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DISTINGUISHING JOURNALISM FROM POLITICAL INFLUENCE OPERATIONS

RETHINKING THE FEC'S
APPROACH TO THE PRESS
EXEMPTION

PHILIP M. NAPOLI

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Distinguishing Journalism from Political Influence Operations:

Rethinking the FEC’s Approach to the Press Exemption

Philip M. Napoli

Introduction

In 2023, an investigation by the *Washington Post* found that a number of Republican political campaigns in Illinois used a private online portal to request stories and shape coverage produced by a network of media outlets that presented themselves as local news sources (Stanley-Becker & Dawsey, 2023).¹ This portal allowed users to pitch stories; provide interview subjects and questions; place announcements, and submit op-eds to be published verbatim in any of about 30 sites that formed part of an Illinois-focused media network, called Local Government Information Services (Stanley-Becker & Dawsey, 2023). The *Washington Post* described this model as offering “a new level of collaboration between political operators and certain media outlets,” and concluded that this Illinois operation could be a testing ground for a nationwide effort in support of the 2024 presidential campaign (Stanley-Becker & Dawsey, 2023).

This is only one example of an intensifying trend in American politics and media—the blurring of the line between legitimate journalism and organized political influence operations. This blurring of boundaries is not new (see, e.g., Anderson-Davis, 2024) but, given the way that both our media technologies and our politics have evolved, it does seem to be reaching new extremes. As the above example—and countless others like it (Bengani, 2022; Folkenflik, 2022; Green & Folkenflik, 2024; Myers, 2024; Swenson & Hendrickson, 2023)—indicate, the blurring of the lines between journalism

¹ The author thanks Asa Royal and Sloan Peterson for their research assistance on this project.

and political influence operations has reached a point that raises legitimate concerns about the cultivation of an informed citizenry and the integrity of the democratic process. As a result, it may be necessary to consider some forms of government intervention to help citizens navigate this media environment and thus effectively engage in self-governance. As this paper illustrates, the government already has a mechanism, although little-known and under-utilized, to address this problem.

Specifically, the Federal Election Commission (FEC) is authorized to determine both whether an organization represents a legitimate press entity and whether that organization's activities represent legitimate press functions, or are, rather, political influence operations. This authority, known as the "press exemption," originates from the Federal Elections Campaign Act of 1971 (and its subsequent revision) and serves as a means of assuring that political campaign communications satisfy both established disclosure requirements and expenditure limitations. At the same time, the press exemption is intended to ensure that legitimate press entities remain free to engage in the full range of reporting, analysis, commentary, and endorsements that are part and parcel of the journalistic enterprise, without being made subject to the regulations that apply to political campaign communication.

This Federal Election Commission authority, how it is exercised, and how it *should* be exercised, are the focus of this analysis. Shining a spotlight on the FEC and the press exemption at this moment in the nation's history seems particularly appropriate and important, given the increased challenges associated with effectively determining the applicability of the press exemption and the increasing prevalence of disguising political influence as journalism.

The key contentions of this paper are: (1) that the FEC's regulatory responsibility to distinguish between legitimate press entities and functions, on the one hand, and political influence operations on the other is an increasingly important mechanism by which the federal government can help news consumers navigate a news and information ecosystem in which identifying legitimate news sources has become much more challenging; and (2) that the FEC should employ a more precise and rigorous assessment process in making its determinations: one that leverages the broader range of analytic and digital forensic tools available to it for evaluating both whether entities merit classification as "press entities" and whether the activities in which an entity engages represent legitimate press functions.

In developing these arguments, this paper proceeds as follows. The first section reviews the scope of the FEC's regulatory authority; the role that the "press exemption" plays in the exercise of this authority; and the means by which this authority is implemented. This section also discusses critiques of, and legal challenges to, the FEC's authority to distinguish between legitimate press entities and functions and political influence operations.

The second section describes some key characteristics of the contemporary news and information ecosystem that make the FEC's exercise of its regulatory authority particularly important. This section draws on current developments, such as new revelations about the extent to which some cable news networks deviate from established journalistic norms to engage in political influence, as well as the rise of so-called "pink slime" hyperlocal news networks, which often operate with both economic and organizational ties to political parties, committees, and candidates. This section illustrates, through a critical analysis of relevant filings and decisions, how these developments fall within the FEC's purview.

The third section recommends that the FEC more rigorously evaluate the application of the press exemption by engaging in more definitional precision and engaging in more rigorous analysis than the agency currently conducts. As this section demonstrates, this more robust approach is necessary if the FEC is to more effectively identify political influence operations masquerading as journalism.

The concluding section considers the broader implications of the recommendations put forth here, as well as potential critiques of and counterarguments to these recommendations.

Background: The Federal Election Commission and the "Press Exemption"

The Federal Election Commission (FEC) was created by Congress in 1974 through an amendment to the Federal Election Campaign Act of 1971 (Federal Election Commission, 2023). The Act made the FEC responsible for "administering and enforcing federal campaign finance law" (Federal Election Commission, 2023). In this capacity, the agency has jurisdiction over House, Senate, and Presidential election campaigns. The campaign finance regulations within the FEC's jurisdiction include public disclosure requirements related to campaign fund-raising and expenditures; restrictions on contributions and expenditures directed at influencing election outcomes; and administering public funding of presidential campaigns (Federal Election Commission, 2023).

The FEC's authority is expansive in that a wide range of types of organizations can seek to influence election outcomes and thus come under the FEC's regulatory purview. The news media also has the capacity to influence election outcomes through the process of informing the voting public about political issues and candidates. Given the protections afforded to the press by the First Amendment, the FEC employs a carveout – the "press exemption" – which excludes "press entities" from most of the FEC's regulatory requirements. As the House of Representatives (1974) report that accompanied the creation of the FEC noted, it was not Congress' intent in creating the FEC to "limit or burden in any way the First Amendment freedoms of the press. ... The press exemption assures

the unfettered right of newspapers, TV networks, and other media to cover and comment on political campaigns” (p. 4). Thus, for example, the costs incurred when a newspaper produces an editorial advocating for a particular presidential candidate would not be subject to the disclaimer required under FEC regulations,² whereas a flyer disseminated by a political action committee containing the exact same text would. Similarly, should a non-press entity such as an oil company incur the costs to produce and disseminate such advocacy for a specific candidate, those costs would be considered an illegal corporate contribution to a federal campaign.

It is important to note that the authority to distinguish between press and non-press entities has been the subject of much critique and resistance (See, *e.g.*, McConnell, 2013; Sentelle, 2013). Much of this tension arises from disagreements over whether the press clause of the First Amendment should be interpreted to mean that the press should receive greater First Amendment protections in some instances than non-press entities (Anonymous, 2015; West, 2018). Further tension arises from disagreements over whether distinguishing “the press” from other entities is still possible, given the ways in which our news and information ecosystem has evolved (West, 2016).

However, the FEC’s authority to distinguish between press and non-press entities has been upheld by the Supreme Court (see, *e.g.*, *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 1986; *McConnell v. FEC*, 2003). Most importantly, when the Supreme Court issued its landmark *Citizens United* decision in 2010, which significantly scaled back the FEC’s authority to regulate political campaign communications, the Court criticized the press exemption but did not invalidate it (*Citizens United v. FEC*, 2010). Thus, although the “everyone is a journalist” mentality has taken root in many quarters (see Napoli, 2019), the FEC retains the authority to determine whether an organization merits classification as a press entity and whether the activities of that “press entity” merit classification as legitimate journalistic functions (see Benjamin, 2006).

Implementation

The FEC employs a two-step test to determine whether political activity (including reporting on politics or publishing editorials) falls under the press exemption (Federal Election Commission, 2022a). In the first step, the Commission determines whether the organization engaging in the activity is a “press entity.” The Commission makes this determination by investigating whether the entity in question “is in the business of producing on a regular basis a program that disseminates news stories, commentary, and/or editorials” (Federal Election Commission, 2008, p. 6). In making this determination, the Commission has employed a fairly broad and inclusive notion of what

² The FEC requires that any public communication made by a political candidate or committee include disclaimers regarding who paid for/authorized the communication. See <https://www.fec.gov/help-candidates-and-committees/advertising-and-disclaimers/>.

constitutes a “press entity.” This is a byproduct of the fact that, as the FEC has emphasized, “the [Federal Election Campaign] Act and Commission regulations do not define the term ‘press entity.’” (Federal Election Commission, 2010, p. 5).

The fact that the FEC determines whether an organization merits classification as a press entity without an explicit statutory definition of “press entity” is both surprising and concerning. In the absence of a definition, the FEC has employed such criteria as the frequency with which journalistic content is produced and the proportion of the organization’s budget devoted to producing journalistic output (Federal Election Commission, 2010). It is important to note, however, that within the context of these particular criteria, the FEC has never articulated any explicit thresholds, such as the required frequency of journalistic output or the proportion of the organization’s budget devoted to journalistic output, required to qualify as a “press entity.”

Early in its history, the FEC often applied a fairly stringent standard in classifying organizations as press entities. The commission reasoned that the press exemption should be limited to organizations resembling the traditional press. In one decision exemplifying the stringency of this standard, the FEC decided that the San Joaquin Valley Republican Associates, publisher of a pamphlet called “Republican’ Spoken Here,” was not a press entity (and was thus ineligible for the press exemption) because (1) what it published were not ‘news stories’; (2) the pamphlet was funded by political donations rather than subscribers; and (3) the pamphlet did not resemble a traditional periodical (Federal Election Commission, 1988).

Throughout much of its history, the FEC has validated press entities based on their resemblance to legacy media (i.e., newspapers, radio stations, and broadcast television stations). A typical validation might read, “C-SPAN, WHO-TV and FOX are broadcasting stations and therefore each qualify as a press entity” (Federal Election Commission, 2005, p. 5) or “Forbes is published at regular intervals in bound form,” “contains news articles of specialized interest,” “derives its income from subscriptions ... and advertising ...” and is “published weekly on newsprint paper” (Federal Election Commission, 1996, p. 11). Clearly, these are superficial indicators of whether an entity is actually engaged in producing legitimate journalism – indicators that were more likely to be adequate in the past than they are today.

In the second step of the test, the Commission determines whether the entity is owned or controlled by a political party, candidate, or committee and whether, in conducting the activity in question, the entity is exercising a “legitimate press function” (Federal Election Commission, 2022a). An entity controlled by a political party, committee, or candidate can still qualify for the press exemption. However, for such an entity the burden of proof “that it is acting like a bona fide news organization is greater than that faced by an entity not under political control” (Zubowicz, 2004, p. 9).

This is where the second component of the second step of the test comes into play – whether the entity is exercising a “legitimate press function.” That is, does the activity in question fall within the established parameters of the practice of journalism? In making this determination, the Commission considers factors such as whether the entity's materials are available to the general public and whether these materials are comparable in form to those ordinarily issued by the entity (*Reader's Digest Association v. Federal Election Commission*, 1981).

For entities not owned or controlled by a political party, candidate, or committee, the press exemption applies only to expenditures used to cover or carry a news story, commentary, or editorial. Resources expended on activities outside of these journalistic functions (e.g., fund-raising for a candidate) are not eligible for the press exemption.

For those entities owned or controlled by a political party, candidate, or committee, the activity in question and its associated expenditures must meet more stringent criteria to be exempt. For such political entities, the FEC specifically considers whether the activity in question “represents a bona fide news account ... and is part of a general pattern of campaign-related news accounts that give reasonably equal coverage to all opposing candidates.” (*11 CFR 100.132 -- News Story, Commentary, or Editorial by the Media.*, n.d.).

Here again we lack definitional precision, in that the FEC has never defined a “bona fide news account.” Dictionary definitions of the term “bona fide” include “neither specious nor counterfeit” and “made in good faith without fraud or deceit.” From this definitional standpoint, the notion of a “bona fide news account” would seem to connect with contemporary concerns about the prominence of disinformation in the news and information ecosystem.

However, in the history of the FEC's press exemption decisions, the agency has never waded into the treacherous waters of the First Amendment by assessing the veracity of the news account in question, despite the fact that assessing whether a news account is “bona fide” would seem to require just such an effort. The First Amendment protections for false speech – even intentionally false speech – are extensive (White, 2019). The Commission has relied instead on the mode of delivery in making its “bona fide” determination. Established modes for delivering news, such as broadcast stations, cable networks, online news sites, and blogs, have all been treated as *de facto* sources of “bona fide” news accounts. In other words, the FEC's analytical approach focuses on form rather than substance, resulting in an exploitable loophole.

Additional stringency is implied by the statutory requirement that the activity in question be part of a “general pattern of campaign-related news accounts that give reasonably equal coverage to all opposing candidates.” There are obviously hints of the long-defunct, but much-maligned, Fairness

Doctrine ³in this passage (see Napoli, 2021). To qualify for the press exemption, news outlets owned or controlled by a political campaign, candidate, or committee must adhere to a level of “balance” in their campaign coverage that is not required of other news outlets. Interestingly, given the scope of the FEC’s authority, this requirement would seem to extend beyond the broadcast media that were the exclusive focus of the Fairness Doctrine.

The Commission has seldom addressed the issue of equivalent coverage directly (perhaps not surprising, given the infrequency with which it has concluded that the organization in question is owned or controlled by a political party, candidate, or committee) but, when it has, its evaluation of the content has been fairly superficial. For instance, in a 1987 decision denying the press exemption to the previously mentioned *Republican Spoken Here*, a newsletter produced by the San Joaquin Valley Republican Associates (which, as noted earlier, the Commission deemed to be a political committee), the FEC found that “*Republican Spoken Here* does not contain articles constituting bona fide news accounts, and is not part of a pattern of campaign-related news accounts which give reasonably equal coverage to all opposing candidates. It is simply a communication dealing with the election of more republicans” (Federal Election Commission, 1988, p. 20). No further evidence or examples were provided to support this conclusion.

If the content in question does not meet these criteria, then the legitimate press function threshold has not been satisfied and the press exemption does not apply. Essentially, then, journalism-related activities conducted by an entity owned or controlled by a political party, candidate, or committee must satisfy a threshold of both journalistic legitimacy and balance that is not applied to the activities of a press entity not controlled by a political party, candidate, or committee.

Implications

When the press exemption applies, the entity in question is exempt from relevant FEC regulations, such as the ban on “coordinated communications” designed to influence election outcomes (which for non-press entities are considered unlawful corporate contributions), the requirement to post disclaimers on its public communications, and the requirement to file disclosure reports with the FEC (Federal Election Commission, 2024b, 2024a). If the FEC finds that the press exemption does *not* apply, then a variety of different scenarios arise. For instance, if a corporate entity fails the first step of the test and is not considered a qualified press entity, then *any* campaign-related communication is considered an unlawful corporate contribution. If the entity is deemed to be owned or controlled by a political party, candidate, or committee, then any campaign-related communication that is not a bona fide news account that is part of a general pattern of campaign-related news accounts that gives reasonably equal coverage to all opposing candidates would be

³ The Fairness Doctrine required that broadcasters cover controversial issues of public importance and do so in a way that provides equal coverage for opposing viewpoints. The FCC eliminated the Fairness Doctrine in 1989.

subject to the relevant disclaimer requirements (e.g., “paid for by ...”). As these scenarios indicate, the FEC’s decision to grant or deny the press exemption could discourage the production of political influence under the guise of news or at least result in greater transparency.

Political Influence in the Evolving News and Information Ecosystem

The Federal Election Commission’s responsibility to make an effective distinction between political influence operations and press entities has perhaps never been more important in the agency’s nearly 50-year history. The rise in both coordinated political influence activities masquerading as journalism has been well-documented (see, e.g., Mahadevan, 2023; Martens et al., 2018; Massoglia, 2020; Napoli, 2019; Washington Post Editorial Board, 2022). It is telling that, even in this moment, when we are regularly confronted with findings about the public’s historically low levels of trust in the news media (see, e.g., Aguiar & Fu, 2023), disguising political influence operations as journalism remains a prominent strategy. Both domestic and international political actors remain committed to packaging their political influence efforts as journalism; often going to great lengths to disguise the true source and the true intent and often brazenly using the journalistic imprimatur as a way of presenting disinformation as news (Cadell & Starks, 2023; Folkenflik, 2022; Folkenflik et al., 2022; Myers, 2024).

The goal here is not to provide a comprehensive review of these trends, but rather to illustrate how they directly intersect with the FEC’s authority and the outcomes of these intersections to date. Toward this end, this section will discuss several contemporary examples of how the line separating political influence from journalism is becoming increasingly blurred in ways that directly implicate the FEC.

Consider, for instance, last year’s revelations involving the Fox News cable network. Fox News eventually settled the lawsuit brought against it by Dominion Voting Systems by paying almost \$800 million (Darcy & Oliver, 2023). Key takeaways from this lawsuit include that the network essentially abandoned all pretense of operating as a news outlet when it repeatedly aired claims about the 2020 presidential election having been rigged that the network’s executives and on-air talent knew to be false (Cohen & Marshall, 2023). On grounds such as these, it would seem that a legitimate complaint could have been made to the FEC that Fox News was not operating as a press entity – a position that characterizes many post-Dominion critiques of the network’s behavior (see, e.g., Putterman, 2023; Zurawik, 2023). Certainly, knowingly and intentionally sharing disinformation directed at overturning an election outcome is not, and cannot be, a “legitimate press function.”

Although no such complaint was filed with the FEC, Media Matters for America (2023) did file a more narrowly-focused complaint in March 2023. The complaint alleges that by providing the Trump campaign with confidential information about the Biden campaign’s advertising activities and media buys, Fox News was acting outside the bounds of a legitimate news organization and thus made an illegal corporate contribution to the Trump campaign.. Evidence of such information-sharing activities emerged from the *Dominion* lawsuit.

The key question for the FEC presented by the Media Matters for America complaint is whether such activities constitute a “legitimate press function.” It would seem clear that sharing confidential political advertising strategy information with a rival political campaign extends beyond the bounds of a legitimate press function. As of this writing, the FEC has yet to issue a decision on this complaint.

The key point is that even an organization that possesses all the superficial trappings of a press entity can engage in activities that call into question whether the press entity exemption is appropriate and whether individual actions fall within the bounds of legitimate press functions.

Another ongoing development that intersects with the FEC’s authority involves the proliferation of “pink slime”⁴ news outlets (Bengani, 2022; Rafsky, 2022; Scherer, 2022; Scola, 2022). ‘Pink slime’ news outlets generate high quantities of low-quality but ostensibly local news, and typically exist online as part of large national networks of sites (though they are migrating to the print realm as well) (Bartholomew, 2022; Bengani, 2020). The networks that run “pink slime” outlets operate in ways that depart dramatically from established journalistic norms. Some networks accept payment from political operatives to produce stories (Alba & Nicas, 2020); some algorithmically generate content to bulk up their pages (thus earning the ‘pink slime’ moniker) (Royal & Napoli, 2022); and some do not employ journalists local (or even proximate) to their news outlets’ covered areas (Tarkov, 2012). Pink slime news networks’ already tenuous claims to journalistic integrity are further undermined by their well-documented connections to political parties, political action committees, and even individual political candidates; as well as their habit of deploying content and new outlets in geographic patterns clearly aimed at affecting national election outcomes in specific partisan directions (Alba & Nicas, 2020; Royal & Napoli, 2022).

Some pink slime outlets disseminate disinformation (Bengani, 2020; Royal & Napoli, 2022). This latter point is well-illustrated by events surrounding the attack on Paul Pelosi, husband of former Speaker of the U.S. House of Representatives, Nancy Pelosi. In a since-deleted tweet, X (formerly Twitter) owner Elon Musk linked to an unfounded conspiracy theory about the motivations of the attacker that was originally published by the *Santa Monica Observer*, a known disinformation purveyor

⁴ In its original usage, “pink slime” referred to a meat byproduct made from waste trimmings to use as a filler in ground meat. Since 2012 the phrase has been used to describe news outlets who similarly infuse their product with various types of filler that don’t merit classification as journalism.

that, as its name suggests, presents itself as a traditional local news source (Martinez, 2022). The outlet is run by a one-time local political candidate (Masunaga, 2022).

The pink slime phenomenon has been brought to the FEC's attention on multiple occasions. The first relevant case (decided in 2019) involved whether a network of local news sites and papers in Illinois was entitled to the press exemption, given the network's apparent ties to Liberty Federal PAC, a political action committee operating in the state. At the core of the complaint filed with the Commission was the contention that the network of Illinois-based local news outlets (both print and online), nominally owned and operated by a company called Local Government Information Services (LGIS) but operating in collaboration with another organization called Locality Labs, was engaging in campaign communication on behalf of 2016 U.S. House of Representatives candidate Tonia Khouri.

Among the specific accusations in support of this contention were that: (a) print publications were appearing in voters' mailboxes for the first time just before the election; (b) the publications reproduced substantial amounts of Khouri campaign materials; (c) the publications were controlled by the Liberty Federal PAC (LGIS owner/publisher Dan Proft was also the chairman and treasurer of the Liberty Federal PAC); and (d) the sites and publications contained no identifying information or contact information related to the outlets' ownership or control (Federal Election Commission, 2019).

This brief summary represents only a superficial overview of the byzantine set of organizational arrangements and financial transactions undergirding LGIS, Locality Labs, the Liberty Federal PAC, and other associated organizations that are detailed in the FEC complaint and decision (Federal Election Commission, 2019; Savage, 2016). The key point here is that, when faced with these contentions, the FEC concluded that there was "insufficient information" to determine whether the press exemption should apply to LGIS or to Locality Labs. In dismissing the complaint without addressing its merits, the FEC concluded that "because the availability of the press exemption is dependent upon the publications' ownership and control, which at this stage is unclear, we do not need to reach an examination of whether the entities were acting within their legitimate press function here" (Federal Election Commission, 2019, p. 18).

The FEC's perspective on this case seems to have been that the burden was on the complainants to provide all information necessary for the Commission to determine the entity's ownership and control and that in the absence of that information, no further investigation or analysis was required by the Commission. For the FEC to refuse to gather the data and conduct the analysis necessary to resolve a complex ownership arrangement and to shift that responsibility to the complainant, despite the FEC's greater resources, greater ability to conduct investigations, and authority to compel the production of information, is troubling for a number of reasons. First, it seems to represent a dereliction of the FEC's regulatory responsibilities. In addition, it would seem to set a precedent –

and essentially cast a spotlight on a loophole – that could inform the efforts of future political actors seeking to disguise political influence efforts as legitimate journalism. The lesson here is to make the ownership/control structure between the political influence operation and the purported press entity as opaque and convoluted as possible, thereby increasing the burden on prospective complainants and discouraging further inquiry by the FEC.

The next relevant pink slime case involved an emerging left-leaning local news network that seems to have been launched in response to the sharp growth in networks of conservative local news sites. Specifically, a complaint submitted in to the FEC in 2020 requested the Commission consider whether Courier Newsroom, a news network with ties to the Democratic Party, was a political organization masquerading as a news organization and therefore should be held liable for misclassifying itself and subjected to the campaign finance regulations associated with political organizations (Americans for Public Trust, 2020). The complaint described Courier Newsroom’s reporting as an effort to “promote vulnerable House Democrats”; contended that Courier Newsroom was opaquely funded by Democratic Party-aligned figures; and suggested that Courier Newsroom was pushing out political advertisements under the guise of “hometown paper[s]” (Federal Election Commission, 2020, pp. 2–3). The complaint effectively called Courier Newsroom a ‘pink slime’ organization, a designation with which some media analysts have agreed (Arvinitis & Sadeghi, 2022; Thompson, 2020; Washington Post Editorial Board, 2022).

The FEC dismissed the complaint against Courier Newsroom, finding that the organization’s activities served a legitimate press function and that the organization was a press entity, not a political organization (Federal Election Commission, 2022b). In reaching this conclusion, the FEC presented its evaluation of the first step of the test by noting that “Courier and its affiliated state websites appear to publish a wide variety of content on both political and nonpolitical topics, as well as content focused on both national and local issues. That also appears to have been the case shortly before the 2020 general election” (Federal Election Commission, 2022b, p. 5). In support of this finding, the FEC cited several Courier Newsroom stories. This perusal of relevant websites led the FEC to conclude that “Courier’s contention that it regularly produces and distributes ‘both electoral and non-electoral content’ is supported by the content on its website, even immediately before the 2020 election” (Federal Election Commission, 2022b, p. 20).

If, indeed, the FEC’s goal is to determine whether an entity is “regularly” producing legitimate journalism, an investigation limited to reviewing the entity’s website is simply an inadequate level of either investigation or analysis. This is particularly the case now, when it has been well-documented how easily artificial intelligence can be (and is being) used to create sites that appear to be active news sites while actually engaging in no legitimate journalism (Brewster, 2024; Sideghi, et al., 2024). When an organization’s output is subject to more rigorous analysis, patterns can emerge that raise questions about the regularity and legitimacy of journalistic output – with the nature of

these patterns raising concerns about whether political influence is the primary objective. It is important to emphasize that the point here is not to contend that the FEC was incorrect in its conclusion that Courier Newsroom is a press entity, only that the Commission's assessment of the criteria it is required to evaluate was far too superficial.

These examples represent the kind of scenarios that are becoming more common and that strike at the core of the FEC's regulatory responsibility to determine the applicability of the press exemption. The analytical shortcomings identified in these cases build upon previous critiques that have raised questions about whether the FEC is exercising its press exemption authority with sufficient rigor (see, e.g., Pandey-Jorin, 2008; Shapiro, 2006). The next section recommends ways for the FEC to bring greater analytical precision and rigor to this increasingly important regulatory responsibility.

Bringing Greater Precision and Rigor to the FEC's Implementation of the Press Exemption

As was noted in the previous section, the FEC has determined the applicability of the press exemption by relying upon fairly superficial indicators. The question going forward is whether the focus on such "superficial considerations of form" (see *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 1986, p. 251) is adequate. By relying upon "superficial considerations of form," the FEC has essentially invited the kind of masquerading that we are witnessing today, in which political influence operations often coat themselves in the superficial trappings of a press entity.

Building on the analytic inadequacies identified in the previous section, this section recommends ways in which the FEC can bring greater precision and rigor to the determination of the applicability of the press exemption. At this political moment, when American democracy appears less stable than it has in generations and when the blurring of the distinction between journalism and political influence operations is playing a prominent role in fostering this instability, it seems particularly important that the FEC rise to the challenge at hand and rigorously implement its authority to be a safeguard against political influence operations masquerading as journalism.

The starting point for these recommendations is the two-step test delineated in *Reader's Digest Association v. Federal Election Commission* (*Reader's Digest Association v. Federal Election Commission*, 1981), which has guided the FEC's analysis of the press exemption. The first step involves determining whether the organization in question is a legitimate press entity. As the FEC decisions

discussed previously indicate, the Commission has employed criteria such as the frequency with which journalistic content is produced and the proportion of the organization's budget devoted to producing journalistic output (Federal Election Commission, 2010), although without any explicit empirical thresholds. For example, the Commission has employed the vague "substantial amount" criterion to the organization's budget. From this standpoint, additional rigor could be brought to the analytical process by the adoption of some specific empirical thresholds.

One could imagine, for example, a requirement that a press entity be defined in terms of an organization that devotes *at least half* of its budget (or, perhaps alternatively, at least half of its workforce) to the production and dissemination of actual journalism. Such a threshold would seem reasonable, in that it leaves ample leeway to reflect the fact that in today's economic climate, a news organization's production of journalism may very well need to be bundled with other product and service offerings for the news part of the organization to remain viable. For the press entity classification to apply, press entities need not be exclusively in the business of producing news, but news should be their primary mission.

Another general criterion that the FEC has employed, without a specific empirical threshold, is the frequency with which journalistic content is produced. The Commission frequently employs the term "regular basis" in relation to news output as a means of determining whether an organization merits classification as a press entity. This is a more challenging criterion to apply, given that today's news environment includes not only incredibly well-resourced news organizations producing substantial amounts of journalism daily, but also a growing number of upstart news organizations, often operating on shoestring budgets, with journalistic outputs that can be sparse and/or erratic. News organizations on both ends of this productivity continuum merit the press exemption.

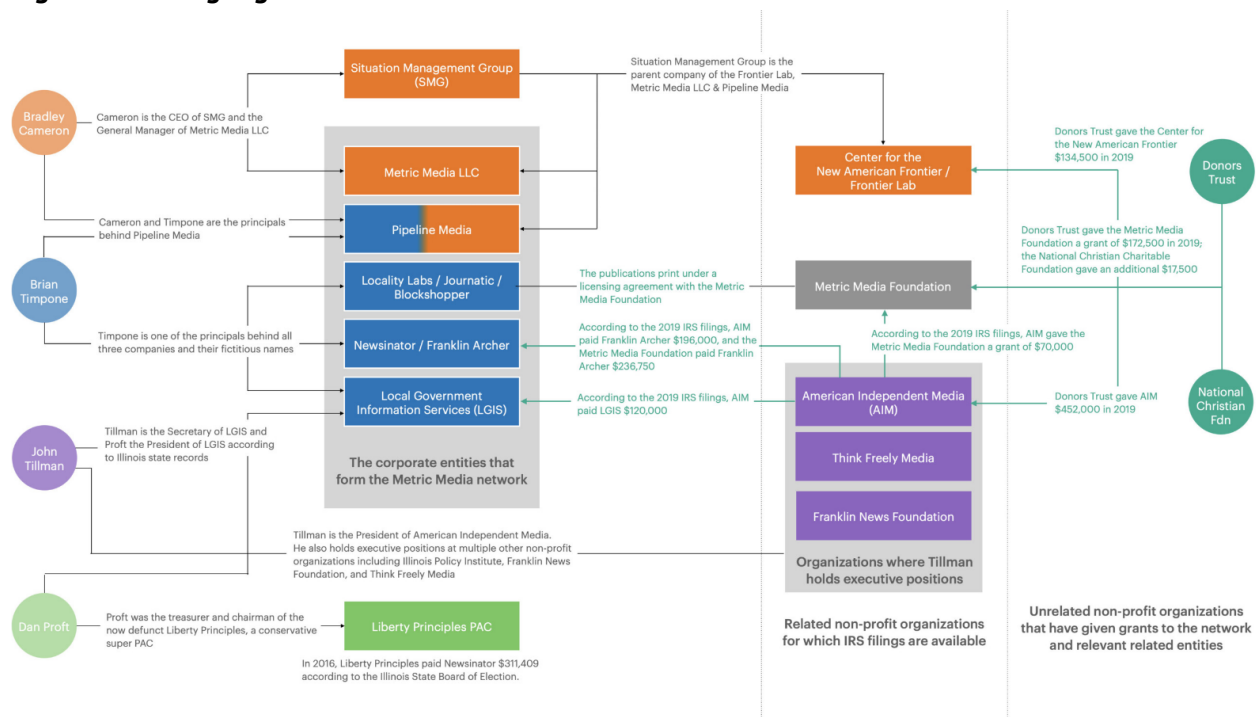
Further complicating this dynamic is the fact that AI-generated content can be cheaply produced at sufficient scale to effectively obscure the frequency with which actual human-generated journalism is being produced (Gold, 2024). This of course raises the larger question of if and, if so, how, reliance on AI-generated stories should factor into the press entity determination (a question that the FEC has yet to address). Regardless, employing a specific quantitative threshold for the amount and frequency of journalistic output in making the press entity determination seems inadvisable, given the variety of news organizations operating today. As will be discussed below, consideration of output dynamics is more appropriate in the second step of the test, in which the FEC evaluates the output of a press entity owned or controlled by a political party, committee, or candidate.

Moving then, to this second step, the first component involves determining whether the entity is owned or controlled by a political party, political committee, or candidate. As noted above, disguising ownership and control of a "news outlet" is a common strategy in today's media environment. If we look at the 'pink slime' networks, for example, we find that they are often characterized by what

appear to be deliberate efforts to conceal or misrepresent the true nature of their ownership or control – often by a political party, committee, or candidate.

Research by Columbia University’s Tow Center for Digital Journalism has uncovered the incredibly complex web of political action committees, conservative think tanks, foundations, and wealthy political donors that form the extended network of Metric Media, the nation’s largest network of conservative hyperlocal news sites (Bengani, 2022). Uncovering this network of actors and the flow of funds among them required extensive public records research (including IRS records), as well as the use of “threat intelligence tools,” such as RiskIQ, FarSight DNSB, and BuiltWith (for details, see Bengani, 2021), resources unlikely to be available to, or affordable by, many potential complainants. The complexity of just some of what the Tow Center uncovered is reflected in Figure 1, which shows, among other things, the flow of money among the various entities, the fictitious corporate names employed by some actors, and the role played by political action committees.

Figure 1: Untangling the Metric Media Network



Source: Bengani (2022).

The key point here is that intensive investigations are necessary to ascertain if, and to what extent, an entity seeking the press exemption is owned or controlled by a political party, committee, or candidate. Superficial inquiries into the nature of the ownership and control of press entities may have been adequate in the past, but that is no longer the case as non-profits, political action committees, political actors, and news outlets intertwine in their efforts to influence election

outcomes. The FEC must employ the kind of investigatory rigor reflected in the figure above if it is to meaningfully carry out its regulatory responsibilities.

The next question the Commission must consider is whether the activity in question represents a “legitimate press function,” which the Commission has defined as covering or carrying a news story, commentary, or editorial. Such activities, and the expenditures associated with them, are exempt from FEC regulations. This would seem to be a sufficiently stringent – and relatively straightforward – standard to apply to the activities that come before the FEC for consideration.

Where things become more challenging is in the FEC’s assessment of the activities of an organization that has been determined to be owned or controlled by a political party, candidate, or committee. In this situation, the activity in question is evaluated in terms of whether the activity “represents a bona fide news account . . . and is part of a general pattern of campaign-related news accounts that give reasonably equal coverage to all opposing candidates” (*11 CFR 100.132 -- News Story, Commentary, or Editorial by the Media.*, n.d.). There is much to unpack in this text that bears directly on the analytical approach the FEC should employ.

First, there is the requirement that the communication in question represents a “bona fide news account” – a phrase that, like “press entity,” has gone essentially undefined by the FEC. As noted above, the term “bona fide” seems to beg some sort of consideration of the legitimacy of what is being reported, despite the restrictions of the First Amendment against the government determining its truth or falsity – particularly in the political arena. Perhaps a viable approach would be one in which any communication that had been shown to be false by the growing network of fact-checkers (see, *e.g.*, Graves, 2018), some of which have begun fact-checking both politicians and media outlets (*PolitiFact | PunditFact*, 2023), could not be treated as a “bona fide news account.” Thus, the veracity determination would be delegated to non-governmental entities.

Next, there is the requirement that the reporting in question be “part of a general pattern of campaign-related news accounts that give reasonably equal coverage to all opposing candidates” (*11 CFR 100.132 -- News Story, Commentary, or Editorial by the Media.*, n.d.). It is inherent in this phrasing that the FEC’s analysis extend beyond the reporting in question to evaluate the broader output of the entity in question. Traditionally, in making this determination regarding a “regular pattern,” the FEC has relied on indicators such as publication and broadcast schedules (Federal Election Commission, 2018, 2022c). In this digital era, journalism is delivered in less discrete, self-contained packages. In such a context, it is necessary to more rigorously evaluate patterns of journalistic output.

For the FEC to meaningfully determine whether an entity is engaging in a regular and consistent pattern of reporting, one possibility is to employ the analytical approach utilized in recent research

examining the publication patterns of the Metric Media “pink slime” network. Specifically, previous research plotted story production over a multi-month time period, examining patterns across outlets and over time, related to factors such as story output over time, human-written versus algorithmically-generated stories, and geographic patterns in story production (Royal & Napoli, 2022). This work found that, for large stretches of time, the outlets in this network were essentially dormant, springing to life only to provide substantially more journalistic output under specific political circumstances. Amongst the findings of this research were that Metric Media sites in states in which the 2020 election outcome was being contested experienced massive jumps in human-produced stories (roughly 75 percent of which focused on election fraud claims). Human-written news stories on these sites plummeted between 64 and 95 percent in these states once Congress certified the election results, returning to their normal, negligible, levels of human-generated story output (Royal & Napoli, 2022).

Such findings would seem to have a direct bearing on whether an organization that is owned or controlled by a political party, candidate, or committee is genuinely engaged in a regular and consistent pattern of reporting. If such an organization’s journalistic output deviates this dramatically in response to particular political issues or campaigns, then it seems questionable whether the criterion of a regular and consistent pattern of reporting has been met. When the pattern seems to reflect an effort to influence a particular political outcome (as was the case in the above-referenced research), the case against granting the press exemption becomes even stronger. The FEC should engage in this type of output analysis when determining whether entities owned or controlled by a political party, candidate, or committee qualify for the press exemption.

Should, however, the Commission dig deeper yet, into the degree to which the entity in question provides “reasonably equal coverage to all opposing candidates”? This phrasing suggests that a fairly comprehensive and rigorous assessment of the totality of journalistic output over some prolonged period of time is necessary to determine how coverage is being allocated across different candidates. The notion of “balance” in journalism has been subject to a growing body of compelling criticism, particularly in terms of how notions of balance can lead to problems of false equivalency that help to legitimize extremism (see Napoli, 2021). However, it is important to remember that the FEC applies this criterion only in the narrow context of a press entity owned or controlled by a political party, candidate, or committee.

Within this narrow context, a case can be made for the FEC to systematically evaluate the extent to which an outlet’s output is overwhelmingly directed at one candidate or another (something it has not done to date). Methodologically, this is a relatively straightforward task (see, *e.g.*, Erlich, et al., 2024). Holding outlets controlled or owned by political parties, candidates, or committees to a different standard than independent news outlets is essential if the press exemption is to

meaningfully serve the rationale for its creation; to facilitate the distinction between political campaign communications and journalism.

However, if the notion of “equal coverage” is operationalized only in terms of quantity, then an outlet owned or controlled by a political party, candidate, or committee can presumably satisfy this criterion for the press exemption by simply devoting half of its coverage to positive stories of its preferred candidate and the other half to negative stories of the candidate it opposes. Such an outcome is certainly not in keeping with the spirit of the press exemption. Consequently, the application of the “equal coverage” standard most likely must take into consideration the valence of the coverage. Here, too, the academic literature provides ample methodological guidance to inform such analyses (see, e.g., Maier & Nai, 2020).

Conclusion

As the Supreme Court noted in *Citizens United v. FEC*, the landmark decision that essentially took a wrecking ball to much of American campaign finance regulation, given the technological changes affecting the news and information ecosystem, “the line between the media and others who wish to comment on political and social issues becomes far more blurred” (*Citizens United v. FEC*, 558 U.S. 310, 352 (2010)). Almost 15 years later, as efforts to disguise political influence as journalism become more common, sophisticated, and pernicious, the pendulum must swing back in the other direction if democracy is to function effectively. The authority invested in the FEC represents one mechanism for doing so and therefore must be applied with more precision and rigor.

The past few weeks have further demonstrated the significance of the FEC’s authority in this area. As this piece was going to press, the advocacy group End Citizens United filed a complaint with the FEC, alleging that Elon Musk’s interview with Donald Trump on X, and his accompanying endorsement of Trump’s candidacy, represented an unlawful corporate contribution. End Citizen United specifically contends that X does not represent a press entity in this context and that the interview/campaign event does not represent a legitimate press function. Thus, the press exemption clearly represents an important regulatory lynchpin for our contemporary media and political ecosystem (Muller, 2024).

One obvious objection to the recommendations being made here is that the First Amendment prohibits the government from distinguishing between entities that merit being categorized as “the press.” Although First Amendment arguments are beyond the scope of this analysis, it merits noting that the government has long provided exclusive benefits to organizations considered part of “the press” (e.g., postal subsidies), and that substantial legal scholarship has convincingly argued that the “or of the press” clause of the First Amendment should be interpreted as endorsing a certain degree of “press exceptionalism” (see, e.g., Collins, 1987; West, 2014, 2018).

It is also important to keep in mind the specific reasoning underlying the contemporary need to reinvigorate the FEC's press exemption authority – the rise of political influence operations masquerading as journalism. From this standpoint, it is well worth remembering that, in the wake of the *Citizens United* decision, Supreme Court justice and First Amendment absolutist Antonin Scalia was asked what Thomas Jefferson would think of the speech environment post-*Citizens United*. His reply: “The more speech the better. That’s what the First Amendment is all about. *So long as the people know where the speech is coming from*” (*Piers Morgan Tonight*, 2012, emphasis added). To paraphrase Justice Scalia, this is what the FEC's press exemption is all about. It is about assuring that people know where the speech is coming from. And so, even from Scalia's standpoint, regulations, such as the press exemption, that help to clarify for citizens the source of the speech they are consuming, would seem to be fundamentally compatible with the First Amendment.

A more pragmatic extension of the First Amendment objection is that making such a complex and nuanced determination as to whether an entity is a press entity or not is simply too fraught and challenging a task for government decision-makers. The reality, of course, is that government bodies already engage in a variety of similarly challenging and complex decisions that implicate speech rights, whether it is the FCC determining if specific broadcasts merit classification as obscenity or indecency, or the FTC determining whether specific advertisements are deceptive. Further, as legal scholar Sonja West (2016, p. 258) notes in relation to the courts and the press, “There is simply no reason to assume that when it comes to defining the press, the task of constitutional interpretation is unusually difficult.” The same logic transfers to the FEC.

Hopefully this analysis and recommendations serve as the starting point for a larger conversation about the role that our political, economic, and cultural institutions can – and should – play in the conferral of journalistic authority (see, e.g., Carlson, 2017). A variety of institutions play a range of roles. Digital platforms and search engines play a role, in terms of whether and when they apply the news organization label to an account, and in terms of how the application of that label affects the treatment and circulation of the organization's content (Napoli, 2022). Press associations play a role, through their decision-making about which organizations do, and do not, merit membership (Ihlebaek, & Ustad Figenschou, 2022). Foundations play a role through their funding allocation decisions (Konieczna, 2022). Media distributors, such as cable systems, satellite systems and streaming platforms, play a role through their carriage decisions and their placement/categorization of networks (Smith, 2021). And, of course, various government entities can play a role, through processes such as the granting of accreditation/access (Farhi, 2023) and through regulation and policy decisions involving issues such as eligibility for government funding (Local Journalism Sustainability Act of 2021, 2021) and the provision of legal protections (Ugland & Henderson, 2007).

All of these institutions have the right, and the responsibility, to make consequential decisions about whether an organization merits being considered part of “the press” and whether particular outputs merit classification as journalism. In today’s media and political environment, we need all of these institutions, along with the FEC, to be more demanding and more rigorous in how they do so, if our democracy is to function effectively.

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