FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

ADVISORY OPINION 2023-10
(SONY PICTURES TELEVISION)

CONCURRING STATEMENT OF CHAIRMAN SEAN J. COOKSEY

Today, the Commission affirmed that the media exemption in the Federal Election Campaign Act of 1971, as amended (the "Act"), protects Sony Pictures Television's ("Sony") production and distribution of *The Good Doctor*, a fictional television series whose cast includes Hill Harper, a current candidate in Michigan's 2024 Democratic Senate primary. I agree with the advisory opinion's conclusion.[1] I write separately to emphasize that the First Amendment compels the same outcome, irrespective of the media exemption's application.

This Advisory Opinion Follows the Commission's Media Exemption Precedents

Our conclusion that Sony's production and distribution of *The Good Doctor* is protected under the media exemption accords with a long line of Commission precedent instructing us to "read the press exemption [ ] broadly, consistent with the Act's legislative history."[2] These precedents have applied the media exemption "to news stories, commentaries, and editorials no matter in what medium they are published," and afforded protection to news content and commentary appearing "in both traditional media and on the Internet."[3]

While neither the Act nor Commission regulations define "commentary" for purposes of the media exemption,[4] our precedents have not limited "the issues permitted to be discussed or the format in which they are to be presented under the 'commentary' exemption."[5] On several

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[1] While I voted to approve this advisory opinion, I remain convinced that the first part of the Commission's two-step analysis for applying the media exemption—which asks whether the organization in question is a "press entity"—is both constitutionally suspect and increasingly impracticable, as I have previously explained in depth. *See* Statement of Reasons of Commissioner Sean J. Cooksey (Apr. 22, 2022), MUR 7789 (Courier Newsroom, *et al.*).

[2] Advisory Op. 2010-08 (Citizens United) at 4. Congress made clear when it codified the media exemption as part of the 1974 amendments to the Act that "it is not the intent of the Congress in the present legislation to limit or burden in any way the first amendment freedoms of the press and of association. Thus, [the media exemption] assures the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns." H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. at 4 (1974).

[3] Explanation and Justification for the Regulations on Internet Communications, 71 Fed. Reg. 18,589, 18,608 (Apr. 12, 2006) ("Internet Communications"). *See also* Statement of Reasons of Commissioner Sean J. Cooksey at 2 (Apr. 22, 2022), MUR 7789 (Courier Newsroom, *et al.*) ("In recent years, the Commission has sanctioned the press activities of blogs, news-aggregating websites, message boards, digital streaming services, satellite radio broadcasts, webcasts, documentary films, and more.").

[4] *See* 52 U.S.C. § 30101(9)(B)(i); 11 C.F.R. §§ 100.73, 100.132.

[5] Advisory Op. 1982-44 (DNC/RNC) at 3.

occasions, the Commission has made clear that the concept of "commentary" within the media exemption reaches fictional works and entertainment, along with discussion of actual news items.[6] Indeed, there is no clear or workable division between the two: today and throughout history, individuals have engaged in political commentary through works of fiction, satire, artistic expression, and many other media.[7] Take, for example, Advisory Opinion 2003-34 (Showtime). There, the Commission concluded that *American Candidate*—a reality TV series in which participants ran as candidates in a simulated presidential campaign—was a type of "'commentary,' within the meaning of the Act and the regulations."[8] The Commission explained that "no contribution or expenditure will result from payments for the production (including payments received for 'product placements'), promotion, distribution, or licensing of rights, even if statements that expressly advocate the election or defeat of a clearly identified Federal candidate are included," and regardless of "the extent that actual Federal candidates or officeholders are depicted or discussed in the series or the [series] websites."[9]

This advisory opinion is much simpler by comparison. Unlike in Advisory Opinion 2003-34, the requestor here has given no indication that actual federal candidacies might be depicted or discussed in *The Good Doctor*, or that the show will advocate for any federal candidate's election in either express or implicit terms.[10] Although a current candidate for federal office is part of *The Good Doctor*'s regular cast, the plot of the show is fictional and has no relation to real or fictitious elections, including cast member Hill Harper's 2024 Senate campaign. The show is a form of "commentary," and as a result, Sony's costs in making and distributing it fall squarely within the protections of the media exemption.

The First Amendment Precludes Commission Regulation of *The Good Doctor*

Even without the media exemption, however, the First Amendment's guarantees of free press and speech preclude the Commission from regulating the costs associated with *The Good Doctor* as contributions or expenditures.

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6 *See* Internet Communications, 71 Fed. Reg. at 18,610 (observing that "a 'periodical publication' means 'a publication . . . containing articles of news, information, or *entertainment*'" (emphasis added) (quoting Advisory Op. 1980-109 (James Hansen) at 2)); Advisory Op. 2003-34 (Showtime); MUR 3500 (Brown for President, *et al.*) (publication of satirical political cartoon *Doonesbury* was covered by media exemption and therefore not a contribution or expenditure).

7 *See*, *e.g.*, *McConnell v. FEC*, 540 U.S. 93, 282 (2003) (Thomas, J., concurring in part and dissenting in part) ("First Amendment protection was extended to that fundamental category of artistic and entertaining speech not for its own sake, but only because it was indistinguishable, practically, from speech intended to inform."); *Winters v. New York*, 333 U.S. 507, 510 (1948) ("The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine.").

8 Advisory Op. 2003-34 (Showtime) at 3.

9 *Id.*

10 *See* AOR002 ("No past or planned episodes of *The Good Doctor* refer to Mr. Harper's candidacy, much less advocate for his election. Indeed, the only reference to the name 'Hill Harper' on the show is in the brief credit sequence at the opening of each episode.").

Congress explicitly intended for the Act *not* "to limit or burden in any way the first amendment freedoms of the press and of association,"[11] and the Supreme Court has said, unequivocally, that "entertainment, as well as news, enjoys First Amendment protection."[12] The Court has specifically recognized that "motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee."[13] In the Court's estimation, the constitutional protection given to the many varieties of entertainment available to Americans today is "based not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas."[14]

Therefore, if the Commission had concluded that the media exemption applied only to traditional news commentary and not to fictional entertainment like *The Good Doctor*, the First Amendment would still proscribe our efforts to regulate it. Purely fictional television programming offered for the public's entertainment and enjoyment, even if it features a federal candidate in a leading role, is outside the purview of the Federal Election Campaign Act and of this agency, whose authority is circumscribed by the statute and the Constitution.[15] Regardless of its creative merits or artistic value, *The Good Doctor* is a form of expression protected under the First Amendment and entirely beyond the Commission's jurisdiction.

Sean J. Cooksey
Chairman

January 11, 2024
Date

[11] H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. at 4 (1974).

[12] *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 578 (1977); *Leathers v. Medlock*, 499 U.S. 439, 444 (1991) ("Cable television provides to its subscribers news, information, and entertainment. It is engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the 'press.'"); *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.").

[13] *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981). *See also Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) ("The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform."); *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.").

[14] *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978); *see also Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) ("It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by [federal agencies].").

[15] *See* 52 U.S.C. § 30106.