures for software, access to subscription databases, telephone expenses, mailing, FedEx charges, travel expenses or any other miscellaneous costs that have not been described or disclosed by the anonymous affiant.

The anonymous affiant does state that no person or entity has been paid directly or indirectly for any work related to the site. That statement, however, is conclusory and should not be accepted at face value without further investigation by the Commission. If, as seems possible, the Commission finds that the research for the Cutlerfiles site was conducted by a paid consultant on behalf of a gubernatorial primary campaign in anticipation of running a general election campaign against Eliot Cutler, the Commission should investigate whether that research was conducted in whole or in part by a paid campaign consultant, by paid campaign staff or by other persons in the inner circle of a campaign who should be considered to have been agents of that campaign for this purpose.

If further investigation by the Commission establishes that the research was done on behalf of or in conjunction with a paid consultant to a gubernatorial primary campaign, the Commission should investigate who owned the research material when the primary campaign ended – was it the paid consultant to the campaign, the campaign, or someone else in the campaign's inner circle. The Commission should also determine whether that research material had "value" within the meaning of the term "expenditure" under 21-A M.R.S. §1012(3) which would make a sale, gift or loan of that material an "independent expenditure" under 21-A M.R.S. §1019-B. Finally the Commission should investigate whether one of the two people identified by the anonymous affiant, or, a person closely associated with them tried to sell the research material to a general election campaign, a political party, or a political action committee for tens of thousands of dollars to help them to develop negative attack ads against Mr. Cutler.

If the Commission's investigation finds that the Cutlerfiles website has involved independent expenditures in excess of the \$100 statutory reporting threshold of Section 1019-B(1), as we believe it will, the Commission should then require those involved to file an independent expenditure report pursuant to that section.

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The Commission should also review the anonymous affidavit after completion of its investigation to determine whether it contains a material false statement or a statement that includes a material misrepresentation in violation of 21-A M.R.S. §1004-A(5). If that proves to be the case, the Commission should then take further enforcement action under that section.

Again, as stated in the first paragraph of this letter, the Cutler campaign is making a simple request of the Commission: That the Commission carry out its statutory responsibility to continue its investigation until it determines on the basis of reliable and credible evidence (1) whether or not the reporting requirements for independent expenditures of 21-A M.R.S. §1019-B have been violated in connection with the Cutlerfiles website, and if so, that the Commission require those involved to comply with the reporting requirements of Maine law; and (2) whether the facts of this case justify an exercise of the Commission's enforcement discretion to pursue the clear facial violation of 21-A M.R.S. § 1014. Again, the Cutler campaign and the voters of Maine are entitled to know how much has really been spent on the Cutlerfiles website, who is making these expenditures to defeat the candidacy of Eliot Cutler, and whether they have been acting in concert with a political campaign, a political party, or a political action committee.

We appreciate the attention that the Commission and the Commission's staff have already devoted to these issues and hope that you will vote to continue the Commission's investigation until the questions outlined above have been answered in a satisfactory manner on the basis of reliable and credible information.

Thank you for your consideration of this request.

Very truly yours,



Richard A. Spencer

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October 6, 2010

VIA E-MAIL AND U. S. MAIL

Phyllis Gardiner, Esq.
Assistant Attorney General
Office of the Attorney General
General Government Div.
6 State House Station
Augusta, ME 04333-0006

RE: Governmental Ethics Complaint Filed on Behalf of Cutler 2010

Dear Ms. Gardiner:

This letter is in response to the request for written submissions made on September 30, 2010 at the hearing before the Maine Commission on Governmental Ethics and Election Practices ("Commission"), in the above matter relating to the State's investigation of the "cutlerfiles.com" website. This submission is made on behalf of Eliot Cutler and his campaign, Cutler 2010, in support of the Commission's power and authority to investigate legal compliance with applicable disclosure laws of the website in issue, run by a person, group, or entity who are currently identified as "The Cutler Files" (hereafter "TCF"). Specifically, the attorney for TCF claims that Commission investigation, including subpoena powers, directed to the individual or individuals responsible for that website would violate that individual or individuals' First Amendment right to maintain anonymity.

At the September 30, 2010 hearing, the Commission formally requested an opinion from your office regarding the constitutional issue raised by TCF's attorney and invited counsel for TCF and for Cutler 2010 to provide you with information that might be helpful to you in forming your opinion. In accord with that invitation, please find below citation to legal authority making clear that the Commission may inquire into the identity of those behind TCF, in the course of investigating whether those individuals have complied with applicable election law disclosure requirements. In addition, we are also submitting to you herewith a memorandum from Keith Frederick of FrederickPolls,

LLC; Mr. Frederick is an experienced campaign operative and professional pollster (now the pollster of Cutler 2010). As stated in his affidavit, in his considered professional opinion the website content contains the hallmarks of classic "opposition research report" data which in the political consultation field constitutes paid-for research of considerable expense. If in fact the source of the information on the website represents an expenditure of this magnitude (and by all indications, that is precisely the case here) – and if in fact the source can be traced to a former or present campaign – then the disclosure laws could very well be implicated (as well as other laws within the Commission's jurisdiction). The Commission acts well within its power and jurisdiction to investigate based upon this reasonable indicia, and doing so does not violate any person's rights under the United States Constitution or otherwise.

Introduction

The issue presently before the Commission is whether it has the power to effectively investigate alleged violations of Maine's disclosure laws applicable to the publication or distribution of political communications. For those laws to have any force, the answer to this question must be yes. The simple requirement that those who use information of sophisticated political operations, for the express purpose of convincing voters that an identified candidate is unfit for a particular office, must identify themselves and the source of the funding that resulted in the gathering of that information, does not violate the right to anonymity in political speech as articulated by the United States Supreme Court.

Discussion

Under 21-A M.R.S.A. § 1014(1),

[w]henver a person makes an expenditure to finance a communication expressly advocating the election or defeat of a clearly identified candidate through . . . publicly accessible sites on the Internet . . . the communication, if authorized by a candidate, a candidate's authorized political committee or their agents, must clearly and conspicuously state that the communication has been so authorized and must clearly state the name and address of the person who made or financed the expenditure for the communication

Alternatively, under 21-A M.R.S.A. § 1014(2),

[i]f the communication described in subsection 1 is not authorized by a candidate, a candidate's authorized political committee or their agents, the communication must clearly and conspicuously state that the communication is not authorized by any candidate and state the name and address of the person who made or financed the expenditure for the communication

In the present case, the Commission is confronted with a website that has as its avowed purpose to expressly advocate for the defeat of a clearly identified candidate – independent candidate for Governor of Maine Eliot Cutler. No one seriously disputes this focus of the website. The persons responsible for the website have also admitted that “an expenditure to finance the communication” did occur in connection with establishing this publicly accessible site on the Internet. But, furthermore, the information on the site clearly represents, as a whole, a significant expenditure, likely the product of expensive paid-for “opposition research.” The site is filled with obscure and difficult to obtain information (intertwined with false political “spin” and character assassination) that is characteristic of the kind of “opposition research” for which some sophisticated political operations pay several tens of thousands of dollars. There is no reasonable indicia that this website is just the result of “armchair” research compiled by amateurs; to the contrary, the only reasonable inference to be drawn is that the website is derived from, or exists as, paid-for high end and professional research by a professional opposition research consultant.

Given that this information is “publicly accessible [] on the Internet” it is obvious to a neutral observer that 21-A M.R.S.A. § 1014 operates to require the disclosure of the “name and address of the person who made or financed” TCF. Nevertheless, the attorney for TCF has presented a number of different arguments as to why such disclosure should not be obtained. Each argument will be addressed in turn below.

I. There is No Absolute Right to Anonymous Political Speech.

TCF's attorney has previously argued that the right to anonymous political speech has been recognized by the United States Supreme Court in cases such as *McIntyre v. Ohio Elections Commission*. 514 U.S. 334 (1995). While this is no doubt true, the inquiry does not end there. First Amendment rights, like any Constitutional rights, are not absolute.

As recognized by the Law Court, the first step in analyzing “all challenges to the constitutionality of laws that regulate speech . . . [is to] determine what level of judicial

scrutiny should be applied to its validity.” *Mowles v. Commission on Governmental Ethics and Election Practices*, 2008 ME 160, ¶ 11, 958 A.2d 897, 901. Judge Hornby of the United States District Court of Maine recently provided guidance on this issue in the context of the same statute at issue here in *National Organization for Marriage v. McKee*, ___ F. Supp. 2d ___, 2010 WL 3270092 (D. Me. 2010).

In *McKee*, the National Organization for Marriage (“NOM”), among other arguments, challenged the attribution/disclaimer requirements of 21-A M.R.S.A. § 1014 as unconstitutional. *Id.* at *7. In analyzing this claim, Judge Hornby noted that “[t]he Supreme Court has made clear that when election-related speech is not prohibited, but simply carries consequences such as [those provided in § 1014], courts must apply ‘exacting scrutiny’ to the law.” *Id.* at *9. *See also Citizens United v. Federal Election Commission*, 130 S.Ct. 876, 914 (2010) (reiterating that “[d]isclaimer and disclosure requirements . . . impose no ceiling on campaign-related activities, [] do not prevent anyone from speaking . . . [and are subjected] to exacting scrutiny.” (internal quotation marks and citations omitted)).

Under the “exacting scrutiny” standard applicable to the disclosure statute at issue in this case, the disclosure may be investigated and compelled as long as there is “a ‘substantial relation’ between disclosure requirements and a ‘sufficiently important’ governmental interest.” *McKee*, 2010 WL at *9, *Citizens United*, 130 S.Ct. 876, 914. Maine’s statute clearly meets this test.

A. Maine’s “Substantial Governmental Interest” in Requiring Identity Disclosure Under 21-A M.R.S.A. § 1014.

In executing the applicable “exacting scrutiny” analysis in *McKee*, Judge Hornby first noted that the Supreme Court has long held that “[d]isclosure requirements . . . ‘directly serve substantial governmental interests.’” *Id.* at *9 (quoting *Buckley v. Valeo*, 424 U.S. 1, 68 (1976)). The Supreme Court has held that there are at least three categories of “substantial governmental interests” served by disclosure requirements of the kind in § 1014. These include providing

the electorate with information as to where political campaign money comes from and how it is spent . . . deter[ring] actual corruption and avoid[ing] the appearance of corruption by exposing large contributions and expenditures to the light of publicity . . . [and providing] an essential means of gathering the data necessary to detect violations of [statutory campaign] contribution limitations

Id. (quoting *Buckley*, 424 U.S. 1 at 66-68) (internal quotation marks omitted). Judge Hornby went on to hold that the same “substantial governmental interests” recognized in *Buckley* as applicable to federal elections applied equally to the context of a Maine state election. *Id.* Judge Hornby then held that Maine has a “compelling reason” for compiling the information required by § 1014 including “the goal of providing information to Maine voters about the interest groups that spend money referring to candidates in an election - and indeed Maine has polling data demonstrating the public’s interest in such information.” *Id.*

B. 21-A M.R.S.A. § 1014 has a “Substantial Relation” to the Harm Sought to be Addressed.

Maine has a “sufficiently important” governmental interest, and, indeed, as found by Judge Hornby a “compelling reason” to require the disclosure of the identity of those who make an expenditure to advocate for the defeat of an identified candidate through a website. Thus, the only remaining question is whether § 1014 carries a “substantial relation” to those interests to survive constitutional muster. As held, once again by Judge Hornby, the statute is “designed to provide information to the public about the source of monies being spent in an election; and Maine, through its Commission website and otherwise, makes that information easily available to the public.” *Id.* at *10. Therefore, “Maine’s measures are substantially related to the governmental interests [previously] described . . . [and] the disclosure . . . requirements [are] not unconstitutionally burdensome.”¹ *Id.*

¹ In *Citizens United*, the Supreme Court recognized that under some circumstances an “as-applied” challenge to the constitutionality of a disclosure statute might succeed where a “facial” challenge fails if the group being required to disclose its identity could show “a reasonable probability that disclosure of its contributors’ names will subject them to threats, harassment, or reprisals from either Government or private parties.” *Citizens United*, 130 S.Ct. at 914. There has been some loose talk from TCF’s attorney regarding the possibility that identifying those behind TCF might subject them to retribution from Mr. Cutler himself. A similar claim was rejected by the Supreme Court in *Citizens United* as forming the basis for a proper “as-applied” challenge to the disclosure requirement in that case because the group at issue there “offered no evidence that its members may face [] threats or reprisals.” *Id.* at 916. Similarly, there is no claim, nor could there be, that Mr. Cutler, or anyone associated with Mr. Cutler, has made a “threat of reprisal” against those behind TCF. As a result, the unfounded and unsupported claim on this front pursued by TCF’s attorney should be afforded no weight in the Constitutional analysis.

II. The Plain Language of Maine's Disclosure Requirements Apply to Websites.

TCF's attorney has also argued that, even if the disclosure requirements contained in § 1014 are constitutional, the State should nevertheless refuse to enforce those requirements against websites. In support of this argument, TCF's attorney has argued that a regulation promulgated under federal election law by the Federal Election Commission, purportedly interpreting a federal statute identical in relevant respects to Maine's disclosure statute, exempts websites from its disclosure requirements. As a result, TCF's attorney argues that Maine should follow federal law and similarly exempt websites from § 1014's disclosure requirements. This argument is misplaced.

As an initial matter, there is absolutely no reason why Maine should be compelled to follow interpretations of federal election laws. That said, TCF's attorney is simply mistaken to the extent he argues that federal election disclosure law is identical in relevant part to § 1014.

Specifically, 2 U.S.C. § 434(f) is the federal election statute section that most closely covers the ground governed in Maine by 21-A M.R.S.A. § 1014. Under 2 U.S.C. § 434(f), any person who expends in excess of \$10,000 in any calendar year in "producing and airing electioneering communications" is required to disclose "the identification of the person making the disbursement, of any person sharing or exercising direction or control over the activities of such person, and of the custodian of the books and accounts of the person making the disbursement." 2 U.S.C. §§ 434(f)(1)-(2). For purposes of subsection f of section 434, the term "electioneering communication" is statutorily defined as "any broadcast, cable, or satellite communication which . . . refers to a clearly identified candidate for Federal office." 2 U.S.C. § 434(f)(3). Notably absent from this definition is any mention of Internet websites.

In contrast to the omission of websites from 2 U.S.C. § 434(f), Maine's law under 21-A M.R.S.A. § 1014(1) states that "[w]henver a person makes an expenditure to finance a communication expressly advocating the election or defeat of a clearly identified candidate through broadcasting stations, newspapers, magazines, . . . [or] **publicly accessible sites on the Internet**, . . . the communication" must disclose who is responsible for the communication. (emphasis added). The plain language of § 1014 could not be more clear in explicitly including Internet websites among the forms of media to which the disclosure requirements apply. Therefore, regardless of any Federal regulations promulgated under the materially different Federal election statute, the Commission has no authority to ignore the direct command of the Legislature as clearly enunciated in 21-A M.R.S.A. § 1014(1).

Further, although there is no need to even read the Federal regulations relied upon by TCF's attorney as purportedly providing an exemption for websites under Federal law, it is nevertheless notable that neither 11 C.F.R. § 100.94 nor 11 C.F.R. § 100.155 provide a blanket exemption to websites of the kind argued for by TCF's attorney. Both of those regulations, under subsection (a), state that

When an individual or a group of individuals . . . engage in Internet activities for the purpose of influencing a Federal Election, neither of the following is a contribution by that individual or group of individuals:

- (1) The individual's uncompensated personal services related to such Internet activities;
- (2) The individual's use of equipment or services for uncompensated Internet activities, regardless of who owns the equipment and services

The regulations go on to define the terms "equipment and services" as including "Computers, software, Internet domain names, Internet Service Providers (ISP), and any other technology that is used to provide access to or use of the Internet." 11 C.F.R. § 100.94(c); 11 C.F.R. § 100.155(c).

It is important to remember that the issue in this matter before the Commission is not one of holding an individual or individuals accountable for time they personally spent organizing information to put on the TCF website, nor is it a matter of forcing disclosure related to the use of technological equipment necessary to create or maintain that website. Rather, the investigation is based on the reasonable prospect that the website relies on information that a sophisticated political operation devoted several tens of thousands of dollars worth of resources for professional research, the purpose of which was to uncover information that could be twisted and manipulated to advocate for the defeat of Eliot Cutler's campaign efforts in this year's race for Governor of Maine. This is a website containing classic professional "opposition research report" content. Nothing in either of the federal election regulations relied on by TCF's counsel would exempt such materials from the Federal election disclosure requirements. Therefore, even were Federal election law on this topic comparable in relevant ways to Maine's election law, which it is not, disclosure of the names and addresses of those behind TCF would be mandatory under Federal law and, by TCF's own attorney's logic, under Maine law as well.

Phyllis Gardner, Esq.
October 6, 2010
Page 8

III. Conclusion

At bottom, this is a simple decision. Maine has an election law directly on point that requires those behind TCF to simply identify who developed or financed the information supplied on the website. Such disclosure requirements under Federal law have, in *Citizens United*, been upheld by the Supreme Court and, under Maine law, been upheld in *McKee*. Both cases were decided within the past year; neither have, to this point, been acknowledged as relevant authority by TCF's attorney, and both provide direct and forceful authority for the constitutionality of 21-A M.R.S.A. § 1014.

As a result, we strongly urge that the Commission determine it has the authority to investigate this matter, and to subpoena the names and addresses of those behind TCF, for the purposes of determining who financed the research and information gathered on the website, and so determine whether the website complies with expenditure disclosure requirements.

Very truly yours,



Peter J. DeTroy

PJD/pmh
enclosure
cc: Jonathan Wayne

FREDERICKpolls

TO: Ted O'Meara; Eliot Cutler Campaign
FROM: Keith Frederick; FrederickPolls, LLC
DATE: October 5, 2010
RE: Website – Cutlerfiles.com

1. As you know, I have been a professional pollster active in national political campaigns since 1979. Being exposed to developments in the campaign industry that long means I have witnessed numerous innovations throughout the years that have now become familiar practice in statewide, federal and local campaigns. One such development: professional opposition research. It has become a more frequent practice that has spawned an industry of professional practitioners to produce an "Oppo Research Book" on any and all serious candidates in a race.
2. After review of the website "cutlerfiles.com" there is no doubt in my mind this is the work of a professionally oriented opposition researcher of the kind described above. The techniques, the content and the interpretation are 100% recognizable in the industry.
3. This researcher clearly went to great lengths to uncover and expose obscure information from specific sources only a dedicated opposition researcher would utilize including...
 - A 10-year old interview with Bates College;
 - Law firm websites and press releases;
 - Local voting records for decades past;
 - Local tax roles;
 - A FOREIGN LANGUAGE newspaper editorial from China (translated from a Chinese dialect to English); and
 - A 1977 letter from the President's Office of Science and Technology Policy to OMB when Mr. Cutler was an OMB Associate Director.
4. Not only did this researcher produce obscure research documents, but their report on them utilizes typical political opposition research "spin."

For example, the fact that Eliot Cutler did attend Bangor public schools up to his sophomore year is spun into a negative that he then ventured off to an out-of-town school to finish.

The same can be said for the implications made about where Eliot was "based" during his professional career as opposed to where he homesteaded and paid taxes as a permanent resident.

5. All in all, this website is a clear and standard piece of professional opposition research work, for which persons within the campaign industry will often expend considerable sums to have produced.

2101 Wilson Blvd., Suite 104

Arlington, VA 22201

(703) 528-3031 (p)

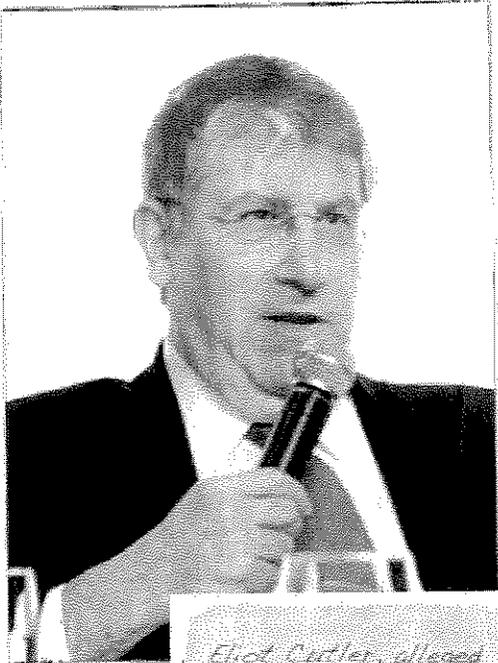
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THE SECRET FILE ON ELIOT CUTLER

Home The Bangor Bison Cutler in Maine
 Saying 'NO' At OMB Cutler in DC China's Lobbyist
 The Thornburg Mess Eliot's Fantasy Reward Offered
 Cutler in Long Underwear



Eliot Cutler, alleged independent candidate for Maine governor

KEE. CUT

JUST WHO IS ELIOT CUTLER?

He's a phony and a fraud. He's rewriting and revising his history and profile to fit a carefully created campaign persona, fudging the facts and ignoring the truth.

So just who is Eliot Cutler? Since the mainstream media in Maine are clearly in the tank for Cutler - whose ravings are quoted verbatim with no challenge or even cursory confirmation by lazy Maine reporters - this is only place where you'll find out.

Cutler calls himself an "independent," even claims to have once been a Republican. But a lifetime of working for big name Democrats, at a Democratic law firm and supporting and contributing to Democratic causes and candidates - including Barack Obama - shows otherwise.

On the campaign trail, he credits a "great school system" in Bangor for giving him a solid foundation. What he doesn't say is that he left Bangor after his freshman year in high school to attend an elite private school saying he was "bored" with Bangor and couldn't get a good education there.

He brags about his time at the Office of Management and

10/4/2010

The Secret File on Eliot Cutler

Budget (OMB). But his foot-dragging and bureaucratic incompetence may have led to the deaths of 39 people.

These are just some of the confusing contradictions and outright lies that Eliot Cutler is telling on the campaign trail. Over the next several weeks, **THE SECRET FILE ON ELIOT CUTLER** will reveal the facts about his life, facts you'll find nowhere else, to help voters see the full picture of the man - his arrogance and ego, his ties to big corporations and foreign countries, and how he has spent a lifetime working directly against the interests of Maine and the US.

Browse around and check back often. You'll find everything that Cutler doesn't want you to know.

*Who we are: We are a group of researchers, writers and journalists who are frustrated that Maine's mainstream media is either unwilling or incapable of adequately investigating the backgrounds of candidates for higher office. We are not authorized by or affiliated with any candidate or political party, and we have not been compensated in any way for our effort. **We do not advocate for or against the election of any particular candidate.** We are simply exercising our First Amendment rights of free speech to provide the public with important information regarding candidates. The information provided here comes from a variety of reputable public sources, including news articles, court and municipal records and other documents. Links are provided throughout this site so a reader can obtain most of the source material and decide for themselves. Contact us at cutlerfiles@yahoo.com*

Paid for an authorized by The Cutler Files
C/O Daniel Billings, Esquire
Marden Dubord Bernier & Stevens
P.O. Box 708, Waterville, ME 04903-0708

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CUTLER LOVES BANGOR - OR DOES HE?

On the campaign trail, Cutler loves to talk about his roots in Bangor and how important that city was to his early foundation. Click on the links to hear "The Bangor Bison"* express his undying devotion to Maine's Queen City:



In and Around
 Bangor
 Nov. 9, 2009



"Maine Can
 Work"
 Campaign Video

But hold the phone. It's true that Cutler did attend Bangor schools – but only one year of public high school. After that, he transferred to an elite Ivy League prep school, Deerfield Academy, in Massachusetts. (It appears from the record that Cutler has spent no significant time in Maine since age 15.)

Although he praises Bangor and the Bangor school system now, he had a much different take during a 2002 interview with Bates College for the Edmund Muskie Archives:

"I went away as a sophomore in high school....mostly because I think I wanted to get away, I was itchy to get out of Bangor. I was doing all right in school but I wasn't working very hard at all, and I was bored I think....So we started the process and I ended up at Deerfield Academy in Massachusetts. And to this day have a very strong link to Deerfield and feel great loyalty to Deerfield, it was a great place for me...Academically I was challenged far beyond any challenge I'd had in Bangor....I learned to write at Deerfield. And that's the most important thing that happened to me by far....and I'm not at all sure it would have happened that way or that early at Bangor High School."

So in 2002, it was Deerfield Academy that gave him the most important foundation of his life. In 2010 when he's a candidate for governor, it's Bangor. Cutler's great "loyalty" and experience at Deerfield is not mentioned in his campaign speeches, and he continues to say that he "went to Bangor schools" every chance he gets.

Phony, phony, phony.

*In Timothy Crouse's landmark book *The Boys on the Bus*, Cutler, who was Ed Muskie's scheduler on his 1972 presidential campaign, was nicknamed "The Bangor Bison." He's described in other articles at the time as a "tall, heavy set Down-Easter."

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CUTLER IN MAINE - THE SPIN VS. THE FACTS

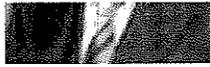


Take a good look at this picture. This is Eliot Cutler's sprawling, coastal estate in Cape Elizabeth, as seen from outer space. It's valued by the town at \$4 million and the property taxes are over \$70,000 a year, making Cutler one of the BIGGEST property taxpayers in all of tony Cape Elizabeth.

Cutler claims that he and his wife moved there "for good" in 1999. But the facts tell a different story.

Click on the audio links below and hear Cutler spin his tale of lies and deception:





Drive Time
Bangor
Sept. 9, 2009



In and Around
Augusta
Nov. 6, 2009



WCAN
Inside Maine
March 27, 2010

Got that? He worked in Washington, lived a few years in China, then moved to Maine when his wife got a job at Maine Medical Center, and they've been living in their mansion since 1999.

BULLSHIT!

It really doesn't matter how long he's lived in Maine or when he moved back to Maine. What's important is he's trying to mislead voters by being dishonest about his past. In other words, he's a liar.

Here's the real story:

Cutler and his wife both lived and worked in China from 2007 to mid-2009. Before that, they lived mostly in Washington, DC.

- According to Cutler's bio on his law firm's website Cutler "is senior counsel in the firm's Washington and Beijing offices"...and "was the partner in charge of the firm's Beijing office from its 2007 opening until June, 2009."
- A 2004 Annual Report of the Muskie School for Public Service, for which Cutler is the chair, lists his address as Washington, DC, not Cape Elizabeth.
- From a 2007 press release from Cutler's firm of Akin Gump: "Before relocating with the firm to Beijing, Mr. Cutler was based in Washington, D.C."
- In a Jan. 21, 2009 post on the Muskie School's website of an interview with Cutler, it says, "Cutler currently lives in Beijing and is managing his law firm's office there."
- In an article in the London Times dated Feb. 16, 2008, Cutler is described as "a Beijing-based lawyer."
- In a 2007 editorial he wrote for a Chinese newspaper, Cutler wrote, "All this makes a Washington lawyer in Beijing feel right at home." (Not a Cape Elizabeth lawyer?)
- In a winter 2009 USM Muskie School of Public Service newsletter, a short article on a talk given by Cutler says, "A Maine native, Cutler came from his office in Beijing, China, to share his perspective...."
- As recently as 2008, his wife, Melanie Cutler listed her employer as a hospital in Beijing when making several donations to then Sen. Barack Obama's presidential bid, not Maine Medical Center. She is listed as staff psychiatrist at the Beijing United Family Hospital in the summer of 2008.

- Of nine election cycles in Maine since 2000, Cutler voted absentee five times, according to Maine state voter records. He neglected to vote altogether in 2001 and 2007. It appears he voted in person only twice since 2000. The voter record for his wife is nearly identical with the only difference that there is no record of her voting in 2005.

So why does Cutler shade the facts about his past? Why not just come clean - he didn't move to Maine "for good" in 1999. He bought a big house in Maine in 1999 and continued to live most of the time somewhere else.

He's a tourist, not a resident

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ELIOT CUTLER AND THE TOCCOA FALLS DAM DISASTER

On the campaign trail, Cutler likes to brag about his time at the Office of Management and Budget (OMB), giving the impression that he was a courageous cost-cutter who stood up to the spendthrift bureaucrats. Click below and listen to his puffery:



“Changed the course of government?” It’s a myth he repeats on his [website](#):

Eliot’s job (at OMB) was to make the tough decisions about how tax dollars were spent – to cut out programs that weren’t working, to reshape others and to force necessary changes in government priorities.

But sometimes saying “NO” is just a euphemism for bureaucratic ineptitude.

Left out of Cutler’s long list of Washington credentials and accomplishments is at least one glaring example of how his lack of action in his role as a big government bureaucrat led to unimaginable tragedy.

In 1972, after the collapse of two private dams killed 333 people, Congress rushed through legislation mandating a national program for federal inspection of private dams. In the years leading up to Jimmy Carter’s inauguration in early 1977, two US Presidential administrations had struggled to implement the

new dam inspection law. The dangers were well known and well documented, but mid-level officials within OMB resisted funding the program for years, saying that inspections of private dams were a state not federal matter. It was a position that violated Congressional intent and veered from presidential policy.

But just a few months into the Carter administration, the program was funded by Congress after investigative news reports and government analysis again highlighted the dangerous situation. The months ticked by, however, as OMB officials continued to drag their feet and delay the paperwork necessary to release the funds to pay for the dam inspections. In mid-June, California Rep. Leo Ryan, who chaired a House subcommittee that conducted a study on dam safety, warned the OMB of the dangers of delay: "You're living on borrowed time."

And there were other warnings, even from within the Administration. On July 13, Philip M. Smith, associate director of President Carter's Office of Science and Technology Policy, wrote a letter, saying, "Our preliminary statistical analysis indicates that in any year, 25 to 30 dams can be expected to fail," Smith warned.

That letter was addressed to the person responsible for the OMB's position on dams: then Associate Director Eliot Cutler.

Despite these warnings, still nothing happened.

Then, four months later, on Nov. 6, 1977, the Kelly Barnes Dam in Toccoa Falls, Georgia collapsed in the middle of the night, killing 39 people – including 20 children as they slept. A 30 foot wall of water came crashing down the river valley with the force of 7,500 locomotives, crushing houses, mobile homes and dormitories at the Toccoa Falls Bible College where students were asleep in their beds.

To get a sense of the enormity of the tragedy, watch the video below:



The eyewitness accounts by survivors of the tragedy are heartbreaking. Bill Stacy, 19, who lived with his parents in a trailer, said: "I heard a bunch of people screaming and hollering. There was this terrible screeching noise .. the trailers were all over the place -- some floating, some just came apart."

Eldon Elsberry narrowly escaped drowning in his pickup truck. After coming to the surface, "I remembered that Bill had said his wife and children were all sleeping. I ran for their farm house, hoping to warn them, but halfway there I saw it begin to float away. The agony was awful I knew a man's wife and children were floating away....there were many screams, mostly from children. I stood on the bank and watched people die, but I couldn't do a thing."

Bodies were found as far away as two miles from the site of the dam, which held back 80-acre Kelley Barnes Lake. Waterlogged mattresses, battered window frames and dozens of uprooted trees littered the banks of the once-small creek.

An investigating board later found that "a routine and proper inspection would have determined that there were some severe problems with that dam...its problems were the kinds of things that could have been caught and corrected." But on the Monday morning following the dam's collapse, the paperwork to release the funds to pay for those inspections was literally still sitting on Elliot Cutler's desk - along with a newspaper bearing the grim headline, "At least 37 Die as Earthen Dam Collapses in Georgia"

The only response he could muster to the senseless loss of life was that it was "a horrible coincidence."

Congress was furious. Five years after passing the law requiring federal inspection of private dams, not a single dam had been inspected. Rep. Ryan called for the government to begin enforcing the law, saying the Toccoa Falls dam was like hundreds of others around the country - "loaded shotguns pointed at the people downstream."

Of course, only after disaster had struck did Cutler finally submit the paperwork to the president. Within days of the tragedy, Carter ordered the Corps to put more than 500 inspectors in the field. In two weeks, they visited 95 dams in 49 states, proving that the federal government can act fast when it wants to. But it was small consolation for those who lost loved ones in a horrible tragedy that didn't have to happen.

That's Cutler's legacy at the OMB.

The details of this tragedy were first reported in a 1977 article in the Los Angeles Times by reporter Gaylord Shaw who won a Pulitzer Prize in 1978 for a series on dam safety and the lack of government action. See "Mid Level Budget Officials Blocked Dam Inspections." by Gaylord Shaw, Dec. 25, 1977, Los Angeles Times.

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MAKING HIS MILLIONS ON BOTH SIDES OF THE RUNWAY

From the minute he left his government job, Eliot Cutler began amassing his fortune by selling out his principles and working both sides of the corridors of power.

His lucrative opportunism is well documented in press accounts of his exploits over the years in which he's referred to by his critics as a "modern-day holdup man," "rotten," "cocky and obnoxious," and for making "wheelbarrows full of money" by opposing economic development projects that eventually got built anyway. It's a pattern he's repeated throughout his professional life, leaving observers to wonder: what does Eliot Cutler truly stand for?

Today, Cutler panders to the environmental community by taking credit for helping write the federal Clean Air Act, the Clean Water Act and the Environmental Policy Act (which requires a full environmental impact statement for every possible federal project, no matter how insignificant). But when Jimmy Carter appointed Cutler to become the associate director of the Office of

Management and Budget (OMB) for Natural Resources, Energy and Science, it was the environmental groups that protested. Loudly. One of his chief critics was Marion Eddy, founder of one of the nation's most respected non-profit environmental organizations, The League of Conservation Voters. She and other groups mounted a huge campaign against Cutler, an experience that he later described as "hideous."

Why were environmentalists so opposed to Cutler? Because after five years working with Senator Ed Muskie on a subcommittee with jurisdiction over environmental legislation and before his appointment to the OMB, Cutler joined the old-line law firm of Webster & Sheffield. One of the firm's clients was the International Council of Shopping Centers, a trade association of owners and operators of the nation's strip malls and shopping centers. (Curiously, Cutler's official bio leaves out his years at Webster & Sheffield, perhaps because of that firm's reputation for defending tobacco companies, as well as shopping malls). Cutler soon became the General Counsel and director of governmental affairs for the Shopping Center group at a time when its biggest problem was a set of regulations proposed by the Environmental Protection Agency (EPA) dealing with "indirect source pollution," namely parking lots that attract a lot of smog-producing cars.

Who better to understand the ins and outs of environmental laws than the man who helped write them? Through a court challenge and Congressional arm twisting - including personally testifying before Muskie's subcommittee *against* the provision that Muskie favored - Cutler was able to stop the EPA's proposed regulations, leaving Wal-Mart - but not its customers - to breathe easier.

"Cutler sold his Muskie experience to the special interests," said the head of one environmental group that fought a losing battle against Cutler's appointment.

But Cutler had discovered a niche - exploiting loopholes in environmental laws that he helped write to benefit his clients. And himself.

After four uneventful years at OMB during which he oversaw the policies and budgets of the EPA, Cutler joined with another White House staffer to start his own law firm, Cutler and Stanfield, specializing in - what else - "environmental law." It's actually a euphemism for the work he and his law partner really became noted for: stopping or delaying the construction of airports.

Employing some revisionist history, Cutler today describes the work he did a little differently. Watch this interview with Democratic supporter Harold Pachios:

“Occasionally” he represented opponents of projects? Is he kidding? How about most of the time?

A 1991 article in the *Fort Worth Star Telegram* was headlined, “Lawyer Chops Airports Down to Size.” and called Cutler and his firm “the most sought-after legal team in the nation for counsel on airport growth issues. “In most of Cutler’s airport cases,” the newspaper reported, “his firm has represented airport opponents.”

Said the chairman of the Dallas/Fort Worth Airport Board, “His strategy at other airports across the country is stalling to the point that he feels the airport is in such a bind that they will cave in or give in to (the opponents’) request.”

A 1993 article in a Seattle paper reports, “Cutler estimated that he has been involved in 20 to 30 airport expansion cases over the past 10 years. IN MOST CASES (emphasis added), he represented communities near airports opposed to expansion.”

Another article dubbed Cutler the “airport buster.” and credited him and his firm for delaying or halting over two dozen airport projects. “They are considered in Texas to be the ultimate ‘airport busters,’” said Rob Allyn, a Dallas PR executive who worked with Cutler and his partner to fight the expansion of the Dallas-Ft. Worth International Airport. “I don’t think there has been a larger expansion than the one proposed at Dallas-Fort Worth - \$3.5 billion. It has been stalled for years, and it today is at a standstill.”

A 1996 article in the St. Louis Business Journal said Cutler had a national reputation for finding loopholes in the law to delay or stop airport expansions, a characterization that even Cutler’s law partner apparently agreed with: “Cutler is an expert in environmental laws and their loopholes,” said Peter Kirsch.

The Mayor of Louisville, Kentucky told a newspaper in 1996 that “Washington lawyer Eliot Cutler holds up airports like Jesse James held up banks,” and said Cutler’s arrival on the scene to block an airport expansion in his city “was not a welcome sight.”

blocking maneuver. "He's so effective, he's been hired (by airports) as a defensive action, because they don't want to see him on the other side," said George Doughty, head of the Lehigh Northampton Airport Authority in Allentown, Pennsylvania.

"If the client wants to work a deal where it's a win-win situation for everyone, Eliot can do that," said Doughty. "If the client wants to simply obstruct, then he can do that too. And he charges a lot for it."

And sometimes it was hard to tell exactly who Cutler was working for. "The firm works both sides of the runway," said the *Puget Sound Business Journal*. In his latest TV ad, Cutler claims to have "helped build airports....all over America," and he has called himself the "architect" of the Denver Airport. But far from an achievement, as Cutler now contends, the siting, development and construction of Denver's airport was a classic bureaucratic clusterfuck - years behind schedule and 50% over original costs.

But Cutler wasn't hired to build the airport anyway. He was hired by surrounding towns and counties to block the construction of Denver's airport, which he did for more than six years by using little-known land use restrictions. The airport was finally built (albeit in a different location more than 20 miles outside of Denver).

"He was rotten," said former Adams County Commissioner Jim Nelms who hired Cutler to fight Denver's airport plans. "The only thing he did for Adams County is get them to give away 53 square miles of land to the city of Denver. He did more for Denver than he did for Adams County. Everything I saw led me to believe he was working for Denver."

In another article, Nelms described Cutler as "cocky" and "obnoxious." Cutler "was very swashbuckly, with fancy cufflinks, fancy clothes, big cars, staying in the finest hotels," Nelms said. "Nothing's cheap about Eliot."

In 1992, Cutler was back in Colorado, this time to fight the Sierra Club, the Environmental Defense Fund and other groups that had filed suit to stop the expansion of Front Range Airport, about eight miles southeast of the Denver airport.

But win or lose, fighting with environmental groups or against them, Cutler and his firm were paid handsomely. All those delays and foot dragging added up to lots of billable hours:

- Cutler collected more than \$6 million in legal fees over a six-year period from communities opposing the expansion of the Dallas/Fort Worth International Airport. The airport was eventually approved after the communities Cutler represented lost six major court cases, including one that went all the way to the US Supreme Court.
- In Denver, Cutler collected \$7 million in legal fees from Adams County trying to stop an airport that was ultimately built.

9/29/2010

The Secret file on Eliot Cutler

- Bridgeton, Missouri paid him \$1.78 million to fight the expansion of the Lambert-St. Louis International Airport. "He charged \$265 an hour from the time he left D.C. until he got back," said former Bridgeton Councilman Rich Collier.
- Cutler was also involved in airport battles in Tampa, Florida; Phoenix, Arizona; and Seattle, Washington.

Said Richard Fleming, president of the Denver Chamber of Commerce, "The pattern seems to be that in virtually every community where Eliot has been brought in (to oppose airports), he has made a wheelbarrow full of money, and at the end of the day, the project was built."

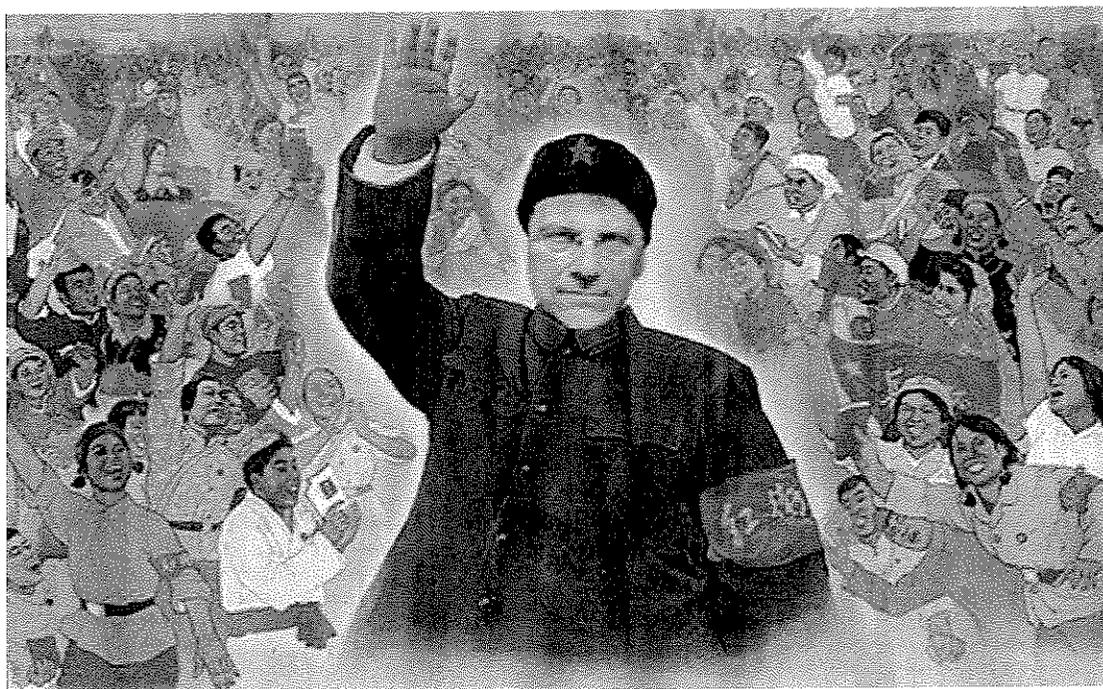
Update: Cutler's opportunism hasn't stopped. He built his career - and filled his wallet - by using the legal system and loopholes in environmental laws to delay major economic development projects for years all across the country. Now, as Candidate Cutler, he says he wants to "tear down the wall of no" that is delaying projects here in Maine and tying them up in bureaucratic red tape - the same 'wall of no' that he made a fortune building in communities all across America.

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CUTLER MEANS JOBS -- IN CHINA



For the last 25 years, Cutler and his law firm of [Akin Gump Strauss Hauer & Feld](#) have worked to help companies send thousands of good paying American jobs overseas, as well as fight charges that China is illegally “dumping” cheap, consumer products in the US at the expense of good-paying manufacturing jobs here.

From 2007 to 2009, Cutler personally led the effort as the Managing Partner of his firm’s [Beijing office](#), where he employed “his experience as a lawyer, government official and political operative,” according to his firm’s [website](#). The result has been the loss of millions of jobs here in the US, including more than 10,000 jobs lost right here in Maine, according to a 2008 study by the [Economic Policy Institute](#).

According to a CNN report [Exporting America](#), these are some of the companies, all clients of Cutler’s firm, that are sending US jobs overseas: AT&T, Boeing, Dow Chemical, Johnson & Johnson, Pfizer,

Tyco, Texas Instruments, among many others.

Each one of Cutler's clients that has moved American jobs to China connects to poignant stories of dislocation and disappointment. Here are just two examples:

In the last decade GE has closed over fifteen factories in Ohio alone. US employment in the lighting division has dropped by 68% and the company plans to send even more jobs to China in anticipation of new US efficiency policies. Starting in 2014 only compact florescent bulbs will be sold in the US and GE plans to make every single one of them in China, where skilled labor is cheap, and unsafe, polluting factories are allowed to operate freely. In fact at least two of the eight large multinational polluters in China, cited by a 2009 Greenpeace report, are Cutler's clients.

Hanesbrands, Inc., the clothing manufacturer best known for its Hanes, Champion and Playtex brands, announced it would ship 1,300 jobs to China from North Carolina in 2008, devastating lives of loyal US factory workers. Bill Sanders, 69, a lifelong textile worker, found out about the closing of his plant as he arrived to work one day at 7am. "It all ended today. My whole life changed...I went weak...I'll never find another job in textiles," he lamented.

But sadly, that's only half the story. Cutler is known around the world as "China's Lobbyist," helping massive state owned and controlled Chinese companies buy up American companies to the tune of billions of dollars. "It is an honor for us to be asked to help Chinese clients in the US," said Cutler. "We try to persuade members of the Congress and regulators that the decision...[is] in the best interests of the United States."

But in at least one blockbuster deal, US officials were not persuaded. In 2005, Cutler's firm was hired by China National Offshore Oil Company (CNOOC) - the country's leading offshore exploration and oil development company which is 70% owned by the communist Chinese Government. CNOOC needed the law firm's help in its \$18.5 billion bid to buy California-based petroleum giant Unocal. Cutler's firm put on a full-court press to win over legislators and White House officials, records show. In just eight days at the end of June 2005, Akin Gump lobbyists reported about 250 contacts with the Office of the President, the Vice President, the Department of Energy, the Department of Commerce, and a long list of congressmen, senators and their staffs. Records show that while some lobbyists knocked on the doors of legislators, others worked the phones, sent out dozens of e-mail messages with information about CNOOC and distributed favorable newspaper articles and editorials about the Chinese company.

The lobbyists also called and sent e-mail to officials at the Treasury Department, which houses the Committee on Foreign Investment in the US (CFIUS), a secretive panel that reviews corporate mergers on national security grounds. CFIUS took a dim view of Akin Gump's attempt to put Unocal's energy reserves in the hands of the Chinese government, as a matter of national security.

So did some members of Congress. Rep. Frank Wolf, R-VA, questioned Akin Gump's loyalties if not its patriotism. "The Chinese government is prosecuting Christians," he said. "They have Catholic bishops and Protestant pastors in jail. In Tibet, they are prosecuting Muslims and Evangelicals. The Chinese government is spying on the United States. Why would you work for a government that is

spying on the United States? Greed is driving them.”

In a strongly worded letter to Akin Gump lobbyists, Wolf wrote, “During the presidency of Ronald Reagan, no major law firm or lobbying organization would have represented the Soviet Union if it had tried to take over an American oil company.”

Rep. Curt Weldon, a senior member of the House Armed Services Committee, agreed. “Unfortunately, corporate dollars often transcend national security.”

CNOOC and its masters in Beijing eventually withdrew the offer rather than subject itself to thorough examination by US regulators, something to which the Chinese are wholly unaccustomed.

So what was Cutler’s involvement? With all of his Washington experience and contacts, it’s hard to believe he didn’t make at least some of those hundreds of lobbying calls and e-mails to Congress or the Commerce Department. But in a recent interview with blogger Mike Tipping, Cutler claims he wasn’t involved and, astoundingly, claims he doesn’t even remember the case.

“Our representation of CNOOC - I don’t even remember,” he said. “I think I was at the firm then, but I wasn’t involved.”

Someone should explain Google to Cutler, because in prior interviews, Cutler spoke at length about his firm’s work for CNOOC, boasted about it, in fact, and was unapologetic to be working directly against US national interests. He even suggested that he was a personal acquaintance of CNOOC’s chairman and could have salvaged the deal if only CNOOC had come to him sooner.

“[CNOOC] Chairman Fu is a very wise man,” said Cutler. “Had CNOOC come to us earlier...[i]t would have made the deal much easier to get approval.”

In a 2006 interview, Cutler said, “We think that Chinese clients will find that the unique combination of skills and experience that we provide is valuable - perhaps essential - as they navigate the world outside China. This is exactly the reason that China National Offshore Oil Company (CNOOC) came to us last year when it sought to acquire Unocal.”

Cutler had another, far more personal reason to be involved in the CNOOC deal. Since 2004, Cutler has been a trustee of the Thornburg International Value Fund, a huge international mutual fund founded in 1998, that according to its latest annual report holds over \$200 million in shares of CNOOC, Ltd. Thornburg is one of CNOOC’s top five institutional shareholders. A takeover of Unocal by CNOOC would have certainly boosted the share price of CNOOC stock and in turn lifted the value of the Thornburg fund of which Cutler oversees.

But today, despite being a senior counsel for the firm that had a major involvement in the failed CNOOC bid, and despite sitting on a board of directors that oversees a fund with a huge investment in the same Chinese oil company, and despite being portrayed on his law firm’s website as a specialist in “energy and global transactions,” Cutler claims amnesia about the whole CNOOC episode, or any involvement in the nasty business of offshore oil.

“By any measure of my work at Akin Gump, over the entire time I was there, you will find almost no oil companies, big or small, or oil service companies, big or small, period,” he told Tipping.

But the outrage and failure of the CNOOC deal didn't stop Cutler or his firm from continuing to represent China's interests. In 2008, the firm was hired by Bain Capital to help smooth the way for China's Huawei Technologies \$2.2 billion buyout of 3Com Corp. Because 3Com had defense contracts for computer network security and anti-hacking software - a known Chinese target - the US director of national intelligence labeled the 3Com deal a threat to national security. Huawei was founded by a former People's Liberation Army officer and current member of the Communist Party. Rumors persist that the firm is actually run by the PLA. The company has been linked to violations of UN sanctions in Iraq and has also been dogged by accusations of intellectual property theft and corporate espionage. (For a recent 60-minutes report on Chinese espionage, go [here](#).)

Congress was again concerned. "U.S. regulators ought to reject the proposed buyout of 3Com by one of the least transparent companies operating in China, a firm with shadowy ties to Chinese army and intelligence services," said Rep. Ileana Ros-Lehtinen, a Republican on the House Foreign Affairs Committee.

But it was just another client for Cutler and his firm. After Congress began a bipartisan probe of the deal, the Huawei-3Com marriage hit the skids, just like the failed CNOOC deal before it.

Cutler's Clients Imported Tainted, Dangerous Chinese Products to US and Maine

At the same time Cutler was helping to export jobs and buy up vast swaths of the American economy, he was also representing companies that imported toxic and dangerous Chinese products into the US and Maine.

Claire's Stores, with at least two locations in the state, sold toxic lead contaminated children's items in Maine and around the US. In 2007

58,000 children's necklaces manufactured in China and sold exclusively by Claire's were recalled by the Consumer Products Safety Commission (CPSC).

GE has had numerous Chinese-made products recalled by the CPSC for defects. One such Item was a GE branded toaster sold in Wal-Marts across the US and Maine that sparked and caused at least 140 fires. 210,000 were recalled in 2008. Other examples of hazardous GE products made in China and recalled here are 146,000 electric slow-cookers and 50,000 electrical outlet converters. In 2008 alone, over 80% of the product recalls by the CPSC involved Chinese products. (Side note: in 2008, Cheryl Falvey was named the CPSC's new General Counsel. Prior to that position, Falvey was a partner in the law firm of Akin Gump.)

Meanwhile, Cutler and his firm has represented a variety of Chinese companies against charges of illegal "dumping" - flooding the US market with goods that are sold well below their actual production



costs making it impossible for US companies to compete. In the past, Akin Gump has proudly represented:

- Chinese honey exporters and importers accused of dumping products on the US market (beekeeping and honey production provide over \$100 million annually to the Maine economy.)
- One of China's largest electricity companies accused of dumping cheap televisions into the United States from Malaysia and China
- An alliance of importers and national restaurant chains that opposed imposing penalties on China for dumping shrimp on the US market which was pushing US shrimp fishermen and dealers out of business.

The International Trade Commission currently has more than 60 separate orders outstanding regarding China's dumping in industries from paint brushes to hammers, from paper clips to industrial bearings, from tissue paper to steel.

Cutler Helped China Cover Up Human Rights Violations and Suppress Protests During the 2008 Summer Olympics.

In 2007 Cutler's office formed a P.R. and policy partnership with Publicis Groupe SA to help the totalitarian Chinese government, and the companies that do business with them, deal with protests and bad publicity during the 2008 Summer Olympics. "Everyone is watching China," said Cutler. "Olympics sponsors are worried about a backlash."

And well they should have been. The list of China's human rights problems is long. It is the world's leading jailer of journalists and executes more "criminals" in any given year than the rest of the world combined. It is home to 16 of the 20 most polluted cities on the planet. It has its hands in crises in Darfur, Tibet, Burma, Iran, Zimbabwe and China's own Uighur Muslim provinces in the western region of Xinjiang.

The companies that want access to the vast untapped market of 1.3 billion potential customers are constantly caught between appeasing Beijing and the scrutiny of the rest of the world. China was understandably worried about disruption of the games and withdrawal of key sponsors under pressure from those protesting China's human rights violations, its use of sweatshop labor, its polluted air and water.

China's abuse of its workforce also contributes to the artificially low cost of Chinese goods. Millions of child workers and forced laborers are used to make products for export to the U.S. Independent labor unions are forbidden, and workers who attempt to form them are fired, imprisoned, or worse. These violations of internationally accepted workers' rights artificially depresses the labor market, leading to Chinese products being cheaper because the companies only have to pay workers 15 to 50 cents per hour.

But to Cutler, China's problems are neither unique or significant. "Most of China's safety and quality problems are caused by good people trying to do their jobs in a domestic marketplace that is so highly competitive and unregulated that it often accounts for nothing but the most direct costs," he wrote.

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As Gerald Weinand wrote on the blog [Dirigo Blue](#), "That people are dying in a genocide, or more slowly by environmental poisoning or lack of work place safety, or that lethal products are being sold around the world, or even the continued occupation of Tibet, all these (for Culter) were simply a public relations problem to be solved."

Cutler and his team were there to help those money-grubbing corporations keep the protests down and the world's attention focused where Beijing wanted it: on the Games.

Postscript: A 2008 article in [Washingtonian](#) reported on the failure of Akin Gump's office in China, which Cutler ran, to produce much business. "Tensions are said to be high, with partners in the New York office unhappy that the Washington lawyers are not producing their share of revenue. The firm also closed its office in Taipei...and insiders predict the money-losing Beijing office will be next to go. The China offices have been expensive failures in the eyes of New York partners, who are pressing Washington to stop the bleeding."

Yet another failed business by Eliot Cutler.

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THE SECRET FILE ON ELIOT CUTLER

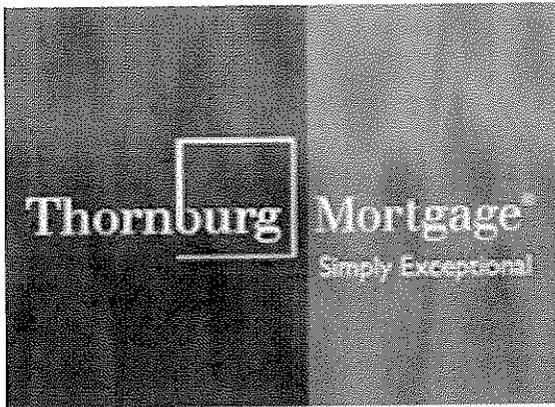
Home The Bangor Bison Cutler in Maine
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ELIOT CUTLER: JUST LIKE WALL STREET

On April Fool's Day last year, Thornburg Mortgage Inc., a publicly traded residential mortgage lender based in Santa Fe, New Mexico, announced that it would file for bankruptcy and cease operations. Along with Enron and General Motors, the \$36.5 billion company entered the top-10 list of biggest bankruptcies in US history.

The bankruptcy was a surprise to many. Thornburg had long prided itself for making large "jumbo" mortgage loans (over \$400,000) to only the most qualified borrowers, unlike other, disgraced lenders such as Countrywide Credit or Ameriquest that got into trouble for so-called "subprime" lending to unqualified homebuyers. But clearly, something was amiss at Thornburg that ultimately resulted in its spectacular demise.

Among the company's well compensated board of directors was one Eliot Cutler, now a candidate for governor in Maine. Recently, Cutler released a lengthy statement in an attempt to fend off an expected attack



by his opponents linking the management - or mismanagement - of Thornburg to the Wall Street greed and incompetence that sent the US economy into a tailspin. Cutler also expected criticism for accepting \$22,000 in "director's fees" after the company had declared bankruptcy

The statement was classic Cutler: it made exaggerated (and unsubstantiated) accusations against a rival campaign while portraying Cutler and Thornburg as innocent victims of the worldwide housing and financial slump. Cutler

restated Thornburg's claim that it was distinct from the ugly subprime mess on Wall Street because its borrowers were wealthy with a very low default rate, and the company's collapse was due to factors outside its control. And while it was true that Cutler received a \$22,000 payment from the company *after* declaring bankruptcy, the payment was fully approved by the courts and anyway it paled in comparison to his personal investment of hundreds of thousands of dollars (Cutler couldn't remember the exact amount) that he lost when Thornburg collapsed.

But Cutler's statement was a lot like Thornburg's investment portfolio - a load of crap.

Nevertheless, the Maine press - including Cutler's pals at Maine Today Media - lapped up Cutler's statement verbatim without so much as a Google search to confirm its accuracy. Had the media bothered, it would have found plenty of information to contradict him, including one Wall Street analyst who said Thornburg was a victim alright, "a victim of mid-2000s, asset-backed security delusion....and they paid for it." Or another analyst who described Thornburg as "the ultimate Roach Motel" - sitting on a pile of rotten securities that it couldn't get rid of. Or an analyst with The Motley Fool who wrote this about Thornburg's explanation of its business: "The numbers might be the only thing not lying."

Here are the facts:

- While Cutler claims that Thornburg only lent big jumbo loans to qualified, wealthy borrowers, the company itself was playing a familiar Wall Street game: the money it lent to home buyers came from investors who bought Thornburg-issued securities, securities that turned out to be just as toxic as those mortgages from Countrywide. As explained in the opening chapter of House of Cards: A Tale of Hubris and Wretched Excess on Wall Street, by William D. Cohan, unlike a traditional bank that uses cash from its depositors for most of its operations, outfits like Thornburg funded their operations in other ways: either by occasionally issuing long-term securities, such as debt or preferred stock, or more often by obtaining short-term, often overnight, borrowings in the unsecured commercial paper market or in the overnight "repo" market. So in addition to servicing its wealthy clientele, Thornburg also bought and repackaged other, lower quality mortgages into what were known as "asset-backed securities" - those "toxic" derivatives that brought down such venerable but no less greedy and self-destructive firms as Lehman Brothers and Bear Stearns. And what were the assets that backed these "asset-backed securities?" Complex investment instruments like Collateralized Debt Obligations (CDO's), Reverse Repurchase Agreements (repo's), commercial paper and especially non-conforming Alt-A mortgages (the kind that don't require a borrower to document his income or assets, suggesting that they perhaps shouldn't have qualified for a loan in the first place). At the time of its collapse, Thornburg was holding billions in securities backed by these Alt-A mortgages. "Thornburg's problems...aren't related to the assets it owns - high-grade 'jumbo' ARM mortgages to wealthy clients," wrote the Financial Times, "but more about the way it conducted its business, and as a lender, aggressively financed its operations." Or as MuckrakersGuide.com put it, "Thornburg Mortgage executives bragged that they offered loans to only the most creditworthy customers. Such standards evidently didn't apply to the securities Thornburg sold to investors."
- Although Thornburg didn't declare bankruptcy until April 2009, documents reveal that the company hired counsel "related to debt counseling or bankruptcy" as early as 2008, indicating that the company officials knew that Thornburg was sinking fast but didn't tell its shareholders. Even earlier, in August 2007, Thornburg's CEO recognized his company's troubles as a harbinger of things to come and called then US Rep. Heather Wilson (R-New Mexico) to warn her of a looming "1929-like event" in the credit and financial markets. Thornburg's failure to disclose its troubles or its heavy investments in toxic assets became the subject of numerous class action lawsuits that named Cutler and the board of directors as defendants. (In his statement, Cutler said that all "claims against Eliot and the other independent directors that have been adjudicated to date have been dismissed," which is a little like saying, "All claims that have been dismissed have been dismissed." It left out the fact that several cases

were consolidated and are still pending, at least one of which names Cutler as a defendant.) On Feb. 8, 2008, Judge James O. Browning dismissed part of the lawsuits against Thornburg's directors, but denied the motion to dismiss the claims against Thornburg's CEO Larry Goldstone. "Judge Browning held that Goldstone's repeated efforts to distance the company from the mortgage crisis by differentiating the company from Alt-A (subprime) mortgage originators 'gives rise to a strong inference that Goldstone was attempting to hide from the market that [Thornburg] engaged in Alt-A or subprime lending, and knew, or recklessly disregarded that withholding this information would mislead investors.' Thornburg's omission from its 2007 10-K of its failure to meet the J.P. Morgan margin calls, and of the consequent triggering of cross-defaults in other agreements, suggests that Thornburg was 'concealing information'." Sound familiar? Goldstone's questionable excuses are repeated by Cutler today.

- Meanwhile, as Thornburg's foundation was collapsing leaving investors with billions in worthless stock, Cutler and other executives continued to collect big paychecks - far more than the \$22,000 that Cutler defended in his press release. SEC documents show that Cutler's cash compensation for 2007 alone was \$105,000. And his "lost investment" was mostly paper losses - \$318,000 in Thornburg stock that was awarded to him by the company as part of his compensation *above and beyond* his cash compensation.
- But that's not all. While Cutler claims Thornburg only made jumbo mortgage loans - a category "on the verge of subprime" - to wealthy borrowers, a review of 10 Thornburg loans recorded at the Cumberland County Registrar of Deeds show only two that would qualify as "jumbo" and one of them - by far the largest - is to Cutler himself, a \$3.6 million mortgage loan from Thornburg in 2001 - two years before he joined Thornburg's board of directors - with terms that can only be described as a "sweetheart deal." So sweet in fact that today they would be illegal. Far from just the \$22,000 in payments Cutler received after Thornburg's bankruptcy, Cutler continues to benefit from the now defunct company in the form of an unusually low interest rate on his huge home mortgage (see below).

Small wonder that Thornburg's angry investors who ended up with nothing sued Cutler and Thornburg to get their money back.

The Complicated, Complex and Confusing Story of Thornburg's Collapse

Perhaps one of the reasons why Cutler believed his statement on Thornburg would be accepted without question is because he knows that what happened to Thornburg - indeed, what happened to the entire US banking and financial system - is so complex that few people truly understand it. Some of this is deliberate. The bond markets that repackaged crappy mortgages into "asset backed securities" did so with all the worst intentions - so investors and certainly the public wouldn't know what was really going on. It's possible that even Cutler believes what he says - that Thornburg wasn't involved in the Wall Street's subprime mess, that it was everybody else who was trying to screw investors and shareholders, not Thornburg.

That would just make him naive and stupid instead of corrupt.

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branched out to originate retail and wholesale mortgages, and work closely with other financial institutions (a.k.a. correspondent origination). The company followed an aggressive growth strategy through what the Financial Times called “a veritable disaster-smorgasbord of wholesale funding methods” - CDOs, commercial paper conduits and repo agreements with prime brokerages like Bear Stearns and Lehman Brothers. In fact, a significant amount of Thornburg’s business came from buying up raw mortgage backed securities and then repackaging them as CDOs. By the end of December 2007, 64% of Thornburg’s balance sheet was permanently financed through CDOs.

Then there were the Alt-A mortgages. In his new book, *The Big Short: Inside the Doomsday Machine*, Michael Lewis describes Alt-A loans this way:

Alt-A was just what they called crappy mortgage loans for which they hadn't even bothered to acquire the proper documents - to verify the borrower's income, say. 'A' was the designation attached to the most creditworthy borrowers; Alt-A, which stood for 'Alternative A-paper,' meant an alternative to the most creditworthy, which of course sounds a lot more fishy once it is put that way. As a rule any loan that had been turned into an acronym or abbreviation could more clearly be called a 'subprime loan,' but the bond market didn't want to be clear.

Other analysts agree. “Alt-A is such a broad group of loans, it’s very hard for investors to know which will perform poorly,” said Bose George, an analyst at Keefe, Bruyette & Woods. “Big chunks will perform very poorly. Other parts will behave like prime.”

Thornbug was sitting on a lot of Alt-A loans. Billions worth. It was a convenient cover story to say that its lending practices were sound, but the leveraging and selling of its securities that provided the money for those sound jumbo loans was pure subprime. “The distinction had become superficial,” Lewis writes. “In practice, Alt-A mortgage loans made in the United States between 2004 and 2008 totaling \$1.2 trillion were as likely to default as subprime loans totaling \$1.8 trillion.”

Cutler joined the board of Thornburg Mortgage in late 2003, but his connection with Thornburg goes back decades. He has been on the board of Thornburg Investment Company, a related firm started by the same founder as Thornburg Mortgage, since the early 1980s. He claims credit for creating the first of that firm’s mutual funds in 1981 and maintained a financial interest in the management of the funds for about 15 years. He remains a member of the board of trustees of Thornburg mutual funds to this day.

There are several perks of being on the Board of Directors of a large public company. Some are obvious: the power and prestige, the tony conferences at extravagant resorts, the stock options and compensation packages for a few hours of work once every quarter. But one part of Eliot’s compensation for his seat on what would later become the ninth largest bankruptcy in US history isn’t yet well known.

In June 2001, after Cutler completed construction of his massive, sprawling estate overlooking Zeb Cove in Cape Elizabeth, he took out a 30 year mortgage on the property with none other than Thornburg Mortgage. For \$3.6 million.

The timing here is interesting. Cutler didn’t officially join the board until 2003, but his connections with the

other Thornburg-related companies, and his deep connections in Washington, must have earned him a once-in-a-lifetime deal. A close look at the terms of the loan, obtained from public records, tells the jaw-dropping story. Let's just say that if Thornburg gave all their clients the same sweetheart deal as they gave Cutler, well, then that might explain why it went under. Perhaps when the inevitable salvo from the Cutler campaign launches against this revelation, he can explain just how it was that he got such liberal terms from a company he recently claimed operated with "the best practices in the industry" - and then wound up on the board of directors shortly thereafter.

Here are the facts: according to the leading provider of historical mortgage rate data, HSH Associates, the 7.125% rate Cutler was given at signing was significantly below the average rate at the time of 7.33%. It may not seem like much, but on that basis alone, Cutler likely saved more than \$10,000 a year on interest charges in the initial year or two.

But that was only the start. According to SEC filings made by Thornburg Mortgage, when Cutler became a Director of the company in late 2003, he became eligible for a special "employee residential mortgage program" offered by the company. Again, the timing is interesting - the Sarbanes Oxley Act which Congress passed in 2002 in reaction to numerous Wall Street scandals made such arrangements illegal. But loans existing as of the date the law went into effect were grandfathered. Since Cutler's 2001 mortgage was deemed to qualify under this provision, his rate dropped from 7.125% to 4.125% as long as he was a director, and perhaps longer.

Also evident from the SEC filings is that Cutler's mortgage is a jumbo, interest-only, adjustable-rate mortgage (ARM). That means the economic benefit of this sweetheart loan to Cutler was in excess of \$115,000 per year during the years he was a director, in addition to the other forms of compensation he received. It also means that Cutler himself is benefiting handsomely from the very type of loan that became the poster child of the mortgage meltdown - the very type of toxic loan he distances himself and Thornburg Mortgage from today.

One has to wonder if such a rich deal might have led to Cutler looking the other way while senior management drove the company into the ground. Who would want to stop that gravy train?

And if you're worried that this sweetheart deal has evaporated along with the tens of billions of dollars in Thornburg Mortgage shareholder equity, fear not. According to the basic terms of the mortgage on file at the Registry of Deeds, after July 2008 Cutler's loan goes from a low fixed rate to an even lower adjustable rate. So even if the special Thornburg Mortgage deal has ended for Cutler, he's still benefitting to the tune of six figures every year until 2031.

The bottom line is this: this past July when Cutler opened the letter that tells him his new mortgage rate for the next 12 months, he must have smiled quietly to himself: according to the terms of the mortgage he would only be paying 2.875% - about half the rate you would be paying for the exact same loan - until 2031.

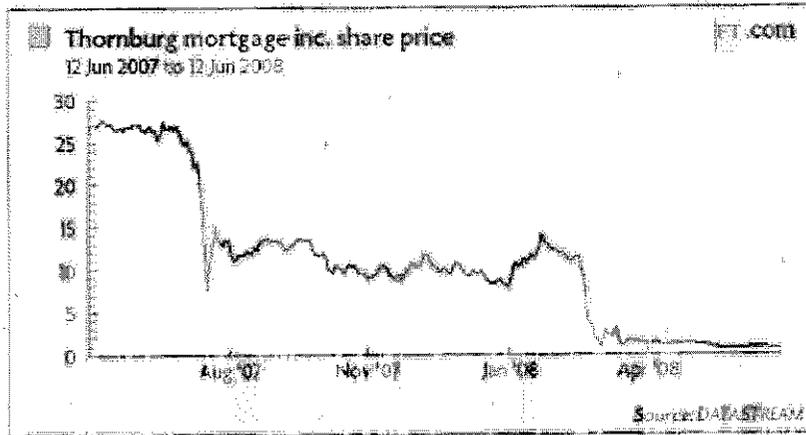
One more thing: if you've ever taken out a mortgage, you know that the lender almost always charges you a fee at closing on top of the annual interest payment. In June 2001 the average fee (commonly referred to as "points") was 0.39% for a 30 year ARM. If this applied to Cutler's \$3.6 million loan, he would have paid over \$14,000 in fees at closing. But the mortgage is silent to any "points" due.

Sweet indeed.

FROM TRIPLE A TO TOXIC ALMOST OVERNIGHT

While there were signs of trouble as early as August 2007, the beginning of the end for Thornburg Mortgage, according to *House of Cards*, came on Valentine's Day 2008 when UBS, the large Swiss bank, reported a fourth-quarter loss of \$11.3 billion after writing off \$13.7 billion of investments in US mortgages. Amid this huge write-off, UBS said it had lost \$2 billion on Alt-A mortgages and, worse, that it had a additional exposure of \$26.6 billion to them.

Suddenly, investment banks and mortgage companies like Thornburg that were sitting on a pile of Alt-A debt joined the subprime mess. The billions of dollars in what were thought to be solid mortgage-backed securities held by Thornburg were suddenly radioactive, and their value plummeted. "UBS's sneeze meant that Thornburg, among others, caught a major cold," writes Cohan.



That set off a round of dreaded margin calls, demands by investors and holders of the toxic securities for

more and more collateral to shore up those assets, sending Thornburg into a tailspin of having to raise more and more cash. In March, Thornburg announced it had \$610 million in outstanding margin calls, an amount greater than its cash on hand. Just a few weeks later, Thornburg said it had reached an agreement with five of its major creditors - including Bear Stearns, Citigroup, Credit Suisse and UBS - that would halt the margin calls for one year - provided it could come up with \$848 million in one week.

By its own description, Thornburg was "left with limited available liquidity" to meet the new margin calls or any future margin calls. "From Dec. 31 2007, to March 3, 2008, Thornburg received margin calls totaling \$1.777 billion and was able to satisfy only \$1.167 billion of them, or about 65 percent - a dismal performance," writes Cohan.

Thornburg had nothing left to sell that the market wanted - the ultimate Roach Motel.

On April 1, 2009, Thornburg announced that it would file for bankruptcy and by the end of the year, it was no longer in existence. Cutler officially resigned from the board in October last year.

Although the federal government didn't bail out Thornburg like it did other large mortgage investment companies, it did eventually acquire \$1 billion worth of Thornburg's securities through the acquisition of "legacy assets" held by Bear Stearns. An analysis of those securities by the *Santa Fe Reporter* showed Thornburg's securities to be a "complex bundle of loans from assorted companies" - including disgraced Countrywide - half of which were the shaky Alt-A (subprime) variety.

“Thornburg always claimed it only lent to wealthy ‘prime’ borrowers,” the newspaper reported. “Evidently, it wasn’t so particular about re-selling other lenders’ crappy loans to investors. The security prospectus shows that approximately 1 in 5 (Thornburg) loans were originated and serviced by Countrywide, whose brand name became a synonym for predatory lending.”

If Thornburg was an innocent victim, as Cutler contends, so was Lehman Brothers, Bear Stearns and so many other investment banks and mortgage companies that peddled risky “asset-backed securities” that were nothing more than a Wall Street euphemism for subprime, toxic loans. “Financial ebola,” as one analyst called them. Wall Street’s mistakes taught America a hard lesson. But it’s a lesson that Cutler evidently hasn’t learned yet.

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THE SECRET FILE ON ELIOT CUTLER

Home The Bangor Bison Cutler in Maine
Saying 'NO' At OMB Cutler in DC China's Lobbyist
The Thornburg Mess Eliot's Fantasy Reward Offered

BABY ELIOT'S CHILDHOOD DREAM



Whenever someone runs for governor, the first question they get asked is, “Why?” Instead of answering honestly (“Because I have a big fucking ego the size of Montana and I want all the attention. Plus I’ll get a driver and good parking.”), candidates invariably come up with some bullshit answer like, “The challenges we face today are so great that I just couldn’t sit on the sidelines and let my state’s economy continue it’s decline, blah, blah, blah....”

Cutler is no exception. He is convinced he has the business and political skills necessary for the job. But the real answer, as revealed in numerous interviews over the years, is that Cutler is running for governor because, well, because he’s always wanted to be governor. Since he was kid.

Here’s what his mother said in an [interview with the Edmund Muskie Archives](#):

Eliot, Eliot was too big, too heavy, he had acne, he was not a very, he wasn't a pretty charming child. And I remember that when other kids were out doing things, during the McCarthy hearings, when he was

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just a little kid, he sat in front of the TV and listened to all those people declare their rights under Article 5 or whatever it is of the Constitution, declared their right not to incriminate themselves. And we went to a Boy Scout meeting one night, I remember, and Eliot wished to participate in the adult discussion. I think he was then about maybe eight or nine or something, he must have been, because he never was an active Boy Scout. Anyway, he insisted on speaking up, and I finally took him out and took him home and planted him with his father who was gentler than I. And I thought, jeepers, how are you going to control this? But at any rate, he developed an interest in government and as he grew up he kept talking about how he was going to be governor of Maine someday.

Cutler himself told a reporter for the *Forth Worth Star Telegram* in 1991, "My dream had always been to go back to Maine and go into politics." He repeated it in a 2002 [interview with the Muskie Archives](#). "I know I wanted to be governor from the time I was 12 or 13 years old," he said. Recalling his years at Harvard, Cutler said, "I had decided years before that I really wanted to go into politics. I wanted to run for office, I wanted to be governor of Maine at some point, I wanted to come back to Maine and run for office. And so I had set out on this course by then, I mean I knew exactly what I wanted to do."

So why is Eliot Cutler running for governor? To fulfill his childhood fantasy. That's the real answer. Accept no substitutes.

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THE SECRET FILE ON ELIOT CUTLER

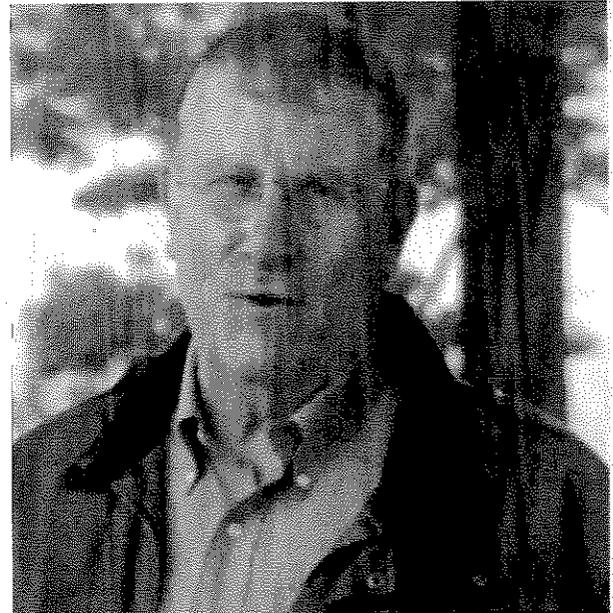
Home The Bangor Bison Cutler in Maine
Saying 'NO' At OMB Cutler in DC China's Lobbyist
The Thornburg Mess Eliot's Fantasy Reward Offered

THINK HE EVER WORE A BARN COAT BEFORE NOW?

Here's Eliot Cutler campaigning in his barn coat to convince voters he's "just like Maine." Riighttt. It's as phony as his rope-throw comb-over hairdo that looks like it was cut with a Flowbee.

We're offering a \$500 reward to anyone who can come up with a picture of Eliot Cutler in a barn coat *BEFORE* he started his run for governor.

BONUS REWARD: Somewhere there's a picture of young Eliot when he was at the Harvard Lampoon, painted in gold lame and wearing long underwear, presenting the Hasty Pudding Award to Natalie Wood. Who wouldn't love to see that? (Ewwww!)



Send your entries to cutlerfiles@yahoo.com

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THE SECRET FILE ON ELIOT CUTLER

Home The Bangor Bison Cutler in Maine
Saying 'NO' At OMB Cutler in DC China's Lobbyist
The Thornburg Mess Eliot's Fantasy Reward Offered
Cutler in Long Underwear

IS THIS THE MISSING NATALIE WOOD PHOTO?

We posted a request for a photo of a young Eliot Cutler when he was at the Harvard Lampoon, painted in gold lame and wearing long underwear, presenting the Worst Actress Award to Natalie Wood. We learned of the photo from an [interview with Cutler](#) but had not been able to locate it:

“Several of my friends from Deerfield had gotten involved in the Harvard Lampoon that freshman year and that sounded like fun, and so I tried out for the Lampoon my sophomore year, first semester in my sophomore year, and made it. And made it only after having been presented to Natalie Wood as the Oscar for worst actress of the year in a huge ceremony that made, that gave me my first national publicity. My picture was in every newspaper in America, painted gold from head to foot, standing like an Oscar and being presented to Natalie Wood.

“The Lampoon had a tradition, which it still has, of (sounds like: promoting) worst awards in presenting awards for the worst picture, the worst actor and the worst actress of the year. Natalie Wood had been in a movie that was so bad that the Lampoon decided to retire the award by giving it to her. And her publicist, or her agent, must have been a genius because he or she decided that it really made a lot of sense for Natalie Wood to say she wanted to come to Cambridge and accept the award personally, which many of them now do because it's a great publicity stunt, but she was the first to ever do it.

“And so she came to Cambridge and there was this huge ceremony on the front steps of the Lampoon Castle. And I, in order, I mean I was told that I would be the, what's called the Roscoe I think, and so I dressed in long underwear that had been dyed gold, and then a gold bathing cap and my face was painted gold, and I was I mean, it should have been much more embarrassing than it was, I thought it was sort of a lark.”

So recently, a fan of The Cutler Files found this photo and sent it along. Is that Eliot in the front, looking a bit zonked out? We think it is! Other opinions are welcome. But Eliot, it is kind of embarrassing. Thanks to one of our loyal followers for finding the photo. See how easy it is to do research worth tens of thousands of dollars?



Text on Cutler Files home page, 09/1/10

He's a phony and a fraud. He's rewriting and revising his history and profile to fit a carefully created campaign persona, fudging the facts, ignoring the truth and fooling the voters.

So just who is Eliot Cutler? Since the mainstream media in Maine is clearly in the tank for Cutler - whose ravings are quoted verbatim with no challenge or even cursory confirmation by lazy Maine reporters - this is only place where you'll find out.

Cutler calls himself an "independent," even claims to have once been a Republican. But a lifetime of working for big name Democrats, at a Democratic law firm and supporting and contributing to Democratic causes and candidates - including Barack Obama - shows otherwise.

On the campaign trail, he credits a "great school system" in Bangor for giving him a solid foundation. What he doesn't say is that he left Bangor after his freshman year in high school to attend an elite private school saying he was "bored" with Bangor and couldn't get a good education there.

He brags about his time at the Office of Management and Budget (OMB). But his foot-dragging and bureaucratic incompetence led to the deaths of 39 people.

These are just some of the confusing contradictions and outright lies that Eliot Cutler is telling on the campaign trail. Over the next several weeks, **THE SECRET FILE ON ELIOT CUTLER** will reveal the facts about his life, facts you'll find nowhere else, to help voters see the full picture of the man - his arrogance and ego, his ties to big corporations and foreign countries, and how he has spent a lifetime working directly against the interests of Maine and the US. You'll see why Cutler is unfit to be Maine's next governor.

Browse around and check back often. You'll find everything that Cutler doesn't want you to know.

Who we are: We are a group of researchers, writers and journalists - unaffiliated with any candidate or political party - who are frustrated that Maine's mainstream media is either unwilling or incapable of investigating the background and business connections of Eliot Cutler. The information provided here comes from a variety of reputable and public sources, including news articles, court and municipal records and other documents. While there is some opinion expressed here, the opinion is based on documented fact. Links are provided throughout this site so a reader can obtain most of the source material and decide for themselves. Contact us at cutlerfiles@yahoo.com