FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: Commissioners
Staff Director Pehrkon
General Counsel Noble
Press Office Ron Harris

FROM: Marjorie W. Emmons/Veneshe Ferebee-Vines
Commission Secretary

DATE: May 27, 1999

SUBJECT: Statement of Reasons For FEC v. Forbes, et al.

Attached is a copy of the Statement of Reasons for FEC v. Forbes, et al. signed by Vice Chairman Darryl R. Wold, Commissioner Lee Ann Elliott, Commissioner David M. Mason, and Commissioner Karl J. Sandstrom. This was received in the Commission Secretary's Office on May 27, 1999 at 10:00 a.m.

cc: V. Convery

Attachments

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

STATEMENT OF REASONS FOR VOTING TO WITHDRAW THE COMMISSION'S COMPLAINT IN FEC v. FORBES, et al.

VICE CHAIRMAN DARRYL R. WOLD
COMMISSIONER LEE ANN ELLIOTT
COMMISSIONER DAVID M. MASON and
COMMISSIONER KARL J. SANDSTROM

This action arose out of the publication in *Forbes* magazine of the "Fact and Comment" columns written by Malcolm S. Forbes, Jr., the magazine's editor-in-chief and owner of its parent company, Forbes, Inc. The Commission contended that after Mr. Forbes became a candidate for President in 1995, the continued publication of these columns constituted an "expenditure" by Forbes, Inc., and therefore a "contribution" to Mr. Forbes' campaign, in violation of 2 U.S.C. § 441b(a), notwithstanding the fact that the columns had been published for a number of years prior to that time, and continued without any legally significant change after Mr. Forbes' declaration of candidacy.

Vice Chairman Wold and Commissioners Elliott and Mason voted to withdraw the Commission's suit in this action for three reasons, each of which they believe would independently be sufficient grounds for terminating this action: (1) Given the circumstances, it cannot be said that the column was published "in connection with any election", so the cost of publishing the columns did not constitute a corporate "expenditure" prohibited by 2 U.S.C. § 441b(a) (Part IIA); (2) the publication of the column was exempt from the definition of "expenditure" in the Act under the provisions of 2 U.S.C. § 431(9)(B)(i) (the "press exemption"), as that provision is properly

interpreted and applied to effect its intent to afford the full protections of the First Amendment to the press (Part IIB); and (3) prudential considerations dictate that this action not be pursued, in that important purposes of the Act would not be served by prosecuting this action, the prosecution of this action would likely not be successful for the reasons stated above and for overriding considerations of the First Amendment, and the prosecution of this action would likely require the investment of substantial resources from the Counsel's Office that would be better spent on other matters of more importance to the enforcement of the Act (Part IIC). Commissioner Sandstrom, however, voted to withdraw this suit for the reasons of prosecutorial discretion in Part IIC.

I

Facts

The essential underlying facts do not appear to be in dispute, and it does not appear likely that further discovery would elicit any additional facts that would change the analysis of this matter. For at least five years prior to the time that Mr. Forbes became a candidate for President in 1995, he wrote his "Fact and Comment" column and Forbes, Inc. carried that column in the magazine it published, *Forbes*.[1] In those columns, Mr. Forbes wrote about a variety of matters, including, among other things, issues of national public importance such as tax policy, social issues, foreign affairs, and other issues concerning the federal government. During that same period, Mr. Forbes held top executive positions with Forbes, Inc., including as editor-in-chief of *Forbes* magazine. In 1990, Mr. Forbes became owner of fifty one percent of the stock of Forbes, Inc., with the balance owned by his siblings. By virtue of his stock ownership and executive positions, Mr. Forbes was at least in effective control of Forbes, Inc., and the editorial content of *Forbes* magazine.

[1] The First General Counsel's Report dated November 8, 1996 stated that the columns had been published for "several years" prior to Mr. Forbes' candidacy. Mr. Forbes' responses to the Commission's interrogatories (No. 4) states that the present version of his column appeared in every issue of *Forbes* since March, 1990, and prior to that the magazine had carried an apparently shorter version of his column since January, 1983.

In 1995, Mr. Forbes became a declared candidate for President of the United States. During the period of his candidacy, Mr. Forbes continued to write his "Fact and Comment" column, and *Forbes* magazine continued to carry it. Some of the issues he wrote about during that period were also some of the issues he discussed in his campaign. At least some of those same issues, however, were issues that Mr. Forbes had discussed over the previous years in his columns. None of the columns mentioned directly or indirectly that Mr. Forbes was a candidate for President, mentioned any other candidate for President, referred in any way to the presidential campaign, or solicited any contributions in connection with the presidential campaign. Neither the exposure given to Mr. Forbes' columns in the magazine, nor the distribution of the magazine, changed in any way following Mr. Forbes' declaration of his candidacy.

At the time that Mr. Forbes became a candidate for President, *Forbes* had a circulation of approximately 765,000 paid subscribers. The value of the portion of the columns that discussed the same issues that Mr. Forbes discussed in his campaign was approximately $95,000, under the measure of value applied by the Commission.

(The same columns were also carried in a newspaper published by Forbes, Inc., *The Hills-Bedminster Press*. The analysis of the columns in *Forbes* is equally applicable to the columns in that newspaper, and the outcome is the same, so the details of that publication are not discussed further in this statement.)

IIA

The Alleged Violation of Section 441b(a)

The Commission's complaint alleged that the publication of Mr. Forbes' column in *Forbes* magazine after he became a candidate constituted an "expenditure" by Forbes, Inc. and a "contribution" to Mr. Forbes' campaign, in violation of the prohibition against corporate expenditures and contributions in section 441b(a).[2] We concluded that the publication of the columns did not constitute either an expenditure or a contribution within the meaning of section 441b because the publication of the columns was not "in connection with any election", which is one of the definitional criteria that a "payment" must meet to qualify as an "expenditure" or a "contribution" under section 441b.

The publication of Mr. Forbes' column in *Forbes* was of course not "in connection with any election" during the several years prior to the time Mr. Forbes became a candidate. After Mr. Forbes became a candidate, that practice continued apparently without material change, including without any change in the nature of the content. In that circumstance, Mr. Forbes' candidacy did not suddenly transform the continuation of that long-standing practice into an activity "in connection with an election", and it did not transmogrify the on-going cost of publication into an "expenditure" prohibited by the Act.[3]

The General Counsel's recommendation that the Commission find probable cause that a violation had occurred relied in part on the position the Commission took in Advisory Opinion 1990-5 (Mueller). In that opinion, the Commission articulated a test of three separate and independent prongs to determine whether payments for the cost of a newsletter published by a company that the candidate owned, and in which, among other

---

[2] The other side of the impermissible expenditure and contribution by Forbes, Inc. alleged in the complaint is the acceptance of that contribution by Mr. Forbes and his campaign committee and treasurer. Those violations fall, of course, if the publication is not an expenditure by Forbes, Inc. in the first place.

[3] As singer Bob Seger put it in a hit tune, "You're still the same, you haven't changed in any way".

features, the candidate propounded her views on public issues, would be for the purpose of influencing the candidate's election, and therefore constitute an expenditure under the Act. We believe that case is distinguishable from the one before us by the essential facts in that case that the newsletter containing the candidate's speech "was apparently inspired by [her] experiences as a previous candidate for Congress" and "is sent primarily to persons whom [she] encountered during [her] prior campaign, many of whom may be potential supporters of [her present] candidacy." The three-prong test articulated by the Commission to determine whether future issues of the newsletter would be considered "for the purpose of influencing" the candidate's election must be read in the context of that background, where the origin of the newsletter was in a political campaign. The contrary background is presented in the instant matter, where the origin of the publication was independent of any campaign, and the question is whether the fact of Mr. Forbes' candidacy transmutes the long-standing practice into one "in connection with an election".[4]

The Statement of Reasons filed by our colleagues who voted against withdrawing this suit relied in part on the Commission's previous decision in MUR 3918 (Hyatt). That matter, however, also has an essential difference with the instant matter. In that matter, a law firm had been advertising in the media for several years, before the "name" partner became a candidate for federal office. The issue was whether advertisements that ran after the partner's date of candidacy constituted expenditures subject to the limitations of the Act. The Commission concluded that they did. The similarity with the instant case is the long-standing practice prior to the date of candidacy. The difference, however, is that

[4] The difference between the present case and that in AO 1990-5 is perhaps further illustrated by the consequence in AO 1990-5 that flowed from any speech in the newsletter meeting the test of "for the purpose of influencing an election": The Commission decided that the full cost of any newsletter that contained any speech that met any part of the test would be an expenditure subject to the provisions of the Act. In the instant case, the Commission's complaint took the position that only the value of Mr. Forbes' columns themselves in *Forbes* would be considered an expenditure, measured by the normal charge for advertising space in the magazine. That different treatment may be appropriate between a newsletter that has its origins in a campaign and is sent largely to political supporters, and a magazine of general circulation that had no election-related origin. That different treatment, however, also emphasizes the essential difference between the two publications, and the need for a different treatment of the speech in each.

in MUR 3918 the Commission focused heavily on the change in the media advertising that occurred after the partner's announcement of candidacy, and the extent to which that change was directed by the partner's campaign consultant. Whether that change was sufficient to make the advertisements "for the purpose of influencing" a federal election in that case is not in issue here, but it clearly distinguishes that case from the one before us, where there was no change -- in the nature of the content, in the type of media -- and no consultation with campaign advisors to shape the content.

The decision we reached is consistent with a long line of advisory opinions issued by the Commission in which the Commission focused on the question of whether the activity in question was for the purpose of influencing an election for Federal office. In Advisory Opinion 1977-42 (Hechler), the Commission concluded that payment to an individual for hosting a series of radio programs -- one a discussion of housing issues and one an interview and talk show dealing with different issues -- did not constitute a "contribution" to the individual notwithstanding that the series began after he announced his candidacy for federal office. The Commission said:

> Recent advisory opinions of the Commission have concluded that a "contribution" or "expenditure" would not necessarily occur in certain specific circumstances where the major purpose of activities involving appearances of candidates for Federal office was not to influence their nomination or election. These opinions were, however, conditioned on (i) the absence of any communication expressly advocating the nomination or election of the candidate involved or the defeat of any other candidate, and (ii) the avoidance of any solicitation, making, or acceptance of campaign contributions for the candidate in connection with the activity. [AO 1977-42.]

Relying on Advisory Opinion 1977-42, subsequent advisory opinions have continued to find that there was no contribution or expenditure where the activity in question did not appear to be undertaken for the purpose of influencing an election, and the two conditions in AO 1977-42 were satisfied. (See Advisory Opinion 1992-6 (Duke) and the advisory opinions cited therein.) Those two conditions were satisfied in the instant case, and there is nothing in the continuation of the long-standing activity of Mr.

Forbes and Forbes, Inc. that would indicate that it was undertaken in connection with an election just because it continued after Mr. Forbes became a candidate for President.

IIB

The Protection of the "Press Exemption" in Section 431(9)(B)

Independently of the foregoing analysis, the payment by Forbes, Inc. of the cost of publishing Mr. Forbes' columns after the date of his candidacy, in the circumstances of this case, does not constitute an "expenditure" under the Act because the columns fall within the exception provided in 2 U.S.C. § 431(9)(B)(i) (the "press exemption"), as that exception must be construed and applied to effect its intent to preserve the protections of the First Amendment for the press.

There is apparently no doubt that *Forbes* is a press entity within the meaning of section 431(9)(B)(i). It is "published at regular intervals in bound form, contains news articles . . . and opinion, and derives its income from subscriptions ($52/year or $4/issue) *and advertising.*" (First General Counsel's Report, p. 11, n. 10.) The question is whether the exception of section 431(9)(B)(i) is available for *Forbes*, notwithstanding that it is owned or controlled by Mr. Forbes, a candidate for President, in light of the limitation in section 431(9)(B)(i) that excludes from the exemption afforded by that section any press entity "owned or controlled by any political party, political committee, or candidate".

The freedom of the press from government regulation is of course explicitly provided by the First Amendment: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . .." The Supreme Court has consistently invalidated statutes that infringed on the protection given the press. In a case instructive in the present matter, Mills v. Alabama, 384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966), the Court invalidated a statute that prohibited newspapers from publishing election day editorials urging readers to vote a particular way in an election. The Court emphasized the full scope of the First Amendment's protection for freedom of the press in connection with elections:

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes. [384 U.S. at 218-219.]

The Court held that the prohibition in question could not stand, noting that it "silences the press at a time when it can be most effective" -- at the time most proximate to an election. (Id., at 219.)

The legislative history of section 431(9)(B)(i) indicates that Congress was aware of the necessity to avoid infringing on the protections of the First Amendment for the press, and that Congress intended by subparagraph (B)(i) to exempt from the Act both news and editorial coverage by bona fide press entities. The House of Representatives' Report on this section adopted in the 1974 amendments to the Act referred to the clause now found in subparagraph (B)(i) and explained:

> [This clause] make[s] it plain that it is not the intent of the Congress in the present legislation to limit or burden in any way the first amendment freedoms of the press and of association. Thus, clause [(i)] assures the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns. [HR Rep No. 93-1239 (1974), p. 4.]

The legislative history unfortunately does not appear to explain the intention behind the language of subparagraph (B)(i) that excludes from its protections an entity "owned or controlled by any political party, political committee, or candidate".[5]

[5] It may be that the statutory exclusion of publications owned by political parties, committees, or candidates was intended to exclude only those publications whose essential purpose is political, and which could readily be used to circumvent the purposes of the Act if the full, unfettered freedom of the press to discuss candidates were extended to them.

The Commission, however, has recognized the constitutional problem in the literal application of that exclusion, by providing in its regulations that the costs of a news story in a publication owned by a political party, political committee, or candidate will be exempt from the definition of expenditure, notwithstanding the literal language of subparagraph (B)(i) excluding such entities from the exemption afforded by subparagraph (B)(i). (11 C.F.R. 100.8(b)(2).) The problem is that this regulation does not go far enough, and extend the constitutional protection to commentary, in addition to news stories. The First Amendment equally protects both news and commentary by the press. (See Mills v. Alabama, supra, which involved the right of the press to publish an editorial.) Mr. Forbes had the unfettered right under the First Amendment to write and have Forbes, Inc. publish "Fact and Comment" during the many years prior to the time he became a candidate. He did not lose that constitutional right by becoming a candidate. In an analogous situation, the Supreme Court bluntly stated: "The political candidate does not lose the protection of the First Amendment when he declares himself for public office." (Brown v. Hartlage, 456 U.S. 45, 53, 102 S.Ct. 1523, 71 L.Ed.2d 732 (1982).) The same is logically true of Forbes, Inc., in publishing Mr. Forbes' commentaries in *Forbes*: The publisher does not lose the protections of the First Amendment for freedom of the press just because its owner becomes a candidate.

Section 431(9)(B)(i) must be construed and applied to preserve the full protections of the First Amendment for both fact and commentary in a bona fide press entity, consistent with the legislative intent behind the adoption of the exemption. As so construed, the cost of the publication by Forbes, Inc. of Mr. Forbes' "Fact and Comment" columns are not "expenditures" under the Act. With the press exemption so construed and applied in this case, we concluded that the cost to Forbes, Inc. of publishing Mr. Forbes' columns did not constitute an "expenditure" under the Act.[9]

[9] We note here also the important factors in the first part of the analysis in this Statement: The long-standing practice of carrying Mr. Forbes' columns in *Forbes*; the absence of any material change in that practice; and the absence of any advocacy or even mention of candidates for President; and the absence of any solicitation of contributions.

IIC

Prudential Considerations

Independently of the foregoing conclusions, we believed that for prudential reasons this action should not have been brought initially. Because the action was still at an early stage (the defendants had answered the Commission's complaint, but apparently no further significant steps had been taken), it was still appropriate to withdraw it for those reasons.

In Heckler v. Chaney, 470 U.S. 821, 831, 105 S.Ct. 1649, 1655-1656, 84 L.Ed.2d 714 (1985), the Supreme Court mentioned several of the factors that an agency could consider in the "complicated balancing" of factors that leads to a decision to prosecute or not prosecute an alleged violation. "[T]he agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing." We concluded that the weight of these considerations that are relevant in the present case is heavily on the side of withdrawing this action.

It does not appear that the purposes of the Act will be substantially served by prosecuting this action. The factual circumstances are highly unusual, and virtually limited to the defendants in this action and the rare individuals who would be similarly situated in the future, who would find that a long-term course of conduct that they had engaged in, unrelated to any political campaign, would suddenly be transformed into a violation of the Act by virtue of their having become a candidate. That fact pattern is not likely to be replicated by others simply for the sake of avoiding the application of the Act. Consequently, it does not appear that there are significant implications in this case for the future enforcement of the Act.

Likewise, this action does not enforce some significant interest that the Act addresses. This action is based on the prohibitions against corporate contributions and expenditures. Corporations nevertheless have the right to engage in issue discussion, and have the right to publish news and commentary in a regularly scheduled journal, without running afoul of the prohibitions of the Act. It is only because of the highly unusual circumstance in this case -- the individual having ownership and control of the corporation having become a candidate -- that the corporation's continued exercise of these rights is even arguably prohibited by the Act.

Further, there is at least substantial uncertainty that the Commission would eventually prevail in this action. Even if one is not entirely persuaded by the analyses in the preceding parts of this statement, concluding for two separate and independent reasons that there was no violation because there was no corporate "expenditure", there is at least a substantial possibility that the defendants would eventually prevail on either or both of these theories. In addition, the First Amendment concerns implicated by the prosecution of this action make it even more likely that the defendants would in the end be successful.

In light of the foregoing factors, the Commission must assess whether the prosecution of this action is worth the investment of scarce resources in the Counsel's office, that could be devoted to other matters that are of more pressing concern and widespread significance. The likelihood that this action will be vigorously contested by the defendants is not a factor in this equation -- if there is a clear violation of the Act, of importance to the enforcement of the Act, the violation should be prosecuted, regardless of how vigorous the defense will be. But in light of the other factors set out above -- the highly unusual fact pattern, the lack of widespread significance of the issue, and the substantial doubt of ultimate success both because of doubtful application of the statutory language and because of overriding constitutional concerns -- the Commission must consider whether devotion of considerable resources to this prosecution is a wise use of

those resources. We concluded that it was not, and also for that reason voted to withdraw the suit and to close the file with respect to the underlying matter under review.

Darryl R. Wold 5/26/99

Darryl R. Wold Date
Vice Chairman
Joining in all Parts

Lee Ann Elliott 5/26/99

Lee Ann Elliott Date
Commissioner
Joining in all Parts

David M. Mason Date
Commissioner
Joining in all Parts

5/26/99

Karl J. Sandstrom Date
Commissioner
Joining in Parts I and IIC