



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

## BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MURs 7668/7669/7685
Bloomberg News, <i>et al.</i>	)	
	)	

### SUPPLEMENTAL STATEMENT OF REASONS OF COMMISSIONER ALLEN J. DICKERSON

For the reasons explained in the Commission’s Factual and Legal Analysis, I joined four of my colleagues in finding no reason to believe that Bloomberg News violated federal campaign finance laws through its coverage of the 2020 Presidential election.<sup>1</sup> I also agree that the Commission’s regulatory treatment of candidate-owned press entities raises serious constitutional issues.<sup>2</sup> In particular, our decision to interpret the media exemption in the Federal Election Campaign Act (“FECA” or “Act”) to reach only “legitimate press entities,” as judged by the Commission, poses a special danger.<sup>3</sup> This is not a new concern,<sup>4</sup> and the Commission’s approach, founded upon a pair of forty-year-old district court rulings,<sup>5</sup> should be revisited.

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<sup>1</sup> Cert. at 2, MURs 7668/7669/7685 (Bloomberg News), Jan. 26, 2023.

<sup>2</sup> See Statement of Reasons of Vice Chairman Cooksey and Commissioners Dickerson and Trainor, MURs 7668/7669/7685 (Bloomberg News), Mar. 1, 2023.

<sup>3</sup> *Id.* at 2–4; Statement of Reasons of Commissioner Sean J. Cooksey at 3–6, MUR 7789 (Courier Newsroom, *et al.*), Apr. 22, 2022.

<sup>4</sup> Distinguished legal thinkers have been making this point for at least a decade. See Michael W. McConnell, *Reconsidering Citizens United as a Press Clause Case*, 123 YALE L.J. 412, 418 (2013); David B. Sentelle, *Freedom of the Press: A Liberty for All or a Privilege for a Few?*, 2013-14 CATO SUP. CT. REV. 15, 26 (2014); Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 537–38 (2012) (“Implicitly, then, the FEC appears to be taking a press-as-industry-specially-protected view of the First Amendment. But I could find no court decision that agreed with the FEC on this.”).

<sup>5</sup> *Readers Digest Ass’n v. FEC*, 509 F. Supp. 1210, 1214–15 (S.D.N.Y. 1981); *FEC v. Phillips Pub., Inc.*, 517 F. Supp. 1308, 1312–13 (D.D.C. 1981).

I write to provide some brief thoughts as to the weaknesses of our current regulatory text, and to highlight some pitfalls that any successful reform must avoid.

As has already been explained,<sup>6</sup> the current rules exempt certain expenses from regulation, even for candidate-owned press entities, but only if they involve a “*bona fide* news account” that is “part of a general pattern of campaign-related news accounts that give reasonably equal coverage to all opposing candidates.”<sup>7</sup> I have joined two of my colleagues in explaining why this standard is constitutionally suspect and unworkable in practice.<sup>8</sup>

In tripping into this problem, however, the Commission has demonstrated its historical amnesia. We often note that the FEC is “[u]nique among Federal administrative agencies” in that it “has as its sole purpose the regulation of core constitutionally protected activity—the behavior of individuals and groups only insofar as they act, speak and associate for political purposes.”<sup>9</sup> But we do not always grasp the significance of that insight.

For instance, the Commission is unique in another way: our governing statute, FECA, has never been enforced according to its literal terms. Almost at the moment of the FEC’s birth, the Supreme Court was forced to narrowly construe (some might say rewrite) the Act “to avoid the shoals of vagueness.”<sup>10</sup> The Court found that, in asking this agency to limit spending “relative to a clearly identified candidate,” Congress “offer[ed] no security for free discussion.”<sup>11</sup> Instead it “put[] the speaker in

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<sup>6</sup> See, e.g., Factual and Legal Analysis, MURs 7668/7669/7685 (Bloomberg News); Statement of Reasons of Vice Chairman Cooksey and Commissioners Dickerson and Trainor, MURs 7668/7669/7685 (Bloomberg News), Mar. 1, 2023.

<sup>7</sup> 11 C.F.R. § 100.73; see also 11 C.F.R. § 100.132; Citizens for Joe Miller Factual and Legal Analysis at 7 (quoting *Reader’s Digest Ass’n, Inc.*, 509 F. Supp. at 1215); Factual and Legal Analysis at 3, MUR 4064 (The Messenger, Inc.) (“Even if the publication is owned or controlled by the candidate, the cost for a news story is not a contribution so long as the news story represents a *bona fide* news account communicated in a publication of general circulation and which is part of a general pattern of campaign-related news accounts which give reasonably equal coverage to all opposing candidates in the circulation area.”).

<sup>8</sup> Statement of Reasons of Vice Chairman Cooksey and Commissioners Dickerson and Trainor, MURs 7668/7669/7685 (Bloomberg News), Mar. 1, 2023.

<sup>9</sup> *Am. Fed’n of Lab. & Cong. of Indus. Orgs. v. FEC*, 333 F.3d 168, 170 (D.C. Cir. 2003) (quoting *FEC v. Machinists Non-Partisan Pol. League*, 655 F.2d 380, 387 (D.C. Cir. 1981)).

<sup>10</sup> *Buckley v. Valeo*, 424 U.S. 1, 78 (1976) (citation omitted).

<sup>11</sup> *Id.* at 43 (citation omitted).

these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.”<sup>12</sup>

Just so here. There is no objective test for *bona fide* news reporting, nor for the line between “news stor[ies], commentary, [and] editorial.”<sup>13</sup> Instead, much as with efforts to determine which publications are “trustworthy enough” as an evidentiary matter, determining whether a given article is “news” or “commentary” will “necessarily reflect commissioners’ subjective views of particular publications and journalists.”<sup>14</sup> The dangers of that approach are obvious. And yet, despite laboring every day in service of a statute declared unconstitutionally vague by a near-unanimous Supreme Court, we have injected possibly worse ambiguity into our own regulations and invited biased decision making.

If that is our first error, the second is almost as grave. We often forget that our statutory role is unusual in asking us to evaluate political speech as such, and to render judgments as to which messages are not permitted,<sup>15</sup> which require reporting, and which are free from federal regulation. Our regulation concerning express advocacy, for instance—while clearer than the original “spending in connection with a federal election” standard—is nevertheless content-based in that it is “targeted at specific subject matter... even [though] it does not discriminate among viewpoints within that subject matter.”<sup>16</sup> Such regulation is “presumptively unconstitutional.”<sup>17</sup>

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<sup>12</sup> *Id.* (citation omitted). The Court was forced to fashion its own line, requiring this Commission to regulate only independent expenditures for “express advocacy.” *See, e.g., id.* at 43–44 & n.52 (“We agree that in order to preserve the provision against invalidation on vagueness grounds, [the Act’s limitation on expenditures relative to a clearly identified candidate] must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.”).

<sup>13</sup> *See* 11 C.F.R. §§ 100.73, 100.132. Notably, the Act itself does not ask the Commission to distinguish among these various forms of speech; it lists all three as part of the Act’s underlying media exemption, doubtless in an effort to ensure the exemption covers the full range of press activity.

<sup>14</sup> *See, e.g.,* Policy Statement of Chairman Allen J. Dickerson Regarding the Commission’s Use of Anonymous Sources Reported in the Press at 8, Oct. 5, 2022.

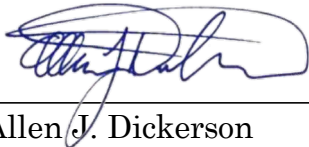
<sup>15</sup> This was a greater worry before *Citizens United v. FEC* invalidated the ban on corporate expenditures, 558 U.S. 310 (2010), but remains a duty of the Commission where, for instance, an independent expenditure is made by a foreign national, *see* 52 U.S.C. § 30121 (prohibition on contributions and donations by foreign nationals).

<sup>16</sup> *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 169 (2015).

<sup>17</sup> *Id.* at 163 (citations omitted).

Of course, the express advocacy standard has been specifically blessed (indeed, created) by the courts.<sup>18</sup> But that extraordinarily unusual legal posture is not a get-out-of-jail-free card; unless the courts have given a dispensation to one of our content-based approaches to regulation, our actions are subject to the same First Amendment standards as any other agency's. And no court has blessed a regulatory approach that permits "*bona fide* news articles" about elections to be freely published while subjecting commentary to a different legal regime.

The FEC operates in an area of extraordinary constitutional sensitivity. In this Matter, we avoided a potential legal crisis by fashioning a common-sense rule that gives effect to our regulations while avoiding the worst excesses of unconstitutional vagueness and content-based judgement. But the Commission will continue to struggle in future matters until it revises its regulations to bypass those dangers permanently.



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Allen J. Dickerson  
Commissioner

March 8, 2023

Date

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<sup>18</sup> See, e.g., *Buckley*, 424 U.S. at 43–44 & n.52.