



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)

Dr. Benjamin Carson, *et al.*)

MUR 6989

**CONCURRING STATEMENT OF
COMMISSIONER LEE E. GOODMAN**

This matter is profoundly important because, for the first time, the Federal Election Commission officially recognized that books and book publishers are exempt from regulation under the Federal Election Campaign Act of 1971, as amended (the "Act"). Although it has been obvious to defenders of a free press that books are exempt from regulation under the Act's Press Exemption,¹ it has taken 43 years for the Commission to resolve that question definitively.

In 2009, in *Citizens United v. FEC*, Chief Justice Roberts and Justice Alito asked a representative of the United States government—advocating on behalf of this agency—if the Federal Election Commission could ban a book that advocates the election or defeat of a candidate. The government's response was a startling "Yes."² The assertion was so "incredible"³ that the Supreme Court ordered re-briefing and reargument. That afforded the government an opportunity to reflect upon the wisdom of banning books, and the government changed (slightly) its tune when asked during reargument, asserting that it could ban "pamphlets," not books.⁴

¹ The Press Exemption: 52 U.S.C. § 30101(9)(B)(i); 11 C.F.R. §§ 100.73, 100.132.

² See, e.g., Transcript of Oral Argument at 29-30, *Citizens United v. FEC*, 558 U.S. 310 (2010) (No. 08-205), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2008/08-205.pdf.

CHIEF JUSTICE ROBERTS: It's a 500-page book, and at the end it says, and so vote for X, the government could ban that?

MR. STEWART: Well, if it says vote for X, it would be express advocacy and it would be covered by the pre-existing Federal Election Campaign Act provision.

MR. STEWART: Yes, our position would be that the corporation could be required to use PAC funds rather than general treasury funds.

CHIEF JUSTICE ROBERTS: And if they didn't, you could ban it?

MR. STEWART: If they didn't, we could prohibit the publication of the book using the corporate treasury funds.

³ See *id.* at 27 ("That's pretty incredible. You think that if -- if a book was published... that was the functional equivalent of express advocacy, that could be banned?") (Alito, J)).

⁴ Transcript of Oral Reargument at 66, *Citizens United v. FEC*, 558 U.S. 310 (2010) (No. 08-205), [https://www.supremecourt.gov/oral_arguments/argument_transcripts/2008/08-205\[Reargued\].pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2008/08-205[Reargued].pdf).

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What became of the *Citizens United* case, a case about the right of a non-profit filmmaker to distribute a political documentary film, is well known and has been highly publicized. What is less known is that Citizens United returned to the Commission requesting acknowledgement in a formal advisory opinion that its documentary films are exempt from regulation under the Press Exemption. The Commission obliged in Advisory Opinion 2010-08 (*Citizens United*), and *Citizens United* has been free to produce, distribute, and exhibit political documentary films ever since.

The Commission decided Advisory Opinion 2010-08 by a split vote (four affirmative votes to one nay vote, with one not voting).⁵ That split both manifested and foreshadowed an abiding disagreement over the parameters of the Press Exemption, a disagreement that has flared from time to time. For example, in Advisory Opinion Request 2010-25 (*RG Entertainment, Ltd.*), the Commission split three to three recognizing filmmaker *RG Entertainment's* entitlement to the exemption from regulation for a political documentary film that was to be released in over 400 theatres nationwide.⁶ In Advisory Opinion 2014-06 (*Ryan, et al.*), the Commission could not muster four affirmative votes acknowledging that *Grand Central Publishing*, a national book publisher, was exempt from regulation when it published and distributed a book authored by Congressman Paul Ryan addressing the state of the conservative movement.⁷ In MUR 6779 (*Joel Gilbert, et al.*), the Commission split three to three on a finding that *Joel Gilbert*, an

JUSTICE GINSBURG: Last time the answer was, yes, Congress could [ban newspaper ads or books containing express advocacy]. Is that – is that still the government's answer?

GENERAL KAGAN: The government's answer has changed Justice Ginsburg.

CHIEF JUSTICE ROBERTS: [A]nd if you say that you are not going to apply [the Act] to a book, what about a pamphlet?

GENERAL KAGAN: I think a – a pamphlet would be different. A pamphlet would be electioneering [.]

⁵ See Advisory Opinion 2010-08 (*Citizens United*), Certification (June 10, 2010).

⁶ See Advisory Opinion 2010-25 (*RG Entertainment, Ltd.*), Certification (Oct. 7, 2010); Advisory Opinion 2010-25 (*RG Entertainment, Ltd.*), Letter to Requestor (Jan. 6, 2011) (stating that the Commission did not approve a draft and could not issue an advisory opinion).

⁷ See Advisory Opinion 2014-06 (*Ryan, et al.*), Certification (July 23, 2014); see also Advisory Opinion 2014-06 (*Ryan for Congress*), Concurring Statement of Chairman Lee E. Goodman and Commissioners Matthew S. Petersen and Caroline C. Hunter; Federal Election Commission, Open Session (July 23, 2014), <https://www.fec.gov/updates/july-23-2014-open-meeting/> (including link to audio recording of the Commission's consideration of Advisory Opinion Request 2014-06); Paul Bedard, *FEC chair warns of chilling regulations, book ban on conservative publishers*, WASHINGTON EXAMINER (July 23, 2014), <http://www.washingtonexaminer.com/fec-chair-warns-of-chilling-regulations-book-ban-on-conservative-publishers/article/2551197>.

experienced documentary filmmaker, and his wholly owned media company Highway 61 Entertainment, were protected by the Press Exemption.⁸

In an effort to resolve these split votes, and clarify the exemption, in September 2016, I proposed an amendment to the Commission's Press Exemption regulation. The amendment would have expressly stated that books and moving pictures, in traditional format as well as digital format, are part of the press protected by the exemption.⁹ Unfortunately, that vote failed three to three.¹⁰ Like the government's representation to the Supreme Court in 2010, the failure of that amendment was startling to many observers.¹¹

But all's well that ends well. In this matter, in 2018, the Commission finally has found the consensus (albeit by a four to one vote) to recognize books as part of the press exempt from regulation under the Act. This is both a profoundly important legal development and marks an important milestone in the Commission's history.

Equally encouraging, the Commission's legal analysis of this outcome relies principally upon Advisory Opinion 2010-08.¹² The Commission's endorsement of Advisory Opinion 2010-08 here, and its extension to books, has the effect of recognizing two media as exempt from regulation: books and moving pictures. This is consistent with a long line of Supreme Court rulings holding that books and moving pictures are part of the press entitled to the protection of the Free Press Clause of the First Amendment.¹³

⁸ See MUR 6779 (Joel Gilbert, *et al.*), Certification (Feb. 23, 2016); see also MUR 6779 (Joel Gilbert, *et al.*), Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Lee E. Goodman and Caroline C. Hunter; MUR 6779 (Joel Gilbert, *et al.*), Concurring Statement of Commissioner Lee E. Goodman.

⁹ Federal Election Commission, Open Session (Sept. 29, 2016), Agenda Doc. No. 16-43-C, available at https://www.fec.gov/resources/updates/agendas/2016/intedoc_16-43-c.pdf.

¹⁰ REG 2013-01 (Draft Notice of Proposed Rulemaking on Technological Modernization), Amended Certification (Sept. 29, 2016).

¹¹ See, e.g., A. Barton Hinkle, *Does the First Amendment Cover Books, Movies or Netflix?*, REASON (Oct. 10, 2016); Paul Bedard, *FEC war: Dems reject call to protect Internet news, talk radio from regs*, WASHINGTON EXAMINER (Oct. 5, 2016).

¹² See MUR 6989 (Dr. Benjamin Carson, *et al.*), Factual & Legal Analysis at 10-12; MUR 6989 (Dr. Benjamin Carson, *et al.*), First Gen. Counsel's Rpt. at 11-13; see also MUR 6989 (Dr. Benjamin Carson, *et al.*), Certification (Feb. 8, 2018).

¹³ See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64 n.6 (1963) ("The constitutional guarantee of freedom of the press embraces the circulation of books as well as their publication") (citing *Lovell v. Griffin*, 303 U.S. 444, 452 (1938)); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948) ("We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment.").

I am gratified that this issue of profound national and Constitutional importance was resolved in favor of the liberty of a free press at my last meeting as a Commissioner of the Federal Election Commission.¹⁴ My work on this issue is done.



Lee E. Goodman
Commissioner

Feb. 15, 2018
Date

¹⁴ See Resignation Letter of Commissioner Lee E. Goodman (Feb. 7, 2018), https://www.fec.gov/resources/cms-content/documents/2765_001.pdf.