FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MURs 7668, 7669, & 7685
Bloomberg News, *et al.*	)	
	)	

SUPPLEMENTAL STATEMENT OF REASONS OF VICE CHAIRMAN SEAN J. COOKSEY AND COMMISSIONERS ALLEN J. DICKERSON AND JAMES E. "TREY" TRAINOR, III

We voted to find no reason to believe that Bloomberg News made—and Mike Bloomberg's 2020 presidential campaign accepted—unlawful in-kind contributions in the form of Bloomberg News opinion articles for the reasons adopted by the Commission.[1] We issue this supplemental statement, however, to raise broader concerns with the Commission's regulations of media activities under its interpretation of the press exemption in the Federal Election Campaign Act of 1971, as amended ("FECA" or the "Act"). Those regulations, we believe, are at odds with the First Amendment's heightened protection of the press and political speech.

Congress was adamant when it amended FECA in 1974 that its intent was *not* "to limit or burden in any way the First Amendment freedoms of the press and of association."[2] Accordingly, since the Act's 1974 amendments, FECA has exempted from the definition of "expenditure" "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate."[3] This statutory carveout is commonly known as the press or media exemption, and it serves to protect "the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns."[4]

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1 *See* Factual & Legal Analysis (Feb. 6, 2023), MURs 7668, 7669, & 7685 (Bloomberg News, *et al.*); Certification (Jan. 26, 2023), MURs 7668, 7669, & 7685 (Bloomberg News, *et al.*).

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

3 52 U.S.C. § 30101(9)(B)(i); *see also* 52 U.S.C. § 30104(f)(3)(B)(i) (providing equivalent exemption under "electioneering communication" definition for "a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate").

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

Courts have further interpreted the press exemption by formulating a two-step analysis that, if satisfied, bars any "investigation of press activities which fall within the exemption."[5]

Notwithstanding these strong pronouncements in support of press freedom found in the congressional record and in judicial precedent, the Act's text and legislative history offer little guidance on the intent behind the exemption's wholesale exclusion of press entities owned or controlled by a political party, committee, or candidate.[6] Commission regulations corresponding to the Act's press exemption provide that "[a]ny cost incurred in covering or carrying a news story, commentary, or editorial by" a press entity is not a contribution or expenditure "unless the facility is owned or controlled by any political party, political committee, or candidate, *in which case the cost for a news story*" that is both (i) "a *bona fide* news account communicated in a publication of general circulation or on a licensed broadcasting facility," and (ii) "part of a general pattern of campaign-related news accounts that give reasonably equal coverage to all opposing candidates in the circulation or listening area," is neither a contribution nor an expenditure.[7] But, in our view, these protections do not go far enough. Most fundamentally, the First Amendment's Press Clause is not merely a shield for professional "press entities" engaged in publishing "bona fide news accounts" as part of their "legitimate press function," whatever that may be.[8]

More narrowly, while the limiting interpretation in the Commission's regulations may ameliorate some of the constitutional issues that stem from a literal application of the Act's total exclusion of candidate-owned media from the press exemption, the difference between the

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5 *Reader's Digest Ass'n v. FEC*, 509 F. Supp. 1210, 1214–15 (S.D.N.Y. 1981); *see also FEC v. Phillips Publ'g, Inc*., 517 F. Supp. 1308, 1312–13 (D.D.C. 1981). This two-step analysis, which the Commission adopted after the *Reader's Digest* and *Phillips* decisions, first considers whether the organization in question is a "press entity," by assessing whether it is "in the business of producing on a regular basis a program that disseminates news stories, commentary, and/or editorials." Advisory Op. 2019-05 (System73) at 4. The second part of the analysis dually examines: (1) whether the entity is owned or controlled by a political party, political committee, or candidate; and (2) whether the relevant activity is a "legitimate press function." *Id.* at 5.

6 *See* Statement of Reasons for Voting to Withdraw the Commission's Complaint in *FEC v. Forbes*, *et al.*, Vice Chairman Wold and Commissioners Elliot, Mason, and Sandstrom, at 8 n.5 (May 27, 1999) ("Forbes SOR") ("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.").

7 11 C.F.R. §§ 100.73, 100.132 (emphasis added). In its limited body of precedent involving commentary or editorials by candidate-owned press entities, the Commission has examined whether the cost of publishing them amounts to an in-kind contribution to the candidate owner. Since the enactment of the Bipartisan Campaign Reform Act of 2002, the Commission's analysis in these matters has specifically focused on whether the editorials or commentaries at issue satisfy the payment, conduct, and content standards for "coordinated communications" under 11 C.F.R. § 109.21, and therefore qualify as impermissible in-kind contributions. *See, e.g.*, Advisory Op. 2005-07 (Mayberry) at 2–5; *see also* First General Counsel's Report at 20–24 (Sept. 21, 2022), MURs 7668, 7669, & 7685 (Bloomberg News, *et al.*).

8 The Supreme Court has never embraced such a crabbed reading of that clause, which lacks historical pedigree. *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) ("The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."); *Pennekamp v. Florida*, 328 U.S. 331, 364 (1946) (Frankfurter, J., concurring) ("[T]he purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it. . . . [I]n the United States, it is no greater than the liberty of every citizen of the Republic."); *Near v. Minnesota*, 283 U.S. 697, 707 (1931) (defining "the press" as an "essential personal liberty of the citizen").

exemption as construed in the regulations and in the Act is one only of degree. The regulations do not resolve the fundamental First Amendment problems posed by excluding some or all candidate-owned media from the full protection of the press exemption.[9] Although the regulations broaden the exemption to include a "bona fide news account" by candidate-owned press entities, they do not provide an analogous safe harbor for commentary or editorials by those entities.

It is black letter law that the First Amendment's Press Clause protects publication of news stories as well as commentary and editorials.[10] And, within its campaign-finance and First Amendment jurisprudence, the Supreme Court has maintained that the government "is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue."[11] Yet, in its regulations for the press exemption, the Commission has done just that. By denying the press exemption's safeguards to commentary and editorials from press organizations that are owned or controlled by candidates, the regulations remain in serious tension with judicial precedent broadly construing the First Amendment's assurances of a free press and "uninhibited, robust, and wide-open" political debate.[12]

The regulation's additional requirement that, to qualify for the press exemption, "bona fide news accounts" distributed by candidate-owned media must be "part of a general pattern of campaign-related news accounts that give reasonably equal coverage to all opposing candidates" similarly presents serious constitutional questions.[13] The Commission appoints itself the sole arbiter of what is "reasonably equal [news] coverage" and therefore eligible for publication under its vague regulatory standard. In this role, the Commission has tasked itself with scrutinizing "the exercise of editorial control and judgment" by candidate-owned press groups, even though "[i]t has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time."[14]

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[9] Indeed, our predecessors have signaled their own discomfort with the dubious constitutionality of this regulatory scheme. In a prior enforcement case from 1996, the Commission determined that the press exemption was inapplicable to opinion columns written by then presidential candidate Steve Forbes and published in *Forbes* magazine, a publication owned and controlled by Mr. Forbes. *See* Factual & Legal Analysis (Dec. 11, 1996), MUR 4305 (Forbes for President, *et al.*). The Commission found probable cause to believe that publication of the columns was an unlawful in-kind corporate contribution to Steve Forbes's campaign and, after failing to reach a conciliation agreement, proceeded to file suit against Mr. Forbes. However, a majority of Commissioners subsequently voted to withdraw the lawsuit because there was "a substantial possibility that the defendants would eventually prevail" in court "both because of doubtful application of the [Act's] statutory language and because of overriding constitutional concerns." Forbes SOR at 11.

[10] *See Mills v. Alabama*, 384 U.S. 214, 220 (1966) (holding that "no test of reasonableness can save a [] law from invalidation as a violation of the First Amendment when that law makes it a crime for a newspaper editor to do no more than urge people to vote one way or another in a publicly held election."); *Lovell*, 303 U.S. at 452.

[11] *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784–85 (1978); *see also Citizens United v. FEC*, 558 U.S. 310, 341 (2010) ("We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers."); *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) (per curiam) ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment").

[12] *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

[13] *See* 11 C.F.R. §§ 100.73, 100.132.

[14] *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

The lack of definitional clarity for key terms in the relevant regulations, such as "bona fide news account" and "reasonably equal coverage," which have no corollary in the Act itself, and the growing difficulty in distinguishing news accounts from editorial commentary in today's media landscape further compound the constitutional and prudential concerns surrounding the Commission's construction of the press exemption.[15]

The Commission was able to prudently avoid the constitutional questions in this matter. We found no reason to believe the Respondents made or accepted unlawful in-kind contributions through Bloomberg News's publication of election-related editorials because of the proactive measures undertaken by Bloomberg News to ensure its editorial and journalistic independence from Mike Bloomberg's presidential campaign. Among other things, Bloomberg News disbanded its editorial board, divested Mr. Bloomberg of personal control over its operations, and ended the publication of unsigned editorial articles. These actions sufficiently preserved the press exemption's applicability in this case.[16] As a result, we did not need to address the press exemption's applicability to commentary and editorials in candidate-owned publications more broadly or the difficult First Amendment questions raised by that analysis.

In future enforcement matters involving candidate-owned media, we will continue to conduct a fact-based analysis that limits our jurisdictional inquiry. We will look to, among other factors, whether a candidate-owned media entity has affirmatively acted to ensure it does not become a conduit for influencing federal elections on behalf of its owner. And we will be wary of any efforts to premise legal analysis, as our Office of General Counsel proposed here, upon a line-by-line reading of published articles to determine whether they are unlawful communications.[17]

A time may come when the Commission must face the dissonance between the First Amendment and the press exemption head on. As one Commissioner has written previously, the Commission's longstanding test for applying the press exemption, particularly its requirement that only "press entities" qualify for the exemption, is both constitutionally suspect and increasingly out of step with how Americans receive and engage with political news today.[18] Once again, we are compelled to express our concerns with how the Commission has sought to construe the Act's

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[15] Other Commissioners have also questioned the press exemption's compatibility with the First Amendment, both in general and in relation to its treatment of candidate-owned media. *See, e.g.*, Forbes SOR at 9 (noting that a "publisher does not lose the protections of the First Amendment for freedom of the press just because its owner becomes a candidate."); Additional Statement of Reasons of Commissioner Mason at 6 (Feb. 14, 2000), MUR 4689 (Robert K. Dornan, *et al.*) ("It is difficult to imagine an assertion more contrary to the First Amendment than the claim that the FEC, a federal agency, has the authority to control the news media's choice of formats, hosts, commentators and editorial policies in addressing public policy issues.").

[16] *See* Certification (Jan. 26, 2023), MURs 7668, 7669, & 7685 (Bloomberg News, *et al.*); Factual & Legal Analysis at 13–14 (Feb. 6, 2023), MURs 7668, 7669, & 7685 (Bloomberg News, *et al.*).

[17] First General Counsel's Report at 26–30 (Sept. 21, 2022), MURs 7668, 7669, & 7685 (Bloomberg News, *et al.*). While this approach was ultimately rejected by the Commission, it is precisely the type of invasive governmental review openly courted by the current regulation.

[18] *See* Statement of Reasons of Commissioner Sean J. Cooksey at 4 (Apr. 22, 2022), MUR 7789 (Courier Newsroom, *et al.*) ("[I]n addition to its constitutional problems, the 'press entity' standard is impractical and difficult to apply fairly and consistently. Even if it were conceivable at one time to reasonably distinguish which entities are 'press' and which are not, that taxonomy is surely unworkable today.").

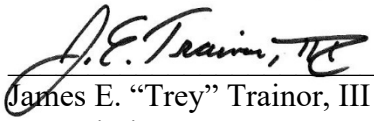
press exemption in a manner that is at odds with the First Amendment's core guarantees. It has become apparent that the Commission needs to reevaluate and reform its regulation of press activities to better reflect constitutional precedent and the evolving modes of political speech and media communications in this century.

Sean J. Cooksey
Vice Chairman

March 7, 2023
Date

Allen J. Dickerson
Commissioner

March 7, 2023
Date



James E. "Trey" Trainor, III
Commissioner

March 7, 2023
Date