Record

November 1996 *Federal Election Commission* *Volume 22, Number 11*

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Court Cases

Perot '96 and Natural Law Party v. FEC and the Commission on Presidential Debates

On October 4, 1996, the U.S. Court of Appeals for the District of Columbia Circuit upheld a lower court ruling that dismissed lawsuits against the Federal Election Commission (FEC) and the Commission on Presidential Debates (CPD). The suits had been filed by two Presidential hopefuls who, among other things, sought to participate in the Presidential debates.

The Complaints

One suit was filed by Ross Perot and Pat Choate, the Presidential and Vice Presidential candidates for the Reform Party, and Perot '96. A similar suit was filed by the Natural Law Party (NLP) and its Presidential and Vice Presidential candidates, John Hagelin and Mike Tompkins.

The two campaigns filed the suits in U.S. District Court for the District of Columbia after the CPD excluded the candidates from a list of participants for three nationally televised debates. Previously, in September, Perot '96 and the NLP had filed administrative complaints with the FEC, but, because of procedures set

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Regulations

FEC Seeks Public Comment on Changes to "Best Efforts" Regulations

The Federal Election Commission seeks comments on proposed revisions to two aspects of its "best efforts" regulations. This section of the law ensures that political committees use their best efforts to obtain and report names, addresses, occupations and employers of people who contribute more than $200 in a year to committee coffers. See 2 U.S.C. §§431(13), 432(i) and 434(b)(3)(A).

The Commission has proposed one change in response to the recent court decision in *Republican National Committee v. FEC,*[1] which found the required notice concerning "best efforts" to be inaccurate and misleading." See 11 CFR 104.7(b). The court concluded that the statute only calls for committees to use their best efforts to collect the information. They may report whatever information donors choose to provide.

The revisions would require committees, under 11 CFR 104.7(b)(1), to include an accurate

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[1] *76 F.3d 400, 406 (D.C. Cir. 1996), petition for cert. filed on other issues (Sept. 9, 1996).*

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statement of the law's requirements in all solicitations. The Notice of Proposed Rulemaking offers two examples that would satisfy the notice requirement and seeks comment on whether it would be preferable to require political committees to use one or the other. The examples are:

- "Federal law requires us to use our best efforts to collect and report the name, mailing address, occupation and name of employer of individuals whose contributions exceed $200 in a calendar year."
- "To comply with Federal law, we must use best efforts to obtain, maintain, and submit the name, mailing address, occupation and name of employer of individuals whose contributions exceed $200 per calendar year."

Committees may substitute their own wording for the "best efforts" statement as long as it complies with federal guidelines.

Federal Election Commission
999 E Street, NW
Washington, DC 20463

800/424-9530
202/219-3420
202/501-3413 (Flashfax Service)
202/219-3336 (TDD for the hearing impaired)
800/877-8339 (FIRS)

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http://www.fec.gov

Another proposed change to the regulations would clarify in 11 CFR 104.7(b)(3) that separate segregated funds (SSFs) are expected to report contributor information that their connected organizations already have. In some situations it may be more efficient for SSFs to obtain missing contributor information from the connected organization—such as a corporation, labor organization, trade association, cooperative or membership organization—than from contributors.

The Notice of Proposed Rulemaking was published in the Federal Register on October 9, 1996 (61 FR 52901).

The deadline for comments, which must be in writing, is December 6. The FEC is extending the usual 30-day deadline for comments because of the Presidential election. Comments should be addressed to Susan E. Propper, Assistant General Counsel, 999 E Street, NW, Washington, DC 20463. ✥

Final Rules on Electronic Filing

On August 15, 1996, the FEC published new rules implementing an electronic filing system for campaign finance reports filed with the agency (61 FR 42371). The electronic filing system will be in place in time for the 1997-98 election cycle (i.e., for reports covering activity after December 31, 1996).

Electronic filing will be a voluntary system available to committees that file with the FEC. Senate campaigns and other committees that file with the Secretary of the Senate do not have the option of filing electronically.

A law passed in 1995 requires the FEC to implement an electronic filing system.[1] The system is intended to result in cost savings and increased efficiency for both filers and the FEC. It is also intended to provide the public with more complete on-line access to reports on file with the FEC.

The effective date of the regulations on electronic filing will be announced in the Federal Register and the *Record.*

Eventually, the Commission will begin accepting reports submitted through telecommunications, but right now diskettes are the only acceptable medium.

A committee that chooses to file electronically must comply with the requirements listed below.

One-Year Commitment

Generally, a committee that begins filing its reports electronically must continue to do so for the remainder of the calendar year. However, the FEC will waive this requirement if it determines that extraordinary circumstances make it impracticable for the committee to continue filing electronically. 11 CFR 104.18(a).

Standard Format

The report must conform to the FEC's Electronic Filing Specification Requirements, which describe how the data must be organized. 11 CFR 104.18(b). The technical specifications can be downloaded from the Commission's home page at http://www.fec.gov.

Validation Checks

Before submitting an electronic report, a committee must check it against the FEC's validation software to make sure that the files can be read by the agency's computer system. The program also checks to see if the report includes the required information and if the summary page figures track those on the detailed summary page. The agency will not accept reports that do not pass the validation program. 11 CFR 104.18(c). The validation software will be available free from

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[1] *See Public Law 104-79, section 1(a), 109 Stat. 791 (December 28, 1995).*

Reports

Post Election Report Due December 5

The 30-day post-election report for the November 5 general election must be filed by the following committees:

- All registered PACs and party committees (both quarterly and monthly filers [1])—even committees with very little or no activity to disclose; and
- Authorized committees of federal candidates in the general election, including committees of unopposed candidates.

The report covers activity from the closing date of the committees' last report through November 25.

The report must reach the appropriate federal and state filing offices by Thursday, December 5. If sent by registered or certified mail, however, the report will be filed on time if postmarked by December 5. ✦

[1] *The post-general election report is filed in lieu of the monthly report covering November activity.*

Public Funding

FEC Denies Requests to Suspend Public Funds for Clinton and Dole

The Commission recently denied requests to stop matching fund payments to the Clinton and Dole Presidential campaigns.

In June 1996, the Democratic National Committee requested that the agency suspend matching fund payments to Dole for President, Inc. (the Dole Committee), alleging that the committee had forfeited its entitlement to the funds because it had overspent the $37.1 million limit on primary spending.

In July 1996, the Dole Committee requested the suspension of matching funds to the Clinton/Gore '96 Primary Committee on the grounds that the committee had exceeded the spending limit.

In both cases, the FEC said that the allegations were too speculative to meet the strict standard in these cases: information demonstrating that a candidate has knowingly and substantially exceeded the expenditure limit. See 11 CFR 9033.3.

The Commission will be able to determine whether the allegations are accurate when it conducts the mandatory audits of the public funding recipients. ✦

Statistics

18-Month PAC Statistics

Political action committees (PACs) contributed $126.5 million to federal candidates between January 1995 and the end of June 1996, an increase of almost $17 million over the 18-month period in the last election cycle (1993-94).

Statistics show that the Republican candidates received more PAC contributions than Democratic candidates, a departure from previous cycles.

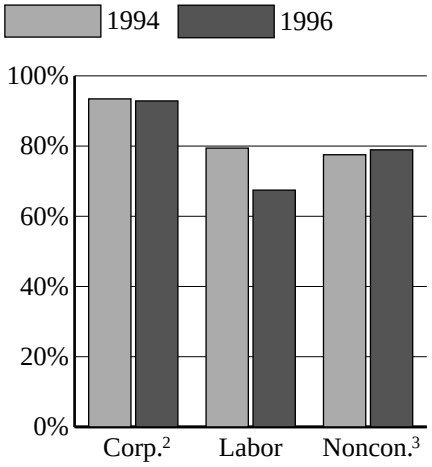
PAC Contributions to Candidates Through June 30 of Election Year

	1994 Cycle	1996 Cycle
Dems	$72.0 million	$54.7 million
Repubs	$37.8 million	$71.6 million

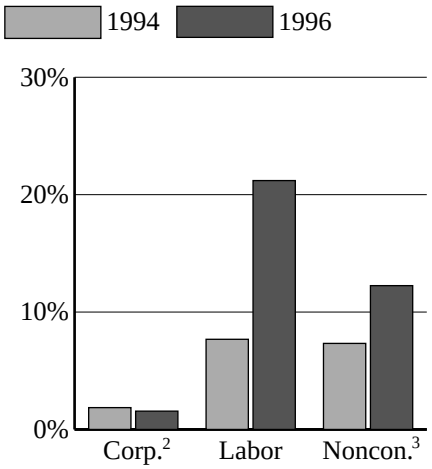
With respect to House candidates, incumbents continued to get a much higher percentage of PAC contributions than challengers and open-seat candidates. Labor and nonconnected PACs, however, increased the percentage of their contributions that went to House challengers.

The table and graphs are based on a September 27 news release on 18-month PAC activity. The release is available through Flashfax (202/501-3413; document 532) and on the FEC's home page at http://www.fec.gov. ✦

Percentage of PAC Contributions Received by House Incumbents [1] Through June 30 of Election Year



Percentage of PAC Contributions Received by House Challengers [1] Through June 30 of Election Year



[1] *Figures limited to PAC contributions given to candidates seeking election in cycle.*

[2] *Figures do not include PAC contributions from the following categories of connected organizations: trade/membership/health, nonstock corporations and cooperatives.*

[3] *Nonconnected PACs do not have any connected organizations.*

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the FEC starting in December. It will also be available for downloading from the FEC's home page.

Signature Requirements

For each report submitted electronically, a committee must also submit a statement, signed by the treasurer or designated assistant treasurer, verifying that the signer examined the report and that the report is true, correct and complete to the best of the signer's knowledge and belief. A committee may submit either the original paper copy of this statement or a digitized copy stored as a separate file on the disk. 11 CFR 104.18(e).

Third-Party Signatures

The schedules, forms and documents listed below have special signature requirements. Therefore, in addition to providing the required data within the electronic report, a committee must submit either the paper document or a digitized version stored as a separate file on the disk. 11 CFR 104.18(f).

- **Schedule C-1** (Loans and Lines of Credit from Lending Institutions), which must be signed by the lender, and copies of loan agreements required to be filed with Schedule C-1;
- **Schedule E** (Itemized Independent Expenditures), which must be notarized;
- **Form 5** (Report of Independent Expenditures Made and Contributions Received), which must be notarized; and
- **Form 8** (Debt Settlement Plan), which must include the signatures of creditors involved in the plan.

Amended Reports

A committee must submit a complete version of an amended report with amended entries flagged electronically so the FEC and the public will know which portions have been revised. 11 CFR 104.18(d).

Preservation of Reports

For each electronic report filed, the treasurer must retain a machine-readable copy of the report for three years (as required under 11 CFR 104.14(b)(2)). A copy of a report stored on a diskette would qualify as a machine-readable copy. In addition, the committee must retain the original of any signature page submitted to the FEC in a digitized format. 11 CFR 104.18(g). ✥

Rulemaking on Independent Expenditures by Party Committees

On October 3, the Commission voted to initiate a rulemaking [deletion] on independent expenditures to address any special circumstances presented by party committees (11 CFR Part 109 and Section 110.7). The rulemaking will address significant issues raised by the Supreme Court's recent ruling in *Colorado Republican Federal Campaign Committee v. FEC,* 116 S.Ct. 2309 (June 26, 1996).[1] (See also court case summary on page 7.) The Court held that "political parties are capable of making independent expenditures on behalf of their candidates for federal office and that such expenditures are not subject to the coordinated expenditure limits found in section 441a(d) of the F[ederal] E[lection] C[ampaign] A[ct]." 116 S.Ct. 2312-15. The FEC had argued that party committees were incapable of making independent expenditures because of their close ties to candidates.

To conform its regulations with the Court's decision, the Commission has already repealed 11 CFR 110.7(b)(4). 61 FR 40961, August 7, 1996. That provision had prohibited national and state party committees from making independent expenditures on behalf of a candidate for the U.S. House of Representatives or the U.S. Senate. The technical amendment became effective August 7, 1996 (61 FR 40961).

The agency's decision to initiate the new rulemaking was in response to a petition for rulemaking submitted by the Democratic Senatorial Campaign Committee and the Democratic Congressional Campaign Committee. The committees requested that the FEC amend its rules to provide "meaningful guidance" on independent expenditures by national party committees.[2]

The Commission expects to consider draft rules on party committee expenditures in early 1997. ✥

[1] *Although the* Colorado Republican *litigation remains ongoing, the issue of what constitutes an independent expenditure by a party committee is no longer part of the case.*

[2] *The Commission sought comments on the petition (61 FR 41036, August 7, 1996) but received none.*

Federal Register

Federal Register notices are available from the FEC's Public Records Office.

Notice 1996-19
11 CFR Part 104: Recordkeeping and Reporting by Political Committees: Best Efforts; Notice of Proposed Rulemaking (61 FR 52901, October 9, 1996)

Election Administration

New Publications

The FEC's Office of Election Administration recently published several new reports and resumed publication of the *Journal of Election Administration.* Each of these publications is available for free from the Office of Election Administration. Call 800/424-9530 (press 4) or 202/219-3670.

- *Ensuring the Accessibility of the Election Process* gives election officials guidance on meeting the accessibility requirements of the Voting Accessibility for the Elderly and Handicapped Act of 1989 and the Americans with Disabilities Act of 1990.
- *Simplifying Election Forms and Materials* gives advice on how to simplify election registration materials to make them more reader friendly.
- *Federal Election Law 96* summarizes federal laws pertaining to registration, voting and public employee participation in the electoral process.
- *Election Directory 96* provides names, addresses and telephone numbers of state election officials and national associations of election officials. It provides the same information for federal agencies and House and Senate committees that are involved in the election process.
- *Journal of Election Administration,* Volume 17, 1996, is the first issue to be published in some years. The Election Administration Office intends to resume *Journal* publication on an annual basis. The new issue focuses on special voting populations: convicted felons, the homeless and college students. An article on American citizenship answers common questions on who qualifies as a U.S. citizen or a U.S. national. ✦

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forth in the Federal Election Campaign Act (the FECA or the Act), resolution of those complaints was not expected before the debates started in October.

Both suits contended that the CPD had violated FEC rules governing nonpartisan candidate debates at 11 CFR 113.10 and the Perot suit alleged that the CPD's acceptance of corporate donations to pay for the debates violated the Act's ban on corporate contributions at 2 U.S.C. §441b.

The Perot suit asked the court:

- To instruct the FEC to order the CPD to invite the Reform Party nominees to the scheduled debates or to cancel all the debates being staged by the CPD;
- To find that the CPD does not qualify for the exemption permitting certain corporations to use corporate money to conduct candidate debates, and that the CPD failed to file as a political committee and accepted excessive contributions;
- To prevent any additional corporate contributions to or expenditures by the CPD for the purpose of intervening in the 1996 Presidential campaign by sponsoring Presidential debates;
- To find that the CPD violated 11 CFR 110.13(c) by making party affiliation the sole criterion for selecting participants and for failing to use "objective criteria" as required by the FEC rules in selecting participants;
- To find that the CPD violated 11 CFR 110.13(a) by selecting only the two major parties' political candidates;
- To find that the FEC unlawfully delegated authority to the CPD to establish the criteria for selecting participants in the debates;
- To find that the FEC's regulations governing candidate debates at 11 CFR 110.13 are outside the scope of the agency's authority; and
- To find that the FEC and CPD violated Mr. Perot's and Mr. Choate's Constitutional rights under the First, Fifth and Fourteenth Amendments.

The NLP suit asked the court:

- To enter a temporary restraining order and issue preliminary and permanent injunctions, preventing the CPD from staging the debates unless it selects debate participants using pre-existing, objective criteria and to provide the court with a list of those criteria; or, in the alternative,
- To order the FEC, prior to the debates, to take action on the administrative complaint that contended that the CPD had violated FEC regulations.

District Court Decision

The court combined the suits for oral argument and dismissed both cases on October 1, 1996.

The court concluded that it had no jurisdiction in the matter. First,

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On Appeal?

	Appealed?
Albanese v. FEC	**No**

U.S. Supreme Court denied Sal Abanese's petition for the Court to hear the case. The district court had dismissed the case, and the court of appeals affirmed the dismissal, ruling that Mr. Albanese did not have standing to challenge the constitutionality of the Federal Election Campaign Act. See the May 1996 *Record,* page 4, and the July 1995 *Record,* page 8.

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as mandated by Congress, the FEC has exclusive jurisdiction to hear complaints alleging violation of the Act, and the plaintiffs have no private right of action against the CPD. Second, the FEC has 120 days to act on an administrative complaint before the court may become involved. 2 U.S.C. §437g.[1]

In addition, the court weighed the potential damage to Mr. Perot, Dr. Hagelin and their running mates from not participating in the debates and found that such damage could be partially remedied in later court proceedings—for example, before the next Presidential election four years from now—and that the damage they incurred did not "outweigh the public interest in allowing the debates to go forward without interference."

Specifically as to Mr. Perot's arguments, the court also found no likelihood of success on the merits of the claim that the CPD had violated the candidate's Constitutional rights because he had not shown that the CPD is a state actor [2] or that the FEC had delegated any of its authority to the CPD. Also, the court upheld the FEC regulations at 11 CFR 110.13(a) that allow nonprofit, nonpartisan corporations to stage debates in certain circumstances and, under 11 CFR 114.4(f), to accept contributions from corporations to put on such events without the funds being considered illegal campaign contributions or expenditures.

Appeals Court Decision

Because of expedited procedures, the appeals court heard the case two days after the district court handed down its ruling. The appeals court affirmed the lower court's decision that it lacked jurisdiction to take action on the alleged violation of the Act or to order the FEC to resolve the complaints prior to the CPD-sponsored debate on October 6. In explaining this decision, the court said, "Congress could not have spoken more plainly in limiting the jurisdiction of federal courts to adjudicate claims under the FECA." The court said, "We assume that in formulating these procedures Congress...knew full well that complaints filed shortly before elections, or debates, might not be investigated and prosecuted until after the event."

The NLP's arguments that the delay would cause "irreparable harm" to its candidates and that the impending debates constituted extraordinary circumstances, requiring a waiver of the Act's procedures, were rejected by the court. Further, the court said that if it were to enjoin the CPD from carrying off the debates or selecting participants, it might risk violating the CPD's First Amendment rights.

The court also rejected Mr. Perot's allegation that the FEC had delegated its authority to the CPD by prescribing regulations that allow organizations that are staging debates to create their own "objective criteria" to determine who may participate. See 11 CFR 110.13(c). The court said, "A regulation's use of a term that may be susceptible to differing interpretations does not automatically result in a delegation of authority to entities that it governs." The court also observed that even if the FEC were to immediately revise its debate regulations (in response to the complaint), the agency could not complete the task in time for the debates. Under the FECA, new regulations do not become effective until 30 legislative days after the FEC transmits them to Congress.

With regard to Mr. Perot's challenge to the debate regulations themselves, the appeals court observed that the district court had not had the benefit of the administrative record and that the issue had not been fully briefed. Consequently, the appeals court vacated the district court's decision upholding the regulation and remanded the claim to the district court with instructions to dismiss without prejudice. (Mr. Perot would then be free to file a new suit on the same issue.) In all other respects, the appeals court affirmed the district court's order.

U.S. Court of Appeals for the District of Columbia Circuit (96-5287 and 96-5288), U.S. District Court for the District of Columbia (96-2196 and 96-2132).

FEC v. Survival Education Fund

On September 3, 1996, the U.S. District Court for the Southern District of New York issued a consent order imposing a $2,000 penalty against the Survival Education Fund, Inc., for failing to comply with the disclaimer rules of 2 U.S.C. §441d(a)(3). The Commission alleged that the Survival Education Fund (SEF) had failed to include the required disclaimer notice in a July 1984 fundraising letter soliciting contributions to defeat a candidate for federal office.

In a 1995 decision, the Court of Appeals for the Second Circuit had ruled that the SEF was within the class of nonprofit advocacy corporations whose independent expenditures the Supreme Court, in FEC v. Massachusetts Citizens for Life, Inc., had found to be exempt from the overall ban on corporate expenditures (2 U.S.C. §441b(a)). With respect to the disclaimer issue, however, the appellate court had

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[1] *Section 437g(a)(8) allows a complainant to file suit against the FEC only for dismissing his complaint or for failing to act on it within 120 days after the complaint was filed.*

[2] *Only government entities (or state actors), not private groups, are subject to the Constitutional violations alleged by Mr. Perot.*

found that the SEF violated the disclaimer provisions by not identifying itself as the sponsor of the solicitation letter. (See the December 1995 *Record* for a summary of this decision.)

The court of appeals had remanded the case to the district court for appropriate action.

The parties agreed to the district court's imposition of the $2,000 penalty and dismissal of the case.

U.S. Court of Appeals for the Second Circuit (94-6080), U.S. District Court for the Eastern District of Pennsylvania (89-0347). ❖

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.

U.S. District Court for the District of Columbia, 96-4490. ❖

FEC v. Colorado Republican Federal Campaign Committee

On September 20, 1996, the Court of Appeals for the 10th Circuit decided not to expedite litigation on whether the statute's coordinated party expenditures limits (2 U.S.C. §441d(a)) are constitutional because the issues were "too important to be resolved in haste." The Colorado Republican committee had urged the court to make a quick decision on the constitutionality of the 441a(d) limits and related issues. The court said that inevitably the Supreme Court itself would have to resolve the issues but that complex factual questions first needed to be researched. The court therefore remanded the case to the Colorado district court to consider the issues after further factfinding.

In its June 1996 decision in this case, the U.S. Supreme Court ruled that a radio advertisement paid for by the Colorado Republican committee qualified as an independent expenditure rather than as a coordinated party expenditure and, as such, was constitutionally protected speech that could not be subject to spending limits. The Supreme Court did not address the Colorado Republican Committee's constitutional challenge to the 441a(d) expenditure limits but instead remanded consideration of the broader issues to the lower courts. (See the August 1996 *Record.)*

U.S. Supreme Court (95-489), U.S. Court of Appeals for the 10th Circuit (93-1433 and 93-1434), U.S. District Court for the District of Colorado (89-1159). ❖

DSCC 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.

In July the committees also formally requested an FEC advisory

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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.

U.S. Court of Appeals for the District of Columbia Circuit (96-5291), U.S. District Court for the District of Columbia (96-2019). ✥

New Litigation

NRCC v. FEC (96-2295)

The National Republican Congressional Committee (NRCC) asks the court to find that the FEC's failure to act on NRCC's administrative complaints within 120 days is contrary to law under 2 U.S.C. §437g(a)(8)(A).

The NRCC has filed three complaints with the Commission alleging that the AFL-CIO and allied labor organizations are engaged in making massive expenditures directly coordinated with Democratic candidates. The NRCC claims that these expenditures have resulted in millions of dollars in in-kind contributions from prohibited labor dues, in violation of 2 U.S.C. §441b(a).

Claiming that the FEC's "unreasonable delay" in failing to act on the three administrative complaints (filed in February, March and April 1996) exposes the committee to irreparable injury, the NRCC petitions the court to order the FEC to take action within 30 days.

The NRCC simultaneously moves for an expedited discovery schedule so that the case can be decided before the election.

U.S. District Court for the District of Columbia, 96-2295, October 3, 1996. ✥

Advisory Opinions

AO 1996-25 Seeking Employer Information from Union Members Without Permanent Employment

The Seafarers Political Activity Donation (SPAD), the separate segregated fund of the Seafarers International Union, must provide some employer information when itemizing contributions even though their members—merchant seamen who work aboard U.S.-flag vessels—frequently change employers. If a contributor states that he or she is currently "on the beach" rather than currently assigned to a vessel, SPAD may report the contributor's employer as "various U.S.-flag vessel operators." In this situation, listing the contributor as simply "unemployed" would be somewhat inaccurate.

A merchant seaman generally works for a shipping company only for the duration of the trip—a few months or less. After the trip, the Union member returns to the "beach," waits for his name to reach the top of the hiring list, and then returns to work, usually for a different company. To deal with this "rotary crewing" arrangement, which prevents SPAD from using a conventional payroll deduction program, SPAD collects contributions deducted from the Union's employer-funded vacation plan. (Vacation plan funds are a permissible source of contributions; see AOs 1980-74, 1980-69 and 1979-60.)

At the time a contribution is deducted, the contributor is usually between assignments and unemployed. Because of this special circumstance, SPAD wished to forgo seeking the employer identification from contributors whose

annual contributions exceed $200. (The other required contributor information—name, address and occupation—is easily available to SPAD.) Alternatively, SPAD proposed to include in the Seafarers vacation pay application form a request for information regarding current employment. (The request would ask: "Are you currently sailing or assigned to a vessel on the date of this application?" The member could check either "No, I am 'on the beach,'" or "Yes, I am currently working for _____.")

Like any other political committee, SPAD must follow the "best efforts" regulations by requesting contributor information in its solicitations. 11 CFR 104.7(b)(1). Because of the special employment circumstances of the Union's members, SPAD is required to use its alternative proposal to fulfill its obligations. If a contributor checks yes and names the current employer, SPAD must disclose that employer when itemizing the contribution. If a contributor checks no, SPAD may simply report that the contributor is employed by "various U.S.-flag operators."

If a contributor fails to provide SPAD with any employer information, it must make a follow up inquiry. 11 CFR 104.7(b)(2). Date Issued: September 12, 1996: Length: 5 pages. ✥

AO 1996-34
Use of Campaign Funds for Travel of Congressman's Family

Representative William M. Thornberry may use funds from his campaign committee to pay travel expenses for his wife to attend the Republican National Convention and for his family to accompany him on a final campaign swing through the 13th Congressional district in Texas.

Although he was not a delegate to the Republican convention, the Congressman, who is up for reelection, planned on attending the convention and bringing his wife and children. In addition, four days before the election, he planned to take a campaign tour with his family through major cities in his district.

Candidate committees may not convert campaign funds to the personal use of a candidate or of any other person. See 11 CFR 113.1(g) and 113.2(d). Federal Election Commission guidelines find that personal use of campaign funds is "any use of funds in a campaign account...that would exist irrespective of the candidate's campaign or duties as a Federal officeholder." See 11 CFR 113.1(g).

FEC rules list examples of what constitutes personal use. But, when the use in question is not listed, as in travel expenses, Commissioners make a determination on a case-by-case basis.

At the convention, Congressman Thornberry planned to meet with major donors, attend Republican committee functions and communicate with his constituents. He considered his wife's attendance at the convention an integral part of this reelection effort. Consequently, the travel expenses of the Congressman and his wife would be directly related to his campaign.

Similarly, the travel expenses incurred by his entire family for the campaign tour would be related to his reelection efforts because the family would play a significant role in the political receptions and fundraising events taking place during the trip.

In both cases, the candidate could use campaign funds to cover the travel expenses because the expenditure would not be for personal use. The campaign committee should report the expenses as operating expenditures in its filings with the FEC.

Date Issued: September 12, 1996; Length: 4 pages. ✥

AO 1996-36
Application of Contribution and Spending Limits to Court-Ordered Elections

Candidates in several Texas Congressional districts who won March 12 primaries—the results of which were later nullified by a federal court—have a separate set of contribution limits for (1) the March 12 primary; (2) a "defunct" general election campaign that ended August 5 (the date of the court decision); (3) a November 5 special general election (open to all candidates, not just March 12 primary winners); and (4) a December 10 runoff (if the candidate has to participate in a runoff). Coordinated party expenditures made on or before August 5 do not count against the $30,910 limit for the November 5 special general election in each district. (There is no separate coordinated party expenditure limit for the runoff.)

Background

On August 5, 1996, the United States District Court for the Southern District of Texas redrew the boundaries of 13 U.S. Congressional districts due to a previous court decision that three of those districts were the result of racial gerrymandering. *Vera v. Bush*, No. H-94-0277. (The redrawn districts are 3, 5, 6, 7, 8, 9, 18, 22, 24, 25, 26, 29 and 30.) The court ordered that special general elections—open to all candidates—be held on November 5 in those districts. If no candidate receives a majority of the votes in a November 5 special election, a special runoff election will be held in that district on December 10, 1996**,** between the top two vote-getters in the November 5 election.

The FEC answered several questions concerning the application of the contribution and expenditure limits in this unique situation. The questions were posed by Democratic

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March 12 primary winners in five of the affected districts.[1]

Treatment of Contributions for March 12 Primary

A contribution made to a candidate running in the March 12 primary election remains a contribution for purposes of the Federal Election Campaign Act (the Act) because the contribution, at that time, was made to influence a federal election. 11 CFR 100.7(a)(1). Surplus contributions remaining from the March 12 primary may be transferred to the candidate's campaign for the November 5 special general election. 11 CFR 110.3(c)(3). No contributor redesignations are necessary because surplus primary contributions do not have to be aggregated with contributions received for the November 5 election.

Contributions Made After Primary But Before Court Decision

Because the effect of the court's August 5 decision was to create a new general election campaign period beginning on August 6 and lasting until November 5, any contributions made during the defunct general election campaign—from March 13 through August 5—do not apply to contributions limits for the November 5 special election. (However, a candidate is not allowed to collect contributions designated to retire August 5 net debts outstanding. See 11 CFR 110.1(b)(3) and 110.2(b)(3).)

This situation is distinguishable from that in AO 1982-22, in which a candidate, before the primary election, changed his district because of a court decision altering district boundaries. He did not receive any additional contribution limits because his electoral position essentially remained unchanged. By contrast, the Texas court decision nullified the results of the March 12 primary elections and placed each candidate in a new electoral situation whereby he or she was no longer the party's nominee but instead a candidate in an election that could involve other candidates of the same party.

Application of $25,000 Limit to Contributions

For the reason given under "Treatment of Contributions for March 12 Primary," contributions made for that primary count toward an individual's $25,000 limit under 2 U.S.C. §441a(a)(3) and 11 CFR 110.5. Contributions for the regular or special November election also count toward the $25,000 limit. The Act contains no "hardship" exception allowing increases to the $25,000 limit when unforeseen election events develop.

Contributions for Special Runoff Election

A committee may accept contributions designated for the December 10 runoff election before there is an established necessity for the runoff (i.e., before the November 5 election results are in) provided that the committee uses an acceptable account method to distinguish between general election contributions and runoff contributions. AO 1983-39.

Coordinated Party Expenditure Limits

Political party committees may make limited coordinated expenditures in connection with the general election campaign of candidates. The national party committee and the state party committee may each spend $30,910 for the 1996 general election campaign of a House candidate. 2 U.S.C. §§441a(d) and 441a(c); 11 CFR 110.7 and 110.9(c).

In the case of the affected Texas districts, there are, in effect, two general elections: the regular general election that was to have been held November 5 and the special November 5 general election ordered by the court. In this situation, any coordinated party expenditures made before August 6 do not have to be attributed to the $30,910 limit for the November 5 special election. However, there is no separate coordinated party limit available for the December 10 runoff. AO 1993-2; *Democratic Senatorial Campaign Committee v. FEC*, No. 93-1321 (D.D.C. Nov, 14, 1994).

Date Issued: September 20, 1996: Length: 7 pages. ✦

[1] *The candidates are: Sheila Jackson Lee, Martin Frost, Ken Bentsen, Gene Green and Eddie Bernice Johnson; they currently represent the 18th, 24th, 25th, 29th and 30th Districts of Texas, respectively.*

AO 1996-37
Application of Contribution Limits to Court-Ordered Elections

Kevin Brady, a U.S. House candidate from the 8th Congressional district of Texas, has a separate contribution limit for a special November 5 general election ordered by the court on August 5. Contributions made on or before August 5 for the regular general election (also scheduled for November 5 but now cancelled) do not count against Mr. Brady's limit for the special general election. The court-ordered election is a separate election with separate contribution limits from those originally in effect for the regular general election. In the event Mr. Brady has to participate in a special runoff election on December 10 (to be held between the top two vote-getters in the November 5 special if no candidate wins a majority of votes), a separate contribution limit will also apply for that election.

On August 5, a federal district court redrew the boundaries of 13 Congressional districts in Texas—an action resulting from an earlier court determination that three of those districts were the result of racial gerrymandering. *Vera v. Bush,* Civ. Action No. H-94-0277 (S.D. Tex. August 5, 1996). One of the affected districts is the 8th, where Mr. Brady is a candidate. The court ordered that special general elections be held on November 5 in the redrawn districts. The special general elections are open to all candidates, including those who lost or never participated in earlier primary races.

Before the court decision, Mr. Brady participated in a March 12 primary election, won an April 9 primary runoff and conducted a general election campaign for nearly four months as the Republican nominee.

Because the earlier elections cannot be regarded as void, Mr. Brady had a separate contribution limit for the regular general election. Mr. Brady's situation changed, however, on August 5, when the court ordered a new, special general election. Contributions made after August 5 count against the limit for the new general election. In addition, contributions made to Mr. Brady's committee for the March 12 primary or April 9 runoff do not have to be redesignated by the contributors for the special general election. 11 CFR 110.3(c)(3).

Mr. Brady's situation is distinguishable from that of the candidate in AO 1982-22, who changed his district because of a court decision that altered the boundaries of the district. That candidate, unlike Mr. Brady, was in the same electoral position that he was in before the court decision because he changed districts before the primary.

Mr. Brady's situation is not materially distinguishable from that in AO 1996-36 (summarized above). He may therefore rely on that opinion for answers to related questions.

Date Issued: September 20, 1996; Length: 4 pages. ❖

AO 1996-38 Solicitable Class of Nonconnected PAC Affiliated with SSF

The American Seniors Housing Association (ASHA), an unincorporated association, is affiliated with the National Multi Housing Council (NMHC), an incorporated trade association. Because of this affiliation, a nonconnected political committee established by ASHA would be affiliated with NMHC's separate segregated fund (NMHC PAC). The new PAC (Seniors Housing PAC), as an affiliate of a NMHC PAC, would have to limit its solicitations to the NMHC PAC's restricted class.

A nonconnected committee, unlike a separate segregated fund (SSF), is normally not limited in persons it may solicit for contributions (except, of course, those persons prohibited from making any contributions to influence federal elections). However, in earlier advisory opinions, the Commission determined that the SSF solicitation restrictions applied to the PAC of a partnership that was an affiliate of a corporation with an SSF. AOs 1992-17 and 1989-8. Contributions to the partnership PAC could be solicited only from the shareholders or owners and the executive and administrative personnel (and families) of the corporation and the partnership. 11 CFR 114.5(g)(1).

The Seniors Housing PAC, as a nonconnected committee, could avoid the solicitation restrictions only if (1) either NMHC or ASHA had no sponsoring relationship to the PAC; or (2) ASHA were not affiliated with NMHC. Neither of these is true.

With regard to the first point, ASHA—whose personnel formed the Seniors Housing PAC to achieve ASHA's legislative goals—does have a sponsoring relationship to the PAC. With regard to the second point, based on the relationship between ASHA and NMHC, the two are affiliated.[1]

Solicitations for contributions to the Seniors Housing PAC would therefore be limited to: the executive and administrative personnel (and families) of NMHC and ASHA; the unincorporated members of NMHC (all of whom are also members of ASHA); and the executive and administrative personnel and shareholders (and families) of those incorporated NMHC members who give separate and specific solicitation approval, as set out in 11 CFR 114.8(c). Any solicitation approval granted by a corporate member of NMHC would cover solicitations from both the Seniors Housing PAC and the NMHC PAC. (A solicitation approval granted to Seniors Housing PAC only would still count as a solicitation approval given to NMHC, so the corporate member could not grant solicitation approvals to any other trade association for that calendar year.)

Because of the affiliated relationship between NMHC and ASHA, NMHC could use its corporate funds to pay for the exempt administrative and solicitation costs of the Seniors Housing PAC. However, in that event, the Seniors Housing PAC

(continued)

[1] The affiliated relationship is based on the following facts: all members of ASHA are required to be members of NMHC; ASHA's activities are funded by NMHC from membership dues paid to NMHC; ASHA itself was founded by the NMHC Board and persons associated with NMHC; and the two organizations have significant personnel in common. These facts indicate that ASHA was established by NMHC and continues to be financed and maintained by NMHC. 11 CFR 110.3(a)(3)(ii)(D) (E), (G), (H) and (I).

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would have to identify NMHC as a connected organization on its Statement of Organization. Regardless, Seniors Housing PAC should identify NMHC PAC as an affiliated committee on its Statement of Organization.

Date Issued: October 4, 1996: Length: 6 pages. ✦

AO 1996-39
Legal Fees Related to Ballot Access

Funds received and spent to pay legal expenses stemming from challenges to candidate Susan Heintz's access to the primary ballot are not considered contributions or expenditures provided the funds are placed in an account that is separate from her Congressional committee (Heintz for Congress). The committee itself may not establish the account or conduct the fundraising. If this is done, corporate funds may be accepted to defray the expenses.

Past advisory opinions present similar situations where individuals, faced with legal actions contesting their access to the ballot, needed to raise funds to pay for associated legal costs. In AO 1982-35, the Commission said that filing a lawsuit to challenge a party rule that would prevent a candidate's ballot access was "a condition precedent to the candidate's participation in the primary election."[1] The Commission concluded that funds raised to pay the litigation costs were outside the purview of the Federal Election Campaign Act. See also AO 1983-37.

Similarly, previous advisory opinions provide guidance on how to collect donations to pay for legal costs. The entity that engages in the fundraising must be separate and independent from the candidate's principal campaign committee, and solicitations should be accompanied by a letter stating the purpose of the fund and noting that no donations to the fund will be used to influence any federal election. Such solicitations should be conducted completely separately from campaign solicitations. See AOs 1990-23 and 1983-30.

Date Issued: October 4, 1996; Length: 3 pages. ✦

AO 1996-40
Contributions of Campaign Funds to Nonprofit Organizations

Retiring Missouri Representative Mel Hancock may direct the remainder of his campaign committee funds to the nonprofit Taxpayers' Survival Association (TSA).

Congressman Hancock is not seeking reelection this year and anticipates a fund balance in Hancock for Congress committee accounts. He also is the president and chairman of the board for the taxpayer association, which he formed in 1977.

Federal Election Commission rules allow campaign funds to be donated to nonprofit organizations covered by §170(c) of the Internal Revenue Code so long as those funds are not converted for personal use. See 11 CFR 113.1. Congressman Hancock's donation complies with this regulation because TSA is a §170(c) organization and because the donation does not represent personal use.

While he heads the TSA, which is a tax-exempt educational foundation, Congressman Hancock receives no payment for his duties and does not anticipate drawing a salary from the association after he retires from Congress. Further, none of Congressman Hancock's family will receive financial compensation from the association. While the TSA may hire an executive director in the future, none of the congressman's present or former staff members is being considered for the position.

Date Issued: September 26, 1996; Length: 3 pages. ✦

AO 1996-41
Broadcasting Views of Candidates for Federal and State Offices

A.H. Belo Corporation, in conjunction with PBS affiliate stations, may produce and broadcast television programs that feature candidates for federal and state office.

Belo owns seven television stations in six states and, in conjunction with PBS affiliates in each of the areas, proposes to feature congressional and gubernatorial candidates who are running in districts that encompass viewing audiences of the various stations.

Under the federal election law, a corporation is prohibited from making contributions or expenditures in connection with a Federal election. 2 U.S.C. §441b. But, the FECA exempts from this prohibition expenditures for "any news story, commentary, or editorial distributed through the facilities of any broadcasting station...unless such facilities are owned or controlled by any political party, political committee, or candidate." 2 U.S.C. §431(9)(B)(i). Thus, a bona fide news entity is free to publish or broadcast candidate-related material contained in news stories and editorials as long as it is not owned

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[1] *In AO 1982-35, the Commission was careful to distinguish the situation from the one presented in AO 1980-57, in which a candidate sought to prevent the electorate from voting for an opponent by challenging the opponent's ballot petitions in court. In that case, the candidate's efforts related, not to defending his own ballot position, but to disqualifying another person. The Commission concluded that, in that situation, the funds raised were contributions as defined by the Act.*

or controlled by a party, a political committee or a candidate.

Belo satisfies the basic criteria for the news exemption. It is a bona fide press entity as described in FEC regulations. None of Belo's seven television stations is owned by a political party, committee or candidate and all appear to be actively involved in local news coverage. And Belo's proposal constitutes genuine news activity, as set out below.

Under Belo's plan, each candidate will be taped separately, will be asked the same question and will have five uninterrupted minutes to respond. Belo staff will devise the question in consultation with the staffs of the PBS stations, but without input from the candidates or their committees.

When two or more candidates seek the same seat, Belo will select candidates to participate in the broadcasts based on "pre-established objective criteria for public support and credibility." More than two candidates seeking the same seat may be invited to participate in the broadcasts if they meet the criteria.

The candidate segments will be combined by each station's news division into a program expected to run one hour. In some markets, where there are a number of candidates, the programs may be aired in two episodes. The order of appearance for the candidates will be determined by lot, but candidates who are seeking the same office always will appear in the same broadcast.

The broadcasts will be shown during times normally devoted to news or public affairs programming and will run unedited and without interruptions.

Based on its description of the broadcasts it plans to produce, the Commission found that Belo, operating through its owned and operated stations, is acting as a press entity and, therefore, is conducting activity that is permissible under FEC regulations.

Because Belo's proposal falls within the press exemption, it is not subject to the Commission's debate regulations at 11 CFR 110.13. (Under those rules, a staging organization must sponsor a face-to-face meeting of two or more candidates to avoid making a prohibited corporate contribution.) Consequently, Belo is free to broadcast the responses of all the candidates who participate in the programs even if some other candidates decline to appear.

Date Issued: October 4, 1996; Length: 4 pages. ✥

Advisory Opinion Requests

Advisory opinion requests are available for review and comment in the Public Records Office.

AOR 1996-42
PAC disaffiliation following corporate spin off (Lucent Technologies Inc.; September 24, 1996; 14 pages plus 113-page attachment)

AOR 1996-43
Qualification as a state committee of a political party and support of Presidential nominee (The Green Party of New York State; September 25, 1996; 2 pages plus 9-page attachment)

AOR 1996-44
Use of campaign funds for moving expenses (Congressman Charles Wilson; October 1, 1996; 2 pages)

AOR 1996-45
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Commission Joins Inter-American Union

The Federal Election Commission has become a member of the Conference of the Inter-American Union of Electoral Bodies. The organization is composed of the top election officials of all South and Central American countries, some of their neighboring islands and Canada. The conference meets every two years to discuss issues related to electoral systems.

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