



**FEDERAL ELECTION COMMISSION
1050 FIRST STREET, N.E.
WASHINGTON, D.C. 20463**

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
) MUR 7280
Unknown Respondent)
)

STATEMENT OF REASONS OF COMMISSIONER JAMES E. "TREY" TRAINOR, III

Derek Utley, a previously unknown publisher of the “Trump 2020” Facebook page, posted his own views supporting Donald Trump for President, spending \$483 of his own funds on Facebook posts. Because Mr. Utley exercised his protected constitutional right of anonymous free speech, a complaint was filed against “UNKNOWN OWNER OF ‘TRUMP 2020’ FACEBOOK PAGE” alleging that the Unknown Respondent “made approximately \$34,000 in undisclosed independent expenditures,” in violation of 52 U.S.C. § 30104(c). The verified complaint relied solely on a news article in VICE News which reported the “Unknown Respondent” spent \$34,000 in advertisements on Facebook.¹

The Commission, having previously voted to find “reason to believe” that an unknown respondent violated 52 U.S.C. §§ 30104(b)(4)(H)(iii) or (c) and 30120(a), and 11 C.F.R. § 110.11(a), and having authorized the use of compulsory process to investigate the matter,² then voted to substitute the name Derek Utley in place of the “Unknown Respondent” and to take no further action as to the allegation that Mr. Utley violated the Federal Election Campaign Act of 1971, as amended (“FECA”). I dissented from the latter vote because I believe Mr. Utley properly exercised his constitutional right to anonymous free political speech and certainly did not violate any campaign finance statute. Instead, the Commission should have voted to find “no reason to believe” a violation occurred.³ The failure of the Commission to find “no reason to believe” creates uncertainty among those who wish to engage in anonymous political speech and, therefore, has a chilling effect of the exercise of First Amendment rights.

¹ MUR 7280 (Unknown Respondent), Complaint, dated Sept. 26, 2017, at 1. It is ironic that the authors of the VICE News article grossly inaccurately reported that the “Unknown Respondent” spent at least \$34,000 in Facebook posts and suffered no consequences for their inaccuracy, while Mr. Utley has had to respond to the complaint, endure an investigation, and deal with this issue for over four years for the simple act of exercising his constitutional rights.

² MUR 7280 (Unknown Respondent), Certification dated Jun. 4, 2019. I was not a member of the Commission when this vote was taken.

³ See generally Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 51, 12545 (Mar. 16, 2007).

Without anonymous speech, this country would be without our Constitution and its First Amendment. To help persuade public opinion to support the Constitution drafted by Congress, “Publius” anonymously published the Federalist Papers, a series of pamphlets advocating the merits of a federalist system of governance.⁴ Anonymous free speech has been a hallmark of political debate in the country from the country’s beginning.

The right to anonymous political speech was initially directly addressed by the United States Supreme Court in *Talley v. California*.⁵ In striking down a California statute which prohibited and criminalized anonymous speech, the Court stated, “[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind.”⁶ The court pointed out that anonymous pamphlets and leaflets have been “historic weapons in the defense of liberty.”⁷ The court held the statute to be violative of the First Amendment and reversed Mr. Talley’s conviction.⁸

Despite the Court’s decision in *Talley*, Ohio adopted a statute which prohibited anonymous political speech:

No person shall write, print, post, or distribute, or cause to be written, printed, posted, or distributed, a notice, placard, dodger, advertisement, ample ballot, or any other form of general publication which is designed to promote the nomination or election or defeat of a candidate, or promote the adoption or defeat of any issue, or to influence the voters in any election ... unless there appears on such form of publication in a conspicuous place or is contained within the said statement the name and residence of ... the person who issues, makes, or is responsible therefor.⁹

On April 27, 1988, Mrs. McIntyre attended a school board meeting in Ohio and distributed handbills opposing the school district’s proposed tax levy to attendees. She was subsequently charged with violating Ohio’s statute by the Ohio Election Commission and issued a fine. The constitutionality of the Ohio statute was considered by the United States Supreme Court in *McIntyre v Ohio Election Commission*.¹⁰ The Court struck down the statute holding that it violated Ms. McIntyre’s First Amendment right to anonymous speech, finding that, “[i]ndeed, the speech in which Mrs. McIntyre engaged – handing out leaflets in the advocacy of a politically controversial viewpoint – is the essence of First Amendment expression... No form of

⁴ The Federalist Papers, published anonymously under the name “Publius,” were authored by James Madison, Alexander Hamilton and John Jay. Opponents to the federal system also published anonymously. The authors “Cato,” “Centinel,” “Brutus,” and “The Federal Farmer”, who opposed a federal system, are still not known for certain.

⁵ 362 U.S. 60 (1960).

⁶ *Id.* at 64.

⁷ *Id.*

⁸ Mr. Talley’s handbill urged readers to boycott businesses and products of “manufactures who will not offer equal employment opportunities to Negros, Mexicans and Orientals,” and stated, “I believe that every man should have an equal opportunity for employment no matter what his race, religion, or place of birth.” Mr. Talley was convicted of violating the statute in Los Angeles Municipal Court.

⁹ 3 Ohio Rev. Code Ann. § 3599.09(A) (1988).

¹⁰ 514 U.S. 334 (1995).

speech is entitled to greater constitutional protection than Mrs. McIntyre.”¹¹ The Court concluded that:

Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation-and their ideas from suppression- at the hand of an intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of dissenting.¹²

In this matter, Mr. Utley engaged in the same speech conduct as did Mrs. McIntyre. Facebook is the modern-day equivalent of a pamphlet and those who post opinions are no different than the pamphleteers the court protected in *McIntyre*. The reasoning of *McIntyre* should have been applied in this matter. I do not want Mr. Utley or anyone else to be deterred from engaging in anonymous political speech as a result of the Commission’s handling of this matter. This Commission should have upheld Mr. Utley’s rights to anonymous speech, and I dissented on the motion to take no further action only because the motion did not send the clear message that the Commission would protect anonymous speech as mandated by the Constitution and the United States Supreme Court.

Just a few days ago, the United States Supreme Court reminded this Commission of its mandate to uphold political speech. In *Fed. Election Comm’n v. Ted Cruz for Senate*,¹³ the Court reaffirmed that the only reason FECA may restrict political speech is: “[t]he prevention of ‘*quid pro quo*’ corruption or its appearance.”¹⁴ How could a person who anonymously purchased Facebook posts with his own money in the amount of \$483 possibly buy influence with any candidate? There is simply no suggestion or opportunity for “*quid pro quo*” influence or corruption arising from the anonymous internet postings in this matter. Accordingly, Mr. Utley did not violate FECA in my judgment.



June 1, 2022

James E. “Trey” Trainor, III
Commissioner

Date

¹¹ *Id.* at 347.

¹² *Id.* at 357.

¹³ 596 U.S. __ (2022).

¹⁴ *Id.*, opinion at 13.