SELECTED COURT CASE ABSTRACTS
1976—MARCH 2002

This collection of abstracts, prepared by the FEC's Information Division, includes court cases pertinent to the Federal Election Campaign Act of 1971, as amended. Most of the abstracts originally appeared in the Commission's monthly newsletter, the *Record.* This edition includes *Record* summaries through the March 2002 issue.

The Information Division updates this collection annually.

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AKINS v. FEC (91-2831)

On June 9, 1992, the U.S. Court of Appeals for the District of Columbia Circuit, in a *per curiam* order, directed the district court to clarify its order of January 21, 1992. (Civil Action No. 92-5124.) In that order, the district court had required the FEC to "issue a final decision on the merits of the Plaintiffs' administrative complaint forthwith, and in no event later than 4 p.m. on May 29, 1992."

The court of appeals stated that it found the above language confusing: "While it could be interpreted, as the FEC has suggested, as a direction to the agency to take final action by May 29, we question this interpretation because the district court has not found that the FEC's failure to act on appellees' administrative complaint was 'contrary to law' as required by 2 U.S.C. §437g(a)(8)(C)."

The court further stated: "We would have serious doubts about the propriety of an order compelling the FEC to take final action absent a finding by the district court that the agency's failure to act was 'contrary to law.' Upon clarification, the district court should allow the FEC sufficient time for any action the clarified order may contemplate."

(The FEC had interpreted the order as a mandatory deadline for final action and had asked the district court to clarify the order by deleting that language. When the court refused, the agency filed an appeal.)

In response to the directions from the court of appeals, the district court issued a new order on June 26, 1992. Stating that its previous order "was not intended as an injunction," the district court reopened the case to decide the "contrary to law" issue. However, shortly thereafter, on July 7, 1992, the court dismissed the case as moot since the FEC had completed action on the administrative complaint (MUR 2804). Civil Action No. 91-2831 (CRR).

Source: FEC *Record*, August 1992, p. 11.

Akins v. FEC, No. 91-2831 (D.D.C. Jan. 20, 1992); *on remand*, No. 92-5124 (D.C. Cir. June 9, 1992); *on remand* (D.D.C. June 26, 1992).

AKINS v. FEC (92-1864)

On September 29, 1995, the U.S. Court of Appeals for the District of Columbia ruled that the FEC's use of a "major purpose test" to narrow the definition of "political committee" was valid, that its application of the "major purpose test" in this case was reasonable, and that its investigation into the matters raised by appellants was adequate. The court therefore affirmed the district court's ruling dismissing appellants' complaint that the FEC's actions were contrary to law.

On December 6, 1996, the U.S. Court of Appeals for the District of Columbia Circuit, sitting en banc, reversed the district court's decision.

On June 1, 1998, the U.S. Supreme Court ruled that Mr. James E. Akins and several other former government officials had standing to challenge in federal court the Commission's dismissal of an administrative complaint they filed in 1989 against the American Israel Public Affairs Committee (AIPAC). The Supreme Court also referred questions about the membership status of AIPAC members to the Commission.

Administrative Complaint

On January 9, 1989, Mr. Akins and his associates filed an administrative complaint with the FEC alleging that AIPAC, an organization that lobbies public officials and disseminates information about federal candidates and officeholders, failed to register and report as a political committee, after it had made contributions to and expenditures on behalf of federal candidates in excess of $1,000.

The Federal Election Campaign Act (the Act) defines a political committee as any committee, association or other group that receives contributions or makes expenditures to influence federal elections in excess of $1,000 during a calendar year. 2 U.S.C. §431(4)(A). However, a statutory exception to the definition of expenditure allows membership organizations to make disbursements of more than $1,000 for campaign-related communications to their members, without their counting as contributions or expenditures.

AIPAC claimed that its communications to its members fell within this exception and, therefore, that it did not have to register as a political committee or disclose any of its financial activities to the FEC.

The FEC did not agree. In its view, AIPAC's disbursements did qualify as expenditures because its members did not qualify as members under the Act. The Commission, nonetheless, concluded AIPAC was not subject to the registration and disclosure rules applicable to political committees. The Commission believed that,

because AIPAC's major purpose was not influencing federal elections, it did not qualify as a political committee even though it had made expenditures in excess of $1,000. The Commission dismissed the complaint.

District and Appellate Courts Decisions

Mr. Akins and the other plaintiffs filed suit in U.S. District Court for the District of Columbia charging that the FEC failed to proceed on the administrative complaint and challenging the Commission's interpretation of what constitutes a political committee. The district court ruled in favor of the FEC, agreeing with the "major purpose" test—that an organization that receives contributions or makes expenditures of more than $1,000 becomes a political committee only if its major purpose is the influencing of federal elections.

The U.S. Court of Appeals for the District of Columbia Circuit affirmed the lower court ruling, but an en banc panel of the same appellate court reversed the district court decision. The en banc panel, referencing both *Buckley v. Valeo* and *FEC v. Massachusetts Citizens for Life, Inc.*, found that the major purpose test can only be applied to organizations that make independent expenditures, not contributions, which is what was in question in the administrative complaint against AIPAC. The court also rejected the Commission's argument that the appellants lacked standing to bring their claim to federal court. On behalf of the FEC, the solicitor general appealed the decision to the Supreme Court.

Supreme Court Decision

The Supreme Court focused its opinion on the three-pronged test of standing—which a plaintiff must demonstrate to show there is a "case" or "controversy" under Article III of the U.S. Constitution—injury in fact, causation and redressability. The high court also found that the plaintiffs' inability to obtain information about AIPAC's campaign-related finances satisfied prudential standing because it was the kind of injury that the Act seeks to address.

Injury in Fact. The Supreme Court found that the injury in fact in this case was that the plaintiffs were prevented from obtaining information about AIPAC's donors and the organization's campaign-related contributions and expenditures. It said that there is no reason to doubt that this information would have helped the plaintiffs evaluate candidates for public office, especially those candidates who received assistance from AIPAC. Thus, the court said, the injury in this case is both "concrete" and "particular." The FEC argued that the lawsuit involved only a "generalized grievance" shared by many (a kind of grievance for which standing usually is not conferred); the Supreme Court disagreed. In such cases of "generalized grievance," the court said, the harm is usually "of an abstract and indefinite nature"—not the kind of concrete harm that the court found here.

The court concluded that, "[T]he informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts."

Causation and Redressability. The high court also found that the harm asserted by the plaintiffs was "fairly traceable" to the FEC's decision to dismiss its administrative complaint, and that the courts have the power to redress this harm.

The Supreme Court also rejected the FEC's argument that, because the agency's decision not to undertake an enforcement action is generally an area not subject to judicial review, 2 U.S.C. § 437g(a)(8) should be interpreted narrowly.

"Major Purpose" Test

With regard to the "major purpose" test, the Supreme Court referred the matter back to the FEC because of the uncertainty of the "membership" issue as applied to AIPAC.

Source: FEC *Record*, May 1994, p. 4; December 1995, p. 1; February 1997, p. 1; and July 1998, p. 1.

Akins v. FEC, No. 92-1864 (JLG) (D.D.C. Aug. 11, 1993) (on motion for amended complaint); (D.D.C. Dec. 8, 1993); (D.D.C. Mar. 30, 1994) (opinion); 66 F.3d 348 (D.C. Cir. 1995), *rev'd*, 101 F.3d 731 (D.C. Cir. 1996) (*en banc*), *vacated and remanded*, 118 S. Ct. 1777 (1998).

ALBANESE v. FEC

On March 12, 1996, the U.S. Court of Appeals for the Second Circuit affirmed the district court's decision to dismiss this case for lack of standing.

Background

This suit was brought by Sal Albanese, who chose not to challenge Representative Susan Molinari in 1994 after his unsuccessful attempt to unseat her in 1992, and on behalf of a number of his supporters.

In their original suit, plaintiffs challenged the constitutionality of the federal electoral system on the grounds that it financially handicapped campaigns to unseat an incumbent, thus discouraging potential candidacies. In an amended complaint, they specifically challenged the constitutionality of the Federal Election Campaign Act (the Act)—alleging that it authorizes the use of private monies in federal elections—and the franking privileges enjoyed by incumbents.

District Court Ruling

In determining that plaintiffs lacked standing to bring this suit, the court applied the three-part test for standing; this test requires plaintiffs to identify (1) an actual injury that (2) is caused by the challenged act and (3) is likely to be redressed by the relief requested. The court found that plaintiffs in this case failed all three parts of this test.

Plaintiffs failed the first part because plaintiffs represented a potential candidate and supporters of his would-be campaign, rendering their alleged injury "abstract and conjectural." For instance, their alleged injury that large contributors diminish the influence of those who cannot give as much was "abstract and remote" in this case since the campaign that plaintiffs wished to support did not exist.

Plaintiffs failed the second part because, since their alleged injury was theoretical, they could not provide tangible evidence that the injury was caused by the Act. The court noted, "We will never know how much money might have been contributed to [Albanese's campaign] and how successful he might have been at the polls . . . ." The court further stated that, "Albanese opted not to participate in the election process; he was not prevented from doing so." The alleged injuries, therefore, were not traceable to the Act.

Lastly, plaintiffs failed the third part because their suggested remedy—to declare the Act unconstitutional—would not redress the injury. The court stated, "[If] plaintiffs' goal is to eliminate the contribution of private funds to politicians and thereby level the electoral playing field, declaring the [Act]—a statute which *limits* such contributions—unconstitutional cannot be said to redress plaintiffs' injury."

Additionally, the court cited *Buckley v. Valeo* as a legal precedent upholding the constitutionality of the Act, and several other court decisions similarly upholding the constitutionality of the franking statute.

In closing, the court declared that it was outside its jurisdiction to address the plaintiffs' grievance, and that plaintiffs had to seek relief through the legislative and executive branches of government: "To the extent that the plaintiffs believe that a modification of the process would enhance its integrity, they must make the case for the validity of that belief with the political branches of our government. For just as fundamental to the political order of this democracy is the doctrine of separation of powers and the limited jurisdiction conferred upon the federal judiciary within that political order."

Source: FEC *Record*, July 1995, p. 8; and May 1996, p. 4.

Albanese v. FEC, 884 F. Supp. 685 (E.D.N.Y. 1995), *aff'd*, 78 F.3d 66 (2d Cir. 1996).

AFL-CIO AND DNC SERVICES CORP./DNC v. FEC

On December 19, 2001, the U.S. District Court for the District of Columbia found that the FEC's decision to disclose documents obtained during an investigation of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and DNC Services Corporation/DNC (DNC) was arbitrary, capricious and contrary to law. The court ruled that the confidentiality provision of the Federal Election Campaign Act (the Act) and an FEC regulation prohibit the Commission from making public the investigatory files of matters under review (MURs). The court also found that the Commission is required to redact names and other individual identifying information from the files prior to release under the Freedom of Information Act (FOIA).

Background

On June 17, 1997, the Commission found reason to believe that the plaintiffs had violated the Act during the 1995-96 election cycle (MURs 4291, *et al.*). At the conclusion of its investigation, the Commission voted to take no further action on MURs 4291, *et al*. and to close the files. In keeping with its long-standing practice of disclosing the investigatory record once a MUR is closed, the Commission planned to make public a portion of the investigatory file. 11 CFR 5.4(a)(3) and (4).

The plaintiffs claimed that public disclosure of the files would cause irreparable injury by revealing confidential information to their political opponents, the media and the public, and by chilling the plaintiffs' future efforts to engage in political activities. The plaintiffs asked the Commission not to make the documents public. The Commission denied their requests, and the AFL-CIO and DNC filed suit. On July 17, 2001, the U.S. District Court for the District of Columbia granted the plaintiffs' request for a preliminary injunction barring the Commission from publicly releasing certain documents relating to the investigation until the court made a final decision in this case.

Court Decision

The plaintiffs requested summary judgment from the court, arguing that disclosure of the documents would violate the confidentiality provision of the Act, which states that:

"Any notification or investigation made under [the enforcement] section shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made." 2 U.S.C. §437g(a)(12)(A).

The plaintiffs further claimed that publicizing the MUR documents would violate:

- FOIA exemptions at 5 U.S.C. §552(b)(3) and (7)(C);
- The Privacy Act (5 U.S.C. §522a(b)); and
- The First Amendment.

Confidentiality Provision of the Act

The Commission argued that the Act only protects the confidentiality of ongoing investigations. Once a MUR is closed, the Act requires the Commission to make public the conciliation agreement or the Commission's determination that the Act has not been violated. 2 U.S.C. §437g(a)(4)(B)(ii). The Commission asserted that the Act's confidentiality provision was intended to protect a MUR respondent from disclosure of the fact that the respondent is under investigation. When the Commission makes public its MUR determination, it also reveals the fact that the respondent has been investigated, leaving nothing to be protected by the confidentiality provision.

The court, however, concluded that the plain language of the Act barred the Commission from publicizing investigative materials and, thus, that the Commission's interpretation of the statute ran counter to congressional intent. 2 U.S.C. §437g(a)(12)(A). The court explained that, "Had Congress intended §437g(a)(12)(A) to expire upon the conclusion of an FEC investigation, it certainly knew how to draft language to accomplish that goal." The court found that the Act's provision requiring that MUR determinations be made public was a limited exception to the Act's confidentiality provision, not a directive to end the protection of that provision. 2 U.S.C. §437g(a)(4)(b)(ii). Moreover, the court concluded that publication of the materials would violate one of the Commission's regulations that implements the Act's confidentiality provision. 11 CFR 111.21(a).

FOIA Exemption

FOIA exemption 7(C) protects information compiled for law enforcement purposes that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy. 5 U.S.C. §552(b)(7)(C). The plaintiffs claimed that this exemption protected the identities and personal information of all individuals named in the investigative files. The Commission argued in response that:

- Individuals named in the files had a diminished expectation of privacy resulting from the Act's reporting requirements, its administrative enforcement procedures, the Commission's public disclosure

regulations and the potential for enforcement cases to be litigated in federal district court (2 U.S.C. 437g(a)(6) and (8));
- The public interest in the disclosure of the results of any FEC enforcement investigation outweighed the privacy interest of the named individuals; and
- Much of the information contained in the files was already in the public domain and could thus be disclosed despite the FOIA exemption.

The court rejected the Commission's claims concerning the public interest and individuals' expectations of privacy because the District of Columbia Circuit has established a categorical rule that an agency must exempt from disclosure the names and identifying information of individuals appearing in an agency's law enforcement files. Moreover, the court found that the Commission had failed to show that the majority of the names of individuals contained in the materials were already in the public domain.

Other Issues
The court, having found that disclosure would violate the Act and Commission regulations, as well as FOIA exemption 7(C), did not reach the merits of the plaintiffs' First Amendment or Privacy Act claims. The court granted the plaintiffs' motion for summary judgment in this case and denied the Commission's motion for summary judgment.

Appeal

On February 15, 2002, the Commission appealed this case to the U.S. Court of Appeals for the District of Columbia Circuit.

Source: FEC *Record*, February 2002, p. 3; and March 2002, p. 5.

177 F. Supp.2d. 48

ANDERSON v. FEC (80-0272)

On April 10, 1981, the U.S. District Court for the District of Maine dismissed *John B. Anderson v. FEC* (Civil Action No. 80-0272P) in response to a motion to dismiss the suit filed by plaintiffs on the same day. The suit had been remanded to the district court after certification of constitutional questions to the U.S. Court of Appeals for the First Circuit. Several plaintiffs—John B. Anderson, a candidate in the 1980 Presidential elections, the National Unity Campaign 441a(d) Committee and three individual plaintiffs—had brought suit on September 8, 1980, asking the district court to certify the following constitutional questions to the appeals court:

- Does Section 441a(a)(1)(B), which entitles a national party committee to receive contributions of up to $20,000 per year from individuals, infringe on plaintiff's First and Fifth Amendment rights; and
- Does Section 441a(d), which permits a national party committee to make special "coordinated party expenditures" on behalf of its Presidential candidate, infringe on plaintiffs' First and Fifth Amendment rights?

Plaintiffs had also sought a preliminary injunction from the district court, directing the Commission to permit the application of Sections 441a(a)(1)(B) and 441a(d) to the National Unity Campaign 441a(d) Committee, which had registered as a political committee the day before plaintiffs filed suit.

District Court Ruling

On October 14, 1980, the district court certified plaintiffs' constitutional questions to the appeals court but denied plaintiffs' motion for a preliminary injunction. The court held that plaintiffs had not exhausted the administrative relief available to them under the election law. Moreover, the court noted that any injunction granted would have been permanent, rather than temporary, since the election would be held within two and one-half weeks of its ruling.

Appeals Court Ruling

On October 30, 1980, the appeals court granted the FEC's motion to remand the case to the district court for further fact finding. The court noted that, if plaintiffs had sought an advisory opinion from the FEC before filing suit, the court "...would likely have had more facts before us than we do presently and would have been better able to evaluate plaintiffs' constitutional claims."

Plaintiffs Seek Administrative Relief From FEC

On November 4, 1980, prior to seeking dismissal of their suit, plaintiffs requested an advisory opinion from the Federal Election Commission on the status of the

National Unity Campaign and the National Unity Campaign 441a(d) Committee as national party committees operating on Mr. Anderson's behalf. In AO 1980-131, issued on November 20, 1980, the Commission determined that neither committee qualified as the national committee of a political party and, therefore, that neither committee was entitled to receive up to $20,000 in contributions from individuals or to make coordinated party expenditures.

Source: FEC *Record*, July 1981, p. 6.

Anderson v. FEC, 634 F.2d 3 (1st Cir. 1980) (*en banc*).

ANDERSON v. FEC (80-1911)

On September 9, 1980, the U.S. District Court for the District of Columbia dismissed the suit, *John B. Anderson v. FEC* (Civil Action No. 80-1911). The court determined that there was no longer a need for a decision either on the FEC's motion to dismiss the suit or on the substantive issues raised in the suit.

In the suit, plaintiffs had sought an expedited ruling by the court that John B. Anderson would be eligible as an independent candidate for the same post-election public funding as that provided Presidential candidates of "new parties," if he received five percent or more of all popular votes cast in the 1980 Presidential general election and met other requirements of the Act. Such a ruling, plaintiffs told the court, would immediately make large bank loans available to the Anderson campaign.

The FEC had consistently argued that plaintiffs should have requested an advisory opinion from the FEC on the application of the Act and the Commission's new regulations to the Anderson campaign before seeking a court ruling. On August 13, plaintiffs did file an advisory opinion request (AOR 1980-96) with the FEC, and on September 4 the Commission issued an opinion declaring Mr. Anderson eligible for post-election public funding as the candidate of a new political party.

After issuing the Anderson opinion, the FEC filed a supplement to its motion to dismiss the suit, submitting the opinion and arguing that it fully supported its consistent position that the case should be dismissed. Plaintiffs, who had opposed the FEC's motion to dismiss, also filed their own motion to dismiss the case as moot.

Source: FEC *Record*, October 1980, p. 6.

ANTOSH v. FEC (84-1552 and 84-2737)

On August 30, 1984, the U.S. District Court for the District of Columbia issued an order granting the FEC's motion to dismiss *Antosh v. FEC* (Civil Action No. 84-1552) and denying the plaintiff's motion to file a supplemental complaint. On September 13, 1984, the court issued an opinion explaining the ruling. Following the court's order, Mr. James E. Antosh filed a second suit with the court on September 6, 1984 (Civil Action No. 84-2737). The second suit included a request by the plaintiff that the district court certify two constitutional claims to the U.S. Court of Appeals.

On January 5, 1988, the court ruled that Mr. Antosh lacked standing in his second suit to seek the court's certification of his constitutional questions to the appeals court. The court granted a motion by the FEC to dismiss the counts of his complaint which included the constitutional questions.

On March 24, 1988, the district court issued an order granting a further motion by the FEC for a summary judgment in the second suit. The court's order dismissed the remaining two counts of Mr. Antosh's complaint.

First Suit

Mr. Antosh, a registered voter in Oklahoma, is president of Shawnee Garment Manufacturing, Inc. On December 2, 1983, he filed an administrative complaint with the FEC alleging that the separate segregated funds of three international unions were affiliated with the AFL-CIO's political action committee (PAC)[1] within the meaning of 2 U.S.C. §441a(a)(5). MrAntosh claimed that the four political committees had failed to disclose their affiliation in their respective Statements of Organization and, in making contributions to several political committees, had exceeded their single $5,000 contribution ceiling. (See 2 U.S.C. §§433(b)(2) and 441a(a)(2)(A).)

Furthermore, his complaint claimed that the election law and FEC Regulations recognized automatic affiliation between business federations and their members, on the one hand, while only a discretionary affiliation between a labor federation and its members, on the other. The plaintiff had alleged that this was discriminatory treatment in violation of the First and Fifth Amendments.

Pursuant to 2 U.S.C. §437g(a)(8), MrAntosh filed his first suit against the FEC in the district court on May 17, 1984. The plaintiff asked the court to declare that the FEC's failure to act on his administrative complaint within 120 days was contrary to law and to issue an order directing the FEC to proceed with an investigation into the complaint within 30 days.

On July 10, 1984, the Commission dismissed Mr. Antosh's administrative complaint, finding no reason to believe that violations of the election law had occurred. On the same day, the Commission also filed a motion with the court to dismiss Mr. Antosh's suit as moot. On July 23, 1984, Mr. Antosh requested that the court deny the FEC's motion to dismiss his case and grant his motion to file a supplemental complaint. In his proposed supplemental complaint, Mr. Antosh requested the court to declare that the FEC's dismissal of his administrative complaint was contrary to law, and to certify his constitutional questions to the appeals court. The court found, however, that Mr. Antosh's July 23 request did not constitute a supplement to his original suit because, unlike the original request, the motion did not deal with delays in processing his administrative complaint, but rather it dealt with the merits of the FEC's decision to dismiss the complaint. The court therefore decided that, under procedural rules, Mr. Antosh had to file a separate suit with the court.

Second Suit

On September 6, 1984, Mr. Antosh filed a second suit with the district court to challenge the Commission's dismissal of his complaint. On December 3, 1984, pursuant to 2 U.S.C. §437h(a), he asked the district court to certify two constitutional claims to the appeals court. Specifically, he alleged that several provisions of the Federal Election Campaign Act and FEC regulations provided preferential treatment to labor organization PACs over trade association PACs. Mr. Antosh claimed that these distinctions violated the First and Fifth Amendments. Furthermore, Mr. Antosh asked the court to declare that the FEC's dismissal of his administrative complaint was contrary to law and that both the FEC and former Commissioner Thomas E. Harris had violated his rights to due process in refusing to disqualify Commissioner Harris from the agency's consideration of his administrative complaint.[2] (Prior to his appointment to the Commission in 1975, Commissioner Harris had served as counsel for the AFL-CIO. Mr. Antosh claimed that Mr. Harris had signed a factual stipulation on behalf of the AFL-CIO in a 1973 case that was germane to Mr. Antosh's suit.)

The FEC filed an opposition to Mr. Antosh's motion for certification of his constitutional claims and filed an additional motion to dismiss them. The agency argued that Mr. Antosh lacked standing to raise the constitutional questions and that federal courts had already substantially settled the questions he raised.

In January 1988, the court granted the FEC's motions and dismissed Mr. Antosh's constitutional claims. The court found that, although the plaintiff had standing to raise his questions under the election law, he lacked standing under Article III of the Constitution. The court concluded that Mr. Antosh failed to demonstrate the

kind of injury required by Article III, that is, "some actual or threatened injury which is traceable to illegal conduct by the defendant" and which "is likely to be redressed by a favorable ruling." The court first rejected Mr. Antosh's claim that, as a businessman who might contribute to trade association political action committees, his voice had been diminished in the political process by the law's alleged discrimination against such committees, thereby violating his rights under the free speech provision of the First Amendment. The court then rejected Mr. Antosh's claim that he had a personal stake in the law's alleged discrimination against corporate political action committees by virtue of his position as president of a corporation that was a member of trade associations, thereby violating his rights under the First Amendment and under the due process clause of the Fifth Amendment.

In March 1988 the district court ruled on the rest of the counts in Mr. Antosh's suit. With regard to Mr. Antosh's allegation that the FEC's dismissal of his administrative complaint was contrary to law, the court held that the FEC had "reasonably interpreted" the provision of the election law governing possible affiliation between the political committees named in the complaint. Consequently, the agency's dismissal of the complaint was not contrary to law.

The FEC had argued that the legislative history of Section 441a(a)(5) demonstrated that Congress had not intended to impose a single contribution limit on the AFL-CIO's PAC and the PACs of international unions affiliated with the AFL-CIO. The agency noted that it had consistently interpreted the provision this way.

The district court supported the FEC's view, noting comments made in 1976 by Congressman Wayne Hays, then Chairman of the House Ways and Means Committee and a sponsor of the 1976 amendments to the Act, saying that the membership of international unions in the AFL-CIO did not mean that the unions and the federation were to be treated as a single entity for the purposes of the 1976 amendments.

With regard to Mr. Antosh's claim that Commissioner Harris should have recused himself from the case, the court concluded that "the intervention of significant numbers of years [nine] certainly is sufficient to remove any taint." The court added that it "refuse[d] to find that an attorney, at the very least nine years later, cannot consider cases involving a former client, especially after the Commission has made a determination that he or she is capable of impartially addressing the individual facts of a case."

Source: FEC *Record*, November 1984, p. 5; March 1988, p. 10; and June 1988, p. 8.

Antosh v. FEC, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶9260 (D.D.C. Jan. 5, 1988), (D.D.C. Mar. 24, 1988) (unpublished opinion).

[1] The full title of the AFL-CIO's PAC is "American Federation of Labor Congress of Industrial Organizations, Committee on Political Education Political Contributions Committee (AFL-CIO COPE-PCC)."

[2] Commissioner Harris's third term on the Commission expired in April 1985. He continued to serve on the Commission, however, until autumn 1986, when he was replaced on the Commission by Scott E. Thomas.

ANTOSH v. FEC (84-3048)

On December 21, 1984, the U.S. District Court for the District of Columbia issued an order granting plaintiff's motion for summary judgment in *James Antosh v. FEC* (Civil Action No. 84-3048). The court found that the Commission's dismissal of an administrative complaint Mr. Antosh had filed with the FEC was contrary to law. On the same day, therefore, the court issued an order requiring the Commission to vacate its determination in the administrative complaint and to "reopen [the complaint] for further proceedings consistent with the court's opinion."

On July 1, 1987, the court denied Mr. Antosh's petition for award of attorneys' fees and costs incurred by him in the same suit.

Background

In filing his complaint with the FEC in May 1984, Mr. Antosh had alleged that:

- Engineers Political Education Committee/International Union of Operating Engineers (EPEC/IUOE) and Supporters of Engineers Local 3 Federal Endorsed Candidates (SELFEC), the separate segregated funds of the International Union of Operating Engineers and Engineers Local 3, had violated 2 U.S.C §441(a)(2)(A) by making contributions in excess of $5,000 to the 1982 primary campaign of Thomas P. Lantos, a Congressional candidate, and Mr. Lantos' principal campaign committee;
- Mr. Lantos and his principal campaign committee had, in turn, violated 2 U.S.C. §441a(f) by knowingly accepting the excessive contributions (totaling $3,600); and
- Mr. Lantos, his campaign treasurer and his principal campaign committee had violated Commission regulations by failing to report the excessive contributions accurately. See 11 CFR 104.14(d).

In a report submitted to the FEC in July 1984, the General Counsel noted, however, that based on an affidavit and a letter submitted by the respondents, of the $3,600 alleged to be excess contributions to the 1982 primary, $3,100 had in fact been designated for retiring debts of Mr. Lantos' 1980 general election campaign. The General Counsel therefore concluded that the two union PACs had made excessive contributions of $500 to Mr. Lantos' 1982 primary campaign rather than $3,600. Accordingly, the General Counsel recommended that "due to the small amount in question" (i.e., excessive contributions of $500), the Commission should find reason to believe that the respondents had violated the Act, but take no further action. The Commission followed the General Counsel's recommendations and closed the file on MUR 1719.

In October 1984 Mr. Antosh petitioned the district court to take action against the FEC for dismissing his administrative complaint.

The District Court's Ruling

The court noted that in determining whether an agency's determinations were "arbitrary and capricious," the court's standard of review had to be "a highly deferential one...which presumes the agency's action to be valid." In the case of Mr. Antosh's complaint, however, the court found a "problem in the Commission's treatment of this matter." Specifically, although EPEC/IUOE had designated $3,100 for retiring the Lantos committee's 1980 general election debt, committee reports indicated the contributions had been made during May and June 1981, several weeks after the committee had apparently extinguished the 1980 debt in mid-April 1981.

The court concluded that "the Commission dismissed MUR 1719 because it only involved violations of $500.... The violations in fact appear to involve considerably more money, and are thus more egregious than the Commission realized. For these reasons, the Commission's dismissal of MUR 1719 was arbitrary and capricious and, thus, contrary to law." See 2 U.S.C. §437g(a)(8).

Attorneys' Fees and Costs

The Equal Access to Justice Act states that only those courts which have jurisdiction over the underlying civil action may consider whether to award attorney's fees and costs to a prevailing party. Upon examination of its jurisdiction over the original suit, the district court concluded that, in fact, Mr. Antosh did not have standing to bring it. Consequently, the court could not grant plaintiff's petition for award of costs and attorneys' fees.

Under Article III of the Constitution, in order to have standing to sue, an aggrieved party must "show that he personally suffered some actual or threatened injury as a result of the putatively illegal conduct of the respondent..." (i.e., the Lantos campaign). Since Mr. Antosh was an Oklahoma resident, the court concluded that he would not be injured by a California candidate's acceptance of excessive contributions. "Plaintiff's interest in the California election is no different from the interest of any citizen who wishes to ensure that candidates abide by the rules that govern elections," the court said. The court noted that this conclusion was the same as that reached by the court in July 1986 in a "virtually identical" suit brought by Mr. Antosh against the FEC. (*Antosh v. FEC*, Civil Action No. 86-0179.)

Source: FEC *Record*, February 1985, p. 4; and January 1988, p. 8.

Antosh v. FEC, 599 F. Supp. 850 (D.D.C. 1984), 664 F. Supp. 5 (D.D.C 1987) (ruling on att'y fees).

ANTOSH v. FEC (85-1410)
CITIZENS FOR PERCY '84 v. FEC (85-0763)
COMMON CAUSE v. FEC (85-0968)
GOLAR v. FEC

On October 23, 1985, the U.S. District Court for the District of Columbia ruled on *Common Cause v. FEC*.[1] (Civil Action No. 85-968), *Golar v. FEC* (Civil Action No. 85-225) and *Citizens for Percy v. FEC* (Civil Action No. 85-763), three suits which had challenged the FEC's dismissal of administrative complaints.

Under the election law, a suit challenging the dismissal of an administrative complaint must be filed with a district court within 60 days after it is dismissed by the FEC. 2 U.S.C. §437g(a)(8)(B).The FEC had argued that the 60-day period begins at the time the Commission votes to dismiss an administrative complaint. The court, however, concluded that the 60-day period begins when a complainant actually receives the notice of dismissal.

Based on this ruling, the court dismissed *Citizens for Percy v. FEC* because the Committee had filed its suit more than 60 days after both the Commission's decision to dismiss the Committee's administrative complaint and its receipt of the FEC's notice of dismissal. On the other hand, the court decided not to dismiss the suits brought by Common Cause and Mr. Golar because plaintiffs had filed their respective challenges within 60 days of FEC notification.

In *Antosh v. FEC* (Civil Action No. 85-1410),[2] another district court reached a different conclusion on June 7, 1985. In a suit to review conciliations agreements entered into by the Commission, the court concluded that the 60-day period for filing suit began on "the date the Commission approved the conciliation agreements and they became effective." Finding that the matter had been filed within 60 days of that date, the court agreed to hear the case.

Source: FEC *Record*, December 1985, p. 7; and *Annual Report 1985*, p. 15.

Antosh v. FEC, 613 F. Supp. 729 (D.D.C. 1985).

Citizens for Percy '84 v. FEC, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶9229 (D.D.C. 1985).

[1] The district court decision in *Common Cause v. FEC* (85-0968) appears in alphabetical order, inserted with other Common Cause suits.

[2] For the district court decision in *Antosh v. FEC* (85-1410), see *Antosh v. FEC* (86-0179).

ANTOSH v. FEC (85-2036)

On April 4, 1986, the U.S. District Court for the District of Columbia issued an order which granted the FEC's motion for summary judgment in *Antosh v. FEC* and which dismissed with prejudice plaintiff Edward Antosh's complaint. (Civil Action No. 85-2036.) The court held that, under Article III of the Constitution, Mr. Antosh lacked standing to seek judicial review of the FEC's dismissal of his administrative complaint.

Background

A resident of Oklahoma, Mr. Antosh had filed his administrative complaint with the FEC in April 1984. In the complaint, he alleged that: (1) the Engineers Political Education Committee (EPEC), the separate segregated fund of the International Union of Operating Engineers, had violated the election law by making excessive contributions to Arizona Senator Dennis DeConcini's 1982 primary campaign (the campaign); and (2) the campaign had violated the election law by accepting the excessive contributions. The Commission determined that there was reason to believe EPEC had violated the election law by making excessive contributions to Senator DeConcini's reelection campaign. However, in a tie vote, the agency failed to find reason to believe that the campaign had violated the law.

On June 21, 1985, Mr. Antosh filed suit with the district court. He claimed that the FEC's determination that the campaign had not violated the law was arbitrary and capricious. In cross motions for summary judgment, Mr. Antosh claimed that he had standing to bring suit because, under the election law, "[a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party...may file a petition with the U.S. District Court for the District of Columbia." 2 U.S.C. §437g(a)(8)(A).

District Court's Ruling

In ruling that Mr. Antosh lacked standing to seek judicial review of the FEC's determination, the court referred to the requirement that an aggrieved party must "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant...." to establish standing under Article III.

The court held that Mr. Antosh failed to meet this requirement. As a citizen of and a registered voter in Oklahoma, Mr. Antosh had "suffered no greater injury, nor likely will he in the future, as a result of the Commission's failure to order a refund, than any other U.S. citizen who is neither a resident of nor with

franchise in Arizona." The court concluded that "plaintiff has no interest save his own, which is, at the moment, only that of a public-spirited spectator of Arizona elections."

Finally, the court noted that the standard for qualifying as an "aggrieved party" (eligible to seek judicial review for an administrative agency's determination) was higher than the standard for filing an administrative complaint with an agency. "Congress can permit anyone to engage in proceedings before them [administrative agencies]. But it cannot confer upon a participant at the administrative level the right to maintain a suit to review the agency's decision in federal court, no matter how grievously he may be offended by it.... "

The court did not address issues related to the merits of the FEC's administrative determinations or its own jurisdiction to review those determinations.

Appeals Court's Ruling

On August 13, 1986, the U.S. Court of Appeals for the District of Columbia Circuit granted Mr. James E. Antosh's motion to dismiss his appeal of the April 1986 decision handed down by the U.S. District Court.

Source: FEC *Record*, June 1986, p. 8; and October 1986, p. 7.

Antosh v. FEC, 631 F. Supp. 596 (D.D.C. 1986).

ANTOSH v. FEC (86-0179)

On July 15, 1986, the U.S. District Court for the District of Columbia issued an order which granted the FEC's motion for summary judgment in *Antosh v. FEC* and which dismissed with prejudice plaintiff Edward Antosh's complaint. (Civil Action No. 86-0179.) The court held that, under Article III of the Constitution, Mr. Antosh lacked standing to seek judicial review of the FEC's dismissal of his administrative complaint.

Background

Mr. Antosh filed suit against the FEC on grounds that, in two complaints, the agency's failure to order refunds of respondents' excessive contributions was contrary to law. The administrative complaints concerned excessive contributions made respectively by two labor organizations to Senators Edward Kennedy (MUR 1637) and Paul Sarbanes (MUR 1696) in 1984. The contributing committees were the Engineers Political Education Committee (EPEC), the Sheet Metal Workers International Association Political Action League (SMWIA) and the American Federation of Government Employees' Political Action Committee (AFGE). Having found that the respondents violated the law, the Commission required the labor organizations to pay civil penalties for their violations. Refunds by the candidates, however, were not required.

District Court Ruling

In ruling that Mr. Antosh lacked standing to seek judicial review of the FEC's determination, the court referred to recent decisions in two "virtually identical" suits filed by Mr. Antosh (*Antosh v. FEC*, Civil Action Nos. 85-1410 and 85-2036). In those rulings, the court held that Mr. Antosh had failed to meet the eligibility requirement for standing under Article III of the Constitution. Under this requirement, an aggrieved party must "'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the respondent.... '" Noting that the excessive contribution alleged in Mr. Antosh's suit had been made to Senatorial candidates in Massachusetts and Maryland, the court concluded that "plaintiff thus fails to satisfy the constitutional requisite of 'injury-in-fact.'"

Nor was the court persuaded by plaintiff's claim that he had suffered "injury-in-fact" in making contributions to nonconnected political committees which had, in turn,

made expenditures in connection with the Sarbanes and Kennedy reelection campaigns "because he is not eligible to vote in either Massachusetts or Maryland."

Source: FEC *Record*, September l986, p. 5.

Antosh v. FEC, No. 86-179, (D.D.C. July 18, 1986).

ATHENS LUMBER CO. v. FEC

On October 24, 1983, the U.S. Court of Appeals for the Eleventh Circuit issued an *en banc* opinion in *Athens Lumber Company v. FEC* upholding the constitutionality of 2 U.S.C. §441b(a) of the Federal Election Campaign Act (the Act). (Civil Action No. 82-8102.) The court's decision also reversed an earlier order by the U.S. District Court for the Middle District of Georgia which had dismissed the case on grounds that: (1) plaintiffs lacked standing to bring suit under the Act; and (2) plaintiffs failed to present a justiciable controversy for the federal courts' consideration. The appeals court remanded the case to the district court for entry of a judgment in favor of the FEC.

Plaintiffs' Claims

The Athens Lumber Company and its President John P. Bondurant filed the suit with the Georgia district court on July 27, 1981. Pursuant to Section 437h(a) of the Act,[1] plaintiffs asked the district court to certify their questions concerning the constitutionality of 2 U.S.C. §441b(a) to the *en banc* appeals court for the Eleventh Circuit. Plaintiffs claimed that this provision of the election law abridged First and Fifth Amendment rights by prohibiting corporations, labor organizations and national banks from making contributions and expenditures in connection with federal elections.

Plaintiffs further asked that the FEC be enjoined from initiating enforcement proceedings against them if the Athens Lumber Company participated in federal elections. At the same time, however, plaintiffs said that the company would not make expenditures or contributions in connection with federal elections until either: (1) 2 U.S.C. §441b was repealed or declared unconstitutional; or (2) the company obtained an opinion of counsel from the Commission stating that the proposed expenditures did not violate any federal or state law or regulation. Plaintiffs further argued that their uncertainty about a possible violation of the election law had deterred them from exercising their First and Fifth Amendments rights, thereby causing them irreparable harm.

District Court Decision

In an opinion issued on February 9, 1982, the Georgia district court dismissed the suit. (Civil Action No. 81-79-ATH.) The court held that, under Section 437h(a) of the election law, only the following types of plaintiffs had standing to bring suit: the national committee of a political party, individuals eligible to vote in Presidential elections and the FEC. Consequently, the court found that the Athens Lumber Company lacked standing to bring suit. While the court recognized that Mr.

Bondurant was an eligible voter, he too lacked standing to bring suit since the corporation—not Mr. Bondurant—planned to make the expenditures.

Moreover, the district court held that plaintiffs had not presented a justiciable case or controversy ripe for the court's consideration. The court concluded that "it is obvious that the statute under attack in no way interferes with the way that the plaintiff corporation through its plaintiff president conducts its corporate affairs...." Similarly, the court found that Mr. Bondurant had not presented a justiciable claim because he was "free to independently expend his personal funds [in federal elections], including dividends from the corporate plaintiff without limitation." Moreover, the court found that Athens Lumber Company was only seeking an advisory opinion because the shareholders had not voted to spend any corporate funds in connection with federal elections as long as Section 441b remained in force.

Appeals Court Decision

On October 22, 1982, a three-judge panel of the Eleventh Circuit court of appeals reversed the judgment of the district court, finding that Mr. Bondurant did have standing to bring suit and to raise those issues pertaining to Athens Lumber Company's participation in federal elections. Moreover, the court found that the suit raised justiciable claims because, if Athens Lumber Company were to make contributions and expenditures in connection with federal elections, both Mr. Bondurant and the corporation would be subject to civil and criminal prosecution. The panel then certified to the *en banc* Eleventh Circuit eight constitutional questions adopted from appellants' complaint.

In upholding the constitutionality of Section 441b, the *en banc* Eleventh Circuit court of appeals stated: "Viewing the substantive constitutional issues as being controlled by the Court's unanimous opinion in *Federal Election Commission v. National Right to Work Committee*, 459 U.S. 197 (1982), and for the reasons there stated, we find the limitations and prohibitions of which appellants complain to be constitutional."

Supreme Court Action

On March 19, 1984, the Supreme Court dismissed an appeal brought by plaintiffs in *Athens Lumber Company v. FEC*. Citing a lack of jurisdiction over the appeal, the Court treated it as a request for discretionary review (i.e., a petition for a writ of certiorari) and declined the request. (U.S. Supreme Court No. 83-1190) The high Court's action left standing the earlier, *en banc* opinion of the U.S. Court of Appeals for the Eleventh Circuit.

Source: FEC *Record*, January 1984, p. 10; and May 1984, p. 7.

Athens Lumber Company, Inc. v. FEC, 531 F. Supp. 756 (M.D. Ga. 1982), *rev'd*, 689 F.2d 1006 (11th Cir. 1982), 718 F.2d 363 (11th Cir. 1983) (*en banc*), *appeal dism'd, cert. denied*, 465 U.S. 1092 (1984).

[1] Section 437h, which provides for an expedited judicial review procedure, notes that certain designated parties "may institute such actions in the appropriate district court of the United States...to construe the constitutionality" of the Act. The district court is then directed to certify appropriate constitutional questions to the court of appeals sitting *en banc*.

AUSTIN v. MICHIGAN STATE CHAMBER OF COMMERCE

On March 27, 1990, the Supreme Court ruled that a Michigan state law prohibiting independent expenditures by corporations was constitutional. Reversing a Sixth Circuit U.S. Court of Appeals decision in *Austin v. Michigan State Chamber of Commerce*, the Court said that the state could prohibit corporations from using their treasury funds to make independent expenditures in connection with state elections.

Background

The suit originated in a 1985 district court complaint filed by the Michigan State Chamber of Commerce. The Chamber is a nonstock, nonprofit incorporated membership organization funded by dues. Three quarters of its members are for-profit corporations.

The Chamber sought to make an independent expenditure for a newspaper advertisement supporting a candidate for the state legislature. Although the Chamber had established a separate segregated fund for political purposes (which could lawfully have been used to make the expenditure), the organization wanted to purchase the ad with its general treasury funds. Finding that section 54(1) of the Michigan Campaign Finance Act appeared to prohibit independent expenditures made with corporate treasury funds, the Chamber filed suit against Richard Austin, Michigan's Secretary of State, challenging the constitutionality of the state law.

The law was upheld by the district court; the appeals court overturned the lower court's decision, finding the prohibition unconstitutional as applied to the Chamber.

Supreme Court Decision

First Amendment Issue

The Court held that the Michigan law, which permitted corporations to set up segregated political funds, was narrowly tailored to serve the compelling state interest of preventing the distortions in the political process that might result from allowing corporations to spend their general treasury funds to express their political views. "This potential for distortion," the Court said, "justifies §54(1)'s general applicability to all corporations"—regardless of their size or earnings—because all corporations "receive from the state the special benefits conferred by the corporate structure." Thus, the burden imposed on free speech by section 54(1) was permissible.

The Court further held that the Chamber did not qualify for the constitutional exemption to the ban on corporate spending set forth in *FEC v. Massachusetts Citizens for Life, Inc.* (MCFL), 479 U.S. 238 (1986). In that decision, the Court addressed the federal election law's prohibition against corporate independent expenditures and found that the law was unconstitutional as applied to MCFL, a small, nonprofit corporation. The Court found that three characteristics of MCFL qualified the organization for an exception (based on the First Amendment) from the federal law's general ban on corporate spending because they negated the government's interest in preventing the threat or appearance of corruption.

The three features of MCFL that exempted it from the ban on corporate spending were that MCFL:

- Was a nonprofit corporation established to promote political ideas and not to engage in business activities;
- Had no shareholders or other persons with a claim on its assets or earnings; and
- Was not set up by a corporation and had an established policy not to accept donations from corporations or labor organizations.

With regard to the first characteristic, the Court observed that, unlike MCFL, the Chamber's activities were not limited to political and public educational purposes. The Chamber's bylaws set forth several purposes beyond politics, including, for example, the promotion of ethical business practices, the provision of group insurance for members and litigation on behalf of the Michigan business community.

The Chamber also failed to meet the second of the MCFL criteria. The Court concluded, "[W]e are persuaded that the Chamber's members are more similar to the shareholders of a business corporation than to the members of MCFL." Because the Chamber provided its members with several nonpolitical benefits and services, members had an economic disincentive to withdraw support from the organization even if they disagreed with its political views. In the MCFL case, the Court had stressed that the MCFL's lack of shareholders or other financially affiliated persons meant that members had no disincentive to disassociate from the group.

With respect to the third MCFL feature, the Court noted that here "the Chamber differs most greatly from the Massachusetts organization." While "MCFL was not established by, and had a policy of not accepting contributions from, business corporations," three fourths of the Chamber's members were business corporations, and the organization's treasury contained corporate funds in the form of membership dues. "Because the Chamber accepts money from for-profit corporations, it could, absent application of §54(1), serve as a conduit for corporate political spending," the Court concluded.

Finally, the Court rejected the Chamber's claim that, because the Michigan law did not include a similar ban on political expenditures by labor organizations, it was underinclusive. The Court noted that although unincorporated labor organizations had power to accumulate wealth, they did not have the special legal privileges

enjoyed by incorporated organizations, such as limited liability and perpetual life. The Court further distinguished unions from corporations like the Chamber by pointing out that the Constitution precludes unions from having the power to compel members to support their political activities. "[T]he funds available for a union's political activities more accurately reflect members' support for the organization's views than does a corporation's general treasury," the Court said.

Fourteenth Amendment Issue
The Chamber claimed that section 54(1) violated the Equal Protection Clause of the Fourteenth Amendment because it did not apply the restrictions to unincorporated associations having the ability to raise large amounts of money or to corporations in the news media.

Having clarified that a compelling state interest in preventing corruption justified the restrictions on political activity by corporations, the Court rejected the Chamber's arguments with respect to the application of the prohibition to unincorporated entities. Corporate status, the Court said, was a state-granted privilege that facilitated the amassing of wealth, the source of the threat of corruption.

The Court also affirmed that the limited "media exception" in the state law for news stories and editorials disseminated by corporations operating in any of the news media did not constitute a breach of equal protection because of the unique public informational and educational role that such organizations play. "The media exception ensures that the Act does not hinder or prevent the institutional press from reporting on and publishing editorials about newsworthy events."

Source: FEC *Record*, May 1990, p. 5.

Austin v. Michigan State Chamber of Commerce, 856 F.2d 783 (6th Cir. 1988), *rev'd*, 494 U.S. 652, 110 S. Ct. 1391 (1990).

BARNSTEAD FOR CONGRESS COMMITTEE v. FEC

On June 5, 1979, the U.S. District Court for the District of Columbia granted summary judgment to the FEC and dismissed a complaint which had been filed by the Barnstead Committee (the Committee) against the FEC, WGBH Educational Foundation (Public Broadcasting TV, Channel 2), the Corporation for Public Broadcasting and the Quaker Oats Corporation. The Committee had filed suit on January 1, 1979, disputing the Commission's dismissal of a complaint which the Committee had filed with the Commission on November 2, 1978. The Committee requested that the court reverse the Commission's determination.

The Committee had alleged in its complaint, and repeated in its suit, that the corporate sponsorship of and payment for production and promotional costs of a televised film about House Speaker Tip O'Neill (Mr. Barnstead's opponent for a House seat) was in violation of 2 U.S.C. §441b. The Committee contended that, since Congressman O'Neill was officially a candidate at the time the film was broadcast, the film was "...in essence a campaign film, which enhanced the political standing of one candidate over another." Costs incurred in producing and broadcasting the film, therefore, were expenditures in connection with a federal election. The FEC, on the other hand, maintained that the costs incurred by WGBH Educational Foundation, the Corporation for Public Broadcasting and the Quaker Oats Corporation, in sponsoring the film, were exempt communication costs. Under Section 431(f)(4)(A), the Act exempts from the definition of expenditure certain communication costs, which include "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." In dismissing the suit, the court upheld the Commission's determination that the costs involved in sponsoring the broadcast were, in fact, communication costs and not expenditures under the Act.

Source: FEC *Record*, January 1980, p. 5.

BEAUMONT v. FEC

On October 3, 2000, the U.S. District Court for the Eastern District of North Carolina, Northern Division, found that the prohibitions of the Federal Election Campaign Act (the Act) and Commission regulations against corporate independent expenditures and contributions on behalf of federal candidates violated the plaintiffs' First Amendment rights. The court granted the plaintiffs' motion for summary judgment and denied the FEC's motions for partial summary judgment and partial dismissal. The court stayed the effect of this ruling until a final order is issued.

On October 26, 2000, the court also imposed a preliminary injunction barring the FEC from enforcing the statutory and regulatory provisions against the plaintiffs.

On December 21, 2000, the Federal Election Commission appealed this case to the United States Court of Appeals for the Fourth Circuit.

Background

North Carolina Right to Life, Inc. (NCRL), members of its board of directors and an unaffiliated individual asserted that Section 441b of the the Act, which prohibits corporations from making contributions or expenditures in connection with a federal election, is unconstitutional because it makes no exception for nonprofit, ideological corporations. The lawsuit also challenged the constitutionality of two FEC regulations: one that prohibits corporations from making contributions (11 CFR 114.2(b)) and another that creates an exemption from the ban on corporate expenditures for certain nonprofit corporations, pursuant to the Supreme Court's decision in *FEC v. Massachusetts Citizens for Life* (*MCFL*). 479 U.S. 238 (1986) (11 CFR 114.10).

Commission regulations at 11 CFR 114.10 provide that certain "qualified nonprofit corporations" may be exempt from the prohibition on corporate independent expenditures. To be considered a "qualified nonprofit corporation," a corporation must meet the following criteria:

- Its only express purpose is the promotion of political ideas;
- It does not engage in business activities;
- It has no shareholders or other individuals who receive a benefit that might discourage an individual from disassociating from the corporation on the basis of that corporation's political positions; and
- It was not established by a business corporation or labor organization and does not accept direct or indirect donations from business corporations.

NCRL argued that it failed to meet this exemption only because it accepted a small amount of corporate contributions and participated in "minor business activities incidental and related to its advocacy of issues." NCRL further argued that, even though the FEC had conceded that a Fourth Circuit decision in an earlier case between NCRL and North Carolina over a similar provision in a North Carolina statute barred enforcement of the Act's prohibition against NCRL, its officers remained subject to criminal liability and, as a result, their First Amendment rights were censored.

NCRL also argued that, in this case, the Act's ban on corporate contributions to political candidates infringed on the organization's right to association. While the FEC argued that NCRL's ability to contribute through a separate segregated fund minimized this infringement, NCRL contended that the maintenance of such a fund was a burden.

Decision

The court found no compelling justification for denying NCRL (a nonprofit, ideological organization) the right to make contributions and independent expenditures solely because it was an incorporated entity. Moreover, the court was not persuaded by the FEC's argument that a ban on corporate contributions was constitutional, as applied to NCRL, while a ban on corporate expenditures might not be.[1] The court found the distinction between contributions and expenditures immaterial.

The court declared that the provisions in question were unconstitutional as applied to NCRL and suggested that the court could, in its final order, deem these provisions facially unconstitutional.

Final Order

On January 24, 2001, the court found that the prohibitions on corporate contributions and expenditures of the the Act and Commission regulations were unconstitutional as applied to NCRL. The court found that the statute and regulations infringed on NCRL's First Amendment rights without a compelling state interest. The court permanently enjoined the Commission from relying on, enforcing or prosecuting violations of 2 U.S.C. §441b and 11 CFR 114.2(b) and 114.10—or any other parts of the Act whose restrictions flow from these provisions—against the plaintiffs.

The court did not find, however, that 2 U.S.C. §441(b) and its implementing regulations were unconstitutional on their face. In order to find a statute facially unconstitutional, rather than merely invalid as applied to a specific case, the court must find that its constitutional infringements are "substantial" in relation to its legitimate uses. The plaintiffs submitted a list of nonprofit, tax-exempt corporations, arguing that the statute's unconstitutional infringement was "substantial" in that it reached "hundreds, if not thousands, of constitutionally protected ideological corporations." The court, however, ruled that the plaintiffs had failed to show that the statute's constitutional infringements were substantial in relation to their "plainly legitimate sweep." The

court said, "In light of these numbers [4.5 million for-profit corporations] and the importance of the statute's 'plainly legitimate' purpose of regulating for-profit corporations, its inadvertent infringement on the rights of 'hundreds if not thousands' does not appear 'substantial' . . ." The court concluded that the constitutionality of the statute should be considered on a case-by-case basis.

Appeal

On March 6, 2001, the Commission appealed this case to the U.S. Court of Appeals for the Fourth Circuit. On March 15, 2001, the Fourth Circuit Court of Appeals consolidated this appeal with a previous appeal, filed on December 22, 2000, that requested relief from the district court's preliminary injunction of October 26, 2000. That injunction barred the Commission from relying on and enforcing the challenged provisions against the plaintiffs pending a final decision in the case. The plaintiffs filed a cross appeal on March 16, 2001.

Appeals Court Decision

On January 25, 2002, the appeals court affirmed the district court decision that found the prohibitions on corporate contributions and expenditures to be unconstitutional as applied to NCRL. The appeals court also affirmed the district court's finding that the Act's prohibition on corporate contributions and expenditures, and Commission regulations that implement the prohibition, were not facially unconstitutional.

The appeals court found that a complete ban on corporate contributions and expenditures in connection with federal elections, with an exception to the corporate expenditure ban "so narrow that NCRL does not fit into it," burdened the plaintiffs' First Amendment speech and association interests. The court explained that "Organizations that in substance pose no risk of 'unfair deployment of wealth for political purposes' may not be banned from participating in political activity simply because they have taken on the corporate form."

The FEC argued that the Act did not absolutely ban corporations from engaging in political activity. Rather, it permits corporations to establish political action committees, which can make contributions and expenditures subject to the Act's limits. The appeals court, however, found that the reporting requirements and administrative burdens associated with maintaining a political committee "stretch far beyond the more straightforward disclosure requirements of unincorporated associations." The court concluded that, as a nonprofit advocacy group, the "NCRL is more akin to an individual or an unincorporated advocacy group than a for-profit corporation."

The appeals court found that the criteria at 11 CFR 114.10, which create a test for whether a nonprofit corporation qualifies for the *MCFL* exemption, merely codify the list of nonprofit corporate attributes considered by the Supreme Court in *MCFL*. Relying upon a previous Fourth Circuit case involving NCRL, the appeals court held that these rigid criteria could not be used to determine whether an organization qualified for the constitutionally-mandated exception. The court ruled that the NCRL was constitutionally entitled to the exception and was not barred from making independent expenditures to influence federal elections.

The court also ruled that the prohibition on corporate contributions was unconstitutional as applied to NCRL. The court reasoned that same rationale the Supreme Court used to find the ban on independent expenditures unconstitutional as applied to *MCFL* also applied to contributions. The court found that contributions by an MCFL-type corporation carried no greater risk of political corruption than did independent expenditures by such an organization. Thus, the appeals court concluded that, as applied to the NCRL, the prohibition on corporate contributions was not closely drawn to match a sufficiently important government interest in preventing real or perceived corruption of the political system.

The appeals court, however, found that the Act's corporate prohibition was constitutional in the "overwhelming majority of applications," and, thus, was not facially unconstitutional. 2 U.S.C. §441b(a). The court rejected the plaintiffs' argument that the statute was unconstitutional because it did not contain an *MCFL* exception, citing a case in which the Supreme Court had rejected a similar argument concerning a state statute modeled on §441b(a).

The appeals court affirmed the district court's permanent injunction barring the FEC from prosecuting the plaintiffs for violations of §441b and 11 CFR 114.2(b) and 114.10. The appeals court also affirmed the district court's finding that the statute and its implementing regulations are not facially unconstitutional.

Source: FEC *Record*, December 2000, p. 5; February 2001, p. 8; March 2001, p. 2; May 2001, p. 6; and March 2002, p. 4.

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[1] The Supreme Court's decision in *FEC v. Massachusetts Citizens for Life*, permitting qualified nonprofit corporations to make independent expenditures, extends only to corporate expenditures and not to corporate contributions.

BECKER v. FEC
NADER v. FEC

Independent voter Heidi Becker, candidate Ralph Nader, the Green Party and others (Becker) asked the U.S. District Court for the District of Massachusetts to find that the Commission's regulations concerning debates, at 11 CFR 110.13 and 114.4(f), were unlawful.

The Commission's regulations allow a nonprofit corporation to stage a debate among federal candidates and to "use its own funds" and "accept funds donated by corporations or labor organizations" as long as certain guidelines are followed. 11 CFR 110.13 and 114.4(f).

Becker argued that these regulations exceed the Commission's statutory authority because the Federal Election Campaign Act (the Act) prohibits corporations from making contributions or expenditures "in connection with" a federal election, and the statute does not make an exception for corporate activity that helps stage federal candidate debates. 2 U.S.C. §441b(a). Becker further argued that Commission regulations allow corporations to fund debates between the major party candidates that exclude independent and ballot-qualified third party candidates. Becker alleged that the Commission's regulations deprived the plaintiffs of their right to participate in presidential elections that are free of the corrupting influence of illegal corporate contributions.

Becker asked the court to:

- Enter a declaratory judgment that 11 CFR 110.13 and 114.4(f) exceed the Commission's statutory authority;
- Enter a declaratory judgment that the Act does not permit a debate staging organization to use its own corporate funds or accept funds donated by corporations or labor organizations; and
- Preliminarily and permanently enjoin the Commission from relying on 11 CFR 110.13 and 114.4(f) and require it to enforce the Act's prohibition against the use of corporate funds in the staging of federal candidate debates.

District Court Decision

On September 1, 2000, the court denied Becker's motion for a preliminary injunction. The court found that these regulations are not in excess of the FEC's statutory authority under the Act. The court also dismissed the complaint for lack of standing with regard to the individual-voter plaintiffs.

By consent of the parties, the district court entered a final judgment in favor of the FEC on September 14, 2000. The plaintiffs filed an appeal of this decision on September 15, 2000, and asked for an expedited review. The appeal was argued as *Nader v. FEC*.

Nader v. FEC

On November 1, 2000, the U.S. Court of Appeals for the First Circuit upheld the district court's denial of relief. On January 31, 2000, Mr. Nader and the other petitioners filed a writ of certiorari with the U.S. Supreme Court. The Court denied the plaintiff's petition on April 30, 2001.

Source: FEC *Record*, August 2000, p. 13; November 2000, p. 8; April 2001, p.8; and June 2001, p 9.

Nader v. FEC, 230 F.3d 381.

BOULTER v. FEC

On August 3, 1988, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the FEC's July 26 decision to certify public funds for the general election campaign of Democratic Presidential nominee Michael S. Dukakis and his Vice Presidential running mate Lloyd M. Bentsen.

The petitioners, Congressman Beau Boulter, the Republican Senatorial candidate from Texas, and the National Republican Senatorial Committee, a national committee of the Republican party, had submitted their petition to the appeals court after the FEC had dismissed their request to deny public funding to the Democratic Presidential ticket. In its expedited review of the petition, the court decided to dismiss as moot the petitioners' emergency motion for a stay of the certification because, on July 27, the U.S. Treasury had disbursed the public funds to the Democratic Presidential and Vice Presidential nominees. Nor did the court grant petitioners' request for an emergency injunction barring the Democratic ticket from expending the grant. The court held that "petitioners have failed to carry the 'burden of showing that exercise of the court's extraordinary injunctive powers is warranted.'" *Cuomo v. Nuclear Regulatory Commission*, 722 F.2d 972, 974 (D.C. Cir. 1985).

Finally, the court summarily affirmed the agency's certification of funds to the Democratic ticket. The appeals court noted that its standard for reviewing the FEC's decision was whether the FEC's action was "arbitrary, capricious or contrary to law." See In *re Carter-Mondale*, 642 F.2d at 542. Based on this standard, the court concluded that "petitioners' allegations are insufficient on their face to warrant a revocation of the certification."

Source: FEC *Record*, September 1988, p. 7.

Boulter v. FEC, No. 88-1541 (D.C. Cir. 1988) (unpublished order).

BRANSTOOL v. FEC

On April 4, 1995, the U.S. District Court for the District of Columbia granted defendant's motion for summary judgment. This decision sustains the Commission's dismissal of plaintiffs' administrative complaint.

Background

The origins of this case are rooted in the 1988 Presidential contest between Republican candidate George Bush and Democratic candidate Michael Dukakis. In the course of the Presidential race, the National Security Political Action Committee (NSPAC) financed the production and airing of the "Willie Horton" ad. This ad attacked the Democratic candidate by blaming then Massachusetts Governor Michael Dukakis for the violent crimes committed by a convict while on furlough from a state prison.

Plaintiffs filed an administrative complaint with the FEC in May 1990, alleging that the NSPAC coordinated the production and airing of the Willie Horton ad with the Bush campaign. Under the Federal Election Campaign Act (the Act), a candidate running in a Presidential general election who accepts public funding may not accept contributions. The Bush campaign accepted public funding. If, as plaintiffs claimed, the Horton ad had been coordinated, then it would have been an in-kind contribution, in violation of 26 U.S.C. §9003(b)(2).The complaint thus hinged on the issue of whether the Horton ad was a coordinated in-kind contribution, and therefore illegal, or a permissible independent expenditure as defined under 2 U.S.C. §431(17). [1]

After examining the complaint, the Commission found reason to believe that the Bush campaign and the NSPAC had violated the Act, but after a limited investigation into the matter, the Commission deemed the evidence inconclusive and decided to take no further action on the matter. Plaintiffs' complaint was subsequently dismissed.

This led plaintiffs to file this suit in January 1992, claiming that the FEC had abused its discretion in not conducting a comprehensive investigation and had violated the Act by dismissing plaintiffs' complaint. Plaintiffs noted that among the FEC investigation's findings were a record of a June 1988 telephone conversation between the Bush campaign's chief media advisor and a NSPAC media consultant, and documentation showing that a media technician worked for both NSPAC and the Bush campaign. Plaintiffs contended that these findings were proof of coordination.

The Court's Decision

In addressing plaintiffs' challenge to the Commission's decision to limit the investigation into their complaint, the court saw no reason to depart from the general policy of giving broad deference to agency prosecutorial decisions.

The court held that it could set aside FEC statutory interpretations as "impermissible" only if they have no reasonable basis. The court concluded that the factual conclusions underpinning the Commission's decision were "sufficiently reasonable" to warrant the court's deference.

For instance, in dismissing the complaint, the Commission concluded that the inference of coordination created by the telephone call was rebutted by other findings. With regard to the media technician's dual employment, the Commission reasonably concluded that he performed technical tasks for the two committees and had no role in substantive or strategic decisions.

Source: FEC *Record*, June 1995, p. 12.

Branstool v. FEC, No. 92-0284 (D.D.C. Apr. 4, 1995).

[1] An independent expenditure is an expenditure made without any coordination with a candidate's campaign for a communication which expressly advocates the election or defeat of a clearly identified candidate for federal office

BREAD PAC v. FEC

This suit, filed by the National Lumber and Building Dealers Association and the National Restaurant Association (trade associations) and by Bread Political Action Committee, Restaurateurs Political Action Committee and Lumber Dealers Political Action Committee (separate segregated funds of trade associations), challenged the constitutionality of 2 U.S.C. §441b(b)(4)(D). (Civil Action No. 77-C-947.) This provision of the election law restricts solicitations by a trade association or its separate segregated fund to the stockholders, executive and administrative personnel (and their families) of member corporations which have given prior approval for such solicitations to occur, and limits member corporations to approval of one trade association per calendar year.

District Court Ruling

On April 5, 1977, plaintiffs asked the U.S. District Court for the Northern District of Illinois to enjoin the FEC from enforcing 441b(b)(4)(D) or, in the alternative, to certify constitutional questions to the appeals court, pursuant to 2 U.S.C. §437h. (Section 437h allows for expedited handling of constitutional challenges to the Act and a right of direct appeal to the Supreme Court.)

The district court ruled in September 1977 that plaintiffs lacked standing to bring suit under the Act's expedited review procedures. The court held that only the following types of plaintiffs had standing to bring suit under 2 U.S.C. §437h(a): the national committee of a political party, individuals eligible to vote in Presidential elections and the FEC.

Appeals Court: First Ruling

On January 12, 1979, the U.S. Court of Appeals for the Seventh Circuit, sitting *en banc*, overturned the district court's decision in response to an interlocutory appeal filed by plaintiffs. The appeals court ruled that plaintiffs did have standing to bring suit under the expedited review procedures. It remanded the case to the district court for further fact finding and certification of the constitutional questions. These constitutional challenges were then certified to the appeals court for its decision:

- Whether 2 U.S.C. §441b(b)(4)(D), both facially and as applied, infringes plaintiffs' right of assembly guaranteed by the First Amendment...?
- Whether 2 U.S.C. §441b(b)(4)(D), both facially and as applied, deprives plaintiffs of liberty without due process of law in violation of the Fifth Amendment...?
- Whether the failure of the Federal Election Campaign Act, as amended, 2 U.S.C. §431 et seq., to define the term 'solicitation' infringes plaintiffs' right of assembly guaranteed by the First Amendment...or deprives plaintiffs of liberty without due process of law in violation of the Fifth Amendment...?

- The failure of the Federal Election Campaign Act, as amended, 2 U.S.C. §431 *et seq.*, to define the term 'trade association' as used in 2 U.S.C. §441b(b)(4)(D), violates the due process clause of the Fifth Amendment...?

Appeals Court: Second Ruling

As to the issue of plaintiffs' standing to bring suit under 2 U.S.C. §437h(a), the appeals court declined to overrule its earlier decision that Section 437h(a) did not limit parties who may utilize the expedited review procedures.

As to constitutional challenges brought by plaintiffs, the court rejected their claim that Section 441b (b)(4)(D) infringed on their First Amendment rights by requiring that plaintiffs obtain the prior approval of a member corporation to solicit the corporation's stockholders, executive and administrative personnel and their families. The court found that there had been no showing that this restriction on trade association solicitations "...has had or could have any prior restraining effect whatsoever on the free flow of political information and opinion by trade associations or their political action committees." The court noted that plaintiffs were "...free to solicit any individual...to join their trade association." Moreover, once he or she became a member of the association, the individual could "...be solicited for contributions without limit under §441b (b)(4)(D)." Thus, the court concluded that the challenged provision was "...a very narrowly drawn aspect of a statutory scheme carefully designed to balance a compelling governmental interest [i.e., the prevention of the appearance or actuality of corruption in federal elections caused by large contributions] and jealously guarded First Amendment freedoms."

The court also rejected plaintiffs' claim that §441b(b)(4)(D) unconstitutionally discriminated against trade associations. The court found the exact opposite to be true and concluded that plaintiffs' argument was "...largely premised...on a misreading of the statute." Specifically the court noted that, although trade associations may not solicit contributions from a member corporation's employees without the corporation's prior approval, trade associations are granted more avenues for solicitation than are corporations. "Incorporated trade associations, because they are corporations, have precisely the same solicitation rights under paragraphs (A) and (B) [of 2 U.S.C. §441b(b)(4)] as do others corporations.... Moreover, trade associations are also membership organizations or corporations without capital stock and are therefore provided precisely the same solicitation rights as they have under paragraph (C) [i.e., solicitation of their individual members].... Finally, trade associations are provided under paragraph (D) with an additional group of potential solicitees [i.e., the stockholders, executive and administrative employees of corporate members and their families]."

The court also rejected plaintiffs' claims that in failing to define the terms "solicitation" and "trade association," §441b(b)(4)(D) abridged their First and Fifth Amendment rights. The court found that the term "solicitation" had a widely accepted meaning and that rules and statutes using the term had been uniformly upheld. The court further held that the Commission's advisory opinions, which had ruled on whether certain communications constituted solicitations under the Act, were not inconsistent. Rather, the opinions (AO's 1979-13 and 1979-66) had ruled on different types of communications by corporate and trade association separate segregated funds. Similarly, the court noted that the FEC had adhered to the "plain and ordinary meaning of trade association" as defined by Commission regulations at 11 CFR 114.8(a) and (g)(1).

Supreme Court Ruling

In an opinion issued on March 8, 1982, in *Bread Political Action Committee v. FEC* (Supreme Court No. 80-1481) the Supreme Court ruled that plaintiffs lacked standing to bring suit under 2 U.S.C. §437h, which allows for expedited handling of constitutional challenges to the Act and a right of direct appeal to the Supreme Court. The Court remanded the suit to the appeals court without ruling on the plaintiffs' constitutional challenges. The Court's ruling overturned a decision by the appeals court for the Seventh Circuit while upholding an earlier decision by the Northern Illinois district court.

The Court ruled that plaintiffs lacked standing to bring suit under Section 437h because they did not fall within the categories of qualified plaintiffs enumerated in the provision. The Court held that "the plain language of §437h controls its construction, at least in the absence of 'clear evidence,'...of a 'clearly expressed legislative intention to the contrary....'" The Court concluded that "the appellants, however, fall far short of providing 'clear evidence' of a 'clearly expressed legislative intention' that the unique expedited procedures of §437h be afforded to parties other than those belonging to the three listed categories."

Nor did the Court find merit to plaintiffs' argument that, since Congress had expressly extended the judicial review procedures of Section 437h to cover all constitutional questions about any provision of the Act, Congress had also intended to broaden the categories of plaintiffs eligible to file suit under §437h.

Moreover, the Court refuted plaintiffs' contention that, while Congress had specified three eligible classes of plaintiffs to remove any doubts about their standing to bring suit, it had not intended to exclude other classes of

plaintiffs. To the contrary, the Court concluded that Congress "went to the trouble of specifying that only two precisely defined types of artificial entity and one class of natural persons could bring these actions." The Court noted, however, that its ruling did not affect the right of parties involved in FEC enforcement actions to challenge, under 2 U.S.C. §437g, the constitutionality of any provision of the Act and to be afforded expedited review.

Source: FEC *Record*, May 1981, p. 6; and May 1982, p. 6.

Bread Political Action Committee v. FEC, 591 F.2d 29 (7th Cir. 1979), 635 F.2d 621 (7th Cir. 1980) (*en banc*), rev'd, 455 U.S. 577, (1982), *on remand*, 678 F.2d 46 (7th Cir. 1982) (*en banc*) (remanding to District Court).

BROWN v. FEC

On November 20, 1981, the U.S. Court of Appeals for the District of Columbia Circuit issued a judgment affirming an earlier decision by the district court in *Archie E. Brown v. FEC* (Civil Action No. 80-2108). The district court's decision had upheld the FEC's dismissal of the complaint plaintiff had filed against the International Brotherhood of Teamsters, Chauffers, and Warehousemen and Helpers of America (the Teamsters). In his complaint, plaintiff alleged that Local 745 of the Teamsters had violated 2 U.S.C. §441b(b)(3)(A) by attempting to coerce him to contribute to DRIVE (the Democratic Republican Independent Voter Education), the separate segregated fund of the Teamsters. Plaintiff alleged that he was subsequently denied membership in Local 745 because he had refused to contribute to, or join, DRIVE. Plaintiff claimed that the FEC's dismissal of his complaint was contrary to law.

In upholding the FEC's determination, the district court said that the General Counsel's Report to the Commission indicated that "...plaintiff's membership in Local 745 was denied because his union dues were unpaid, not because he refused to contribute to DRIVE." Moreover, the district court held that the General Counsel's Report, by itself, was a sufficient record for the court's review of the Commission's determination in the complaint. In appealing the district court's decision, plaintiff contended, however, that the General Counsel's Report alone, without a separate statement of the Commission's reasons for dismissing the complaint, afforded "...an inadequate basis for informed judicial review."

In its Memorandum affirming the district court's decision, the appeals court found no merit in plaintiff's assertion. The appeals court cited the Supreme Court's decision in *FEC v. Democratic Senatorial Campaign Committee*, which held that the General Counsel's Report constituted sufficient grounds to dismiss an administrative complaint—even if the Report were not expressly adopted by the Commission.

The appeals court concluded that the General Counsel's Report to the Commission recommending dismissal of Brown's complaint was sufficiently reasonable, "...particularly when considered in the context of the large discretion the Commission has to determine whether or not a civil violation of the Act has occurred."

Source: FEC *Record*, January 1982, p. 6.

Brown v. FEC (D.D.C. July 17, 1980) (unpublished opinion), *aff'd mem.*, 672 F.2d 893 (D.C. Cir. 1981), *cert. denied*, 457 U.S. 1111 (1982).

BUCHANAN v. FEC

On April 18, 1996, the U.S. Court of Appeals for the District of Columbia Circuit granted a joint stipulation to dismiss this case; the parties settled this matter out of court.

Patrick J. Buchanan and his publicly-funded 1992 Presidential campaign committee had petitioned this court to review the FEC's final repayment determination. See the November 1995 *Record*, page 8, for a summary of the suit filed by plaintiffs. See the October 1995 *Record*, page 9, for the FEC's final repayment determination.

The Buchanan committee made most of the repayment immediately from an escrow fund previously established, and agreed to pay the remainder of the amount ordered by the FEC, with full interest, within 6 months.

Source: FEC *Record*, June 1996, p. 4.

BUCHANAN v. FEC (00-1775)

On September 14, 2000, the U.S. District Court for the District of Columbia granted the FEC's motion for summary judgment and denied the plaintiffs' motion for summary judgment in this case. The district court ruled that, although the plaintiffs had standing to challenge the FEC's dismissal of their administrative complaint against the Commission on Presidential Debates, they failed to show that the FEC's interpretation of the debate regulations at 11 CFR 110.13 was arbitrary and capricious.

The plaintiffs appealed, and were granted an expedited appeal concerning the single issue of whether a debate must include all nominees who have qualified for public funding in order to comply with the "objective criteria" standard set out in the Commission's debate regulations. The U.S. Court of Appeals for the District of Columbia Circuit affirmed the district court's order on this issue on September 29, 2000.

Dismissal of Case

On November 30, 2000, the U.S. Court of Appeals for the District of Columbia Circuit granted the motion by Buchanan et al. to dismiss their appeal. The FEC did not oppose the motion.

Source: FEC *Record*, November 2000, p. 10; and January 2001, p. 10

BUCKLEY v. VALEO

On January 30, 1976, the Supreme Court issued a *per curiam* opinion in *Buckley v. Valeo*, the landmark case involving the constitutionality of the Federal Election Campaign Act of 1971 (FECA), as amended in 1974, and the Presidential Election Campaign Fund Act.

The Court upheld the constitutionality of certain provisions of the election law, including:

- The limitations on contributions to candidates for federal office (2 U.S.C. §441a);
- The disclosure and recordkeeping provisions of the FECA (2 U.S.C. §434); and
- The public financing of Presidential elections (Subtitle H of the Internal Revenue Code of 1954).

The Court declared other provisions of the FECA to be unconstitutional, in particular:

- The limitations on expenditures by candidates and their committees, except for Presidential candidates who accept public funding (formerly 18 U.S.C. §608(c)(1)(C-F));
- The $1,000 limitation on independent expenditures (formerly 18 U.S.C. §608e);
- The limitations on expenditures by candidates from their personal funds (formerly 18 U.S.C. §608a); and
- The method of appointing members of the Federal Election Commission (formerly 2 U.S.C. §437c(a)(1)(A-C)).

Background

On January 2, 1975, the suit was filed in the U.S. District Court for the District of Columbia by Senator James L. Buckley of New York, Eugene McCarthy, Presidential candidate and former Senator from Minnesota, and several others.[1] The defendants included Francis R. Valeo, Secretary of the Senate and Ex Officio member of the newly formed Federal Election Commission, and the Commission itself.[2] The plaintiffs charged that the FECA, under which the Commission was formed, and the Presidential Election Campaign Fund Act were unconstitutional on a number of grounds.

On January 24, 1975, pursuant to Section 437h(a) of the FECA, the district court certified the constitutional questions in the case to the U.S. Court of Appeals for the District of Columbia Circuit. On August 15, 1976, the appeals court rendered a decision upholding almost all of the substantive provisions of the FECA with respect to contributions, expenditures and disclosure. The court also sustained the constitutionality of the method of appointing the Commission.

On September 19, 1975, the plaintiffs filed an appeal with the Supreme Court, which reached its decision on January 30, 1976.

Supreme Court Decision

Contribution Limitations

The appellants had argued that the FECA's limitations on the use of money for political purposes were in violation of First Amendment protections for free expression, since no significant political expression could be made without the expenditure of money. The Court concurred in part with the appellants' claim, finding that the restrictions on political contributions and expenditures "necessarily reduce[d] the quantity of expression by restricting the number of issues discussed, the depth of the exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money." The Court then determined that such restrictions on political speech could only be justified by an overriding governmental interest.

The Court upheld the contribution limitations in the FECA,[3] stating that they constituted one of the election law's "primary weapons against the reality or appearance of improper influence stemming from the dependence of candidates on large campaign contributions" (the other weapon being the disclosure requirements). Although it appeared that the contribution limitations did restrict a particular kind of political speech, the Court concluded that they "serve[d] the basic governmental interest in safeguarding the integrity of the electoral process without directly impinging upon the rights of individual citizens and candidates to engage in political debate and discussion."

The Court found no evidence to support the appellants' allegations that the contribution limitations discriminated against nonincumbent candidates. With respect to the appellants' charge that the contribution limitations discriminated against minor and third parties and their candidates, the court noted that the FECA, "on its face," treated all candidates and parties equally. Furthermore, the Court said there was a legitimate argument that the limitations, in fact, appeared to benefit minor parties, since major parties and candidates received a greater proportion of their funding from large contributions.

The appellants had additionally challenged the limitations on certain expenses incurred by volunteers working on behalf of candidates or political committees. While the FECA placed no limits on most unreimbursed volunteer activities, it did limit unreimbursed travel expenses and certain costs of organizing campaign functions. Beyond these limits the costs were considered in-kind contributions (§431(8)(B)(i, ii, and iv)). The Court upheld the provisions for limited spending by volunteers, stating that they were a "constitutionally acceptable accommodation of Congress' valid interest in encouraging citizen participation in political campaigns while continuing to guard against the corrupting potential of large financial contributions to candidates."

Expenditure Limitations

In contrast to its ruling on contribution limitations, the Court found that the expenditure ceiling in the FECA imposed "direct and substantial restraints on the quantity of political speech" and invalidated three expenditure limitations as violations of the First Amendment.

The overall limitations on expenditures by federal candidates and their committees were struck down by the Court. The appellees had argued that these limitations (formerly 18 U.S.C. §608(c)) served a public interest by equalizing the financial resources of candidates, but the Court determined that the amount of money spent in particular campaigns must necessarily vary, depending on the "size and intensity" of the support for individual candidates. Furthermore, expenditure ceilings "might serve not to equalize the opportunities of all candidates but to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign." The appellees had also claimed that the expenditure limitations would reduce the overall cost of campaigning, and they cited statistics demonstrating the dramatic increases in campaign spending that had occurred nationwide in preceding years. The Court decided, however, that "[t]he First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive or unwise." The Court ruled, therefore, that the limitations on overall expenditures were unconstitutional.

The appellants had charged that the $1,000 per candidate annual limitation on independent expenditures—i.e., expenditures made by persons "relative to a clearly identified candidate...advocating the election or defeat of such candidate" (formerly 18 U.S.C. §608(e)(1))—was both unconstitutionally vague and an excessive hindrance on First Amendment rights of free expression. The Court resolved the vagueness question by reading "relative to" to mean "advocating the election or defeat of such candidate" in the same subsection, and by construing the provision to apply only to "expenditures for communications that in express terms advocate[d] the election or defeat of a clearly identified candidate for Federal office." While the Court of Appeals had accepted the appellees' argument that the provision was necessary to prevent circumvention of the contribution limitations, the Supreme Court found that the "governmental interest in preventing corruption and the appearance of corruption"—which justified the contribution limitations—was not sufficient to warrant the limitation on independent expenditures. If expenditure ceilings were to apply only to situations of express advocacy, the limitation would be easily circumvented by "expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited" a candidate. Moreover, the Court pointed out, abuses that might be generated by large independent expenditures did not appear to pose the same threat of corruption that large contributions posed since the "absence of prearrangement or coordination of the expenditure with the candidate or his agent alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidates." Thus finding that no substantial governmental interest was served by the limitation on independent expenditures, the Court concluded that such expenditures were protected as political discussion and expression under the First Amendment.

Regarding the limitations on a candidate's use of personal funds, the Court found that the provisions unconstitutionally interfered with the protected and valued right of an individual "to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election." The Court continued that no governmental interest supported the limit on such personal funds. To the contrary, the Court noted that "the use of personal funds reduces a candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the contribution limitations are directed."

Finally, the Court added that its invalidation of the expenditure limitations was severable from Subtitle H, which provides for the public financing of Presidential elections. The limitations on expenditures by Presidential candidates who received public funds was legitimate since the acceptance of public funds was voluntary. Therefore, with regard to publicly financed elections, the consequent societal and governmental benefits weighed more heavily in favor of expenditure limitations.

Reporting and Disclosure Requirements

The appellants had sought a blanket exemption from the public disclosure provisions for all minor parties, claiming that contributors to minor parties, unlike contributors to the Republican and Democratic Parties, were more vulnerable to threats, harassment and reprisal as a result of the public disclosure of their names. The appellants claimed the provisions constituted a violation of their rights to free association under the First Amendment and to equal protection under the Fifth Amendment. Recognizing that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment," the Court nevertheless ruled that the Act's reporting and disclosure provisions were justified by governmental interest in (1) helping voters to evaluate candidates by informing them about the sources and uses of campaign funds, (2) deterring corruption and the appearance of it by making public the names of major contributors, and (3) providing information necessary to detect violations of the law.

The Court acknowledged the potential disadvantage for minor parties that could result from the public disclosure provisions of the law, but it noted that none of the minor parties that were appellants in this suit had demonstrated that their contributors had been injured by the disclosure provisions. Therefore, the Court ruled a blanket exemption unnecessary. The Court left open the possibility, however, that minor and new parties might successfully claim an exemption from FECA disclosure requirements by showing proof of injury.

Presidential Election Campaign Fund

The Court upheld the constitutionality of Subtitle H of the Internal Revenue Code, which established the public financing of Presidential campaigns through a voluntary income tax checkoff. The Court determined that the appellants' claim that Congress violated the First Amendment in not allowing taxpayers to earmark their $1.00 checkoff to any candidate or party of their choice was not sufficient to invalidate the law. In the Court's opinion the checkoff constituted an appropriation by Congress, and as such it did not require outright taxpayer approval. Furthermore, "every appropriation made by Congress uses public money in a manner to which some taxpayers object."

The appellants had also argued, by analogy, that just as Congress may not subsidize or burden religion under the freedom of religion clause of the First Amendment, the freedom of speech clause prohibits it from financing particular political campaigns. The Court ruled the analogy inapplicable, however, finding that Subtitle H furthered rather than abridged political speech because its purpose was "to facilitate and enlarge public discussion and participation in the electoral process."

The appellants further claimed that the public funding provisions violated the Fifth Amendment's due process clause, arguing that the eligibility requirements for public funds were comparable to unconstitutionally burdensome ballot access laws. The Court found no merit in the argument; the denial of public funds to candidates did "not prevent any candidate from getting on the ballot or prevent any voter from casting a vote for the candidate of his choice."

"In addition," the Court said, "the limits on contributions necessarily increase the burden of fundraising, and Congress properly regarded public financing as an appropriate means of relieving major-party Presidential candidates from the rigors of soliciting private contributions."

The Court also rejected appellants' contention that the public financing provisions discriminated against minor and new party candidates, in violation of the Fifth Amendment. Specifically, the appellants had argued that Subtitle H favored major parties and their nominees by granting them full public funding for their conventions and general election campaigns, while minor and new parties and their candidates received only partial public funding according to a formula based on percentage of votes received.

Similarly, the appellants challenged the provision that restricted the payment of primary matching funds to only Presidential candidates who met certain requirements. These requirements included a provision for payments to candidates who had raised a minimum amount of contributions in at least twenty states (26 U.S.C. §9033(b)(3-4)). The Court found that such requirements for receiving public funds were reasonable; rather than preventing small parties from receiving public financing, the law only required them to demonstrate that they had a minimum level of broad-based support in order to qualify for federal subsidies. The Court concluded, "Any risk of harm to minority interests...cannot overcome the force of the governmental interests against the use of public money to foster frivolous candidacies, create a system of splintered parties, and encourage unrestrained factionalism." Furthermore, the Court noted that the advantage of receiving public financing was balanced by the requirement to adhere to strict expenditure limitations. As mentioned above, the Court upheld the constitutionality of expenditure limits as they applied to candidates and parties receiving public funds.

Appointment of the Commissioners

The appellants had challenged the method of appointing the six members of the Commission, as specified in the FECA, which provided that the President, the Speaker of the House of Representatives and the President pro tempore of the Senate each appoint two members. Arguing that the FEC's powers were executive rather than legislative, the appellants contended that the Congressional appointment of Commissioners violated the separation of powers principle embodied in the appointments clause of Article II of the Constitution. The Supreme Court determined that the appointments clause permitted only the President, with the advice and consent of the Senate, to appoint officers to exercise such executive authority as the Commission was granted. The Court ruled that the Commission, as it was then constituted, could not exercise its authority to enforce the law, conduct civil litigation, issue advisory opinions or determine eligibility for public funds, because these functions could not properly be regarded as legislative. The Commission's informational and auditing powers, however, were found to be legislative in nature, and therefore constitutional.

The Court accorded de facto validity to all acts of the Commission prior to the ruling and granted a 30-day stay of judgment—during which time the agency could exercise all of the authorities given to it under the FECA—so that Congress could reconstitute the Com-

mission according to the provisions of Article II of the Constitution. The initial 30-day stay expired on February 29, 1976, but was extended to March 22. On March 23 the FEC's executive powers were suspended, and they remained suspended until May 21, when the Commissioners were reappointed by the President pursuant to the FECA Amendments of 1976, Pub. L. No. 94-283 (May 5, 1976).

Buckley v. Valeo, 387 F. Supp. 135 (D.D.C. 1975) (application for three judge district court denied: constitutional questions certified to the Court of Appeals), 519 F.2d 817 (D.C. Cir. 1975) (*per curiam*) (motion to remand for the purpose of certifying constitutional questions granted), 519 F.2d 821 (D.C. Cir. 1975) (*per curiam*) (certified questions answered), 401 F. Supp. 1235 (D.D.C. 1975) (relevant portions of the opinion of the D.C. Cir. adopted), *aff'd in part, rev'd in part*, 424 U.S. 1 (1976), *on remand*, 532 F.2d 187 (1976 D.C. Cir.) (*en banc*), (modifying answers to constitutional questions certified by the district court).

[1] Along with Buckley and McCarthy, the appellants in this suit included Congressman William A. Steiger of Wisconsin, Mr. Stewart Rawlings Mott (a major contributor to various political committees), the Committee for a Constitutional Presidency—McCarthy '76, the Conservative Party of the State of New York, the New York Civil Liberties Union, the American Conservative Union, Human Events, Inc., Conservative Victory Fund, the Mississippi Republican Party and the Libertarian Party.

[2] The other appellees included the Clerk of the House of Representatives W. Pat Jennings, the Comptroller General Elmer B. Staats, and the Attorney General.

[3] The contribution limitations in the FECA included a $1,000 per candidate, per election, ceiling on contributions by individuals and political committees, a $5,000 per candidate, per election, ceiling on contributions by committees which qualify as multicandidate committees, a $25,000 annual ceiling for all contributions by any individual, and limitations on contributions to political party committees.

BUSH-QUAYLE '92 PRIMARY COMMITTEE v. FEC

On January 14, 1997, the U.S. Court of Appeals for the District of Columbia Circuit remanded this case to the FEC and asked it to explain why the Commission departed from precedent, or remedy that departure, when it required the Bush-Quayle '92 Primary Committee to repay $323,832 of the federal matching funds it received.

Background

As required by law, the FEC, at the end of the 1992 election cycle, audited former President George Bush's 1992 campaign. The audit included the primary committee, the Bush-Quayle '92 General Committee and the legal and accounting arm of the general election committee, the Bush-Quayle '92 Compliance Committee. The latter two committees are party to this lawsuit.

During the 1992 election, the primary committee received nearly $10.7 million in public funds through the Matching Payment Act. Once Mr. Bush and his running mate, Dan Quayle, had received the Republican nomination for President and Vice President, the general committee received $55.2 million in public funds.

The Law

The Matching Payment Act provides partial public funding—paid for through the $3 check-off on federal tax forms—to Presidential primary candidates who meet certain qualifications. Candidates who receive public funding must agree to limit expenditures to "qualified campaign expenses," i.e., those expenses that are incurred by the candidate in connection with his or her campaign for nomination and that do not violate state or federal law. 26 U.S.C. §9032(9)(A).

The Commission also must conduct an audit of every publicly funded campaign after it ends and require the committee to repay the U.S. Treasury for any nonqualified campaign expenses that were paid for with public funds. The Commission also can require a committee to repay any matching funds that it received in excess of what the law allows. 26 U.S.C. §9038(b)(1).

Final Repayment Determination

The FEC issued a final repayment determination to the primary committee on August 17, 1995, having determined that $409,123 in expenses incurred by the primary committee were not qualified primary campaign expenses because they had, in fact, been made for the benefit of the general election campaign as well.

The expenses in question included disbursements for direct mailings and political advertisements and for equipment and materials sent to the Bush campaign's

national headquarters. All these disbursements took place before August 20, 1992—the day Mr. Bush was nominated by his party to run for President. Concluding that expenses benefited both the primary and general campaigns, the Commission determined that half of the expenses should be assigned to the general election committee and the other half to the primary committee.

The FEC calculated the repayments as follows:

- The primary committee would pay its share of the nonqualified campaign expenses—$106,979—plus an additional $216,853 that the FEC determined it had received in excess of the matching fund allowance.
- As a result of reassigning half of the expenses in question to the general committee, the FEC found that the general committee had exceeded its expenditure limit by $182,785. The FEC recommended, but did not order, that the compliance fund reimburse the general committee for this overspending. That would resolve the general committee's excess expenditure problem.

Expenses in Connection With Primary

The Bush-Quayle committees challenged the FEC's final repayment determination in court, saying the Commission should have used a "bright-line" rule and allocated expenses based solely on whether they were incurred before the August 20 Presidential nomination or after the party's Presidential contender had been named.

The Commission had rejected this approach, arguing that whether an expenditure is a primary qualified expenditure depends on both its timing and nature. To qualify, the Commission had explained, the expense must be primarily in connection with the primary. The committees had argued that *any* connection to the primary campaign would qualify an expense fully as a qualified primary campaign expenditure.

Finding that arguments from both the agency and the committees were defensible, the court upheld the FEC's interpretation, based on *Chevron U.S.A. Inc. v. NRDC*.[1] That case requires that, where statutory language is ambiguous, courts must uphold the agency's interpretation so long as it is reasonable. The court added, however, that another committee objection to the Commission's decision merited further consideration.

Arbitrary and Capricious

The committees charged that the FEC had acted "arbitrarily and capriciously" because it had treated expenditures of the Bush-Quayle 1992 campaign differently than similar expenditures of the 1984 Reagan-Bush campaigns.

In the 1984 election, the committees said, the FEC had concluded that certain pre-nomination expenditures by the Reagan-Bush Primary Committee were primary expenses despite the fact that some benefited the general election campaign.

The FEC responded that the two cases were distinguishable from each other and thus were treated differently. It also said that in the Reagan audit, the FEC had not adopted a "bright line" test based on the date of the candidate's nomination.

The court found the FEC's response inadequate. Further, the court said: "An agency interpretation that would otherwise be permissible is, nevertheless, prohibited when the agency has failed to explain its departure from prior precedent."[2]

The court noted further that the FEC's determination was especially problematic given the fact that the agency had adopted new regulations two months before making its repayment determination concerning the Bush-Quayle campaign, but had not applied the approach embodied in those regulations to that determination. The court said that the new rules use a "bright-line" approach to determine whether expenses should be attributed to primary or general elections.

The court remanded the matter to the FEC either to justify its approach or to reconsider the repayment determination.

Source: FEC *Record*, March 1997, p. 5.

Bush-Quayle '92 Primary Committee v. FEC, 104 F.3d 448 (D.C. Cir. 1997).

[1] *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 844 (1984).

[2] See *Interstate Quality Servs. Inc. v. RRB*, 83 F. 3d 1463, 1465 (D.C. Cir. 1996); *ANR Pipeline Co. v. FERC*, 870 F. 2d 717, 723 (D.C. Cir. 1989); *Greater Boston Tel. Corp. v. FCC*, 444 F. 2d 841, 852 (D.C. Cir.), *cert denied*, 403 U.S. 923 (1971).

CALIFORNIA MEDICAL ASSOCIATION v. FEC

This suit was precipitated by an FEC enforcement proceeding in which the California Medical Association (CMA), an unincorporated professional association, and CALPAC, a political committee, were respondents. On April 19, 1979, the FEC had found "probable cause to believe" CMA had violated 2 U.S.C. §441a(a)(1)(C) by making contributions exceeding $5,000 to CALPAC, which CALPAC had accepted. When it was unable to reach a conciliation agreement with the respondents, the Commission filed suit against them on May 22, 1979, in the U.S. District Court for the Northern District of California (Civil Action No. C79-U97-WHO).[1]

Claims Filed Against Commission

Anticipating the FEC enforcement action, CMA filed a separate suit against the FEC on May 7, 1979, challenging the constitutionality of those provisions of the Act it had allegedly violated. (Civil Action No. 79-4426) Specifically, CMA asked the district court to certify the following constitutional questions to the U.S. Court of Appeals for the Ninth Circuit:

- Whether 2 U.S.C. §441a(a)(1)(C), which limits contributions to multicandidate committees to $5,000 per year, per contributor, abridges First Amendment rights of free speech and association. In particular, does §441a(a)(1)(C) unconstitutionally limit contributions by an unincorporated association (CMA) to a political committee (CALPAC) for the purpose of establishing, administering or soliciting contributions to the committee; and
- Whether 2 U.S.C. §441b(b)(2)(C), which permits labor organizations and corporations (but not unincorporated associations) to pay costs of establishing, administering and soliciting funds to a separate segregated fund, abridges the equal protection provisions of the Fifth Amendment.

Ruling of Appeals Court

In its opinion of May 23, the appeals court, sitting *en banc*, rejected all the constitutional claims asserted by CMA. Relying on the Supreme Court's decision in *Buckley v. Valeo*, the court found that the contribution limits imposed only inconsequential restrictions on rights of free speech. The court observed that these restrictions were minimal compared to the "potent alternative means of expression" available to unincorporated associations like CMA. It noted that CMA, CALPAC and its members could make contributions and expenditures in connection with federal elections, as long as the per-candidate and per-committee contribution limits were respected. Further, CMA, its members and CALPAC could make unlimited independent expenditures to express their political views. Moreover, the court concluded that the contribution limits were supported by a compelling governmental interest, namely preventing the circumvention of the contribution limits, which were intended to minimize both the actuality and appearance of corruption in federal political campaigns.

The court also found that the Act did not abridge Fifth Amendment rights by discriminating against political activities of unincorporated associations. To the contrary, the court concluded that unincorporated associations like CMA are regulated to a lesser degree under the Act. While corporations and labor unions are prohibited from making any contributions or expenditures in connection with federal elections, and individuals are limited to total contributions of $25,000 per year, unincorporated associations have no overall limit imposed on the total amount they may contribute or expend in connection with federal elections. Unlike corporations and labor organizations, they may solicit contributions from anyone and make partisan communications to the general public.

Appeal to Supreme Court

In its appeal to the Supreme Court, filed on June 4, 1980, CMA reiterated the arguments which the appeals court had rejected and restated its claim that the challenged provisions violated both First and Fifth Amendment rights. In challenging the constitutionality of limits on contributions to multicandidate committees, CMA argued that, in its *Buckley v. Valeo* decision, the Supreme Court had not equated contributions to political committees with contributions to candidates. CMA maintained that "...contributions to political committees are functionally different from contributions to candidates."

In its Supreme Court brief, the FEC challenged appellants' raising of constitutional issues under 2 U.S.C. §437h, a provision by which the Supreme Court may expedite its handling of constitutional challenges to the federal election law. The Commission argued that the provision was "...enacted by Congress in 1974 for the specific purpose of facilitating the resolution of a major constitutional challenge to the Act prior to the 1976 general election." In the Commission's view, appellants sought to "...invoke the extraordinary process of 437h for the purpose of avoiding the Commission's enforcement procedures."

As to the constitutional issues raised in the suit, the Commission supported the decision of the appeals court, reiterating its arguments that the Act violated neither the First nor Fifth Amendment rights of appellants.

Supreme Court Ruling

On June 26, 1981, the Supreme Court handed down a decision in *California Medical Association v. FEC* (Civil Action No. 79-1952) that affirmed the earlier decision of the U.S. Court of Appeals for the Ninth Circuit.

In its opinion, the Court upheld the constitutionality of 2 U.S.C. §441a(a)(1)(C), which limits contributions to a political committee to $5,000 per year, per contributor. The Court concluded that the challenged provision did not violate the First Amendment rights of appellants because it was an appropriate means by which Congress could seek to protect the integrity of the contribution restrictions upheld in *Buckley v. Valeo* (424 U.S. 1 (1976)). The Court said, "If First Amendment rights of a contributor are not infringed by limitations on the amount he may contribute to a campaign organization which advocates the views and candidacy of a particular candidate, the rights of a contributor are similarly not impaired by limits on the amount he may give to a multicandidate political committee, such as CALPAC, which advocates the views and candidacies of a number of candidates."

The Supreme Court also upheld the appeals court's ruling that Section 441a(a)(1)(C) did not violate appellants' equal protection rights under the Fifth Amendment. Appellants had unsuccessfully claimed that the provision allowed corporations and labor organizations to make unlimited contributions to their separate segregated funds while limiting to $5,000 a year the contributions an unincorporated association could make to the multicandidate committee it established. The Court held, however, that no equal protection violation existed. The Court stated, "Appellants' contention ignores the fact that the Act as a whole imposes far fewer restrictions on individuals and unincorporated associations than it does on corporations and unions. The differing restrictions placed on individuals and unincorporated associations, on the one hand, and on corporations and unions, on the other, reflect a congressional judgment that these entities have differing structures and purposes and that they therefore may require different forms of regulation in order to protect the integrity of the political process."

The Court found no merit, however, to the FEC's claim that the appellants' direct appeal to the Court (pursuant to Section 437h of the Act)[2] was inappropriate because an FEC enforcement proceeding was pending against appellants (pursuant to Section 437g of the Act). The Court found that neither the legislative history nor the statutory language of Sections 437g and 437h indicated that a direct appeal should be limited to situations where no enforcement proceeding was pending.

Source: FEC *Record*, April 1981, p. 7; and August 1981, p. 1.

California Medical Association v. FEC, 641 F.2d 619 (9th Cir. 1980) (*en banc*), *aff'd*, 453 U.S. 182 (1981).

[1] In its October 21, 1980, opinion in *FEC v. California Medical Association*, the district court ordered CMA and CALPAC to pay the FEC civil penalties of $5,000 each.

[2] Section 437h provides for expedited handling of constitutional challenges to the Act. Section 437h(b), which granted the right of direct appeal to the Supreme Court, was repealed by Congress in 1988.

CARTER/MONDALE PRESIDENTIAL COMMITTEE v. FEC (82-1754)

On June 24, 1983, the U.S. Court of Appeals for the District of Columbia ruled that, since the Carter/Mondale Presidential Committee, Inc. (the Committee) had failed to file its petition for review of certain final FEC repayment determinations within 30 days after the FEC had made them, the court had no jurisdiction over the petition. Filed on July 6, 1982, the Committee's petition concerned certain final Commission determinations with regard to the FEC's audit of the Committee's publicly funded primary campaign in 1980.

Since it dismissed the suit on jurisdictional grounds, the court did not address the issue of whether the FEC could require the Committee to:

- Repay federal matching funds in an amount equal to total federal and private funds used for nonqualified campaign expenses; or
- Repay only the portion of nonqualified expenses that were paid with federal funds.

Source: FEC *Record*, August 1983, p. 8.

Carter/Mondale Presidential Committee, Inc. v. FEC, 711 F.2d 279 (D.C. Cir. 1983).

CARTER/MONDALE PRESIDENTIAL COMMITTEE v. FEC (84-1393)

On November 1, 1985, the U.S. Court of Appeals for the District of Columbia Circuit ruled that the FEC did not abuse its discretion in declining to reconsider a final determination the agency had made with regard to the Carter/Mondale Presidential Committee, Inc.'s (the Committee's) repayment of nonqualified campaign expenses to the U.S. Treasury.[1] CA No. 84-1393 and 84-1499 (The Committee was the publicly funded principal campaign committee for former President Carter's 1980 primary campaign.) The court's ruling sustained decisions made by the FEC on July 12 and September 20, 1984, not to reconsider its final repayment determination with regard to the Committee.

Background

On July 6, 1982, the Committee had filed a petition with the appeals court which sought review of an FEC final determination that the Committee must repay $104,300.78 to the U.S. Treasury, an amount equal to those nonqualified expenses incurred by the Committee during the 1980 primary campaign. (*Carter/Mondale Presidential Committee v. FEC*; 111 F.2d 279 (D.C. Cir. 1983); see summary at left.) The court dismissed the case on grounds that it had not been filed within the time frame required by the election law. See 26 U.S.C. §9041(a).

On August 7, 1984, the Committee filed a petition, asking the Court to review the decision that the FEC made on its own initiative not to reopen its final repayment determination for the Committee in light of recent decisions made by the court in two other suits concerning repayments. (In *Kennedy for President Committee v. FEC* and *Reagan for President Committee v. FEC*, the court had held that the FEC had exceeded its authority under 26 U.S.C. §9038(b)(2) when it required repayment of the entire amount of nonqualifying payments, rather than the portion attributable to the matching payment account.) The Committee also asked the FEC to reconsider its decision (taken in July 1984) not to reopen the Carter/Mondale repayment determinations. The Commission had decided to reconsider only the repayments by the Kennedy and Reagan committees, which had been required by the court. The Commission had taken this position " 'in the interest of finality in the administrative process, now and in the future.'" The Committee claimed that the FEC's decision disregarded the principle of equal treatment for all candidates, which the Committee alleged the agency had established in reconsidering a final repayment determination made with regard to John Anderson's publicly funded campaign. On September 20, 1984, the FEC once again declined to reconsider the Committee's final repayment determination. On October 2, 1984, the Committee filed

a second petition with the appeals court. On October 15, 1984, the court consolidated this case with the Committee's August 1984 case.

Appeals Court's Ruling

The court rejected the Committee's claim that the FEC's July determination was unlawful because it contradicted a precedent established by the agency's reconsideration of the Anderson Campaign's repayment requirements: "Far from establishing any general or even selective practice of reopening final determinations, the record before us [of the FEC's reconsideration of the Anderson determination] displays only an isolated situation in which the facts distinguishable from those in the case at hand tugged the Commission away from application of the finality principle."

Nor did the court find merit in the Committee's assertion that the FEC had treated the Committee unfairly. "No favoritism can be attributed to the FEC when it carries out the letter of a court's order" to reconsider repayments by the Kennedy and Reagan committees. Moreover, the Committee's tardiness in seeking court review of its own repayment determination contradicts "'Congress' strong interest in resolving federal matching fund audits expeditiously.' 111 F.2d at 289 and n.19."

Finally, the court rejected the Committee's argument that the FEC had failed to give reasons for refusing to reopen its repayment determination. "[A]bsence of an express statement does not render its action unlawful where reasons for that action may be gleaned from its [the FEC's] staff's reports."

Source: FEC *Record*, December 1985, pp. 6-7.

Carter/Mondale Presidential Committee, Inc. v. FEC, 775 F.2d 1182 (D.C. Cir. 1985).

[1] The public funding statutes require Presidential candidates to repay the U.S. Treasury for nonqualified campaign expenses. 26 U.S.C. §§9007(b)(4) and 9038(b)(2).

CARTER/MONDALE REELECTION COMMITTEE AND DNC v. FEC

The Commission's certification of public funds to the Republican nominee was challenged in *Carter-Mondale Reelection Committee, Inc. and the Democratic National Committee v. FEC*, filed July 24, 1980. The Carter-Mondale Committee (the Committee) asked the U.S. Court of Appeals for the District of Columbia Circuit to prevent the Commission's certification of the Republican nominees, pending resolution of an administrative complaint filed by the plaintiffs against the nominees. In their complaint to the Commission, the Committee had said that Ronald Reagan would be ineligible for public funds since he had allegedly violated the law on several counts. The Committee had charged that several groups, purportedly making independent expenditures on Mr. Reagan's behalf, were in fact making qualified campaign expenditures with the prior consent of the candidate and his agents. In the suit, the Commission argued that the certification was proper and within the Commission's exclusive jurisdiction. On September 12, the court ruled in the Commission's favor and affirmed the Commission's "action in certifying the nominees' application for funds."

Source: FEC *Annual Report 1980*, p. 20.

In re Carter-Mondale Reelection Committee, Inc., 642 F.2d 538 (D.C. Cir. 1980).

CENTER FOR RESPONSIVE POLITICS v. FEC (93-2250)

This case was voluntarily dismissed as moot when the Commission took action on three complaints the Center had filed with the agency in 1990 and 1991 (MURs 3175, 3249 and 3325). The Center had filed suit to force the FEC to take action but, in March 1994, agreed to suspend the litigation for four months while the FEC worked to resolved the MURs, which concerned excessive contributions.

The U.S. District Court for the District of Columbia dismissed the case on July 11, 1994. (Civil Action No. 93-2250 (SSH).)

Source: FEC *Record*, September 1994, p. 8.

Center for Responsive Politics v. FEC, No. 93-2250 (D.D.C. Oct. 29, 1993).

CENTER FOR RESPONSIVE POLITICS v. FEC (95-1464)

On November 9, 1995, the U.S. Court of Appeals for the District of Columbia dismissed this case.

The Center for Responsive Politics (CRP) and its executive director, Ellen Miller, brought this suit alleging that the FEC acted contrary to law when, in a recent rulemaking (60 FR 31854, June 16, 1995), it failed to repeal regulations that permit publicly funded Presidential candidates to accept private contributions for their general election legal and compliance fund.

The court ruled that the CRP and Mrs. Miller lacked standing to bring this suit. Neither the CRP nor Mrs. Miller suffered harm that could be directly traced to the FEC's action. Additionally, neither one was qualified to bring suit since their alleged injury was outside the statute's "zone of interest" in this case.

Source: FEC *Record*, January 1996, p. 3.

Center for Responsive Politics v. FEC, No. 95-1464 (D.C. Cir. Nov. 9, 1995).

CHAMBER OF COMMERCE v. FEC

On November 14, 1995, the U.S. Court of Appeals for the District of Columbia reversed the district court's dismissal of this case and ordered the court to issue appellants appropriate declaratory relief.

The U.S. District Court for the District of Columbia had dismissed this case on October 28, 1994, on the grounds that the matter was not ripe for review and that the plaintiffs lacked standing to bring the action.

This case involved the FEC's regulatory definition of "member." FEC regulations allow membership organizations to use their corporate funds to send political communications and solicitations, but only to their administrative and executive personnel and to persons who qualify as "members" under federal election law.[1] To qualify as a "member" under FEC regulations a person must have a significant financial interest in the organization, or pay regular dues and possess the right to vote either directly or indirectly for at least one representative in the organization's highest governing body, or possess the right to vote for all members of the organization's highest governing body. 11 CFR 114.1(e)(2).

Background

In 1976, FEC regulations defined an organization's "members" as "all persons who are currently satisfying the requirements for membership" in the organization. 11 CFR 114.1(e)In subsequent years, court decisions and advisory opinions established that political communications and solicitations financed with corporate monies could only be sent to persons who have a significant financial or organizational attachment to the membership organization.

In 1993, the FEC adopted new rules to reflect these precedents. These rules clarified that a person will be considered a "member" for purposes of the Act if that person:

- Has some significant financial attachment to the organization beyond the mere payment of dues, such as a significant investment or ownership stake; or
- Is obligated to make regular dues payments and has the right to vote, either directly or indirectly, for at least one representative in the membership organization's highest governing body; or
- Is entitled to vote directly for all who sit on the organization's highest governing body. 11 CFR 114.1(e)(2).

When these new regulations took effect, the Chamber of Commerce of the U.S.A. and the American Medical Association (AMA) submitted Advisory Opinion Requests (AORs) 1994-4 and 1994-12 to the Commission, asking about the "member" status of their members. The Commission responded to the AORs by stating that the six Commissioners could not reach a consensus on the status of more than 200,000 Chamber members and nearly 45,000 AMA members; these persons paid dues to their respective organizations but lacked voting rights.

Not satisfied with this result, the Chamber and the AMA challenged the FEC's revised definition of "member" in the U.S. District Court for the District of Columbia.

District Court Decision

The district court ruled that:

- The case was not ripe for review because neither plaintiff had suffered harm by the rule;
- Plaintiffs lacked standing to bring this suit because the rule did not present a reasonable threat of prosecution to them; and
- The FEC's definition of "member" was entitled to deference because it was a permissible construction of that term by the Commission. *Chevron U.S.A. v. Natural Resources Defense Council* (467 U.S. 837, 1984).

Appeals Court Decision

The court of appeals found that the Chamber and the AMA did have standing to argue their case before the court: "In the last federal election, appellants, not surprisingly, felt constrained to alter their prior practice—they ceased political communications with those constituents who did not qualify as 'members' under the Commission's new rule. And counsel for the Commission agreed . . . that he would not advise the Chamber and the AMA to ignore the rule." Thus, the issue brought before the court was ripe for review because it caused both the Chamber and the AMA harm.

Further, the Chamber and the AMA had standing to bring this suit because, although an FEC enforcement decision had not been issued against them, there was a credible threat of enforcement if they chose to ignore the regulation. Additionally, the possibility that appellants' First Amendment rights were chilled by the FEC's regulations conferred standing upon appellants. *Virginia v. American Booksellers.*

The court found that the FEC's rules presented "serious constitutional difficulties" because they precluded "appellants from communicating on political subjects with thousands of persons, heretofore regarded by the Commission as members." Thus, although the court did not disagree with the district court's conclusion that the FEC was entitled to deference under the *Chevron*

doctrine, the court reasoned that the conflict between the rules and the First Amendment warranted judicial review.

At issue here, in the court's view, was whether the FEC's rule accorded with the Supreme Court's opinion in *FEC v. National Right to Work Committee* (459 U.S. 197, 1982). There, the Court ruled that "members of nonstock corporations were to be defined . . . by analogy to stockholders of business corporations and members of labor unions . . . [which] suggest[ed] that some relatively enduring and independently significant financial or organizational attachment is required . . . "

The appeals court concluded that the FEC's new rule did not square with the Supreme Court's opinion in *NRWC*: "[I]mplicit in the Commission's rule is the view that dues, no matter how high, are not by themselves a manifestation of a significant financial attachment." The court said that the FEC's position reads the disjunctive "or" between "financial" and "organizational" as if the Supreme Court had used the conjunctive "and."

Furthermore, the court held that, "It is . . . quite illogical to regard someone who has one share of stock in a public corporation, which can be sold in minutes, as more significantly attached to the organization than a person or entity who pays $1000 or even $100,000 (as is the case for some Chamber members) in annual dues."

The court also criticized the rule's voting requirement. It noted that the nearly 45,000 AMA members in question are subject to sanction by the organization should they violate the organization's Principles of Medical Ethics. "It might be thought, that for a professional, placing oneself in such a position is the *most* significant organizational attachment."

Lastly, the court noted that the rule treats some labor unions and federated rural electric cooperatives differently, exempting them from its new definition of "member." The court noted that this question had not been squarely presented on appeal, but stated that it was not satisfied with the FEC's claim that the separate treatment was consistent with the Act's legislative history. Without further elaboration, the court stated, it "would determine that these exemptions make the regulation arbitrary and capricious."

Source: FEC *Record*, December 1994, p. 1; and January 1996, p. 2.

Chamber of Commerce v. FEC, 1994 WL 615786 (Oct. 28, 1994); No. 94-5339 (D.C. Cir. Nov. 14, 1995).

[1] This is an exception to the general ban on the use of corporate money in connection with federal elections. 2 U.S.C. §441b.

CINCINNATI v. KRUSE
BURRIS v. RUSSELL

On November 16, 1998, the U.S. Supreme Court refused to review two court cases that posed First Amendment challenges to limits on campaign contributions and expenditures in state and local elections. Both cases had been cast as potential challenges to *Buckley v. Valeo*, the landmark court case on the Federal Election Campaign Act (the Act). The FEC was not a party to either suit.

Background of *Buckley*

The appellate courts' reasoning in the two cases was based in great part on *Buckley*, where the high court equated campaign spending with the First Amendment's guarantee of free speech. While the Court found that a compelling government interest in preventing real or perceived corruption justified imposing restrictions on contributions, it concluded that this governmental interest was inadequate to sustain limitations on campaign expenditures.

Decision in *Cincinnati*

In the first case, *Cincinnati v. Kruse*, John Kruse, a candidate for a Cincinnati City Council seat, challenged a council ordinance that limited campaign expenditures for council elections to about $140,000. The city council argued that the rising cost of city council races had resulted in a rise in the influence of wealthy donors and the decline in the influence of small donors. The U.S. District Court for the Southern District of Ohio at Cincinnati ruled in favor of Mr. Kruse, finding that the ordinance was unconstitutional on its face.

The U.S. Court of Appeals for the Sixth Circuit affirmed that ruling on April 27, 1998. It reiterated the Supreme Court's view that restrictions that have the potential of limiting the First Amendment guarantee of political expression must be subjected to "exacting scrutiny" by the courts and that "the prevention of corruption or the appearance of corruption" is the only governmental interest that survives strict scrutiny and, as a result, justifies restrictions on campaign finance.

- *Cincinnati failed to show that an expenditure limit would reduce corruption in the political process*. The city had no direct evidence that imposing contribution limits alone could prevent quid pro quo corruption. The council did not adopt contribution limits until after it had passed the expenditure limits. Further, it based its views of corruption on perceived abuse of the Act on the federal level. The court found that such evidence was not enough. The three-judge panel stated that problems on the federal level are explained

primarily by the exception allowing soft money contributions to party committees "and do not undermine the Supreme Court's conclusion that spending restrictions are not narrowly tailored to addressing the problem of the corrupting nature of money in politics."

The court also said the perception that the public is discouraged and cynical about the democratic process as a result of perceived corruption in campaign finance is not sufficient evidence for limiting campaign spending.

- *Cincinnati failed to show that an expenditure limit would curb the rising cost of campaigns*. The city, through an amicus brief filed by the Brennan Center, had argued that the *Buckley* Court had not considered what is now perceived to be "uncontrollable campaign spending" and the effects of such spending, such as the large amounts of time candidates must spend raising campaign funds. The court rejected this view, stating that the Supreme Court, in *Buckley*, concluded that "reducing the allegedly skyrocketing costs of political campaigns is not compelling or sufficient to justify restrictions on campaign spending."
- *Cincinnati failed to prove that leveling the playing field among candidates is sufficient justification for an expenditure limit*. The city had argued that the government had an interest in eliminating the advantage wealth plays in elections and the perceived disadvantage of poor and minority voters and candidates. The court found that restricting the free speech guarantees of some in order to enhance the voices of others would violate the First Amendment. It also said that the *Buckley* Court had rejected this argument. The *Buckley* Court explained that spending limits, rather than promoting financial equality among candidates, could instead protect incumbents and handicap well-known candidates.

Decision in *Russell*

In *Burris v. Russell*, Ron Russell challenged the Arkansas Ethics Commission after the state's voters approved a referendum that set contribution limits per election for district races at $100 per contributor and for statewide races (such as governor and state treasurer) at $300 per contributor. (The lowest contribution limit per contributor allowed under *Buckley* is $1,000.) The referendum also introduced an entity called the small-donor PAC. Individuals could contribute up to $25 to the PAC, and the PAC, in turn, could contribute up to $2,500 per candidate, per election. The initiative also created independent expenditure committees that could accept no more than $500 from any person annually. Finally, the initiative authorized local governments to set reasonable limits on the amount of campaign funds candidates for local offices could raise. Before this initiative, Arkansas voters had approved a measure that limited PAC contributions to $200 per year, down from $1,000.

This case was merged with *Citizens for Clean Government v. Russell*. The U.S. District Court for the Eastern District of Arkansas rendered a split decision, upholding some of the contribution limits and ruling others unconstitutional. On June 4, 1998, the U.S. Court of Appeals for the Eighth District struck down the individual and PAC contribution limits.

- *Supporters of the initiative failed to prove a link between large contributions and undue influence or corruption of Arkansas officials*. Proponents argued, for example, that financial contributions and support by the Tobacco Institute and other pro-tobacco sources caused a state legislator to champion a measure that would have prohibited local governments from regulating tobacco products. The court, however, showed that the pro-tobacco legislator in question had already stated his support for tobacco interests, had not changed his position on the issue as a result of the contributions and had not tried to conceal the tobacco industry contributions. The court also found that the $2,700 in tobacco money the legislator received was not enough to influence his vote on the measure. "We believe," the court stated, "that $1,000 is simply not a large enough sum of money to yield, of its own accord and without further evidence, a reasonable perception of undue influence or corruption."

  This same pattern emerged with contributions to legislators from several lobbyists who represented various groups, including real estate interests. Again, none of the contributions individually exceeded $1,000.

  The court found that the $100 and $300 contribution limits approved in the voter initiative were too low to allow meaningful participation in the political process. The court also held that the $200-per-year PAC contribution limit enacted before the voter initiative was "simply too low to allow for appropriately robust participation in protected political speech and association."

  The court concluded that, "the limitations in question here are … dramatically lower than, and different in kind from, the limits approved in *Buckley*, and thus are unconstitutionally low."
- *Proponents of small-donor PACs with higher contribution limits failed to show that differential treatment was warranted.* The supporters argued that raising funds in $25 amounts would alleviate the potential for

corruption. The court found, in fact, that the potential for corruption would move from the individual contributor to the small-donor PAC itself.

"If any contribution is likely to give rise to a reasonable perception of undue influence or corruption, it would be one from an entity permitted to contribute two-and-a-half times the amount that most others are allowed to contribute," the court stated. "The small-donor PAC provision is not, then, narrowly tailored to serve the compelling government interest of combating the reality or perception of undue influence or corruption."

Severability. The court found that the contribution limits were severable from the remainder of the voter initiative. It let stand the provisions for independent expenditure committees and rendered no decision on the instructions to local governments to establish reasonable limitations on campaign contributions and expenditures.

Source: FEC *Record*, January 1999, p. 3.

Kruse v. City of Cincinnati, 142 F.3d 907 (6th Cir. 1998), *cert. denied* 1998 WL 651027 (U.S.); *Russell v. Burris*, 146 F.3d 563 (8th Cir. 1998), *cert. denied*, 119 S. Ct. 1040 (1999).

CITIZENS FOR LAROUCHE v. FEC FEC v. LAROUCHE

On January 31, 1984, the U.S. Court of Appeals for the District of Columbia Circuit issued an order dismissing a petition that Lyndon H. LaRouche, Jr., a publicly funded candidate for the Democratic Party's Presidential nomination in 1980, and Citizens for LaRouche, his principal campaign committee, had filed with the court on January 11, 1983. (*Citizens for LaRouche v. FEC*; Civil Action No. 83-1050.) Pursuant to 26 U.S.C. §9041, the LaRouche campaign had asked the appeals court to review a final repayment determination that the FEC had made on December 16, 1982. The court's action affirmed the FEC's determination that the LaRouche campaign had to repay $54,671.84 in primary matching funds to the U.S. Treasury.

On May 8, 1984, the Commission entered into a stipulation dismissing with prejudice *FEC v. LaRouche* (Civil Action No. 83-3743), a suit that the FEC had brought in the U.S. District Court for the District of Columbia against Lyndon LaRouche and Citizens for LaRouche, his principal campaign committee. In this suit, filed on December 15, 1983, the FEC had sought a court ruling that would require the LaRouche campaign to repay the $54,672 in primary matching funds. Since the LaRouche campaign subsequently made the repayment during April 1984, the Commission filed the stipulation dismissing the case as moot.

Source: FEC *Record*, June 1984, p. 11; and July 1984, p. 7.

Citizens for LaRouche v. FEC, 725 F.2d 125 (D.C. Cir. 1984).

Citizens for LaRouche: FEC v., 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶9214 (D.D.C. 1984).

CITIZENS FOR PERCY '84 v. FEC (84-2653)[1]

On November 19, 1984, the U.S. District Court for the District of Columbia issued an opinion in *Citizens for Percy '84 v. FEC* (Civil Action No. 84-2653) stating that the FEC's delay in acting on an administrative complaint filed on April 26, 1984, by Citizens for Percy '84 (the Committee) was contrary to law. (The Committee was former Senator Charles H. Percy's principal campaign committee for his 1984 reelection campaign.) The court also ordered the FEC to conform its conduct to the decision within 30 days of the court's order. See 2 U.S.C. §437g(a)(8).

Background

On August 26, 1984, the Committee had petitioned the district court to declare that the FEC's failure to act on its administrative complaint was contrary to law. See 2 U.S.C. §437g(a)(8)(A). In the complaint, the Percy campaign had claimed that media expenditures made by Michael Goland on behalf of Rep. Thomas Corcoran, Senator Percy's opponent in the Illinois Senate primary, were coordinated with the Corcoran campaign. The Percy campaign had alleged that, since the expenditures were not independent, Mr. Goland had violated the election law by making excessive in-kind contributions to the Corcoran campaign. See 2 U.S.C. §441a(a)(1)(A). Moreover, the Corcoran campaign had violated the law by accepting the contributions. See 2 U.S.C. §441a(f).

Court's Ruling

Noting that the FEC had not found reason to believe the respondent had violated the election law until October 2, 1984, more than five months after the Committee had filed its administrative complaint, the court concluded that the FEC had acted contrary to law. The court reasoned that, since Senator Percy's reelection campaign had been the "focus...of tremendous national interest," the agency did not have the discretion to give the complaint routine treatment.

Source: FEC *Record*, January 1985, p. 6.

Citizens for Percy '84 v. FEC, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶9215 (D.D.C. 1984).

[1] *Citizens for Percy '84 v. FEC* (85-0763) was dismissed. See *Antosh v. FEC* (85-1410).

CITIZENS FOR WOFFORD v. FEC

On April 14, 1995, plaintiff withdrew the complaint it had filed against the FEC in the U.S. District Court for the District of Columbia. An FEC suit filed against plaintiff on December 20, 1994, in the U.S. District Court for the Middle District of Pennsylvania, Harrisburg Division, on December 20, 1994, is still in progress. *FEC v. Citizens for Wofford* (1:CV-94-2057).

Background

Both cases involve an FEC enforcement action borne out of the 1991 Pennsylvania special election. The major party contenders in the special election were Democratic nominee Mr. Harris Wofford and Republican nominee Mr. Richard Thornburgh. The Democrats nominated Mr. Wofford on June 1, 1991, but did not certify the nomination until September 5, 1994.

Citizens for Wofford, Mr. Wofford's principal campaign committee, regarded contributions received following the June 1 designation but prior to the September 5 certification as primary contributions. [1]

As a result, the Republican State Committee of Pennsylvania filed an administrative complaint with the FEC. Following an investigation, the Commission found probable cause to believe that Citizens for Wofford violated 2 U.S.C. §441a(f) —the knowing acceptance of a contribution made in violation of the Federal Election Campaign Act's limits. This was because contributions received after June 1, the date of the nomination, should have been counted against the contributor's general election limit. Attempts to reach a conciliation agreement with Citizens for Wofford failed. This impasse lead to the filing of this case and *FEC v. Citizens for Wofford*.

Source: FEC *Record*, June 1995, p. 13.

Citizens for Wofford v. FEC, No. 94-2617 (D.D.C. Apr. 14, 1995).

[1] Counting these contributions against a contributor's primary election limit instead of against the contributor's general election limit would enable contributors to give up to twice as much to the party's nominee as they would otherwise be able to; contributors would be able to give up to their per-election limit to support Senator Wofford's primary election campaign after the fact and again to support his general election campaign.

CLARK v. FEC AND THE COMMISSION ON PRESIDENTIAL DEBATES

On March 10, 1997, the U.S. Court of Appeals for the District of Columbia Circuit ruled in the FEC's favor, granting its motion for summary affirmance in this case and denying the motion of John P. Clark and the Green Party USA for emergency summary reversal. The ruling upholds the district court's denial of a motion by Mr. Clark, other individual voters and the Green Party to intervene in a suit brought by the Natural Law Party (NLP) and its presidential and vice-presidential candidates against the FEC and the Commission on Presidential Debates (CPD).

This case stemmed from an October 4, 1996, ruling from this same court that upheld a lower court ruling and dismissed lawsuits filed against the FEC and the CPD by the NLP and the presidential and vice presidential candidates running under the Reform Party banner. Both the NLP and the Reform Party candidates had sought to participate in the presidential debates being sponsored by the CPD. The CPD excluded the candidates—the NLP's Dr. John Hagelin and Mike Tompkins and the Reform Party's H. Ross Perot and Pat Choate—from the debates, saying that the minor party candidates did not meet the criteria for participation.

Background

On September 6, 1996, the NLP filed an administrative complaint with the FEC and, on September 13, filed suit in U.S. District Court for the District of Columbia, contending that the CPD had violated FEC rules governing nonpartisan candidate debates. 11 CFR 113.10. Specifically, the NLP suit asked the court to impose a temporary restraining order and issue preliminary and permanent injunctions to prevent the CPD from using any debate selection criteria that did not comply with FEC rules. In the alternative, it asked the court to order the FEC, prior to the debates, to take action on its administrative complaint.

The Green Party, Mr. Clark and seven other individuals, all independent voters or supporters of the Green Party USA and its 1996 presidential candidate Ralph Nader, filed a motion for intervention on September 27, 1996. The district court found that Mr. Clark and the others "show[ed] their curiosity in the case, but…fail[ed] to demonstrate sufficient grounds for intervention." On September 30, the court therefore denied the motion for intervention. However, it did grant Mr. Clark leave to file a brief as a friend of the court.

On November 22—more than a month after the appeals court had ruled in this case and weeks after the debates and 1996 elections had taken place—Mr. Clark filed a notice of appeal of the district court ruling. Mr. Clark had not participated as a friend of the court in the appeals process, nor in a subsequent and unsuccessful petition from Mr. Hagelin for an expedited rehearing and rehearing en banc.

FEC Arguments and Appeals Court Order

First, the FEC argued that the appellants had failed to demonstrate a common question of law, a requirement for permissive intervention under Fed. R. Civ. P. 24.[1] Among other things, Mr. Clark's complaint claimed that the CPD's debate selection criteria violated unspecified sections of the U.S. Constitution. Mr. Hagelin's complaint, on the other hand, had claimed that the CPD's criteria violated FEC regulations at 11 CFR 110.13. Further, the FEC argued that there were no common "questions of fact," as required by Rule 24(b), between Mr. Clark's and Mr. Hagelin's complaints. In addition, the FEC said that the Clark appellants had not shown an independent jurisdictional basis for their claims. The would-be plaintiffs did not even include a presidential or vice-presidential candidate who might have claimed exclusion from the debates.

Timeliness was also at issue, the FEC argued. Rule 24(b) states that a court must consider "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Because the debates were to begin shortly after the original complaints were filed, the district court set about adjudicating the matter on an expedited schedule, but Mr. Clark's motion was not filed until the last day of the briefing schedule.

Finally, the FEC argued that because the district court granted Mr. Clark the option of filing a brief as a friend of the court, it did not abuse its discretion in denying his initial motion to intervene. The appeals court found that the merits of the parties' positions were so clear that they warranted summary action. It held that the district court did not abuse its discretion in denying the appellants' motion to intervene.

Source: FEC *Record*, May 1997, p. 1.

[1] Federal Rule of Civil Procedure 24(b) states that would-be intervenors must timely file their applications and demonstrate that their claim or defense and the "main action" have a question of law or fact in common. In addition, they must show an independent jurisdictional basis for their claims.

CLARK v. VALEO

In a suit filed in 1976, Ramsey Clark, former candidate in the New York State Senate primary election, asked the U.S. District Court of the District of Columbia for declaratory and injunctive relief against those provisions in the Act governing legislative review of the rules, regulations and advisory opinions of the FEC. Under these provisions, regulations proposed by the Commission may not be prescribed until they have been before Congress for 30 legislative days, during which time either house may disapprove them.

Clark argued that the "one-house veto" violated the constitutional principle of "separation of powers." Further, he asserted, regulations would be tainted by congressional influence on the Commission's decision-making process. He also claimed the procedure delayed promulgation of Commission regulations, thereby denying him, as voter and as candidate, protection of the Act.

Intervening as a plaintiff on behalf of the Executive Branch, the Attorney General also requested an injunction against the "one-house veto," arguing that it intrudes "upon those areas reserved by the Constitution of the United States to the Executive Branch.... "

The Federal Election Commission asked the court to dismiss the complaint, arguing *inter alia*, the case was not ripe for court action since Congress had not disapproved any regulation and the plaintiff had claimed no hardship resulting from compliance with the substance of a proposed regulation.

The district court certified a number of constitutional questions to the court of appeals. Concluding that the matter was not "ripe" for adjudication, the court of appeals, in a 6-2 decision on January 21, 1977, returned the certified questions to the district court unanswered, with instructions to dismiss. The court said that Clark's case, based on his status as a candidate, became moot when he failed to win the primary in New York. As a voter, Clark had neither protested a specific veto action by Congress nor identified any proposed regulation tainted by the threat of veto or review. With respect to the constitutional issue raised by the one-house veto, the court held the case was "unripe" because congressional disapproval of a proposed regulation had not yet occurred. "Until Congress exercises the one-house veto," the Court said, "it may be difficult to present a case with sufficient concreteness as to standing and ripeness to justify resolution of the pervasive constitutional issue which the one-house veto provision involves."

On June 6, 1977, the Supreme Court of the United States affirmed the lower court's decision.[1]

Source: FEC *Annual Report 1977*, p. 19.

Clark v. Valeo, 559 F.2d 642 (D.C. Cir.) (*per curiam*), *aff'd mem. sub nom. Clark v. Kimmit*, 431 U.S. 950 (1977).

[1] The Court eventually found the one-house veto to be unconstitutional in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

CLIFTON v. FEC

On May 20, 1996, the U.S. District Court for the District of Maine invalidated the FEC's regulations on voting records and voter guides because they regulate issue advocacy and therefore go beyond the FEC's authority.

On June 6, 1997, the U.S. Court of Appeals for the First Circuit declared invalid two parts of those regulations. The court declared the voting record regulation at 11 CFR 114.4(c)(4) invalid only insofar as the FEC may purport to prohibit mere inquiries to candidates and the voter guide regulation at 11 CFR 114.4(c)(5) invalid only insofar as it limits contact with candidates to written inquiries and replies and imposes an equal space and prominence restriction.

The plaintiffs petitioned the court for a rehearing in this case, but that petition was denied on June 27, 1997. The FEC filed a petition for rehearing and suggestion for rehearing en banc on July 21, 1997.

On February 23, 1998, the Supreme Court denied Maine Right to Life Committee's petition for certiorari in this case.

On April, 30, 1998, on remand from the appeals court, the district court declared the Commission's "electioneering message" provisions of its regulations governing voting guides to be invalid because they were inseverable from those struck down by the appeals court.

Background

The Maine Right to Life Committee (MRLC) is a nonprofit membership corporation established for the purpose of advocating pro-life stances. MRLC uses its corporate funds to create and distribute to its members and the general public voter guides and voting records. Robin Clifton is a Maine voter who wishes to receive this information.

FEC regulations at 11 CFR 14.4(c)(4) and (5) make it illegal for a corporation or labor organization to distribute voting records or voter guides to the general public if such materials expressly advocate the election or defeat of a clearly identified candidate or if the organization consults or coordinates with any candidates concerning the content or distribution of such materials. At 11 CFR 114.4(c)(5)(ii), the FEC lists additional restrictions for voter guides, such as prohibiting a corporate or labor organization from contacting a candidate (except through written questions to which a candidate may respond in writing) and requiring the organization to give all candidates for a particular office an equal opportunity to respond.

MRLC argued that the regulations were too restrictive, exceeding the FEC's statutory power and chilling First Amendment rights. The FEC contended that it had the authority to regulate corporate expenditures for voting records and voter guides if there was coordination with a candidate about the preparation, contents and distribution of such materials.

District Court Decision

The court pointed out that the ban on direct corporate contributions had been upheld by the U.S. Supreme Court in *Buckley v. Valeo* on the grounds that the government's interest in preventing corruption or its appearance outweighs First Amendment concerns. On the other hand, based on the Supreme Court's opinions in *Buckley* and *FEC v. Massachusetts Citizens for Life, Inc. (MCFL),* the court said that corporate spending cannot be limited unless it expressly advocates the election or defeat of a particular candidate. "In other words," the court concluded, "spending on issue advocacy... cannot be limited." The question the court addressed was whether a corporation's contact with a candidate when preparing a voter guide or voting record would transform permissible issue-advocacy spending into a prohibited contribution.

To answer the question, the court examined two provisions of the Federal Election Campaign Act (the Act). In §441a, the Act sets dollar limits on contributions, and for this purpose "contribution" is defined to include "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents." 2 U.S.C. §441a(a)(7)(B)(i).

The other provision, §441b, prohibits corporate "contributions" and "expenditures," which are defined to include "any direct or indirect payment...or anything of value" provided "to any candidate...in connection with any [federal] election." 2 U.S.C. §441b(b)(2).The district court cited the *MCFL* Court's interpretation of Section 441b as prohibiting payments (including indirect payments) made "on behalf of candidates." The district court stated: "That is the statutory and interpretive language on which the FEC's new regulations must be based."

The court said that the FEC, in relying on Section 441a as its authority for the challenged regulations, had "misinterpreted the Supreme Court's teachings." The district court pointed out that, in *Buckley*, the Supreme Court upheld the dollar limitations on contributions because limits on amounts given to a candidate are not the same as limits on direct political speech. "Here," the district court said, "both the disbursements and the

speech are *direct political speech by the MRLC,* not by the candidate. They are thus at the heart of the [Supreme] Court's First Amendment concerns." (Emphasis in original.)

The court concluded that the FEC had based the challenged regulations on too broad an interpretation of the §441b prohibition on corporate expenditures. The court said that the voter guide regulations mistakenly hinge on whether a corporation has had any contact with a candidate rather than on whether the voter guide conveys issue advocacy on behalf of a candidate (which would be an acceptable interpretation). Under the voting record regulations, MRLC would be in violation of §441b if it included an explanation solicited from a candidate concerning apparent inconsistencies in his or her voting record. The court stated: "...it is a distortion of the English language to say that [such an activity] would turn the MRLC's publication...into spending 'on behalf of' a candidate."

In concluding that the FEC had overstepped its authority in promulgating 11 CFR 14.4(c)(4) and (5), the court pronounced that, "as long as the Supreme Court holds that expenditures for issue advocacy have broad First Amendment protection, the FEC cannot use the mere act of communication between a corporation and a candidate to turn a protected expenditure for issue advocacy into an unprotected contribution to the candidate."

Appeals Court Decision

The appeals court found that to avoid First Amendment concerns, it would construe 2 U.S.C. §441b narrowly. Under this construction, both the Commission's restriction on oral contact between MRLC and candidates and its insistence that voter guides provide equal space to candidates were unlawful.

The appeals court found that the FEC's requirement of equal space was a "content-based" restriction because it would affect the content of the MRLC's voting guides. The court said that "[T]here is a strong First Amendment presumption against content-affecting government regulation of private citizen speech, even where the government does not dictate the viewpoint." The court cited a case where the Supreme Court struck down Florida's "right of reply" statute, which guaranteed political candidates equal space to reply to criticism printed in the *Miami Herald*.[1]

With regard to the Commission's requirement that contact between corporations and candidates be limited to written communications when such corporations are preparing voter guides, the court said that the regulation treads "heavily upon the right of citizens, individual or corporate, to confer and discuss public matters with their legislative representatives or candidates for such office." The court said that such a ban on communications served as a "handicap" for discourse between legislators—and would-be legislators—and those they wish to represent.[2]

With respect to both regulations, the court rejected the FEC's argument that such restrictions were justified to prevent illegal corporate contributions to candidates. While the court acknowledged the Commission's legitimate concern with uncovering prohibited contributions, it said that the agency should be able to investigate such impermissible actions through its enforcement proceedings.

The court did not take up MRLC's challenge to the regulation concerning "electioneering message" and instead referred the matter back to the district court. The court concluded that at the district court level there had been inadequate briefing as to the content, purpose and severability of these regulations.

District Court Decision on Remand

The district court declared the Commission's "electioneering message" provisions of its regulations governing voting guides to be invalid because they are inseverable from those struck down by the appeals court. The sections in question—11 CFR 114.4(c)(5)(ii)(D) and (E)—state that voter guides prepared on the basis of written responses from candidates to questions posed by a corporation or labor organization (1) must not include an "electioneering message" and (2) may not score or rate the candidates' responses in a way that conveys an "electioneering message."

Both the Commission and Clifton agreed that the "electioneering message" provisions were not severable from the portions of the FEC's voter guide regulation that had been declared invalid.

Supreme Court Action

On February 23, 1998, the Supreme Court denied Maine Right to Life Committee's petition for certiorari in this case.

Source: FEC *Record*, July 1996, p. 1; August 1997, p. 1; and July 1998, p. 4.

Clifton v. FEC, 927 F. Supp. 493 (D.Me. 1996), 114 F.3d 1309 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 1036 (1998).

[1] *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974).

[2] In a dissenting opinion, Senior Circuit Judge Hugh H. Bownes wrote that the written-contact-only regulation does not infringe on the First Amendment. Citing *Buckley v. Valeo*, the judge said that the Supreme Court had acknowledged that some governmental interests outweigh the possibility of constitutional infringement.

He wrote: "At this stage of American history, it should be clear to every observer that the disproportionate influence of big money is thwarting our freedom to choose those who govern us. This sad truth becomes more apparent with every election. If preventing this is not a compelling governmental interest, I do not know what is."

COMMITTEE FOR JIMMY CARTER v. FEC

On March 2, 1981, the U.S. Court of Appeals for the District of Columbia Circuit dismissed *Committee for Jimmy Carter v. FEC* (Civil Action No. 79-2425). The court's action came in response to an agreement for dismissal of the appeal, filed by the parties on February 20, 1981. This agreement resulted from the Commission's acceptance of the plaintiff's offer to settle the suit.

Petitioners had originally filed the suit on December 3, 1979, challenging an FEC decision to deny matching funds to the Committee for Jimmy Carter (the Committee), the principal campaign committee of former President Carter's 1976 primary campaign. In its suit, the Committee asserted that the Commission had acted arbitrarily, capriciously and contrary to law in certifying only $88,293.92 of the $185,749 in matching funds requested by the Committee in July 1979. The Commission argued that it was bound by its regulations (11 CFR 133.3 (d) and (e))[1] to certify only those funds the Committee needed to retire the legitimate debts of Mr. Carter's primary campaign. The Commission therefore asserted that, if it had granted the Committee's entire request, it would have acted contrary to law by sanctioning an improper use of primary matching funds. Specifically, the Committee had stated in its request for primary matching funds that it planned to use the amount withheld by the Commission ($97,456.08) for the following expenditures. In the Commission's view, none of these constituted qualified campaign expenses.

- Approximately $78,000 would be transferred to former President Carter's 1976 general election committee (the 1976 Democratic Presidential Campaign Committee). The general election committee would, in turn, use the funds to defray legal and compliance costs of the general election campaign, including nearly $50,000 in repayments of public funds that Mr. Carter had accepted for the campaign.[2] (The repayment represented approximately $22,000 the Committee had spent on nonqualified campaign expenses and approximately $27,000 in interest income it had earned on invested public funds.)
- $19,500 would be used to replace funds that the Committee had previously transferred to Mr. Carter's 1976 general election committee in 1978 and 1979, despite the fact that the Committee itself had continued to incur debts during this period.

The Committee argued that the transfers to the 1976 general election committee were part of an ongoing transfer authorization granted by the Commission in February 1977. This authorization had allowed the Committee to transfer $500,000 in private contributions to the compliance fund of the general election committee. These contributions were received after Mr. Carter's

nomination to the Presidency in July 1976. Moreover, the Committee argued that the Commission's partial denial of the certification violated Section 134.3(c)(2) of FEC regulations, the provision in effect during the 1976 elections. The Committee claimed that this provision entitled it to receive matching funds up to the full amount of its outstanding debts on the date Mr. Carter was nominated for the Presidency, regardless of whether it received any private contributions after that date.[3]

The Commission maintained, however, that the transfer authorization had terminated in August 1977 when the Committee repaid $126,515 in matching funds to the U.S. Treasury. The Commission noted that it had requested the repayment because it had certified the funds on the understanding that the Committee planned to transfer $500,000 in private contributions to the compliance fund for the general election committee. The Committee had, however, transferred only $300,000.

In the agreement settling the Committee's claim for matching funds, the Commission agreed to certify $65,650.01 to the Committee, an amount equivalent to qualified legal expenses the Committee had incurred through February 1981. The Commission expressly conditioned this certification on the Committee's consent to:

- Use the funds solely to pay its own outstanding campaign debts;
- Request no further matching funds and terminate; and
- Execute and file the agreement for dismissal of the suit with the court of appeals.

Source: FEC *Record*, May 1981, p. 7.

[1] The FEC prescribed revised regulations in May 1979. Section 133.3(d) is now 9034.1(a) and Section 133.3(e) is now 9034.1(b).

[2] Under the Presidential Election Campaign Fund Act, major party nominees are eligible for public grants of $20 million (plus a cost-of-living adjustment) to finance their general election campaigns.

[3] Under the revised regulation (11 CFR 9034) prescribed in May 1979, Presidential primary candidates are entitled to continue receiving matching funds after their date of ineligibility only if the combined total of their matching funds and private contributions does not cover outstanding debts.

COMMITTEE FOR A UNIFIED INDEPENDENT PARTY, INC. v. FEC

On May 8, 2000, the Committee for a Unified Independent Party and other plaintiffs (collectively the Committee) asked the U.S. District Court for the Southern District of New York to find that the FEC's debate regulations are not authorized by the Federal Election Campaign Act (the Act) and violate the First and Fifth Amendments to the Constitution.

The regulations in question, 11 CFR 110.13 and 114.4(f), permit nonprofit corporations to stage candidate debates and to accept donations from corporations and labor unions to defray the costs of those debates. This exemption from the general prohibition against corporate and union contributions and expenditures is based on a statutory provision that permits "nonpartisan activity (by corporations or unions) designed to encourage individuals to vote or to register to vote." 2 U.S.C. §431(9)(B)(ii).

The Committee argued that debates are not "nonpartisan activity designed to encourage individuals to vote or to register to vote" and are therefore not authorized by the Act. Further, even if debates were considered exempt nonpartisan activity, the FEC's regulations unlawfully expand the statutory exemption to permit debates that are neither nonpartisan nor designed to encourage voting. Rather, the debate regulations permit corporations and unions to make prohibited contributions to influence federal elections.

The Committee further contended that the debate regulations "tilt the electoral playing field so as to put minor parties . . . and persons and organizations seeking to promote a democratic multiparty electoral process, at a competitive disadvantage" in violation of the First and Fifth Amendments to the U.S. Constitution.

Decision

On October 10, 2001, the court granted the Commission's motion to dismiss this case, finding that the Committee lacked standing to challenge the Commission's debate regulations. In order to have standing to bring a case in federal court, the plaintiffs must satisfy a three-part test. The plaintiffs must:

1. Allege personal injury;
2. Show that the injury is fairly traceable to the defendant's allegedly unlawful conduct; and
3. Show that the injury is likely to be redressed by the relief that the plaintiffs request.

In this case, the court found that the plaintiffs that were political parties lacked standing because they either were not injured as a result of the regulations or could not trace their injury directly to the regulations. Likewise, the CUIP, an organization interested in sponsoring

multilateral debates, could not show an injury that was traceable to the debate regulations. The court also found that the plaintiffs who were individual voters, minor party supporters or former candidates lacked standing to challenge the regulations. Having found that Plaintiffs lacked standing, the court ordered the case closed without considering the merits of Plaintiffs' claims.

Source: FEC *Record*, July 2000 , p. 8; and December 2001, p. 1.

COMMITTEE TO ELECT LYNDON LAROUCHE v. FEC
FEC v. COMMITTEE TO ELECT LYNDON LAROUCHE
JONES v. FEC

Committee to Elect Lyndon LaRouche v. FEC

On August 23, 1979, the U.S. Court of Appeals for the District of Columbia upheld the Commission's action in denying primary matching fund payments to Lyndon LaRouche, candidate of the U.S. Labor Party, during the 1976 Presidential primary campaign.

In October 1976, Mr. LaRouche "certified" to the Commission that he had met the eligibility requirement to receive primary matching funds by having raised at least $5,000, in contributions of $250 or less, in each of at least 20 states. Because this "certification" was in the form of a one-page notarized statement, the Commission requested further financial information to support this statement. Later that month, the candidate's principal campaign committee, the Committee to Elect Lyndon LaRouche (CTEL), submitted a computer printout listing contributions in excess of the threshold. Once again, however, the Commission received no supporting documentation of the listed contributions. A subsequent Commission audit, initiated to verify Mr. LaRouche's eligibility, raised substantial questions as to whether many contributions had been made by residents of the States to which they were attributed. After further investigation and an expanded audit, the Commission determined on February 10, 1977, that Mr. LaRouche had not met the threshold requirement in at least two States. Accordingly, the Commission ruled that Mr. LaRouche was not entitled to primary matching funds. On February 14, 1977, CTEL filed suit challenging the Commission's decision.

CTEL argued that the Commission had overstated both the candidate's burden in establishing eligibility and its own role in certifying eligibility. As a result, CTEL maintained, the Commission had violated the Act by denying matching funds to Mr. LaRouche. To establish eligibility, CTEL asserted, the candidate need only "attest authoritatively" in good faith and with knowledge that he has met the threshold. The Commission's role in the certification process is limited to ensuring that the candidate has so attested. CTEL also objected to the Commission's investigative procedures in determining Mr. LaRouche's ineligibility.

The Commission argued that the candidate must not merely attest, but demonstrate to the Commission's satisfaction that he has adequate documentation to support his contention that the threshold has been met. Furthermore, the Commission maintained it is empow-

ered not only to review documentation supplied by the candidate, but also to audit records or campaign contributions and to verify reported contributions by interviewing individual contributors, if necessary.

To properly determine the respective roles of the candidate and the Commission in the certification process, the court focused on two relevant concerns: Congress's intent, on the one hand, to withhold public funds from frivolous candidates and its desire, on the other, to provide prompt payment to serious candidates. The best way to accommodate these two objectives, the court determined, is to construe the Act as the Commission had. Since Congress established eligibility thresholds, it could also impose reasonable procedures to ensure that those thresholds were met. The Commission's approach, the court pointed out, involves an objective standard, which ensures that eligibility criteria will be applied to all candidates in an equitable manner.

Although the Commission acted ultra vires in conducting a premature audit, the court found the Commission's actions reasonable and nonprejudicial. Therefore, since Mr. LaRouche's submissions fell far short of the documentation required to establish his eligibility, the court concluded that the Commission had acted properly in not approving matching funds.

FEC v. Committee to Elect Lyndon LaRouche and Jones v. FEC

Also on August 23, 1979, the U.S. Court of Appeals for the District of Columbia upheld three actions of the District Court for the District of Columbia in an appeal which had been filed on September 28, 1977, by the Committee to Elect Lyndon LaRouche, the National Caucus of Labor Committees, the New Solidarity International Press Service, Inc., and Campaigner Publications, Inc. This was an appeal from an order of the district court enforcing subpoenas issued by the FEC during the investigation of Lyndon LaRouche's eligibility for primary matching funds. In upholding the district court's action, the court of appeals maintained that:

1. The district court had jurisdiction to determine this case despite appellants' argument that the District of Columbia was not the place where the Commission's inquiry took place. The court maintained that the Commission was conducting a nationwide investigation from its national office in the District of Columbia and should be afforded broad discretion, "within the bounds of reasonableness," in selecting this jurisdiction as its place of inquiry.
2. The district court had personal jurisdiction over the appellants despite the fact that they were served in New York rather than in the District of Columbia. The court pointed out that the scope of the Commission's responsibilities is nationwide and its power is sufficiently broad to warrant an implied grant of authority for extraterritorial service of process under 2 U.S.C. §437(b).
3. The district court had not denied the appellants an opportunity to demonstrate that the Commission had issued the subpoenas in retaliation for two suits which the appellants had brought against the Commission. The court of appeals pointed out that the appellants could not have been denied such an opportunity since they had never requested it.

The above appeal was argued with *Leroy B. Jones v. FEC*. In Jones, the appellants repeated numerous constitutional, statutory and common law claims originally stated in their initial suit. The claims arose from the Commission's field interviews of LaRouche contributors, the manner in which the interviews were conducted and the scope of the questions asked. The district court had granted summary judgment to the FEC. The court of appeals upheld the district court's action with respect to all but two of the allegations. The court of appeals determined that the district court had erred in granting summary judgment with regard to the appellants' claim that the Commission had inquired during field interviews into issues bearing no relation at all to the subject matter of an otherwise legitimate investigation into a candidate's eligibility to receive primary matching funds; and appellant Jones' claim that he was subjected to a warrantless seizure of certain financial documents and bank records. These allegations were remanded to the district court for factual determinations. In all other respects, the court affirmed the decision under review.

Supreme Court Action

On February 19, 1980, the Supreme Court denied a petition for certiorari in these three cases. The Federal Election Commission had filed a brief opposing the petition.

Source: FEC *Record*, October 1979, p. 6; and April 1980, p. 7.

Committee to Elect Lyndon LaRouche v. FEC, 613 F.2d 834 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980).

Committee to Elect Lyndon LaRouche: FEC v., 613 F.2d 849 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980).

Jones v. Unknown Agents of the Federal Election Commission, 613 F.2d 864 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980).

COMMON CAUSE v. FEC (78-2135)

On April 30, 1980, the U.S. District Court for the District of Columbia granted summary judgment in two cross motions filed by parties to the suit, *Common Cause v. FEC* (Civil Action No. 78-2135).

Common Cause had filed its motion for summary judgment in November 1978, requesting that the court rule the FEC had acted contrary to law in failing to take final action on Common Cause's administrative complaint within 90 days of its being filed. 2 U.S.C. §437g(a)(9)(B)(ii). In its complaint, Common Cause had asserted that the American Medical Political Action Committee (AMPAC), the separate segregated fund of the American Medical Association (AMA), and the state political action committees of AMA's state affiliates constituted a single political committee by virtue of their affiliation. 2 U.S.C. §441a(a)(5). Therefore, alleged Common Cause, AMPAC and its affiliated state PACs shared a single contribution limit of $5,000 per candidate, per election. Common Cause's complaint listed numerous instances in the 1976 Congressional elections where the combined contribution of AMPAC and an affiliated state PAC to a candidate had exceeded the $5,000 limit.[1]

At the time Common Cause filed its motion for summary judgment, the Commission had entered into conciliation agreements only with AMPAC and a few of the state PACs named in the June 1978 complaint. By fall of 1979, however, the Commission had entered into separate agreements with an additional five state PACs; between Fall 1979 and Spring 1980 the Commission entered into agreements with eleven other state PACs and was preparing to enter into 10 additional agreements. The court also noted that in February 1977 the Commission had broadened the scope of its initial investigation to include all of the AMA's state affiliates and their PACs. Moreover, the Commission had begun investigating four additional complaints which also alleged violations of the Act's contribution limits by AMPAC and its affiliated state PACs.

Common Cause nevertheless maintained that the FEC had acted contrary to law in not taking final action on its complaint within 90 days. The FEC, on the other hand, viewed the 90-day provision as jurisdictional, giving the court power to decide after the 90-day period whether or not the Commission had acted contrary to law.[2]

In addition to supporting the FEC's interpretation of the 90-day provision, the court noted that the determination of whether AMPAC and its state PACs were affiliated (i.e., whether they had been established, financed, maintained or controlled by the same entity) was a factual question requiring proof provided by extensive investigation. Therefore, the court did not find the FEC's efforts to collect further evidence to be an abuse of discretion. Moreover, the court found that the FEC's decision not to investigate combined contributions by state PACs affiliated with AMPAC (in addition to the combined AMPAC-State PAC contributions it had investigated) was not contrary to law since Common Cause had mentioned only one such occurrence among the 69 violations it had cited. The court did, however, order the Commission to either enter into conciliation agreements with the ten remaining respondents named in Common Cause's complaint within 30 days of the court's ruling or bring suit against them. The Commission did enter into conciliation agreements with the remaining respondents, and the court issued an order on June 13, 1980, dismissing the case.

Source: FEC *Record*, August 1980, p. 8.

Common Cause v. FEC, 82 F.R.D. 59 (D.D.C.), 83 F.R.D. 410 (D.D.C. 1979), 489 F. Supp. 738 (D.D.C. 1980).

[1] While this decision was pending, the court issued an order on August 10, 1979, directing the Commission to release to the plaintiff certain internal FEC communications regarding the administrative enforcement action that had been triggered by Common Cause's complaint. Among other things, the court ordered the documents to be released under court seal, and access to them was to be restricted to plaintiff's counsel and to senior officers of Common Cause. Disclosures to outside parties (including the respondents in the FEC enforcement action) were prohibited until a further order of the court. 83 F.R.D. 410 (D.D.C. 1979).

[2] In 1979 Congress amended §437g, expanding the period in which the Commission must act on a complaint from 90 days to 120 days.

COMMON CAUSE v. FEC (83-0720)

On June 10, 1983, the U.S. District Court for the District of Columbia approved dismissal of Common Cause's suit against the FEC (Civil Action No. 83-0720). Common Cause requested the dismissal because, on May 23, 1983, the FEC had taken final action on the administrative complaint which had precipitated the suit.

Pursuant to 26 U.S.C. §437g(a)(8)(A), Common Cause had asked the district court to issue an order directing the Commission to take final action, within 30 days, on a complaint Common Cause had filed on September 26, 1980.[1] In its administrative complaint, Common Cause had alleged that five political committees had made independent expenditures on behalf of the 1980 Republican Presidential nominee which were in violation of 26 U.S.C. §9012(f).[2] (This provision prohibits unauthorized committees from making expenditures exceeding $1,000 to further the election of a publicly funded Presidential nominee.)

Alleging that the committees were not, in fact, independent of the official Reagan campaign, Common Cause had claimed that the committees' activities also resulted in violations of:

- 26 U.S.C. §9012(b)(1), which makes it unlawful for a major party Presidential nominee who receives public funding to accept private contributions;
- 26 U.S.C. §9012(a)(1), which makes it unlawful for a major party Presidential nominee to incur campaign expenditures in excess of the amount of public funding he receives; and
- 2 U.S.C. §441a(a), which prohibits political committees from making contributions in excess of $5,000, per election, to a federal candidate.

Source: FEC *Record*, May 1983, p. 7; and August 1983, p. 8.

[1] This complaint was merged with a similar one filed several months earlier by the Carter-Mondale Reelection Committee and the Democratic National Committee.

[2] On July 15, 1980, the FEC filed suit in the district court against three of the committees named in Common Cause's complaint. The FEC sought the court's declaratory judgment that the committees' proposed expenditures were in violation of 26 U.S.C. §9012(f) and that the provision was constitutional as applied to the committees' expenditures. On August 28, 1981, the court ruled that section 9012(f) was unconstitutional as applied to the defendant committees. On January 19, 1982, the Supreme Court voted 4 to 4 on the issue. While this split vote left the district court decision intact, the Court itself made no ruling on the constitutionality of the provision.

COMMON CAUSE v. FEC (83-2199)

On December 31, 1986, the United States District Court for the District of Columbia declared that the FEC's dismissal of an administrative complaint filed in 1980 by Common Cause was, in part, contrary to law. (Civil Action No. 83-2199.) The case was remanded to the FEC for action consistent with the court's opinion.

On March 15, 1988, the U.S. Court of Appeals for the District of Columbia Circuit reversed the decision by the district court. (*Common Cause v. FEC*, Civil Action No. 87-5036). The appeals court found "entirely permissible" the interpretation of 2 U.S.C. §432(e)(4) that the FEC had applied to allegations contained in Common Cause's complaint. The appeals court also vacated the district court's order remanding the case to the Commission for a statement of reasons concerning the FEC's tie-vote dismissal of an allegation in the complaint and instructed the district court to enter an order dismissing the suit.

Background

The original complaint alleged that five unauthorized political committees, which supported Ronald Reagan's 1980 campaign committee, had violated the Act by using Reagan's name in their respective names. Furthermore, it was alleged that the committees involved in the complaint had impermissibly coordinated their "independent expenditures" with the official Reagan committee and, by doing so, had made contributions which exceeded the committees' limits. The five committees named in the complaint were: Americans for an Effective Presidency (AEP), Americans for Change (AFC), North Carolina Congressional Club[1] (NCCC), Fund for a Conservative Majority (FCM) and National Conservative Political Action Committee (NCPAC). After investigating the majority of the claims, the FEC voted to close the file regarding the administrative complaint and take no further action.

In its suit, filed August 1, 1983, Common Cause alleged that the FEC had wrongfully dismissed the complaint.

District Court Ruling

FEC Determination to Dismiss Complaint on Committees' Use of Candidate's Name

The first legal issue addressed by the court was Common Cause's allegation that AFC, FCM and NCPAC violated the Act (2 U.S.C. §432(e)(4)) by using the name of a candidate, Ronald Reagan, in their respective committee names. Under the Act, only an authorized committee may use a candidate's name in its name. In this case, the committees involved were not authorized by any candidate. Evidence revealed that each committee had used the name "Reagan" in its respective fundraising project when soliciting funds and otherwise communicating with the public. The FEC argued that, because the official registered names of the committees did not contain Reagan's name and that the use of "Reagan" was merely for the purpose of identifying a particular fundraising project, the Act had not been violated.

In its opinion, the court noted that the name of the committee which is presented to the public for identification constitutes a "name" within the meaning of the Act and, therefore, the decision by the FEC to dismiss the complaint was contrary to law. Further, the court ordered the Commission to conform with its opinion within 30 days, pursuant to 2 U.S.C. §437g(a)(8)(c).

FEC Determination Not to Investigate Coordination

In the original administrative complaint, by a vote of 3-3, the FEC reached no conclusion as to whether there was reason to believe AEP and NCCC had coordinated their expenditures with the official Reagan campaign. (With regard to the other three committees, the Commission did find "reason to believe" and did conduct an investigation. See below.) This decision, which resulted in an automatic dismissal of this portion of the complaint, was contrary to the recommendation made by the FEC's General Counsel. Moreover, the Commission submitted no explanation for its decision.

The court stated that some explanation of the FEC's reasons for dismissing the complaint was warranted to enable the court to review the original determination on the issue. As a result, the court ruled that the FEC's action was arbitrary and capricious and required the agency to provide an explanation for its action within 30 days.

FEC Determination to Dismiss Complaint on Coordination

The final issue addressed by the court concerned Common Cause's allegation that the FEC, after investigating expenditures by AFC, FCM and NCPAC, acted contrary to law by dismissing the complaint. In the original complaint, it was alleged that all of the committees had "coordinated" their expenditures with those of the official Reagan campaign and had, thereby, made contributions—rather than independent expenditures. These contributions, according to Common Cause, exceeded the limitations contained in the Act, under 2 U.S.C. §441a(a). (There are no limits on independent expenditures.)

In its suit, Common Cause contended that a determination of coordination should be based on the "totality of circumstances." According to Common Cause, the FEC should have considered circumstances such as interlocking membership of persons at the policy-making level, prior alliances with the official committees and the use of common vendors by the committees. The FEC argued, however, that evidence of "direct coordination"

was a necessary prerequisite to a determination of "impermissible coordination," and it found no evidence of direct coordination.

The court concluded that the FEC's interpretation of what constitutes "impermissible coordination" was not contrary to the law. Moreover, the court noted that, absent evidence of express intent or communication, "it is difficult to state exactly what combination of circumstances would prove that coordination had occurred." Therefore, in this issue, the court ruled that the FEC's action was proper.

Appeals Court Ruling

Committee Names

In reversing the district court's ruling, a three-judge panel of the appeals court affirmed the FEC's interpretation of Section 432(e)(4), that is, that a political committee's "name" refers only to the official or formal name under which the committee must register. The court held that the "sparse legislative history of Section 432(e)(4) shows nothing definitive to undercut the Commission's consistent interpretation of this provision as applying only to the official name of a political committee." The court therefore concluded that, while Common Cause's interpretation of the provision was "not totally implausible," it did not "preclude the Commission's quite plausible alternative. There is, in short, a genuine ambiguity in Section 432(e)(4)'s text."

Further, considering the structure of the statute, the appeals court agreed with the FEC's argument that "name" should be similarly defined in Sections 432(e)(4) and 433(b)(1). (Section 433(b)(1) requires unauthorized committees to register one official name with the FEC.) The court held that these two provisions, along with the Act's disclaimer provision (Section 441d(a)), allowed the Commission "to establish a coherent means by which readers and potential contributors can find out the identity and status of those who are soliciting them."

In dissenting from the majority decision on the "name" issue, Judge Ruth B. Ginsburg argued that "Congress enacted Section 432(e)(4) to avoid public confusion and to increase public awareness of the sources of campaign messages.... Sensibly and purposively construed, the Section 432(e)(4) prohibition covers not only the formal, registered name of a political committee, but also the name the committee actually uses to identify itself in communications with the public purporting to solicit contributions for, or on behalf of, a candidate."

Deadlock Vote

Finally, the appeals court reversed the district court's ruling that the FEC's deadlock vote dismissal of other allegations against two political committees must be remanded for a statement of reasons. The appeals court concluded that its recent ruling in *Democratic Congressional Campaign Committee (DCCC) v. FEC* (Civil Action No. 86-5661) was applicable to the circumstances of Common Cause's case. In *DCCC v. FEC*, the court found that the FEC's dismissal of an administrative complaint as the result of a deadlock vote was subject to judicial review. Consequently, the court could require the FEC to supply a statement of reasons for such dismissals.

Nevertheless, the court declined to "apply the precedent retroactively to this case, which arose before our DCCC decision...To do so, in this case at least, would be an exercise in futility and a waste of the Commission's resources." The court added, however, that it would "enforce the DCCC rule with respect to all Commission orders of dismissal based on deadlock votes that are contrary to General Counsel recommendations issued subsequent to our decision in that case."

Source: FEC *Record*, February 1987, p. 6; and May 1988, p. 7.

Common Cause v. FEC, 655 F. Supp. 619 (D.D.C. 1986) rev'd, 842 F.2d 436 (D.C. Cir. 1988).

[1] NCCC has subsequently become the National Congressional Club.

COMMON CAUSE v. FEC (85-0968)[1]

On June 25, 1986, the U.S. District Court for the District of Columbia issued an opinion in *Common Cause v. FEC*, a suit in which Common Cause challenged the FEC's dismissal of an administrative complaint, which the organization had filed with the Commission in September 1984 (Civil Action No. 85-0968). In remanding the suit to the FEC, the court ordered the agency to provide: (1) an explanation of the legal standard that the agency had used in making its decision to dismiss the complaint and (2) a statement of reasons demonstrating how the FEC had applied this legal standard to the facts before it.

Background

On August 24, 1984, one day after accepting the Republican Party's Presidential nomination, President Reagan addressed a convention of the Veterans of Foreign Wars (the VFW) in Chicago. During his speech, Mr. Reagan did not expressly mention his candidacy; nor did he solicit contributions to his campaign. Since the Reagan administration viewed the Chicago trip as official business, the administration allowed the government to absorb the travel costs and did not report them to the FEC.

On September 20, 1984, Common Cause filed an administrative complaint with the FEC against the Reagan-Bush '84 General Election Committee (the Reagan campaign), President Reagan's principal campaign committee for the 1984 general election. In the complaint, Common Cause alleged that the travel costs related to President Reagan's Chicago speech constituted "qualified campaign expenses" incurred for Mr. Reagan's publicly funded general election campaign.[2] Consequently, Common Cause claimed that the Reagan campaign had to: (1) pay for and report the costs of the Chicago trip as "qualified campaign expenses" and (2) reimburse the government for using a government airplane to make the trip. On December 24, 1984, the FEC's General Counsel recommended that the Commission find "reason to believe" that the Reagan campaign and its treasurer had violated provisions of the election law and public funding statutes by failing to report these expenses. On January 15, 1985, however, the Commission decided, by a four to two vote, to find "no reason to believe" the Reagan campaign and its treasurer had violated federal election laws. Consistent with past practice, the Commission did not issue a formal statement of reasons for its decision to dismiss Common Cause's administrative complaint.

On March 22, 1985, Common Cause challenged the FEC's dismissal decision by filing suit against the Commission with the district court. In its suit, Common Cause asked the court to declare that the FEC's dismissal of its administrative complaint was contrary to law and to order the agency to act on the allegations in its complaint.

In arguing that the FEC's dismissal was contrary to law, Common Cause said that, in determining whether President Reagan's Chicago trip was campaign related, the Commission should have considered the "totality of circumstances" surrounding his Chicago speech rather than using a narrower review standard, which focused solely on: (1) whether President Reagan's speech expressly advocated his reelection and (2) whether he solicited contributions in conjunction with his speech.

The Court's Ruling

Although accepting the legal standard which the parties agreed had been applied by the FEC in its dismissal of Common Cause's complaint, the court observed that it still had to "determine whether the agency has presented a rational basis for its decision." In this regard, the court noted that "the record before us prevents that threshold determination." The court therefore remanded the case to the FEC "both for an explanation of the legal standard actually applied and...a statement of reasons demonstrating how the Commission applied such legal standards to the facts before it."

Commissioners' Second Statements of Reasons

In response to the court's second remand order, Commissioners Joan D. Aikens and John W. McGarry submitted a joint statement of reasons, while Commissioner Lee Ann Elliott submitted a separate statement. The fourth dissenting Commissioner in the case, Frank P. Reiche, did not submit a statement of reasons because he left the Commission in April 1985.

On July 15, 1988, the three Commissioners submitted the statements to the court and to Common Cause. While the Commissioners all agreed that President Reagan's speech before the V.F.W.'s annual convention was not campaign related, they were not in unanimous accord concerning the standard that should have been applied to reach this determination. Commissioners Joan D. Aikens and John W. McGarry concluded that they had applied a "totality of circumstances" standard. On the other hand, Commissioner Elliott concluded that, in the case of an officeholder, the "two-pronged" test was appropriate.

Commissioners Aikens and McGarry

The Commissioners stated their views that, in determining whether an officeholder's speech was campaign related, the Commission "has consistently applied a 'totality of circumstances' test, involving examination of external factors." While they agreed that an examination of the elements of the "two-pronged" test was a necessary first step, they maintained that they had to "look further to the timing, the setting and the purpose of the

event as integral components of the 'totality of circumstances' test and as necessary to the ultimate determination that certain activity is or is not campaign-related." Citing agency precedents, the Commissioners stated that their use of the "totality of circumstances" standard was "totally consistent with the approach recommended by the General Counsel in his Report...and adopted by the Commission in many advisory opinions."[3]

Based on these standards, the Commissioners concluded that President Reagan's speech was made in performance of his official duties, rather than to further his reelection. The speech did not expressly advocate President Reagan's election or solicit contributions to his campaign. Nor did the timing, setting or purpose of the President's speech support the complainant's allegations that the speech was campaign related.

With regard to the timing of the speech, the Commissioners noted that the V.F.W. convention was an annual event and that the invitation to attend it had been extended to President Reagan six months before the Republican National Convention. They concluded, "To argue that the timing of this appearance makes it a campaign event would mean that no incumbent President could make an official appearance to perform officeholder duties after the renomination."

Commissioner Elliott

In explaining her view that the Commission should apply only the "two-pronged" test to determine whether President Reagan's speech was campaign-related, Commissioner Elliott stated that "an officeholder's speech will be considered campaign-related if it expressly advocates the election or defeat of a clearly identified candidate or solicits contributions on behalf of a federal candidate. This 'two-pronged' test is sensible and workable Commission precedent and has repeatedly been held a permissible construction of the Act. Further, the 'two-pronged' test avoids subjective or imponderable considerations when evaluating an officeholder's speech."

Commissioner Elliott cited as precedent for the test the Supreme Court's decision in *Buckley v. Valeo*, as well as a series of other federal court cases and FEC actions, including Commission advisory opinions.[4] The Commissioner noted that "the reasonableness of this policy is enhanced when viewed against 11 years of even-handed application."

Commissioner Elliott concluded that the totality of circumstances approach "is really not applicable for officeholders. Its objective elements are already part of the 'two-pronged' test's legal inquiry into 'express advocacy' and its subjective elements are too vaporous upon which to rest a legal conclusion."

Finally, the Commissioner stated that the "totality of circumstances" test could not be appropriately applied to the Reagan speech. In the past, the Commissioner explained, this test had been applied only to (1) nonincumbent candidates, (2) officeholders who were engaging in activities that were not normally part of their duties and (3) officeholders who were invited to make appearances as candidates, rather than in their official capacities. Commissioner Elliott therefore concluded that "following Counsel's recommendation in this case would not have been following Commission precedent."

Commissioner Elliott found that, based on the "two-pronged" test, President Reagan had not made a campaign-related speech at the convention. "I concluded that the speech [did] not advocate the re-election of the President or the defeat of his opponent...His appearance was that of a head-of-state and his remarks were on issues of importance to America's veterans."

Joint Stipulation of Dismissal

On September 27, 1988, the U.S. District Court for the District of Columbia issued a joint stipulation of dismissal in which Common Cause and the FEC agreed to the dismissal, with prejudice, of the suit.

In the joint stipulation of dismissal, Common Cause did not abandon its position that the FEC's action on the administrative complaint was contrary to law. Nor did the FEC abandon its position that its dismissal of the complaint was reasonable.

Source: FEC *Record*, August 1986, p. 6; and October 1988, p. 7.

[1] See also *Antosh v. FEC* (85-1410).

[2] FEC regulations define "qualified campaign expenses" as those expenditures made during the reporting period to further the general election campaign of a publicly funded Presidential candidate. See 11 CFR 9002.11.

[3] For example, the Commissioners cited as precedent Advisory Opinions 1977-42, 1977-54, 1978-4, 1978-15, 1980-16, 1980-22, 1981-37, 1982-15, 1982-56 and 1984-13.

[4] For example, the Commissioner cited as precedent *Buckley v. Valeo*, 424 U.S. 1, 84 n. 112 (1976) and Advisory Opinions 1977-42, 1977-54, 1978-4, 1979-25, 1980-16, 1980-22, 1980-89 and 1981-37.

COMMON CAUSE v. FEC (85-1130)

On June 19, 1990, the U.S. Court of Appeals for the District of Columbia Circuit reversed a district court decision by ruling that the FEC did not adequately analyze an affiliation issue in its dismissal of an administrative complaint filed by Common Cause. (Civil Action No. 89-5231.) The court remanded the case to the district court with instructions to return the matter to the FEC for reconsideration consistent with the appeals court ruling.

Background

Common Cause filed an administrative complaint with the FEC alleging that the Republican National Independent Expenditure Committee (RNIEC) and the National Republican Senatorial Committee (NRSC) were affiliated committees and that RNIEC's expenditures on behalf of then-Senator Dan Evans' 1984 reelection campaign were coordinated with NRSC. As a result, Common Cause contended, contributions made by the two committees on behalf of Mr. Evans exceeded the contribution limits of 2 U.S.C. §441a. The Commission found no probable cause to believe that a violation of the Federal Election Campaign Act had occurred.

After the Commission dismissed the administrative complaint, Common Cause filed suit in 1985 with the U.S. District Court for the District of Columbia. (Civil Action No. 85-1130). Common Cause asked the court to find that RNIEC and NRSC were affiliated committees, or that they had coordinated their expenditures on behalf of Senator Evans. (Either finding would have resulted in excessive contributions by NRSC.)

District Court Decision

In its decision of May 30, 1989, the court found that the Commission's dismissal of Common Cause's principal allegations—affiliation and coordination between RNIEC and NRSC—was reasonable. The court did remand one issue from the original complaint—that of affiliation between RNIEC and the Republican National Committee—back to the FEC for further consideration, finding that the Commission had not addressed that allegation in dismissing the administrative complaint.

Appeals Court Decision

In its *per curiam* opinion, the appeals court noted the deference accorded by the courts to FEC decisions. However, in considering the General Counsel's brief recommending the "no probable cause to believe" finding adopted by the Commission, the court found that "the brief lacks any discussion of the affiliation issue that is independent of the analysis of the separate coordination issue."

Common Cause's affiliation claim was based on three facts: (1) Mr. Rodney Smith served as the financial director and treasurer of NRSC until two months before he co-founded and became treasurer of RNIEC; (2) Senator John Heinz continued to be a member of NRSC a short time after he co-founded and joined the advisory panel of RNIEC; and (3) there was a substantial overlap in contributors to the two committees, the result of RNIEC's use of NRSC's mailing list.

Section 441a(a)(5) of the Act defines affiliated committees as those that are "established or financed or maintained or controlled" by the same person or group. Commission regulations then in effect listed several indicia of affiliation at 11 CFR 100.5(g)(2)(ii)(A)-(E). (Current FEC rules provide revised indicia at 11 CFR 100.5(g)(4)(ii)(A)-(J).) The court stated that the General Counsel's brief made no attempt to tie the relevant indicia of affiliation to the facts of the case. As a result, there was no indication that the agency had considered one pertinent indicium of affiliation: whether Mr. Smith or Senator Heinz had the ability to influence the decisions of both committees. 11 CFR 100.5(g)(2)(ii)(C) (since revised at 100.5(g)(4)(ii)(B)).

Another indicium set out in the rules is whether two committees show a similar pattern of contributions. 11 CFR 100.5(g)(2)(ii)(D) (since revised at 100.5(g)(4)(ii)(J)). The General Counsel's brief did not specifically refer to this indicium. The appeals court found this issue "less troubling" since the brief considered possible affiliation resulting from RNIEC's use of RNSC's contributor list but went on to explain that this implication was rebutted by the committees' dispute over the ownership of the list.

In conclusion the court stated: "Based upon the General Counsel's brief to the Commission, it is impossible to discern whether the FEC applied the applicable statute and regulation to the claim that the NRSC and the RNIEC were affiliated." The court therefore reversed the judgment of the district court on the affiliation issue and remanded the case with instructions for the FEC to reconsider the issue based on the court's decision.

Source: FEC *Record*, August 1990, p. 11.

Common Cause v. FEC, 715 F. Supp. 398 (D.D.C. 1989) rev'd, 906 F.2d 705 (D.C. Cir. 1990).

COMMON CAUSE v. FEC (86-1838)

On August 3, 1987, the U.S. District Court for the District of Columbia issued an order which granted the FEC's motion for summary judgment on all issues in this case except one: the allocation, between the federal and nonfederal accounts of state party committees, of expenses of certain specified activities (e.g., voter registration, "get out the vote" efforts, and campaign materials used in connection with volunteer activities). (*Common Cause v. FEC*, Civil Action No. 86-1838.) For reconsideration of that issue, the court remanded to the FEC Common Cause's petition for rulemaking concerning the use of "soft money" in federal elections.[1]

On August 25, 1988, the U.S. District Court for the District of Columbia decided to hold in abeyance Common Cause's motion to enforce the district court's previous order that the FEC promulgate rules on "soft money." Instead, the court retained jurisdiction in the case and ordered the FEC to submit, at 90-day intervals, concise reports on the agency's progress toward promulgating the rules.

Background

Common Cause filed its petition for rulemaking on November 7, 1984. The FEC published a notice of availability in the *Federal Register*, sent copies of the petition to a number of organizations and received five comments. On December 5, 1985, the FEC's General Counsel recommended that the Commission seek information and comments on "soft money" issues. The FEC then scheduled two days of public hearings, published a notice of inquiry on the matter in the *Federal Register*, sent the notice to 77 organizations and considered the 15 comments it received in response. The Commission also received testimony from Common Cause, the Center for Responsive Politics and the Republican National Committee. On April 29, 1986, the FEC denied Common Cause's petition for rulemaking (see 51 Fed. Reg. 15915).

On June 30, 1986, Common Cause filed this court action pursuant to the Administrative Protection Act, 5 U.S.C. §706, which provides that agency action that is "not in accordance with the law" must be set aside by the reviewing court.

In its motion for summary judgment, Common Cause argued that the FEC:

- Improperly construed the Federal Election Campaign Act (the Act) by (a) improperly considering "intent" as a requisite factor when it concluded that nonfederal funds had not been transferred to the state and local level with the intent to influence federal elections and (b) allowing the allocation of expenditures made in connection with federal and nonfederal elections;
- Inadequately regulated the allocation of federal and nonfederal funds, thereby creating a loophole through which "soft money" could be used in connection with federal elections; and
- Acted arbitrarily and capriciously in denying the petition for rulemaking, given ample evidence to justify a rulemaking.

District Court Ruling

The court noted that, in 1979, Congress amended the Act to permit state and local party committees to spend money in federal elections for voter registration, "get out the vote" activities, and campaign materials used in connection with volunteer activities.
2 U.S.C.§§431(8)(B)(x), 431(8)(B)(xii), 431(9)(B)(viii) and 431(9)(B)(ix). Under the Act, only monies that are subject to the provisions of the Act may be used for these activities. 2 U.S.C.§§431(8)(B)(x)(2), 431(8)(B)(xii)(2), 431(9)(B)(viii)(2) and 431(9)(B)(ix)(2). Under the Commission's regulations at 11 CFR 102.5 and 106.1, when financing these political activities in connection with both federal and nonfederal elections, state and local party committees may spend money from both their federal and nonfederal accounts, allocating "on a reasonable basis."

In reviewing the FEC's denial of the rulemaking petition, the court rejected plaintiffs' argument that the FEC improperly considered intent as a requisite element. The court found that the question of intent was not crucial or even relevant in the FEC's denial of the rulemaking. Instead, the court said, the FEC had found that there was inadequate evidence to conclude that any "soft money" had been used in the ways Common Cause alleged in its petition.

The court also rejected Common Cause's contention that no allocation method is permissible under the Act, noting that "the FECA regulates federal elections only," and that "Congress would have had to have spoken much more clearly in the amendments at issue to contradict" this limit on the FECA's reach. The court further noted that "the plain meaning of the Act is that any improper allocation of nonfederal funds by a state committee would be a violation of the FECA."

The court maintained, however, that the Commission's regulations provide "no guidance whatsoever on what allocation methods a state or local party committee may use," and thus found that a revision of the Commission's regulations was warranted with respect to this one issue and remanded the matter to the Commission.

Finally, the court found that it was not arbitrary and capricious for the Commission to decline to initiate a rulemaking based on the evidence before it, except with respect to the allocation issue discussed above. The court observed, "The Commission opened its doors to comments from each of the fifty state election finance

agencies, as well as both major parties and various other groups interested in the issue of campaign financing. Only fifteen responses were received, some of which adamantly stated that there were no abuses of the type alleged by Common Cause. Indeed, there was testimony that some of the anecdotes submitted by Common Cause were factually erroneous." In conclusion, the court granted the FEC's motion for summary judgment affirming its decision to deny the rulemaking petition with respect to all issues except that of allocation.

District Court Ruling: August 1988

In petitioning the district court to enforce its order of August 1987, Common Cause asked the court to impose a timetable on the FEC which would require the agency to:

- Propose allocation rules within 30 days of the court's order; and
- Make the proposed rules final as soon as possible.

The FEC argued that it had begun to respond to the court's 1987 order by publishing a Notice of Inquiry in the *Federal Register* that sought comments on its proposed rulemaking. The FEC pointed out that the election law had established no timetable for rulemakings. Furthermore, under the law, Common Cause could file a documented administrative complaint to remedy any alleged abuses of the allocation rules. Additionally, the FEC argued that its delay (of seven months) did not approach the three-and five-year agency delays that courts have found to be reasonable. Finally, the agency cited demands on the FEC's resources during a Presidential election year.

The court concluded that "Common Cause ha[d] not shown that the Commission's delay thus far warrant[ed] the intrusive relief sought by the plaintiffs." Nevertheless, the court ruled that the FEC should submit a report to the court every 90 days on its progress toward promulgating the rules.

Source: FEC *Record*, September 1987, p. 6; and October 1988, p. 6.

Common Cause v. FEC, 692 F. Supp. 1391 (D.D.C. 1987); 692 F. Supp. 1397 (D.D.C. 1988).

[1] In its complaint, Common Cause defined the term "soft money" as "funds from sources prohibited under the FECA that are given to political committees and party organizations ostensibly for use at the state and local level, but which are actually used in connection with and to influence federal elections in violation of the FECA."

COMMON CAUSE v. FEC (87-2224)

The U.S. District Court for the District of Columbia granted the FEC's motion to dismiss Common Cause's suit and to dissolve a protective order that had placed court documents under seal. In its order of January 11, 1989, the court noted that Common Cause did not oppose the FEC's motion.

Background

In its suit, filed August 12, 1987, Common Cause asked the court to declare that the FEC failed to take action within the required 120-day period on an administrative complaint Common Cause had filed with the Commission on October 28, 1986. Common Cause further asked the court to direct the FEC to take action within 30 days, pursuant to 2 U.S.C. §437g(a)(8). Civil Action No. 87-2224. Common Cause had alleged in its administrative complaint that the National Republican Senatorial Committee had made excessive contributions to several candidates, a violation of 2 U.S.C. §441a(h).

FEC's Motion to Dismiss Suit and Lift Seal

The Commission asked the court to dismiss Common Cause's suit because the agency had taken final action on the administrative complaint, thus rendering the litigation moot. On December 23, 1988, the Commission had voted to enter into a conciliation agreement with the National Republican Senatorial Committee and had then closed the file. Citing other "failure to act" cases filed against the agency pursuant to 2 U.S.C. §437g(a)(8), the FEC pointed out that the courts have granted similar dismissals once the agency has taken final action.

The FEC had originally requested that the court impose a seal on documents filed in the case that related to the administrative complaint, which was pending at the time and therefore subject to the confidentiality provision of 2 U.S.C. §437g(a)(12). That provision prohibits the agency from making public any information on administrative complaints until the case is resolved. The court imposed a protective seal on October 2, 1987.

Under another provision, however, the Commission must release to the public the results of its inquiries once an enforcement matter is resolved. 2 U.S.C. §437g(a)(4)(B)(i). In its motion to lift the protective seal, the FEC stated that the confidentiality requirements of 437g(a)(12) no longer applied since the agency had since closed the file on the case.

Source: FEC *Record*, March 1989, p. 3.

Common Cause v. FEC, No. 87-2224 (D.D.C. Feb. 8, 1988) (memorandum and order), *dismissed as moot*, (D.D.C. 1989) (unpublished order).

COMMON CAUSE v. FEC (89-0524) FEC v. NATIONAL REPUBLICAN SENATORIAL COMMITTEE (90-2055)

On June 12, 1992, the U.S. Court of Appeals for the District of Columbia Circuit reversed the district court's judgment. The district court had ruled that the National Republican Senatorial Committee (NRSC) had exceeded the contribution limits through its exercise of "direction or control" over earmarked contributions. The court of appeals, however, found that the district court had erred in a previous decision. In that case, *Common Cause v. FEC*, the district court had ordered the FEC to conform to the court's own interpretation of "direction or control."

Background

If a committee, in soliciting earmarked contributions to be passed on to a candidate, exercises "direction or control" over the contributor's choice of the recipient candidate, the contribution counts against both the contributor's limit and the committee's limit. 11 CFR 110.6(d)(2).

In an administrative complaint filed with the Commission (MUR 2282), Common Cause alleged that NRSC had exercised direction or control over the earmarked contributions it had solicited for twelve Senate candidates. As a result, Common Cause claimed, the contributions counted against NRSC's limits for the candidates and caused NRSC to exceed the contribution limits.

NRSC's October 1986 solicitation letter asked readers to support Republican Senate candidates running in four states, without mentioning the names of the candidates. The letter noted that contributions would be divided equally among the four candidates. Various combinations of the four states appeared in different versions of the letter; twelve states were covered in all. Checks were payable to NRSC or an NRSC-controlled fund. The mailing resulted in $2.3 million in contributions. The NRSC deposited the checks in its own accounts, aggregated the contributions to the specified candidates and forwarded the contributions to the candidates in checks drawn on its accounts.

The FEC's General Counsel recommended, *inter alia*, that the agency find probable cause to believe that NRSC had exceeded the contribution limits by exercising direction or control over the choice of recipient candidates. The Commission, in a 3-3 vote, deadlocked with respect to this allegation and therefore took no action. Commissioner Thomas J. Josefiak (who has since left the Commission), joined by Commissioners Aikens and Elliott, issued a statement of reasons supporting their votes against a probable cause finding.

The Commission did find probable cause to believe that NRSC had committed other violations, and the MUR was resolved through a December 1988 conciliation agreement in which NRSC agreed to pay a $20,000 civil penalty. The MUR was then closed.

Common Cause v. FEC

Common Cause asked the court to compel the FEC to act on the "direction or control" allegation. On January 24, 1990, the district court found that the FEC's dismissal of the allegation was contrary to law. Ruling that NRSC had exercised direction or control, the court ordered the agency to proceed on that basis. In compliance with the order, the Commission reopened MUR 2282 and found probable cause. When it failed to reach a conciliation agreement with NRSC on the matter of direction or control, the agency filed suit.

FEC v. NRSC

The new suit was assigned by lot to the same district judge. On April 9, 1991, the district court granted the FEC's motion for summary judgment, ruling that the NRSC had exceeded the contribution limits by exercising direction or control over earmarked contributions. The court imposed a $24,000 penalty.

Court of Appeals Ruling

In addressing the central issue—the interpretation of direction or control—the court cited its decision in *Democratic Congressional Campaign Committee (DCCC) v. FEC*. In that opinion, the court held that, when the FEC dismisses a complaint due to a 3-3 deadlock, the action is subject to judicial review, and the three Commissioners who voted to dismiss must provide a statement of reasons for their vote. The *NRSC* court noted the purpose of this requirement: "Since those Commissioners constitute a controlling group for purposes of the decision, their rationale necessarily states the agency's reasons for acting as it did." A footnote to the DCCC opinion "strongly suggests that, if the meaning of the statute is not clear, a reviewing court should accord deference to the Commission's rationale."

In the present case, the court pointed out that the three Commissioners who had voted against probable cause in MUR 2282 voted in favor of reopening the enforcement proceedings only because they felt they "were obligated to follow the [district] court's order."[1]

The court of appeals found that Commissioner Josefiak's Statement of Reasons in MUR 2282, joined by two other Commissioners, should have been sustained in *Common Cause v. FEC*.[2] The court observed that Commissioner Josefiak's statement "identified the two main factors the Commission's General Counsel, and later the district court, invoked to support a finding of direction or control, and pointed out the present inadequacy of each."

The first factor was that NRSC deposited the earmarked contributions in its accounts before forwarding them to the candidates. Noting that FEC regulations permit a conduit committee to deposit earmarked contributions, the court stated: "Nothing has been offered to reveal why engaging in a Commission-approved practice should cause one to run afoul of other Commission rules."

The second factor was that NRSC "controlled" the choice of candidates by selecting the candidates for whom contributions were solicited and by further selecting the four states mentioned in each fundraising letter. The court, however, observed: "Every solicitation 'pre-selects' candidates to some degree. It is fanciful to suppose that national political committees of any party would expend their resources merely to urge individuals to contribute to the candidate of their choice."

To find "direction or control" on the basis of these two factors, the court said, "would throw into doubt whether any solicitation of *any* earmarked contribution would be exempt from the 'double-counting' requirements of §110.6(d)(2)." However, the court concluded that it was not required to decide if that would be a permissible construction: "It is enough to say that the Commission has not affirmatively adopted such a construction and that it has provided, through the statement of Commissioner Josefiak, joined by two others, a reasoned justification for not doing so." Ruling that "[i]t was an error for the district court to force a different construction upon the Commission," the court reversed the district court judgment.

Source: FEC *Record*, August 1992, p. 11.

Common Cause v. FEC, 729 F. Supp. 148 (D.D.C. 1990).

FEC v. National Republican Senatorial Committee, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶9302 (D.D.C. 1991), ¶9316 (D.C. Cir. 1992).

[1] Statement of Reasons of Commissioners Aikens, Elliott and Josefiak, MUR 2282, December 10, 1990.

[2] Statement of Reasons of Commissioner Josefiak, MUR 2282, January 30, 1989; Concurrence, February 24, 1989.

COMMON CAUSE v. FEC (91-2914)

As stipulated by both parties, the U.S. District Court for the District of Columbia dismissed this case with prejudice on July 31, 1992, without ruling on the issues. The FEC and Common Cause stipulated the dismissal in light of the recent court of appeals decision in *FEC v. National Republican Senatorial Committee* (NRSC). (See *Common Cause v. FEC* (89-0524) on page 36.)

Common Cause had challenged the FEC's dismissal of a complaint alleging that the NRSC had exceeded the contribution limits by exercising "direction or control" over earmarked contributions raised in a 1990 fundraising program. See 11 CFR 110.6(d)(2). However, in the NRSC case, decided on June 12, 1992, the U.S. Court of Appeals for the District of Columbia Circuit held that the NRSC had not exercised direction or control in a somewhat similar fundraising program that took place in 1986.

Source: FEC *Record*, October 1992, p. 11.

COMMON CAUSE v. FEC (92-0249)

On March 3, 1993, the U.S. District Court for the District of Columbia dismissed this suit by agreement of both parties. Common Cause had asked the court to order the FEC to take action on an administrative complaint but agreed to drop its claim because the agency had completed the investigation and entered into conciliation agreements with the respondents. In its administrative complaint, Common Cause had alleged that seven individuals had each exceeded the $25,000 annual limit on aggregate federal contributions.

Source: FEC *Record*, April 1993, p. 10.

COMMON CAUSE v. FEC (92-2538)

On March 30, 1993, the U.S. District Court for the District of Columbia approved an agreement between Common Cause and the FEC to suspend this litigation. In light of that agreement, the court dismissed the suit.

In its suit, Common Cause claimed that the FEC had failed to take required action on its administrative complaint filed in December 1990. The complaint alleged that the National Republican Senatorial Committee (NRSC) had made excessive contributions and expenditures in connection with the 1988 Montana Senate race and had failed to report them accurately. The complaint also alleged that the Montana Republican Party had violated the law by participating in the NRSC's alleged violations.

Common Cause and the FEC agreed to suspend litigation for six months, at the end of which time the FEC was to report on its efforts to resolve the complaint. Under the court's dismissal order, if Common Cause was not satisfied with the Commission's actions on the complaint, the parties would have until October 30 to reopen the litigation.[1]

Source: FEC *Record*, August 1993, p. 5.

[1] The October 30 date was extended.

COMMON CAUSE v. FEC (94-02104)

On March 29, 1996, the U.S. District Court for the District of Columbia ordered the Commission to reconsider portions of two administrative complaints that had been dismissed. Both had been filed in 1990 by Common Cause and John K. Addy.

On March 21, 1997, the U.S. Court of Appeals for the District of Columbia Circuit found that Common Cause lacked standing to litigate certain claims against the Commission, and the court therefore dismissed those claims.

Background

The administrative complaints, designated MURs 3087 and 3204, alleged that the National Republican Senatorial Committee (NRSC) and the Montana Republican Party (MRP) had exceeded their contribution and expenditure limits with respect to Conrad Burns's 1988 U.S. Senate campaign and had failed to disclose all the contributions and expenditures that they had made on behalf of the candidate.

Under the Act: the MRP's contribution limit for the Burns campaign was $5,000 (2 U.S.C. §441a(a)(2)(A)); the NRSC's contribution limit for the Burns campaign was $17,500 (2 U.S.C. §441a(h)); and the NRSC's 1988 coordinated-party-expenditure limit for the Burns campaign was $92,200 (2 U.S.C. §441a(d)).

The FEC's Office of General Counsel investigated the matters alleged in the complaints and found evidence that both committees had erroneously reported certain transactions as transfers, administrative costs or exempt volunteer activities when in fact they were contributions and expenditures made in excess of the Act's limits. Based on this evidence, the General Counsel recommended that the six-member Commission find probable cause to believe that:

- The NRSC and the MRP knowingly and willfully violated the Act when the NRSC transferred funds to the MRP to pay for direct mail materials promoting the Burns campaign;
- The MRP violated the Act when it paid the salary of an MRP employee who worked on the Burns campaign;
- The NRSC violated the Act when it paid for daily polls tracking the progress of the Burns campaign;
- The NRSC violated the Act when it did not charge the Burns campaign for the development of a list of registered voters; and
- The NRSC violated the Act by exercising direction and control over contributions it received in response to a solicitation letter that asked contributors to support Mr. Burns and other Republican candidates, and by not reporting a portion of the solicitation costs as a contribution to the Burns campaign.

At least four of the six FEC Commissioners must approve of an action before the FEC can execute it. Fewer than four FEC Commissioners voted to accept the General Counsel's recommendations. After further deliberations failed to yield a compromise, five of the Commissioners voted to close this case without taking any action. Subsequent to having their administrative complaints dismissed, Common Cause and Mr. Addy filed suit.

District Court Ruling

The court stated that it could only order the FEC to reconsider its dismissal of these MURs if it found that the dismissal was arbitrary or capricious or an abuse of discretion. The court reviewed the reasons for the Commissioners' actions, as articulated in their "statement of reasons." The court found that Commissioners on both sides of most of the issues involved in these MURs presented well reasoned explanations for their differing interpretations of federal election law; the court let the Commission's dismissal of these issues stand. The court, however, did not accept the Commission's reasons for dismissing the following issues.

MRP payments to mailing vendor. Both the NRSC and the MRP had argued that payments for a direct mailing that promoted Mr. Burns's candidacy were not contributions or expenditures on the candidate's behalf. The MRP had argued that these payments fell under the volunteer activities exemption at 2 U.S.C. §431(8)(B)(x) and were therefore not contributions. The court noted that this exemption only applied when the purchased materials were distributed by volunteers and not by commercial vendors. 11 CFR 100.7(b)(15)(iv) and 100.8(b)(16)(iv). The Commissioners who voted against finding probable cause assumed that the MRP used volunteers to distribute these materials, but the MRP never produced any documentation that showed that volunteers were used. The court therefore ordered the FEC to reconsider its dismissal of this charge.

MRP salary payments to Burns campaign worker. MRP employee Ken Knudson was paid a salary by the MRP while he was extensively involved in managing and staffing the Burns campaign. The FEC's General Counsel had determined that the MRP's salary payments to Mr. Knudson constituted contributions to the Burns campaign. The Commissioners who disagreed with this determination reasoned that payments made to field staff who perform a variety of functions for a variety of

persons need not be attributed to any one candidate. They based this reasoning on MUR 3218. The court noted, however, that MUR 3218 states that such salary payments would not constitute a contribution to a candidate's campaign "absent evidence that [a committee's] field staff [were] extensively involved in managing or staffing [a] particular campaign on an ongoing basis . . . ." Since this was precisely what Mr. Knudson had been doing for the Burns campaign, the court found the dismissal of this charge to be arbitrary and capricious and ordered the FEC to reconsider this issue.

Solicitation costs for earmarked contributions. All of the Commissioners agreed that the NRSC had made a contribution to the Burns campaign when it incurred costs associated with the mailing of a letter that encouraged contributors to earmark their contributions to the Burns campaign, among other Republican campaigns. 11 CFR 106.1(c)(1). However, despite this consensus, the Commission failed to take action on this issue because the Commissioners who originally accepted the General Counsel's probable-cause-to-believe finding refused to separate this issue from the less-clear-cut issue of whether the NRSC had exercised direction and control over these earmarked contributions. In their statement of reasons, these Commissioners explained that they were reluctant to separate these issues because doing so would imply that they rejected the General Counsel's direction-and-control analysis. The court noted that the General Counsel's report made separate recommendations with regard to the direction-and-control issue and the solicitation-costs issue. Therefore, the court reasoned, approving one recommendation did not imply rejecting the other. Based on this reasoning, the court found the Commission's dismissal of the solicitation-costs issue to be arbitrary and capricious. The court ordered the FEC to reconsider its dismissal of this issue.

Appeals Court Ruling

The appeals court rejected all three of Common Cause's theories as to why it had standing to litigate the remaining claims.

In order to show standing, a plaintiff must have suffered an injury in fact, or an actual wrong against a legally protected interest, that is traceable to the challenged act and is likely to be redressed by a favorable decision from a court. Organizations may have standing to sue in order to vindicate the rights and immunities it enjoys or, under certain conditions, on behalf of its members. When an organization sues on its own behalf, it must show a concrete injury to its activities with a resulting drain on its resources in order to attain standing. In the case of an organization suing on behalf of its members, the organization must show that its members would otherwise have standing to sue in their own right, that the interests it seeks to protect are germane to the organization's purpose and that neither the claim asserted nor the relief requested requires individual members to participate in the lawsuit.

- *Member Standing*. The court found that Common Cause was unclear on exactly what "political information" was denied its members. However, in the court's view, the nature of the information was crucial to the injury-in-fact analysis. If the information allegedly withheld was simply that a violation of the Act had occurred, then Common Cause's members did not suffer the type of injury that the court had previously held to be sufficient for standing. To allow a plaintiff to establish the required injury in fact in those circumstances, the court concluded, would be "tantamount to recognizing a justiciable interest in the enforcement of the law. This we cannot do."
- *Organizational Standing*. The court also said Common Cause itself did not have standing in this case. It found that the organization was asserting an interest in knowing whether the NRSC and MRP had violated the Act's contribution and expenditure limits. Just as this was an inadequate interest to establish standing when Common Cause asserted it on behalf of its members, it was inadequate to establish Common Cause's own standing. The court stated that, in contrast, if Common Cause had asserted "an interest in knowing how much money a candidate spent in an election, infringement of such an interest may…constitute a legally cognizable injury." While Common Cause also alleged that the NRSC and MRP had violated the Act's reporting requirements, this was a small part of its complaint. Further, Common Cause asked only for an investigation and, if its allegations were proven, monetary penalties against the two Republican committees. The court specifically noted that Common Cause did not ask for any kind of disclosure of the allegedly undisclosed financial information.
- *Dismissal of Complaint*. The court also rejected Common Cause's final argument—that it had standing because the FEC had dismissed its complaint in a manner contrary to law. The organization relied on a section of the law that grants any person who has filed an administrative complaint with the FEC the right to seek review in the U.S. District Court for the District of Columbia if the Commission dismisses that complaint. 2 U.S.C. §437g(a)(8)(A). Based on the U.S. Supreme Court's ruling in *Lujan v. Defenders of Wildlife*,[1] the court said that "absent the ability to demonstrate a 'discrete injury' flowing from the alleged violation of FECA, Common Cause cannot establish standing merely by asserting that the FEC failed to process its complaint in accordance with law." Section 437g(a)(8)(A), the court explained, "does not confer standing; it confers a right to sue upon parties who otherwise already have standing." Because

Common Cause did not demonstrate an injury as a result of the alleged violations of the Act, it could not assert standing under this provision.

Source: FEC *Record*, May 1996, p. 5; May 1997, p. 4.

Common Cause v. FEC, 108 F.3d 413 (D.C. Cir. 1997).

[1] *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

COMMON CAUSE v. SCHMITT FEC v. AMERICANS FOR CHANGE[1]

On July 1, 1980, Common Cause filed suit against Americans for Change and several of its officers in the U.S. District Court for the District of Columbia. Common Cause alleged that defendants had made (or were about to make) independent and coordinated expenditures in violation of 26 U.S.C. §9012(f), which prohibits unauthorized political committees from making expenditures of more than $1,000 on behalf of a publicly funded Presidential candidate. Common Cause asked the court to uphold the constitutionality of Section 9012(f) as applied to defendants' alleged expenditures.

On July 11, the Commission was allowed to intervene in the Common Cause suit and moved to dismiss the action on the grounds that the Commission had exclusive jurisdiction over civil enforcement of the alleged violations and that Common Cause lacked standing to bring suit. Four days later, the Commission filed suit, alleging that the defendant political committees (which claimed to be independent of candidate Reagan's campaign) planned to spend large sums in support of the Republican Presidential candidate's general election campaign. The FEC also asked the court to uphold the constitutionality of 9012(f) as applied to defendants' expenditures. On September 24, 1980, the district court consolidated the two suits for argument before the court.

FEC's Argument

In the motion it filed for summary judgment, the FEC rejected the defendants' argument that the Supreme Court's decision in *Buckley v. Valeo* invalidated Section 9012(f). The FEC pointed out that the constitutional protection accorded political communications is not the same in every context. Citing the Supreme Court's rulings on the public funding program in *Buckley v. Valeo* (424 U.S. 1, 96, 99 and 101 (1976)) and in *Republican National Committee v. FEC*, the FEC maintained that the Court had confirmed the governmental interest served by the contribution and expenditure limits contained in the Presidential public funding program. The FEC argued that, in a similar vein, Section 9012(f) closed off "...the only major avenue by which enormous amounts of aggregate wealth and private financing could be interjected into a scheme designed to encompass only public funding, while avoiding any direct and substantial infringement of protected rights by permitting individuals independent expenditures and by limiting its [Section 9012(f)'s] reach to only those campaigns where candidates have chosen public financing as an alternative to private funding." The FEC maintained that if the defendant committees' "...stated intentions [came] to fruition, namely to raise and expend on behalf of the general election campaign an amount approximately double that

which Mr. Reagan and Mr. Bush have accepted in public financing, the Congressional purpose in enacting this legislation would clearly be subverted, with the taxpayer left footing the bill."

The FEC noted that the legislative history demonstrates that Congress was principally concerned with ensuring the effectiveness of the overall limitations imposed upon those candidates accepting public funding. As stated by Senator Taft in support of his amendment to limit committee expenditures, Section 9012(f)'s purpose was "...to prevent any political committees from being formed as a subterfuge so that they can go beyond the authorization of the committees and make expenditures that were not within the limitations of the expenditures which are in the bill."

The FEC further argued that the limited restrictions of Section 9012(f) were constitutional as applied to defendants "...because public funding of a general election presidential campaign is an option which is chosen by candidates in place of unlimited private funding." Additionally, the provision did not abridge free speech rights because "...the transformation of [political committee member] contributions into political debate involves speech by someone other than the contributor (*Buckley v. Valeo*, 424, U.S. at 21), thereby removing political committee expenditures from the core of individual political expression." (See *California Medical Association v. FEC*, Opinion at 9 n. 5, 10, 15; *Mott v. FEC*, Opinion at 7.)

Defendant Committees' Argument

In their motion for summary judgment in the suit, defendants argued that the independent expenditures in question were a form of free speech and, as such, were protected by the First Amendment. They contended that, in its *Buckley v. Valeo* decision (424 U.S. 1 (1976)), the Supreme Court had held that statutory limits on the amounts which individual citizens or groups could spend on independent communications in political campaigns were an impermissible restraint on First Amendment freedoms. Defendants argued, therefore, that Section 9012(f) could be interpreted as prohibiting only coordinated expenditures authorized or requested by a candidate.

District Court Decision

In its opinion of August 28, 1980, the court ruled on the claims made by the FEC and Common Cause in the consolidated suits. In its rulings on the FEC's claims, the three-judge court determined that Section 9012(f) did apply to defendants' activities. The court concluded, however, that the defendants' proposed expenditures constituted "independent expenditures" which, under *Buckley v. Valeo*, could not be limited. The court said, "The compelling governmental interest to fight electoral corruption is insufficient, here, as in Buckley, to justify what amounts to a direct limitation on political speech.... Whereas a Presidential candidate, by accepting public funds, may choose...to do without unlimited contributions and expenditures, the candidate's public supporters have a separate, protected right to express themselves, individually or jointly. This preserves free access and full participation in the public debate."

Since it had ruled on the constitutionality of Section 9012(f) in the FEC's suit, the court dismissed that portion of Common Cause's suit (Count I) as moot. The court also dismissed Count II of the Common Cause suit, which had sought enforcement of provisions of the Act allegedly violated by defendants. The court stated that the Commission had been vested by Congress with exclusive jurisdiction over enforcement of the Act. The court did not, however, rule on Common Cause's standing to bring suit.

Supreme Court Hearing

On February 23, 1981, the Supreme Court agreed to consolidate the cases of *FEC v. Americans for Change, Americans for an Effective Presidency and Fund for a Conservative Majority* (Civil Action No. 80-1754) and *Common Cause v. Harrison Schmitt* (Civil Action No. 80-1609).

On January 19, 1982, the Supreme Court, in a 4 to 4 split vote, left standing the earlier decision by the district court. (U.S. Supreme Court Nos. 80-1067 and 80-847)

Source: FEC *Record*, April 1981, p. 8; and March 1982, p. 1.

Common Cause v. Schmitt, 512 F. Supp. 489 (D.D.C. 1980) (three-judge court), *aff'd by an equally divided court*, 455 U.S. 129 (1982), *petition for further relief denied*, (D.D.C. Oct. 19, 1983) (three-judge court) (unpublished opinion).

[1] See also *Fund for a Conservative Majority v. FEC* and *FEC v. National Conservative Political Action Committee* (83-2823).

COMMON CAUSE AND DEMOCRACY 21 v. FEC

On November 21, 2001, Common Cause and Democracy 21 (the plaintiffs), both nonprofit public interest organizations, asked the U.S. District Court for the District of Columbia to find that the Commission acted contrary to law when it dismissed the plaintiffs' administrative complaint, filed April 4, 2000. The administrative complaint alleged that, during the 2000 election, joint fundraising efforts by authorized Senate campaign committees and national and state party committees resulted in violations of the Federal Election Campaign Act (the Act). On September 25, 2001, the Commission dismissed the administrative complaint.

Background. Under Commission regulations, political committees, such as authorized candidate committees and party committees, may engage in joint fundraising efforts and may form a committee to act as a joint fundraising representative. 11 CFR 102.17(a). If any participant in the joint fundraiser can lawfully accept nonfederal funds (soft money), then the joint fundraising representative can accept nonfederal funds. 11 CFR 102.17(c)(3) and 2 U.S.C. §§441a, b, c, e, f and g. However, only federal funds—contributions that comply with the Act's limits and prohibitions—may be used to influence a federal election. Party committees may make coordinated expenditures on behalf of their federal candidates, so long as only federal funds are used and the expenditures do not exceed the coordinated party expenditure limits. 2 U.S.C. §441a(d).

Administrative Complaint. In their April 2000 administrative complaint, the plaintiffs alleged that during the 2000 federal elections a number of campaign committees and party committees were using nonfederal funds raised through joint fundraising activities to make expenditures that violated the Act. The plaintiffs alleged that during the 2000 New York Senatorial race, the Democratic Senatorial Campaign Committee (DSCC), the New York State Democratic Committee (NYSDC) and Senator Hillary Clinton's campaign committee (Clinton Committee) created a joint fundraising representative that raised funds for the committees. The plaintiffs claimed that the DSCC and the NYSDC used joint fundraising funds, including nonfederal funds, to purchase television advertisements that were intended to promote Senator Clinton's election and that may have constituted coordinated party expenditures because they appeared to have been coordinated with the Clinton committee. According to the complaint, donors who gave money to the joint fundraising representative understood that their donations would be used to support Senator Clinton's campaign. The plaintiffs asserted that the DSCC transferred funds that under the Act could not be allocated to the Clinton Committee to the NYSDC, which then purchased the ads. Thus, the administrative complaint alleged that the committees violated the Act's contribution limits and its prohibitions on corporate and labor union contributions. 2 U.S.C. §§441a and 441b.

Court Complaint

In their November 2001 court complaint, the plaintiffs repeated the above allegations concerning the 2000 New York Senate race. The court complaint further alleged that these expenditures, when aggregated with the parties' other expenditures, exceeded the Act's coordinated party expenditure limits and were not properly reported to the Commission.

As a result, the complaint alleged, the Clinton Committee, the DSCC and the NYSDC violated the Act by:

- Accepting contributions in excess of the individual contribution limits and in violation of the prohibitions on contributions from corporations and labor organizations (2 U.S.C. §§441a and 441b(a));
- Accepting or expending funds in excess of the coordinated party expenditure limits (2 U.S.C. §§441a(d) and 441a(f)); and
- Failing to report contributions and expenditures used to influence a federal election (2 U.S.C. §434(b)).

Additionally, the complaint alleged that the DSCC exceeded the Act's limit on national committee contributions to Senate candidates and that the DSCC and the NYSDC exceeded limits on political committee contributions to candidates and their authorized committees. 2 U.S.C. §§441a(h) and 441a(a).

In their complaint, the plaintiffs also asserted that other committees involved in joint fundraising for the 2000 elections had committed similar violations, including Democratic committees in Michigan supporting Senator Stabenow and Republican committees in Missouri supporting then-Senator Aschcroft.

Relief

The plaintiffs claim that the Commission failed to provide a reasoned basis for its decision to dismiss their administrative complaint and that the dismissal was erroneous. The plaintiffs ask the court to declare that the Commission's dismissal of the administrative complaint was arbitrary and capricious and contrary to law under the Act.

Source: FEC *Record*, February 2002, p. 4.

CONDON v. USA

On March 26, 1996, the parties in this case agreed to a voluntary dismissal by the U.S. Court of Appeals for the Fourth Circuit. The plaintiff in the case, South Carolina Attorney General Charles Condon, had asked the court to declare that the National Voter Registration Act (NVRA) was an unfunded federal mandate that was unconstitutional. The FEC was named in this suit as one of the defendants.

Mr. Condon had alleged that the NVRA violated the Tenth Amendment, which states that powers not delegated to the federal government and not prohibited to the state by the Constitution are reserved to the states.

Source: FEC *Record*, December 1997, p. 7.

CUNNINGHAM v. FEC

On June 22, 2001, the Robert W. Rock for Congress Committee (the Committee) and its treasurer, Jeremiah T. Cunningham, filed suit against the Federal Election Commission in the U.S. District Court for the Southern District of Indiana, Indianapolis Division. The complaint appealed a civil money penalty the Commission assessed against the committee and its treasurer, and claimed that the Commission's assessment of that penalty was erroneous, excessive and not warranted.

Mr. Cunningham alleged that, on December 12, 2000, he mailed to the Commission the Committee's 2000 30-Day Post General Report, which was due December 7, 2000. Mr. Cunningham maintains that in mid-January he noticed the Committee's report was not posted on the Commission's web site, and that he then sent an additional copy of the report to the Commission. The Commission received that report on February 6, 2001.

In March 2000, the Commission found reason to believe that the Committee and Mr. Cunningham had violated 2 U.S.C. §434(a), which requires the timely filing of reports by political committees. The Commission sent Mr. Cunningham and the Committee a "reason to believe" notice, which included a civil money penalty, assessed under the administrative fine regulations, of $4,500 for failing to file the report. 11 CFR 111.43. The notice informed Mr. Cunningham and the Committee that they had 40 days to either pay the civil money penalty or challenge the Commission's finding. Mr. Cunningham claims that he did not receive the notice because he ceased to receive mail at the address he had given the Commission.

In May 2001, the Commission made a final determination that the Committee and Mr. Cunningham violated 2 U.S.C. §434(a) and assessed a $4,500 civil money penalty for the violation. Plaintiffs filed suit against the Commission on June 22, 2001.

The plaintiffs asked that the court set aside or modify the determination and civil money penalty imposed by the Commission.

Source: FEC *Record*, August 2001, p. 4.

DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE v. FEC (84-3352)

On November 2, 1984, the U.S. District Court for the District of Columbia issued an order denying plaintiff's motion for a preliminary injunction in *Democratic Congressional Campaign Committee v. FEC* (Civil Action No. 84-3352).

Background

In its suit, filed on November 2, 1984, the Democratic Congressional Campaign Committee (the Committee) had sought action against the FEC for the agency's failure to expedite action on an administrative complaint the Committee had filed on October 22, 1984. In light of the November 6 general election, the Committee's administrative complaint had asked the FEC to initiate expedited enforcement proceedings against the Republican National Committee and the National Republican Congressional Committee for their alleged violations of the election law. In its civil complaint, the Committee asked the court to enter a permanent injunction directing the Commission to institute expedited enforcement proceedings concerning the violations of the election law alleged in the Committee's complaint. The Committee also asked the court to establish and announce the compliance standards no later than 5:00 p.m. on November 2, 1984.

In addition, the Committee sought a preliminary injunction ordering the Commission to give expedited consideration to the Committee's administrative complaint and to announce its determination on that complaint no later than 5:00 p.m. on November 2, 1984.

District Court Ruling

On November 2, 1984, the district court denied the Committee's motion for a preliminary injunction. The court concluded that it lacked jurisdiction to require the Commission to make an expedited decision on the Committee's administrative complaint because 120 days had not yet elapsed since the Committee had filed the complaint with the FEC. See 2 U.S.C. §437g(a)(8)(A). In addition, the court stated that it clearly lacked authority to direct the Commission to shorten the time period set forth in the Act's enforcement provisions because Congress had given that authority to the Commission's discretion.

Appeal

The Committee filed an appeal with the U.S. Court of Appeals for the District of Columbia Circuit but later asked the court to dismiss it. On December 14, 1984, the court granted the Committee's motion and dismissed the appeal.

Source: FEC *Record*, December 1984, p. 3; and February 1985, p. 6.

DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE v. FEC (86-2075)

On October 3, 1986, the U.S. District Court for the District of Columbia declared that the FEC's dismissal of an administrative complaint filed with the agency by the Democratic Congressional Campaign Committee was contrary to law. (*Democratic Congressional Campaign Committee v. FEC*; Civil Action No. 86-2075.) Pursuant to 2 U.S.C. Section 437g(a)(8)(C), the court directed the FEC to conform with its declaration within 30 days.

On October 23, 1987, the U.S. Court of Appeals for the District of Columbia Circuit issued an opinion which partially affirmed the district court decision. The appeals court affirmed the ruling that the FEC's dismissal of an administrative complaint resulting from a deadlock vote was subject to judicial review. However, since the appeals court lacked a Commission explanation for the dismissal, it rejected the district court's finding that the dismissal was contrary to law. Instead, the court remanded the suit to the district court with instructions that the district court, in turn, remand the suit to the Commissioners for an explanation of why they voted to dismiss the complaint.

Background

The Democratic Congressional Campaign Committee (DCCC), a national committee of the Democratic Party, filed its administrative complaint with the FEC on December 20, 1985. DCCC alleged that its Republican counterpart, the National Republican Congressional Committee (NRCC), violated the election law by failing to allocate $10,000 to NRCC's coordinated party spending limits for the reelection of Congressman Fernand St Germain in Rhode Island.[1] NRCC made the expenditures for mailings during 1985, which allegedly benefited the Republican House candidate in Rhode Island's First Congressional District. (Although the mailings were officially sponsored by the Rhode Island Citizens Group, NRCC did not deny that it had actually prepared and paid for the mailings.)

The mailings encouraged recipients to petition the House Ethics Committee to investigate newspaper charges that "Cong. St Germain had amassed a multi-million dollar personal fortune by using his public position to help wealthy investors." (Congressman St Germain was the Republican candidate's opponent for the Rhode Island House seat.)

The General Counsel recommended the Commission find reason to believe that the NRCC had violated the election law by failing to allocate and report the mailing expenses as coordinated party expenditures. However, on June 5, 1986, a majority of the Commissioners failed to find "reason to believe" the NRCC had violated the election law. Subsequently, by a unanimous vote, the Commissioners closed the file on the complaint.

Court Ruling

Initially the court noted that, even though the Commissioners' dismissal of the complaint had resulted from their failure to obtain the votes required to find reason to believe the election law had been violated, the DCCC still had "the right [under the statute] to seek review of an adverse outcome."

On reviewing the DCCC's administrative complaint, the court found that the mailing addressed in FEC Advisory Opinion 1985-14 and those conducted by the NRCC in Rhode Island were similar. They both: "(1) were prepared by a national committee of a political party, (2) identified by name a specific Congressman of the opposing party, (3) criticized the record of the Congressman, and (4) were distributed to the constituents of the Congressman in question."

Furthermore, the court noted that "...[T]he Counsel found that the mailer's statement about ridding the government of corruption 'is a reference to an election in that one way to remove Congressman St Germain would be to vote him out of office.'"

The court therefore concluded that the "NRCC mailer conveys an 'electioneering message' as defined by the FEC's own advisory opinions and as interpreted by its General Counsel. Thus the FEC's dismissal of the plaintiff's complaint was 'contrary to law.'"

FEC Appeal

On July 16, 1987, the FEC filed an appeal of the district court's decision with the U.S. Court of Appeals for the District of Columbia Circuit (No. 86-5661). The FEC argued that "authoritative legislative history... demonstrate[d] that Section 437g(a)(8) [of the election law] was not intended to authorize judicial review" of the agency's dismissal of an administrative complaint which results from a deadlock vote on the merits of the complaint.[2] Moreover, the FEC contended that "...even apart from the controlling legislative history of Section 437g(a)(8), the courts have traditionally found agency deadlocks that do not resolve substantive issues to be inappropriate for judicial review." The FEC further argued that the district court should not have ruled on the merits of DCCC's administrative complaint but should have limited its role to determining whether the FEC's dismissal of the complaint "could be rationally justified." The FEC claimed that "the district court's failure to limit its review to this narrow question [ran] afoul of Congress' expressed intent not to 'work a transfer of prosecutorial discretion from the Commission to the courts...' and was therefore erroneous."

Appeals Court Ruling

The appeals court concurred with the district court's finding that the FEC's dismissal of the complaint in this case was subject to judicial review, but it rejected the lower court's ruling that the FEC's dismissal of the complaint was contrary to law.

The court found that "because Section 437g(a)(8)(A) provides broadly for court review of an FEC order dismissing a complaint...we resist confining the judicial check to cases in which... the Commission 'act[s] on the merits.'" The court further noted that the explanation of the provision in the legislative history occurred three years after Congress originally enacted the provision. However, the court limited its decision to the narrow circumstances presented in the case, "specifically a general counsel recommendation to pursue the complaint in fidelity to FEC precedent in point."

Furthermore, the appeals court did not agree with the district court's resolution of the merits of DCCC's administrative complaint. "Because we have no explanation why three Commissioners rejected or failed to follow the General Counsel's recommendation, we are unable to say whether reason or caprice determined the dismissal of DCCC's complaint," the court said. The court therefore held that "the Commission or the individual Commissioners should first be afforded an opportunity to say why DCCC's complaint was dismissed in spite of the FEC's General Counsel's recommendation." The case was remanded to the district court.

Source: FEC *Record*, July 1985, p. 6; November 1986, p. 4; and December 1987, p. 5.

Democratic Congressional Campaign Committee v. FEC, 645 F. Supp. 169 (D.D.C. 1986), *aff'd in part and remanded,* 831 F.2d 1131 (D.C. Cir. 1987).

[1] Coordinated party expenditures are limited expenditures which may be made by party committees on behalf of federal candidates in general election campaigns. During 1986, based on the cost of living adjustment, a national party committee could spend up to $21,810 for each of its House candidates in Rhode Island. 2 U.S.C. §441a(d).

[2] "[I]f the Commission considers a case and is evenly divided as to whether to proceed, that division...is not subject to review anymore than a similar prosecutoral decision by a U.S attorney." See legislative history of 2 U.S.C. §437g(a)(8)(A) at 125 *Cong. Rec.* 36,754 (1979) (emphasis added), reprinted in FEC, *Legislative History of the FECA Amendments of 1979*, at 549.

DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE v. FEC (96-0764)

On November 18, 1996, the U.S. District Court for the District of Columbia dismissed this case. The Democratic Congressional Campaign Committee (DCCC) had voluntarily requested such action.

Originally, the DCCC had asked the court to require the FEC to take action on an administrative complaint it filed with the agency on November 4, 1994, alleging violations of the Federal Election Campaign Act (the Act) by Grant Lally, a Congressional candidate from New York.

The Act allows a complainant to file a lawsuit against the FEC if the agency fails to take action on his or her administrative complaint within 120 days after it is filed. 2 U.S.C. §437g(a)(8)(A). The DCCC filed suit on April 23, 1996, after more than 120 days had elapsed.

In its original complaint, the DCCC alleged that Mr. Lally, who was vying to represent the fifth district, received substantial, undisclosed contributions in violation of the limits of the Act. 2 U.S.C. §441a. The DCCC alleged that the money was in excess of $300,000. Mr. Lally said the money was "personal funds" lent to the campaign. The DCCC filed a supplemental complaint in 1995 alleging that Mr. Lally had continued to violate the Act.

Source: FEC *Record*, January 1997, p. 4.

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE v. FEC (80-2074)
NATIONAL REPUBLICAN SENATORIAL COMMITTEE v. DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE

In an administrative complaint, filed May 9, 1980, DSCC alleged that NRSC had violated the Act by making special "coordinated" expenditures (2 U.S.C. §441a(d)(3)) as an agent for certain state Republican Party committees. Based on written agreements with the state party committees, the NRSC had made the expenditures to support the general election campaigns of various Senatorial candidates in 1978. NRSC's expenditures were within the limits prescribed by §441a(d)(3) for special party expenditures that a state party committee may make on behalf of its Senate candidate (i.e., $20,000 or 2 cents multiplied by the voting age population of the state). On July 11, 1980, the Commission unanimously determined that there was "no reason to believe" that NRSC had violated the Act. This action was consistent with Commission determinations in prior enforcement actions.

District Court Ruling

In a petition filed with the U.S. District Court for the District of Columbia on July 30, 1980 (*Democratic Senatorial Campaign Committee v. FEC*, Civil Action No. 80-1903), DSCC sought a declaration from the court that the FEC's determination was contrary to law and an order directing the Commission to comply with the declaration within 30 days. On August 28, 1980, the district court, ruling on cross-motions for summary judgment, denied the DSCC's petition and affirmed the Commission's determination and interpretation of §441a(d)(3), concluding that the dismissal of DSCC's complaint was not arbitrary, capricious, an abuse of discretion or otherwise contrary to law.

Appeals Court Ruling

DSCC appealed the district court's order on September 3, 1980 (No. 80-2074). On October 9, 1980, in a *per curiam* opinion, the appeals court reversed the district court's judgment and declared the Commission's determination contrary to law. Finding that the Commission had presented no reasoned explanation for its determination on the administrative complaint, the court decided the issue *de novo*. The court determined that neither the language of the statute nor its legislative history could support the Commission's interpretation of §441a(d)(3), i.e., that Congress had not intended to prohibit intraparty agency agreements, such as those used by the Republican Party committees. Accordingly, the appeals court held that, in the absence of an explicit statutory authorization, the agreements between NRSC and the state Republican Party committees violated Section 441a(d)(3). It issued a mandate directing the Commission to conform with its decision.

On October 10, 1980, while the Commission was attempting to comply with the court's decision, intervenor NRSC filed an application to recall the mandate and a petition for an *en banc* rehearing of the case. The appeals court denied both motions on October 11, 1980. Then, in response to a request from NRSC, the Chief Justice of the Supreme Court issued a stay of the appeals court's judgment, pending the Court's decision on NRSC's petition for a writ of certiorari.

Supreme Court Ruling

On March 2, 1981, the Supreme Court granted the Commission's petition for a writ of certiorari in *FEC v. Democratic Senatorial Campaign Committee* (Civil Action No. 80-939). The Court also granted a petition for a writ of certiorari filed by the National Republican Senatorial Committee (*National Republican Senatorial Committee v. Democratic Senatorial Campaign Committee*, Civil Action No. 80-1129) and consolidated the cases for oral argument.

In a brief filed with the Supreme Court on April 16, 1981, the Commission argued that its decision to dismiss DSCC's administrative complaint was based on a reasonable interpretation of the Act and should be affirmed. The Commission contended that, by substituting its judgment for that of the FEC, the appeals court had interfered with the Commission's exclusive role as the expert body established by Congress to administer, enforce and interpret the Act. Moreover, in reversing the FEC's consistent construction of Section 441a(d)(3), the appeals court had ignored precedent in the District of Columbia circuit, which gave judicial deference to the Commission's interpretations of the Act. The Commission also asserted that the appeals court's decision required it to develop a new rule of law or statutory interpretation in the context of an enforcement proceeding. This requirement was contrary to the statutory mandate that such rules and interpretations be made through advisory opinions and rulemaking.

Furthermore, the Commission argued that its interpretation of 2 U.S.C. §441a(d)(3) was not contrary to law Rather, the Commission's interpretation was consistent with statutory language, Commission regulations and advisory opinions and legislative history. A contrary interpretation would conflict with the clear Congressional intent to encourage a close working relationship among the various party committees. For example, under the Act, funds may be transferred without limit between political committees of the same party.
2 U.S.C. §441a(a)(4)The Commission asserted that

Congress recognized the Act did not prohibit such intraparty arrangements when it rejected an amendment to the Act that would have prohibited NRSC from transferring funds to the state party committees for the purpose of making §441a(d) expenditures. The Commission therefore argued that its interpretation of §441a(d)(3) was entitled to deference by the appeals court.

On November 10, 1981, the Supreme Court issued an opinion reversing the appeals court decision. The Supreme Court's opinion affirmed the Commission's construction of §441a(d)(3) as a "sufficiently reasonable" one. The Court found that the district court had been "correct" in according deference to the Commission's interpretation.[1] The Court held that "Section 441a(d)(3) does not expressly or by necessary implication foreclose the use of agency arrangements, such as are at issue here, and the FEC thus acted within the authority invested in it by Congress when it determined to permit such agreements.... While §441a(d)(3) does not authorize the NRSC to make expenditures in its own right, it does not follow that it may not act as agent of a Committee that is expressly authorized to make expenditures." The Court further held that "the FEC's view that the agency agreements were logically consistent with §441a(4)—which authorizes the transfer of funds among national, state, and local committees of the same party—is acceptable."

Source: FEC *Record*, August 1981, p. 2; and January 1982, p. 6.

Democratic Senatorial Campaign Committee v. FEC, 660 F.2d 773 (1980 D.C. Cir.), *rev'd* 454 U.S. 27 (1981), *on remand*, 673 F.2d 551 (1982).

[1] Moreover, the Court did not take issue with the fact that the FEC's dismissal of the complaint was based solely on the General Counsel's Report.

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE v. FEC (90-1504)

On August 27, 1990, the U.S. District Court for the District of Columbia granted the FEC's motion for summary judgment, ruling that the agency did not act contrary to law when it dismissed a portion of an administrative complaint filed by the Democratic Senatorial Campaign Committee (DSCC). (Civil Action No. 90-1504.)

Background

In its administrative complaint (MUR 2766), DSCC alleged that $325,000 in media expenditures made by the Auto Dealers and Drivers for Free Trade Political Action Committee (Auto Dealers PAC) in support of 1988 Florida Senate candidate Connie Mack were not independent and thus violated the PAC's $5,000 contribution limit for a candidate under 2 U.S.C. §441a(a)(2)(A). DSCC contended that, because the Auto Dealers PAC and the Mack campaign (Friends of Connie Mack) both used the services of two key campaign consultants, the independence of the PAC's expenditures was compromised, resulting in excessive contributions by the PAC. The consultants, two media firms, provided services to the Mack campaign in Florida and to the Auto Dealers PAC for expenditures in other states.

The PAC denied using either media firm in connection with the Florida Senate race, identifying a third firm as its media consultant for Florida. The PAC's director explained in an affidavit that, when the presidents of the two media firms disclosed that they were retained by the Mack campaign, he told them "not to say anything at all" about the Florida race to anyone associated with the PAC. The PAC submitted affidavits by the two presidents consistent with the PAC director's affidavit. The Mack campaign also denied any consultation or coordination with the PAC and provided supporting affidavits.

The FEC's General Counsel recommended that the Commission authorize an investigation of the matter because of "unanswered questions." However, the Commission, by a vote of 3-2 (and one abstention), failed to find "reason to believe" that a violation had occurred with respect to the independent expenditure portion of the complaint, thereby dismissing that portion.[1] (The Commission did find reason to believe that the Mack campaign had failed to comply with the 48-hour notice requirement for last-minute contributions and later entered into a conciliation agreement with the campaign with respect to that violation.)

On June 26, 1990, DSCC filed suit seeking summary judgment that the FEC had acted contrary to law in dismissing DSCC's allegation of coordination between the Auto Dealers PAC and the Mack campaign with respect to the PAC's independent expenditures.

Court Decision

The court found that the Commission's decision to dismiss the independent expenditure allegation was not contrary to law, given the "totality of the circumstances" of the case.

DSCC had argued that the "totality of the circumstances" compelled an investigation to determine whether the PAC's expenditures were independent. These circumstances included: (1) the two common consultants used by the Auto Dealers PAC and the Mack campaign; (2) the General Counsel's recommendation to find "reason to believe" and authorize an investigation; and (3) the affidavits submitted by the PAC and the Mack campaign, which DSCC claimed raised substantial questions. The court, however, was not persuaded by DSCC's arguments.

With respect to the common consultants, the court found that "there was no reason to presume 'coordination' as the consultants were retained by the PAC to work on elections only outside the state of Florida."

The court also found that the Commission's decision not to follow the General Counsel's recommendation was not unreasonable. Citing Commissioner Josefiak's Supporting Memorandum for the Statement of Reasons, the court stated: "In refusing to order an investigation, the Commission applied a minimum evidentiary threshold that required at least 'some legally significant facts' to distinguish the circumstances from every other independent expenditure....[O]therwise every 'independent expenditure' complaint would demand investigation." The court said that "the only record of fact offered in support of DSCC's allegations was the use of 'common consultants.'" In the court's view, however, the affidavits suggested that "the Florida Auto Dealers PAC built a 'Chinese Wall' between itself and the two Mack consultants."

With regard to the affidavits, the court found it "entirely reasonable to read [them] as precluding, rather than raising, an inference of coordination."

Accordingly, the court entered summary judgment in favor of the FEC and against DSCC.

Source: FEC *Record*, October 1990, p. 8.

Democratic Senatorial Campaign Committee v. FEC, 745 F. Supp. 742 (D.D.C. 1990).

[1] Four affirmative votes are necessary to find "reason to believe."

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE v. FEC (93-1321)

On November 14, 1994, the U.S. District Court for the District of Columbia ordered the FEC to vacate its dismissal of the Democratic Senatorial Campaign Committee's (DSCC's) complaint against the National Republican Senatorial Committee (NRSC) with respect to excessive contributions made in the 1992 Georgia U.S. Senate race. The court based this judgment on FEC regulations defining general and runoff elections. 11 CFR 100.2(b) and (d).

Background

A general election was held in Georgia on November 3, 1992, in which none of the candidates for U.S. Senate won a majority. Under Georgia law, when an election for U.S. Senator fails to produce a majority winner, a second election must be held between the top two vote getters. Such an election was held on November 24, 1992.

Under the federal election law, the DSCC and the NRSC were each permitted to spend up to $535,608 on behalf of their party nominee in the 1992 Georgia general election for U.S. Senate. 2 U.S.C. §441a(d). The NRSC had exhausted this spending authority by November 3, while the DSCC had not. Subsequently, the NRSC requested an advisory opinion from the FEC as to whether to classify the November 24 election as a second general election or as a runoff. The NRSC would be legally entitled to a new $535,608 spending authority if the election were deemed a general election, but not if it were deemed a runoff election. Since the Commission split 3-3 [1]on how to classify the November 24 election, no advisory opinion was issued. The NRSC then proceeded to spend nearly the full amount permitted for a general election in support of its candidate for the November 24 election. The DSCC, on the other hand, limited its expenditures to the balance which remained from the original §441a(d) allowance.

The DSCC filed a complaint with the FEC on November 19, alleging that the NRSC had violated federal election law by exceeding its §441a(d) spending limit in this race. The Commission split 3-3 on whether or not to initiate an investigation and then dismissed the DSCC's complaint. The DSCC then brought this case before the court.

Court's Ruling

Based on its interpretation of FEC regulations, the court concluded that the November 24 election was not a general election. It reasoned that the election could not qualify as a general election because it was not held on the Tuesday following the first Monday in November in

an even numbered year, nor was it designed to fill a vacancy, thus failing to meet either of the criteria for a general election. 11 CFR 100.2(b).

The court further reasoned that the November 24 election fit the definition of a runoff election because it was held after a general election and it was prescribed by applicable state law as the means for deciding which candidate was the winner. 11 CFR 100.2(d).

The court disagreed with the argument that the November 24 election could be both a general and a runoff election. The court observed that the regulations do not state that a runoff election can also be a general election, whereas, in defining other types of elections, the regulations clearly state where overlap is possible.

The court ordered the FEC to initiate appropriate enforcement proceedings against the NRSC.

Source: FEC *Record*, January 1995, p. 10.

Democratic Senatorial Campaign Committee v. FEC, No. 93-1321 (HHG) (D.D.C. Nov. 14, 1994).

[1] Four votes (out of six) are required to adopt advisory opinions and to take action in compliance matters. 11 CFR 112.4(a).

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE v. FEC (95-0349)

On April 17, 1996, the U.S. District Court for the District of Columbia ruled that the FEC acted contrary to law when it allowed nearly 600 days to pass without taking any meaningful action on an administrative complaint filed by the Democratic Senatorial Campaign Committee (DSCC). Under 2 U.S.C. §437g(a)(8)(A), anyone who files a complaint with the FEC may seek court intervention if the FEC fails to complete action on the complaint within 120 days.

The DSCC filed the complaint on May 14, 1993. In the complaint, the DSCC alleged, among other things, that the National Republican Senatorial Committee had violated the law by making illegal "soft money" contributions to influence the 1992 Senate elections—particularly the runoff in Georgia.

On February 22, 1995, the DSCC filed this suit claiming that the FEC's failure to complete action was arbitrary and capricious.

The court reasoned that while FEC decisions concerning whether to conduct an investigation were entitled to judicial deference, the agency's failure to consider a complaint for nearly 600 days was subject to judicial review. The court examined whether the FEC had acted reasonably in allowing nearly 600 days to pass before taking action on the DSCC's complaint.

The criteria the court used to review the FEC's inaction are outlined in *Rose v. FEC* (1984) and *Telecommunications Research & Action Center v. FCC* (1984); they are:

- The credibility of the allegation;
- The nature of the threat posed;
- The resources and information available to the agency;
- The novelty of the issues involved;
- The time it takes for the agency to make decisions;
- Whether Congress mandated a timetable for the agency to take action on such matters as the one at hand;
- The nature of the matter (for instance, delayed agency action on matters affecting human health and welfare are less tolerable than those in the sphere of economic regulation);
- The effect that court-ordered expedited action on the matter would have on agency activities of a higher or competing priority;
- The nature and extent of the interest prejudiced by the agency's delay in acting on the matter; and
- The fact that the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'"

Based on its analysis of the factors listed above, the court ruled that the FEC's failure to consider the DSCC's complaint for nearly 600 days was contrary to law. The court noted, however, that while this litigation was pending, the FEC had moved forward with respect to the DSCC's complaint. The court warned that should the FEC stall on this matter again, "the need for additional judicial intervention may well be compelling."

Source: FEC *Record*, July 1996, p. 5.

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE v. FEC (96-2109)

On October 9, 1996, the U.S. District Court for the District of Columbia dismissed this case in an expedited decision prompted by the nearness of the November general election. The court said that it could not rule on how party committees may make expenditures that are "independent" because the FEC has not yet addressed the issue in a rulemaking or an advisory opinion.

The Democratic Senatorial Campaign Committee (DSCC) and the Democratic Congressional Campaign Committee (DCCC) wanted the court to rule that their proposed expenditures qualified as "independent expenditures" and therefore were outside any spending limits. But the court said that the FEC "has been granted primary jurisdiction and therefore should be given an adequate opportunity to address the issues raised by Plaintiffs."

Background

In a June 26, 1996, decision, the Supreme Court held that political parties were capable of making "independent expenditures," thus reversing the FEC's long-held presumption that party expenditures on behalf of candidates were "coordinated" with candidates and thus subject to contribution or expenditure limits. *Colorado Republican Federal Campaign Committee v. FEC*, 116 S. Ct. 2309 (1996).

In July, the DSCC and the DCCC asked the FEC to revise agency regulations in time for the November election to explain how party committees, with their traditionally close contacts with candidates, could make independent expenditures. The Commission agreed to conduct the rulemaking but said it could not revise the rules in time for the 1996 election cycle.

That same month the committees also formally requested an FEC advisory opinion (AOR 1996-30) to answer questions on their proposed independent expenditures, such as whether past contacts between party staff and candidates' campaign staff would compromise the independence of the expenditures, or whether the party committees could erect a "Chinese Wall" to segregate staff chosen to work on independent expenditure campaigns.

An advisory opinion drafted by the FEC's Office of General Counsel and voted on in late August failed to win approval by the required four-vote majority of Commissioners.

In September, the plaintiffs filed suit asking the court to find that their proposed expenditures would qualify as independent expenditures. The committees claimed that they were forced to file suit because the FEC's failure to

issue formal guidance would expose them to possible penalties under the Federal Election Campaign Act should they pursue their independent expenditure program.

Court Decision

The court ruled that the plaintiffs had standing to file suit because they suffered injury: "the chilling of First Amendment rights" and "a creditable threat of prosecution."

However, the court said, it was unable to rule on the substance of the case because the FEC had not yet taken any final agency action that could be reviewed by a court. The court said that the plaintiffs "are asking the Court to 'step into the Commission's shoes' and issue the advisory opinion and final rules which it was unable to provide." The court noted that Congress intended the FEC to interpret the statute first, before the courts.

The court therefore granted the FEC's motion to dismiss the case.

The DSCC and DCCC subsequently asked the U.S. Court of Appeals for the District of Columbia to review the lower court's judgment on an expedited basis so the case could be resolved before the election. That court, however, on October 11, 1996, denied the request to expedite the appeal.

Source: FEC *Record*, November 1996, p. 7.

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE v. FEC (96-2184, 97-5160 and 97-5161)

On November 25, 1996, the U.S. District Court for the District of Columbia denied a request from the Democratic Senatorial Campaign Committee (DSCC) to find that the FEC violated the Federal Election Campaign Act when it failed to take action on an administrative complaint the DSCC had filed with the Commission.

The DSCC filed the lawsuit against the FEC after the agency had failed to act on its administrative complaint against the National Republican Senatorial Committee (NRSC) within 120 days. 2 U.S.C. §437g(a)(8)(A).

On April 10, 1998, the U.S. Court of Appeals for the District of Columbia Circuit remanded these two cases to the district court after finding that the question of standing had not been resolved.

On October 18, 1999, the U.S. District Court concluded that the DSCC had constitutional standing to litigate these cases.

Background

The DSCC filed its administrative complaint in 1993 and followed it with a supplemental complaint in 1995. The complaints alleged that the NRSC had made at least $187,000 in illegal "soft money" expenditures to influence the Senate election of a Republican candidate in Georgia. The NRSC did this, the DSCC alleged, by funneling the money through four nonprofit organizations that were allegedly closely aligned with the Republican Party.

In April 1996, the DSCC asked the court to order the FEC to act on its administrative complaints. The court found the FEC's delay was contrary to law and told the agency to move forward with the case. It also told the DSCC to file another lawsuit if the FEC did not take action.

The DSCC did just that. In September 1996, it filed suit, asking the court again to order the FEC to complete the consideration of its complaint within 30 days or give the DSCC the authority to file a civil action against the NRSC. In denying the DSCC's request, the court said the FEC's conduct did not yet constitute a failure to act that was contrary to law. Further, the FEC provided the court and the DSCC with a chronology of its actions taken over the past 15 months.

The court also based its ruling, in part, on the FEC's considerable work load, lack of resources and competing priorities. In particular, it noted the U.S. Supreme Court ruling in the *Colorado Republican Federal Campaign Committee* case, which was handed down in June 1996 and which invalidated part of the FEC's regulation governing expenditures by national and state

party committees. That ruling, the court said, added an "additional layer of complexity" to the DSCC's allegations against the NRSC.

The court noted that the statute of limitations period was coming to a close with regard to the DSCC's administrative complaint. Therefore, the court ordered the FEC to file status reports on its progress on the administrative complaint every 30 days (the first report was due December 10, 1996) and scheduled a March 1997 status conference for the FEC and the DSCC in the event that the matter was not resolved by then.

After waiting an additional four months and nearing the five-year statute of limitations for this case, the DSCC filed a motion for summary judgment, citing the FEC's "near glacial pace" in the investigation and arguing again that the agency's actions were contrary to law.

On May 30, 1997, the court granted the DSCC's motion and ordered the FEC to take action, within 30 days, on the committee's administrative complaint. The court also stated that if the FEC failed to take action within 30 days, then the DSCC could initiate its own lawsuit against the NRSC pursuant to 2 U.S.C. §437g(a)(8)(C).

Arguments from the Commission

The FEC contended that it was moving forward with the investigation of the DSCC's complaint and that it was "conducting a careful and deliberate investigation of constitutionally sensitive and factually complex issues arising from a national party's payments to independent issue advocacy groups." The FEC also argued that, without sufficient time to conduct a thorough investigation, its five commissioners would not be able to make an informed decision as to whether there was probable cause to believe that a violation of the Act had occurred. The FEC added that certain witnesses were challenging the Commission's discovery requests.

District Court Decision

The standard for evaluating administrative delay is whether an agency has acted reasonably and in a manner that is not arbitrary or capricious.[1] To measure this, the courts use several criteria described in *Rose v. FEC* and *Telecommunications Research & Action Center v. FCC*.

Using those criteria, the court concluded that the FEC's delay—taking more than four years from when the administrative complaint was filed and nearly two years from the Commission's "reason to believe" determination to decide whether there was probable cause to believe a violation of the Act had occurred—was unreasonable.

The court said that the FEC could no longer claim that the Supreme Court's decision in the *Colorado* case complicated its investigation. The court also cited the impending five-year mark for the case, and said that litigation delays resulting from motions to quash FEC subpoenas were foreseeable and provided no acceptable excuse for the delay.

The court concluded that the FEC's failure to investigate and make a "probable cause" determination in a reasonable time frame was contrary to law under 2 U.S.C. §437g(a)(8)(C). It ordered the Commission to conform its conduct with the court's declaration within 30 days. Subsequently, on June 20, 1997, the Commission appealed this decision to the U.S. Court of Appeals for the District of Columbia Circuit.

Appeals Court Decision

The appeals court remanded both cases to the district court to determine whether the DSCC had standing to sue the Commission under §437g(a)(8). In citing the issue of standing, the appeals court acknowledged that the question had come up only on appeal and mainly through an *amicus curiae*, or friend of the court, brief. The appeals court based its ruling on a 1998 U.S. Supreme Court decision in *Steel Co. v. Citizens for a Better Environment*, which "seems to hold that before deciding the merits (of a case), federal courts must always decide Article III (of the U.S. Constitution) standing whenever it is in doubt." Because some doubt has now been raised, the appeals court remanded the cases to the district court to address the standing question. The DSCC must present evidence that it satisfied the three-pronged test of standing—injury in fact, causation and redressability. With regard to redressability, the court said that the standing analysis may well have to depend on the Supreme Court's decision in *Akins v. FEC*.[2]

District Court Decision

On remand, the district court decided that, in the first case, the DSCC did not qualify as a "prevailing party" as defined in the Equal Access to Justice Act, and therefore vacated its earlier decision to award the DSCC attorney's fees. The court did reconfirm its prior order in the second case that found the Commission to have unreasonably delayed taking action on the administrative complaint filed by the DSCC and required the Commission to conclude the matter within 30 days.

Source: FEC *Record*, January 1997, p. 2; August 1997, p. 3; June 1998, p. 4; and January 2000, p. 2.

DSCC v. FEC, 139 F.3d 951 (D.C. Cir. April 10, 1998).

[1] *Common Cause v. FEC*, 489 F. Supp. 738, 744 (D.D.C. 1980).

[2] In the *Akins* case, several former government officials filed a lawsuit against the FEC after it dismissed an administrative complaint they had filed. Among the issues discussed at the Supreme Court was whether these former officials had standing to initiate this lawsuit.

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE v. NATIONAL REPUBLICAN SENATORIAL COMMITTEE

On August 15, 1997, in response to a court order, the FEC filed an amicus brief about the confidentiality of its documents in the Democratic Senatorial Campaign Committee (DSCC) suit against the National Republican Senatorial Committee (NRSC).

The DSCC's suit was the first contested case in which a private party has sued another private party for violations of the Federal Election Campaign Act (the Act), pursuant to 2 U.S.C. §437g(a)(8)(C). That section of the Act states that if the FEC fails to take action on a complaint within 30 days after it has been ordered to do so by the U.S. District Court for the District of Columbia, then the complainant may file suit in his or her own name against the alleged offender of the Act.

The DSCC had filed two previous lawsuits—in April and November 1996—against the FEC charging that it had failed to take action within 120 days on an administrative complaint filed by the DSCC, alleging that the NRSC had made illegal "soft money" expenditures to influence a Senate election in Georgia. 2 U.S.C. §437g(a)(8)(A). In the resolution of the second delay suit, which occurred on May 30, 1997, the court ordered the FEC to take action on the administrative complaint within 30 days. When that did not happen, the DSCC filed suit on its own against the NRSC.

The Commission's brief was in response to an order from the court seeking the FEC's views on keeping under seal certain documents it filed during proceedings in the two DSCC delay cases and to which the NRSC has requested access. The Commission argued that providing such information to the NRSC would compromise its investigation into the DSCC's original administrative complaint, which continues despite the DSCC's most recent lawsuit against the NRSC. The documents being sought by the NRSC included information about potential witnesses and FEC actions and procedures in the investigation. The FEC contended that the information in the sealed files contained no evidence about the NRSC's alleged violations, and thus would be of little relevance to the NRSC's court battle with the DSCC. And, although the DSCC had seen some of the information under seal, it was barred by the court's protective order from using that information in its own lawsuit against the NRSC.

The Commission also noted the precedent the court would set if it were to allow the NRSC to view the confidential information covered by the protective order, stating that the Commission would have to take such actions into consideration in deciding what information to provide the court in future delay cases.

On August 27, 1997, the court granted a stay requested by the NRSC without deciding whether to maintain the confidentiality of the documents.

Source: FEC *Record*, October 1997, p. 1.

DNC v. FEC (96-2506)

On February 20, 1997, with the agreement of both parties, the U.S. District Court for the District of Columbia dismissed this case without prejudice and ordered the FEC to periodically update the Democratic National Committee (DNC) on the status of an administrative complaint it filed against Bob Dole's 1996 presidential campaign.

In June 1996, the DNC filed an administrative complaint with the Commission alleging that Mr. Dole's presidential committee, Dole for President, Inc., disregarded the limit on expenditures during the pre-primary season. The administrative complaint was designated MUR 4382. Under the Presidential Primary Matching Payment Account Act, presidential candidates may receive matching payments for their primary campaigns if they agree to limit their expenditures to a set amount—in this case, a little more than $37 million. 2 U.S.C. §441a(b)(1)(A).

After no apparent action had taken place on the complaint, the DNC, on October 31, 1996, filed suit asking the court to order the FEC to move forward on its allegations against the Dole campaign. The DNC said that in failing to act on its complaint within 120 days after it was filed—the original administrative complaint was filed June 12 and a supplemental complaint was filed on July 22—the FEC was acting contrary to law. 2 U.S.C. §437g(a)(8)(A).

The court said that the FEC should give lawyers for the DNC confidential, updated chronologies on the Commission's actions in MUR 4382. The first was to be delivered at the end of March 1997 with subsequent chronologies presented at 12-month intervals until the matter was resolved or there was further court action.

The contents of the chronologies may not be disclosed to anyone not involved in the administrative complaint. Additionally, DNC counsel may use the information only in preparation for litigation that may result from the MUR. To ensure that there is no unauthorized dissemination of the chronologies, DNC counsel must inform in writing each person who sees the information that it may not be shared with others. The DNC must maintain a list of those people, what information they have seen and a written statement from each person acknowledging that he or she understands the confidentiality provisions that are part of this court action.

Source: FEC *Record*, May 1997, p. 5.

DNC v. FEC (97-676)

On July 2, 1998, at the request of the FEC, and with the consent of the Democratic National Committee (DNC), the U.S. District Court for the District of Columbia dismissed this case without prejudice and remanded the matter back to the FEC to review the impact of the appellate and U.S. Supreme Court decisions in *Akins v. FEC* on issues presented in this case.

The suit concerned the Commission's dismissal of the DNC complaint alleging that the Christian Coalition is a political committee.

Source: FEC *Record*, December 1995, p. 1; February 1997, p. 1; June 1997, p. 7; July 1998, p. 1; and September 1998, p. 3.

DOLAN v. FEC

By agreement of both parties, the U.S. District Court for the District of Columbia dismissed this case on August 17, 1990. (Civil Action No. 90-0542.) Robert E. Dolan had asked the court to declare that 2 U.S.C. §438(a)(4), referred to as the "sale and use restriction," was unconstitutional as applied to his efforts to solicit individuals identified as contributors in FEC reports.

On July 13, 1990, the Commission had filed suit in the same court, asking the court to declare that Mr. Dolan knowingly and willfully violated the sale and use restriction.

On September 5, 1990, the Commission filed a motion to amend its complaint by requesting a court declaration that the sale and use restriction is constitutional insofar as it curtails the sale or use of contributor data for commercial purposes. The Commission also asked the court to certify the constitutional issue to the U.S. Court of Appeals for the District of Columbia Circuit under 2 U.S.C. §437h.

Source: FEC *Record*, October 1990, p. 8.

DOLBEARE v. FEC

On March 11, 1982, the U.S. District Court for the Southern District of New York issued a ruling granting a preliminary injunction to the plaintiffs in *Dolbeare v. FEC* (No. 81 Civ. 4468-CLB).

Plaintiffs' suit challenged pending FEC investigations of various activities with respect to the Citizens for LaRouche Committee (the LaRouche campaign), Lyndon H. LaRouche's principal campaign committee for the 1980 Presidential primaries. The LaRouche campaign claimed that the statutory provision authorizing the investigations (2 U.S.C. §437g(a)(2)) was unconstitutional as applied to the LaRouche campaign because it placed no limits on the time for completing the investigations. Moreover, the LaRouche campaign alleged that the FEC had undertaken the investigations to harass the campaign. Furthermore, the investigations had a chilling effect on the free association rights of the campaign's contributors. The LaRouche campaign also claimed that, in conducting its investigations, the FEC had gone beyond the prescribed scope for FEC investigations.

The FEC sought dismissal of the suit on jurisdictional grounds. Primarily, the FEC claimed that the suit was not justiciable because, under 2 U.S.C. §437g(a), an agency has the discretion to decide whether there is "reason to believe" the Act has been violated and whether an alleged violation should be investigated. The FEC also argued that, pursuant to the Supreme Court's decision in *Federal Trade Commission v. Standard Oil of California*, such initial agency determinations are not final and thus not ripe for judicial review in a federal court. Moreover, the FEC said that §437h provides jurisdiction only for claims of statutory unconstitutionality, not for claims that a statute is unconstitutional as applied. Furthermore, the FEC argued that the LaRouche campaign's claim that the FEC's investigations would have a long-term chilling effect on their political activities did not meet the test for immediate injunctive relief—evidence of "specific present objective harm or a threat of specific future harm..." (*Laird v. Tatum*, 408 U.S. 1, 13-14 (1971)). The FEC further argued that the LaRouche campaign had failed to present sufficient evidence to demonstrate a likelihood of succeeding with its case on the merits.

In granting a preliminary injunction, the court found that it did have jurisdiction over the claims raised in the suit and that §437h could be used to challenge the constitutionality of the Act, as applied. The court also held that it did not have to certify the campaign's constitutional questions to the appeals court, pursuant to §437h, but could itself take primary jurisdiction over them. The court reasoned that the campaign would be caused "irreparable harm" as a result of substantial legal fees and the depletion of volunteer staff resources required to defend the campaign against the FEC's ongoing investigations. The court therefore barred the FEC from:

- Initiating any more investigations into the LaRouche campaign's 1980 Presidential primary activities until the pending enforcement actions were concluded; and
- Auditing, or issuing depositions to, LaRouche campaign contributors unless the FEC simultaneously notified the LaRouche campaign of such actions.

Moreover, the court ordered the FEC to complete its enforcement actions promptly and to treat the LaRouche campaign as a respondent to all pending investigations involving the campaign's 1980 Presidential primary activities. The court also ordered the FEC to furnish copies of depositions taken with regard to any of the pending investigations, if requested by the LaRouche campaign. The court, however, conditioned its enforcement of the injunction on:

- Plaintiffs' agreement to waive certain legal claims with respect to time limits for the FEC enforcement actions; and
- Plaintiffs' full cooperation with the FEC in completing the pending enforcement matters.

Source: FEC *Record*, May 1982, p. 6.

Dolbeare v. FEC, No. 81 Civ. 4468-CLB (S.D. N.Y. March 9, 1982) (unpublished opinion).

DOLE v. FEC

On February 29, 2001, Robert J. Dole and Dole/Kemp '96, Inc., (Dole/Kemp), Mr. Dole's 1996 presidential campaign committee, filed in the U.S. Court of Appeals for the District of Columbia Circuit a petition for review of the Federal Election Commission's audit of Dole/Kemp. On January 29, 2001, the Commission made a final determination that the petitioners must repay $1,416,903.40 to the U.S. Treasury.

On April 2, 2001, the court granted a joint motion filed by the petitioners and the Commission to hold the case in abeyance through May 23, 2001, to allow the parties an opportunity to engage in settlement discussions that might eliminate the need for further litigation.

Source: FEC *Record*, May 2001, p. 6.

DOLE v. INTERNATIONAL ASSOCIATION MANAGERS

On February 14, 1991,[1] the U.S. District Court for the District of Arizona granted the FEC's motion for leave to intervene in the case. (Civil Action No. CIV 90-0129 PHX RCB.)

The suit was filed by the Department of Labor and its Secretary, Elizabeth Dole. They alleged that defendants failed to pay overtime wages in violation of the Fair Labor Standards Act. International Association Managers, Inc. (IAM) and two of its officers were named as defendants. Counsel for the defense took depositions from two former IAM employees who defendants believe are involved in the Department of Labor investigation and in an ongoing investigation by the FEC. When questioned about their communications with the two agencies, the employees refused to answer, citing the "government informant's privilege." Defendants then filed a motion to compel the employees to respond to these questions.

In response to the defendants' motion, the FEC filed a motion to intervene in the case or to file an amicus response to defendants' motion to compel. The court granted the motion, stating: "The interest of the FEC in protecting against disclosure of the identity of informants and the nature of informants' communications with the FEC is similar to the interest the Department of Labor seeks to protect....The interest of the two agencies may not be identical, however, and the court can see no reason for requiring the FEC to rely on another agency to protect its interest."

The court also denied defendants' motion to compel the testimony of the two employees. Further, it granted the FEC's motion for a protective order to prohibit defendants from questioning any witness to learn the identity of persons communicating with the FEC and the nature of those communications. The court granted a motion for a similar order requested by the Department of Labor to protect that agency's communications.

Source: FEC *Record*, June 1991, p. 9.

[1] The order was amended on April 1, 1991, to correct a typographical error.

DUKAKIS v. FEC
SIMON v. FEC

On May 5, 1995, the U.S. Court of Appeals for the District of Columbia Circuit ruled that in both these cases the FEC was time barred from imposing repayment obligations on the plaintiffs. Both plaintiffs did not receive an initial repayment determination within the 3-year statute of limitations. 26 U.S.C. §9038(c). The FEC's actions in these matters were therefore reversed.

Background

Both Governor Michael Dukakis and Senator Paul Simon made bids for the 1988 Democratic Presidential nomination. Both of them received public funding for their campaigns. Pursuant to 26 U.S.C. §9038(a), the FEC conducted audits of both campaigns. The 3-year statute of limitations was triggered on July 20, 1988, the day the Democratic National Convention nominated Governor Dukakis for President. Final audit reports containing initial repayment determinations were issued on December 9, 1991, for Dukakis and on October 22, 1991, for Simon. These initial determinations were not finalized until February 25, 1993, for Dukakis and March 4, 1993, for Simon; the Commission determined that the Dukakis and Simon campaigns owed the U.S. Treasury $491,282 and $412,162, respectively.

The 3-Year Statute of Limitations

26 U.S.C. §9038(c) states: "No notification [of repayment] shall be made by the Commission . . . with respect to a matching payment period more than 3 years after the end of such period." The FEC contended that the interim audit report, issued in both cases within 3 years of the date of the nomination, was sufficient notice to obligate plaintiffs to make the repayments. To bolster this argument, the FEC reminded the court that, in accordance with the decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, the court must defer to an agency's reasonable interpretation of the statute it administers.

The court concluded that deference was not required in this case because *Chevron* requires a court to defer to an agency only in cases where the statute at hand is ambiguous on the issue in dispute. The court found no ambiguity in either of these cases: "Subsection §9038(b) requires that the Commission notify the candidate of the amount which he is to pay to the Secretary. The interim audit report does not even purport to notify the candidate of any such amount."

The court cited 11 CFR 9038.2, which states that the inclusion of a preliminary repayment calculation in an interim audit report is optional, as grounds on which to dismiss the notion that the interim report fulfilled the FEC's obligation under the statute of limitations. Further, the court noted that when the Commission issued rules making the interim audit report a mandatory part of the audit process, it included in its Explanation and Justification language stating that: "[Preliminary] calculations will not . . . be considered as the Commission's initial repayment determination . . . ."

The court also dismissed the FEC's reliance on a 1991 amendment to its regulations, 11 CFR 9038.2(a)(2), that explicitly states that the interim audit report constitutes notification for purposes of the 3-year statute of limitations. "[No] such administrative action by the Commission can override the plain mandate of the legislation," said the court.

Additionally, the court held that, although the statute does not explicitly say so, the 3-year notification period implicitly applies to the repayment of surplus campaign funds when the candidate disputes that a surplus exists, as well as to the repayment of nonqualified campaign expenses and excessive payments. 26 U.S.C. §9038(b)(1), (2) and (3). Thus, in the case of Governor Dukakis, who disputed the audit's finding that he had a surplus, the Commission was required to notify him of the amount due within the 3-year period.

Source: FEC *Record*, July 1995, p. 9.

Dukakis v. FEC, No. 93-1219 (D.C. Cir. May 5, 1995).
Simon v. FEC, No. 93-1252 (D.C. Cir. May 5, 1995).

DURKIN FOR U.S. SENATE v. FEC

Plaintiff initially sought a declaratory judgment from the court that certain individuals associated with a "Defeat Durkin" effort constituted a "political committee" under the Act, which had failed to register and report with the FEC, and that one of the individuals had made excessive contributions to the "Defeat Durkin" effort. Plaintiff also sought a preliminary injunction to enjoin the "Defeat Durkin" effort from: spending any additional funds until it registers with the FEC or spending any funds which consist of contributions in excess of the limits. Finally, plaintiff asked the court to order the FEC to expedite review of a complaint plaintiff had filed three days earlier, on October 24, against the same individuals and the "Defeat Durkin" effort.

On October 31, 1980, the district court denied plaintiff's request for declaratory and injunctive relief and dismissed the suit. The court maintained that it had no jurisdiction over the suit because the Act stipulates the time frame in which the Commission must resolve complaints. The court said, "The FECA explicitly requires...that the party accused of a violation be given 15 days to 'demonstrate, in writing...that no action should be taken against such person on the basis of the complaint.' .... By the terms of the statute, the Commission cannot act until they [the accused parties] have responded or until 15 days have passed."

(U.S. District Court for the District of New Hampshire, Docket No. C80-503D, October 27, 1980)

Source: FEC *Record*, December 1980, p. 7.

Durkin for U.S. Senate Committee v. FEC, 2 Fed. Elec. Camp. Fin. Guide (CCH) 9147 (D.N.H. 1980).

EPSTEIN v. FEC

On September 23, 1981, the U.S. District Court for the District of Columbia issued an order in *Jon Epstein v. FEC* (Civil Action No. 81-0336) upholding the Commission's determination in an administrative complaint that plaintiff had brought against the Reader's Digest Assoc., Inc. in March 1981. Plaintiff's suit sought review of the FEC's dismissal of his complaint (Matter Under Review [MUR] 1283), pursuant to 2 U.S.C. §437g. In the complaint, he alleged that an ad Reader's Digest had placed in the August 27, 1980, edition of the Washington Post constituted illegal corporate contributions to the campaigns of the Democratic and Republican Congressmen whose excerpted articles had appeared in the ad (in violation of 2 U.S.C. §441b). Introductory and concluding copy in the ad had also promoted Reader's Digest as a "forum for ideas." Plaintiff claimed the FEC's dismissal of his complaint was contrary to law.

The court found that the standard used by the FEC in dismissing the complaint was not arbitrary or otherwise contrary to law. The court held that the "...Commission may reasonably determine that expenditures on publicity that have a purpose other than assistance of political candidates...were not intended by Congress to be" regulated by the Act. This is particularly true, the court said, when the "major purpose" of the publicity is "not to advocate the election of candidates, but to promote the organization paying for the publicity." The court further noted that, in making this determination, the FEC had "relied upon a growing body of decisions...that remove advertisements and other forms of publicity from the Act's prohibition" on corporate expenditures, even though the advertisements" may have political aspects."

Moreover, the court found no merit in plaintiff's argument that the General Counsel's Report did not explain the Commission's decision to dismiss the complaint. "The General Counsel's Memorandum alone, if it is complete enough to have provided a basis for the Commission decision to accept the General Counsel's recommendation, will be adequate for judicial review under section 437g(a)(8)." Nor did the court find merit in plaintiff's contention that the ad was partisan because it offered commentary only by representatives of the two major parties. The court held that the issue was not "the narrowness, or diversity, of the political views" represented in the ad but rather whether the ad served a "partisan purpose."

Source: FEC *Record*, November 1981, p. 4.

Epstein v. FEC, 2 Fed. Elec. Camp. Fin. Guide (CCH) 9161 (D.D.C. 1981), *aff'd mem.*, 684 F.2d 1032 (D.C. Cir. 1982).

FAUCHER v. FEC

On June 29, 1990, the U.S. District Court for the District of Maine ruled that 11 CFR 114.4(b)(5)(i), which concerned the publication and public distribution of voter guides by corporations, was unauthorized by the Federal Election Campaign Act. In the court's view, the rule was invalid because it applied "issue advocacy" as a factor in determining whether a voter guide constituted a prohibited expenditure.

The court denied, however, a request from plaintiffs for injunctive relief to prevent the FEC and the U.S. Attorney General from taking enforcement action against plaintiffs' proposed 1990 publications.

On March 21, 1991, the U.S. Court of Appeals for the First Circuit affirmed the district court decision. On October 7, 1991, the U.S. Supreme Court denied the FEC's petition for a writ of certiorari.

Background

Previous Suit
The Maine Right to Life Committee, Inc. (MRLC), a nonprofit membership corporation, and Sandra Faucher, an MRLC board member, filed a similar suit in the same court in 1985, *Faucher v. FEC*, 708 F. Supp. 9 (D. Me. 1989). In that suit, MRLC and Ms. Faucher also challenged 11 CFR 114.4(b)(5), which permits corporations to prepare and distribute to the public nonpartisan voter guides consisting of questions posed to candidates on campaign issues and the candidates' responses. Anticipating that the proposed MRLC voter guide would not comply with the FEC's standards for nonpartisanship, plaintiffs asked the court to invalidate the regulation and issue an injunction preventing the FEC from enforcing the rule. On February 24, 1989, the court dismissed the suit on the ground that plaintiffs first needed to obtain an FEC advisory opinion on the legality of the proposed publication. Plaintiffs then sought an advisory opinion, which was issued on February 14, 1990 (AO 1989-28).

AO 1989-28
In AO 1989-28, the Commission concluded that MRLC could not use general treasury funds to distribute to the general public a newsletter containing a proposed voter guide.

First, because MRLC had a policy of accepting corporate contributions and had, in fact, accepted such contributions, it failed to qualify for the exemption granted to certain nonprofit corporations as a result of the Supreme Court's decision in *Massachusetts Citizens for Life, Inc. (MCFL) v. FEC*, 479 U.S. 238 (1986). In that decision, the Supreme Court ruled that the prohibition against corporate spending was unconstitutional as applied to nonprofit corporations that satisfied certain criteria.

Second, MRLC's proposed publication did not comply with the criteria for nonpartisan communications set forth at 11 CFR 114.4(b)(5). Specifically, the publication favored a pro-life position, although the rule states that a nonpartisan voter guide may not suggest or favor any position on the issues covered by the candidate survey. 11 CFR 114.4(b)(5)(i)(C) and (D). (For a more detailed summary of this opinion, see the March 1990 *Record*.)

Second Suit
On April 18, 1990, MRLC and Faucher filed a second suit, again challenging 11 CFR 114.4(b)(5) on the grounds that the regulation was beyond the authority of the FEC and was unconstitutionally vague. Plaintiffs also sought a declaratory judgment that MRLC's proposed 1990 publications were permissible under the Federal Election Campaign Act. They further sought an injunction prohibiting the FEC and the U.S. Attorney General from enforcing the voter guide regulations with regard to MRLC's proposed activity.

District Court

In its June 29 decision, the court found that 11 CFR 114.4(b)(5) was invalid because it focused on "issue advocacy." The court found that plaintiffs did not have standing to challenge other aspects of the rule and denied plaintiffs' request for declaratory and injunctive relief.

Invalidity of 11 CFR 114.4(b)(5)
The court first cited 2 U.S.C. §441b as the statutory basis for the regulation in question. Section 441b prohibits "any corporation whatever" from making "a contribution or expenditure in connection with any [federal] election...." The court, however, found that the Supreme Court, in its MCFL decision, had limited the scope of the prohibition to expenditures that "expressly advocate" the election or defeat of a clearly identified candidate.

Under the regulation in question, 11 CFR 114.4(b)(5), a corporation may use its treasury funds to distribute a voter guide to the general public only if the guide is "nonpartisan." Included among the factors defining "nonpartisan" is that the wording does not favor any position, or express an editorial opinion, on the issues covered by the candidate survey. 11 CFR 114.4(b)(5)(i)(C) and (D). The court found that "[t]his approach ignores the clear language of *FEC v. Massachusetts Citizens for Life* that issue advocacy by a corporation cannot constitutionally be prohibited and that only express advocacy...is constitutionally within the statute's prohibition."

The court therefore concluded that the regulation, "with its focus on issue advocacy, is contrary to the statute as the United States Supreme Court has interpreted it and, therefore, beyond the power of the FEC."

Other Challenges
The court ruled that MRLC did not have standing to challenge another aspect of the regulation: its failure to incorporate in explicit language the MCFL holding that the statute cannot constitutionally limit even express advocacy by a certain type of nonprofit membership corporation. MRLC lacked standing because it did not qualify as the type of corporation covered under the MCFL exemption. One of the essential factors for the exemption is that the nonprofit corporation must not receive contributions from business corporations and must have a policy against accepting such contributions. Although MRLC received "comparatively modest" amounts from corporate businesses, without an explicit policy against accepting such contributions, organizations like MRLC could serve as a conduit for corporate contributions.

The court also declined to address plaintiffs' challenge that 11 CFR 114.4(b)(5) does not explicitly incorporate the statutory "news story" exemption at 2 U.S.C. §431(9)(B)(i), which exempts news media costs from the definition of "expenditure." The court said it was "satisfied that the MRLC does not fit within this media exemption" and that therefore plaintiffs did not have standing to challenge the regulation on this score. (Another FEC regulation, 11 CFR 100.8(b)(2), parallels the statutory exemption.)

Finally, the court found that plaintiffs did not have standing to challenge 11 CFR 114.4(b)(5)(ii). Plaintiffs had asserted that the regulation was unconstitutionally vague in directing that certain publications "not favor one candidate or political party over another." Since that portion of the regulation affects only nonprofit, tax-exempt corporations that do not "support, endorse or oppose candidates or political parties," it does not apply to MRLC, which has established a separate segregated fund to engage in such activity. (In AO 1984-17, the Commission held that a tax-exempt corporation becomes an organization that supports, endorses or opposes candidates if it establishes a separate segregated fund that does so.)

Denial of Declaratory and Injunctive Relief
Finding that the issue was not ripe for consideration, the district court denied plaintiffs' request for a declaratory judgment that their proposed 1990 voter guide was permissible under the Act and also denied their request for injunctive relief to prevent any enforcement action against their proposed 1990 publications. Plaintiffs said that the 1990 publications would be substantially similar to the 1988 publication, but the court was "not prepared to base declaratory and injunctive relief upon a 1988 publication, when minor changes could make that ruling wholly inapplicable to the actual 1990 publications."

The court stated: "In a context where words and nuances may be critical, I do not have the actual language and format of the publications. Given the FEC's enforcement role,...such [declaratory and injunctive] relief would unduly interfere with the overall ability of that agency to conduct investigations of alleged violations, might well delay it in gathering important information and would interfere with the congressional goal of resolving specific election disputes through conciliation....An injunction may in fact be wholly unnecessary. Finally, any hardship to the parties in finding this issue not ripe is minimal, given the plaintiffs' historical practice of publishing despite any uncertainty."

The plaintiffs did not appeal the district court's denial of the injunction or rejection of their constitutional challenges. The FEC, however, filed an appeal seeking reversal of the court's invalidation of section 114.4(b)(5)(i).

Court of Appeals

In affirming the district court's judgment invalidating the Commission's regulation, the U.S. Court of Appeals for the first circuit first examined the scope of the statutory prohibition, section 441b(a). (The provision prohibits "any corporation whatever" from making "a contribution or expenditure in connection with any [federal] election....") The court acknowledged that "the statute appears to allow for a very broad application," but stated that the Supreme Court in *Buckley v. Valeo* narrowed the scope of the prohibition: "The Supreme Court, recognizing that such broad language as found in section 441b(a) creates the potential for first amendment violations, sought to avoid future conflict by explicitly limiting the statute's prohibition to 'express advocacy.'" The court went on: "This express advocacy test was again embraced by the Supreme Court in the more recent case of *Massachusetts Citizens for Life*."

The court rejected the FEC's argument that the language in the Supreme Court's MCFL opinion which appeared to limit section 441b(a) was dictum and therefore not binding. The court also rejected the FEC's alternative argument that even if section 441b(a) were restricted to express advocacy expenditures, the FEC's voter guide rules were properly directed at advocacy of candidates and did not appreciably infringe upon a corporation's ability to advocate its position on issues. The court stated: "In our view, trying to discern when issue advocacy in a voter guide crosses the threshold and becomes express advocacy invites just the sort of constitutional questions the Court sought to avoid in adopting the bright-line express advocacy test in *Buckley*."

Source: FEC *Record*, September 1990, p. 5; May 1991, p. 8; and November 1991, p. 1.

Faucher v. FEC, 743 F. Supp. 64 (D.Me. 1990), *aff'd*, 928 F.2d 468 (1st Cir. 1991), *cert. denied*, 495 U.S. (October 7, 1991).

FEC v. AFL-CIO

On November 13, 1980, the U.S. Supreme Court denied the Commission's petition for a writ of certiorari in the suit, *FEC v. American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)* (Supreme Court Docket No. 80-368). The Commission sought review of a judgment of the U.S. Court of Appeals for the District of Columbia Circuit, which had reversed an earlier decision by the U.S. District Court for the District of Columbia, imposing a $10,000 civil penalty against the AFL-CIO.

In filing the suit against the AFL-CIO on December 16, 1977, the Commission had sought to enjoin the organization from transferring funds from its COPE Education Fund (which contained general treasury funds) to COPE-PCC, its separate segregated fund (which contained only voluntary political contributions from individuals). The Commission had argued that the transfers violated provisions of the Act prohibiting labor organizations from using their general treasury funds to make contributions or expenditures in connection with federal elections. Between 1970 and 1977, COPE-PCC had transferred funds to the COPE Education Fund several times because COPE-PCC's funds were idle between elections. On demand of COPE-PCC, the funds were subsequently transferred from the COPE Education Fund back to COPE-PCC for its use. The COPE-PCC transfers were designated as loans to the COPE Education Fund but were interest free. Complete records were kept, and the transactions were reported to the Office of Federal Elections of the General Accounting Office (GAO) and later to the FEC.

In 1977, after the FEC had succeeded to the GAO's authority, it notified the AFL-CIO that section 441b of the Act permits transfers of funds from COPE-PCC to the COPE Education Fund but not transfers from the COPE Education Fund back to COPE-PCC. In an FEC enforcement action brought against the AFL-CIO, the AFL-CIO attempted to negotiate with the FEC a transfer of $321,000 from the Education Fund to COPE-PCC for the purpose of clearing the balance between the two funds. No agreement was reached and the FEC brought a civil action against the AFL-CIO in the district court. On June 16, 1978, the district court granted the Commission's motion for summary judgment in the case. It ruled that past transfers from the COPE Education Fund to COPE-PCC were illegal, enjoined the AFL-CIO from making any such transfers in the future (except for a single transfer of the $321,000 previously transferred) and assessed a $10,000 civil penalty against the AFL-CIO. The AFL-CIO appealed the assessment of the civil penalty.

The appeals court, on April 1, 1980, reversed the imposition of the $10,000 civil penalty. The appeals court found that the lower court had imposed the statutory penalty for a "knowing and willful" violation of the election law, although the facts in this case did not support a finding that the defendant's violation were "knowing and willful." (See 2 U.S.C. §437g(a)(5)(B).) The court held that the AFL-CIO's belief in the legitimacy of the transfers had been reasonable; during the GAO audit no comment had been made about the routinely reported transfers, and neither the Act nor any court decision had addressed the immediate issue. (The appeals court rejected the FEC's argument that *Pipefitters Local No. 562 v. United States*, 407 U.S. 385 (1972) provided specific notice that interfund transfers were prohibited by the Act.)

On November 10, 1980, the Supreme Court refused a request by the FEC for a writ of certiorari to review the appeals court ruling on the imposition of the civil penalty.

Source: FEC *Record*, January 1981, p. 6.

FEC v. AFL-CIO, 628 F.2d 97 (D.C. Cir.), *cert. denied*, 449 U.S. 982 (1980).

FEC v. AFSCME

On May 14, 1979, the U.S. District Court for the District of Columbia dismissed a suit which the FEC had filed against the American Federation of State, County and Municipal Employees (AFSCME). In that action, it was alleged that AFSCME had violated the disclosure requirements of 2 U.S.C. §431(f)(4)(C) by failing to report $983.73 it had spent to publish and circulate a political poster to its members immediately prior to the 1976 general election. The poster in question depicted, in caricature, President Gerald Ford, wearing a lapel button with the words "Pardon Me," and embracing former President Richard Nixon. The poster contained a quote taken from a speech given by Ford as Vice President: "I can say from the bottom of my heart the President of the United States is innocent and he is right."

The Act specifically excludes from the definition of the term "expenditure" any communication made by a membership organization or a corporation to its members or stockholders, but requires that the costs directly attributable to communications expressly advocating the election or defeat of a clearly identified candidate must be reported to the Commission if they exceed $2,000 per election (2 U.S.C. §431(9)(b)(iii))[1]. AFSCME had reported "communications costs" of approximately $40,000 in connection with the 1976 general election, including approximately $23,000 directly attributable to expressly advocating the election of Jimmy Carter.

The court found that, although the Nixon-Ford poster did pertain to a clearly identified candidate and may have tended to influence voting, it did not contain an "express advocacy" of election or defeat within the narrow definition given to that term in *Buckley v. Valeo*. Additionally, the court held that, as a communication concerning a public issue widely debated during the 1976 campaign, the poster is typical of the political speech which is protected from regulation. Accordingly, the court dismissed the action for failure to allege a violation.

Source: FEC *Record*, July 1979, p. 8.

American Federation of State, County and Municipal Employees: FEC v., 471 F. Supp. 315 (D.D.C. 1979).

[1] Prior to the 1979 amendments to the FECA, this statute was §431(f)(4)(C).

FEC v. AFSCME-PQ

On July 10, 1990, the U.S. District Court for the District of Columbia granted the FEC's motion for summary judgment, ruling that the American Federation of State, County and Municipal Employees-P.E.O.P.L.E., Qualified (AFSCME-PQ), the separate segregated fund of AFSCME, and its treasurer, William Lucy, violated the law when they delayed the disclosure of in-kind contributions to the 1982 and 1984 Indiana House campaigns of Representative Frank McCloskey. (Civil Action No. 88-3208.) On October 31, 1991, the court assessed a civil penalty of $2,000 against the defendants.

During September of 1982 and 1984, AFSCME-PQ established telephone banks that were used in part to advocate the election of Representative McCloskey. Instead of reporting these in-kind contributions at the time they were made (i.e., when the services were provided on behalf of the candidate), AFSCME-PQ reported them after it paid the bills for the services, some months after the services were provided.

Although AFSCME-PQ claimed that the in-kind contributions were reported on time (i.e., when the funds were disbursed), the court disagreed, citing the statutory requirement that a committee must disclose the name and address of "each political committee which has received a contribution from the reporting committee during the reporting period, together with the date and amount of any such contribution." 2 U.S.C. §434(b)(6)(B)(i). Because AFSCME-PQ reported on a monthly basis, the contributions should have been disclosed in the months immediately following the making of the contributions, i.e., the operation of the phone banks.

Penalty

In its October 1991 ruling on the penalty, the court observed that, although there was no bad faith by the defendants, "there is always harm to the public when the FECA is violated." Considering the maximum penalty of $10,000 inappropriate here, the court said a $2,000 penalty would serve the public's interest "by punishing a violation of the plain language of the statute." The court declined, however, to permanently enjoin defendants from future violations of 2 U.S.C. §434(b). The court pointed out that defendants cured the violation and have since complied with the reporting provision. Because "there has been no showing of a reasonable likelihood that the defendants will commit future violations," the court decided the public interest would not be substantially advanced by an injunction.

Source: FEC *Record*, October 1990, p. 7; and January 1992, p. 7.

AKINS v. FEC (91-2831)

On June 9, 1992, the U.S. Court of Appeals for the District of Columbia Circuit, in a *per curiam* order, directed the district court to clarify its order of January 21, 1992. (Civil Action No. 92-5124.) In that order, the district court had required the FEC to "issue a final decision on the merits of the Plaintiffs' administrative complaint forthwith, and in no event later than 4 p.m. on May 29, 1992."

The court of appeals stated that it found the above language confusing: "While it could be interpreted, as the FEC has suggested, as a direction to the agency to take final action by May 29, we question this interpretation because the district court has not found that the FEC's failure to act on appellees' administrative complaint was 'contrary to law' as required by 2 U.S.C. §437g(a)(8)(C)."

The court further stated: "We would have serious doubts about the propriety of an order compelling the FEC to take final action absent a finding by the district court that the agency's failure to act was 'contrary to law.' Upon clarification, the district court should allow the FEC sufficient time for any action the clarified order may contemplate."

(The FEC had interpreted the order as a mandatory deadline for final action and had asked the district court to clarify the order by deleting that language. When the court refused, the agency filed an appeal.)

In response to the directions from the court of appeals, the district court issued a new order on June 26, 1992. Stating that its previous order "was not intended as an injunction," the district court reopened the case to decide the "contrary to law" issue. However, shortly thereafter, on July 7, 1992, the court dismissed the case as moot since the FEC had completed action on the administrative complaint (MUR 2804). Civil Action No. 91-2831 (CRR).

Source: FEC *Record*, August 1992, p. 11.

Akins v. FEC, No. 91-2831 (D.D.C. Jan. 20, 1992); *on remand*, No. 92-5124 (D.C. Cir. June 9, 1992); *on remand* (D.D.C. June 26, 1992).

AKINS v. FEC (92-1864)

On September 29, 1995, the U.S. Court of Appeals for the District of Columbia ruled that the FEC's use of a "major purpose test" to narrow the definition of "political committee" was valid, that its application of the "major purpose test" in this case was reasonable, and that its investigation into the matters raised by appellants was adequate. The court therefore affirmed the district court's ruling dismissing appellants' complaint that the FEC's actions were contrary to law.

On December 6, 1996, the U.S. Court of Appeals for the District of Columbia Circuit, sitting en banc, reversed the district court's decision.

On June 1, 1998, the U.S. Supreme Court ruled that Mr. James E. Akins and several other former government officials had standing to challenge in federal court the Commission's dismissal of an administrative complaint they filed in 1989 against the American Israel Public Affairs Committee (AIPAC). The Supreme Court also referred questions about the membership status of AIPAC members to the Commission.

Administrative Complaint

On January 9, 1989, Mr. Akins and his associates filed an administrative complaint with the FEC alleging that AIPAC, an organization that lobbies public officials and disseminates information about federal candidates and officeholders, failed to register and report as a political committee, after it had made contributions to and expenditures on behalf of federal candidates in excess of $1,000.

The Federal Election Campaign Act (the Act) defines a political committee as any committee, association or other group that receives contributions or makes expenditures to influence federal elections in excess of $1,000 during a calendar year. 2 U.S.C. §431(4)(A). However, a statutory exception to the definition of expenditure allows membership organizations to make disbursements of more than $1,000 for campaign-related communications to their members, without their counting as contributions or expenditures.

AIPAC claimed that its communications to its members fell within this exception and, therefore, that it did not have to register as a political committee or disclose any of its financial activities to the FEC.

The FEC did not agree. In its view, AIPAC's disbursements did qualify as expenditures because its members did not qualify as members under the Act. The Commission, nonetheless, concluded AIPAC was not subject to the registration and disclosure rules applicable to political committees. The Commission believed that,

because AIPAC's major purpose was not influencing federal elections, it did not qualify as a political committee even though it had made expenditures in excess of $1,000. The Commission dismissed the complaint.

District and Appellate Courts Decisions

Mr. Akins and the other plaintiffs filed suit in U.S. District Court for the District of Columbia charging that the FEC failed to proceed on the administrative complaint and challenging the Commission's interpretation of what constitutes a political committee. The district court ruled in favor of the FEC, agreeing with the "major purpose" test—that an organization that receives contributions or makes expenditures of more than $1,000 becomes a political committee only if its major purpose is the influencing of federal elections.

The U.S. Court of Appeals for the District of Columbia Circuit affirmed the lower court ruling, but an en banc panel of the same appellate court reversed the district court decision. The en banc panel, referencing both *Buckley v. Valeo* and *FEC v. Massachusetts Citizens for Life, Inc.*, found that the major purpose test can only be applied to organizations that make independent expenditures, not contributions, which is what was in question in the administrative complaint against AIPAC. The court also rejected the Commission's argument that the appellants lacked standing to bring their claim to federal court. On behalf of the FEC, the solicitor general appealed the decision to the Supreme Court.

Supreme Court Decision

The Supreme Court focused its opinion on the three-pronged test of standing—which a plaintiff must demonstrate to show there is a "case" or "controversy" under Article III of the U.S. Constitution—injury in fact, causation and redressability. The high court also found that the plaintiffs' inability to obtain information about AIPAC's campaign-related finances satisfied prudential standing because it was the kind of injury that the Act seeks to address.

Injury in Fact. The Supreme Court found that the injury in fact in this case was that the plaintiffs were prevented from obtaining information about AIPAC's donors and the organization's campaign-related contributions and expenditures. It said that there is no reason to doubt that this information would have helped the plaintiffs evaluate candidates for public office, especially those candidates who received assistance from AIPAC. Thus, the court said, the injury in this case is both "concrete" and "particular." The FEC argued that the lawsuit involved only a "generalized grievance" shared by many (a kind of grievance for which standing usually is not conferred); the Supreme Court disagreed. In such cases of "generalized grievance," the court said, the harm is usually "of an abstract and indefinite nature"—not the kind of concrete harm that the court found here.

The court concluded that, "[T]he informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts."

Causation and Redressability. The high court also found that the harm asserted by the plaintiffs was "fairly traceable" to the FEC's decision to dismiss its administrative complaint, and that the courts have the power to redress this harm.

The Supreme Court also rejected the FEC's argument that, because the agency's decision not to undertake an enforcement action is generally an area not subject to judicial review, 2 U.S.C. § 437g(a)(8) should be interpreted narrowly.

"Major Purpose" Test

With regard to the "major purpose" test, the Supreme Court referred the matter back to the FEC because of the uncertainty of the "membership" issue as applied to AIPAC.

Source: FEC *Record*, May 1994, p. 4; December 1995, p. 1; February 1997, p. 1; and July 1998, p. 1.

Akins v. FEC, No. 92-1864 (JLG) (D.D.C. Aug. 11, 1993) (on motion for amended complaint); (D.D.C. Dec. 8, 1993); (D.D.C. Mar. 30, 1994) (opinion); 66 F.3d 348 (D.C. Cir. 1995), *rev'd*, 101 F.3d 731 (D.C. Cir. 1996) (*en banc*), *vacated and remanded*, 118 S. Ct. 1777 (1998).

ALBANESE v. FEC

On March 12, 1996, the U.S. Court of Appeals for the Second Circuit affirmed the district court's decision to dismiss this case for lack of standing.

Background

This suit was brought by Sal Albanese, who chose not to challenge Representative Susan Molinari in 1994 after his unsuccessful attempt to unseat her in 1992, and on behalf of a number of his supporters.

In their original suit, plaintiffs challenged the constitutionality of the federal electoral system on the grounds that it financially handicapped campaigns to unseat an incumbent, thus discouraging potential candidacies. In an amended complaint, they specifically challenged the constitutionality of the Federal Election Campaign Act (the Act)—alleging that it authorizes the use of private monies in federal elections—and the franking privileges enjoyed by incumbents.

District Court Ruling

In determining that plaintiffs lacked standing to bring this suit, the court applied the three-part test for standing; this test requires plaintiffs to identify (1) an actual injury that (2) is caused by the challenged act and (3) is likely to be redressed by the relief requested. The court found that plaintiffs in this case failed all three parts of this test.

Plaintiffs failed the first part because plaintiffs represented a potential candidate and supporters of his would-be campaign, rendering their alleged injury "abstract and conjectural." For instance, their alleged injury that large contributors diminish the influence of those who cannot give as much was "abstract and remote" in this case since the campaign that plaintiffs wished to support did not exist.

Plaintiffs failed the second part because, since their alleged injury was theoretical, they could not provide tangible evidence that the injury was caused by the Act. The court noted, "We will never know how much money might have been contributed to [Albanese's campaign] and how successful he might have been at the polls . . . ." The court further stated that, "Albanese opted not to participate in the election process; he was not prevented from doing so." The alleged injuries, therefore, were not traceable to the Act.

Lastly, plaintiffs failed the third part because their suggested remedy—to declare the Act unconstitutional—would not redress the injury. The court stated, "[If] plaintiffs' goal is to eliminate the contribution of private funds to politicians and thereby level the electoral playing field, declaring the [Act]—a statute which *limits* such contributions—unconstitutional cannot be said to redress plaintiffs' injury."

Additionally, the court cited *Buckley v. Valeo* as a legal precedent upholding the constitutionality of the Act, and several other court decisions similarly upholding the constitutionality of the franking statute.

In closing, the court declared that it was outside its jurisdiction to address the plaintiffs' grievance, and that plaintiffs had to seek relief through the legislative and executive branches of government: "To the extent that the plaintiffs believe that a modification of the process would enhance its integrity, they must make the case for the validity of that belief with the political branches of our government. For just as fundamental to the political order of this democracy is the doctrine of separation of powers and the limited jurisdiction conferred upon the federal judiciary within that political order."

Source: FEC *Record*, July 1995, p. 8; and May 1996, p. 4.

Albanese v. FEC, 884 F. Supp. 685 (E.D.N.Y. 1995), *aff'd*, 78 F.3d 66 (2d Cir. 1996).

AFL-CIO AND DNC SERVICES CORP./DNC v. FEC

On December 19, 2001, the U.S. District Court for the District of Columbia found that the FEC's decision to disclose documents obtained during an investigation of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and DNC Services Corporation/DNC (DNC) was arbitrary, capricious and contrary to law. The court ruled that the confidentiality provision of the Federal Election Campaign Act (the Act) and an FEC regulation prohibit the Commission from making public the investigatory files of matters under review (MURs). The court also found that the Commission is required to redact names and other individual identifying information from the files prior to release under the Freedom of Information Act (FOIA).

Background

On June 17, 1997, the Commission found reason to believe that the plaintiffs had violated the Act during the 1995-96 election cycle (MURs 4291, *et al.*). At the conclusion of its investigation, the Commission voted to take no further action on MURs 4291, *et al*. and to close the files. In keeping with its long-standing practice of disclosing the investigatory record once a MUR is closed, the Commission planned to make public a portion of the investigatory file. 11 CFR 5.4(a)(3) and (4).

The plaintiffs claimed that public disclosure of the files would cause irreparable injury by revealing confidential information to their political opponents, the media and the public, and by chilling the plaintiffs' future efforts to engage in political activities. The plaintiffs asked the Commission not to make the documents public. The Commission denied their requests, and the AFL-CIO and DNC filed suit. On July 17, 2001, the U.S. District Court for the District of Columbia granted the plaintiffs' request for a preliminary injunction barring the Commission from publicly releasing certain documents relating to the investigation until the court made a final decision in this case.

Court Decision

The plaintiffs requested summary judgment from the court, arguing that disclosure of the documents would violate the confidentiality provision of the Act, which states that:

"Any notification or investigation made under [the enforcement] section shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made." 2 U.S.C. §437g(a)(12)(A).

The plaintiffs further claimed that publicizing the MUR documents would violate:

- FOIA exemptions at 5 U.S.C. §552(b)(3) and (7)(C);
- The Privacy Act (5 U.S.C. §522a(b)); and
- The First Amendment.

Confidentiality Provision of the Act

The Commission argued that the Act only protects the confidentiality of ongoing investigations. Once a MUR is closed, the Act requires the Commission to make public the conciliation agreement or the Commission's determination that the Act has not been violated. 2 U.S.C. §437g(a)(4)(B)(ii). The Commission asserted that the Act's confidentiality provision was intended to protect a MUR respondent from disclosure of the fact that the respondent is under investigation. When the Commission makes public its MUR determination, it also reveals the fact that the respondent has been investigated, leaving nothing to be protected by the confidentiality provision.

The court, however, concluded that the plain language of the Act barred the Commission from publicizing investigative materials and, thus, that the Commission's interpretation of the statute ran counter to congressional intent. 2 U.S.C. §437g(a)(12)(A). The court explained that, "Had Congress intended §437g(a)(12)(A) to expire upon the conclusion of an FEC investigation, it certainly knew how to draft language to accomplish that goal." The court found that the Act's provision requiring that MUR determinations be made public was a limited exception to the Act's confidentiality provision, not a directive to end the protection of that provision. 2 U.S.C. §437g(a)(4)(b)(ii). Moreover, the court concluded that publication of the materials would violate one of the Commission's regulations that implements the Act's confidentiality provision. 11 CFR 111.21(a).

FOIA Exemption

FOIA exemption 7(C) protects information compiled for law enforcement purposes that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy. 5 U.S.C. §552(b)(7)(C). The plaintiffs claimed that this exemption protected the identities and personal information of all individuals named in the investigative files. The Commission argued in response that:

- Individuals named in the files had a diminished expectation of privacy resulting from the Act's reporting requirements, its administrative enforcement procedures, the Commission's public disclosure

regulations and the potential for enforcement cases to be litigated in federal district court (2 U.S.C. 437g(a)(6) and (8));
- The public interest in the disclosure of the results of any FEC enforcement investigation outweighed the privacy interest of the named individuals; and
- Much of the information contained in the files was already in the public domain and could thus be disclosed despite the FOIA exemption.

The court rejected the Commission's claims concerning the public interest and individuals' expectations of privacy because the District of Columbia Circuit has established a categorical rule that an agency must exempt from disclosure the names and identifying information of individuals appearing in an agency's law enforcement files. Moreover, the court found that the Commission had failed to show that the majority of the names of individuals contained in the materials were already in the public domain.

Other Issues
The court, having found that disclosure would violate the Act and Commission regulations, as well as FOIA exemption 7(C), did not reach the merits of the plaintiffs' First Amendment or Privacy Act claims. The court granted the plaintiffs' motion for summary judgment in this case and denied the Commission's motion for summary judgment.

Appeal

On February 15, 2002, the Commission appealed this case to the U.S. Court of Appeals for the District of Columbia Circuit.

Source: FEC *Record*, February 2002, p. 3; and March 2002, p. 5.

177 F. Supp.2d. 48

ANDERSON v. FEC (80-0272)

On April 10, 1981, the U.S. District Court for the District of Maine dismissed *John B. Anderson v. FEC* (Civil Action No. 80-0272P) in response to a motion to dismiss the suit filed by plaintiffs on the same day. The suit had been remanded to the district court after certification of constitutional questions to the U.S. Court of Appeals for the First Circuit. Several plaintiffs—John B. Anderson, a candidate in the 1980 Presidential elections, the National Unity Campaign 441a(d) Committee and three individual plaintiffs—had brought suit on September 8, 1980, asking the district court to certify the following constitutional questions to the appeals court:

- Does Section 441a(a)(1)(B), which entitles a national party committee to receive contributions of up to $20,000 per year from individuals, infringe on plaintiff's First and Fifth Amendment rights; and
- Does Section 441a(d), which permits a national party committee to make special "coordinated party expenditures" on behalf of its Presidential candidate, infringe on plaintiffs' First and Fifth Amendment rights?

Plaintiffs had also sought a preliminary injunction from the district court, directing the Commission to permit the application of Sections 441a(a)(1)(B) and 441a(d) to the National Unity Campaign 441a(d) Committee, which had registered as a political committee the day before plaintiffs filed suit.

District Court Ruling

On October 14, 1980, the district court certified plaintiffs' constitutional questions to the appeals court but denied plaintiffs' motion for a preliminary injunction. The court held that plaintiffs had not exhausted the administrative relief available to them under the election law. Moreover, the court noted that any injunction granted would have been permanent, rather than temporary, since the election would be held within two and one-half weeks of its ruling.

Appeals Court Ruling

On October 30, 1980, the appeals court granted the FEC's motion to remand the case to the district court for further fact finding. The court noted that, if plaintiffs had sought an advisory opinion from the FEC before filing suit, the court "...would likely have had more facts before us than we do presently and would have been better able to evaluate plaintiffs' constitutional claims."

Plaintiffs Seek Administrative Relief From FEC

On November 4, 1980, prior to seeking dismissal of their suit, plaintiffs requested an advisory opinion from the Federal Election Commission on the status of the

National Unity Campaign and the National Unity Campaign 441a(d) Committee as national party committees operating on Mr. Anderson's behalf. In AO 1980-131, issued on November 20, 1980, the Commission determined that neither committee qualified as the national committee of a political party and, therefore, that neither committee was entitled to receive up to $20,000 in contributions from individuals or to make coordinated party expenditures.

Source: FEC *Record*, July 1981, p. 6.

Anderson v. FEC, 634 F.2d 3 (1st Cir. 1980) (*en banc*).

ANDERSON v. FEC (80-1911)

On September 9, 1980, the U.S. District Court for the District of Columbia dismissed the suit, *John B. Anderson v. FEC* (Civil Action No. 80-1911). The court determined that there was no longer a need for a decision either on the FEC's motion to dismiss the suit or on the substantive issues raised in the suit.

In the suit, plaintiffs had sought an expedited ruling by the court that John B. Anderson would be eligible as an independent candidate for the same post-election public funding as that provided Presidential candidates of "new parties," if he received five percent or more of all popular votes cast in the 1980 Presidential general election and met other requirements of the Act. Such a ruling, plaintiffs told the court, would immediately make large bank loans available to the Anderson campaign.

The FEC had consistently argued that plaintiffs should have requested an advisory opinion from the FEC on the application of the Act and the Commission's new regulations to the Anderson campaign before seeking a court ruling. On August 13, plaintiffs did file an advisory opinion request (AOR 1980-96) with the FEC, and on September 4 the Commission issued an opinion declaring Mr. Anderson eligible for post-election public funding as the candidate of a new political party.

After issuing the Anderson opinion, the FEC filed a supplement to its motion to dismiss the suit, submitting the opinion and arguing that it fully supported its consistent position that the case should be dismissed. Plaintiffs, who had opposed the FEC's motion to dismiss, also filed their own motion to dismiss the case as moot.

Source: FEC *Record*, October 1980, p. 6.

ANTOSH v. FEC (84-1552 and 84-2737)

On August 30, 1984, the U.S. District Court for the District of Columbia issued an order granting the FEC's motion to dismiss *Antosh v. FEC* (Civil Action No. 84-1552) and denying the plaintiff's motion to file a supplemental complaint. On September 13, 1984, the court issued an opinion explaining the ruling. Following the court's order, Mr. James E. Antosh filed a second suit with the court on September 6, 1984 (Civil Action No. 84-2737). The second suit included a request by the plaintiff that the district court certify two constitutional claims to the U.S. Court of Appeals.

On January 5, 1988, the court ruled that Mr. Antosh lacked standing in his second suit to seek the court's certification of his constitutional questions to the appeals court. The court granted a motion by the FEC to dismiss the counts of his complaint which included the constitutional questions.

On March 24, 1988, the district court issued an order granting a further motion by the FEC for a summary judgment in the second suit. The court's order dismissed the remaining two counts of Mr. Antosh's complaint.

First Suit

Mr. Antosh, a registered voter in Oklahoma, is president of Shawnee Garment Manufacturing, Inc. On December 2, 1983, he filed an administrative complaint with the FEC alleging that the separate segregated funds of three international unions were affiliated with the AFL-CIO's political action committee (PAC)[1] within the meaning of 2 U.S.C. §441a(a)(5). MrAntosh claimed that the four political committees had failed to disclose their affiliation in their respective Statements of Organization and, in making contributions to several political committees, had exceeded their single $5,000 contribution ceiling. (See 2 U.S.C. §§433(b)(2) and 441a(a)(2)(A).)

Furthermore, his complaint claimed that the election law and FEC Regulations recognized automatic affiliation between business federations and their members, on the one hand, while only a discretionary affiliation between a labor federation and its members, on the other. The plaintiff had alleged that this was discriminatory treatment in violation of the First and Fifth Amendments.

Pursuant to 2 U.S.C. §437g(a)(8), MrAntosh filed his first suit against the FEC in the district court on May 17, 1984. The plaintiff asked the court to declare that the FEC's failure to act on his administrative complaint within 120 days was contrary to law and to issue an order directing the FEC to proceed with an investigation into the complaint within 30 days.

On July 10, 1984, the Commission dismissed Mr. Antosh's administrative complaint, finding no reason to believe that violations of the election law had occurred. On the same day, the Commission also filed a motion with the court to dismiss Mr. Antosh's suit as moot. On July 23, 1984, Mr. Antosh requested that the court deny the FEC's motion to dismiss his case and grant his motion to file a supplemental complaint. In his proposed supplemental complaint, Mr. Antosh requested the court to declare that the FEC's dismissal of his administrative complaint was contrary to law, and to certify his constitutional questions to the appeals court. The court found, however, that Mr. Antosh's July 23 request did not constitute a supplement to his original suit because, unlike the original request, the motion did not deal with delays in processing his administrative complaint, but rather it dealt with the merits of the FEC's decision to dismiss the complaint. The court therefore decided that, under procedural rules, Mr. Antosh had to file a separate suit with the court.

Second Suit

On September 6, 1984, Mr. Antosh filed a second suit with the district court to challenge the Commission's dismissal of his complaint. On December 3, 1984, pursuant to 2 U.S.C. §437h(a), he asked the district court to certify two constitutional claims to the appeals court. Specifically, he alleged that several provisions of the Federal Election Campaign Act and FEC regulations provided preferential treatment to labor organization PACs over trade association PACs. Mr. Antosh claimed that these distinctions violated the First and Fifth Amendments. Furthermore, Mr. Antosh asked the court to declare that the FEC's dismissal of his administrative complaint was contrary to law and that both the FEC and former Commissioner Thomas E. Harris had violated his rights to due process in refusing to disqualify Commissioner Harris from the agency's consideration of his administrative complaint.[2] (Prior to his appointment to the Commission in 1975, Commissioner Harris had served as counsel for the AFL-CIO. Mr. Antosh claimed that Mr. Harris had signed a factual stipulation on behalf of the AFL-CIO in a 1973 case that was germane to Mr. Antosh's suit.)

The FEC filed an opposition to Mr. Antosh's motion for certification of his constitutional claims and filed an additional motion to dismiss them. The agency argued that Mr. Antosh lacked standing to raise the constitutional questions and that federal courts had already substantially settled the questions he raised.

In January 1988, the court granted the FEC's motions and dismissed Mr. Antosh's constitutional claims. The court found that, although the plaintiff had standing to raise his questions under the election law, he lacked standing under Article III of the Constitution. The court concluded that Mr. Antosh failed to demonstrate the

kind of injury required by Article III, that is, "some actual or threatened injury which is traceable to illegal conduct by the defendant" and which "is likely to be redressed by a favorable ruling." The court first rejected Mr. Antosh's claim that, as a businessman who might contribute to trade association political action committees, his voice had been diminished in the political process by the law's alleged discrimination against such committees, thereby violating his rights under the free speech provision of the First Amendment. The court then rejected Mr. Antosh's claim that he had a personal stake in the law's alleged discrimination against corporate political action committees by virtue of his position as president of a corporation that was a member of trade associations, thereby violating his rights under the First Amendment and under the due process clause of the Fifth Amendment.

In March 1988 the district court ruled on the rest of the counts in Mr. Antosh's suit. With regard to Mr. Antosh's allegation that the FEC's dismissal of his administrative complaint was contrary to law, the court held that the FEC had "reasonably interpreted" the provision of the election law governing possible affiliation between the political committees named in the complaint. Consequently, the agency's dismissal of the complaint was not contrary to law.

The FEC had argued that the legislative history of Section 441a(a)(5) demonstrated that Congress had not intended to impose a single contribution limit on the AFL-CIO's PAC and the PACs of international unions affiliated with the AFL-CIO. The agency noted that it had consistently interpreted the provision this way.

The district court supported the FEC's view, noting comments made in 1976 by Congressman Wayne Hays, then Chairman of the House Ways and Means Committee and a sponsor of the 1976 amendments to the Act, saying that the membership of international unions in the AFL-CIO did not mean that the unions and the federation were to be treated as a single entity for the purposes of the 1976 amendments.

With regard to Mr. Antosh's claim that Commissioner Harris should have recused himself from the case, the court concluded that "the intervention of significant numbers of years [nine] certainly is sufficient to remove any taint." The court added that it "refuse[d] to find that an attorney, at the very least nine years later, cannot consider cases involving a former client, especially after the Commission has made a determination that he or she is capable of impartially addressing the individual facts of a case."

Source: FEC *Record*, November 1984, p. 5; March 1988, p. 10; and June 1988, p. 8.

Antosh v. FEC, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶9260 (D.D.C. Jan. 5, 1988), (D.D.C. Mar. 24, 1988) (unpublished opinion).

[1] The full title of the AFL-CIO's PAC is "American Federation of Labor Congress of Industrial Organizations, Committee on Political Education Political Contributions Committee (AFL-CIO COPE-PCC)."

[2] Commissioner Harris's third term on the Commission expired in April 1985. He continued to serve on the Commission, however, until autumn 1986, when he was replaced on the Commission by Scott E. Thomas.

ANTOSH v. FEC (84-3048)

On December 21, 1984, the U.S. District Court for the District of Columbia issued an order granting plaintiff's motion for summary judgment in *James Antosh v. FEC* (Civil Action No. 84-3048). The court found that the Commission's dismissal of an administrative complaint Mr. Antosh had filed with the FEC was contrary to law. On the same day, therefore, the court issued an order requiring the Commission to vacate its determination in the administrative complaint and to "reopen [the complaint] for further proceedings consistent with the court's opinion."

On July 1, 1987, the court denied Mr. Antosh's petition for award of attorneys' fees and costs incurred by him in the same suit.

Background

In filing his complaint with the FEC in May 1984, Mr. Antosh had alleged that:

- Engineers Political Education Committee/International Union of Operating Engineers (EPEC/IUOE) and Supporters of Engineers Local 3 Federal Endorsed Candidates (SELFEC), the separate segregated funds of the International Union of Operating Engineers and Engineers Local 3, had violated 2 U.S.C §441(a)(2)(A) by making contributions in excess of $5,000 to the 1982 primary campaign of Thomas P. Lantos, a Congressional candidate, and Mr. Lantos' principal campaign committee;
- Mr. Lantos and his principal campaign committee had, in turn, violated 2 U.S.C. §441a(f) by knowingly accepting the excessive contributions (totaling $3,600); and
- Mr. Lantos, his campaign treasurer and his principal campaign committee had violated Commission regulations by failing to report the excessive contributions accurately. See 11 CFR 104.14(d).

In a report submitted to the FEC in July 1984, the General Counsel noted, however, that based on an affidavit and a letter submitted by the respondents, of the $3,600 alleged to be excess contributions to the 1982 primary, $3,100 had in fact been designated for retiring debts of Mr. Lantos' 1980 general election campaign. The General Counsel therefore concluded that the two union PACs had made excessive contributions of $500 to Mr. Lantos' 1982 primary campaign rather than $3,600. Accordingly, the General Counsel recommended that "due to the small amount in question" (i.e., excessive contributions of $500), the Commission should find reason to believe that the respondents had violated the Act, but take no further action. The Commission followed the General Counsel's recommendations and closed the file on MUR 1719.

In October 1984 Mr. Antosh petitioned the district court to take action against the FEC for dismissing his administrative complaint.

The District Court's Ruling

The court noted that in determining whether an agency's determinations were "arbitrary and capricious," the court's standard of review had to be "a highly deferential one...which presumes the agency's action to be valid." In the case of Mr. Antosh's complaint, however, the court found a "problem in the Commission's treatment of this matter." Specifically, although EPEC/IUOE had designated $3,100 for retiring the Lantos committee's 1980 general election debt, committee reports indicated the contributions had been made during May and June 1981, several weeks after the committee had apparently extinguished the 1980 debt in mid-April 1981.

The court concluded that "the Commission dismissed MUR 1719 because it only involved violations of $500.... The violations in fact appear to involve considerably more money, and are thus more egregious than the Commission realized. For these reasons, the Commission's dismissal of MUR 1719 was arbitrary and capricious and, thus, contrary to law." See 2 U.S.C. §437g(a)(8).

Attorneys' Fees and Costs

The Equal Access to Justice Act states that only those courts which have jurisdiction over the underlying civil action may consider whether to award attorney's fees and costs to a prevailing party. Upon examination of its jurisdiction over the original suit, the district court concluded that, in fact, Mr. Antosh did not have standing to bring it. Consequently, the court could not grant plaintiff's petition for award of costs and attorneys' fees.

Under Article III of the Constitution, in order to have standing to sue, an aggrieved party must "show that he personally suffered some actual or threatened injury as a result of the putatively illegal conduct of the respondent..." (i.e., the Lantos campaign). Since Mr. Antosh was an Oklahoma resident, the court concluded that he would not be injured by a California candidate's acceptance of excessive contributions. "Plaintiff's interest in the California election is no different from the interest of any citizen who wishes to ensure that candidates abide by the rules that govern elections," the court said. The court noted that this conclusion was the same as that reached by the court in July 1986 in a "virtually identical" suit brought by Mr. Antosh against the FEC. (*Antosh v. FEC*, Civil Action No. 86-0179.)

Source: FEC *Record*, February 1985, p. 4; and January 1988, p. 8.

Antosh v. FEC, 599 F. Supp. 850 (D.D.C. 1984), 664 F. Supp. 5 (D.D.C 1987) (ruling on att'y fees).

ANTOSH v. FEC (85-1410)
CITIZENS FOR PERCY '84 v. FEC (85-0763)
COMMON CAUSE v. FEC (85-0968)
GOLAR v. FEC

On October 23, 1985, the U.S. District Court for the District of Columbia ruled on *Common Cause v. FEC*.[1] (Civil Action No. 85-968), *Golar v. FEC* (Civil Action No. 85-225) and *Citizens for Percy v. FEC* (Civil Action No. 85-763), three suits which had challenged the FEC's dismissal of administrative complaints.

Under the election law, a suit challenging the dismissal of an administrative complaint must be filed with a district court within 60 days after it is dismissed by the FEC. 2 U.S.C. §437g(a)(8)(B).The FEC had argued that the 60-day period begins at the time the Commission votes to dismiss an administrative complaint. The court, however, concluded that the 60-day period begins when a complainant actually receives the notice of dismissal.

Based on this ruling, the court dismissed *Citizens for Percy v. FEC* because the Committee had filed its suit more than 60 days after both the Commission's decision to dismiss the Committee's administrative complaint and its receipt of the FEC's notice of dismissal. On the other hand, the court decided not to dismiss the suits brought by Common Cause and Mr. Golar because plaintiffs had filed their respective challenges within 60 days of FEC notification.

In *Antosh v. FEC* (Civil Action No. 85-1410),[2] another district court reached a different conclusion on June 7, 1985. In a suit to review conciliations agreements entered into by the Commission, the court concluded that the 60-day period for filing suit began on "the date the Commission approved the conciliation agreements and they became effective." Finding that the matter had been filed within 60 days of that date, the court agreed to hear the case.

Source: FEC *Record*, December 1985, p. 7; and *Annual Report 1985*, p. 15.

Antosh v. FEC, 613 F. Supp. 729 (D.D.C. 1985).

Citizens for Percy '84 v. FEC, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶9229 (D.D.C. 1985).

[1] The district court decision in *Common Cause v. FEC* (85-0968) appears in alphabetical order, inserted with other Common Cause suits.

[2] For the district court decision in *Antosh v. FEC* (85-1410), see *Antosh v. FEC* (86-0179).

ANTOSH v. FEC (85-2036)

On April 4, 1986, the U.S. District Court for the District of Columbia issued an order which granted the FEC's motion for summary judgment in *Antosh v. FEC* and which dismissed with prejudice plaintiff Edward Antosh's complaint. (Civil Action No. 85-2036.) The court held that, under Article III of the Constitution, Mr. Antosh lacked standing to seek judicial review of the FEC's dismissal of his administrative complaint.

Background

A resident of Oklahoma, Mr. Antosh had filed his administrative complaint with the FEC in April 1984. In the complaint, he alleged that: (1) the Engineers Political Education Committee (EPEC), the separate segregated fund of the International Union of Operating Engineers, had violated the election law by making excessive contributions to Arizona Senator Dennis DeConcini's 1982 primary campaign (the campaign); and (2) the campaign had violated the election law by accepting the excessive contributions. The Commission determined that there was reason to believe EPEC had violated the election law by making excessive contributions to Senator DeConcini's reelection campaign. However, in a tie vote, the agency failed to find reason to believe that the campaign had violated the law.

On June 21, 1985, Mr. Antosh filed suit with the district court. He claimed that the FEC's determination that the campaign had not violated the law was arbitrary and capricious. In cross motions for summary judgment, Mr. Antosh claimed that he had standing to bring suit because, under the election law, "[a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party...may file a petition with the U.S. District Court for the District of Columbia." 2 U.S.C. §437g(a)(8)(A).

District Court's Ruling

In ruling that Mr. Antosh lacked standing to seek judicial review of the FEC's determination, the court referred to the requirement that an aggrieved party must "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant...." to establish standing under Article III.

The court held that Mr. Antosh failed to meet this requirement. As a citizen of and a registered voter in Oklahoma, Mr. Antosh had "suffered no greater injury, nor likely will he in the future, as a result of the Commission's failure to order a refund, than any other U.S. citizen who is neither a resident of nor with

franchise in Arizona." The court concluded that "plaintiff has no interest save his own, which is, at the moment, only that of a public-spirited spectator of Arizona elections."

Finally, the court noted that the standard for qualifying as an "aggrieved party" (eligible to seek judicial review for an administrative agency's determination) was higher than the standard for filing an administrative complaint with an agency. "Congress can permit anyone to engage in proceedings before them [administrative agencies]. But it cannot confer upon a participant at the administrative level the right to maintain a suit to review the agency's decision in federal court, no matter how grievously he may be offended by it.... "

The court did not address issues related to the merits of the FEC's administrative determinations or its own jurisdiction to review those determinations.

Appeals Court's Ruling

On August 13, 1986, the U.S. Court of Appeals for the District of Columbia Circuit granted Mr. James E. Antosh's motion to dismiss his appeal of the April 1986 decision handed down by the U.S. District Court.

Source: FEC *Record*, June 1986, p. 8; and October 1986, p. 7.

Antosh v. FEC, 631 F. Supp. 596 (D.D.C. 1986).

ANTOSH v. FEC (86-0179)

On July 15, 1986, the U.S. District Court for the District of Columbia issued an order which granted the FEC's motion for summary judgment in *Antosh v. FEC* and which dismissed with prejudice plaintiff Edward Antosh's complaint. (Civil Action No. 86-0179.) The court held that, under Article III of the Constitution, Mr. Antosh lacked standing to seek judicial review of the FEC's dismissal of his administrative complaint.

Background

Mr. Antosh filed suit against the FEC on grounds that, in two complaints, the agency's failure to order refunds of respondents' excessive contributions was contrary to law. The administrative complaints concerned excessive contributions made respectively by two labor organizations to Senators Edward Kennedy (MUR 1637) and Paul Sarbanes (MUR 1696) in 1984. The contributing committees were the Engineers Political Education Committee (EPEC), the Sheet Metal Workers International Association Political Action League (SMWIA) and the American Federation of Government Employees' Political Action Committee (AFGE). Having found that the respondents violated the law, the Commission required the labor organizations to pay civil penalties for their violations. Refunds by the candidates, however, were not required.

District Court Ruling

In ruling that Mr. Antosh lacked standing to seek judicial review of the FEC's determination, the court referred to recent decisions in two "virtually identical" suits filed by Mr. Antosh (*Antosh v. FEC*, Civil Action Nos. 85-1410 and 85-2036). In those rulings, the court held that Mr. Antosh had failed to meet the eligibility requirement for standing under Article III of the Constitution. Under this requirement, an aggrieved party must "'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the respondent.... '" Noting that the excessive contribution alleged in Mr. Antosh's suit had been made to Senatorial candidates in Massachusetts and Maryland, the court concluded that "plaintiff thus fails to satisfy the constitutional requisite of 'injury-in-fact.'"

Nor was the court persuaded by plaintiff's claim that he had suffered "injury-in-fact" in making contributions to nonconnected political committees which had, in turn,

made expenditures in connection with the Sarbanes and Kennedy reelection campaigns "because he is not eligible to vote in either Massachusetts or Maryland."

Source: FEC *Record*, September l986, p. 5.

Antosh v. FEC, No. 86-179, (D.D.C. July 18, 1986).

ATHENS LUMBER CO. v. FEC

On October 24, 1983, the U.S. Court of Appeals for the Eleventh Circuit issued an *en banc* opinion in *Athens Lumber Company v. FEC* upholding the constitutionality of 2 U.S.C. §441b(a) of the Federal Election Campaign Act (the Act). (Civil Action No. 82-8102.) The court's decision also reversed an earlier order by the U.S. District Court for the Middle District of Georgia which had dismissed the case on grounds that: (1) plaintiffs lacked standing to bring suit under the Act; and (2) plaintiffs failed to present a justiciable controversy for the federal courts' consideration. The appeals court remanded the case to the district court for entry of a judgment in favor of the FEC.

Plaintiffs' Claims

The Athens Lumber Company and its President John P. Bondurant filed the suit with the Georgia district court on July 27, 1981. Pursuant to Section 437h(a) of the Act,[1] plaintiffs asked the district court to certify their questions concerning the constitutionality of 2 U.S.C. §441b(a) to the *en banc* appeals court for the Eleventh Circuit. Plaintiffs claimed that this provision of the election law abridged First and Fifth Amendment rights by prohibiting corporations, labor organizations and national banks from making contributions and expenditures in connection with federal elections.

Plaintiffs further asked that the FEC be enjoined from initiating enforcement proceedings against them if the Athens Lumber Company participated in federal elections. At the same time, however, plaintiffs said that the company would not make expenditures or contributions in connection with federal elections until either: (1) 2 U.S.C. §441b was repealed or declared unconstitutional; or (2) the company obtained an opinion of counsel from the Commission stating that the proposed expenditures did not violate any federal or state law or regulation. Plaintiffs further argued that their uncertainty about a possible violation of the election law had deterred them from exercising their First and Fifth Amendments rights, thereby causing them irreparable harm.

District Court Decision

In an opinion issued on February 9, 1982, the Georgia district court dismissed the suit. (Civil Action No. 81-79-ATH.) The court held that, under Section 437h(a) of the election law, only the following types of plaintiffs had standing to bring suit: the national committee of a political party, individuals eligible to vote in Presidential elections and the FEC. Consequently, the court found that the Athens Lumber Company lacked standing to bring suit. While the court recognized that Mr.

Bondurant was an eligible voter, he too lacked standing to bring suit since the corporation—not Mr. Bondurant—planned to make the expenditures.

Moreover, the district court held that plaintiffs had not presented a justiciable case or controversy ripe for the court's consideration. The court concluded that "it is obvious that the statute under attack in no way interferes with the way that the plaintiff corporation through its plaintiff president conducts its corporate affairs...." Similarly, the court found that Mr. Bondurant had not presented a justiciable claim because he was "free to independently expend his personal funds [in federal elections], including dividends from the corporate plaintiff without limitation." Moreover, the court found that Athens Lumber Company was only seeking an advisory opinion because the shareholders had not voted to spend any corporate funds in connection with federal elections as long as Section 441b remained in force.

Appeals Court Decision

On October 22, 1982, a three-judge panel of the Eleventh Circuit court of appeals reversed the judgment of the district court, finding that Mr. Bondurant did have standing to bring suit and to raise those issues pertaining to Athens Lumber Company's participation in federal elections. Moreover, the court found that the suit raised justiciable claims because, if Athens Lumber Company were to make contributions and expenditures in connection with federal elections, both Mr. Bondurant and the corporation would be subject to civil and criminal prosecution. The panel then certified to the *en banc* Eleventh Circuit eight constitutional questions adopted from appellants' complaint.

In upholding the constitutionality of Section 441b, the *en banc* Eleventh Circuit court of appeals stated: "Viewing the substantive constitutional issues as being controlled by the Court's unanimous opinion in *Federal Election Commission v. National Right to Work Committee*, 459 U.S. 197 (1982), and for the reasons there stated, we find the limitations and prohibitions of which appellants complain to be constitutional."

Supreme Court Action

On March 19, 1984, the Supreme Court dismissed an appeal brought by plaintiffs in *Athens Lumber Company v. FEC*. Citing a lack of jurisdiction over the appeal, the Court treated it as a request for discretionary review (i.e., a petition for a writ of certiorari) and declined the request. (U.S. Supreme Court No. 83-1190) The high Court's action left standing the earlier, *en banc* opinion of the U.S. Court of Appeals for the Eleventh Circuit.

Source: FEC *Record*, January 1984, p. 10; and May 1984, p. 7.

Athens Lumber Company, Inc. v. FEC, 531 F. Supp. 756 (M.D. Ga. 1982), *rev'd*, 689 F.2d 1006 (11th Cir. 1982), 718 F.2d 363 (11th Cir. 1983) (*en banc*), *appeal dism'd, cert. denied*, 465 U.S. 1092 (1984).

[1] Section 437h, which provides for an expedited judicial review procedure, notes that certain designated parties "may institute such actions in the appropriate district court of the United States...to construe the constitutionality" of the Act. The district court is then directed to certify appropriate constitutional questions to the court of appeals sitting *en banc*.

AUSTIN v. MICHIGAN STATE CHAMBER OF COMMERCE

On March 27, 1990, the Supreme Court ruled that a Michigan state law prohibiting independent expenditures by corporations was constitutional. Reversing a Sixth Circuit U.S. Court of Appeals decision in *Austin v. Michigan State Chamber of Commerce*, the Court said that the state could prohibit corporations from using their treasury funds to make independent expenditures in connection with state elections.

Background

The suit originated in a 1985 district court complaint filed by the Michigan State Chamber of Commerce. The Chamber is a nonstock, nonprofit incorporated membership organization funded by dues. Three quarters of its members are for-profit corporations.

The Chamber sought to make an independent expenditure for a newspaper advertisement supporting a candidate for the state legislature. Although the Chamber had established a separate segregated fund for political purposes (which could lawfully have been used to make the expenditure), the organization wanted to purchase the ad with its general treasury funds. Finding that section 54(1) of the Michigan Campaign Finance Act appeared to prohibit independent expenditures made with corporate treasury funds, the Chamber filed suit against Richard Austin, Michigan's Secretary of State, challenging the constitutionality of the state law.

The law was upheld by the district court; the appeals court overturned the lower court's decision, finding the prohibition unconstitutional as applied to the Chamber.

Supreme Court Decision

First Amendment Issue

The Court held that the Michigan law, which permitted corporations to set up segregated political funds, was narrowly tailored to serve the compelling state interest of preventing the distortions in the political process that might result from allowing corporations to spend their general treasury funds to express their political views. "This potential for distortion," the Court said, "justifies §54(1)'s general applicability to all corporations"—regardless of their size or earnings—because all corporations "receive from the state the special benefits conferred by the corporate structure." Thus, the burden imposed on free speech by section 54(1) was permissible.

The Court further held that the Chamber did not qualify for the constitutional exemption to the ban on corporate spending set forth in *FEC v. Massachusetts Citizens for Life, Inc.* (MCFL), 479 U.S. 238 (1986). In that decision, the Court addressed the federal election law's prohibition against corporate independent expenditures and found that the law was unconstitutional as applied to MCFL, a small, nonprofit corporation. The Court found that three characteristics of MCFL qualified the organization for an exception (based on the First Amendment) from the federal law's general ban on corporate spending because they negated the government's interest in preventing the threat or appearance of corruption.

The three features of MCFL that exempted it from the ban on corporate spending were that MCFL:

- Was a nonprofit corporation established to promote political ideas and not to engage in business activities;
- Had no shareholders or other persons with a claim on its assets or earnings; and
- Was not set up by a corporation and had an established policy not to accept donations from corporations or labor organizations.

With regard to the first characteristic, the Court observed that, unlike MCFL, the Chamber's activities were not limited to political and public educational purposes. The Chamber's bylaws set forth several purposes beyond politics, including, for example, the promotion of ethical business practices, the provision of group insurance for members and litigation on behalf of the Michigan business community.

The Chamber also failed to meet the second of the MCFL criteria. The Court concluded, "[W]e are persuaded that the Chamber's members are more similar to the shareholders of a business corporation than to the members of MCFL." Because the Chamber provided its members with several nonpolitical benefits and services, members had an economic disincentive to withdraw support from the organization even if they disagreed with its political views. In the MCFL case, the Court had stressed that the MCFL's lack of shareholders or other financially affiliated persons meant that members had no disincentive to disassociate from the group.

With respect to the third MCFL feature, the Court noted that here "the Chamber differs most greatly from the Massachusetts organization." While "MCFL was not established by, and had a policy of not accepting contributions from, business corporations," three fourths of the Chamber's members were business corporations, and the organization's treasury contained corporate funds in the form of membership dues. "Because the Chamber accepts money from for-profit corporations, it could, absent application of §54(1), serve as a conduit for corporate political spending," the Court concluded.

Finally, the Court rejected the Chamber's claim that, because the Michigan law did not include a similar ban on political expenditures by labor organizations, it was underinclusive. The Court noted that although unincorporated labor organizations had power to accumulate wealth, they did not have the special legal privileges

enjoyed by incorporated organizations, such as limited liability and perpetual life. The Court further distinguished unions from corporations like the Chamber by pointing out that the Constitution precludes unions from having the power to compel members to support their political activities. "[T]he funds available for a union's political activities more accurately reflect members' support for the organization's views than does a corporation's general treasury," the Court said.

Fourteenth Amendment Issue
The Chamber claimed that section 54(1) violated the Equal Protection Clause of the Fourteenth Amendment because it did not apply the restrictions to unincorporated associations having the ability to raise large amounts of money or to corporations in the news media.

Having clarified that a compelling state interest in preventing corruption justified the restrictions on political activity by corporations, the Court rejected the Chamber's arguments with respect to the application of the prohibition to unincorporated entities. Corporate status, the Court said, was a state-granted privilege that facilitated the amassing of wealth, the source of the threat of corruption.

The Court also affirmed that the limited "media exception" in the state law for news stories and editorials disseminated by corporations operating in any of the news media did not constitute a breach of equal protection because of the unique public informational and educational role that such organizations play. "The media exception ensures that the Act does not hinder or prevent the institutional press from reporting on and publishing editorials about newsworthy events."

Source: FEC *Record*, May 1990, p. 5.

Austin v. Michigan State Chamber of Commerce, 856 F.2d 783 (6th Cir. 1988), *rev'd*, 494 U.S. 652, 110 S. Ct. 1391 (1990).

BARNSTEAD FOR CONGRESS COMMITTEE v. FEC

On June 5, 1979, the U.S. District Court for the District of Columbia granted summary judgment to the FEC and dismissed a complaint which had been filed by the Barnstead Committee (the Committee) against the FEC, WGBH Educational Foundation (Public Broadcasting TV, Channel 2), the Corporation for Public Broadcasting and the Quaker Oats Corporation. The Committee had filed suit on January 1, 1979, disputing the Commission's dismissal of a complaint which the Committee had filed with the Commission on November 2, 1978. The Committee requested that the court reverse the Commission's determination.

The Committee had alleged in its complaint, and repeated in its suit, that the corporate sponsorship of and payment for production and promotional costs of a televised film about House Speaker Tip O'Neill (Mr. Barnstead's opponent for a House seat) was in violation of 2 U.S.C. §441b. The Committee contended that, since Congressman O'Neill was officially a candidate at the time the film was broadcast, the film was "...in essence a campaign film, which enhanced the political standing of one candidate over another." Costs incurred in producing and broadcasting the film, therefore, were expenditures in connection with a federal election. The FEC, on the other hand, maintained that the costs incurred by WGBH Educational Foundation, the Corporation for Public Broadcasting and the Quaker Oats Corporation, in sponsoring the film, were exempt communication costs. Under Section 431(f)(4)(A), the Act exempts from the definition of expenditure certain communication costs, which include "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." In dismissing the suit, the court upheld the Commission's determination that the costs involved in sponsoring the broadcast were, in fact, communication costs and not expenditures under the Act.

Source: FEC *Record*, January 1980, p. 5.

BEAUMONT v. FEC

On October 3, 2000, the U.S. District Court for the Eastern District of North Carolina, Northern Division, found that the prohibitions of the Federal Election Campaign Act (the Act) and Commission regulations against corporate independent expenditures and contributions on behalf of federal candidates violated the plaintiffs' First Amendment rights. The court granted the plaintiffs' motion for summary judgment and denied the FEC's motions for partial summary judgment and partial dismissal. The court stayed the effect of this ruling until a final order is issued.

On October 26, 2000, the court also imposed a preliminary injunction barring the FEC from enforcing the statutory and regulatory provisions against the plaintiffs.

On December 21, 2000, the Federal Election Commission appealed this case to the United States Court of Appeals for the Fourth Circuit.

Background

North Carolina Right to Life, Inc. (NCRL), members of its board of directors and an unaffiliated individual asserted that Section 441b of the the Act, which prohibits corporations from making contributions or expenditures in connection with a federal election, is unconstitutional because it makes no exception for nonprofit, ideological corporations. The lawsuit also challenged the constitutionality of two FEC regulations: one that prohibits corporations from making contributions (11 CFR 114.2(b)) and another that creates an exemption from the ban on corporate expenditures for certain nonprofit corporations, pursuant to the Supreme Court's decision in *FEC v. Massachusetts Citizens for Life* (*MCFL*). 479 U.S. 238 (1986) (11 CFR 114.10).

Commission regulations at 11 CFR 114.10 provide that certain "qualified nonprofit corporations" may be exempt from the prohibition on corporate independent expenditures. To be considered a "qualified nonprofit corporation," a corporation must meet the following criteria:

- Its only express purpose is the promotion of political ideas;
- It does not engage in business activities;
- It has no shareholders or other individuals who receive a benefit that might discourage an individual from disassociating from the corporation on the basis of that corporation's political positions; and
- It was not established by a business corporation or labor organization and does not accept direct or indirect donations from business corporations.

NCRL argued that it failed to meet this exemption only because it accepted a small amount of corporate contributions and participated in "minor business activities incidental and related to its advocacy of issues." NCRL further argued that, even though the FEC had conceded that a Fourth Circuit decision in an earlier case between NCRL and North Carolina over a similar provision in a North Carolina statute barred enforcement of the Act's prohibition against NCRL, its officers remained subject to criminal liability and, as a result, their First Amendment rights were censored.

NCRL also argued that, in this case, the Act's ban on corporate contributions to political candidates infringed on the organization's right to association. While the FEC argued that NCRL's ability to contribute through a separate segregated fund minimized this infringement, NCRL contended that the maintenance of such a fund was a burden.

Decision

The court found no compelling justification for denying NCRL (a nonprofit, ideological organization) the right to make contributions and independent expenditures solely because it was an incorporated entity. Moreover, the court was not persuaded by the FEC's argument that a ban on corporate contributions was constitutional, as applied to NCRL, while a ban on corporate expenditures might not be.[1] The court found the distinction between contributions and expenditures immaterial.

The court declared that the provisions in question were unconstitutional as applied to NCRL and suggested that the court could, in its final order, deem these provisions facially unconstitutional.

Final Order

On January 24, 2001, the court found that the prohibitions on corporate contributions and expenditures of the the Act and Commission regulations were unconstitutional as applied to NCRL. The court found that the statute and regulations infringed on NCRL's First Amendment rights without a compelling state interest. The court permanently enjoined the Commission from relying on, enforcing or prosecuting violations of 2 U.S.C. §441b and 11 CFR 114.2(b) and 114.10—or any other parts of the Act whose restrictions flow from these provisions—against the plaintiffs.

The court did not find, however, that 2 U.S.C. §441(b) and its implementing regulations were unconstitutional on their face. In order to find a statute facially unconstitutional, rather than merely invalid as applied to a specific case, the court must find that its constitutional infringements are "substantial" in relation to its legitimate uses. The plaintiffs submitted a list of nonprofit, tax-exempt corporations, arguing that the statute's unconstitutional infringement was "substantial" in that it reached "hundreds, if not thousands, of constitutionally protected ideological corporations." The court, however, ruled that the plaintiffs had failed to show that the statute's constitutional infringements were substantial in relation to their "plainly legitimate sweep." The

court said, "In light of these numbers [4.5 million for-profit corporations] and the importance of the statute's 'plainly legitimate' purpose of regulating for-profit corporations, its inadvertent infringement on the rights of 'hundreds if not thousands' does not appear 'substantial' . . ." The court concluded that the constitutionality of the statute should be considered on a case-by-case basis.

Appeal

On March 6, 2001, the Commission appealed this case to the U.S. Court of Appeals for the Fourth Circuit. On March 15, 2001, the Fourth Circuit Court of Appeals consolidated this appeal with a previous appeal, filed on December 22, 2000, that requested relief from the district court's preliminary injunction of October 26, 2000. That injunction barred the Commission from relying on and enforcing the challenged provisions against the plaintiffs pending a final decision in the case. The plaintiffs filed a cross appeal on March 16, 2001.

Appeals Court Decision

On January 25, 2002, the appeals court affirmed the district court decision that found the prohibitions on corporate contributions and expenditures to be unconstitutional as applied to NCRL. The appeals court also affirmed the district court's finding that the Act's prohibition on corporate contributions and expenditures, and Commission regulations that implement the prohibition, were not facially unconstitutional.

The appeals court found that a complete ban on corporate contributions and expenditures in connection with federal elections, with an exception to the corporate expenditure ban "so narrow that NCRL does not fit into it," burdened the plaintiffs' First Amendment speech and association interests. The court explained that "Organizations that in substance pose no risk of 'unfair deployment of wealth for political purposes' may not be banned from participating in political activity simply because they have taken on the corporate form."

The FEC argued that the Act did not absolutely ban corporations from engaging in political activity. Rather, it permits corporations to establish political action committees, which can make contributions and expenditures subject to the Act's limits. The appeals court, however, found that the reporting requirements and administrative burdens associated with maintaining a political committee "stretch far beyond the more straightforward disclosure requirements of unincorporated associations." The court concluded that, as a nonprofit advocacy group, the "NCRL is more akin to an individual or an unincorporated advocacy group than a for-profit corporation."

The appeals court found that the criteria at 11 CFR 114.10, which create a test for whether a nonprofit corporation qualifies for the *MCFL* exemption, merely codify the list of nonprofit corporate attributes considered by the Supreme Court in *MCFL*. Relying upon a previous Fourth Circuit case involving NCRL, the appeals court held that these rigid criteria could not be used to determine whether an organization qualified for the constitutionally-mandated exception. The court ruled that the NCRL was constitutionally entitled to the exception and was not barred from making independent expenditures to influence federal elections.

The court also ruled that the prohibition on corporate contributions was unconstitutional as applied to NCRL. The court reasoned that same rationale the Supreme Court used to find the ban on independent expenditures unconstitutional as applied to *MCFL* also applied to contributions. The court found that contributions by an MCFL-type corporation carried no greater risk of political corruption than did independent expenditures by such an organization. Thus, the appeals court concluded that, as applied to the NCRL, the prohibition on corporate contributions was not closely drawn to match a sufficiently important government interest in preventing real or perceived corruption of the political system.

The appeals court, however, found that the Act's corporate prohibition was constitutional in the "overwhelming majority of applications," and, thus, was not facially unconstitutional. 2 U.S.C. §441b(a). The court rejected the plaintiffs' argument that the statute was unconstitutional because it did not contain an *MCFL* exception, citing a case in which the Supreme Court had rejected a similar argument concerning a state statute modeled on §441b(a).

The appeals court affirmed the district court's permanent injunction barring the FEC from prosecuting the plaintiffs for violations of §441b and 11 CFR 114.2(b) and 114.10. The appeals court also affirmed the district court's finding that the statute and its implementing regulations are not facially unconstitutional.

Source: FEC *Record*, December 2000, p. 5; February 2001, p. 8; March 2001, p. 2; May 2001, p. 6; and March 2002, p. 4.

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[1] The Supreme Court's decision in *FEC v. Massachusetts Citizens for Life*, permitting qualified nonprofit corporations to make independent expenditures, extends only to corporate expenditures and not to corporate contributions.

BECKER v. FEC
NADER v. FEC

Independent voter Heidi Becker, candidate Ralph Nader, the Green Party and others (Becker) asked the U.S. District Court for the District of Massachusetts to find that the Commission's regulations concerning debates, at 11 CFR 110.13 and 114.4(f), were unlawful.

The Commission's regulations allow a nonprofit corporation to stage a debate among federal candidates and to "use its own funds" and "accept funds donated by corporations or labor organizations" as long as certain guidelines are followed. 11 CFR 110.13 and 114.4(f).

Becker argued that these regulations exceed the Commission's statutory authority because the Federal Election Campaign Act (the Act) prohibits corporations from making contributions or expenditures "in connection with" a federal election, and the statute does not make an exception for corporate activity that helps stage federal candidate debates. 2 U.S.C. §441b(a). Becker further argued that Commission regulations allow corporations to fund debates between the major party candidates that exclude independent and ballot-qualified third party candidates. Becker alleged that the Commission's regulations deprived the plaintiffs of their right to participate in presidential elections that are free of the corrupting influence of illegal corporate contributions.

Becker asked the court to:

- Enter a declaratory judgment that 11 CFR 110.13 and 114.4(f) exceed the Commission's statutory authority;
- Enter a declaratory judgment that the Act does not permit a debate staging organization to use its own corporate funds or accept funds donated by corporations or labor organizations; and
- Preliminarily and permanently enjoin the Commission from relying on 11 CFR 110.13 and 114.4(f) and require it to enforce the Act's prohibition against the use of corporate funds in the staging of federal candidate debates.

District Court Decision

On September 1, 2000, the court denied Becker's motion for a preliminary injunction. The court found that these regulations are not in excess of the FEC's statutory authority under the Act. The court also dismissed the complaint for lack of standing with regard to the individual-voter plaintiffs.

By consent of the parties, the district court entered a final judgment in favor of the FEC on September 14, 2000. The plaintiffs filed an appeal of this decision on September 15, 2000, and asked for an expedited review. The appeal was argued as *Nader v. FEC*.

Nader v. FEC

On November 1, 2000, the U.S. Court of Appeals for the First Circuit upheld the district court's denial of relief. On January 31, 2000, Mr. Nader and the other petitioners filed a writ of certiorari with the U.S. Supreme Court. The Court denied the plaintiff's petition on April 30, 2001.

Source: FEC *Record*, August 2000, p. 13; November 2000, p. 8; April 2001, p.8; and June 2001, p 9.

Nader v. FEC, 230 F.3d 381.

BOULTER v. FEC

On August 3, 1988, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the FEC's July 26 decision to certify public funds for the general election campaign of Democratic Presidential nominee Michael S. Dukakis and his Vice Presidential running mate Lloyd M. Bentsen.

The petitioners, Congressman Beau Boulter, the Republican Senatorial candidate from Texas, and the National Republican Senatorial Committee, a national committee of the Republican party, had submitted their petition to the appeals court after the FEC had dismissed their request to deny public funding to the Democratic Presidential ticket. In its expedited review of the petition, the court decided to dismiss as moot the petitioners' emergency motion for a stay of the certification because, on July 27, the U.S. Treasury had disbursed the public funds to the Democratic Presidential and Vice Presidential nominees. Nor did the court grant petitioners' request for an emergency injunction barring the Democratic ticket from expending the grant. The court held that "petitioners have failed to carry the 'burden of showing that exercise of the court's extraordinary injunctive powers is warranted.'" *Cuomo v. Nuclear Regulatory Commission*, 722 F.2d 972, 974 (D.C. Cir. 1985).

Finally, the court summarily affirmed the agency's certification of funds to the Democratic ticket. The appeals court noted that its standard for reviewing the FEC's decision was whether the FEC's action was "arbitrary, capricious or contrary to law." See In *re Carter-Mondale*, 642 F.2d at 542. Based on this standard, the court concluded that "petitioners' allegations are insufficient on their face to warrant a revocation of the certification."

Source: FEC *Record*, September 1988, p. 7.

Boulter v. FEC, No. 88-1541 (D.C. Cir. 1988) (unpublished order).

BRANSTOOL v. FEC

On April 4, 1995, the U.S. District Court for the District of Columbia granted defendant's motion for summary judgment. This decision sustains the Commission's dismissal of plaintiffs' administrative complaint.

Background

The origins of this case are rooted in the 1988 Presidential contest between Republican candidate George Bush and Democratic candidate Michael Dukakis. In the course of the Presidential race, the National Security Political Action Committee (NSPAC) financed the production and airing of the "Willie Horton" ad. This ad attacked the Democratic candidate by blaming then Massachusetts Governor Michael Dukakis for the violent crimes committed by a convict while on furlough from a state prison.

Plaintiffs filed an administrative complaint with the FEC in May 1990, alleging that the NSPAC coordinated the production and airing of the Willie Horton ad with the Bush campaign. Under the Federal Election Campaign Act (the Act), a candidate running in a Presidential general election who accepts public funding may not accept contributions. The Bush campaign accepted public funding. If, as plaintiffs claimed, the Horton ad had been coordinated, then it would have been an in-kind contribution, in violation of 26 U.S.C. §9003(b)(2).The complaint thus hinged on the issue of whether the Horton ad was a coordinated in-kind contribution, and therefore illegal, or a permissible independent expenditure as defined under 2 U.S.C. §431(17). [1]

After examining the complaint, the Commission found reason to believe that the Bush campaign and the NSPAC had violated the Act, but after a limited investigation into the matter, the Commission deemed the evidence inconclusive and decided to take no further action on the matter. Plaintiffs' complaint was subsequently dismissed.

This led plaintiffs to file this suit in January 1992, claiming that the FEC had abused its discretion in not conducting a comprehensive investigation and had violated the Act by dismissing plaintiffs' complaint. Plaintiffs noted that among the FEC investigation's findings were a record of a June 1988 telephone conversation between the Bush campaign's chief media advisor and a NSPAC media consultant, and documentation showing that a media technician worked for both NSPAC and the Bush campaign. Plaintiffs contended that these findings were proof of coordination.

The Court's Decision

In addressing plaintiffs' challenge to the Commission's decision to limit the investigation into their complaint, the court saw no reason to depart from the general policy of giving broad deference to agency prosecutorial decisions.

The court held that it could set aside FEC statutory interpretations as "impermissible" only if they have no reasonable basis. The court concluded that the factual conclusions underpinning the Commission's decision were "sufficiently reasonable" to warrant the court's deference.

For instance, in dismissing the complaint, the Commission concluded that the inference of coordination created by the telephone call was rebutted by other findings. With regard to the media technician's dual employment, the Commission reasonably concluded that he performed technical tasks for the two committees and had no role in substantive or strategic decisions.

Source: FEC *Record*, June 1995, p. 12.

Branstool v. FEC, No. 92-0284 (D.D.C. Apr. 4, 1995).

[1] An independent expenditure is an expenditure made without any coordination with a candidate's campaign for a communication which expressly advocates the election or defeat of a clearly identified candidate for federal office

BREAD PAC v. FEC

This suit, filed by the National Lumber and Building Dealers Association and the National Restaurant Association (trade associations) and by Bread Political Action Committee, Restaurateurs Political Action Committee and Lumber Dealers Political Action Committee (separate segregated funds of trade associations), challenged the constitutionality of 2 U.S.C. §441b(b)(4)(D). (Civil Action No. 77-C-947.) This provision of the election law restricts solicitations by a trade association or its separate segregated fund to the stockholders, executive and administrative personnel (and their families) of member corporations which have given prior approval for such solicitations to occur, and limits member corporations to approval of one trade association per calendar year.

District Court Ruling

On April 5, 1977, plaintiffs asked the U.S. District Court for the Northern District of Illinois to enjoin the FEC from enforcing 441b(b)(4)(D) or, in the alternative, to certify constitutional questions to the appeals court, pursuant to 2 U.S.C. §437h. (Section 437h allows for expedited handling of constitutional challenges to the Act and a right of direct appeal to the Supreme Court.)

The district court ruled in September 1977 that plaintiffs lacked standing to bring suit under the Act's expedited review procedures. The court held that only the following types of plaintiffs had standing to bring suit under 2 U.S.C. §437h(a): the national committee of a political party, individuals eligible to vote in Presidential elections and the FEC.

Appeals Court: First Ruling

On January 12, 1979, the U.S. Court of Appeals for the Seventh Circuit, sitting *en banc*, overturned the district court's decision in response to an interlocutory appeal filed by plaintiffs. The appeals court ruled that plaintiffs did have standing to bring suit under the expedited review procedures. It remanded the case to the district court for further fact finding and certification of the constitutional questions. These constitutional challenges were then certified to the appeals court for its decision:

- Whether 2 U.S.C. §441b(b)(4)(D), both facially and as applied, infringes plaintiffs' right of assembly guaranteed by the First Amendment...?
- Whether 2 U.S.C. §441b(b)(4)(D), both facially and as applied, deprives plaintiffs of liberty without due process of law in violation of the Fifth Amendment...?
- Whether the failure of the Federal Election Campaign Act, as amended, 2 U.S.C. §431 et seq., to define the term 'solicitation' infringes plaintiffs' right of assembly guaranteed by the First Amendment...or deprives plaintiffs of liberty without due process of law in violation of the Fifth Amendment...?

- The failure of the Federal Election Campaign Act, as amended, 2 U.S.C. §431 *et seq.*, to define the term 'trade association' as used in 2 U.S.C. §441b(b)(4)(D), violates the due process clause of the Fifth Amendment...?

Appeals Court: Second Ruling

As to the issue of plaintiffs' standing to bring suit under 2 U.S.C. §437h(a), the appeals court declined to overrule its earlier decision that Section 437h(a) did not limit parties who may utilize the expedited review procedures.

As to constitutional challenges brought by plaintiffs, the court rejected their claim that Section 441b (b)(4)(D) infringed on their First Amendment rights by requiring that plaintiffs obtain the prior approval of a member corporation to solicit the corporation's stockholders, executive and administrative personnel and their families. The court found that there had been no showing that this restriction on trade association solicitations "...has had or could have any prior restraining effect whatsoever on the free flow of political information and opinion by trade associations or their political action committees." The court noted that plaintiffs were "...free to solicit any individual...to join their trade association." Moreover, once he or she became a member of the association, the individual could "...be solicited for contributions without limit under §441b (b)(4)(D)." Thus, the court concluded that the challenged provision was "...a very narrowly drawn aspect of a statutory scheme carefully designed to balance a compelling governmental interest [i.e., the prevention of the appearance or actuality of corruption in federal elections caused by large contributions] and jealously guarded First Amendment freedoms."

The court also rejected plaintiffs' claim that §441b(b)(4)(D) unconstitutionally discriminated against trade associations. The court found the exact opposite to be true and concluded that plaintiffs' argument was "...largely premised...on a misreading of the statute." Specifically the court noted that, although trade associations may not solicit contributions from a member corporation's employees without the corporation's prior approval, trade associations are granted more avenues for solicitation than are corporations. "Incorporated trade associations, because they are corporations, have precisely the same solicitation rights under paragraphs (A) and (B) [of 2 U.S.C. §441b(b)(4)] as do others corporations.... Moreover, trade associations are also membership organizations or corporations without capital stock and are therefore provided precisely the same solicitation rights as they have under paragraph (C) [i.e., solicitation of their individual members].... Finally, trade associations are provided under paragraph (D) with an additional group of potential solicitees [i.e., the stockholders, executive and administrative employees of corporate members and their families]."

The court also rejected plaintiffs' claims that in failing to define the terms "solicitation" and "trade association," §441b(b)(4)(D) abridged their First and Fifth Amendment rights. The court found that the term "solicitation" had a widely accepted meaning and that rules and statutes using the term had been uniformly upheld. The court further held that the Commission's advisory opinions, which had ruled on whether certain communications constituted solicitations under the Act, were not inconsistent. Rather, the opinions (AO's 1979-13 and 1979-66) had ruled on different types of communications by corporate and trade association separate segregated funds. Similarly, the court noted that the FEC had adhered to the "plain and ordinary meaning of trade association" as defined by Commission regulations at 11 CFR 114.8(a) and (g)(1).

Supreme Court Ruling

In an opinion issued on March 8, 1982, in *Bread Political Action Committee v. FEC* (Supreme Court No. 80-1481) the Supreme Court ruled that plaintiffs lacked standing to bring suit under 2 U.S.C. §437h, which allows for expedited handling of constitutional challenges to the Act and a right of direct appeal to the Supreme Court. The Court remanded the suit to the appeals court without ruling on the plaintiffs' constitutional challenges. The Court's ruling overturned a decision by the appeals court for the Seventh Circuit while upholding an earlier decision by the Northern Illinois district court.

The Court ruled that plaintiffs lacked standing to bring suit under Section 437h because they did not fall within the categories of qualified plaintiffs enumerated in the provision. The Court held that "the plain language of §437h controls its construction, at least in the absence of 'clear evidence,'...of a 'clearly expressed legislative intention to the contrary....'" The Court concluded that "the appellants, however, fall far short of providing 'clear evidence' of a 'clearly expressed legislative intention' that the unique expedited procedures of §437h be afforded to parties other than those belonging to the three listed categories."

Nor did the Court find merit to plaintiffs' argument that, since Congress had expressly extended the judicial review procedures of Section 437h to cover all constitutional questions about any provision of the Act, Congress had also intended to broaden the categories of plaintiffs eligible to file suit under §437h.

Moreover, the Court refuted plaintiffs' contention that, while Congress had specified three eligible classes of plaintiffs to remove any doubts about their standing to bring suit, it had not intended to exclude other classes of

plaintiffs. To the contrary, the Court concluded that Congress "went to the trouble of specifying that only two precisely defined types of artificial entity and one class of natural persons could bring these actions." The Court noted, however, that its ruling did not affect the right of parties involved in FEC enforcement actions to challenge, under 2 U.S.C. §437g, the constitutionality of any provision of the Act and to be afforded expedited review.

Source: FEC *Record*, May 1981, p. 6; and May 1982, p. 6.

Bread Political Action Committee v. FEC, 591 F.2d 29 (7th Cir. 1979), 635 F.2d 621 (7th Cir. 1980) (*en banc*), rev'd, 455 U.S. 577, (1982), *on remand*, 678 F.2d 46 (7th Cir. 1982) (*en banc*) (remanding to District Court).

BROWN v. FEC

On November 20, 1981, the U.S. Court of Appeals for the District of Columbia Circuit issued a judgment affirming an earlier decision by the district court in *Archie E. Brown v. FEC* (Civil Action No. 80-2108). The district court's decision had upheld the FEC's dismissal of the complaint plaintiff had filed against the International Brotherhood of Teamsters, Chauffers, and Warehousemen and Helpers of America (the Teamsters). In his complaint, plaintiff alleged that Local 745 of the Teamsters had violated 2 U.S.C. §441b(b)(3)(A) by attempting to coerce him to contribute to DRIVE (the Democratic Republican Independent Voter Education), the separate segregated fund of the Teamsters. Plaintiff alleged that he was subsequently denied membership in Local 745 because he had refused to contribute to, or join, DRIVE. Plaintiff claimed that the FEC's dismissal of his complaint was contrary to law.

In upholding the FEC's determination, the district court said that the General Counsel's Report to the Commission indicated that "...plaintiff's membership in Local 745 was denied because his union dues were unpaid, not because he refused to contribute to DRIVE." Moreover, the district court held that the General Counsel's Report, by itself, was a sufficient record for the court's review of the Commission's determination in the complaint. In appealing the district court's decision, plaintiff contended, however, that the General Counsel's Report alone, without a separate statement of the Commission's reasons for dismissing the complaint, afforded "...an inadequate basis for informed judicial review."

In its Memorandum affirming the district court's decision, the appeals court found no merit in plaintiff's assertion. The appeals court cited the Supreme Court's decision in *FEC v. Democratic Senatorial Campaign Committee*, which held that the General Counsel's Report constituted sufficient grounds to dismiss an administrative complaint—even if the Report were not expressly adopted by the Commission.

The appeals court concluded that the General Counsel's Report to the Commission recommending dismissal of Brown's complaint was sufficiently reasonable, "...particularly when considered in the context of the large discretion the Commission has to determine whether or not a civil violation of the Act has occurred."

Source: FEC *Record*, January 1982, p. 6.

Brown v. FEC (D.D.C. July 17, 1980) (unpublished opinion), *aff'd mem.*, 672 F.2d 893 (D.C. Cir. 1981), *cert. denied*, 457 U.S. 1111 (1982).

BUCHANAN v. FEC

On April 18, 1996, the U.S. Court of Appeals for the District of Columbia Circuit granted a joint stipulation to dismiss this case; the parties settled this matter out of court.

Patrick J. Buchanan and his publicly-funded 1992 Presidential campaign committee had petitioned this court to review the FEC's final repayment determination. See the November 1995 *Record*, page 8, for a summary of the suit filed by plaintiffs. See the October 1995 *Record*, page 9, for the FEC's final repayment determination.

The Buchanan committee made most of the repayment immediately from an escrow fund previously established, and agreed to pay the remainder of the amount ordered by the FEC, with full interest, within 6 months.

Source: FEC *Record*, June 1996, p. 4.

BUCHANAN v. FEC (00-1775)

On September 14, 2000, the U.S. District Court for the District of Columbia granted the FEC's motion for summary judgment and denied the plaintiffs' motion for summary judgment in this case. The district court ruled that, although the plaintiffs had standing to challenge the FEC's dismissal of their administrative complaint against the Commission on Presidential Debates, they failed to show that the FEC's interpretation of the debate regulations at 11 CFR 110.13 was arbitrary and capricious.

The plaintiffs appealed, and were granted an expedited appeal concerning the single issue of whether a debate must include all nominees who have qualified for public funding in order to comply with the "objective criteria" standard set out in the Commission's debate regulations. The U.S. Court of Appeals for the District of Columbia Circuit affirmed the district court's order on this issue on September 29, 2000.

Dismissal of Case

On November 30, 2000, the U.S. Court of Appeals for the District of Columbia Circuit granted the motion by Buchanan et al. to dismiss their appeal. The FEC did not oppose the motion.

Source: FEC *Record*, November 2000, p. 10; and January 2001, p. 10

BUCKLEY v. VALEO

On January 30, 1976, the Supreme Court issued a *per curiam* opinion in *Buckley v. Valeo*, the landmark case involving the constitutionality of the Federal Election Campaign Act of 1971 (FECA), as amended in 1974, and the Presidential Election Campaign Fund Act.

The Court upheld the constitutionality of certain provisions of the election law, including:

- The limitations on contributions to candidates for federal office (2 U.S.C. §441a);
- The disclosure and recordkeeping provisions of the FECA (2 U.S.C. §434); and
- The public financing of Presidential elections (Subtitle H of the Internal Revenue Code of 1954).

The Court declared other provisions of the FECA to be unconstitutional, in particular:

- The limitations on expenditures by candidates and their committees, except for Presidential candidates who accept public funding (formerly 18 U.S.C. §608(c)(1)(C-F));
- The $1,000 limitation on independent expenditures (formerly 18 U.S.C. §608e);
- The limitations on expenditures by candidates from their personal funds (formerly 18 U.S.C. §608a); and
- The method of appointing members of the Federal Election Commission (formerly 2 U.S.C. §437c(a)(1)(A-C)).

Background

On January 2, 1975, the suit was filed in the U.S. District Court for the District of Columbia by Senator James L. Buckley of New York, Eugene McCarthy, Presidential candidate and former Senator from Minnesota, and several others.[1] The defendants included Francis R. Valeo, Secretary of the Senate and Ex Officio member of the newly formed Federal Election Commission, and the Commission itself.[2] The plaintiffs charged that the FECA, under which the Commission was formed, and the Presidential Election Campaign Fund Act were unconstitutional on a number of grounds.

On January 24, 1975, pursuant to Section 437h(a) of the FECA, the district court certified the constitutional questions in the case to the U.S. Court of Appeals for the District of Columbia Circuit. On August 15, 1976, the appeals court rendered a decision upholding almost all of the substantive provisions of the FECA with respect to contributions, expenditures and disclosure. The court also sustained the constitutionality of the method of appointing the Commission.

On September 19, 1975, the plaintiffs filed an appeal with the Supreme Court, which reached its decision on January 30, 1976.

Supreme Court Decision

Contribution Limitations

The appellants had argued that the FECA's limitations on the use of money for political purposes were in violation of First Amendment protections for free expression, since no significant political expression could be made without the expenditure of money. The Court concurred in part with the appellants' claim, finding that the restrictions on political contributions and expenditures "necessarily reduce[d] the quantity of expression by restricting the number of issues discussed, the depth of the exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money." The Court then determined that such restrictions on political speech could only be justified by an overriding governmental interest.

The Court upheld the contribution limitations in the FECA,[3] stating that they constituted one of the election law's "primary weapons against the reality or appearance of improper influence stemming from the dependence of candidates on large campaign contributions" (the other weapon being the disclosure requirements). Although it appeared that the contribution limitations did restrict a particular kind of political speech, the Court concluded that they "serve[d] the basic governmental interest in safeguarding the integrity of the electoral process without directly impinging upon the rights of individual citizens and candidates to engage in political debate and discussion."

The Court found no evidence to support the appellants' allegations that the contribution limitations discriminated against nonincumbent candidates. With respect to the appellants' charge that the contribution limitations discriminated against minor and third parties and their candidates, the court noted that the FECA, "on its face," treated all candidates and parties equally. Furthermore, the Court said there was a legitimate argument that the limitations, in fact, appeared to benefit minor parties, since major parties and candidates received a greater proportion of their funding from large contributions.

The appellants had additionally challenged the limitations on certain expenses incurred by volunteers working on behalf of candidates or political committees. While the FECA placed no limits on most unreimbursed volunteer activities, it did limit unreimbursed travel expenses and certain costs of organizing campaign functions. Beyond these limits the costs were considered in-kind contributions (§431(8)(B)(i, ii, and iv)). The Court upheld the provisions for limited spending by volunteers, stating that they were a "constitutionally acceptable accommodation of Congress' valid interest in encouraging citizen participation in political campaigns while continuing to guard against the corrupting potential of large financial contributions to candidates."

Expenditure Limitations

In contrast to its ruling on contribution limitations, the Court found that the expenditure ceiling in the FECA imposed "direct and substantial restraints on the quantity of political speech" and invalidated three expenditure limitations as violations of the First Amendment.

The overall limitations on expenditures by federal candidates and their committees were struck down by the Court. The appellees had argued that these limitations (formerly 18 U.S.C. §608(c)) served a public interest by equalizing the financial resources of candidates, but the Court determined that the amount of money spent in particular campaigns must necessarily vary, depending on the "size and intensity" of the support for individual candidates. Furthermore, expenditure ceilings "might serve not to equalize the opportunities of all candidates but to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign." The appellees had also claimed that the expenditure limitations would reduce the overall cost of campaigning, and they cited statistics demonstrating the dramatic increases in campaign spending that had occurred nationwide in preceding years. The Court decided, however, that "[t]he First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive or unwise." The Court ruled, therefore, that the limitations on overall expenditures were unconstitutional.

The appellants had charged that the $1,000 per candidate annual limitation on independent expenditures—i.e., expenditures made by persons "relative to a clearly identified candidate...advocating the election or defeat of such candidate" (formerly 18 U.S.C. §608(e)(1))—was both unconstitutionally vague and an excessive hindrance on First Amendment rights of free expression. The Court resolved the vagueness question by reading "relative to" to mean "advocating the election or defeat of such candidate" in the same subsection, and by construing the provision to apply only to "expenditures for communications that in express terms advocate[d] the election or defeat of a clearly identified candidate for Federal office." While the Court of Appeals had accepted the appellees' argument that the provision was necessary to prevent circumvention of the contribution limitations, the Supreme Court found that the "governmental interest in preventing corruption and the appearance of corruption"—which justified the contribution limitations—was not sufficient to warrant the limitation on independent expenditures. If expenditure ceilings were to apply only to situations of express advocacy, the limitation would be easily circumvented by "expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited" a candidate. Moreover, the Court pointed out, abuses that might be generated by large independent expenditures did not appear to pose the same threat of corruption that large contributions posed since the "absence of prearrangement or coordination of the expenditure with the candidate or his agent alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidates." Thus finding that no substantial governmental interest was served by the limitation on independent expenditures, the Court concluded that such expenditures were protected as political discussion and expression under the First Amendment.

Regarding the limitations on a candidate's use of personal funds, the Court found that the provisions unconstitutionally interfered with the protected and valued right of an individual "to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election." The Court continued that no governmental interest supported the limit on such personal funds. To the contrary, the Court noted that "the use of personal funds reduces a candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the contribution limitations are directed."

Finally, the Court added that its invalidation of the expenditure limitations was severable from Subtitle H, which provides for the public financing of Presidential elections. The limitations on expenditures by Presidential candidates who received public funds was legitimate since the acceptance of public funds was voluntary. Therefore, with regard to publicly financed elections, the consequent societal and governmental benefits weighed more heavily in favor of expenditure limitations.

Reporting and Disclosure Requirements

The appellants had sought a blanket exemption from the public disclosure provisions for all minor parties, claiming that contributors to minor parties, unlike contributors to the Republican and Democratic Parties, were more vulnerable to threats, harassment and reprisal as a result of the public disclosure of their names. The appellants claimed the provisions constituted a violation of their rights to free association under the First Amendment and to equal protection under the Fifth Amendment. Recognizing that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment," the Court nevertheless ruled that the Act's reporting and disclosure provisions were justified by governmental interest in (1) helping voters to evaluate candidates by informing them about the sources and uses of campaign funds, (2) deterring corruption and the appearance of it by making public the names of major contributors, and (3) providing information necessary to detect violations of the law.

The Court acknowledged the potential disadvantage for minor parties that could result from the public disclosure provisions of the law, but it noted that none of the minor parties that were appellants in this suit had demonstrated that their contributors had been injured by the disclosure provisions. Therefore, the Court ruled a blanket exemption unnecessary. The Court left open the possibility, however, that minor and new parties might successfully claim an exemption from FECA disclosure requirements by showing proof of injury.

Presidential Election Campaign Fund

The Court upheld the constitutionality of Subtitle H of the Internal Revenue Code, which established the public financing of Presidential campaigns through a voluntary income tax checkoff. The Court determined that the appellants' claim that Congress violated the First Amendment in not allowing taxpayers to earmark their $1.00 checkoff to any candidate or party of their choice was not sufficient to invalidate the law. In the Court's opinion the checkoff constituted an appropriation by Congress, and as such it did not require outright taxpayer approval. Furthermore, "every appropriation made by Congress uses public money in a manner to which some taxpayers object."

The appellants had also argued, by analogy, that just as Congress may not subsidize or burden religion under the freedom of religion clause of the First Amendment, the freedom of speech clause prohibits it from financing particular political campaigns. The Court ruled the analogy inapplicable, however, finding that Subtitle H furthered rather than abridged political speech because its purpose was "to facilitate and enlarge public discussion and participation in the electoral process."

The appellants further claimed that the public funding provisions violated the Fifth Amendment's due process clause, arguing that the eligibility requirements for public funds were comparable to unconstitutionally burdensome ballot access laws. The Court found no merit in the argument; the denial of public funds to candidates did "not prevent any candidate from getting on the ballot or prevent any voter from casting a vote for the candidate of his choice."

"In addition," the Court said, "the limits on contributions necessarily increase the burden of fundraising, and Congress properly regarded public financing as an appropriate means of relieving major-party Presidential candidates from the rigors of soliciting private contributions."

The Court also rejected appellants' contention that the public financing provisions discriminated against minor and new party candidates, in violation of the Fifth Amendment. Specifically, the appellants had argued that Subtitle H favored major parties and their nominees by granting them full public funding for their conventions and general election campaigns, while minor and new parties and their candidates received only partial public funding according to a formula based on percentage of votes received.

Similarly, the appellants challenged the provision that restricted the payment of primary matching funds to only Presidential candidates who met certain requirements. These requirements included a provision for payments to candidates who had raised a minimum amount of contributions in at least twenty states (26 U.S.C. §9033(b)(3-4)). The Court found that such requirements for receiving public funds were reasonable; rather than preventing small parties from receiving public financing, the law only required them to demonstrate that they had a minimum level of broad-based support in order to qualify for federal subsidies. The Court concluded, "Any risk of harm to minority interests...cannot overcome the force of the governmental interests against the use of public money to foster frivolous candidacies, create a system of splintered parties, and encourage unrestrained factionalism." Furthermore, the Court noted that the advantage of receiving public financing was balanced by the requirement to adhere to strict expenditure limitations. As mentioned above, the Court upheld the constitutionality of expenditure limits as they applied to candidates and parties receiving public funds.

Appointment of the Commissioners

The appellants had challenged the method of appointing the six members of the Commission, as specified in the FECA, which provided that the President, the Speaker of the House of Representatives and the President pro tempore of the Senate each appoint two members. Arguing that the FEC's powers were executive rather than legislative, the appellants contended that the Congressional appointment of Commissioners violated the separation of powers principle embodied in the appointments clause of Article II of the Constitution. The Supreme Court determined that the appointments clause permitted only the President, with the advice and consent of the Senate, to appoint officers to exercise such executive authority as the Commission was granted. The Court ruled that the Commission, as it was then constituted, could not exercise its authority to enforce the law, conduct civil litigation, issue advisory opinions or determine eligibility for public funds, because these functions could not properly be regarded as legislative. The Commission's informational and auditing powers, however, were found to be legislative in nature, and therefore constitutional.

The Court accorded de facto validity to all acts of the Commission prior to the ruling and granted a 30-day stay of judgment—during which time the agency could exercise all of the authorities given to it under the FECA—so that Congress could reconstitute the Com-

mission according to the provisions of Article II of the Constitution. The initial 30-day stay expired on February 29, 1976, but was extended to March 22. On March 23 the FEC's executive powers were suspended, and they remained suspended until May 21, when the Commissioners were reappointed by the President pursuant to the FECA Amendments of 1976, Pub. L. No. 94-283 (May 5, 1976).

Buckley v. Valeo, 387 F. Supp. 135 (D.D.C. 1975) (application for three judge district court denied: constitutional questions certified to the Court of Appeals), 519 F.2d 817 (D.C. Cir. 1975) (*per curiam*) (motion to remand for the purpose of certifying constitutional questions granted), 519 F.2d 821 (D.C. Cir. 1975) (*per curiam*) (certified questions answered), 401 F. Supp. 1235 (D.D.C. 1975) (relevant portions of the opinion of the D.C. Cir. adopted), *aff'd in part, rev'd in part*, 424 U.S. 1 (1976), *on remand*, 532 F.2d 187 (1976 D.C. Cir.) (*en banc*), (modifying answers to constitutional questions certified by the district court).

[1] Along with Buckley and McCarthy, the appellants in this suit included Congressman William A. Steiger of Wisconsin, Mr. Stewart Rawlings Mott (a major contributor to various political committees), the Committee for a Constitutional Presidency—McCarthy '76, the Conservative Party of the State of New York, the New York Civil Liberties Union, the American Conservative Union, Human Events, Inc., Conservative Victory Fund, the Mississippi Republican Party and the Libertarian Party.

[2] The other appellees included the Clerk of the House of Representatives W. Pat Jennings, the Comptroller General Elmer B. Staats, and the Attorney General.

[3] The contribution limitations in the FECA included a $1,000 per candidate, per election, ceiling on contributions by individuals and political committees, a $5,000 per candidate, per election, ceiling on contributions by committees which qualify as multicandidate committees, a $25,000 annual ceiling for all contributions by any individual, and limitations on contributions to political party committees.

BUSH-QUAYLE '92 PRIMARY COMMITTEE v. FEC

On January 14, 1997, the U.S. Court of Appeals for the District of Columbia Circuit remanded this case to the FEC and asked it to explain why the Commission departed from precedent, or remedy that departure, when it required the Bush-Quayle '92 Primary Committee to repay $323,832 of the federal matching funds it received.

Background

As required by law, the FEC, at the end of the 1992 election cycle, audited former President George Bush's 1992 campaign. The audit included the primary committee, the Bush-Quayle '92 General Committee and the legal and accounting arm of the general election committee, the Bush-Quayle '92 Compliance Committee. The latter two committees are party to this lawsuit.

During the 1992 election, the primary committee received nearly $10.7 million in public funds through the Matching Payment Act. Once Mr. Bush and his running mate, Dan Quayle, had received the Republican nomination for President and Vice President, the general committee received $55.2 million in public funds.

The Law

The Matching Payment Act provides partial public funding—paid for through the $3 check-off on federal tax forms—to Presidential primary candidates who meet certain qualifications. Candidates who receive public funding must agree to limit expenditures to "qualified campaign expenses," i.e., those expenses that are incurred by the candidate in connection with his or her campaign for nomination and that do not violate state or federal law. 26 U.S.C. §9032(9)(A).

The Commission also must conduct an audit of every publicly funded campaign after it ends and require the committee to repay the U.S. Treasury for any nonqualified campaign expenses that were paid for with public funds. The Commission also can require a committee to repay any matching funds that it received in excess of what the law allows. 26 U.S.C. §9038(b)(1).

Final Repayment Determination

The FEC issued a final repayment determination to the primary committee on August 17, 1995, having determined that $409,123 in expenses incurred by the primary committee were not qualified primary campaign expenses because they had, in fact, been made for the benefit of the general election campaign as well.

The expenses in question included disbursements for direct mailings and political advertisements and for equipment and materials sent to the Bush campaign's

national headquarters. All these disbursements took place before August 20, 1992—the day Mr. Bush was nominated by his party to run for President. Concluding that expenses benefited both the primary and general campaigns, the Commission determined that half of the expenses should be assigned to the general election committee and the other half to the primary committee.

The FEC calculated the repayments as follows:

- The primary committee would pay its share of the nonqualified campaign expenses—$106,979—plus an additional $216,853 that the FEC determined it had received in excess of the matching fund allowance.
- As a result of reassigning half of the expenses in question to the general committee, the FEC found that the general committee had exceeded its expenditure limit by $182,785. The FEC recommended, but did not order, that the compliance fund reimburse the general committee for this overspending. That would resolve the general committee's excess expenditure problem.

Expenses in Connection With Primary

The Bush-Quayle committees challenged the FEC's final repayment determination in court, saying the Commission should have used a "bright-line" rule and allocated expenses based solely on whether they were incurred before the August 20 Presidential nomination or after the party's Presidential contender had been named.

The Commission had rejected this approach, arguing that whether an expenditure is a primary qualified expenditure depends on both its timing and nature. To qualify, the Commission had explained, the expense must be primarily in connection with the primary. The committees had argued that *any* connection to the primary campaign would qualify an expense fully as a qualified primary campaign expenditure.

Finding that arguments from both the agency and the committees were defensible, the court upheld the FEC's interpretation, based on *Chevron U.S.A. Inc. v. NRDC*.[1] That case requires that, where statutory language is ambiguous, courts must uphold the agency's interpretation so long as it is reasonable. The court added, however, that another committee objection to the Commission's decision merited further consideration.

Arbitrary and Capricious

The committees charged that the FEC had acted "arbitrarily and capriciously" because it had treated expenditures of the Bush-Quayle 1992 campaign differently than similar expenditures of the 1984 Reagan-Bush campaigns.

In the 1984 election, the committees said, the FEC had concluded that certain pre-nomination expenditures by the Reagan-Bush Primary Committee were primary expenses despite the fact that some benefited the general election campaign.

The FEC responded that the two cases were distinguishable from each other and thus were treated differently. It also said that in the Reagan audit, the FEC had not adopted a "bright line" test based on the date of the candidate's nomination.

The court found the FEC's response inadequate. Further, the court said: "An agency interpretation that would otherwise be permissible is, nevertheless, prohibited when the agency has failed to explain its departure from prior precedent."[2]

The court noted further that the FEC's determination was especially problematic given the fact that the agency had adopted new regulations two months before making its repayment determination concerning the Bush-Quayle campaign, but had not applied the approach embodied in those regulations to that determination. The court said that the new rules use a "bright-line" approach to determine whether expenses should be attributed to primary or general elections.

The court remanded the matter to the FEC either to justify its approach or to reconsider the repayment determination.

Source: FEC *Record*, March 1997, p. 5.

Bush-Quayle '92 Primary Committee v. FEC, 104 F.3d 448 (D.C. Cir. 1997).

[1] *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 844 (1984).

[2] See *Interstate Quality Servs. Inc. v. RRB*, 83 F. 3d 1463, 1465 (D.C. Cir. 1996); *ANR Pipeline Co. v. FERC*, 870 F. 2d 717, 723 (D.C. Cir. 1989); *Greater Boston Tel. Corp. v. FCC*, 444 F. 2d 841, 852 (D.C. Cir.), *cert denied*, 403 U.S. 923 (1971).

CALIFORNIA MEDICAL ASSOCIATION v. FEC

This suit was precipitated by an FEC enforcement proceeding in which the California Medical Association (CMA), an unincorporated professional association, and CALPAC, a political committee, were respondents. On April 19, 1979, the FEC had found "probable cause to believe" CMA had violated 2 U.S.C. §441a(a)(1)(C) by making contributions exceeding $5,000 to CALPAC, which CALPAC had accepted. When it was unable to reach a conciliation agreement with the respondents, the Commission filed suit against them on May 22, 1979, in the U.S. District Court for the Northern District of California (Civil Action No. C79-U97-WHO).[1]

Claims Filed Against Commission

Anticipating the FEC enforcement action, CMA filed a separate suit against the FEC on May 7, 1979, challenging the constitutionality of those provisions of the Act it had allegedly violated. (Civil Action No. 79-4426) Specifically, CMA asked the district court to certify the following constitutional questions to the U.S. Court of Appeals for the Ninth Circuit:

- Whether 2 U.S.C. §441a(a)(1)(C), which limits contributions to multicandidate committees to $5,000 per year, per contributor, abridges First Amendment rights of free speech and association. In particular, does §441a(a)(1)(C) unconstitutionally limit contributions by an unincorporated association (CMA) to a political committee (CALPAC) for the purpose of establishing, administering or soliciting contributions to the committee; and
- Whether 2 U.S.C. §441b(b)(2)(C), which permits labor organizations and corporations (but not unincorporated associations) to pay costs of establishing, administering and soliciting funds to a separate segregated fund, abridges the equal protection provisions of the Fifth Amendment.

Ruling of Appeals Court

In its opinion of May 23, the appeals court, sitting *en banc*, rejected all the constitutional claims asserted by CMA. Relying on the Supreme Court's decision in *Buckley v. Valeo*, the court found that the contribution limits imposed only inconsequential restrictions on rights of free speech. The court observed that these restrictions were minimal compared to the "potent alternative means of expression" available to unincorporated associations like CMA. It noted that CMA, CALPAC and its members could make contributions and expenditures in connection with federal elections, as long as the per-candidate and per-committee contribution limits were respected. Further, CMA, its members and CALPAC could make unlimited independent expenditures to express their political views. Moreover, the court concluded that the contribution limits were supported by a compelling governmental interest, namely preventing the circumvention of the contribution limits, which were intended to minimize both the actuality and appearance of corruption in federal political campaigns.

The court also found that the Act did not abridge Fifth Amendment rights by discriminating against political activities of unincorporated associations. To the contrary, the court concluded that unincorporated associations like CMA are regulated to a lesser degree under the Act. While corporations and labor unions are prohibited from making any contributions or expenditures in connection with federal elections, and individuals are limited to total contributions of $25,000 per year, unincorporated associations have no overall limit imposed on the total amount they may contribute or expend in connection with federal elections. Unlike corporations and labor organizations, they may solicit contributions from anyone and make partisan communications to the general public.

Appeal to Supreme Court

In its appeal to the Supreme Court, filed on June 4, 1980, CMA reiterated the arguments which the appeals court had rejected and restated its claim that the challenged provisions violated both First and Fifth Amendment rights. In challenging the constitutionality of limits on contributions to multicandidate committees, CMA argued that, in its *Buckley v. Valeo* decision, the Supreme Court had not equated contributions to political committees with contributions to candidates. CMA maintained that "...contributions to political committees are functionally different from contributions to candidates."

In its Supreme Court brief, the FEC challenged appellants' raising of constitutional issues under 2 U.S.C. §437h, a provision by which the Supreme Court may expedite its handling of constitutional challenges to the federal election law. The Commission argued that the provision was "...enacted by Congress in 1974 for the specific purpose of facilitating the resolution of a major constitutional challenge to the Act prior to the 1976 general election." In the Commission's view, appellants sought to "...invoke the extraordinary process of 437h for the purpose of avoiding the Commission's enforcement procedures."

As to the constitutional issues raised in the suit, the Commission supported the decision of the appeals court, reiterating its arguments that the Act violated neither the First nor Fifth Amendment rights of appellants.

Supreme Court Ruling

On June 26, 1981, the Supreme Court handed down a decision in *California Medical Association v. FEC* (Civil Action No. 79-1952) that affirmed the earlier decision of the U.S. Court of Appeals for the Ninth Circuit.

In its opinion, the Court upheld the constitutionality of 2 U.S.C. §441a(a)(1)(C), which limits contributions to a political committee to $5,000 per year, per contributor. The Court concluded that the challenged provision did not violate the First Amendment rights of appellants because it was an appropriate means by which Congress could seek to protect the integrity of the contribution restrictions upheld in *Buckley v. Valeo* (424 U.S. 1 (1976)). The Court said, "If First Amendment rights of a contributor are not infringed by limitations on the amount he may contribute to a campaign organization which advocates the views and candidacy of a particular candidate, the rights of a contributor are similarly not impaired by limits on the amount he may give to a multicandidate political committee, such as CALPAC, which advocates the views and candidacies of a number of candidates."

The Supreme Court also upheld the appeals court's ruling that Section 441a(a)(1)(C) did not violate appellants' equal protection rights under the Fifth Amendment. Appellants had unsuccessfully claimed that the provision allowed corporations and labor organizations to make unlimited contributions to their separate segregated funds while limiting to $5,000 a year the contributions an unincorporated association could make to the multicandidate committee it established. The Court held, however, that no equal protection violation existed. The Court stated, "Appellants' contention ignores the fact that the Act as a whole imposes far fewer restrictions on individuals and unincorporated associations than it does on corporations and unions. The differing restrictions placed on individuals and unincorporated associations, on the one hand, and on corporations and unions, on the other, reflect a congressional judgment that these entities have differing structures and purposes and that they therefore may require different forms of regulation in order to protect the integrity of the political process."

The Court found no merit, however, to the FEC's claim that the appellants' direct appeal to the Court (pursuant to Section 437h of the Act)[2] was inappropriate because an FEC enforcement proceeding was pending against appellants (pursuant to Section 437g of the Act). The Court found that neither the legislative history nor the statutory language of Sections 437g and 437h indicated that a direct appeal should be limited to situations where no enforcement proceeding was pending.

Source: FEC *Record*, April 1981, p. 7; and August 1981, p. 1.

California Medical Association v. FEC, 641 F.2d 619 (9th Cir. 1980) (*en banc*), *aff'd*, 453 U.S. 182 (1981).

[1] In its October 21, 1980, opinion in *FEC v. California Medical Association*, the district court ordered CMA and CALPAC to pay the FEC civil penalties of $5,000 each.

[2] Section 437h provides for expedited handling of constitutional challenges to the Act. Section 437h(b), which granted the right of direct appeal to the Supreme Court, was repealed by Congress in 1988.

CARTER/MONDALE PRESIDENTIAL COMMITTEE v. FEC (82-1754)

On June 24, 1983, the U.S. Court of Appeals for the District of Columbia ruled that, since the Carter/Mondale Presidential Committee, Inc. (the Committee) had failed to file its petition for review of certain final FEC repayment determinations within 30 days after the FEC had made them, the court had no jurisdiction over the petition. Filed on July 6, 1982, the Committee's petition concerned certain final Commission determinations with regard to the FEC's audit of the Committee's publicly funded primary campaign in 1980.

Since it dismissed the suit on jurisdictional grounds, the court did not address the issue of whether the FEC could require the Committee to:

- Repay federal matching funds in an amount equal to total federal and private funds used for nonqualified campaign expenses; or
- Repay only the portion of nonqualified expenses that were paid with federal funds.

Source: FEC *Record*, August 1983, p. 8.

Carter/Mondale Presidential Committee, Inc. v. FEC, 711 F.2d 279 (D.C. Cir. 1983).

CARTER/MONDALE PRESIDENTIAL COMMITTEE v. FEC (84-1393)

On November 1, 1985, the U.S. Court of Appeals for the District of Columbia Circuit ruled that the FEC did not abuse its discretion in declining to reconsider a final determination the agency had made with regard to the Carter/Mondale Presidential Committee, Inc.'s (the Committee's) repayment of nonqualified campaign expenses to the U.S. Treasury.[1] CA No. 84-1393 and 84-1499 (The Committee was the publicly funded principal campaign committee for former President Carter's 1980 primary campaign.) The court's ruling sustained decisions made by the FEC on July 12 and September 20, 1984, not to reconsider its final repayment determination with regard to the Committee.

Background

On July 6, 1982, the Committee had filed a petition with the appeals court which sought review of an FEC final determination that the Committee must repay $104,300.78 to the U.S. Treasury, an amount equal to those nonqualified expenses incurred by the Committee during the 1980 primary campaign. (*Carter/Mondale Presidential Committee v. FEC*; 111 F.2d 279 (D.C. Cir. 1983); see summary at left.) The court dismissed the case on grounds that it had not been filed within the time frame required by the election law. See 26 U.S.C. §9041(a).

On August 7, 1984, the Committee filed a petition, asking the Court to review the decision that the FEC made on its own initiative not to reopen its final repayment determination for the Committee in light of recent decisions made by the court in two other suits concerning repayments. (In *Kennedy for President Committee v. FEC* and *Reagan for President Committee v. FEC*, the court had held that the FEC had exceeded its authority under 26 U.S.C. §9038(b)(2) when it required repayment of the entire amount of nonqualifying payments, rather than the portion attributable to the matching payment account.) The Committee also asked the FEC to reconsider its decision (taken in July 1984) not to reopen the Carter/Mondale repayment determinations. The Commission had decided to reconsider only the repayments by the Kennedy and Reagan committees, which had been required by the court. The Commission had taken this position " 'in the interest of finality in the administrative process, now and in the future.'" The Committee claimed that the FEC's decision disregarded the principle of equal treatment for all candidates, which the Committee alleged the agency had established in reconsidering a final repayment determination made with regard to John Anderson's publicly funded campaign. On September 20, 1984, the FEC once again declined to reconsider the Committee's final repayment determination. On October 2, 1984, the Committee filed

a second petition with the appeals court. On October 15, 1984, the court consolidated this case with the Committee's August 1984 case.

Appeals Court's Ruling

The court rejected the Committee's claim that the FEC's July determination was unlawful because it contradicted a precedent established by the agency's reconsideration of the Anderson Campaign's repayment requirements: "Far from establishing any general or even selective practice of reopening final determinations, the record before us [of the FEC's reconsideration of the Anderson determination] displays only an isolated situation in which the facts distinguishable from those in the case at hand tugged the Commission away from application of the finality principle."

Nor did the court find merit in the Committee's assertion that the FEC had treated the Committee unfairly. "No favoritism can be attributed to the FEC when it carries out the letter of a court's order" to reconsider repayments by the Kennedy and Reagan committees. Moreover, the Committee's tardiness in seeking court review of its own repayment determination contradicts "'Congress' strong interest in resolving federal matching fund audits expeditiously.' 111 F.2d at 289 and n.19."

Finally, the court rejected the Committee's argument that the FEC had failed to give reasons for refusing to reopen its repayment determination. "[A]bsence of an express statement does not render its action unlawful where reasons for that action may be gleaned from its [the FEC's] staff's reports."

Source: FEC *Record*, December 1985, pp. 6-7.

Carter/Mondale Presidential Committee, Inc. v. FEC, 775 F.2d 1182 (D.C. Cir. 1985).

[1] The public funding statutes require Presidential candidates to repay the U.S. Treasury for nonqualified campaign expenses. 26 U.S.C. §§9007(b)(4) and 9038(b)(2).

CARTER/MONDALE REELECTION COMMITTEE AND DNC v. FEC

The Commission's certification of public funds to the Republican nominee was challenged in *Carter-Mondale Reelection Committee, Inc. and the Democratic National Committee v. FEC*, filed July 24, 1980. The Carter-Mondale Committee (the Committee) asked the U.S. Court of Appeals for the District of Columbia Circuit to prevent the Commission's certification of the Republican nominees, pending resolution of an administrative complaint filed by the plaintiffs against the nominees. In their complaint to the Commission, the Committee had said that Ronald Reagan would be ineligible for public funds since he had allegedly violated the law on several counts. The Committee had charged that several groups, purportedly making independent expenditures on Mr. Reagan's behalf, were in fact making qualified campaign expenditures with the prior consent of the candidate and his agents. In the suit, the Commission argued that the certification was proper and within the Commission's exclusive jurisdiction. On September 12, the court ruled in the Commission's favor and affirmed the Commission's "action in certifying the nominees' application for funds."

Source: FEC *Annual Report 1980*, p. 20.

In re Carter-Mondale Reelection Committee, Inc., 642 F.2d 538 (D.C. Cir. 1980).

CENTER FOR RESPONSIVE POLITICS v. FEC (93-2250)

This case was voluntarily dismissed as moot when the Commission took action on three complaints the Center had filed with the agency in 1990 and 1991 (MURs 3175, 3249 and 3325). The Center had filed suit to force the FEC to take action but, in March 1994, agreed to suspend the litigation for four months while the FEC worked to resolved the MURs, which concerned excessive contributions.

The U.S. District Court for the District of Columbia dismissed the case on July 11, 1994. (Civil Action No. 93-2250 (SSH).)

Source: FEC *Record*, September 1994, p. 8.

Center for Responsive Politics v. FEC, No. 93-2250 (D.D.C. Oct. 29, 1993).

CENTER FOR RESPONSIVE POLITICS v. FEC (95-1464)

On November 9, 1995, the U.S. Court of Appeals for the District of Columbia dismissed this case.

The Center for Responsive Politics (CRP) and its executive director, Ellen Miller, brought this suit alleging that the FEC acted contrary to law when, in a recent rulemaking (60 FR 31854, June 16, 1995), it failed to repeal regulations that permit publicly funded Presidential candidates to accept private contributions for their general election legal and compliance fund.

The court ruled that the CRP and Mrs. Miller lacked standing to bring this suit. Neither the CRP nor Mrs. Miller suffered harm that could be directly traced to the FEC's action. Additionally, neither one was qualified to bring suit since their alleged injury was outside the statute's "zone of interest" in this case.

Source: FEC *Record*, January 1996, p. 3.

Center for Responsive Politics v. FEC, No. 95-1464 (D.C. Cir. Nov. 9, 1995).

CHAMBER OF COMMERCE v. FEC

On November 14, 1995, the U.S. Court of Appeals for the District of Columbia reversed the district court's dismissal of this case and ordered the court to issue appellants appropriate declaratory relief.

The U.S. District Court for the District of Columbia had dismissed this case on October 28, 1994, on the grounds that the matter was not ripe for review and that the plaintiffs lacked standing to bring the action.

This case involved the FEC's regulatory definition of "member." FEC regulations allow membership organizations to use their corporate funds to send political communications and solicitations, but only to their administrative and executive personnel and to persons who qualify as "members" under federal election law.[1] To qualify as a "member" under FEC regulations a person must have a significant financial interest in the organization, or pay regular dues and possess the right to vote either directly or indirectly for at least one representative in the organization's highest governing body, or possess the right to vote for all members of the organization's highest governing body. 11 CFR 114.1(e)(2).

Background

In 1976, FEC regulations defined an organization's "members" as "all persons who are currently satisfying the requirements for membership" in the organization. 11 CFR 114.1(e)In subsequent years, court decisions and advisory opinions established that political communications and solicitations financed with corporate monies could only be sent to persons who have a significant financial or organizational attachment to the membership organization.

In 1993, the FEC adopted new rules to reflect these precedents. These rules clarified that a person will be considered a "member" for purposes of the Act if that person:

- Has some significant financial attachment to the organization beyond the mere payment of dues, such as a significant investment or ownership stake; or
- Is obligated to make regular dues payments and has the right to vote, either directly or indirectly, for at least one representative in the membership organization's highest governing body; or
- Is entitled to vote directly for all who sit on the organization's highest governing body. 11 CFR 114.1(e)(2).

When these new regulations took effect, the Chamber of Commerce of the U.S.A. and the American Medical Association (AMA) submitted Advisory Opinion Requests (AORs) 1994-4 and 1994-12 to the Commission, asking about the "member" status of their members. The Commission responded to the AORs by stating that the six Commissioners could not reach a consensus on the status of more than 200,000 Chamber members and nearly 45,000 AMA members; these persons paid dues to their respective organizations but lacked voting rights.

Not satisfied with this result, the Chamber and the AMA challenged the FEC's revised definition of "member" in the U.S. District Court for the District of Columbia.

District Court Decision

The district court ruled that:

- The case was not ripe for review because neither plaintiff had suffered harm by the rule;
- Plaintiffs lacked standing to bring this suit because the rule did not present a reasonable threat of prosecution to them; and
- The FEC's definition of "member" was entitled to deference because it was a permissible construction of that term by the Commission. *Chevron U.S.A. v. Natural Resources Defense Council* (467 U.S. 837, 1984).

Appeals Court Decision

The court of appeals found that the Chamber and the AMA did have standing to argue their case before the court: "In the last federal election, appellants, not surprisingly, felt constrained to alter their prior practice—they ceased political communications with those constituents who did not qualify as 'members' under the Commission's new rule. And counsel for the Commission agreed . . . that he would not advise the Chamber and the AMA to ignore the rule." Thus, the issue brought before the court was ripe for review because it caused both the Chamber and the AMA harm.

Further, the Chamber and the AMA had standing to bring this suit because, although an FEC enforcement decision had not been issued against them, there was a credible threat of enforcement if they chose to ignore the regulation. Additionally, the possibility that appellants' First Amendment rights were chilled by the FEC's regulations conferred standing upon appellants. *Virginia v. American Booksellers.*

The court found that the FEC's rules presented "serious constitutional difficulties" because they precluded "appellants from communicating on political subjects with thousands of persons, heretofore regarded by the Commission as members." Thus, although the court did not disagree with the district court's conclusion that the FEC was entitled to deference under the *Chevron*

doctrine, the court reasoned that the conflict between the rules and the First Amendment warranted judicial review.

At issue here, in the court's view, was whether the FEC's rule accorded with the Supreme Court's opinion in *FEC v. National Right to Work Committee* (459 U.S. 197, 1982). There, the Court ruled that "members of nonstock corporations were to be defined . . . by analogy to stockholders of business corporations and members of labor unions . . . [which] suggest[ed] that some relatively enduring and independently significant financial or organizational attachment is required . . . "

The appeals court concluded that the FEC's new rule did not square with the Supreme Court's opinion in *NRWC*: "[I]mplicit in the Commission's rule is the view that dues, no matter how high, are not by themselves a manifestation of a significant financial attachment." The court said that the FEC's position reads the disjunctive "or" between "financial" and "organizational" as if the Supreme Court had used the conjunctive "and."

Furthermore, the court held that, "It is . . . quite illogical to regard someone who has one share of stock in a public corporation, which can be sold in minutes, as more significantly attached to the organization than a person or entity who pays $1000 or even $100,000 (as is the case for some Chamber members) in annual dues."

The court also criticized the rule's voting requirement. It noted that the nearly 45,000 AMA members in question are subject to sanction by the organization should they violate the organization's Principles of Medical Ethics. "It might be thought, that for a professional, placing oneself in such a position is the *most* significant organizational attachment."

Lastly, the court noted that the rule treats some labor unions and federated rural electric cooperatives differently, exempting them from its new definition of "member." The court noted that this question had not been squarely presented on appeal, but stated that it was not satisfied with the FEC's claim that the separate treatment was consistent with the Act's legislative history. Without further elaboration, the court stated, it "would determine that these exemptions make the regulation arbitrary and capricious."

Source: FEC *Record*, December 1994, p. 1; and January 1996, p. 2.

Chamber of Commerce v. FEC, 1994 WL 615786 (Oct. 28, 1994); No. 94-5339 (D.C. Cir. Nov. 14, 1995).

[1] This is an exception to the general ban on the use of corporate money in connection with federal elections. 2 U.S.C. §441b.

CINCINNATI v. KRUSE
BURRIS v. RUSSELL

On November 16, 1998, the U.S. Supreme Court refused to review two court cases that posed First Amendment challenges to limits on campaign contributions and expenditures in state and local elections. Both cases had been cast as potential challenges to *Buckley v. Valeo*, the landmark court case on the Federal Election Campaign Act (the Act). The FEC was not a party to either suit.

Background of *Buckley*

The appellate courts' reasoning in the two cases was based in great part on *Buckley*, where the high court equated campaign spending with the First Amendment's guarantee of free speech. While the Court found that a compelling government interest in preventing real or perceived corruption justified imposing restrictions on contributions, it concluded that this governmental interest was inadequate to sustain limitations on campaign expenditures.

Decision in *Cincinnati*

In the first case, *Cincinnati v. Kruse*, John Kruse, a candidate for a Cincinnati City Council seat, challenged a council ordinance that limited campaign expenditures for council elections to about $140,000. The city council argued that the rising cost of city council races had resulted in a rise in the influence of wealthy donors and the decline in the influence of small donors. The U.S. District Court for the Southern District of Ohio at Cincinnati ruled in favor of Mr. Kruse, finding that the ordinance was unconstitutional on its face.

The U.S. Court of Appeals for the Sixth Circuit affirmed that ruling on April 27, 1998. It reiterated the Supreme Court's view that restrictions that have the potential of limiting the First Amendment guarantee of political expression must be subjected to "exacting scrutiny" by the courts and that "the prevention of corruption or the appearance of corruption" is the only governmental interest that survives strict scrutiny and, as a result, justifies restrictions on campaign finance.

- *Cincinnati failed to show that an expenditure limit would reduce corruption in the political process*. The city had no direct evidence that imposing contribution limits alone could prevent quid pro quo corruption. The council did not adopt contribution limits until after it had passed the expenditure limits. Further, it based its views of corruption on perceived abuse of the Act on the federal level. The court found that such evidence was not enough. The three-judge panel stated that problems on the federal level are explained

primarily by the exception allowing soft money contributions to party committees "and do not undermine the Supreme Court's conclusion that spending restrictions are not narrowly tailored to addressing the problem of the corrupting nature of money in politics."

The court also said the perception that the public is discouraged and cynical about the democratic process as a result of perceived corruption in campaign finance is not sufficient evidence for limiting campaign spending.

- *Cincinnati failed to show that an expenditure limit would curb the rising cost of campaigns*. The city, through an amicus brief filed by the Brennan Center, had argued that the *Buckley* Court had not considered what is now perceived to be "uncontrollable campaign spending" and the effects of such spending, such as the large amounts of time candidates must spend raising campaign funds. The court rejected this view, stating that the Supreme Court, in *Buckley*, concluded that "reducing the allegedly skyrocketing costs of political campaigns is not compelling or sufficient to justify restrictions on campaign spending."
- *Cincinnati failed to prove that leveling the playing field among candidates is sufficient justification for an expenditure limit*. The city had argued that the government had an interest in eliminating the advantage wealth plays in elections and the perceived disadvantage of poor and minority voters and candidates. The court found that restricting the free speech guarantees of some in order to enhance the voices of others would violate the First Amendment. It also said that the *Buckley* Court had rejected this argument. The *Buckley* Court explained that spending limits, rather than promoting financial equality among candidates, could instead protect incumbents and handicap well-known candidates.

Decision in *Russell*

In *Burris v. Russell*, Ron Russell challenged the Arkansas Ethics Commission after the state's voters approved a referendum that set contribution limits per election for district races at $100 per contributor and for statewide races (such as governor and state treasurer) at $300 per contributor. (The lowest contribution limit per contributor allowed under *Buckley* is $1,000.) The referendum also introduced an entity called the small-donor PAC. Individuals could contribute up to $25 to the PAC, and the PAC, in turn, could contribute up to $2,500 per candidate, per election. The initiative also created independent expenditure committees that could accept no more than $500 from any person annually. Finally, the initiative authorized local governments to set reasonable limits on the amount of campaign funds candidates for local offices could raise. Before this initiative, Arkansas voters had approved a measure that limited PAC contributions to $200 per year, down from $1,000.

This case was merged with *Citizens for Clean Government v. Russell*. The U.S. District Court for the Eastern District of Arkansas rendered a split decision, upholding some of the contribution limits and ruling others unconstitutional. On June 4, 1998, the U.S. Court of Appeals for the Eighth District struck down the individual and PAC contribution limits.

- *Supporters of the initiative failed to prove a link between large contributions and undue influence or corruption of Arkansas officials*. Proponents argued, for example, that financial contributions and support by the Tobacco Institute and other pro-tobacco sources caused a state legislator to champion a measure that would have prohibited local governments from regulating tobacco products. The court, however, showed that the pro-tobacco legislator in question had already stated his support for tobacco interests, had not changed his position on the issue as a result of the contributions and had not tried to conceal the tobacco industry contributions. The court also found that the $2,700 in tobacco money the legislator received was not enough to influence his vote on the measure. "We believe," the court stated, "that $1,000 is simply not a large enough sum of money to yield, of its own accord and without further evidence, a reasonable perception of undue influence or corruption."

  This same pattern emerged with contributions to legislators from several lobbyists who represented various groups, including real estate interests. Again, none of the contributions individually exceeded $1,000.

  The court found that the $100 and $300 contribution limits approved in the voter initiative were too low to allow meaningful participation in the political process. The court also held that the $200-per-year PAC contribution limit enacted before the voter initiative was "simply too low to allow for appropriately robust participation in protected political speech and association."

  The court concluded that, "the limitations in question here are … dramatically lower than, and different in kind from, the limits approved in *Buckley*, and thus are unconstitutionally low."
- *Proponents of small-donor PACs with higher contribution limits failed to show that differential treatment was warranted.* The supporters argued that raising funds in $25 amounts would alleviate the potential for

corruption. The court found, in fact, that the potential for corruption would move from the individual contributor to the small-donor PAC itself.

"If any contribution is likely to give rise to a reasonable perception of undue influence or corruption, it would be one from an entity permitted to contribute two-and-a-half times the amount that most others are allowed to contribute," the court stated. "The small-donor PAC provision is not, then, narrowly tailored to serve the compelling government interest of combating the reality or perception of undue influence or corruption."

Severability. The court found that the contribution limits were severable from the remainder of the voter initiative. It let stand the provisions for independent expenditure committees and rendered no decision on the instructions to local governments to establish reasonable limitations on campaign contributions and expenditures.

Source: FEC *Record*, January 1999, p. 3.

Kruse v. City of Cincinnati, 142 F.3d 907 (6th Cir. 1998), *cert. denied* 1998 WL 651027 (U.S.); *Russell v. Burris*, 146 F.3d 563 (8th Cir. 1998), *cert. denied*, 119 S. Ct. 1040 (1999).

CITIZENS FOR LAROUCHE v. FEC FEC v. LAROUCHE

On January 31, 1984, the U.S. Court of Appeals for the District of Columbia Circuit issued an order dismissing a petition that Lyndon H. LaRouche, Jr., a publicly funded candidate for the Democratic Party's Presidential nomination in 1980, and Citizens for LaRouche, his principal campaign committee, had filed with the court on January 11, 1983. (*Citizens for LaRouche v. FEC*; Civil Action No. 83-1050.) Pursuant to 26 U.S.C. §9041, the LaRouche campaign had asked the appeals court to review a final repayment determination that the FEC had made on December 16, 1982. The court's action affirmed the FEC's determination that the LaRouche campaign had to repay $54,671.84 in primary matching funds to the U.S. Treasury.

On May 8, 1984, the Commission entered into a stipulation dismissing with prejudice *FEC v. LaRouche* (Civil Action No. 83-3743), a suit that the FEC had brought in the U.S. District Court for the District of Columbia against Lyndon LaRouche and Citizens for LaRouche, his principal campaign committee. In this suit, filed on December 15, 1983, the FEC had sought a court ruling that would require the LaRouche campaign to repay the $54,672 in primary matching funds. Since the LaRouche campaign subsequently made the repayment during April 1984, the Commission filed the stipulation dismissing the case as moot.

Source: FEC *Record*, June 1984, p. 11; and July 1984, p. 7.

Citizens for LaRouche v. FEC, 725 F.2d 125 (D.C. Cir. 1984).

Citizens for LaRouche: FEC v., 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶9214 (D.D.C. 1984).

CITIZENS FOR PERCY '84 v. FEC (84-2653)[1]

On November 19, 1984, the U.S. District Court for the District of Columbia issued an opinion in *Citizens for Percy '84 v. FEC* (Civil Action No. 84-2653) stating that the FEC's delay in acting on an administrative complaint filed on April 26, 1984, by Citizens for Percy '84 (the Committee) was contrary to law. (The Committee was former Senator Charles H. Percy's principal campaign committee for his 1984 reelection campaign.) The court also ordered the FEC to conform its conduct to the decision within 30 days of the court's order. See 2 U.S.C. §437g(a)(8).

Background

On August 26, 1984, the Committee had petitioned the district court to declare that the FEC's failure to act on its administrative complaint was contrary to law. See 2 U.S.C. §437g(a)(8)(A). In the complaint, the Percy campaign had claimed that media expenditures made by Michael Goland on behalf of Rep. Thomas Corcoran, Senator Percy's opponent in the Illinois Senate primary, were coordinated with the Corcoran campaign. The Percy campaign had alleged that, since the expenditures were not independent, Mr. Goland had violated the election law by making excessive in-kind contributions to the Corcoran campaign. See 2 U.S.C. §441a(a)(1)(A). Moreover, the Corcoran campaign had violated the law by accepting the contributions. See 2 U.S.C. §441a(f).

Court's Ruling

Noting that the FEC had not found reason to believe the respondent had violated the election law until October 2, 1984, more than five months after the Committee had filed its administrative complaint, the court concluded that the FEC had acted contrary to law. The court reasoned that, since Senator Percy's reelection campaign had been the "focus...of tremendous national interest," the agency did not have the discretion to give the complaint routine treatment.

Source: FEC *Record*, January 1985, p. 6.

Citizens for Percy '84 v. FEC, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶9215 (D.D.C. 1984).

[1] *Citizens for Percy '84 v. FEC* (85-0763) was dismissed. See *Antosh v. FEC* (85-1410).

CITIZENS FOR WOFFORD v. FEC

On April 14, 1995, plaintiff withdrew the complaint it had filed against the FEC in the U.S. District Court for the District of Columbia. An FEC suit filed against plaintiff on December 20, 1994, in the U.S. District Court for the Middle District of Pennsylvania, Harrisburg Division, on December 20, 1994, is still in progress. *FEC v. Citizens for Wofford* (1:CV-94-2057).

Background

Both cases involve an FEC enforcement action borne out of the 1991 Pennsylvania special election. The major party contenders in the special election were Democratic nominee Mr. Harris Wofford and Republican nominee Mr. Richard Thornburgh. The Democrats nominated Mr. Wofford on June 1, 1991, but did not certify the nomination until September 5, 1994.

Citizens for Wofford, Mr. Wofford's principal campaign committee, regarded contributions received following the June 1 designation but prior to the September 5 certification as primary contributions. [1]

As a result, the Republican State Committee of Pennsylvania filed an administrative complaint with the FEC. Following an investigation, the Commission found probable cause to believe that Citizens for Wofford violated 2 U.S.C. §441a(f) —the knowing acceptance of a contribution made in violation of the Federal Election Campaign Act's limits. This was because contributions received after June 1, the date of the nomination, should have been counted against the contributor's general election limit. Attempts to reach a conciliation agreement with Citizens for Wofford failed. This impasse lead to the filing of this case and *FEC v. Citizens for Wofford*.

Source: FEC *Record*, June 1995, p. 13.

Citizens for Wofford v. FEC, No. 94-2617 (D.D.C. Apr. 14, 1995).

[1] Counting these contributions against a contributor's primary election limit instead of against the contributor's general election limit would enable contributors to give up to twice as much to the party's nominee as they would otherwise be able to; contributors would be able to give up to their per-election limit to support Senator Wofford's primary election campaign after the fact and again to support his general election campaign.

CLARK v. FEC AND THE COMMISSION ON PRESIDENTIAL DEBATES

On March 10, 1997, the U.S. Court of Appeals for the District of Columbia Circuit ruled in the FEC's favor, granting its motion for summary affirmance in this case and denying the motion of John P. Clark and the Green Party USA for emergency summary reversal. The ruling upholds the district court's denial of a motion by Mr. Clark, other individual voters and the Green Party to intervene in a suit brought by the Natural Law Party (NLP) and its presidential and vice-presidential candidates against the FEC and the Commission on Presidential Debates (CPD).

This case stemmed from an October 4, 1996, ruling from this same court that upheld a lower court ruling and dismissed lawsuits filed against the FEC and the CPD by the NLP and the presidential and vice presidential candidates running under the Reform Party banner. Both the NLP and the Reform Party candidates had sought to participate in the presidential debates being sponsored by the CPD. The CPD excluded the candidates—the NLP's Dr. John Hagelin and Mike Tompkins and the Reform Party's H. Ross Perot and Pat Choate—from the debates, saying that the minor party candidates did not meet the criteria for participation.

Background

On September 6, 1996, the NLP filed an administrative complaint with the FEC and, on September 13, filed suit in U.S. District Court for the District of Columbia, contending that the CPD had violated FEC rules governing nonpartisan candidate debates. 11 CFR 113.10. Specifically, the NLP suit asked the court to impose a temporary restraining order and issue preliminary and permanent injunctions to prevent the CPD from using any debate selection criteria that did not comply with FEC rules. In the alternative, it asked the court to order the FEC, prior to the debates, to take action on its administrative complaint.

The Green Party, Mr. Clark and seven other individuals, all independent voters or supporters of the Green Party USA and its 1996 presidential candidate Ralph Nader, filed a motion for intervention on September 27, 1996. The district court found that Mr. Clark and the others "show[ed] their curiosity in the case, but…fail[ed] to demonstrate sufficient grounds for intervention." On September 30, the court therefore denied the motion for intervention. However, it did grant Mr. Clark leave to file a brief as a friend of the court.

On November 22—more than a month after the appeals court had ruled in this case and weeks after the debates and 1996 elections had taken place—Mr. Clark filed a notice of appeal of the district court ruling. Mr. Clark had not participated as a friend of the court in the appeals process, nor in a subsequent and unsuccessful petition from Mr. Hagelin for an expedited rehearing and rehearing en banc.

FEC Arguments and Appeals Court Order

First, the FEC argued that the appellants had failed to demonstrate a common question of law, a requirement for permissive intervention under Fed. R. Civ. P. 24.[1] Among other things, Mr. Clark's complaint claimed that the CPD's debate selection criteria violated unspecified sections of the U.S. Constitution. Mr. Hagelin's complaint, on the other hand, had claimed that the CPD's criteria violated FEC regulations at 11 CFR 110.13. Further, the FEC argued that there were no common "questions of fact," as required by Rule 24(b), between Mr. Clark's and Mr. Hagelin's complaints. In addition, the FEC said that the Clark appellants had not shown an independent jurisdictional basis for their claims. The would-be plaintiffs did not even include a presidential or vice-presidential candidate who might have claimed exclusion from the debates.

Timeliness was also at issue, the FEC argued. Rule 24(b) states that a court must consider "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Because the debates were to begin shortly after the original complaints were filed, the district court set about adjudicating the matter on an expedited schedule, but Mr. Clark's motion was not filed until the last day of the briefing schedule.

Finally, the FEC argued that because the district court granted Mr. Clark the option of filing a brief as a friend of the court, it did not abuse its discretion in denying his initial motion to intervene. The appeals court found that the merits of the parties' positions were so clear that they warranted summary action. It held that the district court did not abuse its discretion in denying the appellants' motion to intervene.

Source: FEC *Record*, May 1997, p. 1.

[1] Federal Rule of Civil Procedure 24(b) states that would-be intervenors must timely file their applications and demonstrate that their claim or defense and the "main action" have a question of law or fact in common. In addition, they must show an independent jurisdictional basis for their claims.

CLARK v. VALEO

In a suit filed in 1976, Ramsey Clark, former candidate in the New York State Senate primary election, asked the U.S. District Court of the District of Columbia for declaratory and injunctive relief against those provisions in the Act governing legislative review of the rules, regulations and advisory opinions of the FEC. Under these provisions, regulations proposed by the Commission may not be prescribed until they have been before Congress for 30 legislative days, during which time either house may disapprove them.

Clark argued that the "one-house veto" violated the constitutional principle of "separation of powers." Further, he asserted, regulations would be tainted by congressional influence on the Commission's decision-making process. He also claimed the procedure delayed promulgation of Commission regulations, thereby denying him, as voter and as candidate, protection of the Act.

Intervening as a plaintiff on behalf of the Executive Branch, the Attorney General also requested an injunction against the "one-house veto," arguing that it intrudes "upon those areas reserved by the Constitution of the United States to the Executive Branch.... "

The Federal Election Commission asked the court to dismiss the complaint, arguing *inter alia*, the case was not ripe for court action since Congress had not disapproved any regulation and the plaintiff had claimed no hardship resulting from compliance with the substance of a proposed regulation.

The district court certified a number of constitutional questions to the court of appeals. Concluding that the matter was not "ripe" for adjudication, the court of appeals, in a 6-2 decision on January 21, 1977, returned the certified questions to the district court unanswered, with instructions to dismiss. The court said that Clark's case, based on his status as a candidate, became moot when he failed to win the primary in New York. As a voter, Clark had neither protested a specific veto action by Congress nor identified any proposed regulation tainted by the threat of veto or review. With respect to the constitutional issue raised by the one-house veto, the court held the case was "unripe" because congressional disapproval of a proposed regulation had not yet occurred. "Until Congress exercises the one-house veto," the Court said, "it may be difficult to present a case with sufficient concreteness as to standing and ripeness to justify resolution of the pervasive constitutional issue which the one-house veto provision involves."

On June 6, 1977, the Supreme Court of the United States affirmed the lower court's decision.[1]

Source: FEC *Annual Report 1977*, p. 19.

Clark v. Valeo, 559 F.2d 642 (D.C. Cir.) (*per curiam*), *aff'd mem. sub nom. Clark v. Kimmit*, 431 U.S. 950 (1977).

[1] The Court eventually found the one-house veto to be unconstitutional in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

CLIFTON v. FEC

On May 20, 1996, the U.S. District Court for the District of Maine invalidated the FEC's regulations on voting records and voter guides because they regulate issue advocacy and therefore go beyond the FEC's authority.

On June 6, 1997, the U.S. Court of Appeals for the First Circuit declared invalid two parts of those regulations. The court declared the voting record regulation at 11 CFR 114.4(c)(4) invalid only insofar as the FEC may purport to prohibit mere inquiries to candidates and the voter guide regulation at 11 CFR 114.4(c)(5) invalid only insofar as it limits contact with candidates to written inquiries and replies and imposes an equal space and prominence restriction.

The plaintiffs petitioned the court for a rehearing in this case, but that petition was denied on June 27, 1997. The FEC filed a petition for rehearing and suggestion for rehearing en banc on July 21, 1997.

On February 23, 1998, the Supreme Court denied Maine Right to Life Committee's petition for certiorari in this case.

On April, 30, 1998, on remand from the appeals court, the district court declared the Commission's "electioneering message" provisions of its regulations governing voting guides to be invalid because they were inseverable from those struck down by the appeals court.

Background

The Maine Right to Life Committee (MRLC) is a nonprofit membership corporation established for the purpose of advocating pro-life stances. MRLC uses its corporate funds to create and distribute to its members and the general public voter guides and voting records. Robin Clifton is a Maine voter who wishes to receive this information.

FEC regulations at 11 CFR 14.4(c)(4) and (5) make it illegal for a corporation or labor organization to distribute voting records or voter guides to the general public if such materials expressly advocate the election or defeat of a clearly identified candidate or if the organization consults or coordinates with any candidates concerning the content or distribution of such materials. At 11 CFR 114.4(c)(5)(ii), the FEC lists additional restrictions for voter guides, such as prohibiting a corporate or labor organization from contacting a candidate (except through written questions to which a candidate may respond in writing) and requiring the organization to give all candidates for a particular office an equal opportunity to respond.

MRLC argued that the regulations were too restrictive, exceeding the FEC's statutory power and chilling First Amendment rights. The FEC contended that it had the authority to regulate corporate expenditures for voting records and voter guides if there was coordination with a candidate about the preparation, contents and distribution of such materials.

District Court Decision

The court pointed out that the ban on direct corporate contributions had been upheld by the U.S. Supreme Court in *Buckley v. Valeo* on the grounds that the government's interest in preventing corruption or its appearance outweighs First Amendment concerns. On the other hand, based on the Supreme Court's opinions in *Buckley* and *FEC v. Massachusetts Citizens for Life, Inc. (MCFL),* the court said that corporate spending cannot be limited unless it expressly advocates the election or defeat of a particular candidate. "In other words," the court concluded, "spending on issue advocacy... cannot be limited." The question the court addressed was whether a corporation's contact with a candidate when preparing a voter guide or voting record would transform permissible issue-advocacy spending into a prohibited contribution.

To answer the question, the court examined two provisions of the Federal Election Campaign Act (the Act). In §441a, the Act sets dollar limits on contributions, and for this purpose "contribution" is defined to include "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents." 2 U.S.C. §441a(a)(7)(B)(i).

The other provision, §441b, prohibits corporate "contributions" and "expenditures," which are defined to include "any direct or indirect payment...or anything of value" provided "to any candidate...in connection with any [federal] election." 2 U.S.C. §441b(b)(2).The district court cited the *MCFL* Court's interpretation of Section 441b as prohibiting payments (including indirect payments) made "on behalf of candidates." The district court stated: "That is the statutory and interpretive language on which the FEC's new regulations must be based."

The court said that the FEC, in relying on Section 441a as its authority for the challenged regulations, had "misinterpreted the Supreme Court's teachings." The district court pointed out that, in *Buckley*, the Supreme Court upheld the dollar limitations on contributions because limits on amounts given to a candidate are not the same as limits on direct political speech. "Here," the district court said, "both the disbursements and the

speech are *direct political speech by the MRLC,* not by the candidate. They are thus at the heart of the [Supreme] Court's First Amendment concerns." (Emphasis in original.)

The court concluded that the FEC had based the challenged regulations on too broad an interpretation of the §441b prohibition on corporate expenditures. The court said that the voter guide regulations mistakenly hinge on whether a corporation has had any contact with a candidate rather than on whether the voter guide conveys issue advocacy on behalf of a candidate (which would be an acceptable interpretation). Under the voting record regulations, MRLC would be in violation of §441b if it included an explanation solicited from a candidate concerning apparent inconsistencies in his or her voting record. The court stated: "...it is a distortion of the English language to say that [such an activity] would turn the MRLC's publication...into spending 'on behalf of' a candidate."

In concluding that the FEC had overstepped its authority in promulgating 11 CFR 14.4(c)(4) and (5), the court pronounced that, "as long as the Supreme Court holds that expenditures for issue advocacy have broad First Amendment protection, the FEC cannot use the mere act of communication between a corporation and a candidate to turn a protected expenditure for issue advocacy into an unprotected contribution to the candidate."

Appeals Court Decision

The appeals court found that to avoid First Amendment concerns, it would construe 2 U.S.C. §441b narrowly. Under this construction, both the Commission's restriction on oral contact between MRLC and candidates and its insistence that voter guides provide equal space to candidates were unlawful.

The appeals court found that the FEC's requirement of equal space was a "content-based" restriction because it would affect the content of the MRLC's voting guides. The court said that "[T]here is a strong First Amendment presumption against content-affecting government regulation of private citizen speech, even where the government does not dictate the viewpoint." The court cited a case where the Supreme Court struck down Florida's "right of reply" statute, which guaranteed political candidates equal space to reply to criticism printed in the *Miami Herald*.[1]

With regard to the Commission's requirement that contact between corporations and candidates be limited to written communications when such corporations are preparing voter guides, the court said that the regulation treads "heavily upon the right of citizens, individual or corporate, to confer and discuss public matters with their legislative representatives or candidates for such office." The court said that such a ban on communications served as a "handicap" for discourse between legislators—and would-be legislators—and those they wish to represent.[2]

With respect to both regulations, the court rejected the FEC's argument that such restrictions were justified to prevent illegal corporate contributions to candidates. While the court acknowledged the Commission's legitimate concern with uncovering prohibited contributions, it said that the agency should be able to investigate such impermissible actions through its enforcement proceedings.

The court did not take up MRLC's challenge to the regulation concerning "electioneering message" and instead referred the matter back to the district court. The court concluded that at the district court level there had been inadequate briefing as to the content, purpose and severability of these regulations.

District Court Decision on Remand

The district court declared the Commission's "electioneering message" provisions of its regulations governing voting guides to be invalid because they are inseverable from those struck down by the appeals court. The sections in question—11 CFR 114.4(c)(5)(ii)(D) and (E)—state that voter guides prepared on the basis of written responses from candidates to questions posed by a corporation or labor organization (1) must not include an "electioneering message" and (2) may not score or rate the candidates' responses in a way that conveys an "electioneering message."

Both the Commission and Clifton agreed that the "electioneering message" provisions were not severable from the portions of the FEC's voter guide regulation that had been declared invalid.

Supreme Court Action

On February 23, 1998, the Supreme Court denied Maine Right to Life Committee's petition for certiorari in this case.

Source: FEC *Record*, July 1996, p. 1; August 1997, p. 1; and July 1998, p. 4.

Clifton v. FEC, 927 F. Supp. 493 (D.Me. 1996), 114 F.3d 1309 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 1036 (1998).

[1] *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974).

[2] In a dissenting opinion, Senior Circuit Judge Hugh H. Bownes wrote that the written-contact-only regulation does not infringe on the First Amendment. Citing *Buckley v. Valeo*, the judge said that the Supreme Court had acknowledged that some governmental interests outweigh the possibility of constitutional infringement.

He wrote: "At this stage of American history, it should be clear to every observer that the disproportionate influence of big money is thwarting our freedom to choose those who govern us. This sad truth becomes more apparent with every election. If preventing this is not a compelling governmental interest, I do not know what is."

COMMITTEE FOR JIMMY CARTER v. FEC

On March 2, 1981, the U.S. Court of Appeals for the District of Columbia Circuit dismissed *Committee for Jimmy Carter v. FEC* (Civil Action No. 79-2425). The court's action came in response to an agreement for dismissal of the appeal, filed by the parties on February 20, 1981. This agreement resulted from the Commission's acceptance of the plaintiff's offer to settle the suit.

Petitioners had originally filed the suit on December 3, 1979, challenging an FEC decision to deny matching funds to the Committee for Jimmy Carter (the Committee), the principal campaign committee of former President Carter's 1976 primary campaign. In its suit, the Committee asserted that the Commission had acted arbitrarily, capriciously and contrary to law in certifying only $88,293.92 of the $185,749 in matching funds requested by the Committee in July 1979. The Commission argued that it was bound by its regulations (11 CFR 133.3 (d) and (e))[1] to certify only those funds the Committee needed to retire the legitimate debts of Mr. Carter's primary campaign. The Commission therefore asserted that, if it had granted the Committee's entire request, it would have acted contrary to law by sanctioning an improper use of primary matching funds. Specifically, the Committee had stated in its request for primary matching funds that it planned to use the amount withheld by the Commission ($97,456.08) for the following expenditures. In the Commission's view, none of these constituted qualified campaign expenses.

- Approximately $78,000 would be transferred to former President Carter's 1976 general election committee (the 1976 Democratic Presidential Campaign Committee). The general election committee would, in turn, use the funds to defray legal and compliance costs of the general election campaign, including nearly $50,000 in repayments of public funds that Mr. Carter had accepted for the campaign.[2] (The repayment represented approximately $22,000 the Committee had spent on nonqualified campaign expenses and approximately $27,000 in interest income it had earned on invested public funds.)
- $19,500 would be used to replace funds that the Committee had previously transferred to Mr. Carter's 1976 general election committee in 1978 and 1979, despite the fact that the Committee itself had continued to incur debts during this period.

The Committee argued that the transfers to the 1976 general election committee were part of an ongoing transfer authorization granted by the Commission in February 1977. This authorization had allowed the Committee to transfer $500,000 in private contributions to the compliance fund of the general election committee. These contributions were received after Mr. Carter's

nomination to the Presidency in July 1976. Moreover, the Committee argued that the Commission's partial denial of the certification violated Section 134.3(c)(2) of FEC regulations, the provision in effect during the 1976 elections. The Committee claimed that this provision entitled it to receive matching funds up to the full amount of its outstanding debts on the date Mr. Carter was nominated for the Presidency, regardless of whether it received any private contributions after that date.[3]

The Commission maintained, however, that the transfer authorization had terminated in August 1977 when the Committee repaid $126,515 in matching funds to the U.S. Treasury. The Commission noted that it had requested the repayment because it had certified the funds on the understanding that the Committee planned to transfer $500,000 in private contributions to the compliance fund for the general election committee. The Committee had, however, transferred only $300,000.

In the agreement settling the Committee's claim for matching funds, the Commission agreed to certify $65,650.01 to the Committee, an amount equivalent to qualified legal expenses the Committee had incurred through February 1981. The Commission expressly conditioned this certification on the Committee's consent to:

- Use the funds solely to pay its own outstanding campaign debts;
- Request no further matching funds and terminate; and
- Execute and file the agreement for dismissal of the suit with the court of appeals.

Source: FEC *Record*, May 1981, p. 7.

[1] The FEC prescribed revised regulations in May 1979. Section 133.3(d) is now 9034.1(a) and Section 133.3(e) is now 9034.1(b).

[2] Under the Presidential Election Campaign Fund Act, major party nominees are eligible for public grants of $20 million (plus a cost-of-living adjustment) to finance their general election campaigns.

[3] Under the revised regulation (11 CFR 9034) prescribed in May 1979, Presidential primary candidates are entitled to continue receiving matching funds after their date of ineligibility only if the combined total of their matching funds and private contributions does not cover outstanding debts.

COMMITTEE FOR A UNIFIED INDEPENDENT PARTY, INC. v. FEC

On May 8, 2000, the Committee for a Unified Independent Party and other plaintiffs (collectively the Committee) asked the U.S. District Court for the Southern District of New York to find that the FEC's debate regulations are not authorized by the Federal Election Campaign Act (the Act) and violate the First and Fifth Amendments to the Constitution.

The regulations in question, 11 CFR 110.13 and 114.4(f), permit nonprofit corporations to stage candidate debates and to accept donations from corporations and labor unions to defray the costs of those debates. This exemption from the general prohibition against corporate and union contributions and expenditures is based on a statutory provision that permits "nonpartisan activity (by corporations or unions) designed to encourage individuals to vote or to register to vote." 2 U.S.C. §431(9)(B)(ii).

The Committee argued that debates are not "nonpartisan activity designed to encourage individuals to vote or to register to vote" and are therefore not authorized by the Act. Further, even if debates were considered exempt nonpartisan activity, the FEC's regulations unlawfully expand the statutory exemption to permit debates that are neither nonpartisan nor designed to encourage voting. Rather, the debate regulations permit corporations and unions to make prohibited contributions to influence federal elections.

The Committee further contended that the debate regulations "tilt the electoral playing field so as to put minor parties . . . and persons and organizations seeking to promote a democratic multiparty electoral process, at a competitive disadvantage" in violation of the First and Fifth Amendments to the U.S. Constitution.

Decision

On October 10, 2001, the court granted the Commission's motion to dismiss this case, finding that the Committee lacked standing to challenge the Commission's debate regulations. In order to have standing to bring a case in federal court, the plaintiffs must satisfy a three-part test. The plaintiffs must:

1. Allege personal injury;
2. Show that the injury is fairly traceable to the defendant's allegedly unlawful conduct; and
3. Show that the injury is likely to be redressed by the relief that the plaintiffs request.

In this case, the court found that the plaintiffs that were political parties lacked standing because they either were not injured as a result of the regulations or could not trace their injury directly to the regulations. Likewise, the CUIP, an organization interested in sponsoring

multilateral debates, could not show an injury that was traceable to the debate regulations. The court also found that the plaintiffs who were individual voters, minor party supporters or former candidates lacked standing to challenge the regulations. Having found that Plaintiffs lacked standing, the court ordered the case closed without considering the merits of Plaintiffs' claims.

Source: FEC *Record*, July 2000 , p. 8; and December 2001, p. 1.

COMMITTEE TO ELECT LYNDON LAROUCHE v. FEC
FEC v. COMMITTEE TO ELECT LYNDON LAROUCHE
JONES v. FEC

Committee to Elect Lyndon LaRouche v. FEC

On August 23, 1979, the U.S. Court of Appeals for the District of Columbia upheld the Commission's action in denying primary matching fund payments to Lyndon LaRouche, candidate of the U.S. Labor Party, during the 1976 Presidential primary campaign.

In October 1976, Mr. LaRouche "certified" to the Commission that he had met the eligibility requirement to receive primary matching funds by having raised at least $5,000, in contributions of $250 or less, in each of at least 20 states. Because this "certification" was in the form of a one-page notarized statement, the Commission requested further financial information to support this statement. Later that month, the candidate's principal campaign committee, the Committee to Elect Lyndon LaRouche (CTEL), submitted a computer printout listing contributions in excess of the threshold. Once again, however, the Commission received no supporting documentation of the listed contributions. A subsequent Commission audit, initiated to verify Mr. LaRouche's eligibility, raised substantial questions as to whether many contributions had been made by residents of the States to which they were attributed. After further investigation and an expanded audit, the Commission determined on February 10, 1977, that Mr. LaRouche had not met the threshold requirement in at least two States. Accordingly, the Commission ruled that Mr. LaRouche was not entitled to primary matching funds. On February 14, 1977, CTEL filed suit challenging the Commission's decision.

CTEL argued that the Commission had overstated both the candidate's burden in establishing eligibility and its own role in certifying eligibility. As a result, CTEL maintained, the Commission had violated the Act by denying matching funds to Mr. LaRouche. To establish eligibility, CTEL asserted, the candidate need only "attest authoritatively" in good faith and with knowledge that he has met the threshold. The Commission's role in the certification process is limited to ensuring that the candidate has so attested. CTEL also objected to the Commission's investigative procedures in determining Mr. LaRouche's ineligibility.

The Commission argued that the candidate must not merely attest, but demonstrate to the Commission's satisfaction that he has adequate documentation to support his contention that the threshold has been met. Furthermore, the Commission maintained it is empow-

ered not only to review documentation supplied by the candidate, but also to audit records or campaign contributions and to verify reported contributions by interviewing individual contributors, if necessary.

To properly determine the respective roles of the candidate and the Commission in the certification process, the court focused on two relevant concerns: Congress's intent, on the one hand, to withhold public funds from frivolous candidates and its desire, on the other, to provide prompt payment to serious candidates. The best way to accommodate these two objectives, the court determined, is to construe the Act as the Commission had. Since Congress established eligibility thresholds, it could also impose reasonable procedures to ensure that those thresholds were met. The Commission's approach, the court pointed out, involves an objective standard, which ensures that eligibility criteria will be applied to all candidates in an equitable manner.

Although the Commission acted ultra vires in conducting a premature audit, the court found the Commission's actions reasonable and nonprejudicial. Therefore, since Mr. LaRouche's submissions fell far short of the documentation required to establish his eligibility, the court concluded that the Commission had acted properly in not approving matching funds.

FEC v. Committee to Elect Lyndon LaRouche and Jones v. FEC

Also on August 23, 1979, the U.S. Court of Appeals for the District of Columbia upheld three actions of the District Court for the District of Columbia in an appeal which had been filed on September 28, 1977, by the Committee to Elect Lyndon LaRouche, the National Caucus of Labor Committees, the New Solidarity International Press Service, Inc., and Campaigner Publications, Inc. This was an appeal from an order of the district court enforcing subpoenas issued by the FEC during the investigation of Lyndon LaRouche's eligibility for primary matching funds. In upholding the district court's action, the court of appeals maintained that:

1. The district court had jurisdiction to determine this case despite appellants' argument that the District of Columbia was not the place where the Commission's inquiry took place. The court maintained that the Commission was conducting a nationwide investigation from its national office in the District of Columbia and should be afforded broad discretion, "within the bounds of reasonableness," in selecting this jurisdiction as its place of inquiry.
2. The district court had personal jurisdiction over the appellants despite the fact that they were served in New York rather than in the District of Columbia. The court pointed out that the scope of the Commission's responsibilities is nationwide and its power is sufficiently broad to warrant an implied grant of authority for extraterritorial service of process under 2 U.S.C. §437(b).
3. The district court had not denied the appellants an opportunity to demonstrate that the Commission had issued the subpoenas in retaliation for two suits which the appellants had brought against the Commission. The court of appeals pointed out that the appellants could not have been denied such an opportunity since they had never requested it.

The above appeal was argued with *Leroy B. Jones v. FEC*. In Jones, the appellants repeated numerous constitutional, statutory and common law claims originally stated in their initial suit. The claims arose from the Commission's field interviews of LaRouche contributors, the manner in which the interviews were conducted and the scope of the questions asked. The district court had granted summary judgment to the FEC. The court of appeals upheld the district court's action with respect to all but two of the allegations. The court of appeals determined that the district court had erred in granting summary judgment with regard to the appellants' claim that the Commission had inquired during field interviews into issues bearing no relation at all to the subject matter of an otherwise legitimate investigation into a candidate's eligibility to receive primary matching funds; and appellant Jones' claim that he was subjected to a warrantless seizure of certain financial documents and bank records. These allegations were remanded to the district court for factual determinations. In all other respects, the court affirmed the decision under review.

Supreme Court Action

On February 19, 1980, the Supreme Court denied a petition for certiorari in these three cases. The Federal Election Commission had filed a brief opposing the petition.

Source: FEC *Record*, October 1979, p. 6; and April 1980, p. 7.

Committee to Elect Lyndon LaRouche v. FEC, 613 F.2d 834 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980).

Committee to Elect Lyndon LaRouche: FEC v., 613 F.2d 849 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980).

Jones v. Unknown Agents of the Federal Election Commission, 613 F.2d 864 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980).

COMMON CAUSE v. FEC (78-2135)

On April 30, 1980, the U.S. District Court for the District of Columbia granted summary judgment in two cross motions filed by parties to the suit, *Common Cause v. FEC* (Civil Action No. 78-2135).

Common Cause had filed its motion for summary judgment in November 1978, requesting that the court rule the FEC had acted contrary to law in failing to take final action on Common Cause's administrative complaint within 90 days of its being filed. 2 U.S.C. §437g(a)(9)(B)(ii). In its complaint, Common Cause had asserted that the American Medical Political Action Committee (AMPAC), the separate segregated fund of the American Medical Association (AMA), and the state political action committees of AMA's state affiliates constituted a single political committee by virtue of their affiliation. 2 U.S.C. §441a(a)(5). Therefore, alleged Common Cause, AMPAC and its affiliated state PACs shared a single contribution limit of $5,000 per candidate, per election. Common Cause's complaint listed numerous instances in the 1976 Congressional elections where the combined contribution of AMPAC and an affiliated state PAC to a candidate had exceeded the $5,000 limit.[1]

At the time Common Cause filed its motion for summary judgment, the Commission had entered into conciliation agreements only with AMPAC and a few of the state PACs named in the June 1978 complaint. By fall of 1979, however, the Commission had entered into separate agreements with an additional five state PACs; between Fall 1979 and Spring 1980 the Commission entered into agreements with eleven other state PACs and was preparing to enter into 10 additional agreements. The court also noted that in February 1977 the Commission had broadened the scope of its initial investigation to include all of the AMA's state affiliates and their PACs. Moreover, the Commission had begun investigating four additional complaints which also alleged violations of the Act's contribution limits by AMPAC and its affiliated state PACs.

Common Cause nevertheless maintained that the FEC had acted contrary to law in not taking final action on its complaint within 90 days. The FEC, on the other hand, viewed the 90-day provision as jurisdictional, giving the court power to decide after the 90-day period whether or not the Commission had acted contrary to law.[2]

In addition to supporting the FEC's interpretation of the 90-day provision, the court noted that the determination of whether AMPAC and its state PACs were affiliated (i.e., whether they had been established, financed, maintained or controlled by the same entity) was a factual question requiring proof provided by extensive investigation. Therefore, the court did not find the FEC's efforts to collect further evidence to be an abuse of discretion. Moreover, the court found that the FEC's decision not to investigate combined contributions by state PACs affiliated with AMPAC (in addition to the combined AMPAC-State PAC contributions it had investigated) was not contrary to law since Common Cause had mentioned only one such occurrence among the 69 violations it had cited. The court did, however, order the Commission to either enter into conciliation agreements with the ten remaining respondents named in Common Cause's complaint within 30 days of the court's ruling or bring suit against them. The Commission did enter into conciliation agreements with the remaining respondents, and the court issued an order on June 13, 1980, dismissing the case.

Source: FEC *Record*, August 1980, p. 8.

Common Cause v. FEC, 82 F.R.D. 59 (D.D.C.), 83 F.R.D. 410 (D.D.C. 1979), 489 F. Supp. 738 (D.D.C. 1980).

[1] While this decision was pending, the court issued an order on August 10, 1979, directing the Commission to release to the plaintiff certain internal FEC communications regarding the administrative enforcement action that had been triggered by Common Cause's complaint. Among other things, the court ordered the documents to be released under court seal, and access to them was to be restricted to plaintiff's counsel and to senior officers of Common Cause. Disclosures to outside parties (including the respondents in the FEC enforcement action) were prohibited until a further order of the court. 83 F.R.D. 410 (D.D.C. 1979).

[2] In 1979 Congress amended §437g, expanding the period in which the Commission must act on a complaint from 90 days to 120 days.

COMMON CAUSE v. FEC (83-0720)

On June 10, 1983, the U.S. District Court for the District of Columbia approved dismissal of Common Cause's suit against the FEC (Civil Action No. 83-0720). Common Cause requested the dismissal because, on May 23, 1983, the FEC had taken final action on the administrative complaint which had precipitated the suit.

Pursuant to 26 U.S.C. §437g(a)(8)(A), Common Cause had asked the district court to issue an order directing the Commission to take final action, within 30 days, on a complaint Common Cause had filed on September 26, 1980.[1] In its administrative complaint, Common Cause had alleged that five political committees had made independent expenditures on behalf of the 1980 Republican Presidential nominee which were in violation of 26 U.S.C. §9012(f).[2] (This provision prohibits unauthorized committees from making expenditures exceeding $1,000 to further the election of a publicly funded Presidential nominee.)

Alleging that the committees were not, in fact, independent of the official Reagan campaign, Common Cause had claimed that the committees' activities also resulted in violations of:

- 26 U.S.C. §9012(b)(1), which makes it unlawful for a major party Presidential nominee who receives public funding to accept private contributions;
- 26 U.S.C. §9012(a)(1), which makes it unlawful for a major party Presidential nominee to incur campaign expenditures in excess of the amount of public funding he receives; and
- 2 U.S.C. §441a(a), which prohibits political committees from making contributions in excess of $5,000, per election, to a federal candidate.

Source: FEC *Record*, May 1983, p. 7; and August 1983, p. 8.

[1] This complaint was merged with a similar one filed several months earlier by the Carter-Mondale Reelection Committee and the Democratic National Committee.

[2] On July 15, 1980, the FEC filed suit in the district court against three of the committees named in Common Cause's complaint. The FEC sought the court's declaratory judgment that the committees' proposed expenditures were in violation of 26 U.S.C. §9012(f) and that the provision was constitutional as applied to the committees' expenditures. On August 28, 1981, the court ruled that section 9012(f) was unconstitutional as applied to the defendant committees. On January 19, 1982, the Supreme Court voted 4 to 4 on the issue. While this split vote left the district court decision intact, the Court itself made no ruling on the constitutionality of the provision.

COMMON CAUSE v. FEC (83-2199)

On December 31, 1986, the United States District Court for the District of Columbia declared that the FEC's dismissal of an administrative complaint filed in 1980 by Common Cause was, in part, contrary to law. (Civil Action No. 83-2199.) The case was remanded to the FEC for action consistent with the court's opinion.

On March 15, 1988, the U.S. Court of Appeals for the District of Columbia Circuit reversed the decision by the district court. (*Common Cause v. FEC*, Civil Action No. 87-5036). The appeals court found "entirely permissible" the interpretation of 2 U.S.C. §432(e)(4) that the FEC had applied to allegations contained in Common Cause's complaint. The appeals court also vacated the district court's order remanding the case to the Commission for a statement of reasons concerning the FEC's tie-vote dismissal of an allegation in the complaint and instructed the district court to enter an order dismissing the suit.

Background

The original complaint alleged that five unauthorized political committees, which supported Ronald Reagan's 1980 campaign committee, had violated the Act by using Reagan's name in their respective names. Furthermore, it was alleged that the committees involved in the complaint had impermissibly coordinated their "independent expenditures" with the official Reagan committee and, by doing so, had made contributions which exceeded the committees' limits. The five committees named in the complaint were: Americans for an Effective Presidency (AEP), Americans for Change (AFC), North Carolina Congressional Club[1] (NCCC), Fund for a Conservative Majority (FCM) and National Conservative Political Action Committee (NCPAC). After investigating the majority of the claims, the FEC voted to close the file regarding the administrative complaint and take no further action.

In its suit, filed August 1, 1983, Common Cause alleged that the FEC had wrongfully dismissed the complaint.

District Court Ruling

FEC Determination to Dismiss Complaint on Committees' Use of Candidate's Name

The first legal issue addressed by the court was Common Cause's allegation that AFC, FCM and NCPAC violated the Act (2 U.S.C. §432(e)(4)) by using the name of a candidate, Ronald Reagan, in their respective committee names. Under the Act, only an authorized committee may use a candidate's name in its name. In this case, the committees involved were not authorized by any candidate. Evidence revealed that each committee had used the name "Reagan" in its respective fundraising project when soliciting funds and otherwise communicating with the public. The FEC argued that, because the official registered names of the committees did not contain Reagan's name and that the use of "Reagan" was merely for the purpose of identifying a particular fundraising project, the Act had not been violated.

In its opinion, the court noted that the name of the committee which is presented to the public for identification constitutes a "name" within the meaning of the Act and, therefore, the decision by the FEC to dismiss the complaint was contrary to law. Further, the court ordered the Commission to conform with its opinion within 30 days, pursuant to 2 U.S.C. §437g(a)(8)(c).

FEC Determination Not to Investigate Coordination

In the original administrative complaint, by a vote of 3-3, the FEC reached no conclusion as to whether there was reason to believe AEP and NCCC had coordinated their expenditures with the official Reagan campaign. (With regard to the other three committees, the Commission did find "reason to believe" and did conduct an investigation. See below.) This decision, which resulted in an automatic dismissal of this portion of the complaint, was contrary to the recommendation made by the FEC's General Counsel. Moreover, the Commission submitted no explanation for its decision.

The court stated that some explanation of the FEC's reasons for dismissing the complaint was warranted to enable the court to review the original determination on the issue. As a result, the court ruled that the FEC's action was arbitrary and capricious and required the agency to provide an explanation for its action within 30 days.

FEC Determination to Dismiss Complaint on Coordination

The final issue addressed by the court concerned Common Cause's allegation that the FEC, after investigating expenditures by AFC, FCM and NCPAC, acted contrary to law by dismissing the complaint. In the original complaint, it was alleged that all of the committees had "coordinated" their expenditures with those of the official Reagan campaign and had, thereby, made contributions—rather than independent expenditures. These contributions, according to Common Cause, exceeded the limitations contained in the Act, under 2 U.S.C. §441a(a). (There are no limits on independent expenditures.)

In its suit, Common Cause contended that a determination of coordination should be based on the "totality of circumstances." According to Common Cause, the FEC should have considered circumstances such as interlocking membership of persons at the policy-making level, prior alliances with the official committees and the use of common vendors by the committees. The FEC argued, however, that evidence of "direct coordination"

was a necessary prerequisite to a determination of "impermissible coordination," and it found no evidence of direct coordination.

The court concluded that the FEC's interpretation of what constitutes "impermissible coordination" was not contrary to the law. Moreover, the court noted that, absent evidence of express intent or communication, "it is difficult to state exactly what combination of circumstances would prove that coordination had occurred." Therefore, in this issue, the court ruled that the FEC's action was proper.

Appeals Court Ruling

Committee Names

In reversing the district court's ruling, a three-judge panel of the appeals court affirmed the FEC's interpretation of Section 432(e)(4), that is, that a political committee's "name" refers only to the official or formal name under which the committee must register. The court held that the "sparse legislative history of Section 432(e)(4) shows nothing definitive to undercut the Commission's consistent interpretation of this provision as applying only to the official name of a political committee." The court therefore concluded that, while Common Cause's interpretation of the provision was "not totally implausible," it did not "preclude the Commission's quite plausible alternative. There is, in short, a genuine ambiguity in Section 432(e)(4)'s text."

Further, considering the structure of the statute, the appeals court agreed with the FEC's argument that "name" should be similarly defined in Sections 432(e)(4) and 433(b)(1). (Section 433(b)(1) requires unauthorized committees to register one official name with the FEC.) The court held that these two provisions, along with the Act's disclaimer provision (Section 441d(a)), allowed the Commission "to establish a coherent means by which readers and potential contributors can find out the identity and status of those who are soliciting them."

In dissenting from the majority decision on the "name" issue, Judge Ruth B. Ginsburg argued that "Congress enacted Section 432(e)(4) to avoid public confusion and to increase public awareness of the sources of campaign messages.... Sensibly and purposively construed, the Section 432(e)(4) prohibition covers not only the formal, registered name of a political committee, but also the name the committee actually uses to identify itself in communications with the public purporting to solicit contributions for, or on behalf of, a candidate."

Deadlock Vote

Finally, the appeals court reversed the district court's ruling that the FEC's deadlock vote dismissal of other allegations against two political committees must be remanded for a statement of reasons. The appeals court concluded that its recent ruling in *Democratic Congressional Campaign Committee (DCCC) v. FEC* (Civil Action No. 86-5661) was applicable to the circumstances of Common Cause's case. In *DCCC v. FEC*, the court found that the FEC's dismissal of an administrative complaint as the result of a deadlock vote was subject to judicial review. Consequently, the court could require the FEC to supply a statement of reasons for such dismissals.

Nevertheless, the court declined to "apply the precedent retroactively to this case, which arose before our DCCC decision...To do so, in this case at least, would be an exercise in futility and a waste of the Commission's resources." The court added, however, that it would "enforce the DCCC rule with respect to all Commission orders of dismissal based on deadlock votes that are contrary to General Counsel recommendations issued subsequent to our decision in that case."

Source: FEC *Record*, February 1987, p. 6; and May 1988, p. 7.

Common Cause v. FEC, 655 F. Supp. 619 (D.D.C. 1986) rev'd, 842 F.2d 436 (D.C. Cir. 1988).

[1] NCCC has subsequently become the National Congressional Club.

COMMON CAUSE v. FEC (85-0968)[1]

On June 25, 1986, the U.S. District Court for the District of Columbia issued an opinion in *Common Cause v. FEC*, a suit in which Common Cause challenged the FEC's dismissal of an administrative complaint, which the organization had filed with the Commission in September 1984 (Civil Action No. 85-0968). In remanding the suit to the FEC, the court ordered the agency to provide: (1) an explanation of the legal standard that the agency had used in making its decision to dismiss the complaint and (2) a statement of reasons demonstrating how the FEC had applied this legal standard to the facts before it.

Background

On August 24, 1984, one day after accepting the Republican Party's Presidential nomination, President Reagan addressed a convention of the Veterans of Foreign Wars (the VFW) in Chicago. During his speech, Mr. Reagan did not expressly mention his candidacy; nor did he solicit contributions to his campaign. Since the Reagan administration viewed the Chicago trip as official business, the administration allowed the government to absorb the travel costs and did not report them to the FEC.

On September 20, 1984, Common Cause filed an administrative complaint with the FEC against the Reagan-Bush '84 General Election Committee (the Reagan campaign), President Reagan's principal campaign committee for the 1984 general election. In the complaint, Common Cause alleged that the travel costs related to President Reagan's Chicago speech constituted "qualified campaign expenses" incurred for Mr. Reagan's publicly funded general election campaign.[2] Consequently, Common Cause claimed that the Reagan campaign had to: (1) pay for and report the costs of the Chicago trip as "qualified campaign expenses" and (2) reimburse the government for using a government airplane to make the trip. On December 24, 1984, the FEC's General Counsel recommended that the Commission find "reason to believe" that the Reagan campaign and its treasurer had violated provisions of the election law and public funding statutes by failing to report these expenses. On January 15, 1985, however, the Commission decided, by a four to two vote, to find "no reason to believe" the Reagan campaign and its treasurer had violated federal election laws. Consistent with past practice, the Commission did not issue a formal statement of reasons for its decision to dismiss Common Cause's administrative complaint.

On March 22, 1985, Common Cause challenged the FEC's dismissal decision by filing suit against the Commission with the district court. In its suit, Common Cause asked the court to declare that the FEC's dismissal of its administrative complaint was contrary to law and to order the agency to act on the allegations in its complaint.

In arguing that the FEC's dismissal was contrary to law, Common Cause said that, in determining whether President Reagan's Chicago trip was campaign related, the Commission should have considered the "totality of circumstances" surrounding his Chicago speech rather than using a narrower review standard, which focused solely on: (1) whether President Reagan's speech expressly advocated his reelection and (2) whether he solicited contributions in conjunction with his speech.

The Court's Ruling

Although accepting the legal standard which the parties agreed had been applied by the FEC in its dismissal of Common Cause's complaint, the court observed that it still had to "determine whether the agency has presented a rational basis for its decision." In this regard, the court noted that "the record before us prevents that threshold determination." The court therefore remanded the case to the FEC "both for an explanation of the legal standard actually applied and...a statement of reasons demonstrating how the Commission applied such legal standards to the facts before it."

Commissioners' Second Statements of Reasons

In response to the court's second remand order, Commissioners Joan D. Aikens and John W. McGarry submitted a joint statement of reasons, while Commissioner Lee Ann Elliott submitted a separate statement. The fourth dissenting Commissioner in the case, Frank P. Reiche, did not submit a statement of reasons because he left the Commission in April 1985.

On July 15, 1988, the three Commissioners submitted the statements to the court and to Common Cause. While the Commissioners all agreed that President Reagan's speech before the V.F.W.'s annual convention was not campaign related, they were not in unanimous accord concerning the standard that should have been applied to reach this determination. Commissioners Joan D. Aikens and John W. McGarry concluded that they had applied a "totality of circumstances" standard. On the other hand, Commissioner Elliott concluded that, in the case of an officeholder, the "two-pronged" test was appropriate.

Commissioners Aikens and McGarry

The Commissioners stated their views that, in determining whether an officeholder's speech was campaign related, the Commission "has consistently applied a 'totality of circumstances' test, involving examination of external factors." While they agreed that an examination of the elements of the "two-pronged" test was a necessary first step, they maintained that they had to "look further to the timing, the setting and the purpose of the

event as integral components of the 'totality of circumstances' test and as necessary to the ultimate determination that certain activity is or is not campaign-related." Citing agency precedents, the Commissioners stated that their use of the "totality of circumstances" standard was "totally consistent with the approach recommended by the General Counsel in his Report...and adopted by the Commission in many advisory opinions."[3]

Based on these standards, the Commissioners concluded that President Reagan's speech was made in performance of his official duties, rather than to further his reelection. The speech did not expressly advocate President Reagan's election or solicit contributions to his campaign. Nor did the timing, setting or purpose of the President's speech support the complainant's allegations that the speech was campaign related.

With regard to the timing of the speech, the Commissioners noted that the V.F.W. convention was an annual event and that the invitation to attend it had been extended to President Reagan six months before the Republican National Convention. They concluded, "To argue that the timing of this appearance makes it a campaign event would mean that no incumbent President could make an official appearance to perform officeholder duties after the renomination."

Commissioner Elliott

In explaining her view that the Commission should apply only the "two-pronged" test to determine whether President Reagan's speech was campaign-related, Commissioner Elliott stated that "an officeholder's speech will be considered campaign-related if it expressly advocates the election or defeat of a clearly identified candidate or solicits contributions on behalf of a federal candidate. This 'two-pronged' test is sensible and workable Commission precedent and has repeatedly been held a permissible construction of the Act. Further, the 'two-pronged' test avoids subjective or imponderable considerations when evaluating an officeholder's speech."

Commissioner Elliott cited as precedent for the test the Supreme Court's decision in *Buckley v. Valeo*, as well as a series of other federal court cases and FEC actions, including Commission advisory opinions.[4] The Commissioner noted that "the reasonableness of this policy is enhanced when viewed against 11 years of even-handed application."

Commissioner Elliott concluded that the totality of circumstances approach "is really not applicable for officeholders. Its objective elements are already part of the 'two-pronged' test's legal inquiry into 'express advocacy' and its subjective elements are too vaporous upon which to rest a legal conclusion."

Finally, the Commissioner stated that the "totality of circumstances" test could not be appropriately applied to the Reagan speech. In the past, the Commissioner explained, this test had been applied only to (1) nonincumbent candidates, (2) officeholders who were engaging in activities that were not normally part of their duties and (3) officeholders who were invited to make appearances as candidates, rather than in their official capacities. Commissioner Elliott therefore concluded that "following Counsel's recommendation in this case would not have been following Commission precedent."

Commissioner Elliott found that, based on the "two-pronged" test, President Reagan had not made a campaign-related speech at the convention. "I concluded that the speech [did] not advocate the re-election of the President or the defeat of his opponent...His appearance was that of a head-of-state and his remarks were on issues of importance to America's veterans."

Joint Stipulation of Dismissal

On September 27, 1988, the U.S. District Court for the District of Columbia issued a joint stipulation of dismissal in which Common Cause and the FEC agreed to the dismissal, with prejudice, of the suit.

In the joint stipulation of dismissal, Common Cause did not abandon its position that the FEC's action on the administrative complaint was contrary to law. Nor did the FEC abandon its position that its dismissal of the complaint was reasonable.

Source: FEC *Record*, August 1986, p. 6; and October 1988, p. 7.

[1] See also *Antosh v. FEC* (85-1410).

[2] FEC regulations define "qualified campaign expenses" as those expenditures made during the reporting period to further the general election campaign of a publicly funded Presidential candidate. See 11 CFR 9002.11.

[3] For example, the Commissioners cited as precedent Advisory Opinions 1977-42, 1977-54, 1978-4, 1978-15, 1980-16, 1980-22, 1981-37, 1982-15, 1982-56 and 1984-13.

[4] For example, the Commissioner cited as precedent *Buckley v. Valeo*, 424 U.S. 1, 84 n. 112 (1976) and Advisory Opinions 1977-42, 1977-54, 1978-4, 1979-25, 1980-16, 1980-22, 1980-89 and 1981-37.

COMMON CAUSE v. FEC (85-1130)

On June 19, 1990, the U.S. Court of Appeals for the District of Columbia Circuit reversed a district court decision by ruling that the FEC did not adequately analyze an affiliation issue in its dismissal of an administrative complaint filed by Common Cause. (Civil Action No. 89-5231.) The court remanded the case to the district court with instructions to return the matter to the FEC for reconsideration consistent with the appeals court ruling.

Background

Common Cause filed an administrative complaint with the FEC alleging that the Republican National Independent Expenditure Committee (RNIEC) and the National Republican Senatorial Committee (NRSC) were affiliated committees and that RNIEC's expenditures on behalf of then-Senator Dan Evans' 1984 reelection campaign were coordinated with NRSC. As a result, Common Cause contended, contributions made by the two committees on behalf of Mr. Evans exceeded the contribution limits of 2 U.S.C. §441a. The Commission found no probable cause to believe that a violation of the Federal Election Campaign Act had occurred.

After the Commission dismissed the administrative complaint, Common Cause filed suit in 1985 with the U.S. District Court for the District of Columbia. (Civil Action No. 85-1130). Common Cause asked the court to find that RNIEC and NRSC were affiliated committees, or that they had coordinated their expenditures on behalf of Senator Evans. (Either finding would have resulted in excessive contributions by NRSC.)

District Court Decision

In its decision of May 30, 1989, the court found that the Commission's dismissal of Common Cause's principal allegations—affiliation and coordination between RNIEC and NRSC—was reasonable. The court did remand one issue from the original complaint—that of affiliation between RNIEC and the Republican National Committee—back to the FEC for further consideration, finding that the Commission had not addressed that allegation in dismissing the administrative complaint.

Appeals Court Decision

In its *per curiam* opinion, the appeals court noted the deference accorded by the courts to FEC decisions. However, in considering the General Counsel's brief recommending the "no probable cause to believe" finding adopted by the Commission, the court found that "the brief lacks any discussion of the affiliation issue that is independent of the analysis of the separate coordination issue."

Common Cause's affiliation claim was based on three facts: (1) Mr. Rodney Smith served as the financial director and treasurer of NRSC until two months before he co-founded and became treasurer of RNIEC; (2) Senator John Heinz continued to be a member of NRSC a short time after he co-founded and joined the advisory panel of RNIEC; and (3) there was a substantial overlap in contributors to the two committees, the result of RNIEC's use of NRSC's mailing list.

Section 441a(a)(5) of the Act defines affiliated committees as those that are "established or financed or maintained or controlled" by the same person or group. Commission regulations then in effect listed several indicia of affiliation at 11 CFR 100.5(g)(2)(ii)(A)-(E). (Current FEC rules provide revised indicia at 11 CFR 100.5(g)(4)(ii)(A)-(J).) The court stated that the General Counsel's brief made no attempt to tie the relevant indicia of affiliation to the facts of the case. As a result, there was no indication that the agency had considered one pertinent indicium of affiliation: whether Mr. Smith or Senator Heinz had the ability to influence the decisions of both committees. 11 CFR 100.5(g)(2)(ii)(C) (since revised at 100.5(g)(4)(ii)(B)).

Another indicium set out in the rules is whether two committees show a similar pattern of contributions. 11 CFR 100.5(g)(2)(ii)(D) (since revised at 100.5(g)(4)(ii)(J)). The General Counsel's brief did not specifically refer to this indicium. The appeals court found this issue "less troubling" since the brief considered possible affiliation resulting from RNIEC's use of RNSC's contributor list but went on to explain that this implication was rebutted by the committees' dispute over the ownership of the list.

In conclusion the court stated: "Based upon the General Counsel's brief to the Commission, it is impossible to discern whether the FEC applied the applicable statute and regulation to the claim that the NRSC and the RNIEC were affiliated." The court therefore reversed the judgment of the district court on the affiliation issue and remanded the case with instructions for the FEC to reconsider the issue based on the court's decision.

Source: FEC *Record*, August 1990, p. 11.

Common Cause v. FEC, 715 F. Supp. 398 (D.D.C. 1989) rev'd, 906 F.2d 705 (D.C. Cir. 1990).

COMMON CAUSE v. FEC (86-1838)

On August 3, 1987, the U.S. District Court for the District of Columbia issued an order which granted the FEC's motion for summary judgment on all issues in this case except one: the allocation, between the federal and nonfederal accounts of state party committees, of expenses of certain specified activities (e.g., voter registration, "get out the vote" efforts, and campaign materials used in connection with volunteer activities). (*Common Cause v. FEC*, Civil Action No. 86-1838.) For reconsideration of that issue, the court remanded to the FEC Common Cause's petition for rulemaking concerning the use of "soft money" in federal elections.[1]

On August 25, 1988, the U.S. District Court for the District of Columbia decided to hold in abeyance Common Cause's motion to enforce the district court's previous order that the FEC promulgate rules on "soft money." Instead, the court retained jurisdiction in the case and ordered the FEC to submit, at 90-day intervals, concise reports on the agency's progress toward promulgating the rules.

Background

Common Cause filed its petition for rulemaking on November 7, 1984. The FEC published a notice of availability in the *Federal Register*, sent copies of the petition to a number of organizations and received five comments. On December 5, 1985, the FEC's General Counsel recommended that the Commission seek information and comments on "soft money" issues. The FEC then scheduled two days of public hearings, published a notice of inquiry on the matter in the *Federal Register*, sent the notice to 77 organizations and considered the 15 comments it received in response. The Commission also received testimony from Common Cause, the Center for Responsive Politics and the Republican National Committee. On April 29, 1986, the FEC denied Common Cause's petition for rulemaking (see 51 Fed. Reg. 15915).

On June 30, 1986, Common Cause filed this court action pursuant to the Administrative Protection Act, 5 U.S.C. §706, which provides that agency action that is "not in accordance with the law" must be set aside by the reviewing court.

In its motion for summary judgment, Common Cause argued that the FEC:

- Improperly construed the Federal Election Campaign Act (the Act) by (a) improperly considering "intent" as a requisite factor when it concluded that nonfederal funds had not been transferred to the state and local level with the intent to influence federal elections and (b) allowing the allocation of expenditures made in connection with federal and nonfederal elections;
- Inadequately regulated the allocation of federal and nonfederal funds, thereby creating a loophole through which "soft money" could be used in connection with federal elections; and
- Acted arbitrarily and capriciously in denying the petition for rulemaking, given ample evidence to justify a rulemaking.

District Court Ruling

The court noted that, in 1979, Congress amended the Act to permit state and local party committees to spend money in federal elections for voter registration, "get out the vote" activities, and campaign materials used in connection with volunteer activities.
2 U.S.C.§§431(8)(B)(x), 431(8)(B)(xii), 431(9)(B)(viii) and 431(9)(B)(ix). Under the Act, only monies that are subject to the provisions of the Act may be used for these activities. 2 U.S.C.§§431(8)(B)(x)(2), 431(8)(B)(xii)(2), 431(9)(B)(viii)(2) and 431(9)(B)(ix)(2). Under the Commission's regulations at 11 CFR 102.5 and 106.1, when financing these political activities in connection with both federal and nonfederal elections, state and local party committees may spend money from both their federal and nonfederal accounts, allocating "on a reasonable basis."

In reviewing the FEC's denial of the rulemaking petition, the court rejected plaintiffs' argument that the FEC improperly considered intent as a requisite element. The court found that the question of intent was not crucial or even relevant in the FEC's denial of the rulemaking. Instead, the court said, the FEC had found that there was inadequate evidence to conclude that any "soft money" had been used in the ways Common Cause alleged in its petition.

The court also rejected Common Cause's contention that no allocation method is permissible under the Act, noting that "the FECA regulates federal elections only," and that "Congress would have had to have spoken much more clearly in the amendments at issue to contradict" this limit on the FECA's reach. The court further noted that "the plain meaning of the Act is that any improper allocation of nonfederal funds by a state committee would be a violation of the FECA."

The court maintained, however, that the Commission's regulations provide "no guidance whatsoever on what allocation methods a state or local party committee may use," and thus found that a revision of the Commission's regulations was warranted with respect to this one issue and remanded the matter to the Commission.

Finally, the court found that it was not arbitrary and capricious for the Commission to decline to initiate a rulemaking based on the evidence before it, except with respect to the allocation issue discussed above. The court observed, "The Commission opened its doors to comments from each of the fifty state election finance

agencies, as well as both major parties and various other groups interested in the issue of campaign financing. Only fifteen responses were received, some of which adamantly stated that there were no abuses of the type alleged by Common Cause. Indeed, there was testimony that some of the anecdotes submitted by Common Cause were factually erroneous." In conclusion, the court granted the FEC's motion for summary judgment affirming its decision to deny the rulemaking petition with respect to all issues except that of allocation.

District Court Ruling: August 1988

In petitioning the district court to enforce its order of August 1987, Common Cause asked the court to impose a timetable on the FEC which would require the agency to:

- Propose allocation rules within 30 days of the court's order; and
- Make the proposed rules final as soon as possible.

The FEC argued that it had begun to respond to the court's 1987 order by publishing a Notice of Inquiry in the *Federal Register* that sought comments on its proposed rulemaking. The FEC pointed out that the election law had established no timetable for rulemakings. Furthermore, under the law, Common Cause could file a documented administrative complaint to remedy any alleged abuses of the allocation rules. Additionally, the FEC argued that its delay (of seven months) did not approach the three-and five-year agency delays that courts have found to be reasonable. Finally, the agency cited demands on the FEC's resources during a Presidential election year.

The court concluded that "Common Cause ha[d] not shown that the Commission's delay thus far warrant[ed] the intrusive relief sought by the plaintiffs." Nevertheless, the court ruled that the FEC should submit a report to the court every 90 days on its progress toward promulgating the rules.

Source: FEC *Record*, September 1987, p. 6; and October 1988, p. 6.

Common Cause v. FEC, 692 F. Supp. 1391 (D.D.C. 1987); 692 F. Supp. 1397 (D.D.C. 1988).

[1] In its complaint, Common Cause defined the term "soft money" as "funds from sources prohibited under the FECA that are given to political committees and party organizations ostensibly for use at the state and local level, but which are actually used in connection with and to influence federal elections in violation of the FECA."

COMMON CAUSE v. FEC (87-2224)

The U.S. District Court for the District of Columbia granted the FEC's motion to dismiss Common Cause's suit and to dissolve a protective order that had placed court documents under seal. In its order of January 11, 1989, the court noted that Common Cause did not oppose the FEC's motion.

Background

In its suit, filed August 12, 1987, Common Cause asked the court to declare that the FEC failed to take action within the required 120-day period on an administrative complaint Common Cause had filed with the Commission on October 28, 1986. Common Cause further asked the court to direct the FEC to take action within 30 days, pursuant to 2 U.S.C. §437g(a)(8). Civil Action No. 87-2224. Common Cause had alleged in its administrative complaint that the National Republican Senatorial Committee had made excessive contributions to several candidates, a violation of 2 U.S.C. §441a(h).

FEC's Motion to Dismiss Suit and Lift Seal

The Commission asked the court to dismiss Common Cause's suit because the agency had taken final action on the administrative complaint, thus rendering the litigation moot. On December 23, 1988, the Commission had voted to enter into a conciliation agreement with the National Republican Senatorial Committee and had then closed the file. Citing other "failure to act" cases filed against the agency pursuant to 2 U.S.C. §437g(a)(8), the FEC pointed out that the courts have granted similar dismissals once the agency has taken final action.

The FEC had originally requested that the court impose a seal on documents filed in the case that related to the administrative complaint, which was pending at the time and therefore subject to the confidentiality provision of 2 U.S.C. §437g(a)(12). That provision prohibits the agency from making public any information on administrative complaints until the case is resolved. The court imposed a protective seal on October 2, 1987.

Under another provision, however, the Commission must release to the public the results of its inquiries once an enforcement matter is resolved. 2 U.S.C. §437g(a)(4)(B)(i). In its motion to lift the protective seal, the FEC stated that the confidentiality requirements of 437g(a)(12) no longer applied since the agency had since closed the file on the case.

Source: FEC *Record*, March 1989, p. 3.

Common Cause v. FEC, No. 87-2224 (D.D.C. Feb. 8, 1988) (memorandum and order), *dismissed as moot*, (D.D.C. 1989) (unpublished order).

COMMON CAUSE v. FEC (89-0524) FEC v. NATIONAL REPUBLICAN SENATORIAL COMMITTEE (90-2055)

On June 12, 1992, the U.S. Court of Appeals for the District of Columbia Circuit reversed the district court's judgment. The district court had ruled that the National Republican Senatorial Committee (NRSC) had exceeded the contribution limits through its exercise of "direction or control" over earmarked contributions. The court of appeals, however, found that the district court had erred in a previous decision. In that case, *Common Cause v. FEC*, the district court had ordered the FEC to conform to the court's own interpretation of "direction or control."

Background

If a committee, in soliciting earmarked contributions to be passed on to a candidate, exercises "direction or control" over the contributor's choice of the recipient candidate, the contribution counts against both the contributor's limit and the committee's limit. 11 CFR 110.6(d)(2).

In an administrative complaint filed with the Commission (MUR 2282), Common Cause alleged that NRSC had exercised direction or control over the earmarked contributions it had solicited for twelve Senate candidates. As a result, Common Cause claimed, the contributions counted against NRSC's limits for the candidates and caused NRSC to exceed the contribution limits.

NRSC's October 1986 solicitation letter asked readers to support Republican Senate candidates running in four states, without mentioning the names of the candidates. The letter noted that contributions would be divided equally among the four candidates. Various combinations of the four states appeared in different versions of the letter; twelve states were covered in all. Checks were payable to NRSC or an NRSC-controlled fund. The mailing resulted in $2.3 million in contributions. The NRSC deposited the checks in its own accounts, aggregated the contributions to the specified candidates and forwarded the contributions to the candidates in checks drawn on its accounts.

The FEC's General Counsel recommended, *inter alia*, that the agency find probable cause to believe that NRSC had exceeded the contribution limits by exercising direction or control over the choice of recipient candidates. The Commission, in a 3-3 vote, deadlocked with respect to this allegation and therefore took no action. Commissioner Thomas J. Josefiak (who has since left the Commission), joined by Commissioners Aikens and Elliott, issued a statement of reasons supporting their votes against a probable cause finding.

The Commission did find probable cause to believe that NRSC had committed other violations, and the MUR was resolved through a December 1988 conciliation agreement in which NRSC agreed to pay a $20,000 civil penalty. The MUR was then closed.

Common Cause v. FEC

Common Cause asked the court to compel the FEC to act on the "direction or control" allegation. On January 24, 1990, the district court found that the FEC's dismissal of the allegation was contrary to law. Ruling that NRSC had exercised direction or control, the court ordered the agency to proceed on that basis. In compliance with the order, the Commission reopened MUR 2282 and found probable cause. When it failed to reach a conciliation agreement with NRSC on the matter of direction or control, the agency filed suit.

FEC v. NRSC

The new suit was assigned by lot to the same district judge. On April 9, 1991, the district court granted the FEC's motion for summary judgment, ruling that the NRSC had exceeded the contribution limits by exercising direction or control over earmarked contributions. The court imposed a $24,000 penalty.

Court of Appeals Ruling

In addressing the central issue—the interpretation of direction or control—the court cited its decision in *Democratic Congressional Campaign Committee (DCCC) v. FEC*. In that opinion, the court held that, when the FEC dismisses a complaint due to a 3-3 deadlock, the action is subject to judicial review, and the three Commissioners who voted to dismiss must provide a statement of reasons for their vote. The *NRSC* court noted the purpose of this requirement: "Since those Commissioners constitute a controlling group for purposes of the decision, their rationale necessarily states the agency's reasons for acting as it did." A footnote to the DCCC opinion "strongly suggests that, if the meaning of the statute is not clear, a reviewing court should accord deference to the Commission's rationale."

In the present case, the court pointed out that the three Commissioners who had voted against probable cause in MUR 2282 voted in favor of reopening the enforcement proceedings only because they felt they "were obligated to follow the [district] court's order."[1]

The court of appeals found that Commissioner Josefiak's Statement of Reasons in MUR 2282, joined by two other Commissioners, should have been sustained in *Common Cause v. FEC*.[2] The court observed that Commissioner Josefiak's statement "identified the two main factors the Commission's General Counsel, and later the district court, invoked to support a finding of direction or control, and pointed out the present inadequacy of each."

The first factor was that NRSC deposited the earmarked contributions in its accounts before forwarding them to the candidates. Noting that FEC regulations permit a conduit committee to deposit earmarked contributions, the court stated: "Nothing has been offered to reveal why engaging in a Commission-approved practice should cause one to run afoul of other Commission rules."

The second factor was that NRSC "controlled" the choice of candidates by selecting the candidates for whom contributions were solicited and by further selecting the four states mentioned in each fundraising letter. The court, however, observed: "Every solicitation 'pre-selects' candidates to some degree. It is fanciful to suppose that national political committees of any party would expend their resources merely to urge individuals to contribute to the candidate of their choice."

To find "direction or control" on the basis of these two factors, the court said, "would throw into doubt whether any solicitation of *any* earmarked contribution would be exempt from the 'double-counting' requirements of §110.6(d)(2)." However, the court concluded that it was not required to decide if that would be a permissible construction: "It is enough to say that the Commission has not affirmatively adopted such a construction and that it has provided, through the statement of Commissioner Josefiak, joined by two others, a reasoned justification for not doing so." Ruling that "[i]t was an error for the district court to force a different construction upon the Commission," the court reversed the district court judgment.

Source: FEC *Record*, August 1992, p. 11.

Common Cause v. FEC, 729 F. Supp. 148 (D.D.C. 1990).

FEC v. National Republican Senatorial Committee, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶9302 (D.D.C. 1991), ¶9316 (D.C. Cir. 1992).

[1] Statement of Reasons of Commissioners Aikens, Elliott and Josefiak, MUR 2282, December 10, 1990.

[2] Statement of Reasons of Commissioner Josefiak, MUR 2282, January 30, 1989; Concurrence, February 24, 1989.

COMMON CAUSE v. FEC (91-2914)

As stipulated by both parties, the U.S. District Court for the District of Columbia dismissed this case with prejudice on July 31, 1992, without ruling on the issues. The FEC and Common Cause stipulated the dismissal in light of the recent court of appeals decision in *FEC v. National Republican Senatorial Committee* (NRSC). (See *Common Cause v. FEC* (89-0524) on page 36.)

Common Cause had challenged the FEC's dismissal of a complaint alleging that the NRSC had exceeded the contribution limits by exercising "direction or control" over earmarked contributions raised in a 1990 fundraising program. See 11 CFR 110.6(d)(2). However, in the NRSC case, decided on June 12, 1992, the U.S. Court of Appeals for the District of Columbia Circuit held that the NRSC had not exercised direction or control in a somewhat similar fundraising program that took place in 1986.

Source: FEC *Record*, October 1992, p. 11.

COMMON CAUSE v. FEC (92-0249)

On March 3, 1993, the U.S. District Court for the District of Columbia dismissed this suit by agreement of both parties. Common Cause had asked the court to order the FEC to take action on an administrative complaint but agreed to drop its claim because the agency had completed the investigation and entered into conciliation agreements with the respondents. In its administrative complaint, Common Cause had alleged that seven individuals had each exceeded the $25,000 annual limit on aggregate federal contributions.

Source: FEC *Record*, April 1993, p. 10.

COMMON CAUSE v. FEC (92-2538)

On March 30, 1993, the U.S. District Court for the District of Columbia approved an agreement between Common Cause and the FEC to suspend this litigation. In light of that agreement, the court dismissed the suit.

In its suit, Common Cause claimed that the FEC had failed to take required action on its administrative complaint filed in December 1990. The complaint alleged that the National Republican Senatorial Committee (NRSC) had made excessive contributions and expenditures in connection with the 1988 Montana Senate race and had failed to report them accurately. The complaint also alleged that the Montana Republican Party had violated the law by participating in the NRSC's alleged violations.

Common Cause and the FEC agreed to suspend litigation for six months, at the end of which time the FEC was to report on its efforts to resolve the complaint. Under the court's dismissal order, if Common Cause was not satisfied with the Commission's actions on the complaint, the parties would have until October 30 to reopen the litigation.[1]

Source: FEC *Record*, August 1993, p. 5.

[1] The October 30 date was extended.

COMMON CAUSE v. FEC (94-02104)

On March 29, 1996, the U.S. District Court for the District of Columbia ordered the Commission to reconsider portions of two administrative complaints that had been dismissed. Both had been filed in 1990 by Common Cause and John K. Addy.

On March 21, 1997, the U.S. Court of Appeals for the District of Columbia Circuit found that Common Cause lacked standing to litigate certain claims against the Commission, and the court therefore dismissed those claims.

Background

The administrative complaints, designated MURs 3087 and 3204, alleged that the National Republican Senatorial Committee (NRSC) and the Montana Republican Party (MRP) had exceeded their contribution and expenditure limits with respect to Conrad Burns's 1988 U.S. Senate campaign and had failed to disclose all the contributions and expenditures that they had made on behalf of the candidate.

Under the Act: the MRP's contribution limit for the Burns campaign was $5,000 (2 U.S.C. §441a(a)(2)(A)); the NRSC's contribution limit for the Burns campaign was $17,500 (2 U.S.C. §441a(h)); and the NRSC's 1988 coordinated-party-expenditure limit for the Burns campaign was $92,200 (2 U.S.C. §441a(d)).

The FEC's Office of General Counsel investigated the matters alleged in the complaints and found evidence that both committees had erroneously reported certain transactions as transfers, administrative costs or exempt volunteer activities when in fact they were contributions and expenditures made in excess of the Act's limits. Based on this evidence, the General Counsel recommended that the six-member Commission find probable cause to believe that:

- The NRSC and the MRP knowingly and willfully violated the Act when the NRSC transferred funds to the MRP to pay for direct mail materials promoting the Burns campaign;
- The MRP violated the Act when it paid the salary of an MRP employee who worked on the Burns campaign;
- The NRSC violated the Act when it paid for daily polls tracking the progress of the Burns campaign;
- The NRSC violated the Act when it did not charge the Burns campaign for the development of a list of registered voters; and
- The NRSC violated the Act by exercising direction and control over contributions it received in response to a solicitation letter that asked contributors to support Mr. Burns and other Republican candidates, and by not reporting a portion of the solicitation costs as a contribution to the Burns campaign.

At least four of the six FEC Commissioners must approve of an action before the FEC can execute it. Fewer than four FEC Commissioners voted to accept the General Counsel's recommendations. After further deliberations failed to yield a compromise, five of the Commissioners voted to close this case without taking any action. Subsequent to having their administrative complaints dismissed, Common Cause and Mr. Addy filed suit.

District Court Ruling

The court stated that it could only order the FEC to reconsider its dismissal of these MURs if it found that the dismissal was arbitrary or capricious or an abuse of discretion. The court reviewed the reasons for the Commissioners' actions, as articulated in their "statement of reasons." The court found that Commissioners on both sides of most of the issues involved in these MURs presented well reasoned explanations for their differing interpretations of federal election law; the court let the Commission's dismissal of these issues stand. The court, however, did not accept the Commission's reasons for dismissing the following issues.

MRP payments to mailing vendor. Both the NRSC and the MRP had argued that payments for a direct mailing that promoted Mr. Burns's candidacy were not contributions or expenditures on the candidate's behalf. The MRP had argued that these payments fell under the volunteer activities exemption at 2 U.S.C. §431(8)(B)(x) and were therefore not contributions. The court noted that this exemption only applied when the purchased materials were distributed by volunteers and not by commercial vendors. 11 CFR 100.7(b)(15)(iv) and 100.8(b)(16)(iv). The Commissioners who voted against finding probable cause assumed that the MRP used volunteers to distribute these materials, but the MRP never produced any documentation that showed that volunteers were used. The court therefore ordered the FEC to reconsider its dismissal of this charge.

MRP salary payments to Burns campaign worker. MRP employee Ken Knudson was paid a salary by the MRP while he was extensively involved in managing and staffing the Burns campaign. The FEC's General Counsel had determined that the MRP's salary payments to Mr. Knudson constituted contributions to the Burns campaign. The Commissioners who disagreed with this determination reasoned that payments made to field staff who perform a variety of functions for a variety of

persons need not be attributed to any one candidate. They based this reasoning on MUR 3218. The court noted, however, that MUR 3218 states that such salary payments would not constitute a contribution to a candidate's campaign "absent evidence that [a committee's] field staff [were] extensively involved in managing or staffing [a] particular campaign on an ongoing basis . . . ." Since this was precisely what Mr. Knudson had been doing for the Burns campaign, the court found the dismissal of this charge to be arbitrary and capricious and ordered the FEC to reconsider this issue.

Solicitation costs for earmarked contributions. All of the Commissioners agreed that the NRSC had made a contribution to the Burns campaign when it incurred costs associated with the mailing of a letter that encouraged contributors to earmark their contributions to the Burns campaign, among other Republican campaigns. 11 CFR 106.1(c)(1). However, despite this consensus, the Commission failed to take action on this issue because the Commissioners who originally accepted the General Counsel's probable-cause-to-believe finding refused to separate this issue from the less-clear-cut issue of whether the NRSC had exercised direction and control over these earmarked contributions. In their statement of reasons, these Commissioners explained that they were reluctant to separate these issues because doing so would imply that they rejected the General Counsel's direction-and-control analysis. The court noted that the General Counsel's report made separate recommendations with regard to the direction-and-control issue and the solicitation-costs issue. Therefore, the court reasoned, approving one recommendation did not imply rejecting the other. Based on this reasoning, the court found the Commission's dismissal of the solicitation-costs issue to be arbitrary and capricious. The court ordered the FEC to reconsider its dismissal of this issue.

Appeals Court Ruling

The appeals court rejected all three of Common Cause's theories as to why it had standing to litigate the remaining claims.

In order to show standing, a plaintiff must have suffered an injury in fact, or an actual wrong against a legally protected interest, that is traceable to the challenged act and is likely to be redressed by a favorable decision from a court. Organizations may have standing to sue in order to vindicate the rights and immunities it enjoys or, under certain conditions, on behalf of its members. When an organization sues on its own behalf, it must show a concrete injury to its activities with a resulting drain on its resources in order to attain standing. In the case of an organization suing on behalf of its members, the organization must show that its members would otherwise have standing to sue in their own right, that the interests it seeks to protect are germane to the organization's purpose and that neither the claim asserted nor the relief requested requires individual members to participate in the lawsuit.

- *Member Standing*. The court found that Common Cause was unclear on exactly what "political information" was denied its members. However, in the court's view, the nature of the information was crucial to the injury-in-fact analysis. If the information allegedly withheld was simply that a violation of the Act had occurred, then Common Cause's members did not suffer the type of injury that the court had previously held to be sufficient for standing. To allow a plaintiff to establish the required injury in fact in those circumstances, the court concluded, would be "tantamount to recognizing a justiciable interest in the enforcement of the law. This we cannot do."
- *Organizational Standing*. The court also said Common Cause itself did not have standing in this case. It found that the organization was asserting an interest in knowing whether the NRSC and MRP had violated the Act's contribution and expenditure limits. Just as this was an inadequate interest to establish standing when Common Cause asserted it on behalf of its members, it was inadequate to establish Common Cause's own standing. The court stated that, in contrast, if Common Cause had asserted "an interest in knowing how much money a candidate spent in an election, infringement of such an interest may…constitute a legally cognizable injury." While Common Cause also alleged that the NRSC and MRP had violated the Act's reporting requirements, this was a small part of its complaint. Further, Common Cause asked only for an investigation and, if its allegations were proven, monetary penalties against the two Republican committees. The court specifically noted that Common Cause did not ask for any kind of disclosure of the allegedly undisclosed financial information.
- *Dismissal of Complaint*. The court also rejected Common Cause's final argument—that it had standing because the FEC had dismissed its complaint in a manner contrary to law. The organization relied on a section of the law that grants any person who has filed an administrative complaint with the FEC the right to seek review in the U.S. District Court for the District of Columbia if the Commission dismisses that complaint. 2 U.S.C. §437g(a)(8)(A). Based on the U.S. Supreme Court's ruling in *Lujan v. Defenders of Wildlife*,[1] the court said that "absent the ability to demonstrate a 'discrete injury' flowing from the alleged violation of FECA, Common Cause cannot establish standing merely by asserting that the FEC failed to process its complaint in accordance with law." Section 437g(a)(8)(A), the court explained, "does not confer standing; it confers a right to sue upon parties who otherwise already have standing." Because

Common Cause did not demonstrate an injury as a result of the alleged violations of the Act, it could not assert standing under this provision.

Source: FEC *Record*, May 1996, p. 5; May 1997, p. 4.

Common Cause v. FEC, 108 F.3d 413 (D.C. Cir. 1997).

[1] *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

COMMON CAUSE v. SCHMITT FEC v. AMERICANS FOR CHANGE[1]

On July 1, 1980, Common Cause filed suit against Americans for Change and several of its officers in the U.S. District Court for the District of Columbia. Common Cause alleged that defendants had made (or were about to make) independent and coordinated expenditures in violation of 26 U.S.C. §9012(f), which prohibits unauthorized political committees from making expenditures of more than $1,000 on behalf of a publicly funded Presidential candidate. Common Cause asked the court to uphold the constitutionality of Section 9012(f) as applied to defendants' alleged expenditures.

On July 11, the Commission was allowed to intervene in the Common Cause suit and moved to dismiss the action on the grounds that the Commission had exclusive jurisdiction over civil enforcement of the alleged violations and that Common Cause lacked standing to bring suit. Four days later, the Commission filed suit, alleging that the defendant political committees (which claimed to be independent of candidate Reagan's campaign) planned to spend large sums in support of the Republican Presidential candidate's general election campaign. The FEC also asked the court to uphold the constitutionality of 9012(f) as applied to defendants' expenditures. On September 24, 1980, the district court consolidated the two suits for argument before the court.

FEC's Argument

In the motion it filed for summary judgment, the FEC rejected the defendants' argument that the Supreme Court's decision in *Buckley v. Valeo* invalidated Section 9012(f). The FEC pointed out that the constitutional protection accorded political communications is not the same in every context. Citing the Supreme Court's rulings on the public funding program in *Buckley v. Valeo* (424 U.S. 1, 96, 99 and 101 (1976)) and in *Republican National Committee v. FEC*, the FEC maintained that the Court had confirmed the governmental interest served by the contribution and expenditure limits contained in the Presidential public funding program. The FEC argued that, in a similar vein, Section 9012(f) closed off "...the only major avenue by which enormous amounts of aggregate wealth and private financing could be interjected into a scheme designed to encompass only public funding, while avoiding any direct and substantial infringement of protected rights by permitting individuals independent expenditures and by limiting its [Section 9012(f)'s] reach to only those campaigns where candidates have chosen public financing as an alternative to private funding." The FEC maintained that if the defendant committees' "...stated intentions [came] to fruition, namely to raise and expend on behalf of the general election campaign an amount approximately double that

which Mr. Reagan and Mr. Bush have accepted in public financing, the Congressional purpose in enacting this legislation would clearly be subverted, with the taxpayer left footing the bill."

The FEC noted that the legislative history demonstrates that Congress was principally concerned with ensuring the effectiveness of the overall limitations imposed upon those candidates accepting public funding. As stated by Senator Taft in support of his amendment to limit committee expenditures, Section 9012(f)'s purpose was "...to prevent any political committees from being formed as a subterfuge so that they can go beyond the authorization of the committees and make expenditures that were not within the limitations of the expenditures which are in the bill."

The FEC further argued that the limited restrictions of Section 9012(f) were constitutional as applied to defendants "...because public funding of a general election presidential campaign is an option which is chosen by candidates in place of unlimited private funding." Additionally, the provision did not abridge free speech rights because "...the transformation of [political committee member] contributions into political debate involves speech by someone other than the contributor (*Buckley v. Valeo*, 424, U.S. at 21), thereby removing political committee expenditures from the core of individual political expression." (See *California Medical Association v. FEC*, Opinion at 9 n. 5, 10, 15; *Mott v. FEC*, Opinion at 7.)

Defendant Committees' Argument

In their motion for summary judgment in the suit, defendants argued that the independent expenditures in question were a form of free speech and, as such, were protected by the First Amendment. They contended that, in its *Buckley v. Valeo* decision (424 U.S. 1 (1976)), the Supreme Court had held that statutory limits on the amounts which individual citizens or groups could spend on independent communications in political campaigns were an impermissible restraint on First Amendment freedoms. Defendants argued, therefore, that Section 9012(f) could be interpreted as prohibiting only coordinated expenditures authorized or requested by a candidate.

District Court Decision

In its opinion of August 28, 1980, the court ruled on the claims made by the FEC and Common Cause in the consolidated suits. In its rulings on the FEC's claims, the three-judge court determined that Section 9012(f) did apply to defendants' activities. The court concluded, however, that the defendants' proposed expenditures constituted "independent expenditures" which, under *Buckley v. Valeo*, could not be limited. The court said, "The compelling governmental interest to fight electoral corruption is insufficient, here, as in Buckley, to justify what amounts to a direct limitation on political speech.... Whereas a Presidential candidate, by accepting public funds, may choose...to do without unlimited contributions and expenditures, the candidate's public supporters have a separate, protected right to express themselves, individually or jointly. This preserves free access and full participation in the public debate."

Since it had ruled on the constitutionality of Section 9012(f) in the FEC's suit, the court dismissed that portion of Common Cause's suit (Count I) as moot. The court also dismissed Count II of the Common Cause suit, which had sought enforcement of provisions of the Act allegedly violated by defendants. The court stated that the Commission had been vested by Congress with exclusive jurisdiction over enforcement of the Act. The court did not, however, rule on Common Cause's standing to bring suit.

Supreme Court Hearing

On February 23, 1981, the Supreme Court agreed to consolidate the cases of *FEC v. Americans for Change, Americans for an Effective Presidency and Fund for a Conservative Majority* (Civil Action No. 80-1754) and *Common Cause v. Harrison Schmitt* (Civil Action No. 80-1609).

On January 19, 1982, the Supreme Court, in a 4 to 4 split vote, left standing the earlier decision by the district court. (U.S. Supreme Court Nos. 80-1067 and 80-847)

Source: FEC *Record*, April 1981, p. 8; and March 1982, p. 1.

Common Cause v. Schmitt, 512 F. Supp. 489 (D.D.C. 1980) (three-judge court), *aff'd by an equally divided court*, 455 U.S. 129 (1982), *petition for further relief denied*, (D.D.C. Oct. 19, 1983) (three-judge court) (unpublished opinion).

[1] See also *Fund for a Conservative Majority v. FEC* and *FEC v. National Conservative Political Action Committee* (83-2823).

COMMON CAUSE AND DEMOCRACY 21 v. FEC

On November 21, 2001, Common Cause and Democracy 21 (the plaintiffs), both nonprofit public interest organizations, asked the U.S. District Court for the District of Columbia to find that the Commission acted contrary to law when it dismissed the plaintiffs' administrative complaint, filed April 4, 2000. The administrative complaint alleged that, during the 2000 election, joint fundraising efforts by authorized Senate campaign committees and national and state party committees resulted in violations of the Federal Election Campaign Act (the Act). On September 25, 2001, the Commission dismissed the administrative complaint.

Background. Under Commission regulations, political committees, such as authorized candidate committees and party committees, may engage in joint fundraising efforts and may form a committee to act as a joint fundraising representative. 11 CFR 102.17(a). If any participant in the joint fundraiser can lawfully accept nonfederal funds (soft money), then the joint fundraising representative can accept nonfederal funds. 11 CFR 102.17(c)(3) and 2 U.S.C. §§441a, b, c, e, f and g. However, only federal funds—contributions that comply with the Act's limits and prohibitions—may be used to influence a federal election. Party committees may make coordinated expenditures on behalf of their federal candidates, so long as only federal funds are used and the expenditures do not exceed the coordinated party expenditure limits. 2 U.S.C. §441a(d).

Administrative Complaint. In their April 2000 administrative complaint, the plaintiffs alleged that during the 2000 federal elections a number of campaign committees and party committees were using nonfederal funds raised through joint fundraising activities to make expenditures that violated the Act. The plaintiffs alleged that during the 2000 New York Senatorial race, the Democratic Senatorial Campaign Committee (DSCC), the New York State Democratic Committee (NYSDC) and Senator Hillary Clinton's campaign committee (Clinton Committee) created a joint fundraising representative that raised funds for the committees. The plaintiffs claimed that the DSCC and the NYSDC used joint fundraising funds, including nonfederal funds, to purchase television advertisements that were intended to promote Senator Clinton's election and that may have constituted coordinated party expenditures because they appeared to have been coordinated with the Clinton committee. According to the complaint, donors who gave money to the joint fundraising representative understood that their donations would be used to support Senator Clinton's campaign. The plaintiffs asserted that the DSCC transferred funds that under the Act could not be allocated to the Clinton Committee to the NYSDC, which then purchased the ads. Thus, the administrative complaint alleged that the committees violated the Act's contribution limits and its prohibitions on corporate and labor union contributions. 2 U.S.C. §§441a and 441b.

Court Complaint

In their November 2001 court complaint, the plaintiffs repeated the above allegations concerning the 2000 New York Senate race. The court complaint further alleged that these expenditures, when aggregated with the parties' other expenditures, exceeded the Act's coordinated party expenditure limits and were not properly reported to the Commission.

As a result, the complaint alleged, the Clinton Committee, the DSCC and the NYSDC violated the Act by:

- Accepting contributions in excess of the individual contribution limits and in violation of the prohibitions on contributions from corporations and labor organizations (2 U.S.C. §§441a and 441b(a));
- Accepting or expending funds in excess of the coordinated party expenditure limits (2 U.S.C. §§441a(d) and 441a(f)); and
- Failing to report contributions and expenditures used to influence a federal election (2 U.S.C. §434(b)).

Additionally, the complaint alleged that the DSCC exceeded the Act's limit on national committee contributions to Senate candidates and that the DSCC and the NYSDC exceeded limits on political committee contributions to candidates and their authorized committees. 2 U.S.C. §§441a(h) and 441a(a).

In their complaint, the plaintiffs also asserted that other committees involved in joint fundraising for the 2000 elections had committed similar violations, including Democratic committees in Michigan supporting Senator Stabenow and Republican committees in Missouri supporting then-Senator Aschcroft.

Relief

The plaintiffs claim that the Commission failed to provide a reasoned basis for its decision to dismiss their administrative complaint and that the dismissal was erroneous. The plaintiffs ask the court to declare that the Commission's dismissal of the administrative complaint was arbitrary and capricious and contrary to law under the Act.

Source: FEC *Record*, February 2002, p. 4.

CONDON v. USA

On March 26, 1996, the parties in this case agreed to a voluntary dismissal by the U.S. Court of Appeals for the Fourth Circuit. The plaintiff in the case, South Carolina Attorney General Charles Condon, had asked the court to declare that the National Voter Registration Act (NVRA) was an unfunded federal mandate that was unconstitutional. The FEC was named in this suit as one of the defendants.

Mr. Condon had alleged that the NVRA violated the Tenth Amendment, which states that powers not delegated to the federal government and not prohibited to the state by the Constitution are reserved to the states.

Source: FEC *Record*, December 1997, p. 7.

CUNNINGHAM v. FEC

On June 22, 2001, the Robert W. Rock for Congress Committee (the Committee) and its treasurer, Jeremiah T. Cunningham, filed suit against the Federal Election Commission in the U.S. District Court for the Southern District of Indiana, Indianapolis Division. The complaint appealed a civil money penalty the Commission assessed against the committee and its treasurer, and claimed that the Commission's assessment of that penalty was erroneous, excessive and not warranted.

Mr. Cunningham alleged that, on December 12, 2000, he mailed to the Commission the Committee's 2000 30-Day Post General Report, which was due December 7, 2000. Mr. Cunningham maintains that in mid-January he noticed the Committee's report was not posted on the Commission's web site, and that he then sent an additional copy of the report to the Commission. The Commission received that report on February 6, 2001.

In March 2000, the Commission found reason to believe that the Committee and Mr. Cunningham had violated 2 U.S.C. §434(a), which requires the timely filing of reports by political committees. The Commission sent Mr. Cunningham and the Committee a "reason to believe" notice, which included a civil money penalty, assessed under the administrative fine regulations, of $4,500 for failing to file the report. 11 CFR 111.43. The notice informed Mr. Cunningham and the Committee that they had 40 days to either pay the civil money penalty or challenge the Commission's finding. Mr. Cunningham claims that he did not receive the notice because he ceased to receive mail at the address he had given the Commission.

In May 2001, the Commission made a final determination that the Committee and Mr. Cunningham violated 2 U.S.C. §434(a) and assessed a $4,500 civil money penalty for the violation. Plaintiffs filed suit against the Commission on June 22, 2001.

The plaintiffs asked that the court set aside or modify the determination and civil money penalty imposed by the Commission.

Source: FEC *Record*, August 2001, p. 4.

DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE v. FEC (84-3352)

On November 2, 1984, the U.S. District Court for the District of Columbia issued an order denying plaintiff's motion for a preliminary injunction in *Democratic Congressional Campaign Committee v. FEC* (Civil Action No. 84-3352).

Background

In its suit, filed on November 2, 1984, the Democratic Congressional Campaign Committee (the Committee) had sought action against the FEC for the agency's failure to expedite action on an administrative complaint the Committee had filed on October 22, 1984. In light of the November 6 general election, the Committee's administrative complaint had asked the FEC to initiate expedited enforcement proceedings against the Republican National Committee and the National Republican Congressional Committee for their alleged violations of the election law. In its civil complaint, the Committee asked the court to enter a permanent injunction directing the Commission to institute expedited enforcement proceedings concerning the violations of the election law alleged in the Committee's complaint. The Committee also asked the court to establish and announce the compliance standards no later than 5:00 p.m. on November 2, 1984.

In addition, the Committee sought a preliminary injunction ordering the Commission to give expedited consideration to the Committee's administrative complaint and to announce its determination on that complaint no later than 5:00 p.m. on November 2, 1984.

District Court Ruling

On November 2, 1984, the district court denied the Committee's motion for a preliminary injunction. The court concluded that it lacked jurisdiction to require the Commission to make an expedited decision on the Committee's administrative complaint because 120 days had not yet elapsed since the Committee had filed the complaint with the FEC. See 2 U.S.C. §437g(a)(8)(A). In addition, the court stated that it clearly lacked authority to direct the Commission to shorten the time period set forth in the Act's enforcement provisions because Congress had given that authority to the Commission's discretion.

Appeal

The Committee filed an appeal with the U.S. Court of Appeals for the District of Columbia Circuit but later asked the court to dismiss it. On December 14, 1984, the court granted the Committee's motion and dismissed the appeal.

Source: FEC *Record*, December 1984, p. 3; and February 1985, p. 6.

DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE v. FEC (86-2075)

On October 3, 1986, the U.S. District Court for the District of Columbia declared that the FEC's dismissal of an administrative complaint filed with the agency by the Democratic Congressional Campaign Committee was contrary to law. (*Democratic Congressional Campaign Committee v. FEC*; Civil Action No. 86-2075.) Pursuant to 2 U.S.C. Section 437g(a)(8)(C), the court directed the FEC to conform with its declaration within 30 days.

On October 23, 1987, the U.S. Court of Appeals for the District of Columbia Circuit issued an opinion which partially affirmed the district court decision. The appeals court affirmed the ruling that the FEC's dismissal of an administrative complaint resulting from a deadlock vote was subject to judicial review. However, since the appeals court lacked a Commission explanation for the dismissal, it rejected the district court's finding that the dismissal was contrary to law. Instead, the court remanded the suit to the district court with instructions that the district court, in turn, remand the suit to the Commissioners for an explanation of why they voted to dismiss the complaint.

Background

The Democratic Congressional Campaign Committee (DCCC), a national committee of the Democratic Party, filed its administrative complaint with the FEC on December 20, 1985. DCCC alleged that its Republican counterpart, the National Republican Congressional Committee (NRCC), violated the election law by failing to allocate $10,000 to NRCC's coordinated party spending limits for the reelection of Congressman Fernand St Germain in Rhode Island.[1] NRCC made the expenditures for mailings during 1985, which allegedly benefited the Republican House candidate in Rhode Island's First Congressional District. (Although the mailings were officially sponsored by the Rhode Island Citizens Group, NRCC did not deny that it had actually prepared and paid for the mailings.)

The mailings encouraged recipients to petition the House Ethics Committee to investigate newspaper charges that "Cong. St Germain had amassed a multi-million dollar personal fortune by using his public position to help wealthy investors." (Congressman St Germain was the Republican candidate's opponent for the Rhode Island House seat.)

The General Counsel recommended the Commission find reason to believe that the NRCC had violated the election law by failing to allocate and report the mailing expenses as coordinated party expenditures. However, on June 5, 1986, a majority of the Commissioners failed to find "reason to believe" the NRCC had violated the election law. Subsequently, by a unanimous vote, the Commissioners closed the file on the complaint.

Court Ruling

Initially the court noted that, even though the Commissioners' dismissal of the complaint had resulted from their failure to obtain the votes required to find reason to believe the election law had been violated, the DCCC still had "the right [under the statute] to seek review of an adverse outcome."

On reviewing the DCCC's administrative complaint, the court found that the mailing addressed in FEC Advisory Opinion 1985-14 and those conducted by the NRCC in Rhode Island were similar. They both: "(1) were prepared by a national committee of a political party, (2) identified by name a specific Congressman of the opposing party, (3) criticized the record of the Congressman, and (4) were distributed to the constituents of the Congressman in question."

Furthermore, the court noted that "...[T]he Counsel found that the mailer's statement about ridding the government of corruption 'is a reference to an election in that one way to remove Congressman St Germain would be to vote him out of office.'"

The court therefore concluded that the "NRCC mailer conveys an 'electioneering message' as defined by the FEC's own advisory opinions and as interpreted by its General Counsel. Thus the FEC's dismissal of the plaintiff's complaint was 'contrary to law.'"

FEC Appeal

On July 16, 1987, the FEC filed an appeal of the district court's decision with the U.S. Court of Appeals for the District of Columbia Circuit (No. 86-5661). The FEC argued that "authoritative legislative history... demonstrate[d] that Section 437g(a)(8) [of the election law] was not intended to authorize judicial review" of the agency's dismissal of an administrative complaint which results from a deadlock vote on the merits of the complaint.[2] Moreover, the FEC contended that "...even apart from the controlling legislative history of Section 437g(a)(8), the courts have traditionally found agency deadlocks that do not resolve substantive issues to be inappropriate for judicial review." The FEC further argued that the district court should not have ruled on the merits of DCCC's administrative complaint but should have limited its role to determining whether the FEC's dismissal of the complaint "could be rationally justified." The FEC claimed that "the district court's failure to limit its review to this narrow question [ran] afoul of Congress' expressed intent not to 'work a transfer of prosecutorial discretion from the Commission to the courts...' and was therefore erroneous."

Appeals Court Ruling

The appeals court concurred with the district court's finding that the FEC's dismissal of the complaint in this case was subject to judicial review, but it rejected the lower court's ruling that the FEC's dismissal of the complaint was contrary to law.

The court found that "because Section 437g(a)(8)(A) provides broadly for court review of an FEC order dismissing a complaint...we resist confining the judicial check to cases in which... the Commission 'act[s] on the merits.'" The court further noted that the explanation of the provision in the legislative history occurred three years after Congress originally enacted the provision. However, the court limited its decision to the narrow circumstances presented in the case, "specifically a general counsel recommendation to pursue the complaint in fidelity to FEC precedent in point."

Furthermore, the appeals court did not agree with the district court's resolution of the merits of DCCC's administrative complaint. "Because we have no explanation why three Commissioners rejected or failed to follow the General Counsel's recommendation, we are unable to say whether reason or caprice determined the dismissal of DCCC's complaint," the court said. The court therefore held that "the Commission or the individual Commissioners should first be afforded an opportunity to say why DCCC's complaint was dismissed in spite of the FEC's General Counsel's recommendation." The case was remanded to the district court.

Source: FEC *Record*, July 1985, p. 6; November 1986, p. 4; and December 1987, p. 5.

Democratic Congressional Campaign Committee v. FEC, 645 F. Supp. 169 (D.D.C. 1986), *aff'd in part and remanded,* 831 F.2d 1131 (D.C. Cir. 1987).

[1] Coordinated party expenditures are limited expenditures which may be made by party committees on behalf of federal candidates in general election campaigns. During 1986, based on the cost of living adjustment, a national party committee could spend up to $21,810 for each of its House candidates in Rhode Island. 2 U.S.C. §441a(d).

[2] "[I]f the Commission considers a case and is evenly divided as to whether to proceed, that division...is not subject to review anymore than a similar prosecutoral decision by a U.S attorney." See legislative history of 2 U.S.C. §437g(a)(8)(A) at 125 *Cong. Rec.* 36,754 (1979) (emphasis added), reprinted in FEC, *Legislative History of the FECA Amendments of 1979*, at 549.

DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE v. FEC (96-0764)

On November 18, 1996, the U.S. District Court for the District of Columbia dismissed this case. The Democratic Congressional Campaign Committee (DCCC) had voluntarily requested such action.

Originally, the DCCC had asked the court to require the FEC to take action on an administrative complaint it filed with the agency on November 4, 1994, alleging violations of the Federal Election Campaign Act (the Act) by Grant Lally, a Congressional candidate from New York.

The Act allows a complainant to file a lawsuit against the FEC if the agency fails to take action on his or her administrative complaint within 120 days after it is filed. 2 U.S.C. §437g(a)(8)(A). The DCCC filed suit on April 23, 1996, after more than 120 days had elapsed.

In its original complaint, the DCCC alleged that Mr. Lally, who was vying to represent the fifth district, received substantial, undisclosed contributions in violation of the limits of the Act. 2 U.S.C. §441a. The DCCC alleged that the money was in excess of $300,000. Mr. Lally said the money was "personal funds" lent to the campaign. The DCCC filed a supplemental complaint in 1995 alleging that Mr. Lally had continued to violate the Act.

Source: FEC *Record*, January 1997, p. 4.

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE v. FEC (80-2074)
NATIONAL REPUBLICAN SENATORIAL COMMITTEE v. DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE

In an administrative complaint, filed May 9, 1980, DSCC alleged that NRSC had violated the Act by making special "coordinated" expenditures (2 U.S.C. §441a(d)(3)) as an agent for certain state Republican Party committees. Based on written agreements with the state party committees, the NRSC had made the expenditures to support the general election campaigns of various Senatorial candidates in 1978. NRSC's expenditures were within the limits prescribed by §441a(d)(3) for special party expenditures that a state party committee may make on behalf of its Senate candidate (i.e., $20,000 or 2 cents multiplied by the voting age population of the state). On July 11, 1980, the Commission unanimously determined that there was "no reason to believe" that NRSC had violated the Act. This action was consistent with Commission determinations in prior enforcement actions.

District Court Ruling

In a petition filed with the U.S. District Court for the District of Columbia on July 30, 1980 (*Democratic Senatorial Campaign Committee v. FEC*, Civil Action No. 80-1903), DSCC sought a declaration from the court that the FEC's determination was contrary to law and an order directing the Commission to comply with the declaration within 30 days. On August 28, 1980, the district court, ruling on cross-motions for summary judgment, denied the DSCC's petition and affirmed the Commission's determination and interpretation of §441a(d)(3), concluding that the dismissal of DSCC's complaint was not arbitrary, capricious, an abuse of discretion or otherwise contrary to law.

Appeals Court Ruling

DSCC appealed the district court's order on September 3, 1980 (No. 80-2074). On October 9, 1980, in a *per curiam* opinion, the appeals court reversed the district court's judgment and declared the Commission's determination contrary to law. Finding that the Commission had presented no reasoned explanation for its determination on the administrative complaint, the court decided the issue *de novo*. The court determined that neither the language of the statute nor its legislative history could support the Commission's interpretation of §441a(d)(3), i.e., that Congress had not intended to prohibit intraparty agency agreements, such as those used by the Republican Party committees. Accordingly, the appeals court held that, in the absence of an explicit statutory authorization, the agreements between NRSC and the state Republican Party committees violated Section 441a(d)(3). It issued a mandate directing the Commission to conform with its decision.

On October 10, 1980, while the Commission was attempting to comply with the court's decision, intervenor NRSC filed an application to recall the mandate and a petition for an *en banc* rehearing of the case. The appeals court denied both motions on October 11, 1980. Then, in response to a request from NRSC, the Chief Justice of the Supreme Court issued a stay of the appeals court's judgment, pending the Court's decision on NRSC's petition for a writ of certiorari.

Supreme Court Ruling

On March 2, 1981, the Supreme Court granted the Commission's petition for a writ of certiorari in *FEC v. Democratic Senatorial Campaign Committee* (Civil Action No. 80-939). The Court also granted a petition for a writ of certiorari filed by the National Republican Senatorial Committee (*National Republican Senatorial Committee v. Democratic Senatorial Campaign Committee*, Civil Action No. 80-1129) and consolidated the cases for oral argument.

In a brief filed with the Supreme Court on April 16, 1981, the Commission argued that its decision to dismiss DSCC's administrative complaint was based on a reasonable interpretation of the Act and should be affirmed. The Commission contended that, by substituting its judgment for that of the FEC, the appeals court had interfered with the Commission's exclusive role as the expert body established by Congress to administer, enforce and interpret the Act. Moreover, in reversing the FEC's consistent construction of Section 441a(d)(3), the appeals court had ignored precedent in the District of Columbia circuit, which gave judicial deference to the Commission's interpretations of the Act. The Commission also asserted that the appeals court's decision required it to develop a new rule of law or statutory interpretation in the context of an enforcement proceeding. This requirement was contrary to the statutory mandate that such rules and interpretations be made through advisory opinions and rulemaking.

Furthermore, the Commission argued that its interpretation of 2 U.S.C. §441a(d)(3) was not contrary to law Rather, the Commission's interpretation was consistent with statutory language, Commission regulations and advisory opinions and legislative history. A contrary interpretation would conflict with the clear Congressional intent to encourage a close working relationship among the various party committees. For example, under the Act, funds may be transferred without limit between political committees of the same party.
2 U.S.C. §441a(a)(4)The Commission asserted that

Congress recognized the Act did not prohibit such intraparty arrangements when it rejected an amendment to the Act that would have prohibited NRSC from transferring funds to the state party committees for the purpose of making §441a(d) expenditures. The Commission therefore argued that its interpretation of §441a(d)(3) was entitled to deference by the appeals court.

On November 10, 1981, the Supreme Court issued an opinion reversing the appeals court decision. The Supreme Court's opinion affirmed the Commission's construction of §441a(d)(3) as a "sufficiently reasonable" one. The Court found that the district court had been "correct" in according deference to the Commission's interpretation.[1] The Court held that "Section 441a(d)(3) does not expressly or by necessary implication foreclose the use of agency arrangements, such as are at issue here, and the FEC thus acted within the authority invested in it by Congress when it determined to permit such agreements.... While §441a(d)(3) does not authorize the NRSC to make expenditures in its own right, it does not follow that it may not act as agent of a Committee that is expressly authorized to make expenditures." The Court further held that "the FEC's view that the agency agreements were logically consistent with §441a(4)—which authorizes the transfer of funds among national, state, and local committees of the same party—is acceptable."

Source: FEC *Record*, August 1981, p. 2; and January 1982, p. 6.

Democratic Senatorial Campaign Committee v. FEC, 660 F.2d 773 (1980 D.C. Cir.), *rev'd* 454 U.S. 27 (1981), *on remand*, 673 F.2d 551 (1982).

[1] Moreover, the Court did not take issue with the fact that the FEC's dismissal of the complaint was based solely on the General Counsel's Report.

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE v. FEC (90-1504)

On August 27, 1990, the U.S. District Court for the District of Columbia granted the FEC's motion for summary judgment, ruling that the agency did not act contrary to law when it dismissed a portion of an administrative complaint filed by the Democratic Senatorial Campaign Committee (DSCC). (Civil Action No. 90-1504.)

Background

In its administrative complaint (MUR 2766), DSCC alleged that $325,000 in media expenditures made by the Auto Dealers and Drivers for Free Trade Political Action Committee (Auto Dealers PAC) in support of 1988 Florida Senate candidate Connie Mack were not independent and thus violated the PAC's $5,000 contribution limit for a candidate under 2 U.S.C. §441a(a)(2)(A). DSCC contended that, because the Auto Dealers PAC and the Mack campaign (Friends of Connie Mack) both used the services of two key campaign consultants, the independence of the PAC's expenditures was compromised, resulting in excessive contributions by the PAC. The consultants, two media firms, provided services to the Mack campaign in Florida and to the Auto Dealers PAC for expenditures in other states.

The PAC denied using either media firm in connection with the Florida Senate race, identifying a third firm as its media consultant for Florida. The PAC's director explained in an affidavit that, when the presidents of the two media firms disclosed that they were retained by the Mack campaign, he told them "not to say anything at all" about the Florida race to anyone associated with the PAC. The PAC submitted affidavits by the two presidents consistent with the PAC director's affidavit. The Mack campaign also denied any consultation or coordination with the PAC and provided supporting affidavits.

The FEC's General Counsel recommended that the Commission authorize an investigation of the matter because of "unanswered questions." However, the Commission, by a vote of 3-2 (and one abstention), failed to find "reason to believe" that a violation had occurred with respect to the independent expenditure portion of the complaint, thereby dismissing that portion.[1] (The Commission did find reason to believe that the Mack campaign had failed to comply with the 48-hour notice requirement for last-minute contributions and later entered into a conciliation agreement with the campaign with respect to that violation.)

On June 26, 1990, DSCC filed suit seeking summary judgment that the FEC had acted contrary to law in dismissing DSCC's allegation of coordination between the Auto Dealers PAC and the Mack campaign with respect to the PAC's independent expenditures.

Court Decision

The court found that the Commission's decision to dismiss the independent expenditure allegation was not contrary to law, given the "totality of the circumstances" of the case.

DSCC had argued that the "totality of the circumstances" compelled an investigation to determine whether the PAC's expenditures were independent. These circumstances included: (1) the two common consultants used by the Auto Dealers PAC and the Mack campaign; (2) the General Counsel's recommendation to find "reason to believe" and authorize an investigation; and (3) the affidavits submitted by the PAC and the Mack campaign, which DSCC claimed raised substantial questions. The court, however, was not persuaded by DSCC's arguments.

With respect to the common consultants, the court found that "there was no reason to presume 'coordination' as the consultants were retained by the PAC to work on elections only outside the state of Florida."

The court also found that the Commission's decision not to follow the General Counsel's recommendation was not unreasonable. Citing Commissioner Josefiak's Supporting Memorandum for the Statement of Reasons, the court stated: "In refusing to order an investigation, the Commission applied a minimum evidentiary threshold that required at least 'some legally significant facts' to distinguish the circumstances from every other independent expenditure....[O]therwise every 'independent expenditure' complaint would demand investigation." The court said that "the only record of fact offered in support of DSCC's allegations was the use of 'common consultants.'" In the court's view, however, the affidavits suggested that "the Florida Auto Dealers PAC built a 'Chinese Wall' between itself and the two Mack consultants."

With regard to the affidavits, the court found it "entirely reasonable to read [them] as precluding, rather than raising, an inference of coordination."

Accordingly, the court entered summary judgment in favor of the FEC and against DSCC.

Source: FEC *Record*, October 1990, p. 8.

Democratic Senatorial Campaign Committee v. FEC, 745 F. Supp. 742 (D.D.C. 1990).

[1] Four affirmative votes are necessary to find "reason to believe."

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE v. FEC (93-1321)

On November 14, 1994, the U.S. District Court for the District of Columbia ordered the FEC to vacate its dismissal of the Democratic Senatorial Campaign Committee's (DSCC's) complaint against the National Republican Senatorial Committee (NRSC) with respect to excessive contributions made in the 1992 Georgia U.S. Senate race. The court based this judgment on FEC regulations defining general and runoff elections. 11 CFR 100.2(b) and (d).

Background

A general election was held in Georgia on November 3, 1992, in which none of the candidates for U.S. Senate won a majority. Under Georgia law, when an election for U.S. Senator fails to produce a majority winner, a second election must be held between the top two vote getters. Such an election was held on November 24, 1992.

Under the federal election law, the DSCC and the NRSC were each permitted to spend up to $535,608 on behalf of their party nominee in the 1992 Georgia general election for U.S. Senate. 2 U.S.C. §441a(d). The NRSC had exhausted this spending authority by November 3, while the DSCC had not. Subsequently, the NRSC requested an advisory opinion from the FEC as to whether to classify the November 24 election as a second general election or as a runoff. The NRSC would be legally entitled to a new $535,608 spending authority if the election were deemed a general election, but not if it were deemed a runoff election. Since the Commission split 3-3 [1]on how to classify the November 24 election, no advisory opinion was issued. The NRSC then proceeded to spend nearly the full amount permitted for a general election in support of its candidate for the November 24 election. The DSCC, on the other hand, limited its expenditures to the balance which remained from the original §441a(d) allowance.

The DSCC filed a complaint with the FEC on November 19, alleging that the NRSC had violated federal election law by exceeding its §441a(d) spending limit in this race. The Commission split 3-3 on whether or not to initiate an investigation and then dismissed the DSCC's complaint. The DSCC then brought this case before the court.

Court's Ruling

Based on its interpretation of FEC regulations, the court concluded that the November 24 election was not a general election. It reasoned that the election could not qualify as a general election because it was not held on the Tuesday following the first Monday in November in

an even numbered year, nor was it designed to fill a vacancy, thus failing to meet either of the criteria for a general election. 11 CFR 100.2(b).

The court further reasoned that the November 24 election fit the definition of a runoff election because it was held after a general election and it was prescribed by applicable state law as the means for deciding which candidate was the winner. 11 CFR 100.2(d).

The court disagreed with the argument that the November 24 election could be both a general and a runoff election. The court observed that the regulations do not state that a runoff election can also be a general election, whereas, in defining other types of elections, the regulations clearly state where overlap is possible.

The court ordered the FEC to initiate appropriate enforcement proceedings against the NRSC.

Source: FEC *Record*, January 1995, p. 10.

Democratic Senatorial Campaign Committee v. FEC, No. 93-1321 (HHG) (D.D.C. Nov. 14, 1994).

[1] Four votes (out of six) are required to adopt advisory opinions and to take action in compliance matters. 11 CFR 112.4(a).

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE v. FEC (95-0349)

On April 17, 1996, the U.S. District Court for the District of Columbia ruled that the FEC acted contrary to law when it allowed nearly 600 days to pass without taking any meaningful action on an administrative complaint filed by the Democratic Senatorial Campaign Committee (DSCC). Under 2 U.S.C. §437g(a)(8)(A), anyone who files a complaint with the FEC may seek court intervention if the FEC fails to complete action on the complaint within 120 days.

The DSCC filed the complaint on May 14, 1993. In the complaint, the DSCC alleged, among other things, that the National Republican Senatorial Committee had violated the law by making illegal "soft money" contributions to influence the 1992 Senate elections—particularly the runoff in Georgia.

On February 22, 1995, the DSCC filed this suit claiming that the FEC's failure to complete action was arbitrary and capricious.

The court reasoned that while FEC decisions concerning whether to conduct an investigation were entitled to judicial deference, the agency's failure to consider a complaint for nearly 600 days was subject to judicial review. The court examined whether the FEC had acted reasonably in allowing nearly 600 days to pass before taking action on the DSCC's complaint.

The criteria the court used to review the FEC's inaction are outlined in *Rose v. FEC* (1984) and *Telecommunications Research & Action Center v. FCC* (1984); they are:

- The credibility of the allegation;
- The nature of the threat posed;
- The resources and information available to the agency;
- The novelty of the issues involved;
- The time it takes for the agency to make decisions;
- Whether Congress mandated a timetable for the agency to take action on such matters as the one at hand;
- The nature of the matter (for instance, delayed agency action on matters affecting human health and welfare are less tolerable than those in the sphere of economic regulation);
- The effect that court-ordered expedited action on the matter would have on agency activities of a higher or competing priority;
- The nature and extent of the interest prejudiced by the agency's delay in acting on the matter; and
- The fact that the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'"

Based on its analysis of the factors listed above, the court ruled that the FEC's failure to consider the DSCC's complaint for nearly 600 days was contrary to law. The court noted, however, that while this litigation was pending, the FEC had moved forward with respect to the DSCC's complaint. The court warned that should the FEC stall on this matter again, "the need for additional judicial intervention may well be compelling."

Source: FEC *Record*, July 1996, p. 5.

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE v. FEC (96-2109)

On October 9, 1996, the U.S. District Court for the District of Columbia dismissed this case in an expedited decision prompted by the nearness of the November general election. The court said that it could not rule on how party committees may make expenditures that are "independent" because the FEC has not yet addressed the issue in a rulemaking or an advisory opinion.

The Democratic Senatorial Campaign Committee (DSCC) and the Democratic Congressional Campaign Committee (DCCC) wanted the court to rule that their proposed expenditures qualified as "independent expenditures" and therefore were outside any spending limits. But the court said that the FEC "has been granted primary jurisdiction and therefore should be given an adequate opportunity to address the issues raised by Plaintiffs."

Background

In a June 26, 1996, decision, the Supreme Court held that political parties were capable of making "independent expenditures," thus reversing the FEC's long-held presumption that party expenditures on behalf of candidates were "coordinated" with candidates and thus subject to contribution or expenditure limits. *Colorado Republican Federal Campaign Committee v. FEC*, 116 S. Ct. 2309 (1996).

In July, the DSCC and the DCCC asked the FEC to revise agency regulations in time for the November election to explain how party committees, with their traditionally close contacts with candidates, could make independent expenditures. The Commission agreed to conduct the rulemaking but said it could not revise the rules in time for the 1996 election cycle.

That same month the committees also formally requested an FEC advisory opinion (AOR 1996-30) to answer questions on their proposed independent expenditures, such as whether past contacts between party staff and candidates' campaign staff would compromise the independence of the expenditures, or whether the party committees could erect a "Chinese Wall" to segregate staff chosen to work on independent expenditure campaigns.

An advisory opinion drafted by the FEC's Office of General Counsel and voted on in late August failed to win approval by the required four-vote majority of Commissioners.

In September, the plaintiffs filed suit asking the court to find that their proposed expenditures would qualify as independent expenditures. The committees claimed that they were forced to file suit because the FEC's failure to

issue formal guidance would expose them to possible penalties under the Federal Election Campaign Act should they pursue their independent expenditure program.

Court Decision

The court ruled that the plaintiffs had standing to file suit because they suffered injury: "the chilling of First Amendment rights" and "a creditable threat of prosecution."

However, the court said, it was unable to rule on the substance of the case because the FEC had not yet taken any final agency action that could be reviewed by a court. The court said that the plaintiffs "are asking the Court to 'step into the Commission's shoes' and issue the advisory opinion and final rules which it was unable to provide." The court noted that Congress intended the FEC to interpret the statute first, before the courts.

The court therefore granted the FEC's motion to dismiss the case.

The DSCC and DCCC subsequently asked the U.S. Court of Appeals for the District of Columbia to review the lower court's judgment on an expedited basis so the case could be resolved before the election. That court, however, on October 11, 1996, denied the request to expedite the appeal.

Source: FEC *Record*, November 1996, p. 7.

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE v. FEC (96-2184, 97-5160 and 97-5161)

On November 25, 1996, the U.S. District Court for the District of Columbia denied a request from the Democratic Senatorial Campaign Committee (DSCC) to find that the FEC violated the Federal Election Campaign Act when it failed to take action on an administrative complaint the DSCC had filed with the Commission.

The DSCC filed the lawsuit against the FEC after the agency had failed to act on its administrative complaint against the National Republican Senatorial Committee (NRSC) within 120 days. 2 U.S.C. §437g(a)(8)(A).

On April 10, 1998, the U.S. Court of Appeals for the District of Columbia Circuit remanded these two cases to the district court after finding that the question of standing had not been resolved.

On October 18, 1999, the U.S. District Court concluded that the DSCC had constitutional standing to litigate these cases.

Background

The DSCC filed its administrative complaint in 1993 and followed it with a supplemental complaint in 1995. The complaints alleged that the NRSC had made at least $187,000 in illegal "soft money" expenditures to influence the Senate election of a Republican candidate in Georgia. The NRSC did this, the DSCC alleged, by funneling the money through four nonprofit organizations that were allegedly closely aligned with the Republican Party.

In April 1996, the DSCC asked the court to order the FEC to act on its administrative complaints. The court found the FEC's delay was contrary to law and told the agency to move forward with the case. It also told the DSCC to file another lawsuit if the FEC did not take action.

The DSCC did just that. In September 1996, it filed suit, asking the court again to order the FEC to complete the consideration of its complaint within 30 days or give the DSCC the authority to file a civil action against the NRSC. In denying the DSCC's request, the court said the FEC's conduct did not yet constitute a failure to act that was contrary to law. Further, the FEC provided the court and the DSCC with a chronology of its actions taken over the past 15 months.

The court also based its ruling, in part, on the FEC's considerable work load, lack of resources and competing priorities. In particular, it noted the U.S. Supreme Court ruling in the *Colorado Republican Federal Campaign Committee* case, which was handed down in June 1996 and which invalidated part of the FEC's regulation governing expenditures by national and state

party committees. That ruling, the court said, added an "additional layer of complexity" to the DSCC's allegations against the NRSC.

The court noted that the statute of limitations period was coming to a close with regard to the DSCC's administrative complaint. Therefore, the court ordered the FEC to file status reports on its progress on the administrative complaint every 30 days (the first report was due December 10, 1996) and scheduled a March 1997 status conference for the FEC and the DSCC in the event that the matter was not resolved by then.

After waiting an additional four months and nearing the five-year statute of limitations for this case, the DSCC filed a motion for summary judgment, citing the FEC's "near glacial pace" in the investigation and arguing again that the agency's actions were contrary to law.

On May 30, 1997, the court granted the DSCC's motion and ordered the FEC to take action, within 30 days, on the committee's administrative complaint. The court also stated that if the FEC failed to take action within 30 days, then the DSCC could initiate its own lawsuit against the NRSC pursuant to 2 U.S.C. §437g(a)(8)(C).

Arguments from the Commission

The FEC contended that it was moving forward with the investigation of the DSCC's complaint and that it was "conducting a careful and deliberate investigation of constitutionally sensitive and factually complex issues arising from a national party's payments to independent issue advocacy groups." The FEC also argued that, without sufficient time to conduct a thorough investigation, its five commissioners would not be able to make an informed decision as to whether there was probable cause to believe that a violation of the Act had occurred. The FEC added that certain witnesses were challenging the Commission's discovery requests.

District Court Decision

The standard for evaluating administrative delay is whether an agency has acted reasonably and in a manner that is not arbitrary or capricious.[1] To measure this, the courts use several criteria described in *Rose v. FEC* and *Telecommunications Research & Action Center v. FCC*.

Using those criteria, the court concluded that the FEC's delay—taking more than four years from when the administrative complaint was filed and nearly two years from the Commission's "reason to believe" determination to decide whether there was probable cause to believe a violation of the Act had occurred—was unreasonable.

The court said that the FEC could no longer claim that the Supreme Court's decision in the *Colorado* case complicated its investigation. The court also cited the impending five-year mark for the case, and said that litigation delays resulting from motions to quash FEC subpoenas were foreseeable and provided no acceptable excuse for the delay.

The court concluded that the FEC's failure to investigate and make a "probable cause" determination in a reasonable time frame was contrary to law under 2 U.S.C. §437g(a)(8)(C). It ordered the Commission to conform its conduct with the court's declaration within 30 days. Subsequently, on June 20, 1997, the Commission appealed this decision to the U.S. Court of Appeals for the District of Columbia Circuit.

Appeals Court Decision

The appeals court remanded both cases to the district court to determine whether the DSCC had standing to sue the Commission under §437g(a)(8). In citing the issue of standing, the appeals court acknowledged that the question had come up only on appeal and mainly through an *amicus curiae*, or friend of the court, brief. The appeals court based its ruling on a 1998 U.S. Supreme Court decision in *Steel Co. v. Citizens for a Better Environment*, which "seems to hold that before deciding the merits (of a case), federal courts must always decide Article III (of the U.S. Constitution) standing whenever it is in doubt." Because some doubt has now been raised, the appeals court remanded the cases to the district court to address the standing question. The DSCC must present evidence that it satisfied the three-pronged test of standing—injury in fact, causation and redressability. With regard to redressability, the court said that the standing analysis may well have to depend on the Supreme Court's decision in *Akins v. FEC*.[2]

District Court Decision

On remand, the district court decided that, in the first case, the DSCC did not qualify as a "prevailing party" as defined in the Equal Access to Justice Act, and therefore vacated its earlier decision to award the DSCC attorney's fees. The court did reconfirm its prior order in the second case that found the Commission to have unreasonably delayed taking action on the administrative complaint filed by the DSCC and required the Commission to conclude the matter within 30 days.

Source: FEC *Record*, January 1997, p. 2; August 1997, p. 3; June 1998, p. 4; and January 2000, p. 2.

DSCC v. FEC, 139 F.3d 951 (D.C. Cir. April 10, 1998).

[1] *Common Cause v. FEC*, 489 F. Supp. 738, 744 (D.D.C. 1980).

[2] In the *Akins* case, several former government officials filed a lawsuit against the FEC after it dismissed an administrative complaint they had filed. Among the issues discussed at the Supreme Court was whether these former officials had standing to initiate this lawsuit.

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE v. NATIONAL REPUBLICAN SENATORIAL COMMITTEE

On August 15, 1997, in response to a court order, the FEC filed an amicus brief about the confidentiality of its documents in the Democratic Senatorial Campaign Committee (DSCC) suit against the National Republican Senatorial Committee (NRSC).

The DSCC's suit was the first contested case in which a private party has sued another private party for violations of the Federal Election Campaign Act (the Act), pursuant to 2 U.S.C. §437g(a)(8)(C). That section of the Act states that if the FEC fails to take action on a complaint within 30 days after it has been ordered to do so by the U.S. District Court for the District of Columbia, then the complainant may file suit in his or her own name against the alleged offender of the Act.

The DSCC had filed two previous lawsuits—in April and November 1996—against the FEC charging that it had failed to take action within 120 days on an administrative complaint filed by the DSCC, alleging that the NRSC had made illegal "soft money" expenditures to influence a Senate election in Georgia. 2 U.S.C. §437g(a)(8)(A). In the resolution of the second delay suit, which occurred on May 30, 1997, the court ordered the FEC to take action on the administrative complaint within 30 days. When that did not happen, the DSCC filed suit on its own against the NRSC.

The Commission's brief was in response to an order from the court seeking the FEC's views on keeping under seal certain documents it filed during proceedings in the two DSCC delay cases and to which the NRSC has requested access. The Commission argued that providing such information to the NRSC would compromise its investigation into the DSCC's original administrative complaint, which continues despite the DSCC's most recent lawsuit against the NRSC. The documents being sought by the NRSC included information about potential witnesses and FEC actions and procedures in the investigation. The FEC contended that the information in the sealed files contained no evidence about the NRSC's alleged violations, and thus would be of little relevance to the NRSC's court battle with the DSCC. And, although the DSCC had seen some of the information under seal, it was barred by the court's protective order from using that information in its own lawsuit against the NRSC.

The Commission also noted the precedent the court would set if it were to allow the NRSC to view the confidential information covered by the protective order, stating that the Commission would have to take such actions into consideration in deciding what information to provide the court in future delay cases.

On August 27, 1997, the court granted a stay requested by the NRSC without deciding whether to maintain the confidentiality of the documents.

Source: FEC *Record*, October 1997, p. 1.

DNC v. FEC (96-2506)

On February 20, 1997, with the agreement of both parties, the U.S. District Court for the District of Columbia dismissed this case without prejudice and ordered the FEC to periodically update the Democratic National Committee (DNC) on the status of an administrative complaint it filed against Bob Dole's 1996 presidential campaign.

In June 1996, the DNC filed an administrative complaint with the Commission alleging that Mr. Dole's presidential committee, Dole for President, Inc., disregarded the limit on expenditures during the pre-primary season. The administrative complaint was designated MUR 4382. Under the Presidential Primary Matching Payment Account Act, presidential candidates may receive matching payments for their primary campaigns if they agree to limit their expenditures to a set amount—in this case, a little more than $37 million. 2 U.S.C. §441a(b)(1)(A).

After no apparent action had taken place on the complaint, the DNC, on October 31, 1996, filed suit asking the court to order the FEC to move forward on its allegations against the Dole campaign. The DNC said that in failing to act on its complaint within 120 days after it was filed—the original administrative complaint was filed June 12 and a supplemental complaint was filed on July 22—the FEC was acting contrary to law. 2 U.S.C. §437g(a)(8)(A).

The court said that the FEC should give lawyers for the DNC confidential, updated chronologies on the Commission's actions in MUR 4382. The first was to be delivered at the end of March 1997 with subsequent chronologies presented at 12-month intervals until the matter was resolved or there was further court action.

The contents of the chronologies may not be disclosed to anyone not involved in the administrative complaint. Additionally, DNC counsel may use the information only in preparation for litigation that may result from the MUR. To ensure that there is no unauthorized dissemination of the chronologies, DNC counsel must inform in writing each person who sees the information that it may not be shared with others. The DNC must maintain a list of those people, what information they have seen and a written statement from each person acknowledging that he or she understands the confidentiality provisions that are part of this court action.

Source: FEC *Record*, May 1997, p. 5.

DNC v. FEC (97-676)

On July 2, 1998, at the request of the FEC, and with the consent of the Democratic National Committee (DNC), the U.S. District Court for the District of Columbia dismissed this case without prejudice and remanded the matter back to the FEC to review the impact of the appellate and U.S. Supreme Court decisions in *Akins v. FEC* on issues presented in this case.

The suit concerned the Commission's dismissal of the DNC complaint alleging that the Christian Coalition is a political committee.

Source: FEC *Record*, December 1995, p. 1; February 1997, p. 1; June 1997, p. 7; July 1998, p. 1; and September 1998, p. 3.

DOLAN v. FEC

By agreement of both parties, the U.S. District Court for the District of Columbia dismissed this case on August 17, 1990. (Civil Action No. 90-0542.) Robert E. Dolan had asked the court to declare that 2 U.S.C. §438(a)(4), referred to as the "sale and use restriction," was unconstitutional as applied to his efforts to solicit individuals identified as contributors in FEC reports.

On July 13, 1990, the Commission had filed suit in the same court, asking the court to declare that Mr. Dolan knowingly and willfully violated the sale and use restriction.

On September 5, 1990, the Commission filed a motion to amend its complaint by requesting a court declaration that the sale and use restriction is constitutional insofar as it curtails the sale or use of contributor data for commercial purposes. The Commission also asked the court to certify the constitutional issue to the U.S. Court of Appeals for the District of Columbia Circuit under 2 U.S.C. §437h.

Source: FEC *Record*, October 1990, p. 8.

DOLBEARE v. FEC

On March 11, 1982, the U.S. District Court for the Southern District of New York issued a ruling granting a preliminary injunction to the plaintiffs in *Dolbeare v. FEC* (No. 81 Civ. 4468-CLB).

Plaintiffs' suit challenged pending FEC investigations of various activities with respect to the Citizens for LaRouche Committee (the LaRouche campaign), Lyndon H. LaRouche's principal campaign committee for the 1980 Presidential primaries. The LaRouche campaign claimed that the statutory provision authorizing the investigations (2 U.S.C. §437g(a)(2)) was unconstitutional as applied to the LaRouche campaign because it placed no limits on the time for completing the investigations. Moreover, the LaRouche campaign alleged that the FEC had undertaken the investigations to harass the campaign. Furthermore, the investigations had a chilling effect on the free association rights of the campaign's contributors. The LaRouche campaign also claimed that, in conducting its investigations, the FEC had gone beyond the prescribed scope for FEC investigations.

The FEC sought dismissal of the suit on jurisdictional grounds. Primarily, the FEC claimed that the suit was not justiciable because, under 2 U.S.C. §437g(a), an agency has the discretion to decide whether there is "reason to believe" the Act has been violated and whether an alleged violation should be investigated. The FEC also argued that, pursuant to the Supreme Court's decision in *Federal Trade Commission v. Standard Oil of California*, such initial agency determinations are not final and thus not ripe for judicial review in a federal court. Moreover, the FEC said that §437h provides jurisdiction only for claims of statutory unconstitutionality, not for claims that a statute is unconstitutional as applied. Furthermore, the FEC argued that the LaRouche campaign's claim that the FEC's investigations would have a long-term chilling effect on their political activities did not meet the test for immediate injunctive relief—evidence of "specific present objective harm or a threat of specific future harm..." (*Laird v. Tatum*, 408 U.S. 1, 13-14 (1971)). The FEC further argued that the LaRouche campaign had failed to present sufficient evidence to demonstrate a likelihood of succeeding with its case on the merits.

In granting a preliminary injunction, the court found that it did have jurisdiction over the claims raised in the suit and that §437h could be used to challenge the constitutionality of the Act, as applied. The court also held that it did not have to certify the campaign's constitutional questions to the appeals court, pursuant to §437h, but could itself take primary jurisdiction over them. The court reasoned that the campaign would be caused "irreparable harm" as a result of substantial legal fees and the depletion of volunteer staff resources required to defend the campaign against the FEC's ongoing investigations. The court therefore barred the FEC from:

- Initiating any more investigations into the LaRouche campaign's 1980 Presidential primary activities until the pending enforcement actions were concluded; and
- Auditing, or issuing depositions to, LaRouche campaign contributors unless the FEC simultaneously notified the LaRouche campaign of such actions.

Moreover, the court ordered the FEC to complete its enforcement actions promptly and to treat the LaRouche campaign as a respondent to all pending investigations involving the campaign's 1980 Presidential primary activities. The court also ordered the FEC to furnish copies of depositions taken with regard to any of the pending investigations, if requested by the LaRouche campaign. The court, however, conditioned its enforcement of the injunction on:

- Plaintiffs' agreement to waive certain legal claims with respect to time limits for the FEC enforcement actions; and
- Plaintiffs' full cooperation with the FEC in completing the pending enforcement matters.

Source: FEC *Record*, May 1982, p. 6.

Dolbeare v. FEC, No. 81 Civ. 4468-CLB (S.D. N.Y. March 9, 1982) (unpublished opinion).

DOLE v. FEC

On February 29, 2001, Robert J. Dole and Dole/Kemp '96, Inc., (Dole/Kemp), Mr. Dole's 1996 presidential campaign committee, filed in the U.S. Court of Appeals for the District of Columbia Circuit a petition for review of the Federal Election Commission's audit of Dole/Kemp. On January 29, 2001, the Commission made a final determination that the petitioners must repay $1,416,903.40 to the U.S. Treasury.

On April 2, 2001, the court granted a joint motion filed by the petitioners and the Commission to hold the case in abeyance through May 23, 2001, to allow the parties an opportunity to engage in settlement discussions that might eliminate the need for further litigation.

Source: FEC *Record*, May 2001, p. 6.

DOLE v. INTERNATIONAL ASSOCIATION MANAGERS

On February 14, 1991,[1] the U.S. District Court for the District of Arizona granted the FEC's motion for leave to intervene in the case. (Civil Action No. CIV 90-0129 PHX RCB.)

The suit was filed by the Department of Labor and its Secretary, Elizabeth Dole. They alleged that defendants failed to pay overtime wages in violation of the Fair Labor Standards Act. International Association Managers, Inc. (IAM) and two of its officers were named as defendants. Counsel for the defense took depositions from two former IAM employees who defendants believe are involved in the Department of Labor investigation and in an ongoing investigation by the FEC. When questioned about their communications with the two agencies, the employees refused to answer, citing the "government informant's privilege." Defendants then filed a motion to compel the employees to respond to these questions.

In response to the defendants' motion, the FEC filed a motion to intervene in the case or to file an amicus response to defendants' motion to compel. The court granted the motion, stating: "The interest of the FEC in protecting against disclosure of the identity of informants and the nature of informants' communications with the FEC is similar to the interest the Department of Labor seeks to protect....The interest of the two agencies may not be identical, however, and the court can see no reason for requiring the FEC to rely on another agency to protect its interest."

The court also denied defendants' motion to compel the testimony of the two employees. Further, it granted the FEC's motion for a protective order to prohibit defendants from questioning any witness to learn the identity of persons communicating with the FEC and the nature of those communications. The court granted a motion for a similar order requested by the Department of Labor to protect that agency's communications.

Source: FEC *Record*, June 1991, p. 9.

[1] The order was amended on April 1, 1991, to correct a typographical error.

DUKAKIS v. FEC
SIMON v. FEC

On May 5, 1995, the U.S. Court of Appeals for the District of Columbia Circuit ruled that in both these cases the FEC was time barred from imposing repayment obligations on the plaintiffs. Both plaintiffs did not receive an initial repayment determination within the 3-year statute of limitations. 26 U.S.C. §9038(c). The FEC's actions in these matters were therefore reversed.

Background

Both Governor Michael Dukakis and Senator Paul Simon made bids for the 1988 Democratic Presidential nomination. Both of them received public funding for their campaigns. Pursuant to 26 U.S.C. §9038(a), the FEC conducted audits of both campaigns. The 3-year statute of limitations was triggered on July 20, 1988, the day the Democratic National Convention nominated Governor Dukakis for President. Final audit reports containing initial repayment determinations were issued on December 9, 1991, for Dukakis and on October 22, 1991, for Simon. These initial determinations were not finalized until February 25, 1993, for Dukakis and March 4, 1993, for Simon; the Commission determined that the Dukakis and Simon campaigns owed the U.S. Treasury $491,282 and $412,162, respectively.

The 3-Year Statute of Limitations

26 U.S.C. §9038(c) states: "No notification [of repayment] shall be made by the Commission . . . with respect to a matching payment period more than 3 years after the end of such period." The FEC contended that the interim audit report, issued in both cases within 3 years of the date of the nomination, was sufficient notice to obligate plaintiffs to make the repayments. To bolster this argument, the FEC reminded the court that, in accordance with the decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, the court must defer to an agency's reasonable interpretation of the statute it administers.

The court concluded that deference was not required in this case because *Chevron* requires a court to defer to an agency only in cases where the statute at hand is ambiguous on the issue in dispute. The court found no ambiguity in either of these cases: "Subsection §9038(b) requires that the Commission notify the candidate of the amount which he is to pay to the Secretary. The interim audit report does not even purport to notify the candidate of any such amount."

The court cited 11 CFR 9038.2, which states that the inclusion of a preliminary repayment calculation in an interim audit report is optional, as grounds on which to dismiss the notion that the interim report fulfilled the FEC's obligation under the statute of limitations. Further, the court noted that when the Commission issued rules making the interim audit report a mandatory part of the audit process, it included in its Explanation and Justification language stating that: "[Preliminary] calculations will not . . . be considered as the Commission's initial repayment determination . . . ."

The court also dismissed the FEC's reliance on a 1991 amendment to its regulations, 11 CFR 9038.2(a)(2), that explicitly states that the interim audit report constitutes notification for purposes of the 3-year statute of limitations. "[No] such administrative action by the Commission can override the plain mandate of the legislation," said the court.

Additionally, the court held that, although the statute does not explicitly say so, the 3-year notification period implicitly applies to the repayment of surplus campaign funds when the candidate disputes that a surplus exists, as well as to the repayment of nonqualified campaign expenses and excessive payments. 26 U.S.C. §9038(b)(1), (2) and (3). Thus, in the case of Governor Dukakis, who disputed the audit's finding that he had a surplus, the Commission was required to notify him of the amount due within the 3-year period.

Source: FEC *Record*, July 1995, p. 9.

Dukakis v. FEC, No. 93-1219 (D.C. Cir. May 5, 1995).
Simon v. FEC, No. 93-1252 (D.C. Cir. May 5, 1995).

DURKIN FOR U.S. SENATE v. FEC

Plaintiff initially sought a declaratory judgment from the court that certain individuals associated with a "Defeat Durkin" effort constituted a "political committee" under the Act, which had failed to register and report with the FEC, and that one of the individuals had made excessive contributions to the "Defeat Durkin" effort. Plaintiff also sought a preliminary injunction to enjoin the "Defeat Durkin" effort from: spending any additional funds until it registers with the FEC or spending any funds which consist of contributions in excess of the limits. Finally, plaintiff asked the court to order the FEC to expedite review of a complaint plaintiff had filed three days earlier, on October 24, against the same individuals and the "Defeat Durkin" effort.

On October 31, 1980, the district court denied plaintiff's request for declaratory and injunctive relief and dismissed the suit. The court maintained that it had no jurisdiction over the suit because the Act stipulates the time frame in which the Commission must resolve complaints. The court said, "The FECA explicitly requires...that the party accused of a violation be given 15 days to 'demonstrate, in writing...that no action should be taken against such person on the basis of the complaint.' .... By the terms of the statute, the Commission cannot act until they [the accused parties] have responded or until 15 days have passed."

(U.S. District Court for the District of New Hampshire, Docket No. C80-503D, October 27, 1980)

Source: FEC *Record*, December 1980, p. 7.

Durkin for U.S. Senate Committee v. FEC, 2 Fed. Elec. Camp. Fin. Guide (CCH) 9147 (D.N.H. 1980).

EPSTEIN v. FEC

On September 23, 1981, the U.S. District Court for the District of Columbia issued an order in *Jon Epstein v. FEC* (Civil Action No. 81-0336) upholding the Commission's determination in an administrative complaint that plaintiff had brought against the Reader's Digest Assoc., Inc. in March 1981. Plaintiff's suit sought review of the FEC's dismissal of his complaint (Matter Under Review [MUR] 1283), pursuant to 2 U.S.C. §437g. In the complaint, he alleged that an ad Reader's Digest had placed in the August 27, 1980, edition of the Washington Post constituted illegal corporate contributions to the campaigns of the Democratic and Republican Congressmen whose excerpted articles had appeared in the ad (in violation of 2 U.S.C. §441b). Introductory and concluding copy in the ad had also promoted Reader's Digest as a "forum for ideas." Plaintiff claimed the FEC's dismissal of his complaint was contrary to law.

The court found that the standard used by the FEC in dismissing the complaint was not arbitrary or otherwise contrary to law. The court held that the "...Commission may reasonably determine that expenditures on publicity that have a purpose other than assistance of political candidates...were not intended by Congress to be" regulated by the Act. This is particularly true, the court said, when the "major purpose" of the publicity is "not to advocate the election of candidates, but to promote the organization paying for the publicity." The court further noted that, in making this determination, the FEC had "relied upon a growing body of decisions...that remove advertisements and other forms of publicity from the Act's prohibition" on corporate expenditures, even though the advertisements" may have political aspects."

Moreover, the court found no merit in plaintiff's argument that the General Counsel's Report did not explain the Commission's decision to dismiss the complaint. "The General Counsel's Memorandum alone, if it is complete enough to have provided a basis for the Commission decision to accept the General Counsel's recommendation, will be adequate for judicial review under section 437g(a)(8)." Nor did the court find merit in plaintiff's contention that the ad was partisan because it offered commentary only by representatives of the two major parties. The court held that the issue was not "the narrowness, or diversity, of the political views" represented in the ad but rather whether the ad served a "partisan purpose."

Source: FEC *Record*, November 1981, p. 4.

Epstein v. FEC, 2 Fed. Elec. Camp. Fin. Guide (CCH) 9161 (D.D.C. 1981), *aff'd mem.*, 684 F.2d 1032 (D.C. Cir. 1982).

FAUCHER v. FEC

On June 29, 1990, the U.S. District Court for the District of Maine ruled that 11 CFR 114.4(b)(5)(i), which concerned the publication and public distribution of voter guides by corporations, was unauthorized by the Federal Election Campaign Act. In the court's view, the rule was invalid because it applied "issue advocacy" as a factor in determining whether a voter guide constituted a prohibited expenditure.

The court denied, however, a request from plaintiffs for injunctive relief to prevent the FEC and the U.S. Attorney General from taking enforcement action against plaintiffs' proposed 1990 publications.

On March 21, 1991, the U.S. Court of Appeals for the First Circuit affirmed the district court decision. On October 7, 1991, the U.S. Supreme Court denied the FEC's petition for a writ of certiorari.

Background

Previous Suit
The Maine Right to Life Committee, Inc. (MRLC), a nonprofit membership corporation, and Sandra Faucher, an MRLC board member, filed a similar suit in the same court in 1985, *Faucher v. FEC*, 708 F. Supp. 9 (D. Me. 1989). In that suit, MRLC and Ms. Faucher also challenged 11 CFR 114.4(b)(5), which permits corporations to prepare and distribute to the public nonpartisan voter guides consisting of questions posed to candidates on campaign issues and the candidates' responses. Anticipating that the proposed MRLC voter guide would not comply with the FEC's standards for nonpartisanship, plaintiffs asked the court to invalidate the regulation and issue an injunction preventing the FEC from enforcing the rule. On February 24, 1989, the court dismissed the suit on the ground that plaintiffs first needed to obtain an FEC advisory opinion on the legality of the proposed publication. Plaintiffs then sought an advisory opinion, which was issued on February 14, 1990 (AO 1989-28).

AO 1989-28
In AO 1989-28, the Commission concluded that MRLC could not use general treasury funds to distribute to the general public a newsletter containing a proposed voter guide.

First, because MRLC had a policy of accepting corporate contributions and had, in fact, accepted such contributions, it failed to qualify for the exemption granted to certain nonprofit corporations as a result of the Supreme Court's decision in *Massachusetts Citizens for Life, Inc. (MCFL) v. FEC*, 479 U.S. 238 (1986). In that decision, the Supreme Court ruled that the prohibition against corporate spending was unconstitutional as applied to nonprofit corporations that satisfied certain criteria.

Second, MRLC's proposed publication did not comply with the criteria for nonpartisan communications set forth at 11 CFR 114.4(b)(5). Specifically, the publication favored a pro-life position, although the rule states that a nonpartisan voter guide may not suggest or favor any position on the issues covered by the candidate survey. 11 CFR 114.4(b)(5)(i)(C) and (D). (For a more detailed summary of this opinion, see the March 1990 *Record*.)

Second Suit
On April 18, 1990, MRLC and Faucher filed a second suit, again challenging 11 CFR 114.4(b)(5) on the grounds that the regulation was beyond the authority of the FEC and was unconstitutionally vague. Plaintiffs also sought a declaratory judgment that MRLC's proposed 1990 publications were permissible under the Federal Election Campaign Act. They further sought an injunction prohibiting the FEC and the U.S. Attorney General from enforcing the voter guide regulations with regard to MRLC's proposed activity.

District Court

In its June 29 decision, the court found that 11 CFR 114.4(b)(5) was invalid because it focused on "issue advocacy." The court found that plaintiffs did not have standing to challenge other aspects of the rule and denied plaintiffs' request for declaratory and injunctive relief.

Invalidity of 11 CFR 114.4(b)(5)
The court first cited 2 U.S.C. §441b as the statutory basis for the regulation in question. Section 441b prohibits "any corporation whatever" from making "a contribution or expenditure in connection with any [federal] election...." The court, however, found that the Supreme Court, in its MCFL decision, had limited the scope of the prohibition to expenditures that "expressly advocate" the election or defeat of a clearly identified candidate.

Under the regulation in question, 11 CFR 114.4(b)(5), a corporation may use its treasury funds to distribute a voter guide to the general public only if the guide is "nonpartisan." Included among the factors defining "nonpartisan" is that the wording does not favor any position, or express an editorial opinion, on the issues covered by the candidate survey. 11 CFR 114.4(b)(5)(i)(C) and (D). The court found that "[t]his approach ignores the clear language of *FEC v. Massachusetts Citizens for Life* that issue advocacy by a corporation cannot constitutionally be prohibited and that only express advocacy...is constitutionally within the statute's prohibition."

The court therefore concluded that the regulation, "with its focus on issue advocacy, is contrary to the statute as the United States Supreme Court has interpreted it and, therefore, beyond the power of the FEC."

Other Challenges
The court ruled that MRLC did not have standing to challenge another aspect of the regulation: its failure to incorporate in explicit language the MCFL holding that the statute cannot constitutionally limit even express advocacy by a certain type of nonprofit membership corporation. MRLC lacked standing because it did not qualify as the type of corporation covered under the MCFL exemption. One of the essential factors for the exemption is that the nonprofit corporation must not receive contributions from business corporations and must have a policy against accepting such contributions. Although MRLC received "comparatively modest" amounts from corporate businesses, without an explicit policy against accepting such contributions, organizations like MRLC could serve as a conduit for corporate contributions.

The court also declined to address plaintiffs' challenge that 11 CFR 114.4(b)(5) does not explicitly incorporate the statutory "news story" exemption at 2 U.S.C. §431(9)(B)(i), which exempts news media costs from the definition of "expenditure." The court said it was "satisfied that the MRLC does not fit within this media exemption" and that therefore plaintiffs did not have standing to challenge the regulation on this score. (Another FEC regulation, 11 CFR 100.8(b)(2), parallels the statutory exemption.)

Finally, the court found that plaintiffs did not have standing to challenge 11 CFR 114.4(b)(5)(ii). Plaintiffs had asserted that the regulation was unconstitutionally vague in directing that certain publications "not favor one candidate or political party over another." Since that portion of the regulation affects only nonprofit, tax-exempt corporations that do not "support, endorse or oppose candidates or political parties," it does not apply to MRLC, which has established a separate segregated fund to engage in such activity. (In AO 1984-17, the Commission held that a tax-exempt corporation becomes an organization that supports, endorses or opposes candidates if it establishes a separate segregated fund that does so.)

Denial of Declaratory and Injunctive Relief
Finding that the issue was not ripe for consideration, the district court denied plaintiffs' request for a declaratory judgment that their proposed 1990 voter guide was permissible under the Act and also denied their request for injunctive relief to prevent any enforcement action against their proposed 1990 publications. Plaintiffs said that the 1990 publications would be substantially similar to the 1988 publication, but the court was "not prepared to base declaratory and injunctive relief upon a 1988 publication, when minor changes could make that ruling wholly inapplicable to the actual 1990 publications."

The court stated: "In a context where words and nuances may be critical, I do not have the actual language and format of the publications. Given the FEC's enforcement role,...such [declaratory and injunctive] relief would unduly interfere with the overall ability of that agency to conduct investigations of alleged violations, might well delay it in gathering important information and would interfere with the congressional goal of resolving specific election disputes through conciliation....An injunction may in fact be wholly unnecessary. Finally, any hardship to the parties in finding this issue not ripe is minimal, given the plaintiffs' historical practice of publishing despite any uncertainty."

The plaintiffs did not appeal the district court's denial of the injunction or rejection of their constitutional challenges. The FEC, however, filed an appeal seeking reversal of the court's invalidation of section 114.4(b)(5)(i).

Court of Appeals

In affirming the district court's judgment invalidating the Commission's regulation, the U.S. Court of Appeals for the first circuit first examined the scope of the statutory prohibition, section 441b(a). (The provision prohibits "any corporation whatever" from making "a contribution or expenditure in connection with any [federal] election....") The court acknowledged that "the statute appears to allow for a very broad application," but stated that the Supreme Court in *Buckley v. Valeo* narrowed the scope of the prohibition: "The Supreme Court, recognizing that such broad language as found in section 441b(a) creates the potential for first amendment violations, sought to avoid future conflict by explicitly limiting the statute's prohibition to 'express advocacy.'" The court went on: "This express advocacy test was again embraced by the Supreme Court in the more recent case of *Massachusetts Citizens for Life*."

The court rejected the FEC's argument that the language in the Supreme Court's MCFL opinion which appeared to limit section 441b(a) was dictum and therefore not binding. The court also rejected the FEC's alternative argument that even if section 441b(a) were restricted to express advocacy expenditures, the FEC's voter guide rules were properly directed at advocacy of candidates and did not appreciably infringe upon a corporation's ability to advocate its position on issues. The court stated: "In our view, trying to discern when issue advocacy in a voter guide crosses the threshold and becomes express advocacy invites just the sort of constitutional questions the Court sought to avoid in adopting the bright-line express advocacy test in *Buckley*."

Source: FEC *Record*, September 1990, p. 5; May 1991, p. 8; and November 1991, p. 1.

Faucher v. FEC, 743 F. Supp. 64 (D.Me. 1990), *aff'd*, 928 F.2d 468 (1st Cir. 1991), *cert. denied*, 495 U.S. (October 7, 1991).

FEC v. AFL-CIO

On November 13, 1980, the U.S. Supreme Court denied the Commission's petition for a writ of certiorari in the suit, *FEC v. American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)* (Supreme Court Docket No. 80-368). The Commission sought review of a judgment of the U.S. Court of Appeals for the District of Columbia Circuit, which had reversed an earlier decision by the U.S. District Court for the District of Columbia, imposing a $10,000 civil penalty against the AFL-CIO.

In filing the suit against the AFL-CIO on December 16, 1977, the Commission had sought to enjoin the organization from transferring funds from its COPE Education Fund (which contained general treasury funds) to COPE-PCC, its separate segregated fund (which contained only voluntary political contributions from individuals). The Commission had argued that the transfers violated provisions of the Act prohibiting labor organizations from using their general treasury funds to make contributions or expenditures in connection with federal elections. Between 1970 and 1977, COPE-PCC had transferred funds to the COPE Education Fund several times because COPE-PCC's funds were idle between elections. On demand of COPE-PCC, the funds were subsequently transferred from the COPE Education Fund back to COPE-PCC for its use. The COPE-PCC transfers were designated as loans to the COPE Education Fund but were interest free. Complete records were kept, and the transactions were reported to the Office of Federal Elections of the General Accounting Office (GAO) and later to the FEC.

In 1977, after the FEC had succeeded to the GAO's authority, it notified the AFL-CIO that section 441b of the Act permits transfers of funds from COPE-PCC to the COPE Education Fund but not transfers from the COPE Education Fund back to COPE-PCC. In an FEC enforcement action brought against the AFL-CIO, the AFL-CIO attempted to negotiate with the FEC a transfer of $321,000 from the Education Fund to COPE-PCC for the purpose of clearing the balance between the two funds. No agreement was reached and the FEC brought a civil action against the AFL-CIO in the district court. On June 16, 1978, the district court granted the Commission's motion for summary judgment in the case. It ruled that past transfers from the COPE Education Fund to COPE-PCC were illegal, enjoined the AFL-CIO from making any such transfers in the future (except for a single transfer of the $321,000 previously transferred) and assessed a $10,000 civil penalty against the AFL-CIO. The AFL-CIO appealed the assessment of the civil penalty.

The appeals court, on April 1, 1980, reversed the imposition of the $10,000 civil penalty. The appeals court found that the lower court had imposed the statutory penalty for a "knowing and willful" violation of the election law, although the facts in this case did not support a finding that the defendant's violation were "knowing and willful." (See 2 U.S.C. §437g(a)(5)(B).) The court held that the AFL-CIO's belief in the legitimacy of the transfers had been reasonable; during the GAO audit no comment had been made about the routinely reported transfers, and neither the Act nor any court decision had addressed the immediate issue. (The appeals court rejected the FEC's argument that *Pipefitters Local No. 562 v. United States*, 407 U.S. 385 (1972) provided specific notice that interfund transfers were prohibited by the Act.)

On November 10, 1980, the Supreme Court refused a request by the FEC for a writ of certiorari to review the appeals court ruling on the imposition of the civil penalty.

Source: FEC *Record*, January 1981, p. 6.

FEC v. AFL-CIO, 628 F.2d 97 (D.C. Cir.), *cert. denied*, 449 U.S. 982 (1980).

FEC v. AFSCME

On May 14, 1979, the U.S. District Court for the District of Columbia dismissed a suit which the FEC had filed against the American Federation of State, County and Municipal Employees (AFSCME). In that action, it was alleged that AFSCME had violated the disclosure requirements of 2 U.S.C. §431(f)(4)(C) by failing to report $983.73 it had spent to publish and circulate a political poster to its members immediately prior to the 1976 general election. The poster in question depicted, in caricature, President Gerald Ford, wearing a lapel button with the words "Pardon Me," and embracing former President Richard Nixon. The poster contained a quote taken from a speech given by Ford as Vice President: "I can say from the bottom of my heart the President of the United States is innocent and he is right."

The Act specifically excludes from the definition of the term "expenditure" any communication made by a membership organization or a corporation to its members or stockholders, but requires that the costs directly attributable to communications expressly advocating the election or defeat of a clearly identified candidate must be reported to the Commission if they exceed $2,000 per election (2 U.S.C. §431(9)(b)(iii))[1]. AFSCME had reported "communications costs" of approximately $40,000 in connection with the 1976 general election, including approximately $23,000 directly attributable to expressly advocating the election of Jimmy Carter.

The court found that, although the Nixon-Ford poster did pertain to a clearly identified candidate and may have tended to influence voting, it did not contain an "express advocacy" of election or defeat within the narrow definition given to that term in *Buckley v. Valeo*. Additionally, the court held that, as a communication concerning a public issue widely debated during the 1976 campaign, the poster is typical of the political speech which is protected from regulation. Accordingly, the court dismissed the action for failure to allege a violation.

Source: FEC *Record*, July 1979, p. 8.

American Federation of State, County and Municipal Employees: FEC v., 471 F. Supp. 315 (D.D.C. 1979).

[1] Prior to the 1979 amendments to the FECA, this statute was §431(f)(4)(C).

FEC v. AFSCME-PQ

On July 10, 1990, the U.S. District Court for the District of Columbia granted the FEC's motion for summary judgment, ruling that the American Federation of State, County and Municipal Employees-P.E.O.P.L.E., Qualified (AFSCME-PQ), the separate segregated fund of AFSCME, and its treasurer, William Lucy, violated the law when they delayed the disclosure of in-kind contributions to the 1982 and 1984 Indiana House campaigns of Representative Frank McCloskey. (Civil Action No. 88-3208.) On October 31, 1991, the court assessed a civil penalty of $2,000 against the defendants.

During September of 1982 and 1984, AFSCME-PQ established telephone banks that were used in part to advocate the election of Representative McCloskey. Instead of reporting these in-kind contributions at the time they were made (i.e., when the services were provided on behalf of the candidate), AFSCME-PQ reported them after it paid the bills for the services, some months after the services were provided.

Although AFSCME-PQ claimed that the in-kind contributions were reported on time (i.e., when the funds were disbursed), the court disagreed, citing the statutory requirement that a committee must disclose the name and address of "each political committee which has received a contribution from the reporting committee during the reporting period, together with the date and amount of any such contribution." 2 U.S.C. §434(b)(6)(B)(i). Because AFSCME-PQ reported on a monthly basis, the contributions should have been disclosed in the months immediately following the making of the contributions, i.e., the operation of the phone banks.

Penalty

In its October 1991 ruling on the penalty, the court observed that, although there was no bad faith by the defendants, "there is always harm to the public when the FECA is violated." Considering the maximum penalty of $10,000 inappropriate here, the court said a $2,000 penalty would serve the public's interest "by punishing a violation of the plain language of the statute." The court declined, however, to permanently enjoin defendants from future violations of 2 U.S.C. §434(b). The court pointed out that defendants cured the violation and have since complied with the reporting provision. Because "there has been no showing of a reasonable likelihood that the defendants will commit future violations," the court decided the public interest would not be substantially advanced by an injunction.

Source: FEC *Record*, October 1990, p. 7; and January 1992, p. 7.

FEC v. AMERICAN INTERNATIONAL DEMOGRAPHIC SERVICES

On February 10, 1986, the U.S. District Court for the Eastern District of Virginia issued an order permanently enjoining American International Demographic Services, Inc. (A.I.D.S.) and its Vice President, Ernest Halter, from using FEC campaign finance information for commercial purposes. The court imposed a $3,500 civil penalty on the defendants for illegal use of the information. (Civil Action No. 85-0437-A.)

Background

The Federal Election Campaign Act states that "...any information copied from reports or statements may not be sold or used by any person for the purpose of soliciting contributions or for commercial purposes, other than using the name and address of any political committee to solicit contributions from such committee." 2 U.S.C. §438(a)(4). While the Commission has allowed FEC information on political committees to be used for contribution solicitations, the agency has forbidden the use of individual contributor information for commercial purposes (e.g., product advertisements) or for solicitations.

The defendants' violation of this provision involved their illegal use of two FEC computer tapes containing individual contributor information that had been disclosed on FEC reports filed by political committees. The tapes had been purchased by Mr. Halter's wife on behalf on the Voter Information Council PAC (VICPAC), a nonconnected political committee she had established in April 1982. (Mrs. Halter claimed she had purchased the tapes to purge outdated information on lists owned by VICPAC and by her.) As part of an agreement A.I.D.S. had entered into with Working Names, Inc., a list management company, Mr. Halter subsequently transferred the two FEC tapes to the company. Working Names used the tapes, along with two other FEC tapes, to create four mailing lists which the company marketed to list brokers and mailers.

The defendants' illegal use of FEC contributor information was discovered by the National Republican Congressional Committee (NRCC) when a direct mail piece was addressed to "Kane Orsell," a fictitious contributor NRCC had listed on a report filed with the FEC. (FEC regulations allow a political committee to "salt" its FEC report with up to ten fictitious names and addresses for purposes of detecting such illegal use of its contributor names. 11 CFR 104.3(e).) The mailing was sent by the American Legislative Exchange Council, which had rented its list of addresses from a broker that Working Names had supplied with lists. (The Council had purchased the list for a one-time use.)

After tracing original ownership of the mailing list back to A.I.D.S., NRCC held a meeting with Mr. Halter in which he agreed, among other things, to take the names of NRCC contributors off the list broker market and to provide NRCC with a list of the direct mail companies that had rented the names. Mr. Halter failed to do any of these things. Consequently, on September 28, 1982, the NRCC filed a complaint against both Mr. Halter and A.I.D.S. with the FEC. After investigating the matter, the FEC found probable cause to believe that the defendants had violated the election law. Subsequently, when defendants failed to enter into a conciliation agreement with the agency, the FEC brought suit against them in the district court.

FEC's Suit

In its suit, the FEC asked the court to declare that Mr. Halter and A.I.D.S. had violated Section 438(a)(4) by using reports filed with the FEC for commercial purposes. Specifically, the FEC asked the court to find that defendants used FEC information to: a) prepare contributor listings they rented to various organizations through a broker and b) increase the commercial value of contributor listings they already had.

Court's Ruling

After examining the evidence presented for its consideration at trial, the court found that "the defendants willfully violated the Act by having Working Names manage the [two FEC computer] tapes for the purpose of renting them out to brokers and mailers." Mr. Halter filed an appeal with the U.S. Court of Appeals, 4th Circuit on March 31, 1986.

Appeals Court Ruling

On February 2, 1987, the U.S. Court of Appeals for the Fourth Circuit dismissed *FEC v. Ernest Halter* (Appeal No. 86-1560). The court's action responded to Mr. Halter's request for a dismissal of his appeal.

Source: FEC *Record*, April 1986, p. 8; and April 1987, p. 7.

American International Demographic Services, Inc.: FEC v., 629 F. Supp. 317 (E.D. Va. 1986).

FEC v. AMERICANS FOR JESSE JACKSON

On May 19, 1987, the United States District Court for the District of Maryland issued a consent order in *FEC v. Americans for Jesse Jackson* (Civil Action No. Y-86-3766). Americans for Jesse Jackson was a 1984 political committee that was not authorized by Presidential primary candidate Jesse Jackson. In the consent order, the parties agreed that Americans for Jesse Jackson violated the Act in several ways:

- The committee failed to file a statement of organization with the Commission after it had spent over $1,000 expressly advocating the election of Presidential candidate Jesse Jackson. 2 U.S.C. §433(a).
- It failed to file the required reports of receipts and expenditures with the Commission. 2 U.S.C. §434.
- It used the name of Jesse Jackson in its name even though the committee was not authorized by the candidate. 2 U.S.C. §432(e)(4).
- It failed to include, on a mail solicitation for contributions, the name of the person who paid for the communication. 2 U.S.C. §441d(a)(3).

The defendant agreed to pay a civil penalty of $500 and to file all outstanding reports with the Committee within 30 days.

Source: FEC *Record*, August 1987, p. 9.

FEC v. AMERICA'S PAC

In a default judgment entered on January 14, 1993, the U.S. District Court of the Central District of California ordered America's PAC (a state committee) and Neil Barry Rincover, as executive director and acting treasurer, to pay a $25,000 civil penalty for violating the Federal Election Campaign Act. (Civil Action No. CV-92-2747-LGB.)

The court found that defendants failed to forward a $2,000 earmarked contribution from the Physicians Interindemnity/PAC to Bill Press, a U.S. Senate candidate. The acceptance of the earmarked contribution caused America's PAC to become a federal political committee with registration and reporting obligations. The court ruled that the defendants, by failing to fulfill those obligations, violated 2 U.S.C. §§433(a) and 434(a)(1). The court also found that they violated §432(b)(1) by failing to forward the earmarked contribution and the required information to the candidate. Finally, because the check contained corporate funds, the court found that defendants knowingly accepted a prohibited contribution, in violation of §441b(a). They were ordered to pay a $25,000 penalty, refund the $2,000 contribution to the PAC and file a Statement of Organization and required reports, all within 15 days.

Furthermore, given defendants' default in the litigation, the court found there was a likelihood that defendants would repeat the violations and therefore enjoined them from further violations of the provisions cited above.

Contempt Ruling

On May 23, 1994, America's PAC and Mr. Rincover, were held in civil contempt by the district court for failing to comply with the January 1993 default judgment.

Earlier, on April 18, 1994, responding to an FEC petition, the court had ordered the defendants to show cause why they should not be held in contempt. That same day, Mr. Rincover filed a motion to set aside the January 1993 default judgment. (America's PAC never responded to the order to show cause.)

The court, however, rejected Mr. Rincover's motion, finding that his claims did not indicate the "extraordinary circumstances" necessary for the court to set aside a judgment. The court therefore ordered Mr. Rincover and America's PAC to comply with the January 1993 order within 30 days or pay $50 for each day of delay. Exercising its discretion, the court reduced the penalty to $5,000 because all the violations stemmed from a single incident.

Source: FEC *Record*, April 1993, p. 10; and August 1994, p. 8.

America's PAC: FEC v., No. 92-2747 LGB (Tx) (C.D. Cal. May 23, 1994).

FEC v. ANDERSON FOR SENATOR

Background

On May 7, 1984, the FEC filed suit in the U.S. District Court for the Eastern District of Pennsylvania, seeking action against three defendants: the Tom Anderson for Senator Committee, the principal campaign committee of Mr. Anderson's 1980 Senate campaign; the Pennsylvania Service Station Dealers Association (the Association), an incorporated trade association; and Mary Anderson, the candidate's wife (Civil Action No. 84-2180).

Specifically, the FEC asked the court to declare that:

- By paying Association employees approximately $4,300 in wages for services they provided to the Anderson campaign, the Association made a prohibited in-kind contribution to the campaign, in violation of 2 U.S.C. §441b(a).
- By cosigning a $50,000 campaign loan with Tom Anderson, Mrs. Anderson made a $25,000 contribution to his Senate campaign, thus exceeding the $1,000 contribution limit, in violation of 2 U.S.C. §441a(a)(1)(A).
- By knowingly accepting these unlawful contributions from the Association and Mrs. Anderson, the Anderson campaign violated 2 U.S.C. §441a(f).

Consent Order: Mrs. Anderson

On December 11, 1984, the U.S. District Court for the Eastern District of Pennsylvania issued a consent order resolving claims the Commission had brought against Mary Anderson.

Within 30 days of signing the consent order, Mrs. Anderson agreed to pay a $350 civil penalty to the U.S. Treasury for having exceeded the election law's contributions limits. 2 U.S.C. §441a(a)(1)(A). By cosigning a $50,000 campaign loan with her husband, the candidate, Mrs. Anderson had made a $25,000 contributions to his Senate campaign. The law limits contributions from all individuals, including spouses, to $1,000 per candidate, per election.

Consent Orders: Association and Campaign

During February 1985, the U.S. District Court for the Eastern District of Pennsylvania issued separate consent orders resolving claims the Commission had brought against the Association and the Anderson campaign. Within 30 days of signing their respective consent orders, defendants agreed to comply with the following terms:

- The Pennsylvania-Delaware Service Stations Dealers, Inc. agreed to pay a $1,369 civil penalty to the U.S. Treasury for making a prohibited in-kind contribution to the Anderson campaign. The Association had paid employees approximately $4,300 in wages for services they provided to the Anderson campaign.
- The Tom Anderson for Senator Committee agreed to pay a $631 civil penalty for accepting: (1) the prohibited in-kind contribution from the Association and (2) an excessive contribution (in the form of a loan endorsement) from Mrs. Anderson.

Source: FEC *Record*, July 1984, p. 8; February 1985, p. 6; and August 1985, p. 8.

FEC v. BANK ONE

On May 20, 1987, the United States District Court, Southern District of Ohio, Eastern Division, approved a consent order between the Commission and the defendants in *FEC v. Bank One, Columbus, N.A.* (Civil Action No. C2-86-1082.) Defendants were: the John Glenn Presidential Committee, Inc., William R. White, treasurer, and Senator John Glenn (Glenn Committee); and Bank One, Columbus, N.A., Ameritrust Company National Association, BancOhio National Bank and the Huntington National Bank (the Banks).

Background

The FEC alleged that $2 million in loans made by the Banks to the Glenn Committee in 1984 were not made on a basis that assured repayment and, therefore, were in violation of 2 U.S.C. §441b(a)After failing to resolve the matter through the conciliation process, the FEC filed suit in federal court on September 9, 1986, and asked the court to find that:

- The four banks violated section 441b(a) of the election law by making prohibited contributions to the Glenn campaign; and
- The Glenn campaign, in turn, violated section 441b(a) of the election law by accepting the contributions.

The FEC also asked the court to assess a civil penalty against each defendant amounting to the greater of $5,000 or 100 percent of the amount involved in each defendant's violation.

Consent Order

The consent order contained the following:

- For purposes of settlement of this litigation only, defendants agreed not to further contest the Commission's allegations that the making and acceptance of the loan was in violation of 2 U.S.C. §441b(a). By agreeing not to further contest the Commission's allegations, defendants did not concede that such allegations were proven by the record or could have been proven at trial.
- In settlement of the litigation, the Glenn Committee agreed to pay $4,000 to the FEC.
- The parties agreed to bear their own costs and fees in this matter.

Source: FEC *Record*, November 1986, p. 6; and July 1987, p. 5.

Bank One, Columbus, N.A.: FEC v., No. C-2-86-1082 (S.D. Ohio 1987).

FEC v. BEATTY FOR CONGRESS

On January 15, 1987, the U.S. District Court for the Southern District of New York granted the FEC's application for a default judgment in *FEC v. Beatty for Congress Committee* (Civil Action No. 86-Civ-3894-[RLC]). The court's default judgment decreed that the Beatty for Congress Committee, the principal campaign committee for Vander L. Beatty's 1982 House campaign, and the committee's treasurer, Edward Myers, Jr., violated the election law on several counts.

The court imposed a $5,000 civil penalty on the defendants for each violation and required the defendants to pay the FEC's court costs and attorney's fees. On March 31, 1987, the defendant entered a motion to vacate the default judgment.

On March 21, 1988, the U.S. Court of Appeals for the Second Circuit dismissed the appeal of Mr. Myers in *FEC v. Beatty for Congress Committee and Edward Myers* (Civil Action No. 88-6011). The FEC and Mr. Myers had filed a Stipulated Dismissal and Settlement Agreement with the court.

Background

On May 16, 1986, the FEC filed suit with the U.S. District Court for the Southern District of New York against the Beatty for Congress Committee and against the committee's treasurer, Mr. Myers. The FEC asked the court to find the defendants in violation of federal campaign finance laws on the following counts:

- Knowingly accepting excessive contributions from individuals and from a political committee (2 U.S.C. §441a(f));
- Knowingly accepting an excessive loan from the candidate's family and failing to report the loan (2 U.S.C. §434(b)(3)(E) and 441a(f) and 11 CFR 104.11(a));
- Accepting prohibited contributions from corporations and labor organizations (2 U.S.C. §441b); and
- Accepting corporate loans and failing to report them (2 U.S.C. §441b and 434(b)(3)(E) and 11 CFR 104.11(a)).

The Commission also asked the court to find the defendants in violation of the FECA's recordkeeping and reporting laws on the following counts:

- Failing to file two 1982 quarterly reports on time (2 U.S.C. §434(a)(2)(A)(iii));
- Failing to file 1982 pre-primary and year-end reports and a 1983 mid-year report (2 U.S.C. §434(a)(2)(A)(i) and (iii) and 434(a)(2)(B)(i));
- Failing to maintain adequate records of contributions (2 U.S.C. §432(c)(1-3));
- Failing to itemize certain contributions and expenditures (2 U.S.C. §434(b)(3-4) and 434(b)(5)(A)); and

- Failing to continuously report two loans until extinguished (11 CFR 104.11(a)).

District Court Ruling

In granting the default judgment against Mr. Myers and the Beatty Committee in January 1987, the court imposed a $5,000 civil penalty for each of the violations. The court denied a motion by Mr. Myers to vacate the default judgment against him in October 1987. Mr. Myers appealed the default judgment to the U.S. Court of Appeals for the Second Circuit.

Court of Appeals

In March 1988, the appeals court dismissed the case after a stipulated agreement was reached between the FEC and Mr. Myers.

By the terms of the agreement, Mr. Myers would withdraw his appeal of the district court's October 1987 decision in the case. The court's decision denied Mr. Myers' motion to set aside the default judgment the court had entered against him in January 1987. That decision had imposed a $5,000 civil penalty on the defendants for each of 17 independent violations of the election law. In addition, the parties agreed that:

- Mr. Myers would pay a $15,000 civil penalty in increments spelled out in the payment schedule contained in the agreement. If he failed to meet the payment schedule within the time frame specified by the agreement, the FEC might reinstate the penalty originally imposed by the district court, plus interest from the entry date of the default judgment.
- After Mr. Myers' final penalty payment, the FEC would file a satisfaction of judgment notice with the court.
- By July 1, 1988, Mr. Myers would file certain original or amended reports for each year between 1983 and 1988. Should Mr. Myers fail to file the reports by July 1, 1988, or if the reports are not adequately filled out, the FEC may increase his civil penalty by $1,000 per month until the reports are filed in compliance with FEC disclosure requirements.
- Upon the acceptable filing of all the Beatty committee's required reports, Mr. Myers would follow FEC procedures for requesting termination of the committee.

Source: FEC *Record*, June 1986, p. 9; March 1987, p. 6; and June 1988, p. 9.

Beatty for Congress: FEC v., No. 86 Civ. 3894, (S.D.N.Y. Oct 23, 1987) (unpublished opinion).

FEC v. JEFFREY BELL

On April 14, 1980, the U.S. District Court for the District of New Jersey issued a consent judgment agreed to by the Commission and defendant Jeffrey Bell. The Commission had filed suit on January 21, 1980, alleging that the defendant had violated 2 U.S.C. §441a(f) by accepting excessive contributions from his mother, Marjorie Bell, during his 1978 Senatorial campaign in New Jersey. Mr. Bell agreed to pay a civil penalty of $1,500 levied by the court.

Source: FEC *Record*, June 1980, p. 8.

FEC v. MARJORIE BELL

On April 10, 1980, the U.S. District Court for the District of Columbia issued a consent judgment agreed to by the Commission and defendants Marjorie Bell, the Bell for Senate Committee and its two treasurers, Andrew P. Napolitano and James S. Wagner. The Commission had filed suit on July 20, 1979, claiming that Marjorie Bell had violated the contribution limits of 2 U.S.C. §441a(a)(1)(A) and 441a(a)(3); and that the Bell Committee and its two treasurers had violated 2 U.S.C. §441a(a)(1)(A) and 441a(a)(3); and that the Bell Committee and its two treasurers had violated 2 U.S.C. §441a(f) by knowingly accepting excessive contributions, and 2 U.S.C. §434(b) by failing to report the actual source of the contributions. Marjorie Bell agreed to pay a civil penalty of $500 levied by the court. The Bell for Senate Committee agreed to pay a civil penalty of $4,500 levied against both the Committee and its officers. The Committee also agreed to amend reports filed with the Commission to indicate that Marjorie Bell was the actual source of $52,400 reported as loans from Jeffrey Bell to the Committee.

Source: FEC *Record*, June 1980, p. 8.

FEC v. BOOKMAN & ASSOCIATES

On May 2, 1989, the U.S. District Court for the Northern District of Georgia, Atlanta Division, issued a final consent order and judgment in *FEC v. Ron Bookman & Associates* (Civil Action No. 1:88-CV-1807-JTC). The consent order declared that Bookman & Associates, a Georgia corporation, made a $150 contribution to a federal candidate. The Act prohibits corporations from making contributions or expenditures in connection with federal elections. 2 U.S.C. §441b.

The order also declared that Ron Bookman, as president of the company, had violated the law by consenting to the making of the contribution. Section 441b also prohibits corporate officers and executives from consenting to the making of contributions and expenditures.

The consent order included a $500 civil penalty and permanently enjoined the defendants from similar future violations of the Act.

Source: FEC *Record*, June 1989, p. 8.

FEC v. BRYANT CAMPAIGN COMMITTEE

On September 1, 1989, the U.S. District Court for the Northern District of Texas issued a final consent order and judgment in *FEC v. John Bryant Campaign Committee* (Civil Action No. CA3-89-1694). The consent order decreed that the committee and its treasurer, Ken Molberg, had violated the election law by accepting a $2,000 excessive contribution from an individual. 2 U.S.C. §441a(f). The order also decreed that the defendants had unlawfully used information contained in another committee's reports for soliciting individuals. 2 U.S.C. §438(a)(4). The consent order included a $500 penalty and a permanent injunction against future similar violations of the law.

Source: FEC *Record*, November 1989, p. 4.

FEC v. BULL FOR CONGRESS

On June 8, 1990, the U.S. District Court for the District of Maine imposed civil penalties on defendants Chipman C. Bull for Congress, the principal campaign committee for Mr. Bull's 1984 House campaign, and Denise M. Deshane, the committee treasurer, for violating several provisions of the Federal Election Campaign Act. (Civil Action No. 88-0037-B.) In earlier rulings of September 13, 1989, and January 9, 1990, the court found that defendants had violated the law by:

- Knowingly accepting $8,937.50 in excessive contributions from three individuals whose contributions took several forms—direct contributions, guarantees of a $10,000 bank loan and interest payments made on the loan (2 U.S.C. §441a(f));
- Failing to disclose the identification of the three guarantors of the bank loan (§434(b)(3)(E)); and
- Failing to meet the filing deadlines for the two reports covering 1985 activity (§434(a)(2)(B)).

In its June 8 order, the court adopted the civil penalties recommended by a United States Magistrate and assessed a penalty of $18,437.50 against the committee and a $500 penalty against the treasurer.

Source: FEC *Record*, August 1990, p. 11.

FEC v. CALIFORNIA DEMOCRATIC PARTY

On October 14, 1999, the U.S. District Court for the Eastern District of California ruled that the California Democratic Party, the Democratic State Central Committee of California—federal, and the Democratic State Central Committee of California—nonfederal (collectively, the CDP) violated the Federal Election Campaign Act (the Act) when it paid for a voter registration drive that was "targeted" at potential Democratic registrants entirely with nonfederal funds. On November 2, 1999, the court issued a consent order and judgment in which the CDP agreed to pay a civil penalty to the FEC in the amount of $70,000 and to transfer $354,500 from its federal account to its nonfederal account.

Background

The CDP is the state party committee responsible for the operations of the Democratic Party in California. In 1992 and early 1993, the CDP contributed $709,000 to Taxpayers Against Deception—No on 165 (No on 165), a California political committee that opposed a state ballot initiative, Proposition 165. The money, paid from the party's nonfederal account, was given with the knowledge that it would be used for voter registration drives for the 1992 general election.

The Commission had argued that the CDP had violated the Act when it failed to allocate the costs of its voter registration drive between its federal and nonfederal accounts. Under Commission regulations, political committees must allocate expenses for generic voter drives between their federal and nonfederal accounts, must pay for the expenses directly from their federal account or a special allocation account, and must disclose the allocation in their reports to the FEC. 11 CFR 102.5(a)(1)(i), 104.10(b)(4) and 106.5(d) and (g). In this case, the CDP failed to allocate any of the voter drive costs to its federal account, paid for all of the costs directly from a nonfederal account and failed to report any of the costs to the FEC.

Court's Findings

Applicability of the Act. The CDP asserted that the "FECA cannot be stretched beyond its literal terms to include any activity which could conceivably have an influence on a federal election." The court stated that the CDP's argument was unavailing because it disregarded the nature of the violations claimed by the FEC—that the CDP financed a partisan voter registration drive with nonfederal funds—and overlooked the allocation rules, which allow apportionment of the costs of fundraising activities not associated with a federal election, including generic voter drives, to a party's nonfederal account.

Nonpartisan Voter Registration Drive Exemption. The CDP argued that No on 165's voter registration drive was, to its knowledge, nonpartisan and that its funding of the drive was therefore exempt from the Act under the Act's definition of "expenditure," which excludes "nonpartisan activity designed to encourage individuals to vote or to register to vote." 2 U.S.C. §431(9)(B)(ii). The court rejected the CDP's argument, and ruled that the definition of "expenditure" was not at issue in the case. The court also pointed out that there is no similar exception in the allocation rules. Further, the court determined that, in any event, the activities undertaken by No on 165 clearly were not nonpartisan and, therefore, could not fall under the exemption.

Whether the Voter Registration Drive was Partisan. The CDP further claimed that there was a genuine issue of fact as to the partisan nature of the voter drives, pointing out that there was no evidence that Democratic literature was distributed at the drive sites, that any worker expressly advocated registering as a Democrat, or that a worker refused to accept a non-Democratic registration card for filing. The court disagreed, asserting that the undisputed evidence demonstrated that No on 165's voter registration drive was "a targeted effort to register Democrats to vote in a general election."

Whether CDP Knew the Drive was Partisan. The court further concluded that the executive director undisputedly knew that No on 165 would target areas in which the majority of potential registrants would probably register as Democrats, and that whether she had "knowledge of all aspects" of the partisan conduct of the drive was not material.

Attributing the Drive. Finally, the CDP had contended that, in light of the fact that No on 165 devised its voter drive strategy independently of the CDP, that it raised approximately $4 million in 1994, and that No on 165 and the CDP were "separate entities with separate interests," the voter registration drive could not be attributed to the CDP. The court, however, concluded that it was unnecessary to "attribute" the drive to the CDP in order to find that the CDP had contributed only nonfederal funds to No on 165's voter registration drive and that its failure to allocate an appropriate portion of the costs to its federal account violated the Act and the allocation rules.

Conclusion and Remedy

Because the FEC showed that the CDP violated the Act and allocation regulations by funding a generic voter drive that targeted Democrats,[1] the court granted the FEC's motion for summary judgment, ruling that the CDP violated the Commission's allocation and reporting rules at 2 U.S.C. §441b and 11 CFR 102.5(a)(1)(i), 104.10(b)(4) and 106.5.

Through a consent order and judgment, issued November 2, 1999, the CDP agreed to pay a civil penalty of $70,000 and to transfer $354,500 from its federal account to its nonfederal account.

Source: FEC *Record*, December 1999, p. 4

[1] The court, however, did not rule on one of the voter drives funded by the CDP. No on 165 had contributed $59,000 of the CDP's money to another California political committee called The Committee to Protect the Political Rights of Minorities (which in turn engaged the Black American Political Association of California (BAPAC)) for use in a separate voter registration drive. The court concluded that there was insufficient evidence that BAPAC's drive was conducted in a partisan manner and this matter, therefore, was to go to trial. In the consent order and judgment, however, the parties resolved all the issues. Consequently, a trial was not held.

FEC v. CALIFORNIANS FOR A STRONG AMERICA (88-1554)

On November 14, 1988, the U.S. District Court for the Central District of California granted the FEC's motion for a default judgment against the Californians for a Strong America (CSA), a nonconnected political committee, and CSA's treasurer Albert J. Cook. (Civil Action No. 88-1554-AWT.)

In the judgment, the court declared that the defendants had violated 2 U.S.C. §434 (a)(4)(A)(i) and (iv) by failing to file reports covering 1986 activity, that is, two quarterly reports and a year-end report. Accordingly, the court:

- Ordered defendants to pay a $15,000 civil penalty, together with $28.20, to cover the FEC's court costs in the case; and [1]
- Enjoined defendants from similar violations of the election law in the future.

Source: FEC *Record*, January 1989, p. 9.

[1] See "Contempt Ruling," next page.

FEC v. CALIFORNIANS FOR A STRONG AMERICA (88-6449)

On June 22, 1989, the U.S. District Court for the Central District of California issued a final order and default judgment in *FEC v. Californians for a Strong America.* (Civil Action No. CV-88-6449-AWT(Ex).) The court decreed that the committee and its treasurer, Albert J. Cook, had violated the election law by:

- Failing to file a 1987 mid-year report on time (2 U.S.C. §434(a)(4)(A)(iv));
- Failing to properly report independent expenditures incurred for radio and television advertisements and fundraising letters advocating the defeat of Senator Alan Cranston in the 1986 Senate election in California (2 U.S.C. §434(b)(6)(B)(iii)); and
- Failing to include a disclaimer notice in at least five solicitation letters (2 U.S.C. §441d(a)(3)).

The court ordered the defendants to comply with the law's reporting requirements within 15 days of the judgment and to pay a civil penalty of $15,000 ($5,000 for each violation). The court also ordered the defendants to pay the FEC's court costs and to refrain from future similar violations of the election law.

Contempt Ruling

On August 13, 1993, the district court held defendants in contempt of court for failing to pay the two $15,000 civil penalties stemming from this and a previous case (No. 88-1554, summarized in the preceding column). By then, the penalties had been outstanding for over three years. In both cases, defendants never responded to the FEC's suits, and the judgments were by default. Defendants also failed to file responses or appear before the court in the contempt proceedings.

The court ordered defendants to pay the penalties, plus accrued back interest, by August 31, 1993. Thereafter, they were to pay an additional $100 per day until they completed payment. Furthermore, if they failed to make full payment by September 30, the court said it would issue a warrant for the arrest of Mr. Cook.

Source: FEC *Record*, September 1989, p. 8; and October 1993, p. 1.

FEC v. CALIFORNIANS FOR DEMOCRATIC REPRESENTATION

On January 9, 1986, the U.S. District Court for the Central District of California ruled that Californians for Democratic Representation (CDR), a nonprofit organization registered with the California Fair Political Practices Commission, had violated various provisions of the Federal Election Campaign Act in the course of conducting a slate mail program during 1982. (Civil Action No. 85-2086.)

Background

CDR's slate mail program consisted of political ads distributed through direct mail to the general public. In addition to endorsing ballot issues and state and local candidates, CDR's slate mail program endorsed federal candidates active in California's 1982 primary and general elections. Candidates could purchase advertising space from CDR at fair market value. (A candidate's ad might include, for example, his/her photograph and a write-up.) CDR also listed candidates who did not purchase advertising space, at no charge to them.

Court's Ruling

The court ruled that those federal candidates who had paid for advertising space in CDR's slate mailings had not contributed to CDR; nor did their advertising space constitute in-kind contributions from CDR to the candidates.

On the other hand, the court found that costs incurred by CDR for listing federal candidates free of charge in mailings constituted expenditures by CDR on behalf of the candidates, which were subject to the election law. (Nine federal candidates were listed free of charge in mailings for the primary elections, and three candidates were listed in general election mailings.) Accordingly, the court found the CDR had violated the election law by failing to register and report as a political committee when these expenditures exceeded $1,000 during 1982. See 2 U.S.C. §§431(4)(A), 433 and 434.

Finally, the court ruled that CDR's ads failed to state who paid for them and whether or not the candidates had authorized the mailings. See 2 U.S.C. §441d(a).

The court imposed a $15,00 civil penalty on the defendants. Subsequently the court denied defendants' motion to have the penalty reduced.

Source: FEC *Record*, March 1986, p. 8.

Californians for Democratic Representation: FEC v., No. 85-2086-JMI, (C.D. Cal. Jan. 9, 1986) (unpublished opinion).

FEC v. CAMPAIGN RESOURCE TECHNOLOGIES

On August 3, 1987, the U.S. District Court for the District of Arizona, Tucson Division, approved a final consent order and judgment between the Commission and defendants Campaign Resource Technologies, Inc. (CRT) and John Kaur (Civil Action No. CTV 86-448 TUC ACM).

During the 1983-84 Presidential election cycle, the Bergland for President Committee (the Committee), the principal campaign committee for David Bergland's 1984 Presidential campaign, contracted with CRT for certain campaign services. CRT, in turn, subcontracted certain services to John Kaur, who was doing business as Digitgraph Computer Systems Company (Digitgraph).

In the consent order, defendants CRT and John Kaur agreed that they violated 2 U.S.C. §432(b) by failing to forward to the Committee's treasurer, within 10 days, approximately $6,000 in campaign contribution checks received by CRT and Digitgraph on behalf of the Committee.

The court imposed a $5,000 civil penalty which the defendants agreed to pay within 30 days of filing the consent order. The court also permanently enjoined the defendant from future similar violations of the Act.

Source: FEC *Record*, September 1987, p. 8.

FEC v. CARTER COMMITTEE FOR A GREATER AMERICA

On July 21, 1986, the U.S. District Court for the Northern District of Georgia approved a consent order between the Commission and the Jimmy Carter Committee for a Greater America, a nonconnected political committee, and the Committee's treasurer, Chip Carter. The consent order provides that defendants violated sections 434(a)(4)(A)(i) and (iii) of the election law during the 1983-84 election cycle by failing to meet the filing deadline for 1984 post-general election and year-end reports.

Within 30 days of filing the consent order, the defendants agreed to pay a $250 civil penalty to the U.S. Treasurer.

The consent order concluded a suit filed by the FEC on April 7, 1986 (Civil Action No. C86-774A).

Source: FEC *Record*, September 1986, p. 7.

FEC v. CAULDER

On June 16, 1992, the U.S. District Court for the Eastern District of Pennsylvania ruled that Michael Caulder violated 2 U.S.C. §432(b)(3) by knowingly and willfully commingling his personal funds with $51,600 belonging to Alerted Democratic Majority, a political committee. (Defendant had embezzled the committee's funds and supplied false information on the committee's FEC reports in order to disguise the embezzlement.)

The court imposed a $103,200 civil penalty against Mr. Caulder but, in view of his depleted financial situation, suspended all but $3,000 of the penalty, to be paid in monthly installments. The court also permanently enjoined him from violating §432(b)(3) and from engaging in any activity that would result in his being responsible for political committee funds, accounts, financial records or FEC reports.

The FEC may request full payment of the suspended penalty if it discovers that defendant made inaccurate or misleading representations during the litigation or that he violated any terms of the court order. The FEC may also request full or partial payment of the penalty should Mr. Caulder's financial circumstances improve. The court's order and judgment were agreed to by both the FEC and Mr. Caulder. (Civil Action No. 91-CV-5906.)

Source: FEC *Record*, August 1992, p. 13.

FEC v. CENTRAL LONG ISLAND TAX REFORM IMMEDIATELY COMMITTEE

On February 2, 1980, the U.S. Court of Appeals for the Second Circuit remanded *FEC v. Central Long Island Tax Reform Immediately et al.* to the District Court for the Eastern District of New York with an order to dismiss the suit.

The FEC originally filed the suit on August 1, 1978, alleging that violations of the Act occurred when the Central Long Island Tax Reform Immediately Committee (CLITRIM) published a pamphlet for general circulation in October 1976 at a cost of more than $100. The FEC claimed that, in publishing and distributing the pamphlet, defendants violated the following provisions of the Act:

- 2 U.S.C. §434(e), which requires any "person...who makes...independent expenditures expressly advocating the election or defeat of a clearly identified candidate" in an amount exceeding $100 in any calendar year to report such costs to the FEC; and
- 2 U.S.C. §441d, which requires any person who "makes an expenditure for the purpose of financing a communication expressly advocating the election or defeat of a clearly identified candidate" to state in the communication whether it is authorized by a candidate, his authorized political committees or their agents or any other unauthorized person.

In its motion to dismiss the case, CLITRIM argued that, in its *Buckley v. Valeo* decision, the Supreme Court had specifically mandated that the Act be amended to regulate only expenditures or communications by persons "expressly advocating the election or defeat of a clearly identified candidate." *Buckley v. Valeo*, 424 U.S. 1, 43 (1976). Further, "express advocacy" must include at least one of the phrases suggested by the Court in Buckley: "'vote for', 'elect', 'support', 'cast your ballot for', 'Smith for Congress', 'Vote Against', 'defeat', 'reject.'" (424 U.S. 1 (1976) at 52). CLITRIM pointed out that the TRIM Bulletin did not contain any of the terms of "express advocacy" spelled out in *Buckley*.

Responding to this argument in one of its reply briefs filed with the court of appeals, the FEC maintained that the CLITRIM/National TRIM bulletin was not merely an informational or educational compilation of Congressional voting records. The bulletin discussed TRIM's position on the issue of high taxes and big government, identified federal candidates, critiqued their position on the issue of high taxes and big government and urged the voter to vote with TRIM. The Commission interpreted these communications as "express advocacy" communications within the meaning of 2 U.S.C. §434(e) and as construed by the Supreme Court in *Buckley*, 424 U.S. at 44, n. 52.

In reaching its decision to dismiss the case, the court of appeals concluded that the *CLITRIM Bulletin* did not "expressly advocate" the election or defeat of a candidate within the meaning of 2 U.S.C. §§434(e) and 441d. Since, as interpreted by the court, these provisions of the Act did not apply to defendants' conduct, the court concluded the constitutional issues raised by defendants in the case would not represent a case ripe for consideration by the court.

On February 25, 1980, National TRIM and John W. Robbins, intervenor in the case, petitioned the court of appeals for a rehearing. Defendants sought injunctive relief from FEC enforcement proceedings brought against local TRIM committees which were not affected by the court's February 2 order to dismiss the case. On March 5, 1980, the petition for rehearing was denied by the court of appeals.

Source: FEC *Record*, April 1980, p. 7.

Central Long Island Tax Reform Immediately Committee: FEC v., 616 F.2d 45 (2d Cir. 1980) (*en banc*).

FEC v. CHRISTIAN ACTION NETWORK

On June 28, 1995, the U.S. District Court for the Western District of Virginia, Lynchburg Division, dismissed this case. The FEC had brought suit against the Christian Action Network (CAN) for making independent expenditures [1] with corporate funds, for failing to include the proper disclaimer on its political communications and for failing to file the required reports with the FEC.

On August 2, 1996, the U.S. Court of Appeals for the Fourth Circuit, in an unpublished opinion, upheld the district court's dismissal of this case. The court of appeals, finding "no error" in the district court opinion, affirmed that court's decision. Following, on April 7, 1997, the Fourth Circuit granted a request from the CAN that the FEC pay its attorney fees and other costs associated with this case. The court remanded the case to the district court to set the amount to be awarded.

District Court Decision

The communications in question—a television advertisement and two newspaper advertisements that ran during the weeks leading up to the 1992 Presidential general election—assailed then-candidate Bill Clinton's alleged position on homosexual issues.

The court ruled that the communications were outside the Commission's jurisdiction because they did not expressly advocate the election or defeat of Mr. Clinton.

The court reached this conclusion on the basis of the Supreme Court's decision in *Buckley v. Valeo*. In that case, the Supreme Court said that, for a communication to be considered an independent expenditure and thus subject to FEC regulation, it must expressly advocate the election or defeat of a clearly identified candidate.[2] In reviewing relevant court decisions since *Buckley*, the court found that "political expression, including discussion of public issues and debate on the qualifications of candidates, enjoys extensive First Amendment protection" and that the courts "have adopted a strict interpretation of the 'express advocacy' standard . . . . Thus, courts generally have been disinclined to entertain arguments made by the Commission that focus on anything other than the actual language used in an advertisement."

In arguing the case, the FEC had relied on the Court of Appeals for the Ninth Circuit's decision in *FEC v. Furgatch*. In that case, the appeals court considered the timing and context of a communication in determining the existence of express advocacy. The FEC stressed that those elements were important here as well: the CAN television advertisement aired in the weeks leading up to the 1992 general election, and, although

the ad did not contain words that expressly advocated Mr. Clinton's defeat, its imagery, music, editing, coloring, etc. clearly conveyed that message.

The FEC also pointed out that the newspaper ads—both of which referred to the "voting public" and one of which referred to a Presidential debate scheduled for that day—conveyed a message identical to that of the television ad. Viewed collectively, the FEC contended, the three ads sent voters the message to vote against Mr. Clinton and his policies in the November elections.

The court recognized the validity of the *Furgatch* approach but noted that the *Furgatch* court stated that the context and timing of a communication were peripheral to the actual words themselves, and therefore should be given only limited weight when determining the presence of express advocacy.

Focusing on the words contained in the ads, the court said there was no call for electoral action. The newspaper ads' reference to the "voting public" "does not *per se* translate into an exhortation to vote."

Finding that express advocacy was absent from the ads, the court concluded that "the Defendants' advertisements represent the very type of issue advocacy the *Buckley* Court sought to exempt from government regulation."

Source: FEC *Record*, September 1995, p. 2; October 1996, p. 1; and May 1997, p. 5.

Christian Action Network: FEC v., 894 F. Supp. 946 (W.D. Va. 1995), *aff'd per curiam*, 92 F.3d 1178 (4th Cir. 1996).

[1] An independent expenditure is an expenditure made without any coordination with a candidate's campaign for a communication which expressly advocates the election or defeat of a clearly identified candidate for federal office.

[2] The court listed the following examples of words that constitute express advocacy: "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject."

FEC v. CHRISTIAN COALITION

On May 13, 1997, the U.S. District Court for the District of Columbia denied the Christian Coalition's motion for partial dismissal of this case.

The decision meant that the FEC was able to seek declaratory and injunctive relief for all of the alleged violations of the Federal Election Campaign Act (the Act), but was not able to obtain civil penalties for any of the violations that occurred more than five years before the lawsuit was filed.

On August 2, 1999, the district court granted in part and denied in part motions for summary judgment by both the Federal Election Commission (the "FEC" or "Commission") and the Christian Coalition (the "Coalition").

The FEC and the Christian Coalition negotiated a final judgment and order, which the court issued on February 23, 2000.

1997 District Court Decision

Statute of Limitations

The Coalition sought dismissal of those portions of the FEC's suit that concerned prohibited activities that had occurred more than five years before the suit was filed—essentially the activities that related to the 1990 election cycle.

At 28 U.S.C. §2462, the law provides for a five-year statute of limitations for certain law enforcement proceedings. The Coalition argued that that time limit started running at the time that the alleged offenses occurred—not when they were reported to the FEC by the Democratic Party of Virginia. The FEC argued that the time began running when it was notified through the administrative complaint process. Because its investigatory powers and resources are limited, the FEC said that it had no way of knowing about the Coalition's alleged conduct until a complaint was filed with the agency.

The court rejected the FEC's argument, citing the ruling of the U.S. Court of Appeals for the District of Columbia Circuit in *3M v. Browner*.[1] In that case, the appeals court ruled that an agency's failure to detect violations does not negate the inherent difficulties faced by bringing a case to court long after the alleged violation has occurred. The appeals court noted: "nothing in the language of §2462 even arguably makes the running of the limitation period turn on the degree of difficulty an agency experiences in detecting violations."

The court, however, agreed with the FEC that §2462 provides no shield for the Coalition from declaratory or injunctive relief. At 2 U.S.C. §437g(a)(6), the FEC has the authority to seek injunctive relief separate from its authority to seek legal remedies (e.g., civil fines, penalties and forfeitures).

1999 District Court Decision

The Commission had alleged that the Coalition had made three expenditures for communications that expressly advocated the election or defeat of clearly identified candidates. The court held that the following two communications did not contain express advocacy and, therefore, did not violate the Federal Election Campaign Act's (the "Act") ban on corporate contributions and expenditures made in connection with federal elections:

- A 1992 Montana speech by Ralph Reed, then-Executive Director of the Coalition; and
- A 1994 nationwide direct mail package entitled "Reclaim America."

The court held that a third communication, a 1994 mailing by the Georgia Christian Coalition, did expressly advocate the election of then-Speaker Newt Gingrich in violation of the Act. The court also held that the Coalition violated the Act by making a prohibited corporate contribution to Oliver North's Senate campaign by giving it a mailing list.

The Commission also alleged that the Coalition coordinated its voter guides during the 1990, 1992 and 1994 elections with various federal candidates. In all but one instance, the court decided that there was no coordination. In one election campaign, Oliver North's 1994 U.S. Senate campaign in Virginia, the court determined that there were contested issues to be resolved after a future hearing.

Background and Holding

The Christian Coalition is a nonprofit, nonstock corporation, originally incorporated in Virginia and doing business in the District of Columbia. In 1992 both the Democratic Party of Virginia and the Democratic National Committee filed complaints against the Coalition with the FEC. The two complaints were merged. The Commission found probable cause to believe the Coalition had violated the Act and attempted conciliation with the Coalition. After that attempt failed, the Commission filed this lawsuit in 1996.

The court determined that the two main issues in the litigation were:

- Whether "express advocacy" is limited to communications that use specific phrases or "magic words," such as "Vote for Smith," or whether a more substantive inquiry into the clearly intended effect of a communication is appropriate; and
- What level of contact between a campaign and a corporation constitutes "coordination" and thereby converts a corporate expenditure that influences an election into a prohibited contribution.

Express Advocacy. With regard to the first issue, the court concluded that an express advocacy communication is one that a reasonable person would understand contains an explicit directive—using an active verb (or its functional equivalent)—that unmistakably exhorts the audience to take electoral action to support or defeat a clearly identified candidate. The verb (or its functional equivalent) must be considered in the context of the entire communication, including temporal proximity to the election.

Corporate Coordinated Expenditure. With respect to the second issue, the district court limited its decision to "expressive coordinated expenditures" by corporations. The court explained that an "expressive coordinated expenditure" is an expenditure for a communication that (although not containing express advocacy) is "made for the purpose of influencing a federal election in which the spender is responsible for a substantial portion of the speech and for which the spender's choice of speech has been arrived at after coordination with the campaign." Such expenditures are coordinated if the candidate requests or suggests the expenditure, or if the spender engages in substantial discussion or negotiation with the campaign about the communication's content, timing, location, mode, intended audience or volume.

Express Advocacy Issues

Express Advocacy Standard. The FEC alleged that in three instances the Coalition used general treasury funds to finance independent communications that contained express advocacy (i.e., expressly advocated the election or defeat of a clearly identified candidate) and thereby violated §441b of the Act, which prohibits corporations and unions from making expenditures in connection with federal elections.

Based on decisions by the Supreme Court and lower courts in other jurisdictions, the district court held that, in order for an expenditure to contain express advocacy and, if made by a corporation, violate §441b of the Act, the following attributes are necessary:

- The communication must contain an explicit directive. It must use an active verb or its functional equivalent (e.g., "Vote for Smith" or "Smith for Congress" or an unequivocal symbol).
- The "active verb or its immediate equivalent—considered in the context of the entire communication, including its temporal proximity to the election—must unmistakably exhort the [receiver] to take electoral action to support the election or defeat of a clearly identified candidate." Electoral action includes campaigning for and/or contributing to a clearly identified candidate, as well as voting for or against the candidate.

The court said that it is a pure question of law as to whether a reasonable person would understand the communication to expressly advocate a candidate's election or defeat. Once the identity of the speaker (organization paying for the communication) and the content of the communication are proven, a court must determine whether the communication contains express advocacy "solely as a matter of law."

Ralph Reed's 1992 Montana Speech. The FEC alleged that the Christian Coalition used general treasury funds to pay travel expenses and compensation to Ralph Reed, then-Executive Director of the Coalition, for a speech that expressly advocated the defeat of Pat Williams, the Democratic U.S. Representative from Montana's First District.

The court held that, while Reed's speech made references to the Democratic incumbent, it did not direct the audience to do anything. He predicted that "victory will be ours" and that "we're going to see Pat Williams sent bags packing . . . in November." The court said this was "prophecy rather than advocacy," because Reed's speech did not contain an explicit exhortation to the audience to take action to defeat Representative Williams. "[I]t can only be concluded that Reed exhibited precisely the 'ingenuity and resourcefulness' in his verb choice that the *Buckley* Court envisioned possible to circumvent the prohibition on express advocacy. As others have acknowledged, results such as this appear unsatisfyingly formalistic, allowing precisely the sort of communications Congress sought to prohibit to remain immune from liability. . . . But the Supreme Court felt that the First Amendment required a choice between a toothless provision and one with an overbite; results such as this flow directly from that choice."

"Reclaim America" 1994 Mailing. The FEC alleged that portions of a mass mailing called "Reclaim America" included prohibited express advocacy. The Commission argued that, when read in conjunction with the enclosed Christian Coalition scorecard (rating incumbents on specific votes), the cover letter could only be understood to urge support of those incumbents rated favorably and defeat of those rated unfavorably.

Though acknowledging that the cover letter contained explicit directives (e.g., "stand together," "get organized"), the court concluded that a reasonable person could understand the cover letter as a directive to engage in lobbying or issue advocacy with all candidates. The scorecard did not identify which incumbents were candidates in 1994 and did not provide an electoral endorsement of any particular candidate. As a result, there was no express advocacy, and the expenditures did not violate §441b.

Georgia Mailing in 1994. The FEC alleged that a mailing by the Georgia Christian Coalition state affiliate (for which the Coalition admitted it was responsible and liable) contained a cover letter from the Coalition's state chair expressly advocating the re-election of Congressman Newt Gingrich. The mailing also contained a copy of the Coalition's nationwide Congressional scorecard.

The court held that, unlike the other two communications discussed above, "the Georgia mailing was expressly directed at the reader-as-voter." The cover letter announced upcoming primary elections and enclosed two items "[to] help you prepare for your trip to the voting booth." The second item was the congressional scorecard. The letter stated that Newt Gingrich, a Christian Coalition "100 percenter," was the only incumbent facing a primary opponent. The letter also exhorted the voter to take the scorecard to the polls in the general election. "While marginally less direct tha[n] saying 'Vote for Newt Gingrich,' the letter in effect is explicit that the reader should take with him to the voting booth the knowledge that Speaker Gingrich was a 'Christian Coalition 100 percenter' and therefore the reader should vote for him. While the 'express advocacy' standard is susceptible of circumvention by all manner of linguistic artifice, merely changing the verb 'vote' into the noun, 'trip to the voting booth' is insufficient to escape the limited reach of 'express advocacy.'"

Coordination Issues

Corporate Coordinated Expenditures. The court explained that §441b of the Act prohibits corporations from making any contributions or expenditures in connection with any federal election, and the Supreme Court, in *Buckley v. Valeo*, established that expenditures made in coordination with a campaign are contributions. The court further stated that, in *FEC v. Massachusetts Citizens For Life*, the Supreme Court "determined that Congress plainly intended the Act to reach corporate expenditures in connection with a federal election. . . . Under that construction, it is manifest that the Coalition's expenditures on voter guides fall within Congress's intended scope for §441b."

The district court went on to distinguish "expressive coordinated expenditures" from other coordinated expenditures. According to the court, an "expressive coordinated expenditure" is an expenditure "for a communication made for the purpose of influencing a federal election in which the spender is responsible for a substantial portion of the speech and for which the spender's choice of speech has been arrived at after coordination with the campaign." The court distinguished this type of coordinated expenditure from other

types such as coordinated expenditures for noncommunicative materials (e.g., food or travel expenses for campaign staff).

The court held constitutional that portion of the FEC's regulations that would treat, as contributions, "expressive coordinated expenditures" made at the request or suggestion of the campaign. In the absence of a request or suggestion from the campaign, the court explained, an expressive expenditure is still coordinated where the candidate or his agent exercises control over the communication, or where there has been substantial discussion or negotiation between the campaign and the spender about such things as the contents, timing, location, mode, intended audience, or volume of the communication. A substantial discussion, the court explained, is one from which the spender and the campaign emerge as partners (not necessarily equal partners) or joint venturers in the expressive expenditure. "This standard limits §441b's contribution prohibition on expressive coordinated expenditures to those in which the candidate has taken a sufficient interest to demonstrate that the expenditure is perceived as valuable for meeting the campaign's needs or wants."

The court stated that, under this standard, a voter guide would be considered a coordinated expenditure if the conversation between the spender and the campaign went well beyond inquiry and included, for example, discussion or negotiation over the selection and phrasing of issues to be included in the candidate survey or voter guide. "Coordination requires some to-and-fro between corporation and campaign . . . ."

With respect to get-out-the-vote ("GOTV") telephone activity, the court held that the level of discussion must involve negotiation regarding such things as the contents of the scripts, when the calls are to be made, location or the audience—including which databases will be used to choose call recipients or the number of people to be called.

Using this standard, the court evaluated the facts surrounding the Coalition's expenditures for voter guides involving the following campaigns.

Bush/Quayle '92 Presidential Campaign. The court held that the Coalition's voter guides and GOTV expenditures, in connection with the 1992 Presidential election, did not qualify as coordinated expenditures—primarily because the court concluded that the Bush/Quayle '92 campaign staff, armed with foreknowledge of the Coalition's plans, chose not to respond to the Coalition's implicit offers to discuss those plans. Although Pat Robertson (Chairman of the Board and former President of the Coalition) and Reed had special access to the Bush/Quayle '92 campaign, and Reed had extensive discussions with campaign staff regarding the campaign's thinking on strategic issues, and the Coalition told the campaign it intended to issue voter guides, "the Coalition did most of the talking." Moreover, there was no request or suggestion by the candidate that the Coalition make expenditures for the voter guides. The corporation's possession of "insider" knowledge from the campaign did not, in itself, establish coordination. More overt acts are required, the court said.

Helms for Senate 1990, Inglis for Congress 1992 and Hayworth for Congress 1994. With regard to three Congressional campaigns (Helms for Senate in 1990, Inglis for Congress in 1992 and Hayworth for Congress in 1994), the court found no coordination. In each case, someone was simultaneously involved in both the Coalition and the campaign, but the court said that such "insider trading" was not sufficient to establish coordination without more overt acts such as expenditures being made at the suggestion or request of the campaign.

North for Senate 1994. In one case, North for Senate in 1994, the Coalition gave to Oliver North's campaign a list of previous delegates to the Virginia Republican convention who were also supporters of the Coalition. The court determined that such lists have commercial value, and therefore the contribution of the list to the North campaign was a prohibited corporation contribution.

The Coalition also distributed voter guides in Virginia in 1994. However, there is a material question of fact as to whether North's campaign manager discussed with Reed which issues should be included in the voter guide. That issue, along with the fair market value of the mailing list, will be determined in later court proceedings.

National Republican Senatorial Campaign Committee. The FEC also had alleged that the Coalition had coordinated with the National Republican Senatorial Campaign Committee to create and distribute voter guides in several states the NRSC considered key in the 1990 elections. The NRSC had contributed $64,000 to the Coalition but had not become a partner in the voter guides by discussing their contents or points of distribution. The court concluded, therefore, that the Coalition had not violated the Act since there had been no discussion or negotiation with regard to the contents or distribution of the voter guides.

2000 District Court Decision

The FEC and the Christian Coalition negotiated a final judgment and order, which the court issued on February 23, 2000.

In the final judgment, the court ordered that:

- The Coalition pay $45,000 to the FEC, representing a complete settlement of all outstanding issues, including civil penalties and sanctions; and
- Both the FEC and the Coalition bear their own costs and attorney fees.

Source: FEC *Record*, July 1997, p. 2; September 1999, p. 4; and April 2000, p. 7.

Christian Coalition: FEC v., 965 F. Supp. 66 (D.D.C. 1997); 52 F. Supp.2d 45 (D.D.C. 1999).

[1] *3M Co. v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994).

FEC v. CITIZENS FOR DEMOCRATIC ALTERNATIVES IN 1980
FEC v. FLORIDA FOR KENNEDY
FEC v. MACHINISTS NON-PARTISAN POLITICAL LEAGUE
FEC v. WISCONSIN DEMOCRATS FOR CHANGE IN 1980

Between December 1980 and January 1981, the FEC filed four separate suits in U.S. district courts seeking enforcement of subpoenas it had issued to three "draft Kennedy" political committees registered with the Commission, which had been engaged in promoting the Presidential candidacy of Senator Edward Kennedy during 1979, and to the Machinist Non-Partisan Political League (MNPL), the separate segregated fund of the International Association of Machinists, which had supported the formation of "draft Kennedy" groups in several states during 1979. The Commission filed suit against MNPL and Citizens for Democratic Alternatives in 1980 in the U.S. District Court for the District of Columbia (*FEC v. Citizens for Democratic Alternatives in 1980*, Civil Action No. 800-0009 and *FEC v. Machinists Non-Partisan Political League*, Civil Action No. 79-0291), against Wisconsin Democrats for Change in 1980 in the U.S. District Court for the Western District in Wisconsin (*FEC v. Wisconsin Democrats for Change in 1980*, Civil Action No. 80-C-124) and against the Florida for Kennedy Committee in the U.S. District Court for the Southern District of Florida (*FEC v. Florida for Kennedy Committee*, Civil Action No. 79-5964-CIV-JLK).

Background

The suits resulted from defendants' failure to comply with subpoenas to produce information, which the FEC had issued as part of an investigation of alleged violations of the election law. 2 U.S.C. §437d. The FEC had received a complaint from the Carter/Mondale Presidential Committee, Inc. on October 4, 1979, alleging that nine named political committees were affiliated within the meaning of 2 U.S.C. §433, 441a(a)(5) and 11 CFR 110.3(a)(1)(ii)(D). The complaint claimed that, as affiliated political committees, the nine committees were subject to a single $5,000 limit on contributions they accepted from a multicandidate committee. 2 U.S.C. §441a(a)(1)(C)(2)(C). The complaint further alleged that the draft committees had received, and MNPL had given to them, contributions in excess of the $5,000 limit. 2 U.S.C. §441a(a).

After finding reason to believe that the draft committees and MNPL had violated the Act, the Commission issued 13 subpoenas to various draft committees and to MNPL in an effort to investigate the draft committees' alleged affiliation.

Continued refusal by the four defendants to comply with their subpoenas prompted the FEC to seek enforcement of the subpoenas in the U.S. district courts. The FEC argued that the subpoenas clearly conformed to the guidelines for the enforcement of an administrative agency's subpoenas established by the Supreme Court in *United States v. Morton Salt Co.* Specifically, the FEC's inquiries were authorized by 2 U.S.C. §437d(a)(1), they were not too indefinite and the information they sought was reasonably relevant to the FEC's investigation. Further, in seeking court-mandated enforcement of the subpoenas, the Commission had followed the procedures prescribed by 2 U.S.C. §437d(b).

Defendant committees raised collateral issues that challenged the Commission's jurisdiction over political committees organized to draft candidates for federal office and that raised First Amendment questions. Defendants argued that, for purposes of the Act, the Supreme Court had restricted the definition of a "political committee" in *Buckley v. Valeo* to a group whose major purpose is to influence the nomination or election of a candidate. (*Buckley v. Valeo*, 424 U.S. at 79.)

District Court Rulings

The district courts ordered enforcement of the Commission's subpoenas. The courts maintained that the subpoenas met the guidelines for enforceability and were within the authority of the agency.

The Wisconsin Democrats for Change in 1980 complied with the Wisconsin district court's subpoena enforcement order. However, Citizens for Democratic Alternatives in 1980 and MNPL filed notices appealing the D.C. district court's decisions to the U.S. Court of Appeals for the District of Columbia Circuit, and the Florida for Kennedy Committee filed a notice appealing the Florida district court's decision to the U.S. Court of Appeals for the Fifth Circuit.

The Florida for Kennedy Committee was granted its application for a stay of the district court's order pending its appeal. The D.C. district and appeals courts denied the stay applications requested by Citizens for Democratic Alternatives in 1980 and MNPL; the Supreme Court also denied a further application made by MNPL. The appellants then produced all documents requested by the Commission.

Appeals Court Decision: MNPL and Citizens for Democratic Alternatives in 1980

On May 19, 1981, the appeals court for the D.C. circuit issued its opinions in *FEC v. MNPL* and *FEC v. Citizens for Democratic Alternatives in 1980*. The appeals court found that the Commission "lacked subject matter jurisdiction over the draft activities it sought to investigate." (*FEC v. MNPL*, slip op. at 7; *FEC v. Citizens for Democratic Alternatives in 1980*, slip op. at 2). The appeals court vacated the D.C. district court's orders enforcing the subpoenas and remanded the cases to the district court for further proceedings consistent with its ruling. The appeals court limited its decision to the provisions of the Federal Election Campaign Act prior to the 1979 Amendments: "Whatever the post-1979 situation, it is clear to us that in this case the contribution limitations did not apply to the nine groups whose activities did not support an existing 'candidate.'" (*FEC v. MNPL*, slip op. at 31.) The court did note that the 1979 Amendments to the Act appeared to require that "draft" committees comply only with the Act's reporting requirements.

The appeals court departed from the standard for judicial review of agency subpoenas and established a new "extra careful scrutiny" standard for judicial enforcement of FEC subpoenas. The appeals court reasoned that such a standard was warranted since "the activities which the FEC normally investigates differ in terms of their constitutional significance" from those of concern to other federal agencies. On June 9, 1981, the Commission decided to seek review of the D.C. appeals court's decisions by petitioning the Supreme Court for a writ of certiorari. On October 13, 1981, the Supreme Court denied the petition.

Appeals Court Decision: Florida for Kennedy Committee

On August 2, 1982, the U.S. Court of Appeals for the Eleventh Circuit issued an opinion overturning a ruling of the U.S. District Court for the Southern District of Florida in *FEC v. Florida for Kennedy Committee* (FKC) (Civil Action No. 80-6013). 681 F.2d 1281 (11th Cir. 1982). The appeals court, with Judge Clark dissenting, found that the Commission lacked subject matter jurisdiction over the FKC's activities. The appeals court therefore reversed the district court's order enforcing subpoenas that the Commission had issued to FKC.

Relying on the Supreme Court's decision in *NAACP v. Alabama* (357 U.S. 499 [1958]), the appeals court maintained that the usual standard for judicial review of agency subpoenas did not apply in the FEC's case. The appeals court reasoned that "the FEC [must] prove to

the satisfaction of the courts that it has statutory investigative authority" before the courts may order enforcement of FEC subpoenas. The appeals court then found that "committees organized to 'draft' a person for federal office" are not "political committees" within the purview of the Act and are not, therefore, subject to the Commission's investigative authority.

Judge Clark, in his dissent to the majority opinion, concluded that the statutory language and legislative history both demonstrated that "draft" committees fall within the jurisdiction of the Act. Judge Clark argued that to exempt draft committees from the Act "would leave a significant portion of political activity outside the coverage of the Act, a construction rejected by the Supreme Court." Judge Clark also found the court's reliance on *NAACP v. Alabama* to be inappropriate.

On September 22, 1982, the Commission filed a petition with the appeals court for a rehearing of the suit and a suggestion for a rehearing *en banc*, which was denied October 8, 1982.

Source: FEC *Record*, July 1981, p. 5; December 1981, p. 6; and November 1982, p. 6.

Citizens for Democratic Alternatives in 1980: FEC v., 655 F.2d 397 (D.C. Cir.), *cert. denied*, 454 U.S. 897 (1981).

Florida for Kennedy Committee: FEC v., 492 F. Supp. 587 (S.D. Fl. 1979), *rev'd*, 681 F.2d 1281 (11th Cir. 1982).

Machinists Non-partisan Political Action Committee: FEC v., 655 F.2d 380 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 897 (1981).

FEC v. CITIZENS FOR LAROUCHE

On September 17, 1984, the U.S. District Court for the District of Columbia issued an order in *FEC v. Citizens for LaRouche* (Civil Action No. 83-0373), which granted summary judgment in favor of the FEC and dismissed the defendants' counterclaims.

Background

On February 9, 1983, the FEC filed suit against Lyndon H. LaRouche and the Citizens for LaRouche (CFL), Mr. LaRouche's principal campaign committee for his publicly funded Presidential campaign in 1980. In the suit, the FEC asked the district court to declare that the LaRouche campaign had violated a conciliation agreement entered into by CFL with the FEC. The Commission claimed that the campaign had failed to pay any portion of the $15,000 civil penalty stipulated in the agreement. The conciliation agreement had resulted from an enforcement action in which the FEC had found probable cause to believe that, among other violations, the LaRouche campaign had accepted unlawful contributions in 1979 and 1980.

In its suit, therefore, the FEC had asked the district court:

- To declare that CFL had violated the conciliation agreement;
- To order Mr. LaRouche and the LaRouche campaign to pay the $15,000 civil penalty (with interest);
- To permanently enjoin the LaRouche campaign from further violations of the conciliation agreement;
- To declare that Mr. LaRouche was jointly and severally liable for the civil penalty and that, in failing to pay the penalty, he had violated one of the terms of his certification letter. (He had signed the letter in November 1979 as a prerequisite to being eligible for primary matching funds); and
- To permanently enjoin Mr. LaRouche from further violating the terms of the certification letter.

Mr. LaRouche and the LaRouche campaign admitted that it had failed to pay any portion of the civil penalty. The defendants maintained, however, that the entire written conciliation agreement had been voided by the FEC's alleged breach of both the written agreement and a supplemental oral agreement that allegedly had been reached between the campaign and FEC attorneys. As a result, the defendants claimed, the FEC could not recover the civil penalty.

District Court Ruling

The court noted that, under the election law, a conciliation agreement may only be entered into with the affirmative vote of four Commissioners. See 2 U.S.C. §437g(a)(4)(A)(i). The court found, therefore, that it had to base its consideration of the case exclusively on the

terms of the written conciliation agreement approved by the Commission. The Commission had not voted on the terms of the alleged oral agreement; nor had the written conciliation agreement made reference to a supplemental oral agreement.

The court noted that, to file a civil action against parties that violate the terms of a conciliation agreement, "the Commission need only establish that the person has violated, in whole or in part, any requirement of such a conciliation agreement.... " See U.S.C. §437g(a)(5)(D). Since the LaRouche campaign admitted that it had never paid the civil penalty required by the conciliation agreement, the court found that "the FEC is entitled to declaratory relief in this action and receipt of an accelerated payment of $15,000 from defendant CFL."

The court further found that the candidate, Lyndon H. LaRouche, must also be held liable for the unpaid civil penalty. The court cited the letter of agreements that Mr. LaRouche had entered into with the FEC as a condition of matching fund eligibility. Under the agreements, both Mr. LaRouche and his campaign committee were held liable for any civil penalties assessed against his campaign. Finding no merit to the campaign's counterclaim for damages resulting from "fraudulent inducement and fraudulent actions by the FEC," the court dismissed the counterclaim "for failure to state a claim upon which relief can be granted."

Source: FEC *Record*, November 1984, p. 6.

Citizens for LaRouche: FEC v., 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶9214, (D.D.C. 1984).

FEC v. CITIZENS FOR THE REPUBLIC

On March 1, 1979, the U.S. District Court for the District of Columbia granted summary judgment to Citizens for the Republic (CFR), defendants in a suit filed by the FEC. In granting judgment to the defendant, the court found that there was no genuine issue as to any material fact.

On August 11, 1977, the Commission found reasonable cause to believe that Citizens for the Republic (formerly Citizens for Reagan, principal campaign committee for former Presidential candidate Ronald Reagan) had violated the Act by failing to report or make best efforts to report the occupations and principal places of business of 35% of those persons who had contributed an aggregate of $100 or more to the candidate, as required by 2 U.S.C. §434(b)(2). On June 23, 1978, the Commission filed suit after unsuccessfully trying, for almost a year, to resolve the matter through conciliation, as required by 2 U.S.C. §437g(a)(5)(A).

The defendant maintained that:

- Section 434(b) does not impose an affirmative duty on the candidate to obtain information which may not exist. Rather, the burden of proof is on the Commission, which must identify persons who contributed more than $100 and establish that, at the time of the contribution, they had an occupation and a principal place of business which they were required to report.
- One cannot be in violation of the law for failure to make best efforts; one can only be in violation for failure to report the required information. In the event that the required information does exist and is not reported, the defendant may be relieved of guilt if he is able to demonstrate that he attempted to obtain the required information and was unable to do so.
- The Commission gave insufficient guidance as to how the Committee might obtain the required information. In the absence of any regulation or guidelines, the Committee efforts were best efforts.

The Commission argued that:

- The Act clearly imposes the burden of obtaining the required information on the candidate.
- If the CFR had been able to demonstrate that they had made an attempt to obtain the required information and had not been successful, their effort would have been sufficient. The Committee's initial mailing to potential contributors did not request the required information, or state that the contributor was required to provide it. The only Committee mailing which pointedly requested the missing information was sent in December 1977 (the relevant reporting period was 1975-76), after the Committee had received 14 requests for additional information from the Commission and after the Committee was aware that the Commission had found reasonable cause to believe it was in violation of the Act.

- Lack of guidance did not hinder other Presidential committees from making satisfactory efforts to obtain the required information. Furthermore, the Commission did provide guidance to the Committee, pointing out its reporting deficiencies, suggesting ways those deficiencies might be corrected, and discussing how other Presidential committees were gathering the required information.

In finding for the defendant, the court concluded that the Commission "had a duty to give more...detailed guidance by regulation." In the absence of such guidance, the efforts made by the Reagan Committee were best efforts.

Source: FEC *Record*, May 1979, p. 2.

FEC v. CITIZENS PARTY (86-3113)

On July 31, 1987, the U.S. District Court for the District of Columbia entered a default judgment against the Citizens Party, a political party committee, and the party's acting treasurer, Kirby Edmonds, for the respondents' failure to timely pay in full a previously agreed upon civil penalty, in violation of the terms of a conciliation agreement they had entered into with the FEC on March 20, 1986. (*FEC v. Citizens Party*; Civil Action No. 86-3113 (OG).)

The court also: (1) ordered the defendants to pay interest on the $1,250 unpaid balance of the civil penalty for the period from June 18, 1986, to December 8, 1986, and (2) permanently enjoined the defendants from further violations of the agreement.

Source: FEC *Record*, March 1987, p. 6.

FEC v. CITIZENS PARTY (87-1577)

On May 1, 1989, the U.S. District Court for the Northern District of New York entered a consent order and judgment in *FEC v. Citizens Party* (Civil Action No. 87-CV-1577). The judgment declared that the Citizens Party, a political committee, and its treasurer, Kirby Edmonds, knowingly and willfully violated the election law by failing to file four reports in a timely manner: a 1985 year-end report and three 1986 quarterly reports (April, July and October). The consent order and judgment also assessed a civil penalty of $10,000 against the committee. Mr. Edmonds was personally assessed a $500 penalty.

Source: FEC *Record*, July 1989, p. 7.

FEC v. CLARK

On April 23, 1987, the U.S. District Court for the Middle District of Florida issued a consent order in *FEC v. John R. Clark, Jr.* (Civil Action No. 86-1841-CIV-T-17B). In the order, the FEC and Mr. Clark agreed that:

- Mr. Clark had entered into a conciliation agreement with the FEC in which he admitted violating section 441f of the election law by knowingly permitting his name to be used for a contribution made in the name of another person. In the conciliation agreement, Mr. Clark also agreed to pay a $250 civil penalty by January 25, 1985.
- Mr. Clark had violated the conciliation agreement by failing to pay the civil penalty on time.
- Mr. Clark paid the civil penalty only after the Commission had notified him that the agency had filed suit against him for failure to pay the penalty.

Finally, Mr. Clark assured the court that, in the future, he would fully comply with the election law.

Source: FEC *Record*, June 1987, p. 6.

FEC v. COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE

In April 1986—four months before the Democratic primary and seven months before the November general election—the Colorado Republican Federal Campaign Committee (the Committee) ran a $15,000 radio ad in response to a series of television ads sponsored by the Senatorial campaign committee of then-Congressman Tim Wirth, a Democrat. The ad contrasted Mr. Wirth's statements in his TV ads with his Congressional voting record, and concluded with the words: "Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts."

Under the Federal Election Campaign Act (the Act), the Committee was authorized to spend up to a certain limit on coordinated party expenditures made "in connection with the general election campaign" of the Republican Party candidate running in the U.S. Senate race in Colorado. 2 U.S.C. §441a(d)(3).The Committee, however, had assigned its entire 1986 spending authority to the National Republican Senatorial Committee.

In its campaign finance reports, the Committee characterized the ad as a generic voter education expense that was not subject to the §441a(d) limits. The FEC, however, viewed it as a coordinated party expenditure and filed suit against the Committee for violating the Act's expenditure limits and reporting requirements for this type of expenditure. The Committee counterclaimed with a First Amendment challenge to the constitutionality of the §441a(d) limits.

District Court Decision

On August 31, 1993, the U.S. District Court for the District of Colorado granted summary judgment to the Committee. The court held that the Committee's $15,000 expenditure for a radio ad, because it did not contain "express advocacy," was not subject to the coordinated party expenditure limit.

The court first rejected the Committee's argument that the ad was an "independent expenditure" (rather than a coordinated expenditure)—and thus not subject to spending limits—because it was aired before the Republican candidate had been nominated. The court noted that the FEC and the courts have said that party committees are incapable of making independent expenditures. The court concluded that the Committee's expenditure "was made on behalf of the Republican candidate, whomever that might be; and it is irrelevant that no particular person had been designated."

In considering whether the ad was subject to the coordinated party expenditure limits at 2 U.S.C. §441a(d), the district court concluded that only communications that expressly advocate the election or defeat of a candidate qualify as coordinated party expenditures. The court decided that the radio ad did not contain express advocacy, and therefore was not a coordinated party expenditure.

The district court reasoned that in *FEC v. Massachusetts Citizens for Life (MCFL)*, the Supreme Court established that the presence of express advocacy determined whether or not an independent expenditure was made "in connection with" a federal election. Although the *MCFL* decision dealt with independent expenditures rather than coordinated party expenditures, the district court noted that §441a(d) also includes the phrase "expenditure in connection with" a federal election. The court therefore followed a common law rule: a phrase recurring in a statute is to be interpreted consistently.

The district court then referred to the list of words and phrases, contained in the Supreme Court's *Buckley v. Valeo* decision as examples of express advocacy. Finding that the Committee's ad did not contain any of these words or phrases, the district court ruled that the expenditure for the ad did not constitute a coordinated party expenditure and therefore did not count toward the Committee's §441a(d) limit.

Appeals Court Decision

On June 23, 1995, the U.S. Court of Appeals for the Tenth Circuit reversed the district court's ruling that express advocacy is a defining feature of coordinated party expenditures. Further, it concluded that the Act's limitation of these expenditures does not violate the Committee's First Amendment rights. The court remanded the case to the district court with instructions to enter judgment in favor of the FEC and to impose on the defendant a proper civil penalty under 2 U.S.C. §437g(a)(6).

Coordinated Party Expenditures and Independent Expenditures

The court of appeals observed that both *Buckley* and *MCFL* distinguish between these two types of expenditures:

"The Supreme Court cases have distinguished between the potential for corruption that attaches to contributions and coordinated party expenditures, and those that might develop from independent expenditures, finding less inherent risk in the latter."

The court of appeals also noted that *Buckley* struck down the Act's limits on independent expenditures as an unwarranted infringement on the First Amendment rights of individuals but upheld the Act's limits on party expenditures because they served the substantial government interest of preserving the integrity of the electoral process. The validity of this interest has been reinforced in subsequent court case decisions.

In the appeals court's view, the distinctions made in these precedents indicate that the phrase "expenditures

in connection with" should not be construed the same way with respect to independent expenditures and coordinated party expenditures.

Rather, the court held that judicial deference was due to the Commission's interpretation of its statute. Advisory Opinions 1984-15 and 1985-14 establish the Commission's criteria for determining whether or not a party expenditure counts against the §441a(d) limit: an expenditure counts against the limit if it is made for a communication that (1) clearly identifies a candidate and (2) contains an electioneering message. The presence of express advocacy is not a factor in this determination.

The court then found that the ad identified a candidate (Mr. Wirth) and "unquestionably contained an electioneering message," since it sought to diminish public support for Mr. Wirth and garner support for the then-yet-to-be-named Republican nominee. Consequently, the court reasoned that the radio ad resulted in an "expenditure made in connection with" an election and thus counted against the Committee's §441a(d) limit.

The First Amendment and the Government's Interest

Citing the reasoning of the Supreme Court in *Buckley* and subsequent cases, the court of appeals ruled that, as with contribution limits, the coordinated party expenditure limits are a justifiable infringement on the First Amendment rights of party committees.

"The opportunity for abuse is greater when the contributions (or in the instant case, coordinated party expenditures) derive from sources inherently aligned with the candidate, rather than with independent expenditures."

The coordinated party expenditure limits were adopted because of Congressional concern that unchecked party spending would give citizens who make large contributions to party committees undue influence on elected officials. The court concluded that the §441a(d) limits diminish this potential with a minimal impact on the important role of political parties. This follows the precedent set in *Buckley* that found that these and other contribution and expenditure limits served the overriding government interest of preserving the integrity of the electoral process.

Appeal to Supreme Court

The Commission appealed the Tenth Circuit's decision to the Supreme Court. Oral arguments were presented on April 15, 1996.

Supreme Court Decision

On June 26, 1996, the U.S. Supreme Court ruled that the coordinated party expenditure limits at 2 U.S.C. §441a(d) could not be constitutionally applied to the radio ad aired by the Committee. The Court found that the ad was not coordinated with any candidate; rather it was an independent expenditure that could not constitutionally be subject to the coordinated party expenditure limit.

The FEC had concluded that political parties, because of their special function, are incapable of making electoral expenditures that are "independent" of their own candidates, since the sole reason for a political party's existence is to elect its candidates to public office.

The Court disagreed, stating that, with reference to the radio ad, there was no evidence of coordination between the Committee and the three candidates who were then seeking the Republican Senate nomination. Rather, the ad "was developed by the Colorado Party independently and not pursuant to any general or particular understanding with a candidate." The Court also found that the potential for, or appearance of, corruption, which the *Buckley* Court found sufficient to justify limiting contributions, was not present to the extent that would justify limiting such independent spending by political parties on behalf of their candidates. Accordingly, the Court concluded that the First Amendment precludes application of the §441a(d) limits to independent campaign expenditures by political parties.

This decision pertained to party spending in connection with congressional races. The Court warned that this opinion does not "address issues that might grow out of the public funding of Presidential campaigns."

The Court decided not to address a constitutional challenge to the §441a(d) coordinated limits brought by the Committee. Instead, the Court chose to "defer consideration of the broader issues until the lower courts have reconsidered the question in light of our current opinion."

This decision vacated the 10th Circuit Court of Appeals' judgment. The case was remanded to the lower courts for further proceedings consistent with this decision.

Concurring and Dissenting Opinions Accompanying This Judgment

Justice Breyer wrote the plurality opinion announcing the judgment of the Court. Although seven Justices concurred in the judgment, only Justices O'Connor and Souter joined Justice Breyer's plurality decision. There were also two separate concurring opinions and one dissent which the remaining Justices signed on to, as follows:

- Justice Kennedy, joined by Chief Justice Rehnquist and Justice Scalia, filed an opinion concurring in the judgment and dissenting in part. This opinion reasoned that coordinated party expenditures cannot constitutionally be limited because this would impermissibly infringe upon the parties' First Amendment right to engage in political speech.

- Justice Thomas, joined in part by Chief Justice Rehnquist and Justice Scalia, filed an opinion concurring in the judgment and dissenting in part. This opinion also reasoned that the §441a(d) limits are unconstitutional. Justice Thomas, writing for himself only, first explained that there is no constitutional difference between expenditures and contributions, and that neither can constitutionally be limited at all. For this reason, he would overrule *Buckley* and find unconstitutional all statutory limits on contributions and expenditures. Chief Justice Rehnquist and Justice Scalia did not join this part of Justice Thomas' opinion, but agreed with Justice Thomas' conclusion that, under *Buckley*, the party expenditure limits at §441a(d) are unconstitutional in their entirety because there is insufficient evidence that coordinated spending by political parties poses a substantial risk of corruption.
- Justice Stevens, joined by Justice Ginsberg, dissented. The dissenters agreed with the FEC's view that all campaign expenditures by political parties should be treated as coordinated with the party's candidates, and concluded that the limit on party expenditures at §441a(d) is constitutional because it serves compelling governmental interests in avoiding both actual corruption and the appearance of corruption, and in leveling the playing field in election campaigns.

District Court Decision on Remand (Colorado II)

On February 23, 1999, the district court granted the Committee's motion for summary judgment on its counterclaim, ruling that the coordinated party expenditure limits are unconstitutional and cannot be enforced against the Committee. The court denied the FEC's cross motion for summary judgment and dismissal of the amended counterclaim.

In the district court's view, the FEC needed to demonstrate that:

- §441a(d) serves a compelling government interest; and
- §441a(d) is narrowly tailored to achieve that interest.

The court said that the FEC had to show that coordinated party expenditure limits prevent corruption or the appearance of corruption. The FEC had to do more than show "the opportunity" for corruption.

The FEC argued that generous contributors could demand special favors of candidates via their party committee contributions; and that party committees could withhold or grant unlimited coordinated expenditures in order to exact a quid pro quo from candidates who needed financial assistance. The court rejected the first argument, saying that the FEC had shown that large contributors to parties had obtained access to elected officials, but such access did not constitute corruption.

The court rejected the analogy to unlimited soft money donations because they may not be used to make coordinated party expenditures. Moreover, because of the limits on individual contributions, the court found the contributor-to-party-to-candidate scenario "an unlikely avenue of corruption."

As to the second argument, the court stated that party committees, by their nature, exert some influence over candidates. "[A] political party's decision to support a candidate who adheres to the parties' beliefs is not corruption. Conversely, a party's refusal to provide a candidate with electoral funds because the candidate's views are at odds with party positions is not an attempt to exert improper influence."

Furthermore, the court stated that in *Buckley v. Valeo* the Supreme Court's concern with corruption was related to large individual financial contributions—not contributions from party committees.

Finally, the court stated: "The FEC cannot rely on general public dissatisfaction with parties and politicians and the amount of money in the political process…to support its claim that the party coordinated expenditure limit serves a compelling purpose and is narrowly tailored to accomplish that purpose."

The court concluded that the FEC had failed to offer relevant, admissible evidence that suggested coordinated party expenditures had to be limited to prevent corruption or its appearance. The court also stated that coordinated party expenditures were "indistinguishable in substance" from the candidate's campaign expenditures. Since, under *Buckley*, candidate expenditures cannot be limited, coordinated party expenditures also cannot be regulated.

Appeals Court Decision (Colorado II)

On May 5, 2000, the U.S. Court of Appeals for the 10th Circuit affirmed a district court decision that the coordinated party expenditure limits at 2 U.S.C. 441a(d)(3) are unconstitutional.

To support the constitutionality of the 441a(d) limits, the Commission offered three principal arguments that the limits prevent corruption or the appearance of corruption:

1. Section 441a(d)(3) limits the extent to which generous contributors to the party can influence the party "to either support or neglect those candidates who endorse or eschew the interests of the large contributor;"
2. The cap on coordinated party expenditures reduces the ability of a small group of incumbent officeholders (the party elite) to exert improper pressure on the party's candidates by granting or withholding the use of party funds; and

3. The 441a(d) limits reinforce the Act's cap on individual contributions. Without them, individuals could try to circumvent the $1,000 per candidate, per election contribution limit by giving the maximum $20,000 per year contribution to the party with the expectation that the funds would be spent to support a particular candidate.

The court, in a 2-1 decision, rejected the first of these arguments by noting, in part, that—based on the Supreme Court's earlier ruling in this case—party committees can already make unlimited independent expenditures. The court refused to consider the potential corrupting influence of unregulated "soft money" contributions, since those funds cannot legally be spent to influence federal elections.

With respect to the FEC's second argument, the court concluded that "there is nothing pernicious" about a party "shaping the views of its candidates." The court added that, "Parties are simply too large and too diverse to be corrupted by any one faction."

The court dismissed the Commission's final argument by noting that 2 U.S.C. 441a(a)(8) requires that contributions earmarked for a particular candidate (i.e., that pass through an intermediary) be treated as contributions from the original source to the candidate.

Having found no persuasive evidence that coordinated party expenditures corrupt, or appear to corrupt, the electoral process, the appeals court upheld the district court's decision. The court concluded that "441a(d)(3)'s limit on party spending . . . constitutes an 'unnecessary abridgment' of First Amendment freedoms." The court stated explicitly that its analysis and holding apply only to party spending in connection with Congressional races.

In dissent, Chief Judge Seymour found the "majority opinion fundamentally flawed in several respects." In her view, the panel majority "substitute[d] its judgment for that of Congress on quintessentially political matters the Supreme Court has cautioned courts to leave to the legislative process. In so doing, the majority creates a special category for political parties based on its view of their place in American politics, a view at odds with history and with legislation drafted by politicians."

Supreme Court Decision (Colorado II)

On June 25, 2001, the U.S. Supreme Court, overruling the Court of Appeals for the 10th Circuit, held that the coordinated party expenditure limits at 2 U.S.C. §441a(d)(3) are constitutional. The Court ruled that party coordinated expenditures, unlike party expenditures made independently of any candidate or campaign, may be restricted to "minimize circumvention of [individual] contribution limits."

In arguments before the Supreme Court, the Committee maintained that financial support of candidates was an inherent function of political parties. Therefore, any limitation of Committee expenditures coordinated with its candidates would be a serious infringement of its speech and associational rights. The Committee argued that such a limitation would impose a unique First Amendment burden on the Committee, and such a burden could not be justified by any benefits gained in preventing corruption or the appearance of corruption.

The Commission argued that coordinated expenditures should be limited not only because they are equivalent to contributions, but also because unlimited coordinated party expenditures would allow individuals to evade the contribution limits applicable to their direct contributions to candidates. Because individuals can give much larger contributions to parties than to candidates, if parties' coordinated spending were unlimited, individuals would have an incentive to make large contributions to parties, who would then be able to spend more of those contributors' dollars on a particular candidate than the individual contribution limits would allow. This circumstance would allow individuals and other contributors to circumvent the contribution limits upheld in *Buckley v. Valeo*.

In upholding the constitutionality of coordinated party expenditure limits, the Court:

- Rejected the Committee's argument that unrestricted coordinated spending is essential to the nature of parties, finding that parties have functioned effectively during the previous three decades, during which the coordinated expenditure limits were in place.
- Rejected the Committee's argument that parties primarily act to elect particular candidates, finding that "parties are [also] necessarily the instrument of contributors . . . whose object is not to support the party's message or to elect party candidates, but rather to support a specific candidate for the sake of a position on one, narrow issue, or even to support any candidate who will be obliged to contributors."
- Found that a party committee is not in a unique position vis-à-vis other political spenders, such as wealthy individuals, PACs and media executives, all of whom could coordinate expenditures with a candidate's campaign. Instead, precisely because political parties can efficiently amplify their members' power through aggregating contributions and broadcasting messages, they are in a position to be used to circumvent contribution limits.

Citing testimony provided by political scientists in friend-of-the-court briefs, the Court agreed with the Commission that there was a serious threat of abuse from unlimited coordinated party expenditures. The Court concluded: "Despite years of enforcement of the challenged limits, substantial evidence demonstrates how candidates, donors, and parties test the limits of the current law, and it shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced by declaring parties' coordinated spending wide open."

Source: FEC *Record*, November 1993, p. 1; August 1995, p. 1; August 1996, p. 1; April 1999, p. 1; July 2000, p. 1; October 2000, p. 6; and August 2001, p. 1.

Colorado Republican Federal Campaign Committee: FEC v., 839 F. Supp. 1448 (D. Colo. 1993); 59 F.3d 1015 (10th Cir. 1995), *rev'd*, 116 S. Ct. 2309 (1996), *on remand*, 41 F. Supp.2d 1197 (D. Colo. 1999); *Supreme Court decision*, 533 U.S. 431, 121 S.Ct. 2351.

FEC v. COMMITTEE FOR A CONSTITUTIONAL PRESIDENCY—McCARTHY '76

On March 7, 1979, the U.S. District Court for the District of Columbia granted summary judgment to the Committee for a Constitutional Presidency—McCarthy '76, defendants in a suit filed by the FEC on August 22, 1977.

The FEC alleged that the defendants had improperly classified a series of payments (speaking fees from universities) as "other receipts" rather than as "contributions," and requested a mandatory injunction from the court requiring the defendant to amend its reports accordingly.

The court agreed with both parties that there were no material issues in dispute. The court also agreed with the FEC that the payments in question were, in fact, "contributions" rather than "other receipts." However, while the court concluded that the defendant may have committed a technical error, it declined to enter the requested order for the following reasons:

- The defendant had acted in good faith and had fully reported all payments on appropriate FEC forms.
- In 1976, Congress amended the reporting provisions of 434(b), which now provide that when candidates and committees "show that best efforts have been used to obtain and submit the information required by this subsection, they shall be deemed in compliance with this subsection." Since the events of this case occurred before Congress adopted the amendment, the amendment does not control the case. However, it does provide support for the court's view that a candidate could act in good faith and yet technically violate a provision of the Act; it also corroborates the court's conclusion that sanctions should not be imposed on a public figure who acts in good faith.
- The public interest would not be served by the requested court order.

This public interest in disclosure is already satisfied by the detailed information supplied by the defendant. Furthermore, a court-imposed remedy would not ensure better compliance in the future since a candidate who acted in the same manner today would probably not be considered in violation of the Act due to the "best efforts" amendment.

Source: FEC *Record*, June 1979, p. 6.

Committee for A Constitutional Presidency—McCarthy '76: FEC v., 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶9074 (D.D.C. 1979).

FEC v. COMMITTEE OF 100 DEMOCRATS

On September 30, 1993, the District Court for the District of Columbia granted the Commission's motion for summary judgment against the Committee of 100 Democrats, the Committee to Elect Fusco to Congress (formerly Throw the Rascals Out) and Dominick A. Fusco, the treasurer of both committees.

The court ruled that Mr. Fusco and the committees had violated the terms of two conciliation agreements related to an FEC enforcement action (MUR 3148). The court ordered the defendants to comply with the agreements, assessed $1,000 penalties against each committee and enjoined the defendants from future violations of the agreements.

Noting that Mr. Fusco was named as a party to the conciliation agreements and had signed them both, the court concluded that his "status as a party to each of the agreements subjects him to personal liability for their violation." As a result, the court held Mr. Fusco and the committees "jointly liable" for compliance with the conciliation agreements and payment of the additional penalties.

To comply with the conciliation agreements, the Committee of 100 Democrats—and Mr. Fusco, as its treasurer—had to register with the Commission and file the appropriate reports of receipts and disbursements. Mr. Fusco and his Committee to Elect Fusco to Congress were to pay the FEC a $3,500 civil penalty. The court directed the defendants to comply with its order within 10 days.

Payment Schedule

In a court document filed September 13, 1994, the parties in this suit agreed to a schedule for paying the $5,500 in total penalties owed by the three defendants.

The stipulation agreement required the defendants to pay the penalties in monthly installments. If payments were late, interest would accrue on the entire unpaid balance until it was fully paid. Moreover, if defendants failed to carry out their obligations, they would be required to reimburse the FEC for costs and attorneys' fees expended on the case since the September 1993 judgment.

Source: FEC *Record*, December 1993, p. 3; and November 1994, p. 9.

Committee of 100 Democrats: FEC v., 844 F. Supp. 1 (D.D.C. 1993).

FEC v. COMMITTEE TO ELECT BENNIE BATTS

On February 14, 1989, the U.S. District Court for the Southern District of New York granted the FEC's motion for summary judgment in *FEC v. Committee to Elect Bennie O. Batts* (Civil Action No. 87-5789(GLG)). The committee was Mr. Batts' principal campaign committee for his unsuccessful 1984 primary campaign in New York's 20th Congressional District.

The court found that the committee and its acting treasurer, Evelyn Batts (the candidate's wife), violated the election law by:

- Failing to amend its Statement of Organization to reflect Mrs. Batts' actual role as treasurer and as custodian of the committee's books and accounts and to disclose a campaign depository (2 U.S.C. §433(c));
- Commingling committee funds with the personal funds of Mrs. Batts in Mrs. Batts' personal bank account (2 U.S.C. §432(b)(3));
- Failing to use the official campaign depository for receiving contributions and making expenditures (2 U.S.C. §432(h)(l)); and
- Knowingly accepting more than $10,000 in excessive contributions from Mrs. Batts' personal account (2 U.S.C. §441a(f)).

The court also found that Mrs. Batts personally violated the election law by making excessive contributions from her personal account.

Observing that the committee's violations had resulted from "at most...sloppy bookkeeping and unprofessional behavior," and that there was no implication that the defendants had been "motivated by personal gain," the court assessed civil penalties of $100 against the committee and its acting treasurer, Mrs. Batts. The court also assessed a $1 civil penalty against Mrs. Batts personally. In addition, the court permanently enjoined the defendants from similar future violations of the election law.

Source: FEC *Record*, May 1989, p. 8.

FEC v. DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE (95-2881)

On January 16, 1997, the U.S. District Court for the Northern District of Georgia, Atlanta Division, ruled that the Democratic Senatorial Campaign Committee (DSCC) violated the Federal Election Campaign Act (the Act) when it contributed $17,500 to a Senatorial candidate's runoff election after having already contributed the same amount during the primary and general elections.

The second contribution violated the Act at §441a(h), which sets a $17,500 limit for national committees—such as the DSCC and the National Republican Senatorial Committee (NRSC)—when giving to a candidate for the U.S. Senate.

On July 7, 1997, the court ordered the DSCC to pay a $175 penalty for violating the Act during the 1992 Senatorial race. The sum amounts to 1 percent of the DSCC's violation of $17,500.

Background

The excessive contribution was made during the unusual circumstances surrounding the 1992 Senatorial campaign in Georgia. A state law, which has since been changed, required that the winner of the Senate seat receive a majority of the vote.

Former Senator Wyche Fowler Jr., a Democrat, had a plurality in the general election in 1992, receiving 49 percent of the ballots cast. Republican Senator Paul Coverdell, who challenged Mr. Fowler in the race, came in second with 48 percent of the vote. Because no candidate received a majority of votes, a runoff election was held between the two men. Mr. Coverdell won that race with 51 percent of the vote.

During the primary and general elections, the DSCC contributed $17,500 to Mr. Fowler's campaign, and then contributed another $17,500 to his runoff election.

District Court Finds for FEC

The court ruled in the FEC's favor. The court held that the language and legislative history of the Act, coupled with accepted principles of statutory construction, support the view that §441a(h) precluded the DSCC from making a second contribution of $17,500.

The court pointed out that, unlike individuals and other committees, national committees have a higher contribution limit under §441a(h) and greater discretion in allocating the sum during the length of a campaign. For example, individuals have a $1,000 contribution limit per election (primary, general and runoff), per candidate. Multicandidate PACs have a $5,000 contribution limit per election, per candidate. The court held that national committees, such as the DSCC, may allocate part or all of their $17,500 contribution limit to a Senatorial candidate at any stage of the election campaign.

The DSCC had argued that the FEC had erroneously interpreted the $17,500 limit with respect to post-general election runoffs and that Congress had intended the statute to be part of an effort to expand the role of national committees. However, the court said that the language of §441a(h) was unambiguous and that, even if it were not, the FEC's interpretation of it would be entitled to deference. In AO 1978-25, the court pointed out, the Commission had confirmed that §441a(h) did indeed establish a single contribution limit without regard to whether there were primary, general or runoff elections.

The DSCC had also argued unsuccessfully that the unusual nature of the Georgia majority-winner rule was not taken into account when Congress adopted the statute, and that, had its members known of such a scenario, it would have drafted the law differently. The court said that such speculation would not cause the court to disregard the language of the law.

The court rejected the DSCC's claim that its First and Fifth Amendment rights of freedom of association and equal protection were violated. The DSCC said the law denied them the freedom to associate with Mr. Fowler's campaign because "no committee would ever reserve funds for the uncertain prospect of a runoff." It also pointed out that other types of committees and individuals were able to contribute to Mr. Fowler's runoff election.

The court said that, while a difficult allocation issue confronted the DSCC, the law does not infringe on its right to associate with whomever it wishes. The DSCC lawfully made more than $200,000 in coordinated expenditures under 2 U.S.C. §441a(d)[1] in support of Mr. Fowler's runoff campaign. Further, the DSCC does not have to be treated the same as other types of committees in respect to contribution limits. "Party committees, individuals, and other organizations and corporations are not similarly situated entities for election regulation purposes," the court said.

Pursuant to a prior agreement of the parties, the court ordered briefing on the appropriate sanctions for DSCC's violation of §441a(h).

Penalty

In determining an appropriate penalty, the court considered these four factors:

- Good or bad faith actions by the defendant,
- Injury to the public resulting from the defendant's conduct,
- Ability of the defendant to pay the penalty and
- Vindication of the FEC's authority.

The court found that the DSCC did act in good faith because it had believed that it was acting lawfully when it made the second $17,500 contribution. The court also determined that the second contribution did no harm to the public. While the FEC had argued that "any violation of the [Act's] limits undermines a public perception of integrity of the election process," the court disagreed with such a blanket assertion. It also found that the FEC did not require vindication in this case and noted that the DSCC's ability to pay did not justify assessing it with a large penalty, which is what the FEC had requested.

In its deliberations, the court also considered the penalty negotiated with the NRSC in a conciliation agreement for a violation of a different provision of the Act—2 U.S.C. §441d—in connection with the same election. That penalty amounted to 1 percent of the approximately $500,000 violation, or $5,000.

Source: FEC *Record*, March 1997, p. 2; and August 1997, p. 3.

[1] Under 2 U.S.C. §441a(d), the national party is entitled to make limited expenditures for the general election in cooperation with the candidate (in addition to the contributions it is otherwise entitled to make).

FEC v. DRAMESI FOR CONGRESS

On July 25, 1986, the U.S. District Court for the District of New Jersey granted the FEC's motion for summary judgment in *FEC v. Dramesi for Congress Committee* (Civil Action No. 85-4039). The court found that the John A. Dramesi for Congress Committee's treasurer, Russell E. Paul, had violated 2 U.S.C. §441a(f) by knowingly accepting an excessive contribution from the New Jersey Republican State Committee (the State Committee) and ordered Mr. Paul to pay a $5,000 civil penalty to the U.S. Treasurer.[1] The court had previously entered a $5,000 default judgment against the Dramesi Committee for accepting the excessive contribution.

In 1990, the U.S. District Court for the District of New Jersey granted a motion by the FEC to hold the committee and Mr. Paul, as treasurer, in contempt of court for failing to pay the penalties imposed in 1986 (*FEC v. Dramesi for Congress Committee*, No. 85-4039(MHC) (D.N.J. Sept. 5, 1990) (unpublished opinion)).

Background

In 1982, when the State Committee made a $5,000 contribution to the Dramesi Committee, the State Committee had not achieved multicandidate status because it had not yet satisfied the six-month registration requirement.[2] Consequently, the State Committee was only eligible to make a contribution of up to $1,000 per election to each Republican Congressional candidate in New Jersey, and the Dramesi Committee could legally receive only $1,000 for the primary election.

On learning of the State Committee's excessive contributions to Republican House candidates, the FEC initiated enforcement proceedings against the State Committee. When the Commission failed to reach a settlement with the Dramesi Committee, the agency filed a suit against the Committee and its treasurer in which it asked the court to: (1) assess a $5,000 civil penalty against the Committee for accepting the State Committee's excessive contribution and (2) order the Dramesi Committee to refund the excessive portion ($4,000) to the State Committee.

The Court's Ruling

The court observed that, under the FEC regulations, the treasurer of a political committee has to "'make his or her best efforts to determine the legality of a contribution.'"[3] The court therefore found that "Mr. Paul...had a duty to determine [the contribution's] propriety. Instead, he merely assumed from the source of the contribution that it was legal."

Nor did the court find any merit to defendant's contention that he had no way of knowing the contribution was illegal. The court noted that the defendant could have consulted the Index of Multicandidate Political Com-

mittees, an "exhaustive list of such eligible [multicandidate] committees, compiled by the FEC, [which] was readily available to the defendants."

The court therefore found that "Mr. Paul, as Treasurer of the Dramesi Committee, acted intentionally in accepting the $5,000 contribution in question, and was fully aware of the facts rendering his conduct unlawful." Accordingly, the court ruled that defendant "knowingly accepted" the State Committee's excessive contribution, in violation of 2 U.S.C. §441a(f).

FEC's Contempt Motion

Although finding the Dramesi committee in contempt, the court did not take any action against it since the committee is defunct. The court, however, rejected Mr. Paul's argument that he should not be held personally liable for payment of the penalty imposed against him. The court stated that, in its previous decision in this case, "we determined that Russell E. Paul's liability was distinct from the liability of the Committee." The court went on to state that, because "political committees have a tendency to dissolve after an unsuccessful campaign," Congress chose to hold an individual—the committee treasurer—responsible for compliance with the Federal Election Campaign Act. See 2 U.S.C. §432(a) and (c). It therefore follows that "an individual will also stand responsible for his indiscretions as a treasurer."

The court, in addition to holding Mr. Paul in contempt, ordered him to pay the $5,000 penalty within 30 days. The court imposed a $50 per day assessment if payment was not complete within 30 days. On January 2, 1991, the court issued stipulation and order in which Mr. Paul agreed to pay a total of $5,317 to the FEC. That amount represented the original $5,000 penalty, $91 in interest charges and $226 in FEC costs. The Commission agreed to waive the contempt penalties of $50 a day (which had been accumulating since the original contempt order in 1990) provided that Mr. Paul pay the $5,317 by March 1, 1991.

Source: FEC *Record*, September 1986, p. 6; November 1990, p. 9; and March 1991, p. 10.

Dramesi for Congress Committee: FEC v., 640 F. Supp. 985 (D.N.J. 1986).

[1] On June 16, 1986, the U.S. District Court for the District of Columbia found that another New Jersey House incumbent campaigning for reelection in 1982 had not knowingly accepted an excessive contribution from the New Jersey Republican State Committee. See *FEC v. Re-Elect Hollenbeck to Congress Committee*.

[2] Multicandidate committees may contribute up to $5,000 per election to a candidate's authorized committee(s) or any other political committee. To achieve multicandidate status, a committee must have more than 50 contributors, have been registered for at least six months and, with the exception of state party committee, have made contributions to five or more candidates for federal office. 2 U.S.C. Section 441a(a)(4); 11 CFR 100.5(e)(3).

[3] See 11 CFR 103.3(b)(1).

FEC v. FORBES

On February 19, 1999, the U.S. District Court for the Southern District of New York dismissed this lawsuit after both parties asked for the action. The court order was preceded by the Commission's 4-2 vote to withdraw the lawsuit against 1996 Presidential candidate Malcolm S. "Steve" Forbes, Jr.

The FEC had asked the court in September 1998 to find that bi-weekly columns authored by the candidate in *Forbes Magazine* resulted in violations of the Federal Election Campaign Act by Mr. Forbes, the magazine, his 1996 committee and the corporation he controls.

Background

In November 1995, while running for the Republican nomination, Mr. Forbes took a leave of absence from Forbes, Inc., but continued to write the weekly column "Fact and Comment" for the company's flagship publication, *Forbes Magazine*. In addition, Mr. Forbes continued to be listed as editor-in-chief on the magazine's masthead, and he controlled the length, content and format of the articles. Excerpts of these columns also appeared in another Forbes publication, *The Hills-Bedminster Press*. The columns discussed some of the same themes Mr. Forbes pressed during his presidential campaign, including the flat tax, term limits, abortion and foreign intervention in Bosnia, and have been valued at $94,900.

The Commission contended that Mr. Forbes's columns were not bona fide news accounts and were not part of a general pattern of campaign-related news accounts that gave reasonably equal coverage to all opposing candidates. Furthermore, the Commission argued that Forbes, Inc., published the columns in consultation with Mr. Forbes while he was a candidate, thereby turning the corporation's expenditure for the columns—$94,900—into a contribution to the Forbes campaign.

In addition, the Forbes committee failed to report the value of the columns in any of its reports filed with the Commission. 2 U.S.C. §434(b)(2)(A).

The FEC asked the court to find that Forbes, Inc., made prohibited in-kind corporate contributions to the Forbes committee and that Mr. Forbes, in his capacity as CEO, violated the Act by consenting to the contributions. The FEC also asked the court to find that Mr. Forbes, the Forbes committee and the committee treasurer violated that Act when they knowingly accepted the prohibited in-kind contributions. The FEC asked the court to enjoin the defendants from violating the Act further and to assess a civil penalty against them.

Source: FEC *Record*, November 1998, p. 2; and April 1999, p. 5.

FEC v. FRANKLIN

On September 27, 1989, the U.S. Court of Appeals for the Fourth Circuit granted the FEC's motion for summary affirmance in *FEC v. William Franklin* (No. 89-1512). The appeals court remanded the case to the district court (Civil Action No. 89-324-N).

Background

In October 1988 Mr. Robb, the Democratic nominee for the U.S. Senate in Virginia, filed a complaint with the Commission alleging that Mr. Franklin's unknown employer had violated the election law by failing to report payments made to Mr. Franklin to investigate rumors linking the candidate with persons allegedly implicated in drug use or drug trafficking. Mr. Franklin was a private investigator and an attorney working in Virginia. Conducted during the height of the 1988 campaign, Mr. Franklin's investigation was the subject of several news stories.

The Robb campaign also alleged that the contribution limits may have been violated by Mr. Franklin's client.

After finding "reason to believe" that the law had been violated, the Commission sent Mr. Franklin a questionnaire about the nature and purpose of his investigation and asking on whose behalf it was conducted. Mr. Franklin answered some of the questions, but he refused to identify the person who had hired him, invoking attorney-client privilege. The FEC subsequently obtained a court order requiring Mr. Franklin to respond fully to the questions.

Along with ordering Mr. Franklin to identify his employer, the court ordered the FEC not to disclose the identity of that person until a formal enforcement action commenced, or the individual waived confidentiality, or until disclosure was mandated by the election law.

District Court Decision

Mr. Franklin challenged the FEC's actions on four grounds:

- The FEC lacked subject-matter jurisdiction over the original complaint because the Robb campaign had identified only "John Doe, Employer of William Franklin" as the respondent. This fact, Mr. Franklin argued, prevented the FEC from fulfilling its statutory requirements in acting on the complaint.
- The complaint from the Robb campaign was inadequate to launch an FEC investigation.
- The FEC's finding of "reason to believe" was arbitrary, capricious and contrary to law.
- Attorney-client privilege permitted him to preserve the anonymity of his client.

The court rejected all of these arguments.

In ruling on the FEC's jurisdiction, the court concluded that the Commission had fulfilled its statutory requirements in acting on the complaint to the extent that it was possible. The election law requires that the Commission notify respondents of complaints filed against them; the Commission must also give such persons the opportunity to respond to the allegations. 2 U.S.C. §437g(a)(1). Although the Commission did not know the name of the respondent, the court found that the Commission had "met the requirements of the law" by communicating with the unknown respondent through Mr. Franklin.

The court also rejected Mr. Franklin's argument that the Robb complaint was inadequate on the grounds that it did not identify the respondent or allege "a clear and concise recitation of the facts which describe a violation," as required under 11 CFR 111.4(d)(3). "While the complaint did not identify the respondent by name," the court said, "the complaint clearly identified the employer of Franklin as the respondent." The court further said that the regulations did not require "a complete factual and legal account of a violation." Filing a complaint is only the first step in the enforcement process, the court emphasized.

With regard to Mr. Franklin's charge that the Commission's "reason to believe" finding was contrary to law, the court observed that "agency actions are not generally ripe for judicial review" unless they constitute "final agency actions." In most cases, a "reason to believe" finding is a preliminary action in the enforcement process, leading to a formal investigation. It is not a final action. Furthermore, the court noted, "reason to believe" findings have not previously been reviewed by courts unless the alleged violation was novel or unless the press exemption to the reporting requirements was at issue. The Robb complaint involved neither novel issues nor the press exemption. Adding that Mr. Franklin had not demonstrated that an FEC investigation would injure himself or his client, the court rejected Mr. Franklin's argument that the Commission's finding was "contrary to law."

The court also found that Mr. Franklin had not established that the attorney-client privilege applied to his case. Although he was a practicing attorney, Mr. Franklin was questioned by the FEC about his activity as a private investigator. "Franklin has not demonstrated that the client retained him in his capacity as an attorney or that [he] provided legal advice to the client relating to Franklin's investigation," the court said.

For these reasons, the court ordered Mr. Franklin to provide written answers to the FEC's questions within 75 days. Furthermore, the court ordered that "upon pain of contempt, no member or employee of the FEC, or any other person, disclose to any person who is not a member or employee of the FEC with a need to know" the identity of Franklin's client in the Robb investigation. This protective order would apply unless and until a formal enforcement action was begun, or Franklin's client waived confidentiality restrictions, or disclosure was otherwise required by the law.

Mr. Franklin appealed the decision.

Appeals Court Decision

On September 27, 1989, the U.S. Court of Appeals for the Fourth Circuit granted the FEC's motion for summary affirmance. The appeals court remanded the case to the district court, which on September 29 ordered Mr. Franklin to provide the Commission with "full and complete answers to the extent of his knowledge to each and every question propounded to him" by the agency. The court ordered the defendant to provide the answers within 5 days.

On the direction of the appeals court, the district court also vacated a protective order that it had imposed in July.

Source: FEC *Record*, September 1989, p. 8; and March 1990, p. 13.

Franklin: FEC v., 718 F. Supp. 1272, *aff'd in part*, (E.D. Va.), 902 F.2d 3 (4th Cir. 1989).

FEC v. FREEDOM'S HERITAGE FORUM, ET AL.

Background

The Forum is a political committee that promotes pro-life and other social issues. In 1994, the Forum made expenditures in connection with the planning and holding of a political meeting and the mailing of four political flyers during the 1994 Republican primary in Kentucky.

The Commission alleged that the Forum had violated sections §§§441(a)(1)(A), 434(b) and 441d(a) of the Federal Election Campaign Act (the Act) by making excessive contributions, failing to report contributions and failing to include disclaimers on its communications. The Forum had engaged in political activities supporting congressional candidate Tim Hardy during the Kentucky Republican primary. The Commission maintained that the Forum had made coordinated expenditures on behalf of Mr. Hardy that exceeded the Act's contribution limits, and that the Forum had distributed communications containing express advocacy that required disclaimers under the Act.

The court ruled that the Forum's expenditures were permissible independent expenditures—not coordinated expenditures. The court also maintained that, of the Forum's four communications, only one contained express advocacy and, thereby, required a disclaimer.

1ST DISTRICT COURT DECISION

The FEC had alleged that the expenditures supporting Mr. Hardy, totaling $23,515.81, were not independent expenditures but coordinated expenditures, which resulted in excessive contributions to his campaign committee. 2 U.S.C. §441a(a)(1)(A).

The Act defines independent expenditure as an expenditure that expressly advocates the election or defeat of a clearly identified candidate and that is not made in concert with, or at the request or suggestion of, the candidate or the campaign. 2 U.S.C. §431(17).

FEC regulations elaborate on this definition. They add the following presumption:

"An expenditure will be presumed to be so made [in cooperation with the campaign] when it is based on information about the candidate's plans, projects, or needs provided to the expending person by the candidate, or by the candidate's agents, with a view toward having an expenditure made." 11 CFR 109.1(b)(4)(i)(A).

The Commission alleged two instances of coordination. The first was a meeting between Dr. Simon and the representatives of Mr. Hardy's campaign prior to Mr. Hardy's entering the primary. The second took place at a political event during which Mr. Hardy was present while Forum members planned strategies "on how to get Tim Hardy elected." Following the event, the Forum made four separate direct mailings of campaign literature that supported the election of Mr. Hardy.

The court rejected the Forum's assertion that actual coordination of a specific disbursement must be shown in order to consider it a "coordinated expenditure." The court said, "This assertion finds no support in the statute, the regulations, or the case law." Further, the court stated, "...we do not find any requirement that coordinated expenditures must contain 'express advocacy' in order for them to fall within the purview of the statute." Nevertheless, the court found that "the FEC has not sufficiently plead enough facts that allege that the expenditures made by the Forum were coordinated with the Hardy campaign."

Regarding the first meeting, the court said that the FEC had not alleged that "Hardy actually informed Dr. Simon of his plans, projects, or needs *with a view toward having an expenditure made*." As to the direct mailings of campaign literature, the court held that there were no allegations made that the mailings were at the request or suggestion of Mr. Hardy. The court stated that, "Hardy's mere presence at the meeting, even if his presence was accompanied by the giving of a campaign speech, [was] insufficient to make these expenditures coordinated." Following its conclusion that there was no coordination, the court dismissed the charges that the Forum had failed to report its expenditures as contributions.

Disclaimer and Express Advocacy

The Forum argued that its four mailings did not contain "express advocacy" and therefore did not constitute contributions to the Hardy campaign. The court disagreed. It said, "There is no requirement that a contribution as defined in 2 U.S.C. §441a must result in or from 'express advocacy.'" The Forum further argued that it was not required to include disclaimers on the four mailings because none of the mailings included "express advocacy." (Under 2 U.S.C. §441d(a), communications containing express advocacy must include certain disclaimers.) The court stated that, "although a communication does not have to contain 'magic words' ['vote for,' 'elect,' 'support,' 'cast you ballot for,' 'Smith for Congress,' 'vote against,' 'reject'] to constitute express advocacy, it will ordinarily contain some sort of functional equivalent of an exhortation, directive, or imperative for it to expressly advocate the election or defeat of a candidate."

The court agreed that all four of the Forum's mailings clearly portrayed Mr. Hardy's opponent in an unfavorable light and Mr. Hardy in a favorable light. Nevertheless, the court found that only one of the Forum's four mailings contained express advocacy. That mailing

included a sample ballot identifying candidates the Forum supported, including Mr. Hardy, which stated, "*Please* take this sample ballot to the polls and vote on Tuesday." It explicitly urged the reader to vote for the "pro-family" candidates identified, and it showed a vote for Mr. Hardy. The court held, therefore, that the flyer contained "the functional equivalent of an exhortation to vote for Hardy."

With regard to another mailing that contained a request for volunteers and contributions, the court concluded that it sought "to persuade the reader to get involved in soliciting votes for Hardy and to contribute time and money to the Forum," but it did not contain "...an express exhortation to the reader to elect Hardy, or to defeat [his opponent]."FEC v. Freedom's Heritage Forum

2ND DISTRICT COURT DECISION

On April 28, 2000, the U.S. District Court for the Western District of Kentucky granted in part and denied in part the Freedom's Heritage Forum's motion to dismiss certain portions of the FEC's complaint against it.

The court's decision relates to the Forum's motion to dismiss Count VII of the Commission's Second Amended Complaint. In Count VII, the FEC had alleged that seven flyers the Forum had distributed in connection with the 1994 elections—including the four on which the court had already ruled—contained express advocacy, but lacked the disclaimers required by 2 U.S.C. §441d(a).

Having already ruled on four of the flyers, the court concluded that two of the three remaining flyers contained express advocacy and should have had disclaimers.

The first of them was a "Congressional Candidate Report" that compared one candidate's positions on certain issues to those of his opponents. It contained in a highlighted box: "IMPORTANT! Registered Democrats and Republicans can vote for [the named candidate] who actively opposes the liberal Clinton agenda. Vote November 8, 1994, 6 a.m. to 6 p.m." The court found that this statement was an exhortation to vote for the named candidate and therefore was express advocacy.

The second express advocacy flyer was a sample ballot that readers were to take to the polls on election day. It "explicitly urge[d] the reader to vote for the 'pro-family' candidates identified."

The other flyer was an invitation that included the statement: "We have the Pro-Abortionists right where we want them, divided and fighting each other. Now [the named candidate] can win with only 40% of the vote!" Because the flyer lacked Lacking an explicit exhortation to vote, the court concluded that the statement was merely a "comment on the status of the election," not express advocacy.

Source: FEC *Record*, December 1999, p. 6; and June 2000, p. 8.

FEC v. FREE THE EAGLE
FEC v. RUFFPAC

On June 5, 1995, the U.S. District Court for the District of Columbia issued consent judgments in these two cases. In both cases the FEC sought enforcement of conciliation agreements (MUR or Matter Under Review 2191) entered into by Free the Eagle and by RUFFPAC and Tammy J. Lyles. Ms. Lyles was the managing director of Free the Eagle and the treasurer of RUFFPAC.

In the stipulations for consent judgments, both defendants and Ms. Lyles admitted to being in breach of the conciliation agreement. Free the Eagle owed the Commission $5,000, and RUFFPAC and Ms. Lyles owed the Commission $8,000, both with interest accrued since November 15, 1994. Defendants and Ms. Lyles agreed to the following:

- Free the Eagle and RUFFPAC, both in conjunction with Ms. Lyles, would make monthly payments of $250 and $350, respectively, until their debts, with compounded interest, were paid in full.
- Should either Free the Eagle or RUFFPAC file for bankruptcy, Ms. Lyles would be personally obligated to make all of the defendant organization's remaining payments. Ms. Lyles would remain liable for these amounts even if her relationship with Free the Eagle and RUFFPAC were terminated, unless she secured a written assumption of liability from her successor at each organization. This assumption would have to be approved by the Commission prior to the effective date of Ms. Lyles' resignation.

Additionally, a $5,000 civil penalty was assessed against each defendant under 2 U.S.C. §437g(a)(6)(A) for breach of the conciliation agreement. The FEC agreed to waive both civil penalties provided that all parties complied with the court's consent judgment order and that all payments were timely.

Source: FEC *Record*, August 1995, p. 5.

Free the Eagle: FEC v., No. 95-0297 (D.D.C. June 5, 1995). *RUFFPAC: FEC v.*, No. 95-0296 (D.D.C. June 5, 1995).

FEC v. FRIENDS FOR FASI

On January 12, 2000, the Commission filed a complaint alleging that Mr. Fasi, a former Mayor of Honolulu and gubernatorial candidate in Hawaii, and his campaign committee, Friends for Fasi, had accepted prohibited contributions in the form of reduced rent for space that was owned, managed and/or controlled by foreign nationals. The Federal Election Campaign Act (the Act) prohibits foreign nationals from making "any contribution of money or other things of value . . . in connection with an election to any political office." 2 U.S.C. §441e(a). The Commission asked the court to declare that Fasi had violated the Act, enjoin them from accepting further contributions prohibited by 2 U.S.C. §441e and assess appropriate civil penalties.

Subsequently, Fasi filed a motion to dismiss the Commission's complaint, arguing three major points:

- First, 2 U.S.C. §441e does not apply to contributions for non-federal elections because the statute defines "contribution" as anything of value given "for the purpose of influencing any election for Federal office" (2. U.S.C. §431(8)(A)(i));
- Second, because the reductions in rent began prior to 1995, the Commission's January 12, 2000, complaint was filed after the 5-year statute of limitations had expired and, thus, was time-barred (28 U.S.C. §2462); and
- Third, the Commission's request for injunctive relief was "improper and unauthorized by law" because there was no basis to allege that the defendants were "about to commit" a violation of the Act.

The court rejected Fasi's argument that §441e only applies to federal elections. Although the court found the language of the statute to be ambiguous in this regard, it concluded that the Commission's interpretation of §441e—as expressed in its own regulations and advisory opinions—was consistent and reasonable. The court said that the Commission has express authorization to "elucidate statutory policy in administering FECA" unless the court finds the Commission's interpretations "demonstrably irrational or clearly contrary to the plain meaning" of the Act. *United States v. Kanchanalak*, 192 F.3d at 1049; *Nevitt v. United States*, 828 F.2d at 1406-07.

The court granted in part and denied in part Fasi's motion to dismiss based on Fasi's second argument, that the Commission had filed its suit after the statute of limitations had expired. The court agreed that any claims based on alleged violations that occurred before January 12, 1995, were barred by the statute. The court also found, however, that the reduced rent constituted a "continuing violation" and that each month that Fasi was allowed to rent space at a reduced rate marked a new and separate contribution. The court reached this

decision both because the Act makes each contribution a separate violation of 441e and because, in the absence of a long-term rental agreement or a fixed rental rate, the court concluded that Fasi had rented on a month-to-month basis. Thus, the court ruled that the Commission could only file claims based on alleged violations occurring between January 13, 1995, and November 1996, after which Fasi allegedly stopped receiving prohibited contributions.

On January 19, 2001, the court signed a consent judgment, in which it:

- Found that Friends for Fasi violated the ban on contributions from foreign nationals by accepting the discounted rental space from January 1995 to November 1996;
- Ordered Friends for Fasi to pay a $15,000 civil money penalty; and
- Permanently enjoined Friends for Fasi and its agents, employees, attorneys, including Frank F. Fasi, from accepting "something of value from a foreign national at less than market value in connection with U.S. elections for public office."

Source: FEC *Record*, August 2000, p. 14; and June 2001, p. 8.

FEC v. FRIENDS OF ISAIAH FLETCHER

On April 24, 1989, the U.S. District Court for the District of Maryland ruled that Friends of Isaiah Fletcher and Mr. Fletcher, as treasurer, violated section 434(a)(2)(A) of the election law by failing to file an October 1986 quarterly report. (Civil Action No. PN 88-2323.) The committee was Mr. Fletcher's principal campaign committee for his 1986 Congressional bid.

The court ordered defendants to pay a civil penalty of $5,000 and to pay the Commission's costs in the action. The court also permanently enjoined the defendants from similar future violations of the Act.

In March 1990, after the Fletcher campaign had failed to make any payments on the judgment, the FEC petitioned the court to (1) hold defendants in contempt for their failure to pay the assessments and (2) order defendants to pay the interest that had accrued on the penalty.

The court denied the motion but ordered defendants to begin paying the assessments in monthly installments of $300 each beginning June 15, 1990. The court also ordered Mr. Fletcher to file a statement profiling his financial situation.

After the defendants failed to comply with these orders, the court granted an FEC petition to hold them in contempt on February 5, 1991. The court ordered Mr. Fletcher and the committee to pay:

- An additional penalty of $100 per day until they fully comply with the previous orders;
- Interest charges on the unpaid court costs owed to the FEC; and
- The FEC's costs in prosecuting the contempt proceeding.

The case was closed on August 6, 1992, when the FEC notified the court that the committee and its treasurer, Mr. Fletcher, had paid the court-ordered penalty to the satisfaction of the agency.

Source: FEC *Record*, June 1989, p. 8; July 1990, p. 4; April 1991, p. 6; and October 1992, p. 12.

FEC v. FRIENDS OF JANE HARMAN

On August 18, 1999, the U.S. District Court for the Central District of California found that Friends of Jane Harman, the principal campaign committee of former Congresswoman Jane Harman, and its treasurer violated the Federal Election Campaign Act (the Act) when they accepted corporate contributions in the form of earmarked contributions collected by a corporate representative and an "advance" from the same corporation.

Background

Hughes Aircraft Company (Hughes), a Los Angeles corporation, sponsored a fundraiser for Ms. Harman at her request during the 1993-1994 election cycle.

Hughes's chairman and CEO approved the fundraiser and directed Hughes's employees to carry out the logistics of the fundraiser. Hughes's executives and employees secured a room at Hughes's corporate headquarters, hired a caterer, issued invitations and collected and transmitted Hughes employees' contribution checks to the Harman campaign.

A solicitation letter, sent to Hughes's employees in tandem with an invitation, requested contributions to Ms. Harman's campaign. The solicitation letter also requested that personal checks be made out to the campaign and that they be forwarded, via interoffice mail, to a Hughes employee in advance of the event.

On October 29, 1993, Representative Harman appeared at the fundraiser held at Hughes's corporate headquarters. Hughes's Director of Public Affairs collected some contributions for the event through interoffice mail prior to the event and collected others from executives at the door. A few days after the fundraiser, a representative of the Harman campaign picked up the checks. Altogether, Hughes collected and forwarded $20,600 to the Harman campaign.

Three months later, the Harman campaign paid $857 to the corporation to cover Hughes's labor costs and the cost of using Hughes's facilities. The campaign paid the food caterer for the event directly.

Earmarked Contributions

The Act prohibits corporations from making contributions or expenditures in connection with any federal election. 2 U.S.C. §441b(a). Because Hughes, as a corporation, was prohibited from making a contribution to a federal campaign, it was also prohibited under FEC regulations from acting as a conduit for contributions that are earmarked to candidates or their authorized committees. 11 CFR 110.6(b)(2). Additionally, 2 U.S.C. §441b(a) prohibits candidates or their committees from knowingly accepting "anything of value" from a corporation.

The court found that the collection of contributions by a Hughes employee in her official capacity as Director of Public Relations conferred a benefit on the campaign from the corporation. Therefore, when the Harman campaign received the checks collected, it violated the §441b(a) prohibition against accepting anything of value from a corporation.

Reimbursement of Staff Labor Costs

Section 441a(b)(2) of the Act provides that a "contribution" includes an advance. On the other hand, 11 CFR 114.9(2) (an FEC regulation) permits campaigns to reimburse corporations for the use of corporate facilities within a commercially reasonable time. The FEC maintained that this regulation covers reimbursement for the use of facilities but not reimbursement for the labor costs of corporate employees.

Deferring to the FEC's interpretation of the Act and its regulations, the court concluded that, "because the Harman Campaign did not pay for the use of employee services until after the event occurred," the $731 value of the employees' labor constituted an advance of corporate funds and was, therefore, an impermissible corporate contribution violating 2 U.S.C §441b(a).

Remedy

While the court found that the committee knowingly violated the Act, the court denied the FEC's request to require the committee to disgorge to the U.S. Treasury an amount equal to the prohibited contributions, to assess a civil penalty against the committee or to enjoin the committee from accepting corporate contributions in violation of 2 U.S.C. Section 441b(a).

The court stated that there was no evidence that the defendants believed, at the time of the fundraiser, that they were not complying with the law. The court also stated that the FEC subsequently clarified its regulations surrounding the use of corporate staff; the regulations now specifically state that the use of corporate staff to "plan, organize or carry out [a] fundraising project" requires payment of the fair market value of the services in advance. 11 CFR 114.2(f)(2)(i)(A). The court did not issue an injunction because the likelihood of future violations of the Act by the campaign or its treasurer was remote since the Harman campaign is no longer in existence and Representative Harman is no longer in office.

Source: FEC *Record*, October 1999, p.4; and November 1999, p. 4.

FEC v. FUND FOR A CONSERVATIVE MAJORITY

On September 23, 1997, parties to this suit agreed to a final order and judgment by the U.S. District Court for the Eastern District of Virginia, Alexandria Division. Under that order, the defendants, Fund for a Conservative Majority (FCM) and its treasurer, Robert C. Heckman, agreed to pay a civil penalty of $2,500 for having violated the Federal Election Campaign Act (the Act).

Mr. Heckman failed to file the FCM's 1994 year-end report on time, a violation of 2 U.S.C. §434(a)(4)(A)(i). This section of the Act requires political committees other than authorized candidate committees to file quarterly reports during a year in which a general election is held. The report for the final quarter that ends on December 31 must be completed and returned to the FEC no later than January 31 of the following year.

The FCM's 1994 year-end report should have been submitted to the FEC by January 31, 1995. Mr. Heckman hand delivered a copy of the FCM's year-end report on September 7, 1995—nearly nine months late. He also delivered another copy of the report to staff of the Commission's Office of General Counsel on June 27, 1996—close to a year and a half after it was due.

Neither Mr. Heckman nor the FCM contested the Commission's allegations in this case. In addition to the civil penalty, the defendants were permanently enjoined from making similar violations of the Act.

Contempt Judgment

On April 28, 2000, the U.S. District Court for the Eastern District of Virginia granted the FEC's motion to hold Robert Heckman and Fund for a Conservative Majority (FCM) in contempt of court for failing to pay a court-imposed civil penalty and for failing to file disclosure reports, as the court had ordered.

The court ordered Mr. Heckman and FCM to pay the outstanding civil penalty plus interest (amounting to $5,540); to pay a $5,000 contempt fine; and to file all outstanding disclosure reports. If Mr. Heckman and FCM fail to comply with the court's orders within 10 days, the court will impose additional contempt fines of $100 per day until they do so.

Source: FEC *Record*, November 1997, p. 1; and June 2000, p. 8.

FEC v. FURGATCH
FEC v. DOMINELLI

On November 20, 1984, the U.S. District Court for the Southern District of California dismissed *FEC v. Furgatch* (Civil Action No. 83-0596-GT[M]) on the ground that the case failed to state a justiciable claim. Based on its ruling in the Furgatch suit, on November 30, 1984, the court also dismissed a "virtually identical case," *FEC v. Dominelli* (Civil Action No. 83-0595-GT[M]).

More than two years later, however, the district court was reversed by the court of appeals, which ruled that the defendants had violated the election law and which remanded the cases to the district court.

On remand, the district court assessed a $25,000 civil penalty against Mr. Furgatch and permanently enjoined him from future similar violations of the election law (Civil Action No. 86-6047). Mr. Furgatch appealed the penalty and the injunction.

On March 8, 1989, the appeals court upheld the lower court's imposition of the civil penalty. However, the court vacated the permanent injunction against Mr. Furgatch and remanded it to the district court with instructions to limit its duration.

Background

In filing suit against Mr. Furgatch on March 25, 1983, the FEC claimed that he had violated the election law by failing to report independent expenditures of approximately $25,008. 2 U.S.C. §434(c). MrFurgatch incurred the expenditures for two political ads he placed in *The New York Times* and *The Boston Globe*, respectively, which the Commission alleged expressly advocated the defeat of President Carter in his 1980 reelection bid. The FEC also claimed Mr. Furgatch had violated section 441d of the law by failing to include an adequate disclaimer notice on the ad he placed in *The Boston Globe*.

In filing suit against Mr. Dominelli on the same day, the FEC had asked the court to find that he had failed to report independent expenditures amounting to $8,471. The FEC alleged that Mr. Dominelli had incurred the expenditures for an ad in a November 1980 issue of *The Chicago Tribune*, which expressly advocated President Carter's defeat.

District Court Ruling on the Furgatch Suit

In ruling on whether the political ads sponsored by Mr. Furgatch expressly advocated President Carter's defeat, and therefore constituted independent expenditures, the district court applied the standard contained in the Supreme Court's *Buckley v. Valeo* opinion.[1] In *Buckley v.*

Valeo, the Court had defined express advocacy as "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Buckley v. Valeo*, 424 U.S. 1, 44 (1976). The district court cited earlier district and appeals court decisions which emphasized that "neither the purpose nor the effect of a political advertisement is determinative of the issue of whether the ad expressly advocates the election or defeat of a clearly identified candidate." See *FEC v. CLITRIM*, 616 F.2d 45, 53 (2d Cir. 1980); *FEC v. AFSCME*, 471 F. Supp. 315, 316 (D.D.C. 1979). Applying this express advocacy standard to Mr. Furgatch's ads, the court found that the pivotal question was "whether the phrase 'Don't let him do it' [was] the equivalent of the expression 'vote against Carter.'" (The remainder of the language in the ad was beyond the election law's scope, the court concluded, because it contained only an implied message not to vote for President Carter.) Interpreting the word "it" in the phrase, the court concluded that the ad exhorted the reader not to let President Carter "hide his own record" or "degrade the electoral process and lessen the prestige of the office." The court then concluded that the phrase "Don't let him do it" did not constitute express advocacy. The court found that "the range of actions expressly recommended by the ad obviously did not include voting the President out of office." Consequently, the ad did not ask the reader to vote against the President.

Finally, the court noted that, since it had decided the case on grounds of statutory construction, it was not "necessary or desirable to [address] the defendants' constitutional challenges to sections 434(c) and 441d" of the election law.

On January 24, 1985, the FEC filed an appeal of the district court's decision with the U.S. Court of Appeals for the Ninth Circuit.

Appeals Court Ruling

On January 9, 1987, the U.S. Court of Appeals for the Ninth Circuit reversed the district court's decision in the case and confirmed the FEC's claim that Mr. Furgatch should be held liable for violations of the election law resulting from: his failure to report spending for the ads as independent expenditures and his failure to state in one of the ads that the communication was not authorized by a candidate or a candidate's committee.

Since *FEC v. Dominelli* presented "facts virtually identical" to those addressed in the Furgatch suit, the appeals court also reversed the district court's ruling in that case. (*FEC v. Dominelli*; Civil Action No. 85-5525)

In reversing the district court's ruling in the case, the appeals court rejected the "strictly limited" definition of express advocacy relied upon by the district court. (See discussion above.) Instead, the appeals court found that "context is relevant to a determination of express advocacy." The court therefore concluded that "[political] speech need not include any of the words listed in *Buckley* to be express advocacy under the Act, but must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate." The appeals court stated that this standard for determining when political speech constitutes express advocacy would "preserve the efficacy of the Act without treading upon the freedom of political expression."

Elaborating on this standard, the appeals court held that a political communication constituted express advocacy if:

- The communication "is unmistakable and unambiguous, suggestive of only one plausible meaning," even if "not presented in the clearest, most explicit language";
- The communication "presents a clear plea for action"; and
- There can be no reasonable doubt about "what action is advocated."

Conversely, the appeals court held that "speech cannot be express advocacy of the election or defeat of a clearly identified candidate when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action." In applying its express advocacy standard to Mr. Furgatch's ads, the appeals court held that it had "no doubt that the ads ask the public to vote against Carter." In reversing the district court's conclusion, the appeals court held that the "pivotal question is not what the reader should prevent Jimmy Carter from doing, but what the reader should do to prevent it [i.e., his reelection]." The appeals court noted that, although "we are presented with an express call to action" in the ad, we are not told "what action is appropriate." However, the court concluded, in the context of the message, "reasonable minds could not dispute that Furgatch's advertisement is urging readers to vote against Jimmy Carter." Moreover, the court held that its conclusion was "reinforced by consideration of the timing of the ad... timing the appearance of the advertisement less than a week before the election left no doubt of the action proposed."

Finally, the court held that Mr. Furgatch's ads were not the kind of "issue-oriented speech" excepted from the election law: "The ads directly attack a candidate, not because of any stand on the issues of the election, but for his personal qualities and alleged improprieties in the handling of his campaign. It is the type of advertising that the Act was enacted to cover."

The court did not explicitly discuss Mr. Furgatch's constitutional challenge to sections 434(c) and 441d of the election law, but noted that in deciding the case on

grounds of statutory construction, it had "implicitly" dealt with the free speech issues raised in his suit.

On October 5, 1987, the U.S. Supreme Court denied a petition by Mr. Furgatch for a writ of certiorari in the suit.

District Court Judgment on Remand

On April 26, 1988, the district court entered a judgment requiring Mr. Furgatch to pay a $25,000 civil penalty and to comply with the FECA's reporting requirements within 30 days. The court also permanently enjoined the defendant from future similar violations of the election law. Mr. Furgatch appealed the judgment in the Ninth Circuit.

Mr. Furgatch petitioned the appeals court to find that the district court had abused its discretion in assessing a $25,000 penalty. He also asked the appeals court to find that the lower court's permanent injunction was not authorized by the election law, was impermissibly vague and was not imposed in compliance with Rule 65(d) of the Federal Rules of Civil Procedure.

Appeals Court Decision

In finding that the district court had not abused its discretion in imposing the civil penalty, the appeals court observed that the Federal Election Campaign Act (the Act) permits a court to assess a civil penalty "which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved" in the violation. 2 U.S.C. §437g(a)(6)(B). Since the total expenditures Mr. Furgatch had made for the ads amounted to $25,008, the district court had assessed a $25,000 penalty.

With regard to the permanent injunction, Mr. Furgatch had claimed that the Act permitted a court to issue an injunction only when a person "is about to commit" a violation of the law. The FEC claimed that the relevant statute, 2 U.S.C. §437g(a)(6)(B), gave a court the authority to issue an injunction on the basis of either a past or a threatened future violation. Admitting that the language of the statute did not clearly indicate whether Congress intended to limit injunctive relief to cases of imminent violations of the Act, the court cited legislative history to conclude that the FEC was correct in its interpretation of section 437g.

Nevertheless, the court said, the district court could not issue an injunction pursuant to section 437g(a)(6)(B) unless there was a likelihood of future violations. The court found that although the record supported a finding that Mr. Furgatch was likely to violate the election law again, it did not justify a permanent injunction—that is, an injunction lasting the duration of his life.

In remanding the injunction to the lower court, the appeals court instructed it to limit the injunction to a "reasonable duration." The appeals court also required the district court to state, in compliance with Rule 65(d), the reasons for the injunction and the specific actions restrained by it.

On remand, the district court cited Mr. Furgatch's past violations of the election law as demonstrating that he was likely to violate the law again. As an additional reason for the injunction, the court pointed out that his conduct since the enforcement action was opened (in 1980) had shown "an absence of good faith efforts by Furgatch to cure his violations."

In accordance with the appeals court's ruling, the district court specified that the injunction prohibited Mr. Furgatch from committing further violations of sections 434(c) and 441d of the Act. Finally, the court limited the duration of the injunction to eight years.

Default Judgment Against Dominelli

Since Mr. Dominelli never responded to the FEC's complaint on remand, the agency asked the district court to issue a default judgment against him.

In response to the FEC's request, on March 14, 1988, the district court issued a judgment in which it decreed that:

- Mr. Dominelli violated section 434(c) of the election law by failing to report $8,471 in independent expenditures he incurred for an ad placed in a November 1980 issue of *The Chicago Tribune*. The ad had expressly advocated the defeat of President Jimmy Carter in his 1980 reelection bid.
- Mr. Dominelli had to report these expenditures within 30 days of the entry of the court's order and default judgment.
- Mr. Dominelli had to pay an $8,471 civil penalty for the violation.

Source: FEC *Record*, January 1985, p. 6; March 1987, p. 5; June 1987, p. 6; December 1987, p. 7; May 1988, p. 8; May 1989, p. 7; June 1989, p. 7; and February 1990, p. 7.

Dominelli: FEC v., No. 83-0595-GT(M) (S.D. Cal. 1984) (unpublished opinion), *rev'd*, 810 F.2d 205 (9th Cir. 1987).

Furgatch: FEC v., No. 83-0956-GT(M) (S.D. Cal. 1984), (unpublished opinion), *rev'd*, 807 F.2d 857 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987), *on remand* (S.D. Cal. April 26, 1988) (unpublished order), *aff'd in part, vacated and remanded in part*, 869 F.2d 1256 (9th Cir. 1989).

[1] An independent expenditure is an expenditure for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made with the cooperation or prior consent of, or in consultation with, or at the request or suggestion of, any candidate or his/her authorized committees or agents. 11 CFR 100.16 and 109.1(a).

FEC v. DAVE GENTRY FOR CONGRESS COMMITTEE

On September 28, 1999, the U.S. District Court for the Middle District of Florida, Orlando Division, found in a default judgment that the Dave Gentry for Congress Committee (the Committee) and its treasurer violated the Federal Election Campaign Act (the Act) when they failed to comply with the Act's reporting requirements. Mr. Gentry was defeated in the 1996 general election for Florida's 5th congressional district.

The Committee and its treasurer violated 2 U.S.C. §§434(a)(2)(A)(i), (ii) and (iii) and 434(a)(2)(B)(ii) by failing to file five reports of receipts and disbursements until after the deadlines established by the Act. Specifically, they failed to file the reports listed below in a timely manner.

- The 1995 Year End Report
- The April 1995 Quarterly Report
- The July 1996 Quarterly Report
- The 1996 12 Day Pre-Primary Report
- The 1996 30 Day Post-General Election Report

The court ordered the Committee and its treasurer to pay a civil penalty of $25,000 to the FEC within fifteen days of the final order and default judgment.

Source: FEC *Record*, November 1999, p. 4.

FEC v. GOPAC

On February 28, 1996, the U.S. District Court for the District of Columbia ruled in GOPAC's favor and dismissed this case. The FEC had asked the court to find that, under the Federal Election Campaign Act, GOPAC first qualified as a political committee in 1989 and as such was required to file and register with the FEC since then. GOPAC argued that it did not qualify as a political committee under the Act until 1991, at which time it did register with the FEC.

The court ruled that an organization's status as a political committee under the Act is properly determined by applying the "major purpose" test to narrow the statutory definition, which states that a political committee is any group that receives at least $1,000 in contributions or makes at least $1,000 in expenditures to support federal candidates. According to the court, the major purpose test serves as a bright line that separates groups that are political committees from those that are not; under the major purpose test, a group is a political committee if its major purpose is to elect a particular candidate or candidates for federal office.

FEC Administrative Activity

Following an investigation into an administrative complaint filed by the Democratic Congressional Campaign Committee in September 1990, the FEC found probable cause to believe that in 1989 GOPAC qualified as a political committee under the Act, and that, until 1991, GOPAC failed to abide by the Act's registration and disclosure requirements for political committees. This probable cause finding was based on a GOPAC solicitation that urged contributors to help "break the Democrats' stronghold on power" in the U.S. House of Representatives.

The FEC was unable to reach a conciliation agreement with GOPAC and filed this lawsuit on April 14, 1994. The FEC asked the court to impose civil penalties on GOPAC and to require GOPAC to file 1989 and 1990 disclosure reports.

Factual Background

In 1989, GOPAC's stated mission was: "to create and disseminate the doctrine which defines a caring, humanitarian, reform Republican Party in such a way as to elect candidates, capture the U.S. House of Representatives and become a governing majority at every level of government."

The court said that although this mission statement had as its ultimate objective the election of Republican candidates to the U.S. House of Representatives, GOPAC's direct support in 1989 and 1990 was for state and local candidates and not for any federal candidates.

GOPAC did develop and distribute materials espousing a set of ideas for Republican candidates, including federal candidates. GOPAC also targeted cash contributions to local and state candidates in areas where it hoped this support might indirectly influence the election of other candidates, including federal candidates, on the Republican ticket.

GOPAC also provided assistance to Congressman Newt Gingrich in 1989 and 1990, but the court said there was no material evidence that Congressman Gingrich used these funds for his 1992 reelection campaign as opposed to his work as GOPAC Chairman.

Legal Analysis

The Act defines a political committee as any group that receives at least $1,000 in contributions or makes at least $1,000 in expenditures for the purpose of influencing a federal election. 2 U.S.C. §431(4)(A).

In *Buckley v. Valeo*, the Supreme Court, citing First Amendment concerns, ruled that the definition of political committee "need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate."

The FEC contended that the *Buckley* decision did not require a group to provide direct support to a specific federal candidate in order for the group to be considered a political committee under the major purpose test. Instead, the FEC argued that *Buckley's* definition of "political committee" encompassed groups organized to engage in partisan electoral politics or electoral activity. Accordingly, the FEC argued that if GOPAC's sole purpose was to advocate the election of Republicans as a class of candidates, then the purpose of its activities was by definition campaign related. And if its expenditures or contributions for these campaign-related activities exceeded $1,000, it qualified as a political committee under the Act.

The court disagreed because it found the term "partisan electoral politics" to be vague and therefore to chill the First Amendment rights of issue advocacy groups. The court quoted the *Buckley* decision: " . . . the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application."

The court reasoned that a bright-line test was therefore required, so that contributors and committee treasurers could easily conform their conduct with the law and so that the FEC could easily identify violations and take quick and decisive action. The court concluded that the appropriate bright line was provided by limiting the definition of political committee to groups whose major purpose was the election of a particular federal candidate or candidates. The court said that this test drew two relatively clear lines: it distinguished between federal and nonfederal candidates; and it distinguished between groups that support particular federal candidates and those that lend general party support.

The court noted that the FEC conceded that there was no evidence of direct GOPAC support to federal candidates in 1989 and 1990. GOPAC's support appeared to have been limited to state and local candidates, to general nationwide dissemination of ideological materials and to Congressman Gingrich in his role as GOPAC chairman and not as a federal candidate. The court therefore ruled in GOPAC's favor and dismissed the FEC's complaint.

Source: FEC *Record*, April 1996, p. 1.

GOPAC: FEC v., 917 F. Supp. 851 (D.D.C. 1996).

FEC v. HALEY CONGRESSIONAL COMMITTEE

On February 24, 1987, the U.S. District Court for the Western District of Washington at Tacoma granted the defendants' motion for summary judgment in *FEC v. Ted Haley Congressional Committee* (Civil Action No. 85-1185). The district court dismissed the suit with prejudice, finding no violation of federal election law regarding contribution limitations (2 U.S.C. §441a(a)(1)(A) and 441a(f)). The court concluded, alternatively, that if there was a violation, no civil penalty would be assessed.

On July 22, 1988, the U.S. Court of Appeals for the Ninth Circuit issued a decision which reversed the district court ruling. Though finding that the defendants had, in fact, violated the contribution limitations, the appeals court upheld the lower court's refusal to assess a civil penalty.

On November 22, 1988, the court issued an amended judgment responding to the remand order.

Background

The Ted Haley Congressional Committee was the principal campaign committee for Mr. Haley's bid for a House seat in Washington's 1982 Congressional primaries. After the election, Mr. Haley obtained a $50,000 personal loan from a local bank to retire debts outstanding from his campaign. To secure the loan, Mr. Haley obtained guarantees from several friends, that is, the six other defendants in the suit. (Four of the defendants provided guarantees of $10,000 each; two provided guarantees of $5,000 each.) The loan and the guarantees were reported by Mr. Haley's campaign in its 1983 mid-year report. By the end of 1983, Mr. Haley had fully repaid the loan.

Under the election law and FEC regulations, an endorsement or guarantee of a loan, like a regular loan, counts as a contribution from the endorser or guarantor to the extent of his/her portion of the outstanding balance of the loan. 11 CFR 100.7(a)(1)(i)(C). Consequently, each guarantor for Mr. Haley's campaign loan exceeded his/her $1,000 limit for Mr. Haley's primary campaign. On October 30, 1984, the Commission therefore found reason to believe that:

- The loan guarantors had made excessive contributions to the Haley Campaign in the form of loan guarantees (2 U.S.C. §441a(a)(9)(A)); and
- The Haley campaign and its treasurer had, in turn, violated the election law by accepting the excessive contributions (2 U.S.C. §441a(f)).

On July 30, 1985, after attempting to resolve this enforcement matter through informal methods of conciliation, the Commission filed a suit against defendants in the U.S. District Court for the Western District of Washington.

District Court Ruling

The court found that "post-election loan guarantees, such as those made here, are presumptively for the purpose of influencing an election under the statute and regulations. This presumption, however, is not conclusive, but rebuttable. It simply allows the FEC to shift the burden of proof to defendants after a minimal showing."

The court held that the defendants had successfully rebutted this presumption by showing that the "facts [of the case] are not in issue, and that those facts lead to the legal conclusion that the guarantees in issue were not for the purpose of influencing any election." Thus the guarantees should not have been viewed as contributions (i.e., funds received to influence a federal election). As evidence that the loan guarantees were not made to influence a federal election, the court cited "the timing of the solicitation [of loan guarantees after the election], the nature of the relationships between Haley and the guarantors, their intent in making and accepting the guarantees and the facts and circumstances of Haley's [re]payment.... " of the loan.

The court also found "no justifiable ground" for assessing a civil penalty against defendants, even if it were to conclude the defendant had violated the election law. On April 23, 1987, the FEC filed an appeal with the U.S. Court of Appeals, 9th Circuit (Civil Action No. 87-3867).

Appeals Court Ruling

In reviewing the case on appeal, the appeals court held that, since Congress had not precisely addressed the issue of whether donations made to a campaign committee after the election constituted contributions for the purpose of influencing a federal election, the court could "not simply impose its own construction on the statute...." Rather, the court had to decide whether the FEC had based its interpretation of the statute on a "permissible construction.... "

The court found that the FEC's interpretation of the relevant statutory provisions through its regulations and advisory opinions was a "permissible" interpretation of the election law. For example, when the FEC promulgated a regulation in 1976 stating that post-election contributions were subject to limits, Congress did not disapprove it. In the court's view, "Congress' acquiescence [was] made more concrete in view of several advisory opinions the FEC has issued on the subject."

The appeals court therefore held that "the district court erred when it substituted its interpretation of the statute and regulations rather than giving deference to the FEC's interpretation of its enabling statute and its own promulgated regulations and advisory opinions...The appellees [the Haley Congressional Committee] cannot choose to ignore that interpretation of the regulatory scheme and urge this court to substitute its own construction for that of the FEC."

The appeals court found that the district court had not abused its discretion in finding that a civil penalty for the defendants' violations of the election law was "unwarranted." Consequently, the appeals court decided not to "disturb that finding and conclusion."

Finally, the appeals court vacated the district court's award of attorneys' fees to the defendants. Since the defendants were no longer the "prevailing party" in the case, the appeals court held that all parties to the suit had to bear their own litigation costs.

District Court Ruling on Remand

In its amended judgment, the district court:

- Reversed its February 1987 decision in the suit in favor of the FEC;
- Ordered that no civil penalties be assessed against defendants; and
- Vacated its order awarding attorneys' fees to defendants.

Source: FEC *Record*, May 1987, p. 6; September 1988, p. 7; and January 1989, p. 9.

Ted Haley Congressional Committee: FEC v., 654 F. Supp. 1120 (W.D. Wash. 1987), *rev'd*, 852 F.2d 1111 (9th Cir. 1988).

FEC v. HALL-TYNER ELECTION CAMPAIGN

On September 22, 1981, the U.S. District Court for the Southern District of New York issued an order in *FEC v. Hall-Tyner Election Campaign Committee* (the Committee) granting the defendant's motion for summary judgment in the suit (Civil Action No. 78-3508). The Committee was the principal campaign committee for the 1976 Presidential and Vice Presidential nominees of the Communist Party, U.S.A. The district court ruled that the recordkeeping and disclosure requirements of the Act, as applied to the Committee, would abridge First Amendment rights to the Committee's supporters.

FEC's Claim

The FEC's suit arose from the Committee's failure to disclose on its reports the names and addresses of 424 contributors who had each made contributions of $100 or more. Instead, the Committee listed the contributors as "anonymous" (in violation of 2 U.S.C. §434(b)(2)). Moreover, the Committee's treasurer failed to keep records of contributions exceeding $50 from individuals who had elected to remain anonymous (in violation of 2 U.S.C. §432(c))After attempting to resolve this matter through informal methods of conciliation, the Commission filed suit with the district court on August 1, 1978.

District Court Ruling

In ruling that the Committee did not have to comply with the Act's disclosure requirements, the district court noted that the Supreme Court had not created a blanket exemption for minor parties from the Act's disclosure requirements in its *Buckley v. Valeo* decision. The Supreme Court did conclude, however, that minor parties might not have to comply with the disclosure provisions when they had a chilling effect on contributors' rights of free association. *Buckley v. Valeo*, 424 U.S. at 72-74.

In order to exempt contributors from the disclosure requirements, the Court said that a minor party would have to demonstrate a "reasonable probability" that compelled disclosure of the names of contributors would "subject them to threats, harassment, or reprisals from either Government officials or private parties." *Id*. at 74. Under these circumstances, disclosure could "...instill sufficient fear in potential supporters of the organization to deter them from engaging in protected associational activity." *Id*. at 71. On examining the evidence presented by the Committee, the district court found that "the record plainly reflects an extensive history of governmental harassment and public hostility directed at the Party and its members and supporters." The district court concluded that "the substantial

infringement of First Amendment rights demonstrated in the record cannot be justified by the governmental interests furthered by applying the FECA disclosure requirements to the defendants." Moreover, the court noted that "the governmental interest served in disclosing the source and amount of contributions is less substantial" in the case of a minor party. The district court cited the Supreme Court's holding in *Buckley* that "the undue influence of large contributions on officeholders" is reduced in the case of minor parties since their candidates are less likely to win an election. *Id*. at 70.

Similarly, the district court found that the Act's recordkeeping requirements also infringed on the contributors' free association rights, even though information recorded would not be publicly disclosed. The court cited an ongoing governmental investigation as evidence that records of contributors' names would subject them to undue harassment. The district court cited 12 affidavits submitted by anonymous individuals providing evidence of harassment. The district court found that the main governmental interest served by the recordkeeping requirements (i.e., effective monitoring and enforcement of the contribution limits) did not justify infringement of the contributors' First Amendment rights.

Appeals Court Ruling

On May 6, 1982, the U.S. Court of Appeals for the Second Circuit issued an opinion in *FEC v. Hall-Tyner Election Campaign Committee* (Civil Action No. 81-6229). The appeals court upheld an earlier ruling by the U.S. District Court for the Southern District of New York that the recordkeeping and disclosure requirements of the Act, as applied to the Hall-Tyner Campaign Committee (the Committee), would abridge First Amendment rights of the Committee's supporters.

In affirming the district court's decision, the appeals court found that the Committee had met the standard set forth in *Buckley v. Valeo* for exempting minor parties from the Act's disclosure requirements; i.e., the Committee had demonstrated a "reasonable probability" that disclosure of the names of its contributors would subject them to governmental or private harassment. *Buckley v. Valeo*, 424 U.S. at 72-74. Moreover, the appeals court cited the Court's holding in *Buckley* that the governmental interest served in disclosing the source and amount of contributions (i.e., "the undue influence of large contributions on officeholders") is less substantial in the case of a minor party with little chance of winning an election. *Id*. at 70. The appeals court concluded, therefore, that the governmental interest served in obtaining information on the Committee's contributors did not justify the chilling effect that disclosure would have on their First Amendment rights of free association.

Source: FEC *Record*, November 1981, p. 5; and July 1982, p. 7.

Hall-Tyner Election Campaign Committee: FEC v., 524 F. Supp. 955 (S.D.N.Y. 1981), *aff'd*, 678 F.2d 416 (2d Cir. 1982), *cert. denied*, 459 U.S. 1145 (1983).

FEC v. INTERNATIONAL FUNDING INSTITUTE

On July 10, 1992, the U.S. Court of Appeals for the District of Columbia Circuit, sitting *en banc*, upheld the constitutionality of 2 U.S.C. §438(a)(4). (Civil Action No. 91-5013.) That provision of the Federal Election Campaign Act (the Act) prohibits anyone from using, for solicitation or commercial purposes, the information on individual contributors listed in political committee reports filed with the FEC. On November 30, 1992, the U.S. Supreme Court denied a petition for review of the case.

On March 1, 1993, the U.S. District Court for the District of Columbia ordered defendants to pay an $18,000 civil penalty for knowing and willful violations of the sale or use restriction.

Background

According to the findings of fact in this case, International Funding Institute (IFI), through Robert E. Dolan, its sole stockholder and director, subscribed to an on-line data base service provided by Legi-Tech, Inc. (an amicus curiae in this action). The data base contained information on individual contributors compiled from FEC reports. IFI developed the contributor data into a mailing list, which it marketed through a broker. The broker, in turn, rented the list to about five customers, including American Citizens for Political Action, Inc. (ACPA), a political committee. (Mr. Dolan is also chairman and treasurer of ACPA.) ACPA used the list for several mailings, each soliciting about 5,000 individuals.

In an internal enforcement matter, the FEC found probable cause to believe that IFI, ACPA and Mr. Dolan, as ACPA treasurer, knowingly and willfully violated section 438(a)(4). Unable to reach a conciliation agreement with respondents, the agency filed suit against them in the U.S. District Court for the District of Columbia. (Civil Action No. 90-1623.)

Defendants asked the district court to dismiss the case, arguing that §438(a)(4) violated the First Amendment of the Constitution, both on its face and as applied to their conduct. The FEC moved to certify the constitutional question to the court of appeals. The district court granted the FEC's motion.

Court of Appeals Opinion

Level of Scrutiny

The court first examined what level of scrutiny it should apply to determine whether the use restriction of §438(a)(4) was constitutional. Noting some apparent conflicts in levels of scrutiny applied by the Supreme Court in similar cases, the court "assumed"—but did not decide—that §438(a)(4) was subject to intermediate scrutiny.

Quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984), the court explained the Supreme Court's criteria for intermediate scrutiny: it "require[s] only that the restriction further 'an important or substantial governmental interest unrelated to the suppression of expression' and [that it] be 'no greater than is necessary or essential to the protection of the particular governmental interest involved.'"

Governmental Interest

The FEC argued, *inter alia*, that §438(a)(4) was narrowly tailored to further an important governmental interest, that of protecting the value of a political committee's contributor list. The FEC further argued that this protection, in turn, preserves political discourse.

The court agreed: "Without the use restriction of §438(a)(4), innumerable entrepreneurs would, like the defendants here, be able freely to appropriate to themselves part of the value of the contributor lists compiled by reporting political committees. As a result, such committees would have less incentive to compile the lists in the first place. In other words, if the return on their investment in solicitation would be reduced by others using the resulting lists, political committees would not find it worthwhile to solicit as much as they now do; they would raise less money, spend less money, and correspondingly underwrite less political discourse....[T]he use restriction protects political discourse from the adverse effect that the disclosure requirement of the Act would otherwise have."

(The FEC also argued, based on legislative history, that §438(a)(4) furthers the governmental interest in protecting contributors from unwanted solicitations, but the court did not find it necessary to reach that argument.)

Defendants claimed that a political committee has no property rights in its contributor list because a list of names and addresses is not sufficiently original to warrant copyright protection. The court, however, observed that "Congress may recognize an intellectual property interest, narrower than copyright, that is not subject to the constitutional requirement of originality."

The court rejected defendants' alternative argument that §438(a)(4) is inconsistent with the First Amendment because it creates "a property interest in the political sympathies of another." Instead, the court said, the use provision "narrowly protects the value of the list itself in a particular use; it does not prevent one from soliciting a person who is on a committee's contributor list, so long as one does not obtain that person's name (directly or indirectly) from a list filed with the FEC."

Conclusion

The court held that, under an intermediate level of scrutiny, section 438(a)(4) is constitutional as applied to the defendants' conduct because it "advances an important governmental interest" (preserving the value of a political committee's contributor list) and "is no broader than is necessary to that task."

The court rejected defendants' second claim, that §438(a)(4) was unconstitutional on its face. Quoting *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798 (1984), the court said that a facial challenge can succeed "only if the statute may 'never be applied in a valid manner' or is 'written so broadly that [it] may inhibit the constitutionally protected speech of third parties.'" The defendants, the court said, failed to make such an argument.

The court remanded the case to the district court for proceedings consistent with its holding.

Defendants agreed to the district court's March 1993 order, which imposed the $18,000 penalty and also permanently enjoined defendants from future violations of the sale and use restriction.

Source: FEC *Record*, September 1992, page 11; January 1993, page 2; and May 1993, p. 2.

FEC v. KALOGIANIS

On March 25, 1997, the U.S. District Court for the District of New Hampshire ordered Anastasios Kalogianis to pay a $37,500 civil penalty to the FEC for making $249,000 in excessive contributions to the Tsongas for President Committee during the 1992 election cycle. Both parties to this suit agreed to the judgment and consent order.

Mr. Kalogianis made six loans to the Tsongas Committee. Although one of the checks was made payable to Nicholas Rizzo, the committee's chief fundraiser, the money was given with the intention that it be used in the Tsongas campaign.

The Federal Election Campaign Act (the Act) states that no person may make contributions to any federal candidate or his or her authorized candidate committee which, in the aggregate, exceed $1,000. 2 U.S.C. 441a(a)(1)(A). A contribution includes anything of value made by any person for the purpose of influencing a federal election, including loans. 2 U.S.C. §431(8)(A)(i). Further, Commission regulations state that a loan that exceeds the contribution limits of the Act is unlawful whether or not it is repaid. 11 CFR 100.7(a)(1)(i)(A). In addition to the civil penalty, Mr. Kalogianis was permanently enjoined from making similar violations of the Act.

Source: FEC *Record*, May 1997, p. 3.

FEC v. KOPKO

On June 8, 1992, the U.S. District Court for the Eastern District of Pennsylvania declared that Edward E. Kopko violated 2 U.S.C. §441f by making contributions in the names of others. In its complaint, the FEC had alleged that defendant Kopko had reimbursed twelve of his relatives and friends for their $250 checks to Alexander Haig's 1988 Presidential campaign. The court ordered Mr. Kopko to pay a $1,500 civil penalty and permanently enjoined him from violating §441f. Both the FEC and the defendant agreed to the entry of the order. (Civil Action No. 91-CV-7764.)

Source: FEC *Record*, August 1992, p. 11.

FEC v. LANCE

On July 2, 1981, citing a lack of appellate jurisdiction, the Supreme Court dismissed an appeal brought by T. Bertram Lance from the U.S. Court of Appeals for the Fifth Circuit, construed Lance's papers as a petition for a writ of certiorari and declined to hear the case. In *FEC v. T. Bertram Lance* (Civil Action No. 78-1859), the appeals court had affirmed an earlier decision by the U.S. District Court for the Northern District of Georgia, which ordered enforcement of a deposition the FEC had issued to Mr. Lance. Motions by the appellant to stay the appeals court's decision had been denied by the appeals court on February 19, 1981, and by the Supreme Court on March 11, 1981.

FEC's Claim

The FEC had issued the subpoena to Mr. Lance as part of an investigation into Mr. Lance's 1974 gubernatorial campaign in Georgia, which involved possible violations of 2 U.S.C. §441b (formerly 610 of the Federal Corrupt Practices Act). This provision prohibits national banks from making or candidates from accepting contributions in connection with any election to any political office.[1] The Commission's investigation began in September 1977.

District Court Ruling

The district court ordered Mr. Lance to comply with the subpoena. The court reasoned that the subpoena was well within the Commission's "broad and inclusive" statutory authority to investigate violations of the Federal Election Campaign Act (the Act).

Appeals Court: Panel

A panel of the appeals court rejected the arguments made by Mr. Lance for quashing the subpoena and affirmed the district court order enforcing the subpoena. Specifically, Mr. Lance claimed that the FEC was investigating matters outside its jurisdiction. He contended that both the Constitution and the Act barred any FEC investigation of contributions made by national banks to his 1974 campaign. The panel responded to this claim by affirming the FEC's argument that it was "...specifically given authority over this provision." (P.L. 93-433, 88 Stat. 1281 (October 15, 1974).) "Moreover, the Supreme Court held that any party seeking enforcement of 610 (now 441b) after January 1, 1975, must seek redress with the Commission." *Cort v. Ash*, 422 U.S. 66 (1974).

Mr. Lance further claimed that the subpoena violated the equal protection and ex post facto provisions of the Constitution by attempting to apply §441b to campaign activities that occurred before the enactment of the FECA in 1975. The panel, on the other hand, affirmed the FEC's argument that these provisions presented no impediment to the FEC's investigation: "The prohibition

against the making of campaign contributions by national banks has been in effect since 1907. Tillman Act, 34 Stat. 864. The mere recodification of 18 U.S.C. §610 as 2 U.S.C. §441b cannot absolve the respondent...from liability for substantive violations which were not changed by the incorporation of §441b into Title 2."

Appeals Court: En Banc

On January 16, 1981, the appeals court, sitting *en banc*, issued an opinion that adopted the earlier panel decision, affirmed the district court's subpoena enforcement order and rejected a claim, presented by Mr. Lance in his appeal, that §441b was unconstitutional on its face. The appeals court adopted three of the arguments given by the appeals court panel, but rejected the ex post facto argument, stating that it was not ripe for adjudication. The court concluded that the prohibition on unsound banking practices (extensions of credit to a campaign that are outside the ordinary course of business) did not violate the First Amendment because all the transactions in question involved "no speech elements at all." The bank drafts were transacted privately and were "...not the sort of public expression or support for Lance and his views that would make them even 'symbolic speech.'"

As to Mr. Lance's argument that §441b was unconstitutionally vague, the court noted, "The vagueness doctrine has been developed in the context of, and it is applicable to, penal statutes." The court concluded that the vagueness issue was not ripe for adjudication because the court was "...unwilling to assume that the present investigation of Lance will result in his criminal prosecution."

The court also rejected Mr. Lance's claim that §441b abridged Fifth Amendment rights by imposing greater restrictions on national banks in connection with elections than on other entities. The court held that since "...the Banks' contributions contain no cognizable elements of speech...we think the statute must be upheld if there is a rational relationship between the prohibition...and the purpose that prohibition serves.... Since we have no difficulty in concluding that a prohibition against banks engaging in unsound banking practices is rational, we reject Lance's equal protection claim."

As to the defendant's claim that the statute of limitations barred the investigation, the panel found that there was no statute of limitations applicable to a civil proceeding undertaken to enforce the Act. 2 U.S.C. §437g.The panel upheld the FEC's argument that the statute of limitations applied only to criminal prosecutions. "Even assuming arguendo that the three year statute of limitations was applicable to a future civil action brought by the Commission," the FEC argued, "the Commission has information suggesting that violations have occurred within the three years. Moreover, as noted, the existence of violations outside the statutory period themselves provide reason to investigate to ascertain whether further violations occurred within the three year period."

Finally, the defendant contended that, since the FEC already had information available to it from other government agencies, enforcement of the subpoena should be denied on grounds of undue burden and harassment. The panel rejected this claim, confirming the FEC's argument that "the existence of prior investigations by other agencies touching on similar issues does not preclude an agency from investigating matters within its jurisdiction." *FEC v. Texaco*, 555 F.2d at 878-79. The appeals court panel determined, however, that the constitutional challenges asserted by Mr. Lance should be heard by the court sitting *en banc*.

Source: FEC *Record*, September 1981, p. 1.

Lance: FEC v., 617 F.2d 365 (5th Cir. 1980), *aff'd*, 635 F.2d 1132 (5th Cir.) (*en banc*), *appeal dism'd, cert. denied*, 453 U.S. 917 (1981).

[1] Under the Act, a loan from a national bank becomes a prohibited contribution if it is not made according to applicable banking laws and in the ordinary course of business. 2 U.S.C. §431(8)(B)(vii).

FEC v. LaROUCHE (94-0658)

On September 28, 1994, the U.S. District Court for the Eastern District of Virginia issued an order stipulated by the parties holding Lyndon H. LaRouche, Jr., and his 1988 Presidential campaign committee jointly and severally liable for repayment of $146,464.44 in Presidential primary matching funds—plus accrued interest—to the U.S. Treasury.

Background

Mr. LaRouche received $833,577 in 1988 primary matching funds. The Commission determined that he had to repay $151,260 in funds received in excess of his entitlement and funds spent on nonqualified campaign expenses. The campaign repaid part of that amount in February 1992, leaving $146,464 still outstanding.

The Commission claimed that, in a letter of September 22, 1992, it notified defendants that the repayment was due within 30 days. On October 22, instead of repaying the funds, Mr. LaRouche and his campaign filed suit against the FEC to challenge the repayment amount.[1] They did not ask the FEC to stay the repayment until the court decided the case; nor did they deposit the repayment amount in an interest-bearing account. See 11 CFR 9038.5(c).

The FEC asked the court to find that Mr. LaRouche and his 1988 Presidential primary campaign had violated the public funding law by failing to repay the remaining $146,464. The agency further asked the court to order Mr. LaRouche and his campaign to repay that amount—plus interest accruing from October 22, 1992—to the U.S. Treasury.

Stipulation

The order stipulated that a $158,304.84 check (the security), given to the court by Democrats for Economic Recovery—LaRouche in ’92,[2] be deposited into an interest-bearing account and used for the repayment, if appropriate.

The FEC agreed to refrain from all efforts to collect on the defendants’ repayment obligation until after the Commission issued a final repayment determination with respect to the Presidential primary matching funds received by the LaRouche in ’92 committee.

If the FEC’s final repayment determination concluded that the LaRouche in ’92 committee had at least $158,304.84 in excess campaign funds, then the court would release the security—plus interest—to the FEC as repayment of the defendants’ repayment obligation. In this event, the FEC and the defendants would voluntarily dismiss all claims and counterclaims associated with this case.

If the FEC’s final repayment determination for the LaRouche in ’92 committee concluded that the committee did not have at least $158,304.84 in excess campaign funds, then the court would issue the FEC a check for that portion of the security equal to the amount of the committee’s excess campaign funds. That amount would represent a partial repayment of the defendants’ repayment obligation. The balance of the security (including accrued interest) would be returned to the LaRouche in ’92 committee. In this event, the FEC could use any available legal procedures to collect the remaining amount owed by the defendants.

The Commission reserved the right to conclude that the LaRouche in ’92 committee’s payment to the court was not a qualified campaign expenditure (for the 1992 campaign) and to contest the sufficiency of the security to pay the defendants’ obligation. The defendants and the LaRouche in ’92 committee reserved the right to contest any Commission finding.

Source: FEC *Record*, July 1994, p. 3; and December 1994, p. 2.

[1] The campaign did not contest the entire repayment amount but only $109,149 of the total. See *LaRouche v. FEC* (92-1555).

[2] Democrats for Economic Recovery—LaRouche in ’92 was Lyndon LaRouche’s 1992 authorized Presidential campaign committee.

FEC v. LAWSON

On April 8, 1991, the U.S. District Court for the District of South Carolina, Greenville Division, granted the FEC's motion for default judgment. (Civil Action No. 6:90-2116-9.) The Commission claimed that Mark Lawson knowingly permitted his name to be used to effect a contribution made in the name of another, a violation of 2 U.S.C. §441f. The FEC alleged that, in 1982, Mr. Lawson received a $1,500 bonus from his employer, Robin's Mens Store, in order to make a $1,000 contribution two days later to the House campaign of Robin Tallon, Jr.

The court decreed that Mr. Lawson had violated §441f and ordered him to pay a $5,000 civil penalty within 10 days. The court also permanently enjoined Mr. Lawson from future violations of §441f.

Source: FEC *Record*, June 1991, p. 1

FEC v. LEE

On October 26, 1988, the U.S. District Court for the Central District of California entered a consent order in *FEC v. Roger Lee* (Civil Action No. 88-02640). The FEC filed the suit against Mr. Roger Lee, President and Director of the Bekins Company, alleging that Mr. Lee had violated section 441b(a) of the election law.

In his capacity as Chief Financial Officer of the Bekins Company, Mr. Lee consented to corporate reimbursements for employees who made contributions to Senator John Glenn's 1984 Presidential primary campaign.

In settlement of this litigation, Mr. Lee agreed to pay $5,000 civil penalty for these violations within 30 days of the court's order.

Source: FEC *Record*, December 1988, p. 8.

FEC v. LEGI-TECH

On February 16, 1996, the U.S. Court of Appeals for the District of Columbia Circuit reversed the district court's decision to dismiss the FEC's case against Legi-Tech, Inc. The district court had dismissed the case on October 12, 1994, based on the ruling of the U.S. Court of Appeals for the District of Columbia Circuit in *FEC v. NRA Political Victory Fund*.

On May 30, 1997, the U.S. District Court for the District of Columbia granted the FEC's motion for summary judgment and imposed a $20,000 civil penalty on Legi-Tech, after it used information obtained from disclosure reports filed with the FEC for commercial purposes in violation of the Federal Election Campaign Act (the Act).

Background

The Act requires political committees to identify each individual whose aggregate contributions exceed $200 in a calendar year by listing their name, mailing address, occupation and employer. 2 U.S.C. §434(b)(3)(A). The FEC must make disclosure reports available for public inspection and copying within 48 hours of receipt. However, "information copied from such reports or statements may not be sold or used by any person for the purpose of soliciting contributions or for commercial purposes." 2 U.S.C. §438(a)(4).

Legi-Tech, through its Campaign Contribution Tracking System (CCTS), devised a plan to provide paying subscribers with information about political contributors and their contributions. Starting with the 1984 election cycle, CCTS copied contributor information directly from disclosure reports filed with the FEC, entered this information into a computer database, added telephone numbers of contributors and sold the information to its customers. In all, the CCTS received $273,869 from at least 42 customers, including the International Brotherhood of Teamsters, Freedom Policy Foundation, National Association of Independent Schools and International Funding Institute, Inc. In addition, Legi-Tech was aware that some of its customers used the information to solicit contributors.

In 1985, the National Republican Congressional Committee (NRCC) filed an administrative complaint against Legi-Tech, alleging the company was using contributor information for commercial purposes. After an investigation of the complaint, the Commission found probable cause to believe that a violation of the Act had occurred and attempted to enter into a conciliation agreement with Legi-Tech. That effort failed, and the Commission filed suit.

District Court Decision

While the court was considering the FEC's suit, the U.S. Court of Appeals for the District of Columbia Circuit issued its decision in *FEC v. NRA Political Victory Fund*. In that decision, the appeals court ruled that the FEC's structure was unconstitutional because, by having the Clerk of the House and the Secretary of the Senate as nonvoting *ex officio* members, it violated the separation of powers principle.

Following the *NRA* decision, the FEC removed the *ex officio* members from its body and, in this new form, ratified its former actions and authorized its attorneys to continue litigation against Legi-Tech. The district court, however, said that these corrective measures were not enough. The court reasoned that, because enforcement proceedings against Legi-Tech had been initiated by an unconstitutionally structured FEC, the rule set forth in *Harper v. Virginia Department of Taxation*—that a newly enunciated rule of law must be retroactively applied to pending cases—had to be applied in this case. For this reason, the district court dismissed this case.

Appeals Court Decision

While the appeals court did not object to the district court's application of the *Harper* rule in this case, it disagreed that dismissal was the only remedy.

In its decision, the appeals court pointed out that: "Even were the Commission to return to square one—assuming the statute of limitations were not a bar—it is virtually inconceivable that its decisions would differ in any way the second time from that which occurred the first time."

Most of the Commissioners who originally voted to find probable cause that Legi-Tech had violated §438(a)(4) and, subsequently, voted to initiate a lawsuit against Legi-Tech, are still on the Commission and would likely vote the same way now as they had before, reasoned the court. The court noted that it can not "examine the internal deliberations of the Commission, at least absent a contention that one or more of the Commissioners were actually biased."

Therefore, instead of dismissal, the appeals court said that "the better course is to take the FEC's post-reconstitution ratification of its prior decisions at face value and treat it as an adequate remedy for the *NRA* constitutional violation."

District Court Ruling

The court rejected Legi-Tech's arguments, which were based, in part, on the corporation's contention that it was an organ of the press and was therefore entitled to use the contributor information in the way that it did. The court agreed with the Commission when it stated that a publisher's use of the names and addresses from disclosure reports filed with the FEC is permissible so

long as that use is incidental to the sale of a larger publication. For example, a newspaper article that includes such information as part of the story is permissible. What is not permissible, the FEC contends, is when the use of contributor information is not incidental to the sale of the publication, but, in fact, the primary focus of the publication. AO 1981-38.

Because the Act does not explicitly state whether commercial activity like the CCTS's is protected, the court gave deference to the FEC's construction of §438(a)(4) as well as to its regulations and advisory opinions relevant to this issue. On that basis, the court rejected all of Legi-Tech's challenges.

- It said that the CCTS could not be characterized as a communication similar to a "newspaper, magazine or book," but was more like a listbroker. The former would fall under the FEC's media exemption to §438(a)(4); a listbroker would not.
- It said that the CCTS failed the "principal purpose" test in that its primary purpose was the dissemination of the contributor information for profit. The court said: "Legi-Tech's sale of information through the CCTS posed the precise threat that troubled Congress: while Congress wanted to promote disclosure of campaign contribution information, it also wanted to protect political committees' intellectual property and 'political discourse from the adverse effect that the disclosure requirement of the Act would otherwise have.'"
- The court found Legi-Tech's argument that the CCTS was exempt because Legi-Tech's parent corporation was a diversified media company "unpersuasive" because the CCTS's primary purpose was commercial.

Legi-Tech also argued unsuccessfully that §438(a)(4) violates the First Amendment in that it prevents "'the dissemination of the truth about political campaigns' and constitutes 'a content based restriction on core political speech.'"

The court, noting that the constitutionality of the statute already had been upheld in *FEC v. International Funding Institute*, restated that the statute "serves important governmental interests by minimizing the adverse effects of the Act's disclosure requirements." In addition, the statute also protects political committees' intellectual property. The commercial use of such information, as the NRCC contended in its original complaint, diminishes the economic value of contributor lists. The court also found that prohibiting commercial use of contributor information would make it more likely that individuals would continue to support financially the current private campaign financing system for U.S. elections. Legi-Tech's other First Amendment arguments also were rejected by the court.

Source: FEC *Record*, December 1994, p. 6; April 1996, p. 9; and July 1997, p. 4.

Legi-Tech, Inc.: FEC v., No. 91-0213 (JHG) (D.D.C. Oct. 12, 1994), (D.D.C. Mar. 1, 1995) (final judgment); 75 F.3d 704 (D.C. Cir. 1996); 967 F. Supp. 523 (D.D.C. 1997).

FEC v. LIBERAL PARTY FEDERAL CAMPAIGN COMMITTEE

Failing to resolve a complaint through the informal conciliation process mandated by the law (2 U.S.C. §437g(a)(4)(A)(i)), the FEC filed suit in the U.S. District Court for the Southern District of New York (Civil Action 84-CIV 5552). The Commission petitioned the court to:

- Find that the Liberal Party Federal Campaign Committee (the Liberal Party Committee) violated 2 U.S.C. §441a(a)(1)(A) by making excessive contributions to the 1980 National Unity Campaign for John B. Anderson, Mr. Anderson's principal campaign committee for his 1980 Presidential general election campaign;
- Order the Liberal Party Committee to amend its reports to reflect in-kind contributions of $14,149 to the Anderson campaign;
- Order the Liberal Party Committee to pay a $5,000 civil penalty or an amount equal to 100 percent of any contributions or expenditures resulting from its violations; and
- Enjoin the Liberal Party Committee (or any of its agents or successors) from further violations of the election law.

On November 13, 1984, the court entered a default judgment against the Committee. Under the court order, within 30 days of the court's final judgment, the Liberal Party Federal Campaign Committee had to amend its reports and pay a $5,000 civil penalty to the U.S. Treasury. On June 25, 1985, the district court entered an order finding the Liberal Party Committee in civil contempt of its November 13 order. The court ordered that, if the Liberal Party Committee had not fully complied with the November 13 order by July 1, 1985, it would be required to pay a fine of $500 per day until compliance was completed.

Source: FEC *Record*, October 1984, p. 8; and March 1985, p. 3.

Liberal Party Federal Campaign Committee: FEC v., No. 84-Civ. 5552 (S.D.N.Y. June 25, 1985 contempt).

FEC v. LIFE AMENDMENT PAC (88-0860 and 89-1429)

On June 15, 1989, the U.S. District Court for the District of Washington issued a final order and default judgment in *FEC v. Life Amendment PAC, Inc.* (Civil Action No. C88-860Z). The court declared that the committee and its treasurer, Rick Woodrow, had violated 2 U.S.C. §434(a) by failing to file six reports during 1985, 1986 and 1987. The court ordered Life PAC to pay a civil penalty of $30,000($5,000 for each missing report).

The court also found that Mr. Woodrow and Citizens Organized to Replace Kennedy (C.O.R.K.), a political committee of which he was also treasurer, had failed to disclose debts and obligations in three 1986 reports, in violation of 2 U.S.C. §434(b)(8).The court ordered C.O.R.K. and Mr. Woodrow to file the missing Schedules C and D and to pay a $5,000 civil penalty. Permanently enjoining the defandants from future similar violations of the election law, the court also ordered them to pay the FEC's costs in the action.

On January 24, 1990, in another suit, the court granted the FEC's motion for a final order and default judgment against Life PAC (No. C89-1429Z (originally C89-1429WD)). The court found that Life PAC and Mr. Woodrow, as treasurer, had committed several violations of the election law and regulations. Unless otherwise noted, the following violations were found in connection with Life PAC's 1983 and 1984 disclosure reports:

- Failing to maintain adequate records with respect to contributions received from individuals (2 U.S.C. §432(c) (1)-(3));
- Failing to retain the required records for three years (2 U.S.C. §432(d));
- Failing to keep adequate records of 129 disbursements, totaling $72,201 (2 U.S.C. §432(c)(5));
- Failing to maintain the committee's bank records for three years and failing to make those records available for audit, inspection or examination by the Commission (11 CFR 104.14(b));
- Misreporting the total amount of Life PAC's receipts and disbursements (2 U.S.C. §434(b) (2) and (4));
- Failing to properly itemize disbursements for operating expenditures (2 U.S.C. §434(b) (5));
- Failing to properly disclose disbursements made in connection with independent expenditures (2 U.S.C. §434(b)(6));
- Failing to properly and continuously disclose the committee's outstanding debts and obligations (2 U.S.C. §434(b)(8) and 11 CFR 104.11); and
- In the committee's 1987 mid-year report, failing to identify contributors (2 U.S.C. §434(b)(3) (A) and (B)).

For the violations cited above, the court ordered the defendants to pay a $55,000 civil penalty.

The court further declared that the defendants had knowingly and willfully committed the following violations:

- Failing to maintain adequate records with respect to contributions received from individuals in 1985 and 1986 (2 U.S.C. §432(c)(1)-(3));
- Failing to preserve the required records for three years (2 U.S.C. §432(d));
- Failing to keep bank records for 1985 and 1986 for at least three years and failing to make those records available for audit, inspection or examination by the FEC (11 CFR 104.14(b)); and
- Failing to file four monthly reports on time from April through July 1988 (2 U.S.C. §434(a)(4) (B)).

For these knowing and willful violations, the court ordered the defendants to pay a civil penalty of $70,000, to amend and correct their reports and to pay the Commission's court costs. The defendants were permanently enjoined from future similar violations of the law.

Motion for Contempt

On September 11, 1992, the court held defendants in the above cases in civil contempt of court for failing to comply with the court's earlier judgments against them.

Under the contempt orders, defendants in each suit must pay an additional penalty of $100 per month until they comply with the earlier order. The defendants were also ordered to pay the FEC up to a maximum of $1,000 as reimbursement for the agency's costs.

Source: FEC *Record*, October 1989, p. 11; April 1990, p. 7; and November 1992, p. 9.

FEC v. MAGGIN FOR CONGRESS COMMITTEE

On June 29, 1993, the U.S. District Court for the District of New Hampshire held defendants Elliott S. Maggin for Congress Committee and its treasurer, Andi T. Johnson, in civil contempt of court for failing to pay civil penalties and the FEC's costs and attorneys fees. (Civil Action No. C86-40-L.) The assessments had remained unpaid since they were imposed under an August 1986 court order.

The court further ordered Ms. Johnson to provide the FEC with financial records on her resources and liabilities within 20 days and to appear before the court 30 days after submitting the records. A $10,000 civil penalty and interest on the earlier penalties would be assessed against her if she failed to provide the information.

Under the 1986 judgment, the court found that the defendants had violated the Federal Election Campaign Act by failing to file a 1984 quarterly report. The court ordered each defendant to pay a $5,000 civil penalty and permanently enjoined them from further violations of the Act. Defendants were also ordered to pay $2,569 to cover the FEC's costs and attorneys fees.

Source: FEC *Record*, November 1993, p. 3.

FEC v. Maggin, No. C86-40-L (D.N.H. 1986)

FEC v. MANN FOR CONGRESS

On March 21, 1991, the U.S. District Court for the District of Columbia granted the FEC's motion for default judgment against Mann for Congress Committee and its treasurer, Terry L. Mann, for violating the terms of a conciliation agreement. (Civil Action No. 90-2419(LFO).) (Under the terms of the agreement, the committee and Mr. Mann had agreed to refund $17,746 in excess contributions, disclose the refunds on FEC reports and pay a $5,000 civil penalty.)

The court ordered defendants to comply with the agreement's terms within 10 days and pay the FEC an additional $5,000 civil penalty for violating the agreement. The court also permanently enjoined defendants from future violations of the conciliation agreement.

Source: FEC *Record*, May 1991, p. 7.

FEC v. MASSACHUSETTS CITIZENS FOR LIFE

In September 1978, Massachusetts Citizens For Life, Inc. (MCFL), a nonprofit corporation without members, printed 100,000 copies of a special election edition flyer captioned "Everything You Need to Vote Pro-Life." The publication contained the position of state and federal candidates on abortion-related issues. It included at least two exhortations to "vote pro-life" and the statement that "No pro-life candidate can win in November without your vote in September." Photographs of pro-life candidates were also included in the publication. To correct minor errors in the special election edition, MCFL subsequently issued a supplement to the edition.

MCFL distributed copies of the two special election editions to 5,985 MCFL contributors and 50,674 noncontributors. MCFL also sent copies to its local chapters for distribution, mailed out copies on request, and left copies in public areas for general distribution.

In response to a complaint filed with the Commission, the FEC found probable cause to believe that MCFL's expenditures for the publications (amounting to $9,812.76) had violated the Federal Election Campaign Act's (the Act's) ban on corporate spending in connection with federal elections. 2 U.S.C. §441bAfter unsuccessfully attempting to conciliate the matter with MCFL, on February 22, 1982, the FEC filed suit against MCFL in the U.S. District Court for the District of Massachusetts. (Civil Action No. 82-609-G.)

District Court Ruling

On June 29, 1984, the U.S. District Court for the District of Massachusetts granted defendant's motion for summary judgment. The court found that, in publishing the special election editions of its newsletter in 1978, MCFL had not made prohibited corporate expenditures in connection with the Massachusetts primary campaigns of federal candidates. The court found that MCFL's expenditures were more properly characterized as independent expenditures and expenditures for news and editorial comments. As such, the court held that the expenditures were explicitly exempted from section 441b's prohibition on corporate spending.

In characterizing MCFL's expenditures for the special election editions as independent expenditures, the court held that the "publication was uninvited by any candidate and uncoordinated with any campaign."[1]

With regard to its characterization of MCFL's publication of the special election editions as exempt spending for a news story and news editorial,[2] the court stated: "In our opinion, the compilation of voting records and questionnaire responses was news, probably not available elsewhere; and the call to vote pro-life in conjunction, incidentally, with a quotation from Thomas Jefferson, was editorial." The court further stated that the special election editions satisfied the statutory requirement that exempt stories may be published in a "periodical publication." The court noted that the special editions were similar in size, format and content to regular issues of MCFL's newsletter. Finally, the court maintained that "the legislative history of the newspaper exemption shows that Congress intended that it be a broad exemption, coextensive with the First Amendment."

Alternatively, the court held that, even if it had misconstrued MCFL's spending as exempt independent and news story/editorial expenditures, the statutory prohibition on corporate expenditures was unconstitutional as applied to MCFL's spending. The court found that applying the prohibition to MCFL's spending abridged the organization's free speech, press and association rights because the expenditures were: "(a) independent of any candidate or party, (b) by a nonprofit-making corporation formed to advance an ideological cause and (c) for the purpose of publishing direct political speech." Under these circumstances, the court concluded, the compelling governmental interest served by banning the special election editions as prohibited corporate expenditures (i.e., the prevention of real or apparent corruption in federal elections) was not justified. Specifically, since the court maintained that MCFL's publication of the special election editions was not coordinated with any candidates, the court followed the Supreme Court's determination in *Buckley v. Valeo* that their independence "alleviate[d] the danger that expenditures will be given as quid pro quo for improper commitments from the candidate." (See *Buckley v. Valeo* at 47.) In finding that the expenditures were independent, the court noted that they were too small (i.e., $80 per federal candidate) to have a corrupting influence on federal elections.

With regard to MCFL's role as a nonprofit corporation, the court held that, "by sharing its views on an important public issue" with the public, MCFL's expenditures for the special election editions advanced, rather than deterred, governmental interests by "promoting citizen responsibility."

Similarly, the court held that, if viewed as direct political speech, MCFL's financing of the special election editions "would seem to promote rather than undermine the honest functioning of representative government." Specifically, the court found that the special editions "sought to influence incumbents and candidates solely by means of informed voter reaction to the candidates' positions on an important public issue." Furthermore, the court found that "the corporate identity of the speaker does not deprive speech of what otherwise would be its clear entitlement to protection under the First Amendment. (*First National Bank of Boston v. Bellotti*, supra at 778-786)"

Appeals Court Ruling

On July 31, 1985, the U.S. Court of Appeals for the First Circuit ruled that MCFL's expenditures, were subject to the election law's prohibition on expenditures by corporations in connection with federal elections. This statutory ruling reversed that of the district court. At the same time, the appeals court affirmed the holding by the district court that, if applied to MCFL's expenditures, the Act's prohibition on corporate expenditures (2 U.S.C. §441b) would violate MCFL's First Amendment rights.

MCFL's Expenditures Fall within the Purview of Section 441b

In overturning the district court's ruling that section 441b(b)(2)'s ban on corporate expenditures did not apply to MCFL's expenditures, the appeals court concluded that section 441b prohibits expenditures in connection with federal elections, in general, as well as contributions specifically made to candidates for federal office.

The appeals court also rejected the district court's holding that, even if section 441b prohibited corporate expenditures in connection with federal elections, MCFL's publication expenditures were exempt from the prohibition because the publication did not expressly advocate the election or defeat of any particular candidate. To the contrary, the appeals court found that the publications did constitute express advocacy: "The MCFL Special Election Edition...explicitly advocated the election of particular candidates in the primary elections and presented photographs of those candidates only...." The appeals court added that it did not have to decide whether such spending was covered by section

441b because MCFL's flyers "would fit within the definition of expenditure, even if an express advocacy requirement were incorporated into the definition."

Finally, contrary to the district court, the appeals court found that the publications did not qualify for the news story exemption: "...the Special Editions may not be considered new stories, commentaries, or editorials because the editions were not distributed through the newsletter's facilities, were not published by the newsletter's staff, did not contain the newsletter masthead and were not limited to the usual MCFL newsletter circulation. " Nor did the expenditures qualify under the exemption as "normal functions of a press entity."

Prohibiting MCFL's Expenditures Is Unconstitutional

Nevertheless, the appeals court affirmed the district court's holding that §441b, as applied to MCFL's expenditures, was unconstitutional. The appeals court said that it did not believe that "the availability of alternative methods of funding speech [e.g., MCFL's establishment of a separate segregated fund] justifies eliminating the simplest method."

Furthermore, the court found that there was no substantial government interest (i.e., to prevent corruption or the appearance of corruption in federal elections) in prohibiting MCFL's expenditures for the publications. "Because MCFL did not contribute directly to a political campaign, MCFL's expenditures did not incur any political debts from legislators." The appeals court concluded that a ruling by the Supreme Court which upheld §44lb's ban on solicitations by another nonprofit corporation, the National Right to Work Committee, did not apply to MCFL's expenditures. "Unlike National Right to Work Committee, [MCFL's spending] involves a corporation's indirect and uncoordinated expenditures in connection with a federal election, not a solicitation for direct contributions to candidates."

The appeals court therefore affirmed the district court's ruling that section 441b was unconstitutional, as applied to MCFL's expenditures: "We therefore uphold that the application of section 441b to indirect, uncoordinated expenditures by a non-profit ideological corporation expressing its views of political candidates violates the organization's First Amendment rights."

Appeal to Supreme Court

On August 28, 1985, the Commission filed an appeal of the first circuit's decision with the Supreme Court. On January 13, 1986, the Court noted probable jurisdiction in this case. Oral argument was heard on October 7, 1986.

Supreme Court Decision

In FEC *v. Massachusetts Citizens for Life, Inc. (M*CFL) the Supreme Court of the United States decided, by a 5 to 4 vote, that the law's prohibition on corporate expenditures is unconstitutional as applied to independent expenditures made by a narrowly defined type of nonprofit corporation. The Court's December 15, 1986, decision affirmed an appeals court ruling.

Scope of Ruling

Acknowledging that "the class of organizations affected by our holding today will be small," the Court delineated the type of corporation which would be permitted to make independent expenditures under this ruling. "MCFL has three features essential to our holding that it may not constitutionally be bound by §441b's restriction on independent spending." These three criteria are as follows:

- The organization must be formed "for the express purpose of promoting political ideas, and cannot engage in business activities. If political fundraising events are expressly denominated as requests for contributions that will be used for political purposes, including direct expenditures, these events cannot be considered business activities."
- The organization must have "no shareholders or other persons affiliated so as to have a claim on its assets or earnings."
- The organization must not have been established by a business corporation or a labor union, and must adopt a policy "not to accept contributions from such entities."

MCFL in Violation of §441b

The Supreme Court unanimously affirmed the appeals court ruling that, as the FEC had argued, MCFL's expenditures were in violation of §441b. In making this determination, the Court rejected MCFL's arguments to the contrary.

MCFL had contended that, in making its expenditures, it had not provided anything to a candidate. Because of this, its spending was not within the reach of §441b(b)(2), which defines "expenditure" to include anything of value provided to a candidate or political committee. The Court, in holding that 441b's scope is broader than MCFL's interpretation, stated that the legislative history "clearly confirms that §441b was meant to proscribe expenditures in connection with an election."

The Court also rejected MCFL's argument that its publication costs did not constitute prohibited expenditures because the material did not "expressly advocate" the election of candidates. Citing its opinion in Bu*ckley v. Valeo,* the Court noted it had previously concluded

"that a finding of 'express advocacy' depended upon the use of language such as 'vote for,' 'elect,' 'support,' etc." Bu*ckley*, 424 U.S. 44, n. 52 (1976). Applying this test to the MCFL's publication, the court stated: "Just such an exhortation appears in the 'Special Edition.' The publication not only urges voters to vote for 'pro-life' candidates, but also identifies and provides photographs of specific candidates fitting that description. The Edition cannot be regarded as a mere discussion of public issues that by their nature raise the names of certain politicians. Rather, it provides in effect an explicit directive: vote for these (named) candidates. The fact that its message is marginally less direct than 'Vote for Smith' does not change its essential nature."

MCFL had also argued that its publication was a "Special Edition" of its regular newsletter and therefore payments for issuing the material were exempt from the definition of expenditure under the statute's exception for news stories, commentaries and editorials distributed through periodical publications and other news media. 2 U.S.C. §431(9)(B)(i). The Court did not need to rule on whether MCFL's newsletter qualified for the press exemption because it considered the "Special Edition" a campaign flyer rather than an issue of the newsletter. "No characteristic of the Edition associated in any way with the normal MCFL publication." The Court emphasized that it was essential to make a distinction between regular publications and campaign flyers "since we cannot accept the notion that the distribution of such flyers by entities that happen to publish newsletters automatically entitles such organizations to the press exemption."

Section 441b's Infringement on Free Speech

In determining whether §441b was unconstitutional as applied to MCFL's independent expenditures, the Court first examined the provision's effect on political speech protected by the First Amendment.

The FEC had argued that, although §441b prohibited MCFL from making expenditures from its corporate treasury funds, the law provided another avenue for MCFL to exercise political speech: It could establish a separate segregated fund (also called a political action committee or PAC) and make contributions and expenditures using money specifically solicited for the fund. The Court maintained that "even to speak through a segregated fund, MCL must make very significant efforts," and mentioned in particular the recordkeeping and solicitation requirements the law imposes on such funds. In conclusion, the Court stated: "These additional regulations may create a disincentive for such organizations to engage in political speech.... The fact that the statute's practical effect may be to discourage protected speech is sufficient to characterize §441b as an infringement on First Amendment activities."

Section 441b Unconstitutional as Applied

In ruling that 441b is unconstitutional as applied to MCFL's activities in this case, a decision from which four Justices dissented, the Court first explained that "[w]hen a statutory provision burdens First Amendment rights, it must be justified by a compelling state interest." The Court disagreed with the Commission's arguments that §441b's prohibition on MCFL's expenditures was justified.

The FEC had noted the long legislative history supporting §441b's prohibition on corporate activity and argued that the courts have consistently ruled that those restrictions are justified by the governmental interest in protecting the election process from the effects of the accumulation of wealth. After examining the legislative history and past Supreme Court decisions, the Court concluded that this governmental interest is valid with respect to expenditure restrictions applied primarily to profit-making corporations but not to corporations such as MCFL, "formed to disseminate political ideas." The Court, therefore, found no compelling justification for treating business corporations and MCFL alike "in the regulation of independent spending."

The Court also rejected the FEC's argument that §441b serves to prevent a corporation such as MCFL from spending individuals' money for political purposes that they might not support. The Court pointed out that individuals who contribute to MCFL do so because they support its political aims and expect that the organization will spend the funds "in a manner that best serves the shared political purposes of the organization and the contributor."

In responding to the Commission's argument that a contributor, while supporting the political views of MCFL, may not wish donations to be used to support or oppose particular candidates, the Court said that this problem could be resolved by "simply requiring that contributors be informed that their money may be used for such a purpose."

Finally, the FEC had maintained that, if the §441b prohibition were not applied to expenditures by corporations such as MCFL, then the political process would be in danger of corruption, since business corporations and labor unions could funnel undisclosed treasury funds into a nonprofit organization to be converted to political spending. In rejecting this argument, the Court cited 2 U.S.C. §434(c), which requires groups that are not political committees to report information on their independent expenditures once they exceed $250 in one year. In reporting under this provision, a group must include the identification of persons funding independent expenditures if they contribute an aggregate of over $200 during a year. "These reporting obligations provide precisely the information necessary to monitor MCFL's independent spending activity and its receipt of contributions," the Court stated. Furthermore, the Court

pointed out that "should MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee," subject to the restrictions and extensive reporting requirements the law applies to such entities.

In conclusion, the Court ruled that "§441b's restriction of independent spending is unconstitutional as applied to MCFL, for it infringes protected speech without a compelling justification for such infringement." However, the Court did not directly rule on the constitutionality of §441b's restrictions on "commercial enterprises," since that was not at issue in this suit.

Justice William J. Brennan, Jr., who wrote the majority opinion, was joined by Justices Thurgood Marshall, Lewis F. Powell, Jr. and Antonin Scalia and, in part, by Justice Sandra Day O'Connor.

Dissents

Chief Justice William H. Rehnquist, joined by Justices Byron R. White, Harry A. Blackmun and John Paul Stevens, dissented from "the conclusion that the statutory provisions are unconstitutional as applied to [MCFL]." Chief Justice Rehnquist observed that the differences between business corporations and corporations like MCFL "are 'distinctions in degree' that do not amount to 'differences in kind.'.... As such, they are more properly drawn by the legislature than the judiciary.... Congress expressed its judgment in §441b that the threat posed by corporate political activity warrants a prophylactic measure applicable to all groups that organize in the corporate form. Our previous cases have expressed a reluctance to fine-tune such judgments; I would adhere to that counsel here."

In his judgment, "[t]he three part test gratuitously announced in today's dicta...adds to a well-defined prohibition a vague and barely adumbrated exception certain to result in confusion and costly litigation."

Source: FEC Re*cord*, August 1984, p. 7; October 1985, p. 7; and February 1987, p. 4.

Ma*ssachusetts Citizens for Life, Inc.: FEC v.*, 589 F. Supp. 646 (D. Mass. 1984), a*ff'd, 7*69 F.2d 13 (1st Cir. 1985), af*f'd, 4*79 U.S. 238 (1986).

[1] The election law and FEC regulations define an independent expenditure as an expenditure for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made with the cooperation or prior consent of, or in consultation with, or at the request or suggestion of, any candidate or his/her authorized committee or agents. 2 U.S.C. §431 (17); 11 CFR 110.16 and 109.1(a).

[2] Under the election law and FEC regulations, a news story, commentary, or editorial by any broadcasting station, newspaper, magazine, or other periodical publication is not considered an expenditure, provided the station or publication is not owned or controlled by a political party, committee or candidate. 2 U.S.C. §431(9)(B)(i); 11 CFR 100.8(b)(2).

FEC v. MASTORELLI CAMPAIGN FUND

On March 28, 1983, the U.S. District Court for the District of New Jersey entered a default judgment against the defendants in *FEC v. Nick Mastorelli Campaign Fund* (Civil Action No. 82-0774F). The court decreed that the Mastorelli Campaign and its treasurer had violated provisions of the election law by:

- Failing to file reports required for the 1978 election year on time and by failing to file the semiannual reports required for 1980 and thereafter (2 U.S.C. §434a);
- Accepting contributions in 1978 from four corporations (2 U.S.C. §441b(a));
- Accepting excessive contributions, in the form of a loan, from three individuals (2 U.S.C. §441a(f)); and
- Accepting $21,050 in excessive cash contributions in 1978 (2 U.S.C. § 441a(f)).

The district court also found that certain contributors to the Mastorelli Campaign had violated the election law by:

- Making cash contributions in excess of $100 to the campaign (2 U.S.C. §441g); and
- Making contributions in the name of another (2 U.S.C. §441f).

The court permanently enjoined the defendants from any further violations of the election law. The court also assessed a $5,000 civil penalty against the Mastorelli Campaign and its treasurer as well as against each of the individual defendants named in the suit.

Source: FEC *Record*, May 1983, p. 7.

FEC v. MCCALLUM

On December 11, 1996, the U.S. District Court in Massachusetts issued a judgment and consent order to which both parties agreed. Under the order, Elkin McCallum must pay a $50,000 civil penalty to the FEC for making excessive contributions to the Tsongas for President Committee.

The FEC filed the lawsuit against Mr. McCallum alleging that he had made $250,000 in loans to Paul Tsongas's campaign in 1991 and 1992. These loans constituted excessive contributions. Specifically, the FEC alleged that Mr. McCallum had made the following contributions:

- He purchased a ticket for $1,000 to a Tsongas Committee fundraiser on April 8, 1991;
- He contributed $100,000 to the Tsongas Committee on August 13, 1991, and $50,000 on October 21, 1991; and
- He wrote a $100,000 check on February 10, 1992, payable to Mr. Tsongas's chief fundraiser, Nicholas Rizzo, intending it to be a loan to the Tsongas Committee.

The Federal Election Campaign Act (the Act) states that an individual has a $1,000 contribution limit for a candidate or that candidate's authorized committee per election and that the definition of contribution includes loans. 2 U.S.C. §§431(8)(A)(i) and 441a(a)(1)(A). Additionally, FEC regulations make it unlawful for a person to make a loan that exceeds the contribution limits whether or not it is repaid. 11 CFR 100.7(a)(1)(i)(A).

In a settlement agreement, Mr. McCallum did not contest the allegations. In addition to the civil penalty, the court permanently enjoined Mr. McCallum from making excessive contributions.

Source: FEC *Record*, February 1997, p. 4.

FEC v. MICHIGAN REPUBLICAN STATE COMMITTEE

On March 22, 1995, the U.S. District Court for the Western District of Michigan, Southern Division, dismissed this case pursuant to a stipulation by the parties.

The FEC originally charged that the Michigan Republican State Committee (MRSC) had knowingly accepted $5,550 in excessive contributions, had deposited $35,655 in impermissible contributions into its federal account, and had exceeded its coordinated party expenditure limit for a Senate candidate by $8,298.

The court issued a consent order on July 18, 1994, that resolved the excessive and impermissible contribution issues; the MRSC agreed to pay a $12,500 civil penalty and to transfer $35,655 from its federal account to its nonfederal accounts. The violation of the coordinated party expenditure limit, however, remained pending.

Subsequent to the consent order, the MRSC paid the civil penalty and transferred the nonfederal monies as agreed.

With regard to the remaining allegation, MRSC provided the FEC with documentation showing that the Senate candidate reimbursed the committee for the expenditures in question and therefore the committee did not exceed its coordinated party expenditure limit.

Source: FEC *Record*, September 1994, p. 8; and May 1995, p. 4.

Michigan Republican State Committee: FEC v., No. 5:94-CV-27 (W.D. Mich. July 18, 1994); (W.D. Mich. Mar. 22, 1995).

FEC v. MID-AMERICA CONSERVATIVE PAC

On October 30, 1992, the U.S. District Court for the Northern District of Iowa ordered the Mid-America Conservative PAC and its treasurer to pay a $10,000 civil penalty for failing to file several reports on time. (Civil Action No. C90-2093.) The court also permanently enjoined defendants from late filing of future reports.

The decision was based on a settlement agreement between both parties. Under the settlement procedures, defendants agreed to submit an offer of settlement to the Commission but also agreed to accept the FEC's final determination. The Commissioners unanimously voted to reject the defendants' proposal and to accept an alternative agreement submitted by the FEC's General Counsel. Defendants then objected to the agreement because the Commissioners had not considered the matter in a public session.

In granting the FEC's motion to enforce the settlement agreement, the court pointed out that the Commission had followed its usual procedures in considering and voting on the agreement. The court also noted that defendants could have specified that the agency follow special procedures but did not do so.

Source: FEC *Record*, December 1992, p. 7.

FEC v. MILLER

On April 23, 1993, the U.S. District Court for the District of Columbia signed a settlement agreed to by both parties. (Civil Action No. 92-2244(SS).) In the joint stipulation, Stefan Miller admitted that he had violated the terms of a conciliation agreement he had entered into with the Commission by failing to pay the $1,300 civil penalty. He further agreed to make monthly installments of $75 until the full amount is paid. If he fails to make a payment, the FEC may require that the entire amount be paid within 10 days.

Mr. Miller later filed a statement in which he maintained that he never agreed to enter into the conciliation agreement, which was signed by his attorney on his behalf. He said, however, that he would honor the terms of the stipulation.

Source: FEC *Record*, June 1993, p. 8.

FEC v. MINCHEW

On April 24, 1981, the U.S. District Court for the District of Columbia issued a judgment in favor of the FEC in the suit *FEC v. Daniel Minchew* (Civil Action No. 81-174). Declaring the defendant had violated the requirements of a conciliation agreement entered into with the FEC in October 1979, the court ordered Mr. Minchew to comply with the conciliation agreement and to pay a $4,000 civil penalty resulting from the agreement. The court also required the defendant to pay the costs of the civil action and to pay interest on civil penalty from the date of the court's order. Mr. Minchew had incurred the penalty for a violation of 2 U.S.C. §432(b): he had failed to provide Senator Talmadge's 1974 reelection committee with detailed accounts of campaign contributions, which he had received on the Senator's behalf, within the required five-day period.

Source: FEC *Record*, June 1981, p. 6.

FEC v. JOHN J. MURRAY FOR CONGRESS COMMITTEE

On September 10, 1996, the U.S. District Court for the Eastern District of Pennsylvania issued a consent order that the defendant committee, an authorized committee of a 1994 Congressional candidate in Pennsylvania, violated 2 U.S.C. §434(a)(6)(A) by failing to file a 48-hour notice disclosing the receipt of a $100,000 loan from the candidate. Under the 48-hour notice provision, a candidate committee must file a notice providing information on any contribution of $1,000 or more it receives after the 20th day but more than 48 hours before an election. The committee must file the notice within 48 hours of receiving the contribution.

The court awarded the FEC a $15,000 penalty but, because of the committee's financial circumstances (its lack of assets and $350,000 debt), the court suspended payment of all but $3,000.

Source: FEC *Record*, November 1996, p. 7

FEC v. NATIONAL CONGRESSIONAL CLUB

On May 15, 1986, the U.S. District Court for the Eastern District of North Carolina issued a consent order agreed to by the Federal Election Commission and three defendants: the National Congressional Club (NCC), a multicandidate political committee; NCC's treasurer, R.E. Carter Wrenn; and Jefferson Marketing, Inc. (JMI), a North Carolina corporation that provides media services to political committees. Plaintiff and defendants agreed that:

- Since NCC and JMI had operated as a single entity,[1] NCC and its treasurer, R.E. Carter Wrenn, had violated section 434 of the election law by failing to report JMI's financial activity; and
- Within 30 days of the court's order, defendants would pay a $10,000 civil penalty to the U.S. Treasury for these violations.

Furthermore, defendants no longer contested the FEC's allegation that JMI had violated section 441b of the election law by charging less than the fair market value for services JMI had provided to federal candidates.

In the order, defendants also agreed to establish themselves as separate entities, despite their contention that they had already done so in 1983. In this regard, the following changes would be made:

- Thomas Ellis and R.E. Carter Wrenn would resign as directors of the Educational Support Foundation, Inc., JMI's sole shareholder;
- JMI would liquidate its outstanding debt to NCC within 12 months of the date of the consent order;
- Employees who began working for NCC after the date of the consent order, and who were later employed by JMI, would not be credited with benefits and seniority accrued during their employment by NCC; and
- As long as he remained an NCC officer, R.E. Carter Wrenn would not act as JMI's director, officer or employee.

After NCC and JMI have made these changes, they will be considered separate entities. However, the FEC reserved the right to file suits and claims against JMI if JMI fails to charge the fair market value for services the organization provides to federal political committees and candidates.

Within 90 days of the consent order, NCC agreed to amend its FEC reports to disclose JMI's financial activity with regard to federal elections during the period from December 1978 to the present.

The suit grew out of an administrative complaint filed by Congressman Charles Rose. In that case, the Commission found probable cause to believe

respondents had violated the law; yet, it failed to resolve the matter through conciliation. Thus, on February 7, 1985, the agency filed suit.

Source: FEC *Record*, July 1986, p. 7.

[1] Evidence noted in the consent order for defendants' operation as a single entity included: JMI's financial dependence on NCC, NCC's control over JMI's voting stock and Mr. Wrenn's involvement in JMI's decision-making process.

FEC v. NATIONAL MEDICAL POLITICAL ACTION COMMITTEE

On May 27, 1998, the U.S. District Court for the District of Columbia entered an order submitted by the parties requiring the National Medical Political Action Committee (NMPAC) and its treasurer to pay a $10,000 civil penalty to the FEC for failing to file 14 disclosure reports in a timely manner during 1992, 1993 and 1994. In a stipulation, both parties had agreed to the facts and to the final order and judgment.

NMPAC had filed all the reports that were due during 1992 and 1993 on May 12, 1994. NMPAC also failed to file on time six other reports due in 1994 and 1995. These tardy filings violated 2 U.S.C. §434(a)(4)(i), (ii), (iii) and (iv).

In addition to finding that NMPAC had violated the Act, the court permanently enjoined the PAC from failing to file reports within the time limits set out by Commission regulations.

Source: FEC *Record*, July 1998, p. 5.

FEC v. NATIONAL REPUBLICAN SENATORIAL COMMITTEE (93-1612)

On June 12, 1995, the U.S. District Court for the District of Columbia found that, as stipulated by both parties in a Stipulation to Final Judgment, the National Republican Senatorial Committee (NRSC) violated 2 U.S.C. §§441a(h) and 434(b) by directing the redesignation of contributions it received and by failing to properly report this activity.

The FEC was precluded from collecting civil penalties in this case because in a February 24, 1995, decision, the court ruled that the 5-year statute of limitations had expired.

This case had been dismissed in November 1993, but was reopened in 1994, as explained below.

Dismissal and Reopening of Case

The court had dismissed the suit on November 24, 1993, based on an October 1993 appellate court holding that the FEC's composition was unconstitutional and that the agency therefore lacked authority to bring an enforcement action. *FEC v. NRA Political Victory Fund (NRA)*. In that case, the appeals court held that the presence of two Congressionally-appointed *ex officio* members on the Commission violated the Constitution's separation of powers.

On December 2, 1993, the Commission moved for reconsideration of the dismissal based on FEC actions immediately following the *NRA* ruling: The agency reconstituted itself as a six-member body entirely composed of Commissioners appointed by the President; ratified its earlier findings in enforcement cases; and authorized ongoing litigation, including *FEC v. NRSC*.

Due to the FEC's remedial actions, the district court reversed its earlier decision that *NRA* was a basis for dismissal, and the case was reopened on February 8, 1994.

Statute of Limitations

In a second stage of the case, on February 24, 1995, the court ruled that the FEC was precluded from recovering monetary penalties in the action because the 5-year statute of limitations expired before the suit was filed. (The statute of limitations, however, does not apply to injunctive and declaratory relief.)

The statute of limitations at 28 U.S.C. §2462[1] applies in all instances except those involving other statutes in which Congress specifically included another time limitation. The court ruled that the Federal Election Campaign Act does not contain such an alternative statute of limitations. Accordingly, the court applied the 5-year limit to this case.[2]

In applying §2462, the court determined that the statute of limitations started running from the date of the alleged violations—the period between November 1985 and November 1986. Since the time between the dates of the violations and the date the FEC filed this case with the court exceeded the 5-year statute of limitations, the FEC could not pursue the imposition of civil penalties.

The case then proceeded to a final stage.

Stipulation to Final Judgment

In its original suit, the FEC had alleged that during the 1986 election cycle the NRSC, having exhausted its contribution and coordinated party expenditure limits on behalf of Republican Senate candidate Jim Santini, contacted its contributors and asked them to redesignate a portion of their NRSC contributions to Mr. Santini. The NRSC then forwarded these newly earmarked contributions to the Santini committee.

Under 11 CFR 110.6(d)(2), the full amount of a contribution earmarked by a contributor at the direction of an intermediary counts against both that contributor's and that intermediary's contribution limit for the recipient. In the matter at hand, this rule caused the NRSC to exceed its contribution limit for Mr. Santini by $183,500—$104,200 of which was the total value of the earmarked contributions and $79,300 of which was the cost of securing the redesignations (an in-kind contribution).

In the Stipulation to Final Judgment, the NRSC admitted to engaging in the alleged conduct, but stated that it offered this admission only to bring this case to a close. In addition, the NRSC agreed to accept, in all future matters, the FEC's position that this conduct constitutes violations of 2 U.S.C. §§441a(h) and 434(b), and 11 CFR 110.6(d)(2). Furthermore, the NRSC agreed that through December 31, 1998, it would report all contributions that it asks contributors to redesignate to candidates as contributions from both itself and the contributor.

Source: FEC *Record*, January 1994, p. 12; April 1994, p. 7; April 1995, p. 4; and August 1995, p. 4.

National Republican Senatorial Committee: FEC v., No. 93-1612 (TFH) (D.D.C. June 24, 1994); (D.D.C. Feb. 24, 1995)(opinion); (D.D.C. June 12, 1995).

[1] That provision reads: "Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued."

[2] This conclusion is inconsistent with the U.S. District Court for the Central District of California's denial of defendant's motion to dismiss in *FEC v. Williams.* In that case, Larry Williams argued that because the 5-year statute of limitations in §2462 had expired, the court should dismiss the case. The court rejected this motion without issuing an opinion. *FEC v. Williams,* No. CV 93-6231 ER.

FEC v. NATIONAL RIGHT TO WORK COMMITTEE (77-7125) NATIONAL RIGHT TO WORK COMMITTEE v. FEC (78-0315)

On December 13, 1982, the Supreme Court issued a unanimous decision reversing a decision by the U.S. Court of Appeals for the District of Columbia Circuit in *FEC v. National Right to Work Committee (NRWC)* (U.S. Supreme Court No. 81-1506). In its opinion, the Court held that some 267,000 individuals solicited by NRWC for contributions to its separate segregated fund during 1976 did not qualify as solicitable "members"[1] of NRWC under 2 U.S.C. §441b(b)(4)(C). (NRWC is a nonprofit corporation without capital stock, which advocates voluntary unionism.)

Complaints

In November 1977, the FEC filed suit against NRWC *(FEC v. NRWC,* Civil Action No. 77-7125) claiming that, since both NRWC's bylaws and the articles of incorporation it had filed with Virginia stated that NRWC had no members, NRWC had violated section 441b(b)(4)(C) of the Act by soliciting funds to its separate segregated fund from persons other than members. (Under this provision, corporations without capital stock may pay the costs of soliciting contributions from their members to their separate segregated funds.) NRWC contended, on the other hand, that its solicitations were permissible since those persons solicited were "members" of NRWC, within the meaning of the Act and FEC regulations.

After receiving notice of the FEC's intent to file a civil action, NRWC filed suit in October 1977 (*NRWC v. FEC*, Civil Action No. 78-0315), seeking injunctive and declaratory relief and challenging the constitutionality of sections 441b(b)(4)(A) and (C) of the Act, which, together, prohibit nonstock corporations from soliciting persons other than their "members." Among its constitutional claims, NRWC asserted that section 441b(b)(4)(C) was unconstitutionally vague and infringed on the First Amendment rights of free speech and association of those persons solicited by NRWC.

In February 1978, the cases were consolidated for argument before the U.S. District Court for the District of Columbia.

District Court Ruling

Referring to NRWC's articles of incorporation and bylaws, the district court found that NRWC was organized without members. The court held that NRWC had violated Section 441b(b)(4)(C) by soliciting contributions to its separate segregated fund from persons who were not members of NRWC. The court found that the legislative history of the Section 441b membership

exception required a limited definition of "members." The court defined "members" as those "...persons who have interests and rights in an organization similar to those of a shareholder in a corporation and a union member in a labor organization. To read the exception more broadly would be to upset the symmetry of the statutory scheme." (501 F. Supp. 422, 432 (D.D.C. 1980)) The court noted that no class of persons solicited by NRWC had been given any such participation rights in NRWC

Appeals Court Ruling

On September 4, 1981, reversing the district court's ruling, the appeals court held that the term "member" set forth at Section 441b(b)(4)(C) "...necessarily includes those individuals solicited by NRWC.... " The appeals court concluded that the district court's definition of "member" was "...so narrow that it infringes on associational rights." The court noted that two identifiable public interests served by the Act (i.e., to eliminate the appearance or actuality of corruption in federal elections and to prevent coercive contributions) were not "...served by restricting the solicitation activities of a nonstock corporation organized solely for political purposes." The court found that, "as to the first interest, we believe that solicitation [alone] will neither corrupt officials nor distort elections." As to the second interest, the court found that "...the individuals from whom NRWC solicits contributions, unlike employees of a corporation or members of a labor union, clearly are not subject to coercion." In the court's opinion, "the NRWC operation...ensures that NRWC accurately identifies and solicits only those individuals who share a similar political philosophy and who have evidenced a willingness to promote that philosophy through support of the Committee."

On October 19, 1981, the Commission filed a petition with the appeals court for a rehearing of the case and a suggestion for an *en banc* rehearing. On November 13, 1981, the U.S. Court of Appeals for the District of Columbia Circuit, sitting *en banc*, denied the FEC's suggestion for a rehearing of *National Right to Work Committee, Inc. (NRWC) v. FEC* (Civil Action No. 80-1487). On December 15, the Commission voted to petition the Supreme Court for a writ of certiorari.

Supreme Court's Ruling

In rejecting the appeals court's reasoning, the Supreme Court held that the "persons solicited by NRWC were insufficiently attached to the corporation to qualify as members under Section 441b(b)(4)(C) of the Act." In this regard, the Court noted that the legislative history of Section 441b(b)(4)(C) indicated that " 'members' of nonstock corporations were to be defined, at least in part, by analogy to stockholders of business corporations and members of labor unions. The analogy to stockholders and union members suggests that some relatively enduring and independently significant financial or organizational attachment is required to be a 'member' under 441b(b)(4)(C)." The Court found that those individuals solicited by NRWC through "random mass mailings" failed to meet this membership requirement: "Among other things, NRWC's solicitation letters did not mention membership, its articles of incorporation disclaim the existence of members, and members play no part in the operations or administration of the corporation." Consequently, the Court found that the respondent's arguments would "virtually excise from the statute the restriction of solicitation to 'members'.... " and would "open the door to all but unlimited corporate solicitation."

The Court found that the Act's restrictions on solicitations by nonstock corporations did not raise "any insurmountable constitutional difficulties." The First Amendment "associational rights asserted by respondent...are overborne by the interests Congress has sought to protect in enacting Section 441b." In this regard, "the statute reflects a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." Moreover, the Court noted that "the governmental interest in preventing both actual corruption and the appearance of corruption of elected representatives has long been recognized [by the Court], *First National Bank of Boston v. Bellotti*, 435 U.S. at 787, n.26, and there is no reason why it may not in this case be accomplished by treating unions, corporations, and similar organizations differently from individuals. *California Medical Association v. FEC*, 435 U.S. 182, 201 (1981)."

As to the defendants' claim that Section 441b(b)(4)(C) was unconstitutionally vague, the Court maintained that "there may be more than one way under the statute to go about determining who are 'members' of a nonprofit corporation, and the statute may leave room for uncertainty at the periphery of its exception for solicitation of 'members.' However, on this record we are satisfied that NRWC's activities extended in large part, if not in toto, to people who would not be members under any reasonable interpretation of the statute. See *Broadrick v. Oklahoma*, 413 U.S. 601 (1973)."

Remand to Appeals Court

The Court then remanded the case to the appeals court to consider, among other things, "the...imposition of a $10,000 civil penalty" on NRWC for unlawful solicitations to its separate segregated fund. On September 2, 1983, the appeals court found that the district court had erred in finding NRWC's violation to be "knowing and willful." The appeals court therefore concluded that the $10,000 civil penalty imposed by the district court was unwarranted.

Remand to District Court

After the case had been remanded to the district court, the court accepted a consent order on October 4, 1984, which provides that:

- NRWC, ERCC and any of their agents will not solicit contributions to ERCC from persons other than NRWC's members. See 2 U.S.C. §441b(b)(4).
- Within thirty days of the date of the consent order, NRWC and ERCC will mail refunds totalling $67,401.62 to those individuals unlawfully solicited on June 21 and September 9-15, 1976. (The court will grant extensions for reasonable delays.)
- Each refund will be accompanied by a letter informing the contributor that the courts have determined that the solicitation constituted a violation of the law's prohibition on corporate contributions which was not knowing and willful. 2 U.S.C. §441b.
- The refund checks will expressly, and in bold print, require deposit within 30 days from the date drawn.
- NRWC and ERCC will report to the FEC on the status of the refund checks indicating whether they were undeliverable, cleared through the bank or remained outstanding.
- Within 30 days of the consent order, NRWC and ERCC will pay a $5,000 civil penalty (without interest) to the U.S. Treasury.
- Within 30 days of the consent order, NRWC and ERCC will pay FEC court costs from the district court proceeding amounting to $4,483.64 (without interest).
- Within an agreed upon time, NRWC and ERCC will donate to the Salvation Army: any contribution refunds that were undeliverable; all checks which remain outstanding; and $15,000 in lieu of the interest accrued from April 24, 1980, on refundable contributions, NRWC's civil penalty and the FEC's court costs. Once NRWC and ERCC have satisfied these conditions, the parties will file a joint motion to:
- Have the Aetna Casualty and Surety Company released from any and all obligations under the Supersedes Bond filed with the district court in these actions; and
- Have all NRWC and ERCC contributor information which was filed under seal with the district court returned to NRWC and ERCC. In addition, the FEC will return to NRWC and ERCC all contributor information that the defendants presented to the FEC under seal, together with all copies, lists, summaries or digests made from them.

Source: FEC *Record*, November 1981, p. 3; January 1982, p. 7; February 1983, p. 3; November 1983, p. 6; and January 1985, p. 7.

National Right to Work Committee: FEC v., 501 F. Supp. 422 (D.D.C. 1980), *rev'd*, 665 F.2d 371 (1981), *rev'd*, 459 U.S. 197 (1982), *on remand*, 716 F.2d 1401 (1983).

[1] As defined by 11 CFR 114.1(e), "'Members' mean all persons who are currently satisfying the requirements for membership.... A person is not considered a member...if the only requirement for membership is a contribution to a separate segregated fund."

FEC v. NATIONAL RIGHT TO WORK COMMITTEE (90-0571)

On February 15, 1996, the U.S. District Court for the District of Columbia ruled that the FEC was barred from suing for a civil penalty in this case because the 5-year statute of limitations had expired. 28 U.S.C. §2462. Additionally, the court ruled that injunctive relief was not warranted because the defendant had not violated the law again for more than 10 years.

Background

The National Right to Work Committee (NRWC) is a nonprofit corporation that defends workers' rights to refuse to join or support a labor union. In 1984, the NRWC spent $100,000 to hire private detectives to infiltrate the AFL-CIO, the National Education Association (NEA) and the Mondale for President Committee for the purpose of gathering evidence that the unions were using their general treasury monies to provide support to Walter Mondale's Presidential effort. (The use of labor union money in connection with a federal election is prohibited by 2 U.S.C. §441b.) The NRWC used the information gathered by its hired detectives to file administrative complaints with the FEC.

In October 1984, the NEA filed an administrative complaint with the FEC that accused the NRWC of violating the same federal election laws that the NRWC had accused the NEA of violating. The NEA complaint contended that the NRWC's payment of $100,000 represented illegal contributions and expenditures because the payments funded the services of detectives who, in the course of conducting their clandestine information gathering, rendered services to the Mondale campaign.

On May 23, 1989, the Commission found "probable cause" that the NRWC had violated §441b. On March 13, 1990, the FEC filed this lawsuit.

Statute of Limitations

In general, federal government agencies must initiate proceedings to assess civil penalties, fines and forfeitures within 5 years from "the date when the claim first accrued." 28 U.S.C. §2462. In *FEC v. National Republican Senate Committee*, the court ruled that this statute of limitations applied to the FEC and that the statute of limitations began to run when the alleged offense was committed. The FEC conceded that the NRWC's hired detectives ceased their undercover operations by September 1984. The court noted that the Commission did not file this lawsuit until March of 1990. The court concluded that the 5-year statute of limitations ran out on this case and the FEC was therefore barred from pursuing a civil penalty in this matter.

Furthermore, the court ruled that because the FEC failed to put forth any compelling evidence that the NRWC had violated the law since 1984, it was both unnecessary and unwarranted to issue injunctive relief.

Source: FEC *Record*, April 1996, p. 11.

National Right to Work Committee: FEC v., No. 90-0571 (D.D.C. Feb. 15, 1996).

FEC v. NCPAC (83-2823)

In September 1980, the U.S. District Court for the District of Columbia ruled that Section 9012(f) was unconstitutional as applied to Americans for Change, Americans for an Effective Presidency and FCM, three multicandidate political committees (not affiliated with any parent organization). This provision of the Presidential Election Campaign Fund Act prohibits unauthorized committees (i.e., those not authorized by a candidate) from making expenditures exceeding $1,000 to further the election of a publicly funded Presidential nominee in the general election. The committees had planned to make expenditures in excess of $1,000 to support the Republican Presidential nominee's general election campaign.

On January 19, 1982, the Supreme Court voted 4 to 4 to affirm the D.C. district court's September decision, with Justice Sandra O'Connor not participating. However, since the high Court's vote on the suit had been equally divided, its affirmance had no precedential value. Subsequently, the FEC issued advisory opinions to NCPAC and FCM in which the FEC stated that Section 9012(f) may be enforced.[1]

In an effort to obtain a final ruling by the high Court on Section 9012(f)'s constitutionality, the FEC filed a new suit with the U.S. District Court for the Eastern District of Pennsylvania on June 14, 1983. (*FEC v. NCPAC and FCM*; Civil Action No. 83-2823.) This suit was consolidated with another suit, *Democratic National Committee (DNC) v. NCPAC* (Civil Action 83-2329), which had been filed on May 1, 1983. The FEC intervened in that suit as defendants and argued that the DNC lacked statutory and constitutional standing to bring that action. In the consolidated suits, plaintiffs asked that a three-judge panel of the court be convened to declare that:

- Expenditures (in excess of $1,000) that NCPAC and FCM each intended to make on behalf of the publicly funded Republican Presidential nominee in 1984 would be prohibited by, and in violation of, 26 U.S.C. §9012(f)(1); and
- Section 9012(f)(1), as applied to the defendant committees, was constitutional.

District Court's Ruling

On December 12, 1983, the Pennsylvania district court first ruled that the Democrats had standing to bring suit. The court then held that Section 9012(f) was unconstitutional on its face because it violated First Amendment rights of free speech and association. The court based its finding on the *Buckley v. Valeo* opinion. That opinion, the court said, allows "restrictions on true campaign speech only to prevent corruption or its appearance." The court concluded that "plaintiffs have produced virtually no evidence of actual corruption and little admissible evidence of the appearance of corruption." The court held the view that "modest expenditures by political committees...[such as the defendant committee] have almost no potential to corrupt or to create the appearance of corruption.... "

On December 16, 1983, the FEC filed an appeal of this decision with the Supreme Court.

Supreme Court's Ruling

On March 18, 1985, the Supreme Court handed down a ruling in *FEC v. National Conservative Political Action Committee (NCPAC)* (CA No. 83-1032), which affirmed the Pennsylvania district court's decision that 26 U.S.C. §9012(f) was unconstitutional on its face because the provision violated First Amendment rights of free speech and association. However, the Court reversed the district court's holding that the Democratic Party and the Democratic National Committee (the Democrats) had standing to file a suit regarding Section 9012(f)'s constitutionality and instructed the lower court to dismiss the Democrats' suit.

The Democrats Lack Standing to Bring Suit

In reversing the lower court's ruling that the Democrats had standing to bring suit, the Supreme Court noted that, while the Fund Act authorized the Democratic National Committee to bring "appropriate" suit,[2] such private suits "to construe or enforce the Act are inappropriate interference" with the FEC's "responsibilities for administering and enforcing the Fund Act."

Section 9012(f) Violates the First Amendment

The Court noted initially that "the expenditures at issue are squarely prohibited by §9012(f)." Nevertheless, since the committees' allegedly independent expenditures on behalf of President Reagan's campaign "produc[ed] speech at the core of the First Amendment and implicat[ed] the freedom of association, they [were] entitled to full protection under that Amendment." The Court stated that in a Presidential election, "allowing the presentation of [political] views while forbidding the expenditure of more than $1,000 to present them is much like allowing a speaker in a public hall to express his views while denying him the use of an amplifying system."

The Court therefore concluded that "Section 9012(f)'s limitation on independent expenditures by political committees is constitutionally infirm, absent any indication that such expenditures have a tendency to corrupt or to give the appearance of corruption. But even assuming that Congress could fairly conclude that large-scale political action committees have a sufficient tendency to corrupt, §9012(f) is a fatally overbroad response to that evil. It is not limited to multimillion dollar war chests, but applies equally to informal

discussion groups that solicit neighborhood contributions to publicize views about a particular Presidential candidate."

Finally, the Court held that "section 9012(f) cannot be upheld as a prophylactic measure deemed necessary by Congress. The groups and associations in question here, designed expressly to participate in political debate, are quite different from the traditional organizations organized for economic gain [e.g., corporations and labor organizations] that may properly be prohibited from making contributions to political candidates."

Source: FEC *Record*, January 1984, p. 8; and May 1985, p. 6.

National Conservative Political Action Committee: FEC v.; *Democratic Party of U.S. v. National Conservative Political Action Committee*; 578 F. Supp. 797 (E.D. Pa. 1983) (three-judge court) *aff'd in part, rev'd in part*, 470 U.S. 480 (1985).

[1] For a summary of AO's 1983-10 and 1983-11, see p. 2 of the July 1983 Record.

[2] Under Section 9011(b)(1) of the Fund Act, the national committee of a political party, the FEC and individuals eligible to vote for President may file appropriate actions which seek to implement or construe provisions of the Fund Act.

FEC v. NCPAC (84-0866)

On May 16, 1986, the U.S. District Court for the Southern District of New York granted the FEC's motion for summary judgment in *FEC v. National Conservative Political Action Committee* (NCPAC). (Civil Action No. 84 Civ. 0866 (GLG).) The court ruled that expenditures made by NCPAC in its campaign to defeat Senator Moynihan's 1982 reelection effort constituted excessive in-kind contributions to Bruce Caputo. The court found that NCPAC had further violated the election law by failing to properly report these expenditures as "in-kind" contributions. Accordingly, on June 13, 1986, the court imposed a $15,000 civil penalty on NCPAC and ordered the PAC to file amended reports with the FEC within 30 days of the court's order.

Background

During the 1981-82 election cycle, as part of its strategy to defeat Senator Moynihan, NCPAC established a political action committee, "New Yorkers Fed Up with Moynihan." NCPAC also hired Arthur J. Finkelstein Associates, a polling and political consulting firm, to develop a media strategy to advocate Senator Moynihan's defeat, conduct and analyze polls, and select election issues on which Senator Moynihan was most vulnerable. From April 1981 until August 1982, NCPAC spent $73,755 on its anti-Moynihan campaign. During this time, the Finkelstein firm also worked for Bruce Caputo's campaign.

In March 1981, Mr. Caputo announced that he would seek the Republican Party's nomination for Mr. Moynihan's Senate seat, and he retained Mr. Finkelstein as a paid political consultant. By March 1982, when Mr. Caputo withdrew from the Senate race, his campaign committee had paid Mr. Finkelstein's firm $28,000 to assist in all aspects of Mr. Caputo's Senatorial primary campaign.

In January 1982, the FEC received a complaint from the New York State Democratic Committee alleging that independent expenditures reported by NCPAC for its anti-Moynihan campaign were actually in-kind contributions to the Caputo campaign. In September 1983, the FEC found probable cause to believe that NCPAC's expenditures were, in fact, contributions. NCPAC had therefore exceeded the election law's contribution limits and had violated the disclosure requirements. After failing to reach a conciliation agreement with the respondent, the FEC filed suit against NCPAC on February 6, 1984.

NCPAC did not deny that, on its face, the election law limits the amount of such contributions. NCPAC claimed, however, that, in making the expenditures, it had relied in good faith on an FEC advisory opinion issued to the PAC in March 1980.

The Court's Ruling

The district court concluded that NCPAC could not rely on the FEC's advisory opinion because "the distinctions between the facts as they actually unfolded and the facts addressed in the FEC's advisory opinion are patent." The court found that Moynihan and Caputo were "for all practical purposes, opponents" during the primary season. The court also noted that the Finkelstein firm's role in both "the NCPAC and Caputo efforts was far more significant than that of a vendor of advertising services or a polling company. Finkelstein was NCPAC's key strategist. He formulated and directed the execution of NCPAC's plan to defeat Senator Moynihan.... Simultaneously, he served as the chief architect of Bruce Caputo's campaign." The court concluded that NCPAC's coordination with the Caputo campaign "far exceeded the 'communication' sanctioned by the FEC" in its advisory opinion. Under these circumstances, the court concluded that "NCPAC's anti-Moynihan expenditures must be deemed contributions to the Caputo campaign" rather than independent expenditures.

On July 17, 1986, the defendants filed an appeal with the U.S. Court of Appeals, 2nd Circuit. (Civil Action No. 86-6139) Both parties filed a Stipulation for Withdrawal of Appeal on August 27, 1986. The defendants were ordered to pay the FEC's taxation of costs and on February 3, 1987, the district court issued an Acknowledgment of Satisfaction of Judgment, thereby closing the matter.

Source: FEC *Record*, July 1986, p. 6; and April 1980, p. 4.

National Conservative Political Action Committee: FEC v., 647 F. Supp. 987 (S.D.N.Y. 1986).

FEC v. NCPAC (85-2898)

On April 29, 1987, the U.S. District Court for the District of Columbia granted plaintiff's motions for summary judgment and dismissal of defendants' counterclaim in *FEC v. National Conservative Political Action Committee* (Civil Action No. 85-2898). The court found that the defendants had violated the law by failing to include a statement in their solicitation material clearly identifying the person who paid for the communication.

Background

During the 1984 election cycle, NCPAC mounted a $10 million independent expenditure campaign advocating the reelection of President Reagan. As part of this project, NCPAC mailed out materials urging the reelection of the President and soliciting contributions to finance its expenditures for this effort. The solicitation material did not identify who paid for it. Under the Act and Commission regulations, any communication which expressly advocates the election or defeat of a clearly identified candidate or which solicits contributions must clearly display a disclaimer identifying the person(s) who paid for the communication. 2 U.S.C. §441d(a)(3).

On April 23, 1985, after attempting to resolve this enforcement matter through informal methods of conciliation, the Commission filed suit against the defendants in the U.S. District Court for the District of Columbia. In its complaint, the FEC sought the following:

- A judgment declaring that the defendants violated the law by failing to include a proper disclaimer in their solicitation material;
- An order permanently enjoining the defendants from repeating the violation;
- An assessment of a civil penalty; and
- An award of attorney's fees and costs incurred by the FEC.

In their counterclaim, the defendants sought review of the FEC's decision to bring this action pursuant to the Administrative Procedure Act (APA), 5 U.S.C. §701 et seq. The defendants claimed that the FEC decision was "final agency action" within the meaning of section 704 of the APA and, therefore, reviewable. Furthermore, the defendants claimed that the FEC decision was "arbitrary, capricious, and an abuse of discretion under the APA" because the Commission had declined to initiate a civil enforcement action in another similar case. Finally, in denying the alleged violation of the Act, the defendants argued that the use of the NCPAC postal frank and other references throughout the material made it quite clear who paid for the communication. In their view, therefore, a specific disclaimer was not necessary.

Court's Ruling

In ruling that the defendants had violated 2 U.S.C. §441d(a)(3), the court said that "the Act and regulations do not provide for disclaimers by inference and the court is consequently of the view that these repeated references to NCPAC which appear within the materials do not satisfy section 441d's disclaimer requirement."

The court also dismissed the defendants' counterclaim. Citing an earlier Supreme Court case, the court held that the initiation of enforcement proceedings does not constitute "final agency action" and is, therefore, not subject to judicial review under the APA. Regarding the defendants' allegation that the FEC exercised selective prosecution against NCPAC, the court ruled that one isolated instance of nonenforcement was not evidence that NCPAC was being singled out for prosecution and that even if it were, defendants produced no evidence demonstrating that this action resulted from an improper motive.

Finally, the court assessed a civil penalty of $3,000 against the defendants. On June 27, 1987, the defendants filed a motion to stay the decision.

Source: FEC *Record*, July 1987, p. 5.

National Conservative Political Action Committee: FEC v., No. 85-2898 (D.D.C. April 29, 1987) (unpublished opinion).

FEC v. NEA

On July 20, 1978, the U.S. District Court of the District of Columbia granted the Commission's motion for summary judgment in this case. The FEC had filed suit against the National Education Association (NEA), its separate segregated fund (NEA-PAC) and eighteen of its state affiliates seeking to enjoin them from collecting political contributions by means of a "reverse checkoff" procedure. Under this procedure, a political contribution is automatically deducted from a member's salary along with his/her dues payment. The contribution is subsequently refundable upon written request by the member.

In addition to granting summary judgment, the court issued the following orders:

- Defendants are permanently enjoined from using the reverse check-off procedure to collect political contributions to NEA-PAC.
- Defendants, in consultation with the Commission, must prepare a plan by which its members will be informed of the suit and the decision of the court. In addition, the plan must provide a method by which the members are afforded an opportunity to obtain, at no expense to them and with minimal effort, a refund of any monies deducted from the paychecks through the reverse check-off. The plan must be presented to the court by August 25, 1978.
- Defendants' counterclaim against the Commission was dismissed.

On November 2, 1978, the U.S. District Court for the District of Columbia ordered the NEA to obtain written affirmation from participants in the reverse check-off programs of their intent to make a political contribution to its separate segregated fund, NEA-PAC. The court set April 1, 1979, as the deadline for obtaining each member's written consent to the contributions they had made through the reverse check-off procedure. NEA was further required to return funds to individuals who do not submit the affirmation.

Source: FEC *Record*, September 1978, p. 4; and January 1979, p. 3.

National Education Association: FEC v., 457 F. Supp. 1102 (D.D.C. 1978).

FEC v. NEW REPUBLICAN VICTORY FUND

On June 23, 1986, the U.S. District Court for the Eastern Division of Virginia, Alexandria Division, approved a consent order between the Commission and defendants, the New Republican Victory Fund (the Fund), a nonconnected political committee, and the Fund's treasurer, Charles R. Black, Jr. The consent order provides that defendants violated section 434(a)(4)(A) of the election law during the 1984 election cycle by:

- Failing to file the Fund's October quarterly, year-end and post-general election reports; and
- Filing its July quarterly report approximately 64 days late.

Within 30 days of filing the consent order, the defendants agreed to:

- File these reports; and
- Pay a $2,350 civil penalty to the U.S. Treasurer.

The consent order concluded a suit filed by the FEC on April 18, 1986.

Source: FEC *Record*, August 1986, p. 7.

FEC v. NEW YORK STATE CONSERVATIVE PARTY STATE COMMITTEE/1984 VICTORY FUND (87-3309)

On April 17, 1990, the U.S. District Court for the Southern District of New York issued a final consent order and judgment declaring that the New York State Conservative Party State Committee/1984 Victory Fund made excessive contributions in connection with a 1982 direct mail project for Florence M. Sullivan, a Republican candidate in the 1982 Senatorial primary election in New York. (Civil Action No. 87-3309). The order included a $15,000 civil penalty.

The consent order stated that the defendants first made a $4,980 in-kind contribution to the Sullivan for Senate Committee by paying for the printing of direct mail literature. Subsequently, the defendants allowed the Sullivan Committee to use the Victory Fund's nonprofit postal permit, saving the Sullivan committee $24,852.15 on postage (i.e., the difference between the usual bulk rate for the Sullivan letters and the postage actually paid using the nonprofit permit). These in-kind contributions exceeded the $5,000 per candidate, per election limit for multicandidate committees, set forth at 2 U.S.C. §441a(a)(2)(A).

In addition, the order stated that the Victory Fund failed to report the in-kind contribution of the postage costs, in violation of 2 U.S.C. §434(b).

The consent order required the Victory Fund to amend its reports and pay a $15,000 civil penalty.[1] Finally, the defendants were permanently enjoined from future similar violations.

Source: FEC *Record*, June 1990, p. 7.

[1] Payment of the civil penalty in this consent order will also satisfy two prior outstanding default judgments in *FEC v. 1984 Victory Fund* (Civil Action Nos. 86-3891 and 85-8384). See the March 1987, June 1986 and December 1985 issues of the *Record* for more information on those suits.

FEC v. NOW

On May 11, 1989, the U.S. District Court for the District of Columbia issued a memorandum opinion granting the defendant's motion for summary judgment in *FEC v. National Organization for Women* (NOW). The court found that the election law's prohibitions against corporate political expenditures did not apply to a series of direct mailings sent as part of a NOW membership drive because the materials did not contain express advocacy.

Background

The agency filed suit against NOW, a nonprofit corporation, in August 1987 after failing to reach a conciliation agreement with the organization in a compliance matter generated by a 1984 complaint from the National Conservative Political Action Committee.

The FEC charged that three direct mailings sent by NOW during the 1984 election cycle contained communications connected with several U.S. Senate elections. The letters mentioned several Senators who were running for reelection in 1984, including Jesse Helms and Strom Thurmond. Although NOW had established a separate segregated fund for political activities, the expenditures for the mailings were made with money from its general treasury. The FEC charged that these expenditures constituted violations of 2 U.S.C. §441b, which prohibits all corporations from making expenditures in connection with federal elections.

District Court Decision

In finding that now's financing of the preparation and distribution of the letters in question with money from its corporate treasury did not constitute a violation of the election law, the court primarily addressed the issue of express advocacy.

Citing the Supreme Court's 1986 ruling in *FEC v. Massachusetts Citizens for Life, Inc.* (MCFL), the court reasoned that section 441b's prohibition against expenditures made "in connection with" federal elections did not broaden the general definition of "expenditure" given in section 431(9)(a)(i) of the Act, i.e., disbursements, gifts and other types of payments made "for the purpose of influencing" federal elections. The court determined that section 441b's prohibition against expenditures made "in connection with" federal elections could only be interpreted as prohibiting expenditures made "for the purpose of influencing" federal elections. Further citing MCFL and other Supreme Court decisions, the district court concluded that this interpretation of the definition of "expenditure" required that the communication expressly advocate the election or defeat of a candidate. Express advocacy, in the court's view, had to include "an explicit and unambiguous reference" to a candidate, as well as a clear exhortation to vote for or against that candidate. Using this interpretation of express advocacy—based on MCFL, the appeals court ruling in *FEC v. Furgatch*, and other decisions—the court found that NOW's letters did not contain any language that expressly advocated the election or defeat of any candidate.

The court found that the central purpose of each of the mailings was apparently to expand the organization's membership, not to tell recipients how to vote. While the letters named some Senators who were candidates, they also mentioned some who were not running for reelection in 1984. Moreover, Senators were named mainly in the context of their opposition to causes embraced by NOW. The letters called for a variety of actions by the recipients in support of the organization and its causes. Such actions included, for example, communicating support for the equal rights amendment to the recipients' own Senators, and making contributions to NOW. The letters "fail[ed] to expressly tell the reader to go to the polls and vote against particular candidates." Since the letters were "suggestive of several plausible meanings...NOW's letters fail the express advocacy test proposed by the Ninth Circuit in *Fugatch*."

The district court added that, since the actual distribution of the letters was conducted by an outside direct mail contractor that did not inform NOW of where the mailings would be sent, NOW "clearly lacked the intent to influence" any particular Senatorial election.

The court decided that the NOW mailings constituted discussion of political issues, protected by the First Amendment, rather than an attempt to influence the election or defeat of any candidates because the letters did not contain express advocacy.

The FEC appealed the decision. In October 1991, however, following the Supreme Court's denial of the Commission's petition for a writ of certiorari in *Faucher v. FEC*, the Commission filed a motion to dismiss the appeal. The U.S. Court of Appeals for the District of Columbia Circuit granted the motion on October 11, 1991.

Source: FEC *Record*, July 1989, p. 7; and November 1991, p. 1.

FEC v. NOW, 713 F. Supp. 428 (D.D.C. 1989), *appeal dismissed* (D.C. Cir. Oct. 11, 1991).

FEC v. NRA (81-1218)

On April 27, 1983, the U.S. District Court for the District of Columbia issued a consent decree resolving claims brought by the FEC against the National Rifle Association of America (NRA), an incorporated association; the Institute for Legislative Action (ILA), NRA's lobbying organization; and the NRA Political Victory Fund (PVF), NRA's separate segregated fund (Civil Action No. 81-1218).

The FEC filed suit against the defendants in May 1981, claiming that they had violated 2 U.S.C. §441b(a), which prohibits corporations from making contributions in connection with federal elections. Specifically, the FEC alleged that:

- NRA and ILA had made corporate expenditures in connection with the 1978 and 1980 Congressional elections and the 1980 Presidential elections;
- NRA and ILA had made corporate contributions to PVF in the form of advanced payments of expenditures on behalf of PVF, for which they were later reimbursed by PVF; and
- PVF had received corporate contributions by accepting (and subsequently reimbursing) the advanced payments of expenditures by NRA and ILA.

On January 6, 1983, the court dismissed, without prejudice, a portion of the FEC's claims, namely, allegations related to NRA's purchase of certain goods and services for PVF that had resulted in a violation of 2 U.S.C. §441b(a). The court found that it did not have subject matter jurisdiction over these specific factual allegations because the FEC had not undertaken conciliation with respect to them.

By the terms of the court's April 27 consent decree, the defendants agreed that:

- They will no longer engage in those activities alleged in the FEC's complaint which were not dismissed as part of the court's January 6, 1983, order.
- They will no longer spend corporate funds in connection with any federal election or otherwise engage in political activities prohibited by 2 U.S.C. §441b(a).
- They will limit partisan communications to NRA's restricted class of personnel (as specified by 2 U.S.C. §431(8)(B)(vi)).
- They will limit corporate expenditures in connection with federal elections to those exempt activities explicitly permitted by the Act and FEC regulations.

Source: FEC *Record*, June 1983, p. 11.

National Rifle Association: FEC v., 553 F. Supp. 1331 (D.D.C. 1983).

FEC v. NRA (85-1018)

On June 29, 2001, the U.S. Court of Appeals for the District of Columbia Circuit ruled that the National Rifle Association (the NRA) and its lobbying organization, the NRA American Institute for Legal Action (ILA), violated the Federal Election Campaign Act's (the Act) ban on corporate contributions and expenditures during the 1978 and 1982 election cycles. 2 U.S.C. §441b(a). While the district court had ruled that the NRA also violated the ban in 1980, the appellate court determined that during 1980 the NRA qualified for a constitutionally-mandated exemption from the ban. As a result, the appeals court remanded the case to the lower court in order to have civil penalties calculated based on the 1978 and 1982 violations alone.

Background

During the 1978, 1980 and 1982 election cycles, the NRA paid $37,833 of the Political Victory Fund's expenses for federal election activity, including payments for newspaper advertisements, direct mailings and other materials that supported or opposed individual candidates. The Political Victory Fund then distributed some of these materials to NRA members, firearms dealers and other related organizations. The Political Victory Fund later reimbursed the NRA for these expenses and reported the disbursements as independent expenditures on its FEC disclosure reports.

In 1985, the Commission filed a civil suit against the NRA, the ILA and the Political Victory Fund, claiming that they had violated the Act's prohibition on corporate contributions and expenditures.

In response, the NRA argued that its payments on behalf of the Political Victory Fund were for that committee's administrative expenses and, thus, permissible under the Act. The NRA also challenged the constitutionality of the Act as applied to its activities, arguing that the organization should qualify for the so-called *MCFL* exemption that allows certain nonprofit political corporations to make independent expenditures.

This exemption is based on the Supreme Court's decision in *FEC v. Massachusetts Citizens for Life (MCFL)*, 479 U.S. 238 (1986). In that case, the Court held that the Act's general prohibition of corporate-financed independent expenditures could not constitutionally be applied to nonprofit ideological corporations that possess three specified features that preclude them from presenting the kinds of dangers at which the prohibition is directed.[1] See also *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

District Court Decision

The district court rejected the NRA's argument that its payments to the Political Victory Fund were merely for administrative expenses. The court also concluded that the NRA, unlike MCFL, did not qualify for the constitutionally-mandated exemption from the Act's prohibition of corporate independent expenditures. The NRA, the court stated, had not been formed for the express purpose of promoting political ideas and pursued a variety of activities, many of which were not political. The court also stated that the NRA had no policy of refusing contributions from business corporations. The court fined the NRA and ILA $25,000 for making prohibited contributions and expenditures, and it imposed a separate $25,000 civil penalty against the Political Victory Fund for receiving prohibited corporate contributions.

Appeals Court Decision

Statutory Claims

On appeal, the NRA again argued that its payments on behalf of the Political Victory Fund were permissible payments of administrative expenses. In addition, the NRA argued that its:

- In-kind contributions of corporate materials and facilities were allowable under Commission regulations that permit persons to use corporate facilities for election-related activity, so long as they reimburse the corporation within a commercially reasonable time for the market value of the production of the materials (11 CFR 114.9 (c)); and
- Payments to NRA employees working for Political Victory Fund on the campaigns of federal candidates were permissible because those payments did not meet the statutory definition of "contribution" at 2 U.S.C. §431(8)(A).

The appeals court, however, deferred to the Commission's interpretation of the definition of administrative expenses at 11 CFR 114.1(b), which allows corporations to cover only the overhead and start-up costs of their political action committees. The court also deferred to the Commission's interpretation of 11 CFR 114.9(c), which allows only stockholders and employees acting as volunteers to use corporate facilities to produce materials in connection with a federal election. Finally, relying on FEC Advisory Opinion 1984-24, the court held that the NRA's payments to its employees who were working for the Political Victory Fund on candidates' campaigns were prohibited corporate contributions under the definition of "contribution" at section 441b(b)(2), which addresses corporate activity. The FEC's advisory opinions, the court stated, are entitled to deference. They "not only reflect the Commission's considered judgment made pursuant to congressionally delegated lawmaking power, but [they] also have binding legal effect."

Constitutional Challenge

In its appeal, the NRA also renewed its claim that, under the *MCFL* decision, it was exempt from the ban on corporate contributions. The NRA argued that it was "not formed to amass capital, and its resources reflect not the 'economically motivated decisions of investors and customers, but rather its popularity in the political marketplace.'"

The Commission argued that, unlike *MCFL*, the NRA does not have a narrow political focus but instead performs a wide variety of nonpolitical services for its members. The Commission also argued that the NRA's extensive business activities and its acceptance of corporate contributions distinguished it from the kinds of corporations exempted by the Supreme Court in *MCFL*.

The appellate court stated that "the Commission must demonstrate that the NRA's political activities threaten to distort the electoral process through the use of resources that, as *MCFL* put it, reflect the organization's 'success in the economic marketplace' rather than the 'power of its ideas.'" The court concluded that the Commission had "failed to demonstrate that the NRA resembles a business firm more closely than a voluntary political association."

The court found, however, that the $7,000 and $39,786 in corporate contributions that the NRA received in 1978 and 1982, respectively, were substantial enough to risk turning it into a "potential conduit for the corporate funding of political activity" during these years. Thus, the court found no constitutional barrier to applying the Act's prohibitions to the NRA for those two years. In 1980, however, the NRA received only $1,000 in corporate contributions, an amount which, in the court's view, did not demonstrate that the organization was acting as a conduit for corporate contributions. Therefore, the court held that the NRA was not in violation of the Act for contributions and expenditures it made to the Political Victory Fund during that year.

Penalties

The appeals court ordered that the case be remanded to the district court to recalculate penalties against the NRA, the ILA and the Political Victory Fund based solely on the 1978 and 1982 violations.

Rehearing

On August 23, 2001, the Court of Appeals for the District of Columbia Circuit denied the Commission's petitions to have this case reheard by a panel of the court and heard *en banc*. The Commission had asked the

court to revisit a portion of its June 29, 2001, ruling. The court had held that in 1980 the National Rifle Association (NRA) qualified for a limited exemption to the Federal Election Campaign Act's ban on corporate contributions and expenditures.

Although the court denied the FEC's petitions, it did—at the Commission's request—clarify that the NRA's 1980 exemption applied only to corporate independent expenditures and not to corporate contributions to candidates.

Source: FEC *Record*, August 2001, p. 3; and December 2001, p. 3.

[1] The three features set forth in *MCFL* are:

1. The organization is a nonprofit ideological corporation formed "for the express purpose of promoting political ideas, and cannot engage in business activities."
2. It has "no shareholders or other persons affiliated so as to have a claim to its assets or earnings."
3. It has not been established by a corporation or labor union and has a policy "not to accept contributions from such entities."

254 F.3d 173.

FEC v. NRA POLITICAL VICTORY FUND

On December 6, 1994, the Supreme Court ruled that the FEC lacked standing to independently bring a case under Title 2 of the U.S. Code before the Supreme Court. In future cases, the FEC must seek authorization from the U.S. Solicitor General if it wishes to represent itself in Title 2 cases. (Civil Action No. 93-1151.)

This decision brought to an end the FEC's legal efforts to enforce a finding that the NRA contributed corporate monies to its separate segregated fund, the NRA Political Victory Fund. (Corporations are prohibited sources of contributions under 2 U.S.C. §441b(a).) In November 1991, the U.S. District Court for the District of Columbia had ruled in favor of the FEC and had imposed a $40,000 penalty on the defendants. On appeal, the U.S. Court of Appeals for the District of Columbia reversed the district court's ruling on the grounds that the FEC's two nonvoting, *ex officio* members, the Secretary of the Senate and the Clerk of the House, sat on the Commission in violation of the Constitution's separation of powers.

District Court Ruling

In a November 15, 1991, order, modified on December 11, the U.S. District Court for the District of Columbia found that a $415,745 payment made by the National Rifle Association—Institute For Legislative Action (ILA) to NRA's separate segregated fund was a corporate contribution in violation of 2 U.S.C. §441b(a). (The ILA is a component of NRA, a nonprofit corporation.) (Civil Action No. 90-3090.) The court ordered defendants ILA, the NRA Political Victory Fund (the separate segregated fund) and the Fund's treasurer to pay a $40,000 civil penalty. The court also ordered defendants to comply with 11 CFR 114.5(b)(3) in future transactions. Under that regulation, a corporation may reimburse its separate segregated fund (SSF) for expenses that the corporation could lawfully have paid as an administrative or solicitation expense, but the reimbursement must be made no later than 30 days after the SSF's payment.

Application of Section 114.5(b)(3)

The payment at issue originated from transactions that took place in March and July 1988, when ILA paid for two solicitation mailings. The Fund reimbursed ILA $415,745, the full cost of the mailings, on August 1. ILA returned that amount to the Fund on October 20—81 days after the August payment. Because this reimbursement was made after the 30-day period specified in section 114.5(b)(3), the court found that the October 20 payment was not a permissible reimbursement of solicitation expenses, as defendants had argued, but was instead an illegal corporate contribution to the Fund.

The court observed that the October 20 payment was not used to pay for the solicitation material purchased in March and July. By defendants' own account, the money was returned to the Fund to bolster its budget for campaign activities related to the 1988 elections.

Application of MCFL
The court also rejected defendants' argument that the October 20 payment was permissible under the Supreme Court's decision in *FEC v. Massachusetts Citizens for Life, Inc.* (MCFL), 479 U.S. 238 (1986). *MCFL* permitted a nonprofit corporation to make independent expenditures if, among other conditions, the corporation had a policy of not accepting donations from business corporations and labor unions. The district court found *MCFL* inapplicable here because the ILA does receive corporate donations.

Constitutional Status of FEC
Defendants also argued that the FEC lacked authority to bring suit because the FEC is a constitutionally flawed agency. They first claimed that the appointment of Commission members impermissibly restricts the appointment power granted the President under Article II because, under the Federal Election Campaign Act, the President is prevented from appointing more than three Commissioners from the same political party. Defendants further claimed that, because the President cannot control or remove Commissioners, the execution of the law does not rest with the President, an infringement of the sole executive power vested in the President under Article II. The court, however, ruled that the defendants did not have standing to raise these claims: "[D]efendants have raised an issue that bears on the rights of a third party, namely the President, and not on their own legal interests."

Defendants also argued that the statute's designation of the Clerk of the House and the Secretary of the Senate as nonvoting Commission members violated the separation of powers. Finding no showing that the nonvoting members participated in any decisions involving the present case, the court said that there was "no need to concern itself" with this argument.

FEC Requests Change in Civil Penalty
In its original order of November 15, the court had imposed a civil penalty in the amount of the FEC's total costs in investigating and prosecuting the violation, the amount to be calculated by the FEC.

On December 2, the FEC filed a motion asking the court to amend the civil penalty so that it reflected the amount necessary to deter similar violations rather than the costs of the agency's enforcement efforts, which the FEC viewed as unrelated to the violation at issue. The FEC also noted that such a penalty would be time consuming and burdensome to calculate.

In an amended opinion issued on December 10, the court ordered defendants to pay a $40,000 penalty. In imposing that amount, the court considered the defendants' bad faith, the injury to the public, the defendants' ability to pay and the need to vindicate the FEC's authority. The court concluded: "Because of the deliberate nature of defendants' actions, the Court must impose a substantial penalty in order to deter them from repeating this violation." The court added that defendants could have accomplished their objective legitimately if they had used proper fiscal planning.

Appeals Court Ruling

On October 22, 1994, the U.S. Court of Appeals for the District of Columbia ruled that the composition of the Federal Election Commission "violates the Constitution's separation of powers."

Under the Federal Election Campaign Act (FECA), the President appoints the Commission's six voting members, and Congress designates two non-voting *ex officio* members. The court found that "Congress exceeded its legislative authority when it placed its agents, the Secretary of the Senate and the Clerk of the House of Representatives, on the independent Commission as non-voting *ex officio* members."

The court rejected the Commission's contention that the *ex officio* members play an "informational or advisory role." The court noted that "advice...implies influence, and Congress must limit the exercise of its influence...to its legislative role." The court added that the "mere presence" of the Congressional representatives "has the potential to influence the other Commissioners." Citing legislative history, the court concluded that Congress intended the *ex officio* members to "serve its interests while serving as commissioners." Ultimately, the court said, "the mere presence of agents of Congress on an entity with executive powers offends the Constitution."

Based on a severability clause in the FECA, the court concluded that "the unconstitutional *ex officio* membership provision can be severed from the rest of " the statute, permitting a reconstituted Commission to continue to operate. The court added that Congress was not, in this instance, required to amend the statute.

The court rejected two other Constitutional challenges raised in the case; one regarding the Commission's bipartisan composition and the other, its status as an independent agency. The NRA had argued that:

- The "FECA's requirement that '[n]o more than 3 members of the Commission...may be affiliated with the same political party,' 2 U.S.C. §437c(a)(1) (1988), impermissibly limits the President's nomination power under the Appointments clause;" and

- The FEC's independence denies the President "sufficient control over the Commission's civil enforcement authority, a core executive function."

The court found the first of these challenges to be nonjusticiable because it is the Senatorial confirmation process, and not the statute itself, that arguably restrains the President. Indeed, the court noted that "without the statute the President could have appointed exactly the same members" to the Commission.

The court also upheld the FEC's status as an independent agency, citing a number of court cases that specifically sanction such entities.

The appeals court ruling reversed a district court decision that the NRA had violated 2 U.S.C. §441b(a) by contributing corporate funds to its separate segregated fund, the NRA Political Victory Fund. Having ruled on the Constitutional issue, the appeals court did not consider the merits of the case.

Commission Response

Following the appeals court's decision, the Commission took several steps to ensure the uninterrupted enforcement of the federal election law. The agency:

- Reconstituted itself as a six-member body, comprising only those commissioners appointed by the President;
- Ratified, in its reconstituted form, the regulations, forms, advisory opinions, audits, compliance matters and litigation issued and/or initiated by the former Commission; and
- Filed a petition for a writ of certiorari with the Supreme Court.

Supreme Court Decision

In December 1994, the Supreme Court ruled that the FEC lacked standing to independently bring Title 2 cases before the Court. As a result of the ruling, the FEC will have to seek authorization from the U.S. Solicitor General if it wishes to represent itself in Title 2 cases.

The FEC's petition to the Supreme Court was filed within the 90-day filing period mandated by law, but it was filed without the authorization of the Solicitor General. The Court contrasted the language at 2 U.S.C. §437d(a)(6) with that of 26 U.S.C. §§9010(d) and 9040(d) to reach the conclusion that the FEC lacked standing to bring this case. The Title 2 statute empowers the FEC "to . . . appeal any civil action . . . to enforce the provisions of the" Federal Election Campaign Act. It fails, however, to explicitly provide the FEC with the authority to file a writ of certiorari or otherwise conduct litigation before the Supreme Court. By contrast, the Court stated, the Title 26 statute does specifically provide the FEC with the authority "to petition the Supreme Court for certiorari to review" judgments in actions to enforce the Presidential election fund laws.

The Court interpreted the discrepancy in the language of these two statutes to indicate congressional intent to restrict the FEC's independent litigating authority at the Supreme Court level to those matters involving the Presidential election laws.

The Court rejected the Commission's argument that, in the past, it had represented itself before the High Court. The Court pointed out that none of those cases had challenged the FEC's standing to petition the Court for a writ of certiorari.

Although the Solicitor General authorized the FEC's petition, this action came months after the 90-day filing period had closed—"too late in the day to be effective."

The FEC's petition for a writ of certiorari, therefore, was dismissed for want of jurisdiction. The action left standing the ruling of the court of appeals.

Source: FEC *Record*, January 1992, page 7; December 1993, p. 2; and February 1995, p. 1.

NRA Political Victory Fund: FEC v., 778 F. Supp. 62 (D.D.C. 1991), No. 90-3090 (D.D.C. Dec. 10, 1991), *rev'd*, 6 F.3d 821 (D.C. Cir. 1993), *cert. dismissed for want of jurisdiction*, 115 S. Ct. 537 (Dec. 6, 1994).

FEC v. ORTON

On April 27 and 28, 1997, the U.S. District Court for the District of Utah, Central Division, approved the parties' settlement that required Utahns for Ethical Government (UEG) to pay a $9,000 civil penalty to the FEC for violations of the Federal Election Campaign Act (the Act) and to amend their termination report so that all of their expenditures would be reported as in-kind contributions to Orton for Congress. UEG also had to either refund $1,800 in impermissible corporate contributions or remit that same amount to the U.S. Treasury.

The violations resulted from UEG's involvement in the 1990 general election campaign for the 3rd Congressional District seat in Utah. UEG, a single-candidate political committee registered with the FEC, supported William Orton over his opponent, Karl Snow.

The settlement states that UEG accepted corporate contributions and contributions in the name of another, in violation of the Act. 2 U.S.C. §§441b(a) and 441f. The committee reported receipts of in-kind contributions of $1,000 from Sherman Fugal and of $800 from Jayson Fugal. In fact, these contributions were actually from Fugal & Fugal, Inc., a corporation, d/b/a Peggy Fugal Advertising.

The settlement also states that, although UEG included disclaimers on its advertisements that opposed Mr. Orton's opponent, the disclaimers failed to include a statement indicating whether the ads had been authorized by a candidate or candidate committee. Additionally, UEG failed to file a statement of organization with the Commission within 10 days of becoming a political committee, as required by 2 U.S.C. §433(a).

The settlement includes no judicial determination as to whether expenditures of $11,452, made by UEG to pay for ads opposing Mr. Orton's opponent, were in fact excessive contributions to Mr. Orton. The Commission, in its administrative proceedings, had found probable cause that UEG's expenditure had been coordinated with the Orton campaign, based on the fact that a former Orton campaign volunteer had participated in some UEG activities. Under the law, any expenditure made in cooperation with or at the suggestion of a candidate or his campaign is considered a contribution. 2 U.S.C. §441a(a)(7)(B)(i). In prior enforcement matters, the Commission had interpreted this provision to cover situations where the spender's activity was based on knowledge of official campaign strategy, the source of which was the candidate or the campaign. The defendants disagreed with the finding, arguing that the Commission had no direct evidence of the alleged violation.

The claims against all the defendants, including Mr. Orton and his campaign committee, will be dismissed with prejudice once UEG pays the fine and amends its reports.

Source: FEC *Record*, June 1997, p. 6.

FEC v. PARISI

On October 31, 1996, the U.S. District Court for the Southern District of New York assessed a $30,000 civil penalty against Angelo Parisi for exceeding the contribution limits of the Federal Election Campaign Act.

The lawsuit against Mr. Parisi grew out of an administrative complaint filed with the FEC in 1994 by the Center for Responsive Politics.

Among the violations, the FEC uncovered the following transactions:

- Contributions in excess of the individual $25,000 annual limit. 2 U.S.C. §441a(a)(3). Mr. Parisi made $33,942 in contributions in 1991, $66,262 in contributions in 1992 and $40,405 in contributions in 1993.
- Contributions in excess of the $20,000 per individual limit on contributions to a national political party committee. 2 U.S.C. 441a(a)(1)(B). Mr. Parisi gave $27,262 to the National Republican Senatorial Committee (NRSC) and $22,750 to the National Republican Congressional Committee in 1992. He also gave $24,655 to the NRSC in 1993.
- Contributions in excess of the $5,000 annual limit on contributions to a PAC. 2 U.S.C. §441a(a)(1)(C). In 1991, Mr. Parisi gave $6,200 to American Citizens for Political Action.

Because of unusual mitigating circumstances, all but $5,000 of the penalty was suspended. However, Mr. Parisi will be required to pay the remaining $25,000 if he violates the contribution limits again.

Source: FEC *Record*, January 1997, p. 4.

FEC v. PHILLIPS PUBLISHING

On July 16, 1981, the U.S. District Court for the District of Columbia denied an FEC petition for court enforcement of two subpoenas the Commission had issued to Phillips Publishing, Inc. (*FEC v. Phillips Publishing, Inc.*, Civil Action No. 81-0079). The court granted the respondent's motion to enjoin any further FEC investigation of either Phillips Publishing, Inc. or its biweekly newsletter, *The Pink Sheet on the Left (The Pink Sheet*).

FEC's Claim

The FEC had issued the subpoenas to the staff of Phillips Publishing, Inc. as part of an investigation into a complaint filed by the Kennedy for President Committee on March 18, 1980. The Kennedy Committee claimed that the publishing company had distributed a promotional mailing for *The Pink Sheet* that expressly advocated the defeat of Senator Edward Kennedy (D-Mass.) in his bid for the 1980 Presidential nomination. The Kennedy Committee alleged that, in making expenditures for the mailing, the respondent had violated the following provisions of the Act:

- §433, by failing to register as a political committee;
- §434(c)(1), by failing to report independent expenditures for the mailing in excess of $250;
- §435(b),[1] by failing to include a notice on the mailing indicating that committee reports were available at the FEC and could be purchased;
- §441(b), by making a prohibited corporate expenditure advocating the defeat of a candidate in a federal election; and
- §441(d), by failing to identify who had paid for and authorized the mailing.

In responding to these allegations, Phillips Publishing, Inc. contended that, since *The Pink Shee*t was a periodical and was not controlled by any political party, candidate or committee, the promotional mailing constituted a news activity exempted from the Act's definition of contribution or expenditure. 2 U.S.C. §431(9)(B)(i). In finding reason to believe the alleged violations had occurred, the FEC concluded that this issue, as well as others, had to be investigated further to make a factual determination with regard to the respondent's claim that the promotional mailing constituted an exempted news activity. Based on a facial comparison, the Commission noted, for example, that the title of the solicitation letter was not printed in the same format as that of the regular *Pink Sheet* newsletter, that the mailing did not contain legends normally carried on *The Pink Sheet* and that the respective contents of the mailing and *The Pink Sheet* were dissimilar. Moreover, the promotional mailing was not distributed through the facilities of a periodical publication.

On April 8, 1981, after company officials to whom the subpoenas had been directed failed to respond, the Commission filed its petition with the district court. On May 29, 1981, Phillips Publishing, Inc. filed a motion to dismiss the FEC's petition and a motion to bar any further investigation of *The Pink Sheet* and the promotional mailing.

District Court Ruling

In denying the FEC's petition for enforcement of the subpoenas, the court found that the FEC had sufficient information to determine that the mailing met the criteria for the news story exemption. "As early as April 1980, the FEC received responses from Phillips Publishing, through its counsel, stating that *The Pink Sheet* and its publisher 'are not political committees, do not solicit or receive any political contributions, or make any contributions to any candidate.... '" Moreover, the court said, "...the solicitation letter was to publicize *The Pink Sheet* and to obtain new subscribers, both of which are normal, legitimate press functions.... " The court concluded, therefore, that the FEC's petition for further information should be denied.

Motion to Appeal Withdrawn

On October 30, 1981, the U.S. Court of Appeals for the District of Columbia Circuit granted the FEC's motion to withdraw its appeal of *FEC v. Phillips Publishing, Inc.* (Civil Action No. 81-2015). In a motion filed on October 21, 1981, the Commission stated that it was withdrawing the appeal "in the interest of judicial economy," but that it continued to believe "the district court's decision was erroneous."

Source: FEC *Record*, September 1981, p. 2; and December 1981, p. 6.

Phillips Publishing, Inc.: FEC v., 517 F. Supp. 1308 (D.D.C. 1981).

[1] This section was stricken from the Federal Election Campaign Act (the Act) by the 1979 Amendments to the Act (Pub. L. No. 96-187, January 8, 1980).

FEC v. POLITICAL CONTRIBUTIONS DATA

On August 21, 1991, the U.S. Court of Appeals for the Second Circuit ruled that Political Contributions Data, Inc., did not violate 2 U.S.C. §438(a)(4) by selling, for profit, individual contributor information copied from FEC reports. (Civil Action No. 91-6084.) This ruling reversed the district court's decision.

On June 17, 1993, the court of appeals also reversed the district court's ruling on attorneys' fees. The appellate court held the FEC liable for payment of PCD's attorneys. On February 22, 1994, the Supreme Court denied the FEC's petition for review of that decision.

Background

Section 438(a)(4) protects information on individual contributors (including names, addresses, occupations and employers) that is disclosed on reports filed with the FEC. Under section 438(a)(4), information copied from such reports "may not be sold or used by any person for the purpose of soliciting contributions or for commercial purposes...." (The names and addresses of political committees, however, may be used for solicitation purposes.)

In AO 1986-25, issued to Public Data Access, Inc. (PDA), the Commission considered PDA's proposed sale of information on individual contributors that was compiled from FEC reports. The Commission concluded that the proposed sale would be for "commercial purposes" and would therefore violate section 438(a)(4).

After the opinion was issued, PDA established Political Contributions Data, Inc. (PCD), a for-profit corporation, which then sold lists of individual contributor information compiled from FEC reports. PCD marketed two standard reports: a list of contributions made by officers and upper-level employees of the 700 largest U.S. corporations; and a list of individuals contributing $500 or more, sorted by congressional district.

The Commission filed suit in August 1989 alleging that PCD had violated section 438(a)(4).

District Court Decision

On December 19, 1990, the U.S. District Court for the Southern District of New York ruled that PCD's sale of contributor lists violated the "commercial purposes" prohibition. (Civil Action No. 89-CIV-5238.) In reaching this decision, the district court found that the FEC's determination in AO 1986-25 was reasonable. The Commission had concluded that PDA's for-profit status indicated a commercial purpose. The Commission also concluded that PDA could not claim the exception for media use of contributor information under 11 CFR 104.15(c) because PDA's lists would have a commercial value to list brokers and because the FEC information

contained in the lists was not incidental to the sale of the communication (as in a newspaper) but was instead the primary focus of the communication.

The court also considered but rejected PCD's constitutional challenges to section 438(a)(4). The court imposed a $5,000 penalty against PCD but stayed payment pending the resolution of PCD's appeal.

Court of Appeals Decision

The court of appeals rejected the Commission's conclusion in AO 1986-25 as an unreasonable interpretation of section 438(a)(4) and 11 CFR 104.15(c).The court instead found that PCD's sale of contributor lists was permissible under those provisions.

Under section 104.15(c), the use of information copied from FEC reports "in newspapers, magazines, books or *other similar communications* is permissible as long as the principal purpose of such communications is not to communicate any contributor information...for the purpose of soliciting contributions or for *other commercial purposes*." [emphasis added]

The court found that PCD's contributor lists qualified as "other similar communications" and that PCD's sale of FEC information did not violate the commercial purposes prohibition: "The absence from PCD's reports of mailing addresses and phone numbers, as well as the caveat on each page against solicitation and commercial use, make it virtually certain that these reports will be used for informative purposes (similar to newspapers, magazines, and books...), not for commercial purposes (similar to soliciting contributions or selling cars)."

The court based this conclusion on its interpretation of the commercial purposes prohibition: "The §438(a)(4) prohibition is only violated by a use of FEC data which could subject the 'public-spirited' citizens who contribute to political campaigns to 'all kinds of solicitations,'" such as commercial solicitations for magazine subscriptions or credit cards. The court said that this reading of the prohibition balances the need to protect the privacy of individual contributors with statutory intent to promote public disclosure of campaign finance information.

Finding the PCD did not violate section 438(a)(4), the court remanded the case to the district court with instructions to dismiss the FEC's complaint.

Application for Attorneys' Fees

District Court

On December 19, 1991, PCD applied to the district court for an award of $55,022 in attorneys' fees and other expenses pursuant to the Equal Access to Justice Act (EAJA). 28 U.S.C. §2412(d)(1)(A). To be considered by a court, an application for attorneys' fees must be filed within 30 days of the date the judgment has become final. Citing judicial precedent, the district court said that "a judgment has been found to be final when the 'losing party asserts that no further appeal will be taken.'" The court found that the FEC provided "clear and unequivocal notice" that it would not appeal the court of appeals' decision in a letter from the FEC's attorney to PCD's attorney. The letter, which stated the FEC's reasons for not pursuing an appeal, was dated October 30, 1991; accordingly, the court found that the deadline expired 30 days later, on November 29, 1991, nearly a month before PCD filed its application for attorneys' fees. The court therefore denied the application because it was filed late. 807 F. Supp. 311 (S.D.N.Y. 1992).

The district court also said that defendants' application would have to be denied on the grounds that the FEC's position was "substantially justified." [1] Applying criteria set forth by the Supreme Court in *Pierce v. Underwood*, 487 U.S. 552 (1988), the court found that the FEC's position had a "reasonable basis both in law and fact" and "could satisfy a reasonable person."

Appeals Court

Reversing the district court decision, the U.S. Court of Appeals for the Second Circuit, on June 17, 1993, found that PCD had filed its application for attorney's fees within 30 days of the "final judgment," as required under the EAJA. (No. 92-6240.) The court said that, in this instance, the date of "final judgment" was the last day the Commission could have applied for a writ of certiorari with the Supreme Court.

The appeals court also found that the FEC's position on the "sale or use" restriction was not "substantially justified." The court found that the 1991 appeals court ruling, which had held the FEC's interpretation to be "unreasonable," precluded the current panel from finding the agency's position "substantially justified" under the EAJA. "This is so," the court reasoned, "because the legal standards which governed the merits phase of this litigation are precisely those to be applied to the EAJA question." The court also relied on *Oregon Natural Resources Council v. Madigan*, 980 F.2d 1330 (9th Cir. 1992), a decision which was issued after this appeal had been filed.

Supreme Court

On February 22, 1994, the U.S. Supreme Court denied the FEC's petition to review the appellate court judgment. The FEC was required to pay PCD's attorneys $54,610.

In its Supreme Court petition, the FEC argued that the Second Circuit's ruling contradicted legislative intent as well as the Supreme Court's own rulings and those of other appellate courts. The FEC's brief quoted the Supreme Court in *Pierce v. Underwood*, where the Court observed that a court's agreement or disagreement

with the government "does not establish whether its position was substantially justified. Conceivably, the Government could take a position that is not substantially justified, yet win; even more likely it could take a position that is substantially justified, yet lose." (487 U.S. 552, 569 (1988).)

The Solicitor General, who filed a friend of the court brief supporting the FEC's petition, said that the *PCD* holding "seriously expands the government's liability for attorney fees under EAJA."

Source: FEC *Record*, February 1991, p. 8; May 1991, p. 7; October 1991, p. 11; October 1992, p. 10; August 1993, p. 6; and May 1994, p. 4.

FEC v. Political Contributions Data, Inc., 753 F. Supp. 1122 (S.D.N.Y. 1990), *rev'd*, 943 F.2d 190 (2d Cir. 1991).

[1] Attorneys' fees must be awarded to the prevailing nongovernment party unless the court finds the position of the federal agency to have been substantially justified. 28 U.S.C. §2412(d)(1)(A).

FEC v. POPULIST PARTY (88-0127)

On March 22, 1989, the U.S. District Court for the District of Columbia issued a final consent order and judgement in *FEC v. Populist Party* (Civil Action No. 88-0127). By the terms of the consent order, the court declared that the Populist Party, a political committee, and Willis Carto, acting as treasurer, violated the election law and regulations by:

- Failing to file 1985 mid-year and year-end reports on time (2 U.S.C. §434(a)(4)(A)(iv));
- Failing to file, in a timely manner, amended Statements of Organization reflecting Mr. Carto's role as treasurer of the committee and a change in the committee's campaign depository (2 U.S.C. §433(c));
- Failing to file, in a timely manner, quarterly reports for April, July and October 1986 (2 U.S.C. §434(a)(4)(A)(i));
- Failing to file in a timely manner, a 1986 post-general election report (2 U.S.C. §434(a)(4)(A)(iii));
- Failing to disclose in any report the purpose of approximately $8,000 in operating expenditures made to one payee (2 U.S.C. §434(a)(4)(A)(iii));
- Failing to disclose, in a timely manner, the receipt of a $500 contribution from an individual (2 U.S.C. §434(b)(3)(A));
- Failing to disclose and continuously report certain outstanding debts and obligations, amounting to approximately $299,817 (2 U.S.C. §434(b)(8), 11 CFR 104.11); and
- Knowingly accepting corporate contributions (2 U.S.C. §441b(a)).

The court also found that the corporations had violated the law in making contributions to the committee. *The Spotlight*, a weekly newspaper, and its owner, Cordite Fidelity, Inc., had made $10,479 in prohibited corporate contributions; Liberty Lobby, Inc., had contributed $7,500. The court also found that Mr. Carto, in his capacity as a director or officer of both corporations (in addition to being treasurer of the Populist Party), had violated 2 U.S.C. §441b(a) by consenting to the corporate disbursements.

The consent order required the defendants Populist Party, Liberty Lobby, Inc., Cordite Fidelity, Inc., *The Spotlight* and Mr. Carto, both personally and as treasurer of the Populist Party, to pay a civil penalty of $20,000 within 20 days; the defendants were jointly and severally liable for the payment. The court also permanently enjoined the defendants from similar future violations of the election law.

Source: FEC *Record*, May 1989, p. 8.

FEC v. POPULIST PARTY (90-0229 and 90-7169)

On May 31, 1991, the U.S. Court of Appeals for the District of Columbia, in a *per curiam* decision, granted the FEC's motion for summary reversal of a district court order that had imposed a date by which the Commission had to conclude its investigation of the Populist Party. (Civil Action No. 90-7169.) The appeals court said the district court had exceeded its jurisdiction by setting the deadline.

The FEC had filed suit in the U.S. District Court for the District of Columbia seeking enforcement of subpoenas and orders the agency had issued to the Populist Party and other respondents in an internal enforcement case (Matter Under Review or MUR). The district court, on October 18, 1990, ordered the respondents to furnish the information to the Commission by November 15, 1990. The court, however, also ordered the agency to conclude its investigation by November 29, 1990. The FEC appealed this portion of the order, and the district court granted a stay of the deadline pending resolution of the appeal.

In its motion for summary reversal of the district court order, the FEC argued that the court had exceeded its limited jurisdiction under 2 U.S.C. §437d(b), the subpoena enforcement provision of the Federal Election Campaign Act (the Act). The FEC said: "Section 437d(b) bestows no license on the court to decide where the Commission's limited resources will be directed or to determine how the underlying investigation should be run."

The FEC also argued that the Act does not provide for judicial review of the length of a Commission investigation that arises from an agency-generated enforcement case, such as the case involving the Populist Party. But even in cases that originate from outside parties, only the complainants—not the respondents—have the right to seek judicial review of an investigation's pace. 2 U.S.C. §437g(a)(8).

The appeals court found the merits of the Commission's position "so clear as to justify summary action."

Source: FEC *Record*, August 1991, p. 11.

FEC v. POPULIST PARTY (92-0674)

On April 20, 1995, the U.S. District Court for the District of Columbia issued a consent order and judgment stating that defendants violated the Federal Election Campaign Act (the Act) by making and accepting corporate and excessive contributions in 1984, and ordering defendants to pay a $20,000 civil penalty for these violations.

Specifically, the court, by agreement of the parties involved, determined that:

- Liberty Lobby, Inc., and Cordite Fidelity, Inc., violated 2 U.S.C. §441b(a), which prohibits the use of corporate money in connection with federal elections, by providing services (in-kind contributions) to the Populist Party in the amount of $268,056 and $82,346, respectively;
- Willis A. Carto, the director of both corporations and treasurer of the Populist Party, violated 2 U.S.C. §441b(a) by consenting to the provision of the corporate services mentioned above;
- Blayne Hutzel, comptroller of both corporations, violated 2 U.S.C. §441b(a) by accepting corporate services, loans and payments valued at $352,903 on behalf of the Populist Party;
- The Populist Party violated 2 U.S.C. §441b(a) by accepting the above corporate contributions and other corporate contributions, for a total of $368,303 in illegal corporate money;
- The Populist Party violated 2 U.S.C. §441a(f), which prohibits committees from accepting contributions in excess of established limits, by accepting contributions from individuals in excess of their annual limit of $5,000 per party committee;
- The Populist Party violated 2 U.S.C. §441a(a)(1)(A) and (C) by making excessive contributions to the Maureen Salaman for Vice President Committee and the Bob Richards for President Committee; and
- The Bob Richards for President committee violated 2 U.S.C. 441a(f) by accepting $9,756 in excessive contributions from the Populist Party.

Source: FEC *Record*, July 1995, p. 9.

Populist Party: FEC v., No. 92-0674(HHG) (D.D.C. Apr. 20, 1995).

FEC v. PUBLIC CITIZEN, INC.

On October 10, 2001, the U.S. Court of Appeals for the Eleventh Circuit ruled that Public Citizen, Inc., and its separate segregated fund, Public Citizen's Fund for a Clean Congress (the Fund), violated 2 U.S.C. §441d(a) by failing to include a disclaimer stating that their independent expenditures had not been authorized by any candidate or candidate's committee. This ruling reversed the decision on this issue by the U.S. District Court for the Northern District of Georgia, which had granted summary judgment to the defendants in September 1999.

Background

Public Citizen, Inc. (Public Citizen) is an incorporated, nonprofit membership organization. It created the Fund in 1992. The Fund, in turn, sponsored several communications that opposed Newt Gingrich in the 1992 primary for Georgia's Sixth Congressional District: a television ad, a direct mailing and a series of flyers—all of which urged voters to "Boot Newt" in the upcoming primary.

District Court Decision

On September 15, 1999, the U.S. District Court for the Northern District of Georgia, Atlanta Division, dismissed an enforcement case brought by the Federal Election Commission against Public Citizen and the Fund.

The Commission had alleged that the Fund had violated 2 U.S.C. §441b by making excessive in-kind contributions to Herman Clark, a 1992 primary opponent of former Representative Newt Gingrich. The Commission maintained that the contributions resulted from the fact that the Fund had coordinated several expenditures, made in opposition to Mr. Gingrich, with the Clark campaign. The court ruled that the expenditures were permissible independent expenditures—not coordinated expenditures.

The court also ruled in favor of the Fund on eight other charges brought against it, including charges that, in some or all cases, it failed to:

- Report expenditures as contributions;
- Indicate, in disclaimers, whether its television advertisement and flyers were authorized by a candidate;
- Inform contributors about the political purpose of the fund;
- Inform contributors of their right to refuse to contribute without reprisal; and
- Inform contributors that a checklist for donations, reading "$20, $40, $50, OTHER," was merely a suggestion.

Coordination

The FEC alleged that the expenditures against Mr. Gingrich, totaling $59,200, were not independent expenditures but, rather, were coordinated expenditures, which resulted in excessive contributions on behalf of Mr. Gingrich's opponent, Mr. Clark. 2 U.S.C. §441a(a)(1)(A).

The Act defines independent expenditure as an expenditure which expressly advocates the election or defeat of a clearly identified candidate and which is not made in concert with, or at the request or suggestion of, the candidate or the campaign. 2 U.S.C. §431(17).

FEC regulations elaborate on this definition. They add the following presumption:

"An expenditure will be presumed to be so made [in cooperation with the campaign] when it is based on information about the candidate's plans, projects, or needs provided to the expending person by the candidate, or by the candidate's agents with a view toward having an expenditure made." 11 CFR 109.1(b)(4)(i)(A).

The Commission had argued that repeated contacts between the Fund and representatives of Mr. Clark's campaign constituted coordination. The court disagreed.

The court held that, "even construed most favorably for the FEC," the evidence did not support the allegation that the expenditures by the Fund were coordinated with the Clark campaign. Coordination, the court stated, implies "'some measure of collaboration beyond a mere inquiry as to the position taken by a candidate on an issue.'"[1]

The court ruled that, because the expenditures had not been coordinated with the Clark campaign, the Fund did not need to report them as contributions.

Disclaimers

The FEC alleged that the Fund failed to include the disclaimer required by 2 U.S.C. §441d(a) in the "Boot Newt" television advertisement or in the "Boot Newt" flyers.

The statute states that, whenever a person makes an independent expenditure (see definition above), the communication must disclose both the name of the person who paid for the communication and the fact that the communication was not authorized by the candidate or his/her committee.

Although the Clark campaign identified who paid for the ads, it did not include a disclaimer stating whether or not the communications had been authorized by a candidate.

Based on a 6th Circuit decision,[2] the court found that the disclaimer requirement was broader than necessary to achieve the government's interests in notifying the public of the source of campaign funds, in preventing actual and perceived corruption in the political process, and in creating a recordkeeping method to detect violations of the Act's contribution limitations—interests identified by the Supreme Court in *Buckley v. Valeo*. The court stated that the disclaimer used by the Fund, which stated that the ads were paid for by the Fund, was sufficient to accomplish all three of the government's objectives. The additional requirement that the disclaimer identify whether the communication was authorized by any candidate or candidate's committee, the court said, violated the Fund's First Amendment rights.

Special Fundraising Notices by Corporations and Labor Organizations

The FEC alleged that the Fund's solicitation letters failed to make adequate disclosures required by the Act. First, two letters violated 2 U.S.C. §441b(b)(3)(B) and 11 CFR 114.5(a)(3) by failing to inform solicitees of the political purposes of the Fund. One solicitation stated that the Fund planned to vote out targeted incumbents by using "everything—T.V., radio, door-to-door canvassing—to let their constituents know what their members of Congress have been up to for the past few years." In another solicitation, the Fund asked for solicitees' help "to tackle nine other House members." The court stated that it was uncertain how the Fund could have been more explicit in stating the political purpose of their solicitation, and concluded that the letter did not violate 2 U.S.C. §441b(b)(3)(B).

Additionally, the FEC alleged that both letters violated 2 U.S.C. §441b(b)(3)(C) and 11 CFR 114.5(a)(4) by failing to inform solicitees of their right to refuse to contribute to the Fund without reprisal. The court dismissed this charge, stating that the purpose of the notice was "to prevent organizations with economic leverage over employees or members from using that leverage to coerce involuntary donations." It was nonsensical, the court stated, for Public Citizen, a purely voluntary, nonprofit membership organization, to include such a disclaimer since it controlled no benefits that could be denied to its individual members.

Lastly, the FEC alleged that the Fund violated 2 U.S.C. §441b(b)(3)(C) and 11 CFR 114.5(a)(2), which requires that, when a corporation suggests a contribution guideline in a solicitation for its separate segregated fund, the solicitees must be informed that the guidelines are merely suggestions and that solicitees are free to contribute more or less than the suggested amount. The court found that the Fund's solicitation included an alternative called "other," making it clear to the solicitee that the listed amounts were suggestions only. Therefore, the court stated, the letter was not violative of the Act.

Appeals Court Decision

The FEC appealed this case to the U.S. Court of Appeals for the Eleventh Circuit. On appeal, the FEC argued that 2 U.S.C. §441d(a) served the governmental interest in protecting the integrity of the electoral process by immediately informing the voters whether a political advertisement was attributable to a candidate or to other persons, including the candidate's supporters. The appeals court agreed and ruled that the statute was narrowly tailored to serve the stated governmental interest because it applied only to candidate elections and was limited to communications that expressly advocated the election or defeat of a clearly identified candidate. As a result, the court found that the disclaimer requirements in 2 U.S.C. §441d(a) did not "impermissibly infringe on Public Citizen's First Amendment rights to free speech."

The appeals court vacated the district court's grant of summary judgment for Public Citizen and remanded the case to the district court to grant summary judgment to the FEC on its §441d(a) claims and to determine appropriate relief for the violations.

Source: FEC *Record*, November 1999, p. 2; December 2001, p. 4.

64 F. Supp. 2d 1327(N. D. Ga. 1999)

[1] *Clifton v. Federal Election Commission*, 114, F.3d 1309, 1311 (1st Cir. 1997), citing *Buckley V. Valeo*, 424 U.S. 1, 46-47 and n.53 96 S.Ct. 612, 647-48 and n. 53 46 L.Ed.2d 659 (1976).

[2] *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 647-48 (6th Cir. 1997).

268 F.3d 1283.

FEC v. RE-ELECT HOLLENBECK TO CONGRESS

On June 16, 1986, the U.S. District Court for the District of Columbia denied the Commission's motion for summary judgment and entered a judgment for the defendants in *FEC v. Re-Elect Hollenbeck to Congress Committee* (Civil Action No. 85-2239). The court held that the Re-Elect Hollenbeck to Congress Committee (the Hollenbeck Committee), Representative Hollenbeck's principal campaign committee for his 1982 reelection effort, and the Hollenbeck Committee's treasurer, David I. Korsh, had not knowingly violated the election law by accepting an excessive contribution from the New Jersey Republican State Committee.[1]

Background

In 1982, when the New Jersey Republican State Committee (the State Committee) made a $5,000 contribution to the Hollenbeck Committee, the State Committee had not achieved multicandidate committee status[2] because it had not yet satisfied the six-month registration requirement. Consequently, the State Committee was only eligible to make a contribution of up to $1,000 per election to each candidate, and the Hollenbeck Committee could legally receive only $1,000 for the primary election.

On learning of the State Committee's excessive contributions, the FEC initiated enforcement proceedings against the State Committee, the campaign committee of each New Jersey Republican incumbent and their respective treasurers. When the Commission failed to reach a settlement with the Hollenbeck Committee, the agency filed a suit against the Committee in which it asked the district court to: (1) assess a $5,000 civil penalty against the defendants for violating 441a(f) of the Act in accepting the State Committee's excessive contribution and (2) order the Hollenbeck Committee and its treasurer to refund the excessive portion of the contribution (i.e., $4,000) to the State Committee.

Acknowledging receipt of the $5,000 contribution, the Hollenbeck Committee denied "knowingly accepting" an illegal contribution. The Committee argued that it had "erroneously assumed that the State Committee had qualified for the status of a multicandidate political committee."

The Court's Ruling

The court noted that, under FEC regulations, a campaign commitee's "treasurer shall make his or her best efforts to determine the legality of any contribution"[3] made to the campaign. The court observed that this regulation was "not unduly burdensome. It does not place an affirmative obligation upon the treasurers to verify the legality of every contribution. Rather, it requires verification of contributions that 'appear to be illegal,' including those exceeding $1,000 that do not appear to come from a multicandidate committee."

In ruling that the Hollenbeck Committee should not be held liable for the State Committee's excessive contribution, the court held that the State Committee's contribution to the Hollenbeck Committee "would appear to be legal to any reasonable treasurer.... "

Source: FEC *Record*, August 1986, p. 7.

[1] On July 25, 1986, the U.S. District court for the District of New Jersey found that another New Jersey House incumbent campaigning for reelection in 1982 had knowingly accepted an excessive contribution from the New Jersey Republican State Committee. See *FEC v. Dramesi for Congress Committee*.

[2] Multicandidate committees may contribute up to $5,000 per election to a candidate's authorized committee(s) or any other political committee. To achieve multicandidate status, a committee must have more than 50 contributors, have been registered for at least six months and, with the exception of state party committees, have made contributions to five or more candidates for federal office. 2 U.S.C. §441a(a)(4); 1 CFR 100.5(e)(3).

[3] See 11 CFR 103.3(b)(1).

FEC v. RHOADS FOR CONGRESS

On May 2, 1986, the U.S. District Court for the Northern District of Illinois approved a consent order between the Commission and the Rhoads for Congress Committee (the Committee), Mark Q. Rhoads' principal campaign committee for his 1982 Illinois House race, and the Committee's treasurer, William E. Naegel. Defendants acknowledged that they had violated section 441a(f) of the election law by accepting excessive contributions from:

- Mary G. Rhoads, the candidate's mother, who made the excessive contributions by personally endorsing and providing security for two loans, portions of which (i.e., $17,000) were accepted by the Committee;[1] and
- The Mid-America Conservative Political Action Committee (MAPAC), a nonconnected PAC. (At the time MAPAC made the excessive contributions, its per election limit was $1,000, rather than $5,000, because the PAC had not yet qualified for multicandidate status.)

Defendants agreed to pay a $2,000 civil penalty within 30 days of the court's order.

Source: FEC *Record*, June 1986, p. 9.

[1] Under the election law and FEC regulations, endorsements and guarantees of loans, including those made by the candidate's family, count as contributions to the extent of the outstanding balance of the loan. 2 U.S.C. §431(a)(A)(i) and 11 CFR 100.7(a)(1)(i)(C).

FEC v. RICHARDS FOR PRESIDENT (88-2832)

On March 22, 1989, the U.S. District Court for the District of Columbia issued a final consent order and judgment in *FEC v. Bob Richards for President Committee, Washington, D.C.* (Civil Action No. 88-2832). The Richards (Washington) committee is a nonauthorized committee affiliated with the Waco, Texas, Bob Richards for President Committee, Mr. Richards' principal campaign committee for his 1984 Presidential campaign.

By the terms of the consent order, the court declared that the Richards (Washington) committee violated the election law and FEC regulations by:

- Failing to file an amended Statement of Organization (FEC Form(1) reflecting its affiliation with the Richards (Texas) committee (2 U.S.C. §433(c));
- Using Mr. Richards' name in its committee name (a nonauthorized committee may not use a candidate's name in its committee name) (2 U.S.C. §432(e)(4));
- Knowingly accepting an excessive contribution in the form of a $60,000 loan from the Populist Party (2 U.S.C. §441a(f));
- Transferring $5,000 to the Richards (Texas) committee from funds derived from excessive (i.e., prohibited) contributions (11 CFR 102.6(a)(1)(iv)); and
- Failing to include an authorization notice in a solicitation letter that expressly advocated Mr. Richards' election (2 U.S.C. §441d(a)).

The consent order required the defendants to:

- File the amended Statement of Organization, reflecting the Richards (Washington) committee's affiliation with the Richards (Texas) committee, with the Commission within 20 days; and
- Pay a civil penalty of $15,000 within 20 days.

The court also permanently enjoined the defendants from future similar violations of the election law.

Source: FEC *Record*, May 1989, p. 9.

FEC v. RICHARDS FOR PRESIDENT (89-0254)

On June 29, 1989, the U.S. District Court for the District of Columbia granted the FEC's motion for summary judgment in *FEC v. Bob Richards for President Committee, Waco, Texas* (Civil Action No. 89-0254). The court ordered the defendants to comply fully with the terms of a conciliation agreement entered into with the Commission a year before. Under that agreement, the defendant had admitted to several violations of the Federal Election Campaign Act and had agreed to pay a civil penalty of $12,000 and to file various reports and statements required under the election law.

Source: FEC *Record*, September 1989, p. 8.

Bob Richards for President Committee, Waco, Texas: FEC v., No. 89-0245 (D.D.C. June 29, 1989) (memorandum opinion).

FEC v. RODRIGUEZ

On October 28, 1988, the U.S. District Court for the Middle District of Florida granted the FEC's motion for a default judgment in a case that the FEC had reopened against Cesar Rodriguez in June 1988 (Civil Action No. 86-687-CIV-T-10).

In 1994, Mr. Rodriguez was held in contempt for failing to pay a $5,000 penalty imposed by the court.

Background

In its original complaint against Mr. Rodriguez, filed in November 1986, the FEC asked the district court to declare that, during 1980, Cesar Rodriguez had violated §441f of the election law by accepting contributions for the Carter/Mondale Presidential Committee which were made by one person in the names of other persons. Specifically, on behalf of Alan Wolfson, Mr. Rodriguez had solicited contributions to the Carter/Mondale Presidential Committee and had subsequently reimbursed each contributor for his or her contribution.

District Court Action

The Florida district court, on May 5, 1987, denied the Commission's motion for summary judgment. The court held that the defendant had aided and abetted a violation of the first clause of 2 U.S.C. §441f ("No person shall make a contribution in the name of another...") rather than the last clause of §441f, as the Commission had alleged ("No person shall knowingly accept a contribution made by one person in the name of another..."). Based on this finding, the court directed the Commission to address the question of whether the agency "can effectively amend the complaint and go forward with this case, or whether it must begin again under the governing statute at the administrative level."

On May 20, 1987, the FEC notified the court that it had decided to reopen its own administrative proceedings in the case. Based on these proceedings, the Commission subsequently found probable cause to believe that Mr. Rodriguez had violated the election law by assisting in the making of contributions in the name of another. Failing to reach conciliation with the defendant, the Commission on March 15, 1988, again initiated a civil suit against Mr. Rodriguez.

Rather than bringing a new complaint against Mr. Rodriguez for this violation, however, the FEC decided to ask the court to:

- Reopen the file on the FEC's original complaint; and
- Accept an amended complaint reflecting the agency's new findings.

In its October 1988 default judgment, the court decreed that:

- Mr. Rodriguez violated 2 U.S.C. §441f by knowingly assisting in the making of contributions in the name of another.
- Mr. Rodriguez was required to pay, within 15 days of the court's entry of the judgment, a $5,000 civil penalty, together with $22.95, to cover costs incurred by the FEC in the suit.

Finally, the court enjoined Mr. Rodriguez from future, similar violations of the election law.

Contempt Ruling

Four years later, in November 1992, the penalty remained unpaid. At a December 1992 contempt hearing, the FEC and the defendant told the judge that they had reached a tentative settlement under which Mr. Rodriguez was to pay $300 per month while the FEC looked into his financial position. But he later refused to make the payments or to provide information on his finances.

In February 1994, the FEC again requested that the court hold Mr. Rodriguez in contempt. In granting that request on March 31, 1994, the court ordered him to pay the $5,000 penalty, plus interest, and $100 per day until the penalty is repaid. The court also ordered him to reimburse the FEC for its costs in the contempt proceeding.

Source: FEC *Record*, August 1988, p. 6; January 1989, p. 10; and June 1994, p. 5.

FEC v. Rodriguez, No. 86-687-CIV-T10 (M.D. Fla. Nov. 12, 1986).

FEC v. ROSE
ROSE v. FEC

First Suit

On February 22, 1984, the U.S. District Court for the District of Columbia issued an order granting Congressman Rose's petition to dismiss a suit he had filed against the Commission on June 13, 1983. (*Charles E. Rose v. FEC*; Civil Action No. 83-1687.) Pursuant to the election law's procedures for obtaining administrative relief, Congressman Rose had asked the court to issue an order directing the FEC to take final action on his administrative complaint within 30 days. (See 2 U.S.C. §437g(a)(8)(A) and (C).)

In his suit, Congressman Rose stated that he had filed an administrative complaint with the FEC alleging that:

- A marketing company had contributed to his opponent in the Democratic primary (in violation of 2 U.S.C.§441b and 11 CFR 114.2).
- The primary opponent had paid for political broadcasting time with a personal check (in violation of 2 U.S.C. §432(h)(1) and 11 CFR 102.10).
- The principal campaign committee of Congressman Rose's primary election opponent had made excessive in-kind contributions to the general election campaign of the Republican candidate opposing Congressman Rose (in violation of 2 U.S.C.§§441a(a)(1)(A) and 441b; and 11 CFR 110.1(a) and 114.2).
- The Congressional Club, which owned the marketing company (cited above), had failed to report the election activities of the company (in violation of 2 U.S.C. §§434(b), 441a and 441b; and 11 CFR 104.3, 110 and 114.2).

After the Commission petitioned the U.S. District Court for the Eastern District of North Carolina to enforce subpoenas issued as part of its investigation into Congressman Rose's complaint, he requested that his suit be dismissed.

Second Suit

Congressman Charles E. Rose repetitioned the U.S. District Court for the District of Columbia to issue an order requiring the FEC to take action on his administrative complaint filed with the FEC in October 1982. On February 22, 1984, Congressman Rose dismissed his first petition because the FEC had filed subpoena enforcement actions with the district court for the Eastern District of North Carolina as part of its investigation into his complaint.

Claiming that the FEC had taken no subsequent action on his complaint, Congressman Rose had filed a second petition with the D.C. district court (Civil Action No. 84-2278).[1] Pursuant to 2 U.S.C. §437g(a)(8), he asked the court to:

- Declare that the FEC's continued failure to act on his administrative complaint was contrary to law;
- Issue an expedited order directing the FEC to act on his complaint within 30 days; and
- Retain jurisdiction over his petition in the event the FEC fails to take action on his complaint.

On October 4, 1984, the district court found that the FEC had acted contrary to law by failing to resolve the complaint. However, after reviewing the case on appeal, on October 24, 1984, the appeals court summarily reversed the district court's original decision and remanded the case to the district court for reconsideration.

Upon reconsideration, the district court again granted the plaintiff's motion for summary judgment. On October 31, 1984, the court issued an order stating that the FEC's delay in acting on Congressman Rose's administrative complaint was contrary to law. The court concluded that a variety of factors had unreasonably delayed the conclusion of the investigation into Congressman Rose's administrative complaint and ordered the FEC to conform its conduct to the decision within 30 days of the order. See 2 U.S.C.§437g(a)(8).

On July 24, 1984, the FEC appealed the district court's determination that the agency was liable for these litigation expenses.

Appeal by FEC

On December 2, 1986, the U.S. Court of Appeals for the District of Columbia Circuit issued an opinion in *FEC v. Congressman Charles E. Rose* (Civil Action No. 85-1455), which reversed an earlier decision by the U.S. District Court for the District of Columbia. The appeals court determined that the FEC was not liable for litigation costs and attorney's fees which Congressman Rose incurred in a suit he had brought against the FEC. The appeals court concluded that, under the statute governing such fee awards, the Equal Access to Justice Act, "the district court [had] erred in holding that the FEC's position in the case was not 'substantially justified.'" The appeals court therefore remanded the case to the district court, with orders to dismiss Congressman Rose's application to have the FEC bear his court costs.

Appeals Court Ruling

Initially, the appeals court noted that its determination concerning the FEC's liability for Congressman Rose's litigation costs and attorney's fees should be based on the Equal Access to Justice Act (EAJA), as amended in 1985. Under the 1985 amendments to this statute, a government agency is not liable for litigation costs and attorney's fees if the agency can show "that both its position in the litigation and its conduct that led to the litigation were substantially justified." To determine whether a government agency's actions were "substantially justified," the court may not use the standard used to challenge an agency's action on an administrative complaint (i.e., whether the action was "arbitrary and capricious"). Rather, in applying the EAJA standard, the court "is obliged to reexamine the facts under a different legal standard to determine whether that conduct is slightly more than reasonable."

While the appeals court found that the district court had used the "correct legal standards" in making its determination with regard to the FEC's liability, the appeals court nevertheless concluded that the district court "fell into error in applying those standards." The court concluded that "the FEC's handling of Congressman Rose's administrative complaint was 'substantially justified.' Far from suggesting unjustifiable delay, the record demonstrates prompt and sustained agency attention to Representative Rose's complaint and thorough consideration of the issues it raised."

The court also found that the FEC's litigation position was substantially justified. "The Commission, in truth, had no practical alternative to defending against Congressman Rose's action. It cannot be forgotten that the Congressman was advancing interpretations of the Campaign Act that would have drastically altered the agency's operations. And the arguments are dead wrong."

The appeals court rejected Congressman Rose's argument that the Act required the FEC to act on his administrative complaint within a 120-day time frame. Instead, the court confirmed the FEC's argument that the FEC's handling of the complaint should be judged under the deferential standard of review prescribed in the Administrative Procedures Act.

Source: FEC *Record*, August 1983, pp. 9-10; April 1984, p. 10; October 1984, p. 9; December 1984, p. 4; and February 1987, pp. 7-8.

Rose: FEC v., 608 F. Supp. 1 (D.D.C., *rev'd*, 806 F.2d 1081 (D.C. Cir. 1986).

[1] See also *National Congressional Club v. FEC*.

FEC v. SAILORS' UNION OF THE PACIFIC POLITICAL FUND

On January 6, 1986, the U.S. District Court, Northern District of California issued an opinion granting defendants' motion for summary judgment in *FEC v. Sailors' Union of the Pacific Political Fund* (Civil Action No. 84-7763-WWS). The court ruled that the separate segregated funds of three maritime unions, the Sailors' Union of the Pacific Political Fund, the Maritime Firemen's Union Political Fund and the Seafarers' Political Donation, were not affiliated. Accordingly, the defendant committees were not subject to a single $1,000 limit on contributions they made to California Governor Jerry Brown's 1982 Senate primary campaign. (Affiliated political committees, on the other hand, are subject to a single contribution limit on both contributions they make and receive. 2 U.S.C. §441a(a)(5).)

On September 15, 1987, the Court of Appeals for the Ninth Circuit affirmed the district court's ruling (Civil Action No. 86-1775).

Background

On December 10, 1984, the FEC filed suit against the defendant political committees in the district court. The Commission asked the court to:

- Declare that, by virtue of their affiliation, the committees had violated 2 U.S.C. §441a(a)(2)(A) by together, contributing more than $5,000 to Governor Brown's primary; and
- Order the three committees to disclose their affiliation by amending their respective statements of organization.

In its suit, the FEC argued that the three committees' respective parent organizations were affiliated on two grounds:

- The parent organizations were parts of the Seafarers' International Union (SIU).
- The parent organizations were subject to SIU's control.

The defendant political committees contended, on the other hand, that the three unions were not controlled by SIU and, further, that the independent histories, structures and management of the unions demonstrated that they did not meet the criteria for affiliation.

District Court Ruling

The district court ruled that the member unions of the Seafarers' Union were an "association of independent unions" and, as such, were not affiliated. Accordingly, the unions' separate segregated funds were not affiliated political committees. The court found that "the [Seafarers] constitution embodies the rules that govern the relationship of these unions and those rules preserve their independence, a fact confirmed by the undisputed evidence of their past conduct." The court said that "other than having the power to collect dues, Seafarers has no power over the affairs of its member unions."

Appeals Court Ruling

The court decided that it would examine the organizational authority of Seafarers in order to determine whether its member unions were affiliated under 2 U.S.C. §441a(a)(5). The court, in making this decision, looked to the legislative history for guidance: "Various comments in the records of both the House and Senate suggest that...Congress intended to aggregate campaign contributions of locals of international unions but did not intend to aggregate contributions of member unions of labor federations."

The court then examined the relationship between the Seafarers' International Union and its member unions to determine whether the degree of control Seafarers exercised over them was closer to the highly intrusive authority of the United Steelworkers of America, the international union which the court had adopted as a model, or the less restrictive authority of a federation of unions, like the AFL-CIO. Acknowledging that Seafarers had powers beyond those of the AFL-CIO (the authority to regulate dues, audit members and appoint financial custodians for members), the court nevertheless judged that "the level of authority exercised over locals by traditional international unions like the Steelworkers far exceeds the level of control that Seafarers may exercise under its constitution." Noting that Seafarers' authority was more like the limited power of the AFL-CIO, the court concluded that two of the member unions were independent of Seafarers and that their separate segregated funds were not, therefore, subject to a common contribution limit.

The court pointed out that one might question the autonomy of the third union and Seafarers because one individual was president of both organizations. However, the court did not have to decide the question because the three member unions involved would still not be subject to a single contribution limit.

Source: FEC *Record*, February 1986, p. 3; and November 1987, p. 6.

Sailors' Union of the Pacific Political Fund: FEC v., 624 F. Supp. 492 (N.D. Cal. 1986), *aff'd*, 828 F.2d 502 (9th Cir. 1987).

FEC v. AL SALVI FOR SENATE (98C-4933)

On February 26, 1999, the FEC appealed this case to the U.S. Court of Appeals for the Seventh Circuit. The U.S. District Court for the Northern District of Illinois, Eastern Division, had dismissed this case on the grounds that it was identical to a case the Commission had previously filed in the court. That first case (98-1321) was dismissed on technical grounds. In both suits, the FEC asked the court to find that the Al Salvi for Senate Committee misreported or failed to report more than $1.1 million in contributions and loans during the 1996 election cycle.

More specifically, the Commission alleged that the Committee:

- Reported bank loans to Mr. Salvi as personal loans from the candidate, never identifying the source of the funds;
- Failed to report debts to the candidate;
- Failed to file 48-hour notices for personal advances from the candidate; and
- Failed to disclose campaign-related payments by the candidate to vendors and a bank.

In addition to asking the court to find that the Committee violated federal election law, the FEC asked the court to assess a civil penalty against the Committee and its treasurer and to enjoin them from committing further violation of the Federal Election Campaign Act.

Appeals Court Decision

On March 8, 2000, the U.S. Court of Appeals for the Seventh Circuit affirmed a district court order dismissing a civil enforcement action the FEC had brought against the Al Salvi for Senate Committee and its treasurer.

Source: FEC Record, April 1998, p. 4; October 1998, p. 2, April 1999, p. 5; June 2000, p. 9.

Al Salvi for Senate Committee: FEC v., 1999 WL 167009 (N.D. Ill. Mar. 23, 1999).

FEC v. SAVAGE FOR CONGRESS ’82

On June 8, 1984, the U.S. District Court for the Northern District of Illinois entered a default judgment against Gus Savage for Congress ’82, the principal campaign committee of Congressman Gus Savage (D-IL), and Thomas J. Savage, the campaign’s treasurer. The Savage campaign had failed to answer the FEC’s suit against the campaign (*FEC v. Gus Savage for Congress ’82 Committee*; Civil Action No. 84-C1076; January 6, 1984).

Court Order

Pursuant to the FEC’s petition for a declaratory judgment, the court ordered the Savage campaign to file, within 30 days, the following reports required by the election law:

- The July and October quarterly reports, the pre- and post-general election reports and the year-end report required during the 1982 election year (see 2 U.S.C. §434(a)(2)(A)(i)-(ii); and
- The mid-year report required during the 1983 nonelection year (see U.S.C. §434(a)(2)(B)(i)).

The court further ordered the Savage campaign to file all reports due in the future and assessed a $5,000 civil penalty against the campaign.

Denial of Contempt Petition

On April 12, 1985, the U.S. District Court, Northern District of Illinois, Eastern Division, denied the Commission’s petition to hold in civil and criminal contempt Gus Savage for Congress ’82 (the Committee), the principal campaign committee for Congressman Gus Savage’s 1982 reelection campaign, and Thomas Savage, the Committee’s treasurer. The court found that, after the Commission’s filing of the contempt petition, the Committee had brought itself into compliance with a default judgment entered against it on June 8, 1984. The Committee had filed the reports required by the default judgment and had established a satisfactory schedule for repaying the $5,000 civil penalty imposed by the default judgment.

Source: FEC *Record*, July 1984, p. 7; and June 1985, p. 3.

Gus Savage for Congress ’82 Committee: FEC v., 606 F. Supp. 541, (D. Ill. 1985).

FEC v. FRIENDS OF SCHAEFER SCHAEFER v. FEC

These suits arose from an FEC enforcement proceeding against Friends of Schaefer and J. Michael Schaefer, as treasurer. Mr. Schaefer was a 1986 Senatorial candidate in Maryland. The agency filed suit against the respondents on May 15, 1991.

Penalty Claims Against Schaefer

On April 19, 1991 (after the FEC had notified him of its intention to file suit), Mr. Schaefer filed an adversary proceeding against the FEC in the U.S. Bankruptcy Court for the Southern District of California, where he had filed for bankruptcy. In *Schaefer v. FEC* (No. 91-9024), he argued that the FEC had failed to file a proof of claim with the court and therefore could not make a claim against him with respect to the payment of any civil penalty that might result from the agency's enforcement efforts.

The FEC asked the court to dismiss Mr. Schaefer's adversary proceeding or, alternatively, to refer the matter to the federal district court, which was the proper forum to litigate campaign finance issues. On July 2, 1991, the bankruptcy court denied the FEC's motion to dismiss and also denied the alternative motion, stating that it should be brought before the district court. The FEC then asked the U.S. District Court for the Southern District of California to take jurisdiction over this issue. (*FEC v. Friends of Schaefer*, No. 91-0650, was then pending in that court.)

The district court consolidated the two cases. On November 25, 1991, the court held that, because a civil penalty is a nondischargeable debt, the FEC could enforce a civil penalty against Mr. Schaefer, regardless of the agency's failure to file a claim in bankruptcy court. (Judgment was entered April 3, 1992.)

Contempt Motion

On May 16, 1991, claiming that the Bankruptcy Code barred the FEC from filing suit against him, Mr. Schaefer moved that the bankruptcy court hold FEC Chairman John Warren McGarry in contempt of court and incarcerate him until the FEC's district court case was dismissed. The FEC opposed the motion, arguing that the provision cited by Mr. Schaefer did not apply to a government agency enforcing its regulatory power. The bankruptcy court agreed with the FEC and, on October 28, 1991, ordered Mr. Schaefer to pay the FEC $750 in sanctions for filing a frivolous motion.

FECA Violations

On April 7, 1992, the district court entered a final judgment in *FEC v. Friends of Schaefer* and ordered defendant Schaefer to pay a $3,000 civil penalty.

The court found that Mr. Schaefer and his committee had violated the Federal Election Campaign Act by:

- Failing to file a Statement of Candidacy and Statement of Organization on time;
- Accepting an excessive contribution (Mr. Schaefer received a $30,000 loan from an individual, deposited the money in his personal account and then loaned the money to his committee);
- Failing to continuously report the loan until it was extinguished;
- Knowingly accepting a $28,000 loan from a corporation (Mr. Schaefer obtained a $28,000 margin loan drawn on his account with Charles Schwab & Co. and then loaned the funds to his committee); and
- Failing to file three reports on time (they were filed between two months and over one year late).

Based upon Mr. Schaefer's continuing refusal to remedy several of the violations, the court enjoined him from committing similar violations for one year, unless the FEC demonstrates that an extension is necessary.

Source: FEC *Record*, June 1992, p. 6.

FEC v. SPEELMAN

On January 28, 1991, the U.S. District Court for the District of Maryland issued a consent order and judgment in which the FEC and Harry Speelman agreed that defendant Speelman exceeded the contribution limits of the Federal Election Campaign Act by making a total of $11,470 in contributions to American Citizens for Political Action during 1987. These contributions exceeded the $5,000 per year limit under 2 U.S.C. §441a(a)(1)(C). The court permanently enjoined Mr. Speelman from future similar violations of the Act. Because of extenuating circumstances that came to the agency's attention after it had filed this suit, the Commission agreed to drop its request for a civil penalty and court costs. (Civil Action No. 90-2190.)

Source: FEC *Record*, March 1991, p. 10.

FEC v. SURVIVAL EDUCATION FUND

In a January 12, 1994, decision, the U.S. District Court for the Southern District of New York ruled that communications paid for by Survival Education Fund, Inc. (SEF) and National Mobilization for Survival, Inc. (NMS) did not violate the prohibition on corporate expenditures or the disclaimer requirements.

The U.S. Court of Appeals for the Second Circuit, on September 12, 1995, affirmed that the two nonprofit corporations did not violate the corporate prohibition but reversed the district court's ruling on the disclaimer violation.

On September 3, 1996, the district court issued a consent order imposing a $2,000 penalty against the SEF for failing to comply with the disclaimer rules of 2 U.S.C. §441d(a)(3). The parties agreed to the district court's imposition of the $2,000 penalty and dismissal of the case.

Background

The defendant corporations paid $16,500 to distribute about 30,000 copies of two letters critical of President Reagan, who was up for reelection. The first letter, mailed in July 1984—four months before the Presidential general election—asked readers to complete and return a "special election-year ANTI-WAR BALLOT" seeking "your No vote for President Reagan" on several policies pursued by his administration. The ballots, which were to be forwarded to the President, ended with the statement: "My vote in the November election will be influenced by your response to these demands." The second letter, a "1984 election survey," was headed "Ronald Reagan: Four More Years?" and asked readers to express their views on predictions that a second Reagan term would bring arms escalation, war in Central America and "life-threatening cuts in human services." The letter said that the survey results would be used "to educate Americans who will be voting."

District Court Decision

In ruling that SEF did not violate the prohibition on corporate expenditures (2 U.S.C. §441b(a)), the district court relied on Supreme Court cases that interpreted §441b as applying only to communications that expressly advocate the election or defeat of a candidate in words such as "vote for," "elect," "support," "cast your ballot," "Smith for Congress," "vote against," "defeat," and "reject." [1]

Based on those rulings, the district court concluded that "[b]oth letters fell short of expressly advocating how the readers should vote." The court commented: "Obviously, the courts are not giving a broad reading of this statute." In the court's view, "...expressions of hostility to the positions of an official, implying that official

should not be reelected—even when that implication is quite clear—do not constitute express advocacy which runs afoul of the statute."

Appeals Court Decision

Corporate Expenditure

The appeals court declined to address the express advocacy question and instead used different grounds to affirm the district court's decision that defendants' letter did not violate §441b. The appeals court accepted SEF's argument that SEF was within the class of nonprofit advocacy corporations whose independent campaign advocacy the Supreme Court has found to be exempt from the prohibition in §441b(a) because of the First Amendment. The appeals court relied on the Supreme Court's ruling in *FEC v. Massachusetts Citizens for Life (MCFL)* to support this idea. In that case, the Supreme Court concluded that the prohibition on corporate expenditures could not be applied to independent political communications made by certain nonprofit groups. The Court determined that MCFL, a nonprofit corporation formed for antiabortion advocacy, had three characteristics that made it "more akin to voluntary political associations than business firms." *MCFL*, 479 U.S. at 251. The Court ruled that a corporation was allowed to make independent expenditures if:

- Its purpose was promoting political activities as opposed to amassing capital;
- It lacked shareholders or other persons having a claim on its assets or earnings; and
- It was not formed by a labor or corporate organization and had a policy of refusing contributions from such entities.

The appeals court rejected FEC arguments that SEF did not qualify under these terms because, unlike MCFL, it did not have an express policy against accepting contributions from corporations or labor unions, and had in fact accepted corporate contributions. The court maintained that the core concerns of *MFCL* are the amount of for-profit corporate funding a nonprofit receives, rather than the establishment of a policy not to accept corporate contributions. *Day v. Holahan*, 34 f.3d 1356 (8th Cir. 1994), cert. denied, 115 S. Ct. 936 (1995). The court determined that the evidence did not show that SEF received a significant amount of corporate contributions.

Disclaimer

With regard to the disclaimer issue, the appeals court reversed the district court ruling and upheld the FEC's arguments that SEF and NMS violated §441d(a)(3) in the July 1984 mailing. The court found that even if the communication itself did not expressly advocate the defeat of a candidate (Mr. Reagan), it was a solicitation for funds that "would be used to advocate President Reagan's defeat at the polls, not simply to criticize his policies during the election year." The letter read: "your special election-year contribution today will help us communicate your views to hundreds of thousands of members of the *voting public* (emphasis added), letting them know why Ronald Reagan and his anti-people policies *must* be stopped."

Section 441d(a)(3) requires disclaimers in political communications that either expressly advocate election or defeat of a clearly identified candidate, or solicit contributions. The appeals court only addressed the second category in this case and concluded that requiring disclosure of the identity of a group that is soliciting a contribution does not run afoul of the First Amendment.

The court concluded that §441d(a)(3) serves several compelling interests that justify any infringement on SEF's First Amendment rights. The government has an interest, the court reasoned, in ensuring that contributors know whether they are donating their money directly to a candidate or, instead, to independent critics of another candidate. Further, disclosure of the identity of the sponsor of a solicitation helps private contributors determine whether a new contribution would cause them to exceed their aggregate contribution limit for that group.

Thus, the application of §441d(a)(3) to SEF and NMS does not conflict with the Supreme Court's recent decision in *McIntyre v. Ohio Elections Commission.* In that case, the Supreme Court ruled unconstitutional a state law banning the distribution of anonymous campaign literature. The Supreme Court determined that Ohio "had not shown that its interest in preventing the misuse of anonymous election-related speech justified a prohibition of all uses of that speech."

Source: FEC *Record*, March 1994, p. 1; December 1995, p. 4; and November 1996, p. 6.

Survival Education Fund, Inc.: FEC v., No. 89 Civ. 0347 (TPG) (S.D.N.Y. Feb. 25, 1992); 1994 WL 9658 (S.D.N.Y. Jan. 12, 1994); 65 F.3d 285 (2d Cir. 1995).

[1] *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 248-248 (1986); *Buckley v. Valeo*, 424 U.S. 1, 44 *n.* 52 (1976).

FEC v. TAYLOR CONGRESSIONAL COMMITTEE

On June 22, 1988, the U.S. District Court for the District of Columbia issued a default judgment in a suit that the FEC brought against the Taylor Congressional Committee, the principal campaign committee for Clarence Taylor's 1984 House campaign, and the Committee's treasurer, Richard L. Smith. (*FEC v. Taylor Congressional Committee*; Civil Action No. 88-0453 (SSH).)

In the default judgment, the district court decreed that:

- Defendants had violated the terms of a conciliation agreement that they had entered into with the FEC in February 1988. (In the agreement, the defendants had agreed to pay a $1,500 civil penalty in two equal installments.)
- Defendants had to pay the $1,500 penalty, an additional $500 penalty for violating the terms of the conciliation agreement and a small fee to cover the FEC's court costs in the case. These penalties had to be paid within 15 days from the date the court entered the default judgment against defendants.

Finally the court enjoined defendants from future similar violations of the election law.

Source: FEC *Record*, January 1989, p. 10.

FEC v. THORNTON TOWNSHIP REGULAR DEMOCRATIC ORGANIZATION

On September 19, 1988, the U.S. District Court for the Northern District of Illinois issued a final consent order and judgment in a suit the FEC has filed in July 1988 against the Thornton Township Regular Democratic Organization (TTRDO) and its treasurer.

In its suit, the FEC claimed that defendants violated the election law when they sponsored a direct mail solicitation to approximately 18,000 registered Democratic voters at a costs of approximately $4,371. In the consent order, the district court decreed that TTRDO violated the election law by:

- Failing to register and report with the FEC as a political committee when its costs for the direct mail solicitation exceeded $1,000 (2 U.S.C. §433(a) and 434); and
- Failing to include on the solicitation a disclaimer notice stating that TTRDO had sponsored the solicitation and that the solicitation was not authorized by any candidate's campaign committee. (2 U.S.C. §441d(a)(3)).

The district court further ordered defendants to pay a $2,000 civil penalty within 30 days of the court's order.

Source: FEC *Record*, December 1989, p. 9.

FEC v. TOLEDANO

On April 17, 2000, the FEC filed suit asking the U.S. District Court for the Central District of California to find that James Toledano, former Chair of the Orange County Democratic Central Committee (Orange County Party), violated 2 U.S.C. §432(b) by failing to forward two $5,000 contributions to the treasurer of the Orange County Party within 10 days after receiving them.

The contributions in question were made by Debra and Paul LaPrade in early 1996. At the time, Ms. LaPrade's brother, James M. Prince, was a candidate for the Democratic nomination for Congress in California's 46th congressional district.

The LaPrades, who had already given the maximum to the Prince campaign, contributed to the Orange County Party. Upon receipt of the funds, Mr. Toledano opened a new bank account in the name of the party, with only his own signature required for withdrawals, and deposited the LaPrades' $10,000 check into the account. He then spent the money to finance a slate mailer that advertised the California Democratic Party's endorsement of Mr. Prince.

Unaware of the contributions and expenditures, the Orange County Party's treasurer was unable to fulfill the Orange County Party's registration and reporting obligations under the federal election law. The treasurer learned of the LaPrades' contributions and the existence of the new bank account only one day before the primary.

The Commission learned of Mr. Toledano's actions through a letter sent by the Orange County Party itself, and a complaint filed by another individual. After finding probable cause to believe that Mr. Toledano had violated §432(b), the Commission attempted, but failed, to reach a conciliation agreement with him. Unable to resolve the matter, the Commission voted to authorize this suit.

District Court Decision

On May 3, 2001, the U.S. District Court for the Central District of California granted the Commission's request for summary judgment, ruling that James Toledano violated 2 U.S.C. §432(b)(2). On September 27, 2001, James Toledano appealed this case to the U.S. Court of Appeals for the Ninth Circuit.

Source: FEC *Record*, June 2000, p. 9; July 2001, p. 8; and December 2001, p. 4.

FEC v. WALSH FOR CONGRESS

1985 Court Orders

On September 20, 1985, the U.S. District Court for the Eastern District of Michigan, Southern Division, issued an opinion which held the Kirk Walsh for Congress Committee (the Committee) and its treasurer, Kirk Walsh, in contempt for failing to comply with a default judgment entered against the Committee in April 1985. (Civil Action No. 84-9802.)

In the April 1985 default judgment, the court had ordered the Committee, Mr. Walsh's principal campaign committee for his 1980 House campaign, to take the following actions within 30 days:

- File a 30 day post-general election report for 1980 and mid-year and year-end reports for 1981, 1982 and 1983;
- Pay a $5,000 civil penalty to the U.S. Treasury; and
- Pay court costs incurred by the FEC in pursuing the action.

In its contempt order, the court ordered the Committee and Mr. Walsh to comply with the default judgment by October 11, 1985. In the event the Committee failed to meet the deadline, the court would assess a fine of $2,000 and $100 per day until the Committee fully complied with the court's orders.

The court also ordered the Committee and Mr. Walsh to pay costs and attorney fees incurred by the Commission in bringing this action.

July 1986 Court Order

On July 28, 1986, the district court issued another order after the Committee and Mr. Walsh had failed to comply with the court's September 1985 contempt order. In its order of July 1986, the court required the Kirk Walsh for Congress Committee (the Committee) and its treasurer, Kirk Walsh, to:

- Provide the FEC with accurate reports of campaign finance activity from 1980 through 1986; and
- Pay a $5,000 civil penalty to the U.S. Treasurer, in addition to the $5,000 civil penalty the court had assessed against the Committee in September 1985.

The court also ordered the Committee and Mr. Walsh to comply with its order by August 28, 1986. (Civil Action No. CA84-CV-9802) In the event that the Committee failed to meet the deadline, the court would assess a fine of $200 per day, beginning August 15, 1986, and continuing until the defendants had fully complied with the court's order.

Source: FEC *Record*, November 1985, p. 5; and September 1986, p. 7.

Kirk Walsh for Congress Committee: FEC v., No. 84-CV-9802-PH (E.D. Mich. August 5, 1986) (memorandum opinion and order, supersedes July 28, 1986).

FEC v. WEBB FOR CONGRESS

On January 2, 1991, the U.S. District Court for the Eastern District of North Carolina, Raleigh Division, granted the FEC's motion for summary judgment against William Woodward Webb, a 1986 House candidate, his principal campaign committee and the committee treasurer. (Civil Action No. 89-664-CIV-5-BO.) The court found that defendants had violated 2 U.S.C. §441a(f) by knowingly accepting an excessive contribution in the form of a $19,000 loan from the candidate's mother. Defendants argued that the loaned funds were not subject to the contribution limits because they were Mr. Webb's own funds under the definition of a candidate's "personal funds" in FEC rules: "gifts of a personal nature which had been customarily received prior to candidacy." 11 CFR 10.10(b)(2).

The court ruled that, while Mrs. Webb's loan to her son "may have been intended to be... similar to those gifts she had given to him prior to his candidacy, this gift was distinct in the fact that it was given to Mr. Webb's election committee and not to Mr. Webb directly....Merely because Mr. Webb had received gifts in the past [from his mother] it does not follow that this particular loan was customary or of a personal nature as required by 11 CFR 10.10(b)(2). This gift was made at the request of Mr. Webb and as a direct result of his candidacy." The court also found that defendants had violated 2 U.S.C. §434(b) by falsely reporting Mr Webb, rather than his mother, as the source of the $19,000 loan.

The court fined the defendants $5,000 and permanently enjoined them from future violations of the Federal Election Campaign Act.

Source: FEC *Record*, February 1991, p. 10.

FEC v. WEINBERG

On September 14, 1989, the U.S. District Court for the District of Columbia issued a final order and default judgment in *FEC v. Mark R. Weinberg* (Civil Action No. 89-0416 RCL)). The court found that Mr. Weinberg had violated the terms of a conciliation agreement he had entered into with the Commission in 1988 (MUR 2073) and directed him to pay additional penalties.

Under the terms of the 1988 agreement, Mr. Weinberg had agreed to pay a $17,000 civil penalty for violations of sections 441a(a)(1)(A) and (3) of the election law. When the defendant failed to pay the first installment on the penalty, the Commission filed suit pursuant to 2 U.S.C. §437g(a)(5)(D).

On August 15, 1990, the court granted the FEC's petition to hold Mr. Weinberg in contempt of court after Mr. Weinberg had failed to pay the civil penalties included in the conciliation agreement and consent order.

Under the terms of the 1990 order, Mr. Weinberg had to pay:

- An additional fine of $10,000 and $500 per day until he complies with the court's prior order of September 1989;
- Post-judgment interest to the Commission (at a rate of 8.27 percent) until he complies with the September 1989 order; and
- Court costs and attorneys' fees incurred by the Commission in prosecuting the contempt proceeding.

Source: FEC *Record*, November 1989, p. 5; and October 1990, p. 8.

FEC v. WEINSTEN

On June 8, 1979, the U.S. District Court for the Southern District of New York issued a consent judgment in a suit which the FEC had filed against Milton Weinsten and the Winfield Manufacturing Company on March 2, 1978.

In its suit, the Commission alleged that Milton Weinsten, President of Winfield Manufacturing (a government contractor), used corporate funds to reimburse employees of Winfield Manufacturing Company for contributions they made to the 1976 Presidential primary campaign of Milton Shapp.

The consent decree stated that use of corporate funds in this manner had violated the Act's prohibitions against:

- The use of corporate funds in connection with Federal elections (2 U.S.C. §441b);
- Contributions by government contractors (2 U.S.C. §441c); and
- Contributions made in the name of another (2 U.S.C. §441f).

The court levied a civil penalty of $5,000, enjoined the defendants from future violation of the Act, and retained jurisdiction over the case for three years to ensure compliance with the provisions of the decree.

Source: FEC *Record*, September 1979, p. 5.

Weinsten: FEC v., 462 F. Supp. 243 (S.D.N.Y. 1978).

FEC v. WEST VIRGINIA REPUBLICAN STATE EXECUTIVE COMMITTEE

On January 18, 1991, the U.S. District Court for the Southern District of West Virginia entered a judgment that was agreed to by the FEC and the defendant committee. (Civil Action No. 2:90-0898.) The parties agreed to the following points:

- In conducting a phone bank voter drive on behalf of the Presidential ticket—an exempt party activity—the committee also mentioned the names of House and Senate candidates but failed to report any part of the phone bank expenditures as contributions allocated to the House and Senate candidates, in violation of 2 U.S.C. §434(b).
- The committee incorrectly reported as "operating expenditures" certain disbursements for newspaper advertisements that advocated the defeat of a federal candidate, a second violation of 2 U.S.C. §434(b).
- The committee used its nonfederal account to make the phone bank and newspaper ad expenditures described above, a violation of 11 CFR 102.5(a).
- The committee failed to itemize certain contributions and transfers it received and failed to disclose year-to-date totals, a third violation of 2 U.S.C. §434(b).

The court issued a consent order imposing a $2,000 civil penalty against the committee and permanently enjoining it from future similar violations.

Source: FEC *Record*, March 1991, p. 10.

FEC v. WILLIAMS

On January 31, 1995, the U.S. District Court for the Central District of California granted the FEC's motion for summary judgment and denied the defendant's motion for summary judgment. [1]The court ordered Larry R. Williams to pay $10,000 in civil penalties and enjoined him for 10 years from making contributions in the name of another and exceeding the $1,000 individual contribution limit to a federal candidate.

On December 26, 1996, the U.S. Court of Appeals for the Ninth Circuit reversed a district court ruling and dismissed this case.

On December 8, 1997, the U.S. Supreme Court denied the U.S. Solicitor General's petition asking the Court to review this case.

Background

Jack Kemp's 1988 Presidential campaign had a fundraising program which enabled anyone who contributed $1,000 to purchase a Super Bowl ticket for $100 from the Philadelphia Eagles. Mr. Williams, a campaign fundraiser at the time, purchased 40 tickets from the Eagles at the $100 special price and then offered them to employees and friends in exchange for a $1,000 contribution to the campaign. He then advanced or reimbursed 22 of his employees and friends $1,000 each to make a contribution to the Kemp campaign.

Additionally, Mr. Williams contributed $1,694 on his own behalf to the Kemp campaign.

District Court Decision

Mr. Williams argued that the *FEC v. NRA Political Victory Fund* ruling [2]precluded the FEC from pursuing this case because the structure of the agency violated the separation of powers doctrine.

The court denied the defendant's motion because the court did not believe that the presence of the *ex officio* members on the Commission rendered the Commission's actions unconstitutional under the separation of powers doctrine. The court reasoned that this doctrine was not violated because the *ex officio* members did not "hold an 'Office Under the United States'" and because the *ex officios* merely exercised an advisory role and could not vote on Commission action. In its opinion, the court disagreed with the reasoning in the *FEC v. NRA Political Victory Fund* decision, and cited the decisions of the Court of Appeals for the Ninth Circuit in *Lear Siegler, Inc. v. Lehman* and *Commodities Futures Trading Commission v. Schor* in support of its conclusion. [3]

Further, the court stated that even if the presence of the *ex officio* members were deemed unconstitutional, the de facto officer doctrine established in *Buckley v. Valeo* applied and the case could continue. In *Buckley v. Valeo*, the Supreme Court accorded validity to the FEC's past actions even though the composition of the Commission in 1976 violated the separation of powers doctrine.

Lastly, the court rejected the defendant's arguments that the Act was unconstitutionally vague, that the FEC waived its right to impose a civil penalty by not pursuing its claims in bankruptcy court or that the defendant suffered prejudice as a result of an excessive delay in the prosecution of this action.

The court concluded that Mr. Williams committed the following violations of the Federal Election Campaign Act:

- *Contributions in the name of another.* It is illegal to make a contribution in the name of another. Mr. Williams violated this provision of the law when he advanced or reimbursed $1,000 to 22 contributors. 2 U.S.C. §441f; and
- *Exceeding the $1,000 contribution limit for individuals.* It is illegal for an individual to give more than $1,000 per election to any federal candidate. Mr. Williams made $28,694 in contributions to a single candidate, exceeding his legal limit (11 CFR 110.1(b)(1)).

Appeals Court Decision

In a split decision, the appeals court reversed the district court's order. The appeals court held that the general five-year statute of limitations at 28 U.S.C. §2462 applied to the FEC's action seeking to assess civil penalties against Mr. Williams.[4] The court ruled that the time limit started running at the time the alleged offenses occurred—not at the time they were reported. The court also found that §2462 barred the FEC from seeking injunctive relief because the "claim for injunctive relief is connected to the claim for legal relief."

The allegations involved acts that took place in 1987 and early 1988. The court found that the statute of limitations had run out in 1992 and early 1993. The FEC did not file a lawsuit against Mr. Williams until October 1993, though the Commission had begun to respond to the administrative complaint in late 1988 and had attempted to reach a conciliation agreement in 1993.

The FEC argued that the statute of limitations should be temporarily tolled (i.e., the clock stops ticking) any time before the agency receives a complaint and during mandated periods of review and conciliation attempts that generally must occur before a lawsuit can be filed. However, the court was not moved by the FEC's arguments. It said that, although the doctrine of "equitable tolling"[5] applies in principle to §2462, it is not applicable to the Williams case. The Commission had ample

opportunity through its normal disclosure and investigatory processes, the court stated, to learn of Mr. Williams's alleged violations of the Act.

Supreme Court Action

On December 8, 1997, the U.S. Supreme Court denied the U.S. Solicitor General's petition asking the Court to review this case.

Source: FEC *Record*, April 1995, p. 5; February 1997, p. 3; November, 1997, p. 2; and January 1998, p. 3.

Williams: FEC v., No. CV 93-6321-ER(BX) (C.D. Cal. Jan. 31, 1995), *rev'd* 104 F.3d 237 (9th Cir. 1996), *cert. denied* 118 S. Ct. 600 (1997).

[1] Previously, Mr. Williams had moved to dismiss this case pursuant to the 5-year statute of limitations in 28 U.S.C. §2462. The court dismissed this motion without issuing an opinion.

[2] In the *NRA* case, the Court of Appeals for the District of Columbia concluded that the presence of the *ex officio* members on the Commission violated the separation of powers principle. The Commission has since reconstituted itself so as to exclude the *ex officios* from its body.

[3] Citing *Lear Siegler*, the court found that Congress did not usurp an executive function by placing the *ex officio* members on the Commission because the *ex officio* members did not vote. Additionally, quoting the *Schor* decision, the court held that the presence of the *ex officio* members on the Commission did not impermissibly undermine the executive branch's role.

[4] The appeals court cited several cases to back up its claim that the Act is indeed subject to 28 U.S.C. §2462: *3M Co. v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994); *FEC v. National Republican Senatorial Comm.*, 877 F.Supp. 15 (D.D.C. 1995) and *FEC v. National Right to Work Comm.* Inc. 916 F.Supp. 10 (D.D.C. 1996).

[5] Equitable tolling provides that "where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered." *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946).

FEC v. WOFFORD

On March 27, 1996, the U.S. District Court for the Middle District of Pennsylvania accepted the January 1, 1996, recommendation of the magistrate judge in this case; a $15,000 civil penalty was imposed on the Citizens for Wofford committee and its treasurer for accepting contributions in excess of the per-election limits. 2 U.S.C. §441a(f).

This case involved an FEC enforcement action born out of the 1991 Pennsylvania special election to fill a U.S. Senate seat. The Democratic party nominated Harris Wofford on June 1, 1991. The party chose not to certify him to the state as the Democratic nominee until September 5, however, because the Republican party did not nominate his opponent, Richard Thornburgh, until then.

Mr. Wofford's principal campaign committee, Citizens for Wofford, regarded contributions received after June 1 but before September 5 as primary election contributions. In doing so, contributors were able to give twice as much to Mr. Wofford's general election effort; contributors gave up to their per-election limit for his primary election effort after the fact and again to his general election effort.

The court determined that contributions received after June 1 should have been treated as general election contributions. 11 CFR 10.1(b)(2) and (3).

Although the amount of unlawful contributions received by the defendants was stipulated to have been $198,075, the court did not issue a higher civil penalty because "there is not a basis presented upon which one may reasonably infer that the defendants acted in bad faith" and because the committee had less than $15,000 in assets and was $70,000 in debt. The court concluded: "A fine in the amount of $15,000 would be adequate to vindicate all of the interests of the Commission and of the public in this case."

Source: FEC *Record*, June 1996, p. 4.

FEC v. WOLFSON

On February 6, 1986, the U.S. District Court for the Middle District of Florida, Tampa Division, issued an order granting the FEC's motion for summary judgment in a suit which the FEC had brought against Allen Wolfson on October 7, 1985. (*FEC v. Allen Z. Wolfson*; Civil Action No. 85-1617-CIV-T-13.)

As requested by the FEC, the court found that Mr. Wolfson had violated the election law by making contributions to authorized candidate committees which exceeded the law's monetary limits (2 U.S.C. §441a(a)(1)(A)) and which were made in the names of other persons (2 U.S.C. §441f).

The court permanently enjoined Mr. Wolfson from further violations of the election law and imposed a $52,000 civil penalty on him.

Source: FEC *Record*, April 1986, p. 8.

FEC v. CHARLES WOODS FOR U.S. SENATE

On January 16, 1998, the U.S. District Court for the District of Nevada ordered Charles Woods, two of his corporations, and Charles Woods for U.S. Senate (the Committee) to pay the FEC $50,000 for violating the Federal Election Campaign Act's (the Act's) ban on corporate contributions, and for failing to file 48-hour notices for $28,000 in contributions that came in during the waning days of the 1992 primary campaign. The court also issued a permanent injunction against future violations.

The court granted the FEC's motion for summary judgment and imposed the civil penalty because of the extent of the violations and the unambiguous nature of the sections of the Act in question in this case.

The Committee served as the principal campaign committee for Mr. Woods, who was seeking the 1992 Democratic nomination for the Senate in Nevada. During the election cycle, Quinn River Ranch, which was wholly owned by Mr. Woods, contributed $290,000 to the Committee. A subsidiary of another corporation that Mr. Woods owned, WTVY-FM, also made an impermissible contribution when it used its American Express credit card to charge $1,426.23 in expenses for the Committee.

The Act at §441b(a) prohibits corporations from making contributions in connection with a federal election, and prohibits political committees from accepting such contributions. Both Quinn River Ranch and WTVY were wholly owned by Mr. Woods. Nonetheless, the Act makes no distinction for closely-held corporations when applying the 441b(a) prohibition. The statute makes it unlawful for "any corporation whatever" to make contributions in connection with a federal election.

The law also provides for the timely filing of disclosure reports with the Commission for contributions received after the 20th day but more than 48 hours before an election. 2 U.S.C. §434(a)(6)(A).

Source: FEC *Record*, March 1998, p. 3.

FEC v. WORKING NAMES

First Judgment

On May 19, 1988, the U.S. District Court for the District of Columbia granted the FEC's motion for a default judgment against Working Names, Inc., a corporation that provides mailing list services, and the corporation's president, Meyer T. Cohen.

The FEC had filed a motion for the default judgment in April 1988, after the defendants had violated the terms of a conciliation agreement entered into with the FEC in September 1986. Under the terms of the conciliation agreement, the defendants had agreed to pay a $2,000 civil penalty for violating 438(a)(4) of the election law and section 104.15 of FEC regulations. Specifically, the defendants had rented to two organizations a mailing list containing a name obtained from a listing of contributors disclosed on an FEC report. Under the election laws names of contributors (other than political committees) that are disclosed on FEC reports may not be copied and used for commercial or solicitation purposes.

The court ordered the defendants to comply with the terms of the conciliation agreement within 15 days of the court's judgment. The court further decreed that the defendants pay $2,000 for violating the terms of the conciliation agreement and awarded the Commission its costs for the litigation. The court also permanently enjoined the defendants from future violations of the election law.

FEC's Contempt Petition

On May 10, 1990, after defendants had paid only $100 toward the $4,000 in assessed penalties, the court granted the FEC's petition to hold the defendants in contempt of court for failing to pay the civil penalties assessed in the previous year's default judgment. The court ordered defendants to pay the prior penalties plus $75 per day for each day the assessments remain unpaid. The late charge was to increase to $150 per day after June 17, 1990. Additionally, defendants had to pay interest on the unpaid civil penalties and court costs.

On February 28, 1991, the court issued a consent order in which defendants agreed to pay $15,000 to settle the dispute. The order declared that defendants had violated the sale and use restrictions and permanently enjoined them from further violations of the law. The Commission agreed to waive the accumulated contempt penalties and additional costs awarded in May 1990.

Source: FEC *Record*, July 1988, p. 6, July 1990, p. 4, and May 1991, p. 7.

FEC v. WRIGHT

On November 12, 1991, a U.S. district court ordered James C. Wright, Jr., former Speaker of the U.S. House of Representatives, to answer the FEC's questions in connection with an administrative complaint filed against him. The court also ordered Mr. Wright to pay the FEC's court costs.

The former Speaker appealed the judgment on January 9, 1992. However, he later filed a motion to dismiss the appeal as moot since he and the FEC had reached a settlement with respect to the administrative complaint (MUR 2649). The FEC did not object to the motion, and on May 1, 1992, the U.S. Court of Appeals for the Fifth Circuit dismissed the appeal. (Civil Action No. 92-1033.)

Background

In July 1988, Citizens for Reagan filed an administrative complaint alleging that Speaker Wright violated 2 U.S.C. §441iThat provision, now repealed, prohibited a federal officeholder from accepting more than a $2,000 honorarium for a speech, appearance or article. The complaint specifically alleged that Speaker Wright, during 1985 and 1986, accepted excessive honoraria disguised as proceeds from the sale of his book, *Reflections of a Public Man*. In January 1990, the Commission found reason to believe Mr. Wright had violated §441i and opened an investigation into the matter. When he refused to comply with an FEC order seeking answers to questions about his appearances and the sale of his book, the agency asked the district court to enforce the order.

District Court Decision

In its November 12, 1991, judgment, the court concluded that the FEC's order complied with a three-pronged test for validity: the investigation was for a lawful purpose; the information sought was relevant; and the agency's demand was reasonable. The court therefore ordered Mr. Wright to answer the FEC's questions. In reaching its decision, the court considered but rejected Mr. Wright's arguments, which challenged the FEC's authority to investigate his activities.

(Mr. Wright also filed a motion asking the court to dismiss the lawsuit, arguing that, with the repeal of §441i in August 1991, the FEC lost jurisdiction to bring the action. On October 16, 1991, for the reasons discussed below, the court denied Mr. Wright's motion.)

Speech or Debate Clause
Former Speaker Wright relied on the speech or debate clause in the Constitution for several of his arguments. The clause states that "for any Speech or Debate in either House, they [Senators or Representatives] shall not be questioned in any other Place." Article I, Section 6.

Mr. Wright contended that the clause nullified the FEC's authority to seek answers to questions on activities that took place when he was a House Member. The court, however, found that the clause did not apply to the FEC's questions, which concerned activities that occurred "outside, and away from, the House" and which were "totally unrelated to anything done in the course of the legislative process...."

Mr. Wright also argued that the FEC violated the clause because, in deciding to pursue an investigation, the agency relied on "speech or debate" material, namely, a report prepared by an outside counsel at the request of the House Committee on Standards of Official Conduct when that body was investigating the sale of the Speaker's book. The court rejected the argument, pointing out that the report lacked any "speech or debate" content but merely contained findings related to the Speaker's financial affairs. Moreover, the court said that the relevant findings in the report (i.e., his alleged circumvention of the honoraria limit) were "independent of anything that occurred in any kind of House proceeding."

The former Speaker again invoked the speech or debate clause with respect to his testimony before the House Committee, arguing that the clause immunized him from having to answer the FEC's questions on the same matters. However, because he testified before the Committee "in his capacity as a witness and not in his legislative capacity," the court found no merit to this argument

Finally, he argued that the Constitution's self-discipline clause, when read with the speech or debate clause, effectively allocated to the House the sole authority to enforce violations of the honorarium limit by Members. The self-discipline clause states, in part: "Each House may determine the Rules of its Proceedings [and] punish its Members for disorderly Behavior...." Article I, Section 5. The court rejected this argument for two reasons. First, it "is tantamount to a contention that the relevant provisions of the Act are unconstitutional." Second, it "fails to recognize that the standards of conduct and rules of enforcement found in the Act are, indeed, self-disciplinary rules—the combined votes of the two Houses created the statutory provisions in question."

Repeal of §441i
In another line of argument, Mr. Wright claimed that the FEC no longer had authority to investigate or enforce §441i because of recent legislation: The Ethics Reform Act of 1989 (effective January 1, 1991), which prohibited House Members from accepting honoraria and amended §441i to remove House Members from its scope; and the repeal of §441i later that year, on August 14.

The court first noted that the Ethics Reform Act effectively repealed §441i insofar as it applied to House Members. The court went on to point out that, if Congress had intended to eliminate the FEC's authority to enforce §441i violations occurring before the repeal, the legislation would have expressed that intent. "Thus, to this day," the court stated, "§441i is deemed to be in full force and effect as to any conduct of Wright occurring before the date of its repeal."

Source: FEC *Record*, July 1992, p. 8.

FEC v. Wright, 777 F. Supp. 525 (D.C.N.D. Tex. 1991).

SIMON C. FIREMAN v. USA

In October 1999, the parties in this case signed a settlement agreement, which did not constitute an admission of liability on the part of either party.

The plaintiffs, Simon C. Fireman and Aqua-Leisure Industries, Inc. (Aqua-Leisure), brought this action to recover from the government illegal campaign contributions they had made to the Dole for President Committee, which had disgorged the illegal contributions to the U.S. Treasury.

In 1996, Mr. Fireman pleaded guilty to making contributions in the names of others and making excessive contributions to two 1996 Presidential campaign committees of former Senator Bob Dole. The U.S. District Court for the District of Massachusetts ordered him to pay a $1 million fine and sentenced him to one year of probation. Upon learning that the contributions were likely impermissible, Mr. Dole's primary and compliance committees disgorged $69,000 to the U.S. Treasury.

Mr. Fireman alleged that FEC regulations mandate that a contribution that does not appear impermissible at the time it is made, but later is found to be from a prohibited source, be refunded to the contributor within 30 days. 11 CFR 103.3(b)(2). He also alleged that Commission advisory opinions concluding that a campaign committee could also refund impermissible contributions to the U.S. Treasury are beyond the Commission's authority and contrary to its regulations.

On October 26, the USA agreed to settle the matter in full by paying Mr. Fireman $69,000. The payment fully discharges the USA of all claims and demands made by Mr. Fireman. The parties entered into the agreement solely for the purpose of settling this action and all disputes between the parties involved. The agreement should not be cited or otherwise referred to, in any proceeding, whether judicial or administrative.

Source: FEC *Record*, January 2000, p. 13

FIRST NATIONAL BANK OF BOSTON v. BELLOTTI

On April 28, 1978, the Supreme Court issued an opinion in *First National Bank of Boston v. Bellotti*.[1] The Court struck down a Massachusetts statute which severely restricted the participation of banks and corporations in state ballot measures.

Background

First National Bank of Boston and four other banks and corporations (hereafter referred to collectively as First National) wanted to make expenditures for advertisements criticizing a proposed constitutional amendment which authorized the state legislature to impose a graduated income tax on individuals. The proposal was to be submitted to voters in a referendum in November 1976.

A Massachusetts law (chapter 55, 8 of the Massachusetts General Laws) prohibited contributions or expenditures by any bank or corporation for the purpose of "influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any property, business or assets of the corporation." The law further specified that questions submitted to voters concerning the taxation of individuals did not materially affect the property, business or assets of the corporation.

Massachusetts Attorney General Francis X. Bellotti notified First National that the banks's expenditures would be illegal and that he intended to enforce 8 against it.

In April 1976 First National filed a suit challenging §8's constitutionality. The suit was subsequently submitted to the Supreme Judicial Court of the Commonwealth of Massachusetts. The plaintiffs claimed that the statute violated the First Amendment, the due process and equal protection clauses of the Fourteenth Amendment and similar provisions of the Massachusetts Constitution. They also claimed that §8, as it applied to their expenditures, was unconstitutional because the adoption of a graduated personal income tax would indeed materially affect their businesses in a number of specified ways.[2]

In September 1976 the Supreme Judicial Court of Massachusetts upheld the constitutionality of §8 and dismissed First National's claims. The decision was appealed to the United States Supreme Court.

The Federal Election Commission submitted an *amicus curiae* brief supporting the Massachusetts court's decision.

Supreme Court Decision

In ruling on *First National Bank v. Bellotti*, the Supreme Court first determined whether the case was moot. The

suit reached the Court in November 1977, by which time the referendum of November 1976 had already resulted in the defeat of the proposed constitutional amendment. The Court denied that, since the controversy surrounding 8 was likely to occur again (because the law remained in force in Massachusetts and because the proposed constitutional amendment authorizing the tax had already been presented as a referendum four times in that state), the case was not moot.

On the merits, the Massachusetts court had asked whether corporations had First Amendment rights. "Instead," the Supreme Court observed, the lower court should have asked "whether 8 abridge[d] expression that the First Amendment was meant to protect." The Supreme Court maintained that it did.

Referring to the proposed advertisements, the Supreme Court said, "It is the type of speech indispensable to decision-making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source."

The Supreme Court also faulted the lower court's ruling that corporations could only claim a right to free speech on the subject of a referendum if they demonstrated that they would be materially affected by it.

The Court said that freedom of expression for communications businesses had been protected because such protection was necessary to insure the free flow of information and ideas to the public.

The Court also struck down the law's proscription against corporate discussion of ballot questions concerning personal income taxes. The Justices held that "the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." The Court then considered whether the restrictions in 8 were nonetheless justified by a compelling state interest. Bellotti claimed that the restrictions on free speech by corporations were justified by the state's interest in: (1) "sustaining the active role of the individual citizen in the electoral process and thereby preventing diminution of the citizen's confidence in government" and (2) "protecting the rights of shareholders whose views differ from those expressed by management on behalf of the corporation."

The Court acknowledged that these interests were of the "highest importance," but it found that there was no evidence to corroborate such claims in this case.

Further, the Court maintained that "the risk of corruption perceived in cases involving candidate elections...simply is not present in a popular vote on a public issue."

As for the notion that the law's restrictions protected shareholders by preventing corporate expenditures to further views with which shareholders disagreed, the Court said this alleged purpose was belied by other facts. For example, in Massachusetts a corporation could legally lobby on behalf of its interests in the legislature even though the corporate viewpoint on any legislative question might differ from that of some of its shareholders. On the other hand, the law forbade the corporation from spending money to oppose or support a referendum, "even if its shareholders unanimously authorized the contribution or expenditure."

The Court deemed §8 to infringe on protected political speech without any compelling state interest supporting the regulation.

First National Bank of Boston v. Attorney General, 371 Mass. 773, 359 N.E.2d 1262 (Mass. 1977), *rev'd sub nom*, *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

[1] The other complainants in this suit were New England Merchants National Bank, The Gillette Company, Digital Equipment Corporation and Wyman-Gordon Company.

[2] With regard to contributions and expenditures made to influence the election of candidates, the Court observed: "Appellants do not challenge the constitutionality of laws prohibiting or limiting corporate contributions to political candidates or committees, or other means of influencing candidate elections.... The overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act [the forerunner of the Federal Election Campaign Act] was the problem of corruption of elected representatives through the creation of political debts.... The importance of the governmental interest in preventing this occurrence has never been doubted. The case before us presents no comparable problem, and our consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office. (Footnote 26)"

FREEDOM REPUBLICANS v. FEC

On April 7, 1992, the U.S. District Court for the District of Columbia remanded this case to the FEC, ordering the agency "with all deliberate speed...[to] begin rulemaking proceedings designed to consider the means through which the FEC will ensure compliance with Title VI of the Civil Rights Act...." Title VI bars racial discrimination in any program receiving federal funds.[1]

On January 18, 1994, finding that Freedom Republicans lacked standing to bring suit, the U.S. Court of Appeals for the District of Columbia vacated the judgment of the district court and remanded the case with instructions to dismiss. On October 3, 1994, the Supreme Court refused to review that decision, and on December 7, 1994, the case was dismissed by the district court. (Civil Action No. 92-0153 (CRR).)

Background

The plaintiffs in this case—The Freedom Republicans, Inc., and its President, Lugenia Gordon—alleged that the Republican Party's delegate selection process discriminated against African Americans in violation of Title VI. (Plaintiffs had made similar allegations in an administrative complaint, which FEC staff dismissed for lack of jurisdiction.) Claiming that the FEC was responsible for ensuring that the convention funding program complied with Title VI, plaintiffs asked the court to order the agency to conduct an investigation of the Republican Party's delegate selection procedures and to adopt Title VI regulations on delegate selection.

Plaintiffs additionally claimed that Title VI prohibited the FEC from providing any public funds to the Republican Party for its 1992 national convention because of the Party's alleged discriminatory delegate process. In moving for partial summary judgment, however, plaintiffs asked the court to consider only their request for a rulemaking.

The FEC asked the court to dismiss the case, arguing, among other things, that plaintiffs lacked standing to bring suit; that they had not exhausted administrative remedies; that Title VI did not apply to the public funding programs the FEC administers; and that the FEC did not have authority to issue delegate selection regulations under Title VI.

District Court Ruling

Finding that Title VI applies "to the FEC as well as to both major political parties and other recipients of federal funds," the court granted plaintiffs' motion for partial summary judgment and denied the FEC's motion to dismiss. The court held that the FEC was obligated to adopt rules that would ensure enforcement of Title VI in the delegate selection process.

Plaintiffs' Standing to Bring Suit

The agency argued that plaintiffs lacked standing to bring suit. (The FEC contended that the jurisdiction of the courts can be invoked only when an individual plaintiff has suffered actual injury and that plaintiff Gordon made no such allegation. The FEC similarly argued that Freedom Republicans failed to allege injury to its members sufficient to invoke the court's jurisdiction.)

The court, however, held that Freedom Republicans had standing to sue on behalf of its members because the organization satisfied the three criteria set forth in *Hunt v. Washington State Apple Advertising Commission*.[2] First, the individual members of the group could themselves have brought action under Title VI, which "entitles the Plaintiffs to a private right of action against the agency for dereliction of its enforcement duties." Second, the interests Freedom Republicans sought to protect were germane to its purpose, namely, "advancing the interests of African Americans through, and within, the Republican Party." And third, "the presence of individuals who have actually been denied delegate status on the basis of racial discrimination is not necessary" when an organization challenges an agency's interpretation of law, "such as the FEC's interpretation of the applicability of Title IV."

Administrative Remedies

The FEC also contended that the plaintiffs had failed to pursue an administrative remedy still open to them: to petition the agency to issue a rulemaking on Title IV. The court pointed out that the administrative complaint plaintiffs had filed with the agency "put the FEC on sufficient notice of Plaintiffs' desire for a rulemaking."

Application of Title IV

The FEC contended that Title IV[3] was not applicable to the public funding of national nominating conventions because of First Amendment concerns (i.e., government control over the selection of delegates to the party conventions). The court, however, said that there were numerous cases in which First Amendment rights were overridden "by the need to prevent state-sponsored discrimination."

The court rejected the FEC's argument that convention funding does not qualify as "federal financial assistance" because Title VI applies only to programs where funding is provided to a nonfederal entity, which then provides the assistance to the ultimate beneficiaries. In the court's view, convention funding meets this test because the funds "enable the party to provide a platform for other, ultimate beneficiaries, such as Republican candidates and party members."

Responding to the FEC's argument that Congress never intended for the agency to have any control over the internal workings of the parties, the court said that there

was nothing in the legislative history suggestive of Congress's desire to prevent the FEC from enforcing Title VI.

Court of Appeals Ruling

The U.S. Court of Appeals for the District of Columbia concluded that Freedom Republicans had no standing to bring suit against the Commission for the purpose of pressuring the Republican Party to change its delegate-selection rules. The court found that Freedom Republicans failed to meet two requirements for standing under Article III of the Constitution.

First, the organization failed to show that the allegedly discriminatory delegate-selection process was caused by the authorization of federal funding to the Republican convention. The court said that "the injury alleged in Freedom Republicans' complaint is not fairly traceable to any encouragement on the part of the government, but appears instead to be the result of decisions made by the Party without regard to funding implications." Second, Freedom Republicans failed to show that court action or action by the FEC would likely redress the injury. The court found no "adequate likelihood, as opposed to speculation, that the Party would choose to change its time-tested delegate-selection mechanism rather than forego the convention funding."

Accordingly, on January 18, 1994, the court vacated the judgment of the district court and remanded the case with instructions to dismiss.

Petition to Supreme Court; Dismissal

On October 3, 1994, the Supreme Court denied Freedom Republicans' petition for a writ of certiorari. The district court dismissed the case on December 7, 1994.

Source: FEC *Record*, June 1992, p. 7; March 1994, p. 3; and February 1995, p. 6.

Freedom Republicans, Inc. v. FEC, 788 F. Supp. 600 (D.D.C. 1992), *rev'd*, 13 F.3d 412 (D.C. Cir.), *cert. denied*, 115 S. Ct. 84 (1994).

[1] In response to the FEC's motion to amend judgment, and over the objection of plaintiffs, the court revised its order on May 4, 1992, to make clear that the order referred to a rulemaking governing the delegate selection process of federally funded national party conventions. The amended order also made clear that the court did not impose a deadline for the promulgation of the rules.

[2] 432 U.S. 333, 97 S.Ct. 2434 (1977).

[3] Title VI states: "Each Federal agency... which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract...is authorized and directed to effectuate the provisions of section 2000d of this title...by issuing rules, regulations or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance." 42 U.S.C. §2000d-1.

FRIENDS FOR HOUGHTON v. FEC

On September 13, 2001, Plaintiffs filed a complaint in the U.S. District Court for the Western District of New York. The complaint appeals a civil money penalty the Commission imposed on Friends for Houghton (the Committee) for failure to file the Committee's 2000 Pre-Primary Report.

According to the allegations in the complaint, Congressman Houghton was a candidate in the New York primary held September 12, 2000. As a result, his campaign committee was required to file a pre-primary report due August 31. On September 1, the Commission sent a notice to the Committee indicating that it may have failed to file its pre-primary report, and that it would have four business days from the date of the notice to file the report. Because of the Labor Day holiday, the fourth business day after September 1 was September 8. The Committee filed the report on that day.

Under the Commission's Administrative Fine program, election-sensitive reports—including pre-primary reports—are considered late if they are filed after their due date, but more than four days before an election. Committees filing later than that are considered nonfilers.

On October 17, 2000, the Commission found reason to believe that the Committee and its treasurer had violated 2 U.S.C. §434(a), which requires the timely filing of reports by political committees. Having filed its pre-primary report less than five days before the election, the committee was considered a nonfiler. The Commission assessed a civil money penalty in the amount of $9,000 in accordance with 11 CFR 111.43.

In its complaint, the Committee argues that the Commission should have considered it a late filer instead of a nonfiler, reducing its civil money penalty to $3,850.

The Committee asks that the court:

- Declare that the Commission's determination that the Committee and its treasurer violated 2 U.S.C. §434(a), and its assessment of a civil money penalty of $9,000, were arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law;
- Prevent the Commission from designating the Committee a nonfiler and from enforcing the civil money penalty of $9,000; and
- Order the Commission to modify both its determination that the Committee is a nonfiler and its assessment of the civil money penalty.

Source: FEC *Record*, December 2001, p. 2.

FROELICH v. FEC

The U.S. Court for the Eastern District of Virginia, Alexandria Division, dismissed this suit on May 27, 1994, ruling that Francis E. Froelich and two other plaintiffs, all residents of Virginia, lacked standing to bring suit.

On June 14, 1995, the U.S. Court of Appeals for the Fourth Circuit affirmed the district court's decision and found the appeal to be without merit.

In their suit, plaintiffs claimed that the Federal Election Campaign Act was unconstitutional to the extent that it allowed House and Senate candidates to accept out-of-state contributions. They argued that such contributions to the announced U.S. Senate candidates from Virginia (also named in the suit) allowed non-Virginians to participate in the process of electing a Senator and diluted the value of the plaintiffs' participation. They further claimed that nonresident contributions created the appearance that an elected Senator is answerable to nonresident contributors. These alleged consequences of nonresident contributions, they argued, violated the 17th Amendment's guarantee that two Senators from each state shall be "elected by the people thereof."

The district court, however, ruled that plaintiffs' claims were too general, lacking the factual specificity necessary to establish standing for judicial review. The court said that the "abstract question of wide significance" and "general grievances" presented by the plaintiffs were more properly addressed by Congress. The court commented that if it were to uphold plaintiffs' claims, it would be "making legislative policy" and consequently "improperly interfering" with the legislative branch. The court of appeals affirmed the district court's decision.

Source: FEC *Record*, August 1994, p. 9; and August 1995, p. 5.

Froelich v. FEC, 855 F. Supp. 868 (E.D. Va. 1994); No. 94-1777 (4th Cir. May 27, 1994).

FULANI v. FEC (94-1593)

On February 9, 1995, the U.S. Court of Appeals for the District of Columbia dismissed this case.

Dr. Fulani and her principal campaign committee for the 1994 Presidential race had asked the court to review an FEC decision to conduct an investigation into the campaign's finances pursuant to the public funding statute. 26 U.S.C. §9039(b).

The court dismissed the case because the action in question was not a final agency action and was therefore not subject to judicial review under 26 U.S.C. §9041(a), as previously construed by the court.

Source: FEC *Record*, October 1994, p. 9; and April 1995, p. 6.

Fulani v. FEC, No. 94-1593 (D.C. Cir. Feb. 9, 1995).

FULANI v. FEC (94-4461)

On April 12, 1995, the U.S. District Court for the Southern District of New York dismissed this case as moot.

Plaintiffs had sought to restrain the FEC from taking any action in an enforcement matter because the administrative complaint that originated the case included unsworn attachments.

When the complainant filed a sworn statement verifying the attachments, plaintiffs' arguments were rendered moot.

Source: FEC *Record*, August 1994, p. 11; and June 1995, p. 12.

Fulani v. FEC, No. 94-4461 (S.D.N.Y. Apr. 12, 1995).

FULANI v. FEC (97-1466)

On June 23, 1998, the U.S. Court of Appeals for the District of Columbia Circuit denied a petition from Dr. Lenora B. Fulani and the Lenora B. Fulani for President Committee to review the FEC's final repayment determination for the committee's financial transactions during the 1992 Presidential campaign. The FEC had determined that Dr. Fulani and her committee had to repay the U.S. Treasury $117,269 in public matching funds.

Dr. Fulani received about $2 million for the 1992 campaign, under the Presidential Primary Matching Payment Account Act. Under the Matching Payment Act, eligible candidates can use matching funds only for qualified campaign expenses. Committees that receive such funds are also subject to an audit by the FEC and the requirement to make repayments to the U.S. Treasury if the audit reveals that they made nonqualified campaign expenses or received payments in excess of their entitlement. Commission regulations allow a candidate to contest the initial repayment determination by submitting written materials and by requesting an oral hearing before the Commission issues a final repayment determination. The regulations further state that, if the candidate does not contest an initial repayment determination, it becomes final 30 days after a candidate is served written notice of the determination.

Dr. Fulani did not contest the Commission's initial repayment determination, which concluded that Dr. Fulani owed the Treasury $1,394. Dr. Fulani had already repaid this amount. The Commission, however, held its final determination in abeyance after a former Fulani campaign worker came forward to challenge the accuracy of some of the documentation on which the FEC had based its initial repayment determination. The FEC continued to investigate—though hampered by a lack of cooperation from committee staff and vendors—and issued a second initial repayment determination, this time, in the amount of $612,557. Dr. Fulani contested this determination, and, in its final repayment determination, the Commission reduced the amount to $117,269. Dr. Fulani asked for a rehearing, which was denied by the Commission, and then brought the matter before the appellate court. Dr. Fulani challenged the FEC's authority to issue a second repayment determination and, in the alternative, argued that the Commission's findings that she and her committee owed $18,768 in nonqualified disbursements to a vendor and $73,750 in unsubstantiated payments to individuals by check were unreasonable.

Dr. Fulani and the committee first argued that the Matching Payment Act contemplates only one repayment determination and that the FEC had no authority to make a second one in their case. Commission regulations, however, allow additional repayment determinations after a final determination has been made "where there exist facts not used as the basis for a previous final determination." 11 CFR 9038.2(f). The court agreed with the Commission that the statute is silent on this matter and the agency's regulation is a reasonable construction of the Act.

Dr. Fulani also argued that the FEC had no authority to hold its first repayment determination in abeyance because the determination became final when Dr. Fulani did not object to it within the designated 30-day period. The court agreed with the Commission that it makes no difference whether the first initial repayment determination had become final or had been suspended because the FEC's own regulation explicitly authorizes it to make additional repayment determinations on the basis of new facts.

Dr. Fulani also argued that, even if the Commission is authorized to make a second repayment determination, it did not issue that determination within the three-year period the statute requires. Although the Commission, in fact, did issue the second initial determination just before the three-year period ended, Dr. Fulani stated that the determination figure ($612,557) was drawn up just to meet the deadline and was not the product of a thorough examination and audit. But the court found that the obstacles the Commission encountered in investigating the committee understandably led it to draw all inferences against the committee. "When a candidate seeks to frustrate and delay a government investigation, it can hardly be heard to complain that the product is insufficiently thorough," the court stated.

The court also affirmed the Commission's determination on the merits and its denial of Dr. Fulani's petition for a rehearing. In regard to the payments to the vendor, the court stated that Dr. Fulani failed to offer a timely explanation of the payments. In regard to the Fulani committee's payments by check to individuals, the court deferred to the Commission's construction of its own regulations even when it found that the "FEC's reading of its regulation admittedly is not obvious."

Source: FEC *Record*, August 1998, p. 6.

Fulani v. FEC, 147 F.3d 924 (D.C. Cir. June 23, 1998).

FUND FOR A CONSERVATIVE MAJORITY v. FEC (80-1609)

On October 19, 1983, the U.S. District Court for the District of Columbia issued an order denying the Fund for a Conservative Majority's (FCM's) petition for further relief in a consolidated suit originally decided by the court in September 1980. *(Common Cause v. Harrison Schmitt [FEC Intervenor]*; *FEC v. Americans for Change*;[1] Civil Action Nos. 80-1609 and 80-1754.) The court also denied a motion filed by the National Congressional Club (NCC) and the National Conservative Political Action Committee (NCPAC) to intervene in FCM's petition and dismissed the petition with prejudice.

In *FEC v. NCPAC and FCM*[2] the U.S. District Court for the Eastern District of Pennsylvania on December 12, 1983, refused to allow the FEC to implement 26 U.S.C. §9012(f). (Civil Action No. 83-2823.) The Federal Election Commission filed an appeal with the Supreme Court on December 16.

Background

In its September 1980 ruling, the U.S. District Court for the District of Columbia held that Section 9012(f) was unconstitutional as applied to Americans for Change, Americans for an Effective Presidency and FCM, three multicandidate political committees (not affiliated with any parent organization). They had planned to make expenditures in excess of $1,000 to support the Republican Presidential nominee's general election campaign.

On January 19, 1982, the Supreme Court voted 4 to 4 to affirm the D.C. district court's September decision, with Justice Sandra Day O'Connor not participating. However, since the high Court's vote on the suit had been equally divided, its affirmance had no precedential value. Subsequently, the FEC issued advisory opinions to NCPAC and FCM in which the FEC stated that Section 9012(f) may be enforced.[3]

District Court's Ruling

On June 16, 1983, FCM filed a petition with the D.C. district court. (Civil Action No. CA 80-1609) Citing the D.C. district court's 1980 ruling in the first suit, FCM asked the court to:

- Order the FEC to dismiss its suit against NCPAC and FCM in the Pennsylvania district court;
- Prohibit the FEC from filing suits in state and federal courts which seek to enforce or to construe Section 9012(f)(1);
- Direct the FEC to withdraw an advisory opinion (AO 1983-11) issued to FCM on May 18, 1983, which stated that FCM would be subject to the $1,000 spending limit imposed by Section 9012(f)(1) should FCM make expenditures on behalf of the publicly funded Republican Presidential nominee in 1984; and
- Direct the FEC to issue an alternative advisory opinion to FCM stating that FCM's proposed expenditures would not be subject to Section 9012(f)(1).

In dismissing FCM's petition, the D.C. district court judges found no merit to FCM's contention that the FEC could not file suit in the Pennsylvania district court because the issues raised by the suit had already been resolved by the D.C. district court's ruling in 1980.[4] The D.C. district court found, to the contrary, that the FEC's second suit raised new issues. "The controversy in the original suit decided by the [D.C. district] court stemmed from FCM's planned expenditures for then-Presidential hopeful Reagan's 1980 campaign, not from planned expenditures by other parties [i.e., NCPAC], and not from FCM's planned expenditures for the 1984 presidential election." The court also cited legal precedent which permitted federal agencies "to relitigate substantially legal issues raised by different transactions or events, after adverse decisions elsewhere." *Western Oil and Gas Association v. Environmental Protection Agency*, 633 F.2d 803, 808.

Furthermore, the D.C. district court found that, in filing its second suit with the Pennsylvania district court, the FEC had not intended to undermine the D.C. district court's ruling in the first suit. The court conceded that the "constitutional issues remained unsettled" as a result of the high Court's evenly divided decision.

Since the high Court has not yet resolved the constitutionality of Section 9012(f), the D.C. district court asserted that, as the federal agency charged with enforcing the provision, the "FEC must legitimately be permitted to retry the legal issue of section 9012(f)'s constitutionality" until "it is finally settled by the Supreme Court." The district court maintained that Congress had placed a special importance "on FEC participation in actions construing the Fund Act, and on quick Supreme Court review."

The D.C. district court also found that FCM had provided no evidence to indicate that the FEC's second suit had caused it "unwarranted inconvenience or harm." Moreover, the D.C. district court held that in attempting to enjoin the FEC from seeking a resolution of Section 9012(f)'s constitutionality in the Pennsylvania district court, FCM should directly petition the Pennsylvania district court.

Source: FEC *Record*, January 1984, p. 8.

[1] See *FEC v. Americans for Change*.

[2] See *FEC v. National Conservative Political Action Committee and Fund for a Conservative Majority*.

[3] For a summary of AO's 1983-10 and 1983-11, see p. 2 of the July 1983 *Record*.

[4] Under the doctrine of collateral estoppel, when an issue of ultimate fact has been determined by a valid judgment, that issue cannot be relitigated between the same parties.

FUND FOR A CONSERVATIVE MAJORITY v. FEC (84-1342)

On February 26, 1985, the U.S. District Court for the District of Columbia granted summary judgment to the FEC in *Fund for a Conservative Majority v. FEC*. (Civil Action No. 84-1342.) The court held that the Commission was justified in refusing to disclose documents pertaining to the agency's audit and review procedures, which FCM sought under the Freedom of Information Act (FOIA). (FCM is a nonconnected political committee, which the FEC had proposed to audit based on the Commission's review of FCM's reports and its determination that FCM had not met the agency's requirements for substantial compliance with the law's reporting provisions.)

In its suit, FCM challenged the FEC's refusal to disclose documents setting forth the agency's threshold requirements for auditing committees, as well as FEC staff recommendations detailing FCM's failure to meet them. In upholding the FEC's action, the court noted that the agency had justifiably withheld information exempt under section 552(b)(2) of the FOIA. Under this provision, "matters that are...related solely to internal personnel rules and practices" may be exempted from disclosure. The FEC's action met the standards for applying this exemption, which were set forth in *Crooker v. Bureau of Alcohol, Tobacco and Firearms,* (670 F.2d 1051, D.C. Cir. 1981). First, the undisclosed information was "predominantly internal," and did not constitute "secret law." In this regard, the court noted "the Commission's threshold requirements are not secret law because they made 'no attempt to modify or regulate public behavior—only to observe it for illegal activity.'" Id. at 1075. "The information at issue here is simply used to review Commission reports for substantial compliance with [the reporting] rules" published in the U.S. Code and accompanying regulations. "The plaintiff's argument that it is 'in the dark' as to how to pass that review is especially weak in light of the many letters it has received from the Commission, advising and pointing out apparent reporting inconsistencies and irregularities."

Under the second standard for applying the exemption for internal practices, the disclosed information must "significantly risk circumvention of agency regulations and statutes." (See *Crooker* at 1074.) In this instance, the court agreed with the Commission that disclosure of the threshold requirements "would enable unscrupulous

political committees to tailor their reports to avoid being audited, and ignore statutory reporting requirements that are not central to the internal review procedures."

The FEC had also invoked section 552(b)(7)(E) of the FOIA to justify withholding portions of agency documents pertaining to the compliance thresholds FCM had failed to meet. This provision exempts " 'investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would...disclose investigative techniques.'" The court found that the information withheld by the FEC met the requirements of this exemption, specifically, the information: (1) constituted an " 'investigative record'" and (2) had been " 'compiled for law enforcement purposes.'" *Pratt v. Webster*, 673 F.2d 408, 413 (D.C. Cir. 1982). The court pointed out that the federal election law specifically requires the Commission to review Committee reports.

Source: FEC *Record*, June 1985, p. 3.

Fund for a Conservative Majority v. FEC, No. 84-1342 (D.D.C. February 26, 1985).

GALLIANO v. UNITED STATES POSTAL SERVICE

On January 8, 1988, the U.S. Court of Appeals for the District of Columbia Circuit issued an opinion in *Ralph J. Galliano v. U.S. Postal Service*, which reversed a decision by the U.S. District Court for the District of Columbia dismissing the plaintiff's suit. The appeals court found that specific provisions of the Federal Election Campaign Act (FECA) control, in part, the application of 39 U.S.C. §3005 to political solicitations named in the plaintiff's suit. The appeals court therefore returned the case to the district court with instructions for the court to remand it to the U.S. Postal Service. In light of the appeals court opinion, the Postal Service must reconsider its decision concerning the political solicitations named in the case.

Background

During 1983 and 1984 the Congressional Majority Committee (CMC), a multicandidate political committee, mailed out letters soliciting contributions to CMC's independent expenditure project, Americans for Phil Gramm in '84 (APG), supporting then-Congressman Gramm's candidacy for the U.S. Senate. The disclaimer notices in the first mailing failed to state that the solicitation was not authorized by any candidate.

In subsequent solicitation mailings, however, CMC did include such a disclaimer.

Alarmed that the APG solicitations were potentially misleading contributors and diverting funds away from his own authorized campaign committee, Congressman Gramm, a Republican from Texas, filed a complaint with the FEC against CMC, alleging that CMC had violated the election law by:

- Using Gramm's name in the title of its independent expenditure project (2 U.S.C. §432(e)(4)); and
- Failing to clearly state in its solicitations that CMC had not been authorized by Congressman Gramm (2 U.S.C. §441d(a)(3)).

The Commission found probable cause to believe that CMC had violated the election law by failing to include a disclaimer notice in its first solicitation mailings. The Commission was evenly divided, however, on the issue of whether CMC had violated the law by including Congressman Gramm's name in the title of its independent expenditure project. In July 1985 the Commission entered into a conciliation agreement with CMC and closed the file on the case.

After filing his complaint with the FEC, Congressman Gramm took two other steps: He filed a suit with the District Court for the Eastern District of Virginia and a complaint with the U.S. Postal Service.

In the suit he filed with the Virginia district court,[1] Gramm claimed that CMC's use of his name in the title of the independent expenditure project had violated a Virginia law against unauthorized use of a person's name. Nevertheless, the district court denied Congressman Gramm's request for injunctive relief, stating that "the Federal Election [Campaign] Act arguably provides the exclusive remedy for the plaintiff's allegation.... "

In the complaint he filed with the U.S. Postal Service, Congressman Gramm asserted that CMC's solicitations contained false representations and thus violated 39 U.S.C. §3005, a provision governing postal fraud outside the purview of the FECA.

The Postal Service found, among other things, that the committee's solicitation mailings implicitly made the false representation that Americans for Phil Gramm in '84 was authorized to collect funds for Congressman Gramm's campaign, and that the funds would be spent by Gramm's authorized committee. The Postal Service further concluded that the disclaimer notice required by the election law (Section 441d(a)(3)) did not adequately inform the recipients that the solicitation was not authorized by Congressman Gramm.

District Court Ruling

On August 7, 1985, Ralph J. Galliano, chairman of CMC, along with CMC and APG (hereafter collectively referred to as APG), contested the Postal Service's decision in the U.S. District Court for the District of Columbia. The district court affirmed the Postal Service's decision and dismissed APG's suit.

On November 13, 1986, Mr. Galliano appealed the district court decision. At the request of the U.S Court of Appeals for the District of Columbia Circuit, the FEC filed a friend of the court brief, which addressed the issue of whether specific provisions of the FECA would displace the application of 39 U.S.C. §3005 to the political solicitations named in the suit.

FEC's Amicus Brief

In its brief the FEC noted that Congress had enacted two provisions of the election law "to ensure the public is informed of the true source of political solicitations and whether they are authorized by a candidate." First, Section 432(e)(4) requires committees authorized by candidates to adopt a name which includes the candidate's name; it requires unauthorized committees to adopt a name which does not contain the name of any candidate. Second, Section 441d(a)(3) requires that fundraising solicitations by unauthorized committees state clearly the committee's name and "that the communication is not authorized by any candidate or candidate's committee."

Further, the FEC argued, since Congress had granted the agency exclusive jurisdiction over provisions of the law, "matters covered by the Act must be brought before the Commission in the first instance even if another statute might otherwise arguably be applicable."

The FEC went on to note that "the courts have long recognized that tension between a statute of general application and a statute specifically addressed to a particular subject must be resolved in favor of the specific statute." The Commission therefore argued that, while Section 3005 may be applied generally to protect the public from "fraudulent political fundraising schemes," this provision cannot be applied "in a manner that overrides the exclusive jurisdiction of the Commission to deal with those matters Congress has specifically resolved in the FECA." Thus, the Commission concluded that "the Postal Service's decision should be reversed only to the extent that it interferes with the exclusive jurisdiction of the Commission and specific provisions of the FECA."

Appeals Court Ruling

Reversing the district court ruling, the appeals court held "that the FEC is the exclusive administrative arbiter of questions concerning the name identifications and disclaimers of organizations soliciting political contributions. As to representations not specifically regulated by FECA, however,... nothing in or about the Act limits the 39 U.S.C. §3005 enforcement authority of the Postal Service."

The court held that the FECA's disclaimer requirements for political solicitations maintained a proper balance between protection of First Amendment rights of free speech and the public's right to be protected from fraudulent solicitations. The court said that "a fine balance of interests was deliberately struck by Congress in the name and disclaimer requirements of FECA...We believe they were meant to provide a safe haven to candidates and political organizations with respect to those organizations' names and sponsorship. If FECA requirements are met, then as we comprehend that legislation, no further constraints on names and disclaimers may be imposed by other governmental authorities."

The court concluded, however, that solicitations for political contributions were not "entirely immune from Postal Service scrutiny under Section 3005. Apart from the name of a political organization and the presence or absence of sponsorship disclaimer, much may appear in

a solicitation for political contributions that could materially deceive readers and thereby constitute a false representation under 3005."

Source: FEC *Record*, January 1988, p. 7; and March 1988, p. 9.

Galliano v. United States Postal Service, 836 F.2d 1362 (D.C. Cir. 1988).

[1] See *Friends of Phil Gramm v. Americans for Phil Gramm in '84*, 587 F. Supp. 767 (E.D. Va. 1986).

GELMAN v. FEC (80-1646)

On July 22, 1980, the U.S. Court of Appeals for the District of Columbia Circuit issued an opinion affirming the FEC's determination that Lyndon H. LaRouche had failed to reestablish his eligibility for primary matching funds in the Democratic Presidential primary held in Michigan on May 20, 1980. In its May 28, 1980, ruling, the Commission found that Mr. LaRouche had failed to receive at least 20 percent of all votes cast for Democratic contenders in the Presidential primary, the minimal amount necessary to reestablish eligibility.

Felice M. Gelman and Citizens for LaRouche, Inc. had filed a petition on June 11, 1980, contending that the Commission should have applied the definition of "candidate" provided by 26 U.S.C. §9033(2) in determining whether Mr. LaRouche had reestablished his eligibility for primary matching funds. That provision stipulates that, for purposes of establishing initial eligibility for primary matching funds, a Presidential primary candidate must be "actively conducting campaigns in more than one State." In calculating total votes in the Michigan Democratic primary, Mr. LaRouche argued, this definition of "candidate" would have excluded votes cast for a candidate who had ceased to campaign actively in more than one state and votes cast for "uncommitted" delegates (i.e., those not pledged to any specific candidate). The FEC argued that the provisions of 26 U.S.C. §9033(c)(4)(B) required the Commission to count total votes cast for all Presidential primary candidates in a particular primary including all votes cast for inactive or write-in candidates or "uncommitted" delegates.

In upholding the FEC's method of determining Mr. LaRouche's reeligibility for primary matching funds, the court maintained "...petitioners' narrow focus on the word 'candidate', to the exclusion of the phrase within which that word appears, results in a strained and artificial construction that is at odds with the Act's underlying concern that federal matching funds should go only to those candidates who have demonstrated at least minimal public support for their candidacies."

Source: FEC *Record*, September 1980, p. 8.

Gelman v. FEC, 631 F.2d 939 (D.C. Cir.), *cert. denied*, 449 U.S. 876 (1980).

GELMAN v. FEC (80-2471)

On March 11, 1981, the U.S. District Court for the District of Columbia denied plaintiffs' motion to find the FEC in contempt of court for failing to obey the court's October 24, 1980, order in the suit, *Felice M. Gelman and Citizens for LaRouche v. FEC* (Civil Action No. 80-2471). In that order, the court ruled that, although the Commission had undertaken an investigation pursuant to 26 U.S.C. §9039(b), the FEC had to notify the Citizens for LaRouche Committee of any investigations conducted of contributors to Mr. LaRouche's 1980 primary campaign, pursuant to 2 U.S.C. §437g(a)(2). Pursuant to the court's order, the FEC undertook no further investigations into the Committee's affairs.

In denying plaintiffs' motion, the court noted that the investigation cited by the LaRouche Committee in its contempt of court motion referred to a separate investigation the Commission had undertaken in March 1981, pursuant to 2 U.S.C. §437g(a)(2). That investigation resulted from the Audit Division's identifying a matching fund contribution that the LaRouche Committee may have submitted with false documentation. The court observed that the FEC had afforded plaintiffs the required notice before proceeding with this investigation.

Source: FEC *Record*, May 1981, p. 7.

Gelman v. FEC, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶9139 (D.D.C. 1980).

GLENN PRESIDENTIAL COMMITTEE v. FEC

On June 23, 1987, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the FEC's final repayment determination of May 15, 1986, with respect to the John Glenn Presidential Committee, Inc. (the Committee), the principal campaign committee for Senator Glenn's publicly funded 1984 Presidential primary campaign (Civil Action No. 86-1348.)

Background

The Committee had asked the appeals court to review the repayment determination, which found that the Committee had made nonqualified campaign expenses (amounting to $248,004.62) as a result of exceeding its spending limits for the Iowa and New Hampshire primaries, and which required the Committee to repay $74,955.62 to the U.S. Treasury.[1]

The Committee had asserted that the state expenditure limits in 2 U.S.C. §441a(b)(1)(A) were unconstitutional. The Committee had also contested the FEC's determination in three specific areas, involving the FEC's allocation of the Committee's expenditures for telephone calls, public opinion polls, and buttons and bumper stickers.

Appeals Court Ruling

The court found no constitutional infirmity in the FEC's actions taken under 26 U.S.C §9038(b)(2), the provision of the President Primary Matching Payment Account Act which authorizes the recoupment of federal funds. The court noted that 26 U.S.C. §9038(b) allows the recoupment of public monies only.

Regarding the FEC's application of its regulations concerning the allocation of expenditures in three specific areas, the court found that the FEC ruled rationally and had not abused its authority.

Source: FEC *Record*, September 1987, p. 6.

John Glenn Presidential Committee, Inc. v. FEC, 822 F.2d 1097 (D.C. Cir. 1987).

[1] The public funding statutes require Presidential primary candidates to repay the U.S. Treasury for nonqualified campaign expenses (26 U.S.C. §9038(b)(2)). Under the statute, spending in excess of the state-by-state spending limits is considered one type of nonqualified expense. When a campaign incurs nonqualified expenses, the campaign must repay that portion of the nonqualified expenses which represents public matching funds.

GOLAND v. UNITED STATES
UNITED STATES v. GOLAND

On May 21, 1990, the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's decision to dismiss the suit and to deny appellant's motion to certify constitutional challenges to the Federal Election Campaign Act. (Civil Action No. 89-55422.) Appellant Michael R. Goland had claimed that the First Amendment guaranteed his right to make unlimited anonymous contributions to candidates.

Background (U.S. v. Goland)

On December 14, 1988, a federal grand jury in Los Angeles indicted Mr. Goland for violations of the Federal Election Campaign Act and criminal statutes stemming from his activities during the 1986 Senatorial election in California. According to the indictments, he advanced $120,000 to a media company to produce advertisements for Ed Vallen, a third-party candidate for the Senate seat. Mr. Goland actually wanted Democratic Senator Alan Cranston to win the election and financed the last-minute Vallen effort in order to divert votes from the Republican candidate, Ed Zschau. Mr. Goland tried to conceal his identity as the donor of the $120,000 contribution by funneling the money through 56 persons, who were later reimbursed by Mr. Goland. The Vallen campaign, uninformed of the true source of the contribution, reported the money as contributions from the 56 individuals.

The federal grand jury indicted Mr. Goland on criminal violations, charging that he had knowingly and willfully caused the treasurer of the Vallen campaign to make false statements to the FEC for the purpose of concealing his $120,000 contribution. 18 U.S.C. §§371 and 1001. Additionally, Mr. Goland was charged with violating the Federal Election Campaign Act (the Act) by exceeding the $1,000 contribution limit and by making a contribution in the name of another. 2 U.S.C. §§441a and 441f.

District Court Decision

On March 13, 1989, after the December 1988 criminal indictment, Mr. Goland filed civil suit in the U.S. District Court for the Central District of California. (Civil Action No. 89-1480.) Pursuant to 2 U.S.C. §437h, he sought immediate certification by the district judge of three constitutional challenges to the Act, as applied. He claimed that the Act's contribution limits and disclosure provisions violated his constitutional rights. He further claimed that the First Amendment protected his right to make unlimited anonymous contributions to a third-party candidate. Mr. Goland also sought a stay of the pending criminal proceeding. On May 1, 1989, the court dismissed the suit with prejudice, finding that the Supreme Court had already addressed appellant's constitutional questions in *Buckley v. Valeo*. Concluding that the constitutional claims were frivolous under *Buckley*, the court denied plaintiff's motion for certification and stay. Mr. Goland immediately filed an appeal.

Appeals Court Decision

On May 11, 1989, the appeals court denied his motion for a stay of the criminal trial but agreed to review the district court's dismissal of the constitutional questions. In its opinion of May 21, 1990, the court affirmed the district court's judgment, denying appellant's constitutional challenges and dismissing the suit.

The appeals court first considered whether Mr. Goland had standing to bring a constitutional challenge. The court found that "Goland satisfies the traditional standing criteria: he has alleged an actual or threatened injury; that injury was caused by the challenged act; and that injury is apt to be redressed by a favorable decision." The court observed that "[a] successful constitutional challenge to FECA provisions would give at least partial redress to Goland."

The appeals court ruled that the district court was acting within its discretion by dismissing the suit once it found the constitutional issues were frivolous. A complaint is frivolous when none of the legal points are arguable on their merits. In this case, the issues raised by Mr. Goland had already been resolved by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976).

Appellant argued that *Buckley* did not resolve the issues he raised. He claimed that the reasoning the Supreme Court applied in upholding the contribution limits—to prevent *quid pro quo* corruption or the appearance of corruption—did not apply to his claim. There was no opportunity for exacting a *quid pro quo* deal since he sought to keep his identity secret. Further, because the candidate (Vallen) had no chance of winning the election, he would not be in a position to exchange official favors for money.

The court rejected this argument, pointing out that there is no assurance that a donor's identity will remain secret forever and, even if there were, the Act's disclosure provisions prohibit anonymous contributions exceeding $50. (See 2 U.S.C. §432(c)(2).) Moreover, *Buckley* upheld the application of contribution limits to minor party candidates as well as to candidates likely to win. *Id.* at 30-31.

Appellant Goland also argued that the Act's disclosure requirements as they relate to anonymous contributions to a third-party candidate were unconstitutional on their face and as applied to him. He based his claim on the historic constitutional protection given to anonymous political speech, citing several Supreme Court cases.

The court found that Mr. Goland could not avail himself of this protection. The Supreme Court in *Buckley* carefully considered the danger posed by compelled disclosure but held that state interests justified the indirect burden imposed by the Act's disclosure requirements on First Amendment interests. The appeals court concluded: "the [Supreme] Court carved out a narrow exception to the line of cases Goland relies on, and that exception encompasses Goland's activities."

In response to appellant's emphasis on the minor party status of the recipient candidate, the court stated that the *Buckley* Court provided an exception to the disclosure provisions for those parties that could show a "reasonable probability" that disclosure would subject their contributors to "threats, harassment, or reprisals." *Id.* at 74. The appeals court noted that appellant Goland "[did] not even attempt to make such a showing." The court also observed that Mr. Goland "was not promoting a reviled cause or candidate."

Finally, Mr. Goland argued that the substantial state interests that the *Buckley* Court found to justify the disclosure requirements did not apply to anonymous contributions made to a candidate with whom the donor disagrees.

The appeals court found no merit in this argument, observing that one purpose behind the disclosure provisions is "to keep the electorate fully informed of the sources of campaign funding....There is valuable information to be gained by knowing that Vallen took $120,000 from a Cranston supporter." Another purpose behind the Act's disclosure provisions is "to gather the data necessary to detect violations of the contribution limits." The court said that if Goland's position were adopted, one could avoid the contribution limits simply by making an anonymous contribution.

Source: FEC *Record*, August 1990, p. 9.

Goland v. United States, 903 F.2d 1247 (9th Cir. 1990).

[1] The first criminal trial, which concluded on July 10, 1989, resulted in a mistrial because of a hung jury. On September 19, 1989, a federal grand jury returned a superseding indictment charging additional violations of the Act's contribution limits and of criminal statutes. The second trial ended on May 3, 1990. Mr. Goland was convicted on one misdemeanor count of making an excessive contribution. He was acquitted on four other counts of conspiracy and making false statements. The jury deadlocked on one felony count of making false statements. On July 16, 1990, Mr. Goland received a federal prison sentence of 90 days on the one conviction (excessive contribution).

GOTTLIEB v. FEC

On May 8, 1997, the U.S. District Court for the District of Columbia granted the FEC's motion to dismiss this case in which Alan Gottlieb and others had asked the court to order the FEC to take action on an administrative complaint that the Commission had voted to dismiss.

On May 22, 1998, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the lower court ruling that dismissed this case for lack of standing. The appeals court rejected the arguments the appellants had presented in an effort to bring suit against the FEC after the agency had dismissed their administrative complaint.

Background

Alan Gottlieb, together with several other voters and organizations, had filed an administrative complaint with the FEC in March 1995 alleging that President Clinton's 1992 campaign received $1.4 million in excess entitlement allowed under the Presidential Primary Matching Payment Account Act. According to the complaint, the excess entitlement occurred because, following President Clinton's nomination, his campaign transferred $1.4 million in private primary contributions to his General Election Legal and Accounting Compliance Fund (GELAC Fund) instead of using the funds to pay his primary debts. According to appellants, the transfer violated 11 CFR 9003.3(a)(1), as it was written at the time of the alleged violation, because the regulation permitted transfers of funds only in excess of amounts needed to pay primary debts.

The Commission dismissed the administrative complaint after deadlocking in a 3-3 vote. Mr. Gottlieb then filed suit, asking the district court to find that the FEC's actions had been contrary to law.

District Court Ruling

The district court found that the appellants did not have standing (under Article III of the U.S. Constitution) to pursue their claims in court because they had not been harmed by the Commission's decision.

Appeals Court Ruling

In affirming the lower court, the appellate court called Mr. Gottlieb's claims of injury "speculative" and "amorphous."

Source: FEC *Record*, July 1997, p. 5; July 1998, p. 4.

Gottlieb v. FEC, 143 F.3d 618 (D.C. Cir. May 22, 1998).

GRAHAM v. FEC

On September 14, 2001, Plaintiffs filed a complaint in the U.S. District Court for the Eastern District of Arkansas, Western Division. The complaint appeals a civil money penalty the Commission imposed on the Dewayne Graham for Congress Committee (the Committee) and Everett Martindale, as the Committee's treasurer, for failure to file the Committee's 2000 October Quarterly Report. According to the allegations of the complaint, the Committee attempted to file a termination report in July of 2000, but the Commission did not act on the termination report until November 2000.

In August 2001, the Commission found reason to believe that the Committee and Mr. Martindale had violated 2 U.S.C. §434(a), which requires the timely filing of reports by political committees, by not filing an October 2000 Quarterly Report. The Commission assessed a civil penalty in the amount of $900 in accordance with 11 CFR 111.43.

Plaintiffs claim that the Commission failed to act on the Committee's termination request in a timely fashion and has taken an "arbitrary and unconscionable position" in assessing the civil penalty, thus violating the plaintiffs' constitutional rights. Plaintiffs ask the court to exempt them from the Commission's rulings and fines based upon the plaintiffs' extenuating circumstances.

Source: FEC *Record*, December 2001, p. 3.

GRAMM v. FEC

During October 1985, the U.S. District Court for the Northern District of Texas, Dallas Division, issued two rulings concerning an FEC audit of the Friends of Phil Gramm, the principal campaign committee for Texas Senator Phil Gramm's 1984 Senate campaign. On October 18, the court granted the FEC's motion to dismiss *Friends of Phil Gramm v. FEC*, a suit filed by the Gramm Committee challenging the audit. (Civil Action No. CA3-85-1164-7.) On October 31, the court determined that the Committee must comply with the FEC's audit. (*FEC v. Friends of Phil Gramm*; Civil Action No. CA3-1507-7.)

Background

In papers filed with the court, Friends of Phil Gramm (the Committee) alleged that, based on a complaint filed against the Committee and on information gathered through internal procedures, in March 1985 the Commission found "reason to believe" that the Committee had violated several provisions of the Federal Election Campaign Act (the Act). The agency then authorized an audit of the Committee to investigate whether the alleged violations had occurred. (The "reason to believe" finding is a statutory prerequisite to an investigation into possible violations.)

On June 19, 1985, the Gramm Committee filed a suit in the Northern District of Texas to enjoin the FEC from auditing the Committee. The Committee claimed that the Commission had to begin the audit within the time frame established under Section 438(b) of the Act. The Commission argued that Section 438(b) (including its time limits) was not applicable to the Gramm audit, which had been authorized under Section 437g(a)(2). The Gramm Committee also contended that the Commission was required to attempt conciliation before conducting the audit.

Subsequently, the Commission subpoenaed certain materials necessary for the audit. When the Committee refused to comply, the Commission filed a suit which asked the Texas district court to enforce the subpoena.

District Court's Ruling

In its memorandum opinion of October 18, dismissing the Committee's suit, the court noted that the time limit of Section 438(b) "is inapplicable to an audit scheduled under §437" and found the audit "well within its [§437's] parameters." Rejecting the Committee's claim concerning conciliation, the court stated that "the FEC is entitled to conduct its audit and gather the necessary

information...before it attempts to conciliate with the violator." In its October 31 ruling, the court determined that the Gramm Committee must comply with the FEC's subpoena.

Source: FEC *Record*, January 1986, p. 10.

GROVER v. FEC

On May 21, 1996, the U.S. District Court for the Southern District of Texas granted the FEC's motion to dismiss this suit.

Henry C. Grover had filed the suit on January 16, 1996, claiming that the $1,000 limit on contributions from individuals and Congress's failure to pass laws to prevent "soft money"[1] from influencing federal elections were unconstitutional impediments to his primary campaign efforts. (Mr. Grover eventually lost the March 12 Texas Republican Senatorial primary.) He asserted that the $1,000 contribution limit and alleged "soft money laundering" (i.e., the redistribution of soft money raised by party committees to favored federal candidates) gave incumbent office holders such an overwhelming advantage that only independently wealthy challengers could run competitive campaigns against them.

The court, however, dismissed the case based on the FEC's arguments that: (1) Mr. Grover's claim was moot since the primary was over and relief no longer available; (2) the contribution limits had already been upheld by the Supreme Court in *Buckley v. Valeo;* and (3) the "soft money" issues were political and therefore outside judicial authority. The court said: "It is Congress that passed the laws and it is Congress that must engage in any necessary repairs."

Source: FEC *Record*, July 1996, p. 6.

[1] "Soft money" refers to funds raised and spent outside the limits and prohibitions of federal election law, including money that exceeds federal limits and money from corporate and labor treasury funds. Soft money may not be used in connection with federal elections but may be used for other purposes, such as nonfederal elections (subject to state law).

HETTINGA v. FEC

Pursuant to 2 U.S.C. §437g(a)(8), on July 12, 1984, Mr Ralph M. Hettinga sought injunctive relief against the FEC for failing to act on his administrative complaint within 120 days. The suit was filed in the U.S. District Court for the District of Columbia. (Civil Action No. 84-2082) In the complaint filed with the FEC on March 6, 1984, Mr. Hettinga had alleged that eight unions had violated 2 U.S.C. §441b by making prohibited in-kind contributions to the Mondale Presidential campaign. The unions had allegedly provided telephone services and equipment and office space to the Mondale campaign at less than fair market value.

On July 24, 1984, the court issued an order requiring the FEC to submit information on its handling of Mr. Hettinga's complaint (i.e., a chronology of events with regard to the FEC's processing of the complaint). This submission, as well as all future submissions, was subject to a protective order issued by the court. By the terms of the protective order, plaintiff and defendant agreed that:

- Plaintiff's counsel would share information or documents concerning the administrative complaint only with the plaintiff and his legal staff;
- Plaintiff's counsel would explain the terms of the protective order to anyone with access to the information; and
- All court filings pertaining to the complaint would be filed under seal.

Stating that it could not determine whether plaintiff had met the burden for injunctive relief until after the court had examined the FEC documents, the court denied plaintiff's motion for injunction, without prejudice.

On August 8, 1985, the court granted the FEC's motion to dismiss the suit and ordered the records unsealed.

Source: FEC *Record*, September 1984, p. 11.

HOLLENBECK v. FEC

On July 27, 1998, the U.S. District Court for the District of Columbia granted the FEC's motion to dismiss this case for lack of standing.

Thomas Hollenbeck, a Pennsylvania resident, had filed suit against the FEC after it had dismissed his administrative complaint alleging that a 1994 candidate for federal office had accepted excessive loans.

In order to show standing, a plaintiff must meet the requirements found in Article III of the Constitution—injury in fact, causation and redressability. The court concluded that Mr. Hollenbeck did not meet the requirements for standing because he failed to allege a "concrete and particularized injury" that came about as a result of a violation of the Federal Election Campaign Act. Mr. Hollenbeck, the court said, only vaguely alleged an injury, claiming violations of his First and Fourteenth Amendment rights and the need to protect the public from abuses by federal candidates.

Source: FEC *Record*, April 1998, p. 4; September 1998, p. 4.

HOOKER v. ALL CAMPAIGN CONTRIBUTORS
HOOKER v. SUNDQUIST

On June 7, 2000, John Jay Hooker filed a lawsuit broadly challenging the constitutionality of all campaign contributions. Mr. Hooker alleged that campaign contributions are both a "backdoor property qualification" for voting rights and bribes of public officials and are, thus, illegal.

On October 18, 2000, the U.S. District Court for the Middle District of Tennessee, Nashville Division, granted the defendants' request to dismiss this case. The court found that:

- The Presidential Election Campaign Fund Act and the Matching Payment Act, 26 U.S.C. §9001-9043, are constitutional under *Buckley v. Valeo*;
- The plaintiff lacked standing to challenge Congress's authority to regulate federal elections;
- The plaintiff's challenges to political contributions in federal elections failed to state a claim for relief; and
- The plaintiff's claims challenging federal election statutes are precluded by the plaintiff's prior lawsuits.

This case was subsequently argued as *Hooker v. Sundqusit*.

Hooker v. Sundquist

On November 9, 2000, Mr. Hooker appealed this case to the U.S. Court of Appeals for the Sixth Circuit.

On September 25, 2001, the appeals court affirmed the district court's decision dismissing this case. The court of appeals agreed with the district court that:

- John Jay Hooker was barred from challenging the constitutionality of the Presidential Election Campaign Fund Act and the Presidential Primary Matching Payment Account Act in this case because he had unsuccessfully challenged those statutes in previous litigation; and
- Mr. Hooker lacked standing to bring this case because he had not alleged that he himself had suffered a concrete, particularized injury.

Source: FEC *Record*, August 2000, p. 15; and January 2001, p. 10; April 2001 , p. 8; and December 2001, p. 3.

HOOKER v. FEC

On October 23, 1996, the U.S. District Court for the Middle District of Tennessee dismissed this case for lack of prosecution.

John Jay Hooker, who billed himself as a potential candidate for the presidency in 1996, had asked the court to declare it unconstitutional for candidates who seek federal office to accept out-of-state contributions for their campaigns.

He also had asked the court to issue a permanent injunction against candidates who solicit, accept or use contributions from outside their home states; force the sitting Congress to address the situation; and notify states that they have a right to prohibit out-of-state contributions in federal elections.

Source: FEC *Record*, January 1997, p. 5.

HOOKER v. FEC (3-99-0794)

On April 12, 2000, the U.S. District Court for the Middle District of Tennessee granted the FEC's motion to dismiss John Jay Hooker's constitutional challenges concerning interstate campaign contributions and the Presidential Primary Matching Payment Act.

Mr. Hooker had alleged that the Federal Election Campaign Act preempts state laws that prohibit interstate campaign contributions, which he believes are unconstitutional. The court barred this challenge because Mr. Hooker had raised and litigated the same issue in prior cases that were dismissed.

Mr. Hooker had also contended that the Presidential Primary Matching Payment Act was unconstitutional because Congress lacked the power to enact it and because it violated the Guarantee Clause of the Constitution. The court dismissed this challenge for lack of standing.

Source: FEC *Record*, June 2000, p. 9

92 F. Supp. 2d 740 (M. D. Tenn. 2000)

HOPFMANN v. FEC

Background

In filing the suit with the U.S. District Court for the District of Columbia in December 1982, Mr. Hopfmann petitioned the court to declare that the FEC's dismissal of an administrative complaint, which he had filed in September 1982 against Senator Edward M. Kennedy (D-Mass.) and the Committee to Re-Elect Senator Kennedy, was contrary to law. See 2 U.S.C. §437g(a)(8)(A). Mr. Hopfmann also asked the district court to certify to a U.S. appeals court certain constitutional challenges involving FEC actions and the Federal Election Campaign Act (the Act). 2 U.S.C. §437h.

In seeking the Massachusetts State Democratic Party's endorsement as candidates for the U.S. Senate, both Mr. Hopfmann and Senator Kennedy participated in the Party's May 1982 pre-primary convention. Under the Party's "15 percent Rule," only candidates receiving at least 15 percent of the votes cast at the Party's pre-primary convention appear on the state's primary ballot. Senator Kennedy obtained ballot access by receiving at least 15 percent of the votes cast at the convention. Mr. Hopfmann, on the other hand, failed to receive ballot access because he received less than 15 percent of the total votes cast.

In the administrative complaint he had filed with the FEC, Mr. Hopfmann claimed that, since the convention vote had resulted in the Party's exclusive endorsement of Senator Kennedy, the convention had the authority to nominate a candidate and therefore met the election law's definition of an "election."[1] Based on this assumption, Mr. Hopfmann alleged that Senator Kennedy and his campaign committee had failed to file timely pre-election reports and may have received excessive contributions. See 2 U.S.C. §§434(a),(b) and 441a(f), respectively.

District Court's Ruling

On March 8, 1984, the U.S. District Court for the District of Columbia issued an opinion in *Alwin E. Hopfmann v. FEC*, which granted both the FEC's motion for summary judgment and its motion to dismiss certain constitutional challenges brought by Mr. Hopfmann in the suit. (Civil Action No. 82-3667)

The district court found that the FEC's decision to dismiss the complaint was "'sufficiently reasonable' to merit [the] Court's deference." Specifically, the court held that the FEC General Counsel's report on the complaint adequately set out the Commission's reasons for dismissing the case. Moreover, the FEC's determination was consistent with previous FEC decisions.

With regard to constitutional challenges raised by Mr. Hopfmann, the court concluded that "plaintiff's challenges do not raise substantial constitutional questions,

are frivolous and are not based on any coherent legal theory."

Appeals Court's Ruling

On May 13, 1985, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the district court's ruling that the FEC's decision to dismiss an administrative complaint filed by Alwin Hopfmann was not contrary to law (Civil Action No. 82-03667). The appeals court also affirmed the district court's decision to dismiss the constitutional questions involving FEC actions and the election law. The court found that Mr. Hopfmann's "appeal was so meritless as to be frivolous" and, as a penalty, ordered him to pay the Commission's attorneys' fees. Moreover, the appeals court found that Mr. Hopfmann's appeal "should properly be dismissed in view of appellant's failure to comply with orders of this court." The appeals court's ruling followed a July 1984 ruling in which the court had denied expedited consideration of Mr. Hopfmann's appeal.

In affirming the district court's decision that the FEC's dismissal of Mr. Hopfmann's complaint was "'sufficiently reasonable' to merit [the] Court's deference," the appeals court noted that the agency "has consistently held that in order for a convention to constitute an 'election' under 2 U.S.C. §431(1)(B), the convention must actually nominate a candidate, rather than...narrow the field of candidates on the primary ballot....Inasmuch as write-in candidates were permitted by state law in the 1982 Massachusetts primary, Senator Kennedy did not secure the Democratic nomination until he won the party's primary. In consequence, the Massachusetts Democratic Convention of 1982 was not an 'election' under the FECA." Consequently, there were no separate reporting requirements for the convention.

As to Mr. Hopfmann's constitutional claims, the court found that "it is not within the FEC's province to determine whether Massachusetts' primary system satisfies the federal Constitution. That is a claim that Mr. Hopfman must make, if at all, to the courts; we take note in this respect of an adverse decision in litigation brought by Mr. Hopfmann claiming that the Massachusetts system was unconstitutional. *Hopfmann v. Connolly*, 746 F.2d 97 (1st Cir. 1984)."

The court described one of Mr. Hopfmann's court papers as "filled with invective and scurrilous comments...." Since he had failed to comply with two court orders, the court found dismissal of his appeal justifiable under court rules. The court stated that "having considered the merits of the case, we conclude that the appeal is in any event utterly without merit....We firmly admonish counsel for appellant to refrain in any future filings in this court from engaging in unprofessional, inappropriate comments and outrageous name-calling." On July 19, 1985, the court denied Mr. Hopfmann's petition for rehearing *en banc*.

Petition for Certiorari

On December 26, 1985, the Supreme Court denied a petition for a writ of certiorari filed by Mr. Hopfmann. He had sought Supreme Court review of the appeals court ruling.

On May 5, 1986, the Supreme Court denied Mr. Hopfmann's petition for rehearing.

Source: FEC *Record*, May 1984, p. 8; September 1984, p. 11; July 1985, p. 7; September 1985, p. 3; February 1986, p. 3; and June 1986, p. 9.

Hopfmann v. FEC, No. 84-5201 (D.C. Cir. May 13, 1985) (unpublished opinion), *aff'd*, 762 F.2d 138 (D.C. Cir.), *cert. denied*, 474 U.S. 1038 (1985).

[1] The Act defines an election to include "a convention or caucus of a political party which has authority to nominate a candidate." 2 U.S.C. §431(1)(B).