



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

June 12, 2001

**MEMORANDUM**

TO: The Commission  
Acting General Counsel  
Staff Director  
Public Information  
Press Office  
Public Records

FROM: Rosemary C. Smith *RCS* *CA*  
Assistant General Counsel

Cheryl A. Fowle *CAF*  
Attorney

SUBJECT Comment on Notice of Proposed Rulemaking on Independent  
Expenditure Reporting

Attached please find one timely comment submitted in response to the above Notice of Proposed Rulemaking published on May 9, 2001 (66 FR 23628). The comment period ended on June 8, 2001.

Attachments

cc: Associate General Counsel for Policy  
Congressional Affairs Officer  
Executive Assistants

JAMES BOFF, JR.  
Senior Associates  
RICHARD E. COLESON<sup>1</sup>  
BARRY A. BOSTROM<sup>1</sup>

Associates  
JAMES R. MASON, III<sup>2</sup>  
RABANNA S. MOORE<sup>1</sup>  
ERIC C. BOKNET<sup>3</sup>  
B. CHAD BUNGARD<sup>4</sup>  
JUSTIN DAVID BRISTOL<sup>4</sup>

Of Counsel  
THOMAS J. MARZEN<sup>5</sup>

<sup>1</sup>admitted in Ind. only  
<sup>2</sup>admitted in Ore. only  
<sup>3</sup>admitted in Tex. only  
<sup>4</sup>admitted in Va. only  
<sup>5</sup>admitted in Wash. only  
<sup>6</sup>admitted in Ill. only

**BOPP, COLESON & BOSTROM**  
**ATTORNEYS AT LAW**

(not a partnership)

1 South 6th Street

TERRE HAUTE, INDIANA 47807-3510

Telephone 812/232-2434 Facsimile 812/235-3685

E-mail [jboffjr@sbc.com](mailto:jboffjr@sbc.com)

JAMES BOFF, JR.  
Of Counsel  
WEBSTER, CHAMBERLAIN & BEAN  
Suite 1000  
1747 Pennsylvania Ave., N.W.  
WASHINGTON, DC 20006  
Telephone 202/785-9500  
Facsimile 202/835-0243

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FEDERAL ELECTION COMMISSION  
WASHINGTON, DC 20543

June 8, 2001

Rosemary C. Smith  
Assistant General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463  
Fax: 202/219-3923  
Email: [IndyExpRep@fec.gov](mailto:IndyExpRep@fec.gov)

Re: Comments Concerning Advance Notice of  
Proposed Rulemaking Regarding 11 C.F.R.  
Part 100, 104, and 109; "Independent Ex-  
penditure Reporting," Notice 2001-6

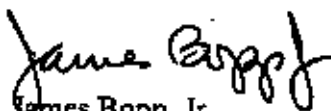
Dear Ms. Smith:

We send with this (by fax, mail, and email) the *Comments on Proposed Rules at 11 C.F.R. Parts 100, 104, and 109 Regarding Independent Expenditure Reporting* by the James Madison Center for Free Speech (in response to a notice published at 66 Fed. Reg. 23628, May 9, 2001), incorporated herein by reference.

Notice is hereby given that Mr. James Bopp, Jr., General Counsel for the James Madison Center for Free Speech, wishes to testify orally concerning the proposed rulemaking in the event a hearing is scheduled on this matter.

Sincerely,

BOPP, COLESON & BOSTROM

  
James Bopp, Jr.  
Richard E. Coleson

1 Enclosure

# Comments on Proposed Rules at 11 C.F.R. Parts 100, 104, and 109 Regarding Independent Expenditure Reporting

*By the*

**James Madison Center for Free Speech**

*To the*

**Federal Election Commission**

*Prepared by*

**James Bopp, Jr. & Richard E. Coleson**

**June 8, 2001**

The James Madison Center for Free Speech submits the following comments regarding the Federal Election Commission's advanced notice of proposed rulemaking ("Notice") regarding amendments to 11 C.F.R. Parts 100, 104, and 109 (Notice 2001-6, "Independent Expenditure Reporting") in response to the solicitation of comments published at 66 Fed. Reg. 23628 (May 9, 2001).

## THE FEC'S RULEMAKING AUTHORITY

Public Law 106-346 made the following minor amendment to the Federal Election Campaign Act, authorizing narrow rulemaking related to the amendment's purpose (emphasis added):

Sec. 502. (a) CLARIFICATION OF PERMISSIBLE USE OF FACSIMILE MACHINES AND ELECTRONIC MAIL TO FILE INDEPENDENT EXPENDITURE STATEMENTS.—Section 304 of the Federal Election Campaign Act of 1971 (2 U.S.C. 434) is amended by adding at the end the following new subsection:

"(d)(1) Any person who is required to file a statement under subsection (c) of this section, except statements required to be filed electronically pursuant to subsection (a)(11)(A)(i) may file the statement by facsimile device or electronic mail, *in accordance with such regulations as the Commission may promulgate.*

"(2) The Commission shall make a document which is filed electronically with the Commission pursuant to this paragraph accessible to the public on the Internet not later than 24 hours after the document is received by the Commission.

"(3) *In promulgating a regulation under this paragraph, the Commission shall provide methods (other than requiring a signature on the document being filed) for verifying the documents covered by the regulation. Any document verified under any of the methods shall be treated for all purposes (including penalties for perjury) in the same manner as a document verified by signature.*"

(b) TREATMENT OF LINES OF CREDIT . . . .

(c) REQUIRING ACTUAL RECEIPT OF CERTAIN INDEPENDENT EXPENDITURE REPORTS WITHIN 24 HOURS.—

(1) IN GENERAL.—Section 304(c)(2) of such Act (2 U.S.C. 434(c)(2)) is amended in the matter following subparagraph (C)—

(A) by striking “shall be reported” and inserting “shall be filed”; and

(B) by adding at the end the following new sentence: “Notwithstanding subsection (a)(5), the time at which the statement under this subsection is received by the Secretary, the Commission, or any other recipient to whom the notification is required to be sent shall be considered the time of filing of the statement with the recipient.”.

(2) Conforming amendment. . . .

(d) EFFECTIVE DATE. . . .

## THE LIMITED SCOPE OF THE RULEMAKING AUTHORITY

By its plain terms, the Act provides that independent expenditure reporters “may file the statement by facsimile device or electronic mail.” The Act authorizes the FEC to promulgate a rule about *how* to submit “24-hour reports” by fax or email, e.g., to whose attention to send reports, the fax number to use, or the email address to employ – just the sort of information provided in the present Notice for submitting comments on proposed rulemaking. The Act also authorizes rulemaking as to verification on faxes and emails.

Congress also specified *when* these independent expenditure reports must be filed – they must be received on the filing date, not sent on that date (and the FEC must get them on the Internet within 24 hours). If Congress had intended to further change deadlines related to when reporting must be done, e.g., considering an expenditure to be “made” when a contract for broadcast time is signed instead of when the broadcast is made, it would have done so while it was considering filing times. It did not.

In fact, it is evident that Congress believes that a broadcast independent expenditure is “made” at the time the information is disseminated to the public instead of when broadcast time is contracted because both the current campaign finance reform bills in Congress — McCain-Feingold (S. 27, already passed by the Senate) and Shays-Meehan (H.R. 380) — change the time when an independent expenditure is “made” from when it is disseminated to the public to when a contract is made for broadcast time.<sup>1</sup>

The FEC’s Notice erroneously represents that

Public Law 106-346 requires, *inter alia*, that the Commission issue rules requiring that reports of independent expenditures made less than twenty (20) days but more than twenty-four (24) hours (“24-hour reports”) must be received by the Commission or the Secretary of the Senate, as appropriate, <sup>(within 24 hours)</sup> within 24 hours of the time the independent expenditure was made.

66 Fed. Reg. 23628. The Public Law *itself* makes the statutory change requiring that 24-hour reports must be received within 24 hours of when independent expenditures are made. No rulemaking is needed. The Public Law provides no authority to the FEC to make rules about when independent expenditures are “made.” As already explained, the Public Law only prescribes rulemaking on this issue with respect to *how* to file by fax and email.

<sup>1</sup>See, e.g., the language of S. 27 at the U.S. Congress’ “Thomas” website at <<http://thomas.loc.gov/cgi-bin/query/D?c107:2:/temp/~c107DgKzwww:e16467?>> (“SEC. 201. DISCLOSURE OF ELECTIONEERING COMMUNICATIONS . . . (5) CONTRACTS TO DISBURSE—For purposes of this subsection, a person shall be treated as having made a disbursement if the person has executed a contract to make the disbursement.”).

In sum, the relevant provisions of the Act are solely about implementing fax and email filing of independent expenditure reports to enhance disclosure by getting reports to the FEC promptly so they can be put on the Internet for public review. The Act is technical and narrow in nature, not substantive and expansive.

### THE PROPOSED "MADE" RULE

The FEC has proposed the following new rule about when independent expenditures are "made":

#### PART 109—INDEPENDENT EXPENDITURES (2 U.S.C. 431(17), 434(c))

8. The authority citation for part 109 would continue to read as follows:

Authority: 2 U.S.C. 431(17), 434(a)(11) and (c), 438(a)(8), and 441d.

9. Section 109.1 would be amended by adding new paragraph (f) to read as follows:

#### Sec. 109.1 Definitions (2 U.S.C. 431(17)).

\* \* \* \* \*

(f) An independent expenditure is made on the earliest of—

- (1) The date on which a written contract, including a media contract, promise or agreement to make an independent expenditure is executed;
- (2) The first date on which the communication is printed, broadcast or otherwise publicly disseminated; or
- (3) The date on which the person making the independent expenditure pays for it.

66 Fed. Reg. 23632.

### COMMENTS ON THE "MADE" RULE

Although Public Law 106-346 in no way requests or authorizes the FEC to make a rule with respect to *when* an independent expenditure is made, the FEC has proposed one anyway. It is black letter agency law that rulemaking must be within the authority granted by the statute. This Act grants the FEC very narrow rulemaking authority on very precise issues. But, the FEC treats it as a grant of authority to implement its vision of campaign finance "reform" (clearly borrowed from the two pending congressional campaign finance reform bills). Therefore, the proposed rule is beyond statutory authority. It is Congress' job, not the FEC's to make substantive changes in election law. Beyond that, as explained below, the proposed rule makes no grammatical or logical sense and would be bad law even if properly enacted by Congress.

Organizations reporting independent expenditures have always understood an "independent expenditure" to be "made" when the communication is released to the public (as has Congress, *supra*). This follows from the statutory definition of "independent expenditure," from common use of the term "made" as a transitive verb with "independent expenditure" as its direct object, and from common sense. The FEC's proposed change would be a major substantive change, leading to bad results in practice.

At first, uncritical glance, the FEC's proposed options of dating an "independent expenditure" from when money is *expended* or a binding contract is made to do so might seem to make sense. Critical analysis, however, quickly notes that both "expenditure" and "independent expenditure" are legal terms of art defined in the FECA. The former is clearly about expending money or contracting to do so, but the latter requires *communication* in addition to expenditure.

In its proposed rule, the FEC seeks to interchange the technical terms "expenditure" and "independent expenditure."

"Expenditure" does include, *inter alia*, "payment" or "a written contract . . . to make an expenditure." 2 U.S.C. § 431(9). Therefore, if the FECA required 24-hour reports of "expenditures," reporters would be required to report when a payment is made or a written contract for an expenditure is made. However, the FECA requires reporting of "independent expenditures," not "expenditures." 2 U.S.C. § 434(c)(1) ("Any *independent expenditure* . . . shall be reported within 24 hours after such *independent expenditure* is made.") (emphasis added).

"'Independent expenditure' means an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate . . ." 2 U.S.C. § 431(17). In other words, an "independent expenditure" is neither complete nor even in existence until the express advocacy has occurred. A person could make numerous payments or sign numerous contracts for broadcast time or periodical advertising space and never make an independent expenditure because, for whatever reason, no express advocacy communication ever occurs. The FEC has well understood this in the past, as evidenced by its rule at 11 C.F.R. § 100.16, defining "independent expenditure" (underscoring added):

The term *independent expenditure* means an expenditure for a communication by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate.<sup>2</sup>

Because "expenditure" and "independent expenditure" are terms of art that are not interchangeable, based on their definitions in the FECA, the FEC is without authority to use them interchangeably. Consequently, the proposed rule that relies on the ability to interchange these terms is beyond the FEC's statutory authority.

Furthermore, the FEC's proposed rule ignores the common meaning and correct grammatical use of the verb "made," which is an inflected form of "make," which is defined in a variety of ways when used as a transitive verb:

1. To cause to exist or happen; bring about; create: "made problems for us; making a commotion." 2. To bring into existence by shaping, modifying, or putting together material; construct: "make a dress; made a stone wall." 3. To form by assembling individuals or constituents: "make a quorum." 4. To change from one form or function to another: "make clay into bricks." 5. a. To cause to be or become: "made her position clear; a decision that made him happy." b. To cause to assume a specified function or role: "made her treasurer; made Austin his home." 6. a. To cause to act in a specified manner: "Heat makes gases expand." b. To compel: "made him quit." 7. a. To form in the mind: "make an estimate." b. To compose: "make verses." 8. a. To prepare; fix: "make dinner." b. To get ready or set in order for use: "made the bed." c. To gather and light the materials for (a fire). 9. a. To engage in: "make war." b. To carry out; perform: "make a phone call; make an incision." 10. To achieve, produce, or attain: "made peace between the two sides;

<sup>2</sup> This requirement of communication is clearly correct. The transitive verb "advocate," as in "expressly advocating," means "[t]o speak, plead, or argue in favor of," which necessarily requires an audience (as is evident from the word's etymology: "from Latin *advocatus* past participle of *advocare*, to summon for counsel, *ad-*, *ad-*, + *vocare*, to call"). THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000).

not making sense; didn't make the quota." 11. a. To institute or establish; enact: "make laws." b. To draw up and execute in a suitable form: "make a will." c. To arrange or agree to: "make a date." 12. a. To arrive at; reach: "made Seattle in two hours." b. To reach in time: "just made the plane." 13. a. To attain the rank or position of: "made lieutenant." b. To acquire a place in or on: "made the baseball team; made the newspapers." 14. a. To gain or earn, as by working: "make money." b. To behave so as to acquire: "make friends." c. To score or achieve, as in a sport: "made a field goal." 15. a. To assure the success of: "Favorable reviews can make a play." b. To favor the development of: "Practice makes a winning team." 16. To be suited for: "Oak makes strong furniture." 17. To develop into: "will make a fine doctor." 18. a. To draw a conclusion as to the significance or nature of: "don't know what to make of the decision." b. To calculate as being; estimate: "I make the height 20 feet." c. To consider as being: "wasn't the problem some people made it." 19. a. To constitute: "Ten members make a quorum." b. To add up to: "Two and two make four." c. To amount to: "makes no difference." 20. To cover (a distance): "made 200 miles before sunset." 21. To constitute the essence or nature of: "Clothes make the man." 22. To cause to be especially enjoyable or rewarding: "You made my day." 23. To appear to begin (an action): "She made to leave." 24. Slang To persuade to have sexual intercourse.

THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000) (emphasis added).<sup>3</sup>

Examination of these definitions reveals that only the italicized definitions apply when "independent expenditure" is the direct object of the transitive verb "make," i.e., "[t]o cause to exist or happen; bring about; create," "to engage in," or "to carry out; perform." Because an "independent expenditure" requires both an expenditure and an express advocacy communication, it does not even come into existence until the communication occurs. So "made" means brought into existence. Alternatively, when both the expenditure and express advocacy communication exist, "made" means that one engaged in or performed an independent expenditure.

When used as a transitive verb, "make/make" requires a direct object, i.e., that which is brought into existence or that in which one engages. The FEC's proposed rule erroneously substitutes for the statutory direct object, i.e., "independent expenditure," either "contract/promise/agreement" or "payment."

The first option of the proposed rule, § 109.1(f)(1), requiring reporting when a contract/promise/agreement is made would require reporting when one makes a contract "to make an independent expenditure." But the FECA requires reporting when one makes an "independent expenditure," not a "contract" for an "independent expenditure." In addition to violating the FECA, the FEC's first and third options for "made" violate grammatical law by switching direct objects that are not synonyms and insisting that the meaning has not changed.

The third option of the proposed rule, § 109.1(f)(3), requiring reporting of an independent expenditure when payment is made for it, substitutes "payment" for "independent expenditure" as the direct object of "made." Again, this violates both the FECA and grammatical law. In fact, this makes no sense under the plain reading of the FECA, which requires reporting of an "independent expenditure" when both an express advocacy communication *and* a contract/promise/agreement to pay for the communication have occurred. Under the proposed rule, an organization could broadcast express advocacy advertisements a week before an election, but

<sup>3</sup>Cf. BLACK'S LAW DICTIONARY at 861 (5th ed. 1979) ("[t]o cause to exist," "[t]o do, perform, or execute")

not pay until a month later, and no "independent expenditure" would have occurred to require reporting before the election.

The second option under the proposed rule, § 109.1(f)(2), does not attempt to substitute non-synonymous direct objects. The proposal correctly requires that an "independent expenditure" would exist if there had been both an "expenditure" (payment or agreement to pay) and an express advocacy communication that had been "broadcast or otherwise publicly disseminated." However, an "independent expenditure" would not exist if the communication had merely been "printed," as the proposed rule would erroneously require. A warehouse full of flyers expressly advocating the election or defeat of a clearly identified candidate and a printer's invoice for them marked "paid" would not constitute an "independent expenditure" absent dissemination to the public, i.e., putting the flyers in the mail.<sup>4</sup> And as already noted, the FEC has previously acknowledged this with its own definition of "independent expenditure," which identifies it as a "communication," requiring some sort of dissemination. 11 C.F.R. § 100.16.

Finally, common sense dictates rejection of the FEC's proposed rule that would make "expenditures" (when contracts or payments are made) into "independent expenditures" that require reporting.<sup>5</sup> Major public policy organizations routinely buy air time in advance of elections key markets in order to have broadcast time available if the organization decides to make independent expenditures. Then the air time may not be used for strategy reasons (and contracts are no problem because broadcasters usually have ready markets for freed-up air time before elections). For example, the organization may decide that independent expenditures are needed more elsewhere in a different race that has just become more critical based on current polling data.

Another example is that of a planned independent expenditure on printed express advocacy pieces in support of U.S. Senate candidate John Ashcroft by the National Right to Life Committee's. When Ashcroft's opponent died, NRLC did not think it seemed to release the brochures and elected to spend its money on other races. In such situations, contracts and payments are made, but there is no communication, and it would be inaccurate and misleading to the public to have such "expenditures" reported as "independent expenditures."

A further example, typical of major public policy organizations, is found in NRL PAC's practice of arranging for telemarketing firms to make express advocacy phone calls into targeted areas at election time. The general agreement is made well in advance of the election, but the agreement is only for a set range of expenditures (low and high ends) and the rate per call. At this point, the amount of money that will be available to spend is yet unknown, for it has not been raised yet. In what state or races the calls will be made is unknown; in fact it may be only

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<sup>4</sup>Public policy organizations sometimes print flyers and then decide not to distribute them (either distributing none, due to changed circumstances, or substituting another). Such an expenditure would show up on reports by a PAC as an expenditure, but would not show up on reports of non-PACs as an "independent expenditure."

<sup>5</sup>Common sense has always told public policy organizations that a printed independent expenditure communication is reportable when it is posted and that broadcast express advocacy communications are reportable when put out on the air. That has been the uniform practice of all organizations in their reporting of independent expenditures to date under existing rules.



decided on the day before the phone calling begins as last-minute polling indicates where there is a need. Thus, at the time of the agreement for telemarketing services, the total amount to be spent is yet unknown, as is the location of the calls. Of course, the option of simply reporting when payment is made after the election on the invoice of the telemarketer would be satisfactory, but that would provide little advance information to the public. However, the idea of reporting when an agreement for services is made would simply be unworkable for telemarketing. These communications are properly "made" when the calling begins.

The same is true of print communications. Major organizations often purchase paper stock in large quantities long before elections. Some generally used materials, e.g., brochures, may also be printed in advance without any knowledge of where the materials will actually be mailed.

As may be seen, the FEC's proposed rule on when independent expenditures are "made" is simply unworkable in the real world of major public policy organizations. The present practice is in place because it is the only reasonable, workable one.

Incumbents, of course, would love the FEC's new rule because it would provide advance opportunity to dissuade broadcasters and newspapers from carrying independent expenditure communications. Such things actually happen.

An example is the case of *National Right to Life PAC v. Friends for Bryan* (No. CV-S-88-865-PMP-(RJJ)), a 1988 case brought in state court by NRL PAC against Nevada Governor Richard Bryan's U.S. Senatorial campaign committee for tortious interference with contractual relations. Lawyer Jeffrey Eskin had written intimidating letters on behalf of Friends for Bryan to radio and television stations that had contracted to carry independent expenditure communications for NRL PAC. As a result, stations refused to broadcast contracted advertisements, imposing the equivalent of a prior restraint on NRL PAC's speech.

Some of the threatening correspondence that was admitted into evidence in that case is appended with its original exhibit numbers. Plaintiff's Exhibit 5 is a fax letter sent to KOH News, accompanied by a copy of Eskin's October 31, 1988, letter. Exhibit 6 is an identical letter (but for candidate name changes) of the same date from lawyer Robert Bauer (of the District of Columbia law firm Perkins Coie, counsel for the Senator Burdick Campaign Committee in North Dakota) targeted at broadcasters of NRL PAC express advocacy communications. Exhibit 7 is a letter that contains the same boilerplate language tailored to intimidate broadcasters from broadcasting NRL PAC ads in opposition to U.S. Senate-candidate Bob Kerrey, written by his campaign chairman in Nebraska. Exhibit 32 is the same letter as the Eskin letter sent with Exhibit 5 concerning NRL PAC ads, but on Bryan for U.S. Senate letterhead.

The source of this systematic campaign of intimidation is evident in Exhibit 33, an October 21, 1988, form letter prepared by Robert F. Bauer, Counsel to the Democratic Senatorial Campaign Committee, from which the other letters were obviously derived. This letter, obtained by legal discovery in this case, reveals a well-orchestrated intimidation effort of which the other letters were a part.

Governor Bryan's lawyer, Jeffrey L. Eskin, also sent threatening letters to stations concerning independent expenditure ads by other organizations. Exhibit 34 was an intimidation letter against broadcast independent expenditure ads by the American Medical Association PAC,

and Exhibit 35 sought to prevent express advocacy communications by the Auto Dealers and Drivers for Free Trade PAC in the Bryan race.

This evidence demonstrates what is usually invisible to the public – a widespread practice of well-planned, systematic intimidation attempts against broadcasters to gain political advantage.

The FEC's proposed rule would provide increased time for such mischief, at the expense of First Amendment rights. If broadcasters are willing to cancel advertisements to which they have already committed and that are in process (as were NRL PACs) – even though it means they might suffer unwanted publicity for pulling ads in progress – how much easier will it be for intimidation to prevail with the extra time the FEC's proposed rule would provide before broadcasting even begins. Candidates seeing reports of contracts would immediately demand to see copies of the ads for which the contract had been made, claiming the ads must be perused for libelous or inaccurate material (and, as noted above, the ad scripts might not even have been created yet). Even if there is only delay in ads being aired as a result of the opportunity for interference provided by the proposed rule, that would be a satisfactory result for the opposition.

As a result of the harassment that would likely arise from the advance reporting of contracts for independent expenditures, many broadcasters would likely be tempted simply not to accept express advocacy communications, thereby depriving advocacy organizations of their opportunity for free speech. The vital ability of Americans to participate in the political process would therefore be thwarted, to the detriment of the Republic.

In sum, the proposed rule is beyond statutory authority, violates grammatical rules, ignores common sense, and would be bad policy. The FEC should not enact it.

## FAX TRANSMISSION SHEET

FRIENDS FOR BRYAN  
 FAX 8782-731-4900  
 TELEPHONE 8782-731-3900

TRANSMITTED

DATE: 10/31/88

TIME: \_\_\_\_\_

CONFIRMATION REQUESTED \_\_\_\_\_ YES  NONUMBER OF PAGES: (including cover page) 5

DOCUMENT IS SENT FROM:

NAME BRYAN SENATE

DOCUMENT IS SENT TO:

NAME KOH News

The Bryan for U.S. Senate campaign today asked all Nevada radio stations to refuse to run advertisements submitted by the National Right to Life Committee which distort Senator Hecht's record on federal funding for abortions. Federal communication law says that so-called "independent expenditures" such as the radio ads are not protected campaign communications, and stations are not obligated to sell such advertising to these outside groups. The Right to Life ad claims that Chic Hecht has voted against abortion and public funding of abortion 100 percent of the time during his Senate career, but the Congressional Record shows that Hecht has voted for public funding of abortions three times (Sept. 26, 1984 - HR 6028; September 16, 1986 - H.R. 5175; and July 27, 1988 - HR 4783.) During the first Hecht-Bryan senatorial debate, Hecht denied supporting such funding, but according to the Las Vegas Sun (9/27/88 - page 1A) "after the Bryan campaign produced documentation following the debate that Hecht indeed had voted in favor of federal funding for abortions in the event of rape or incest, Hecht acknowledged that he voted for this bill."

PLAINTIFF'S  
 EXHIBIT

5

## FAX TRANSMISSION SHEET

FRIENDS FOR BRYAN  
FAX 8702-731-6960  
TELEPHONE 8702-731-1980

## TRANSMITTED

DATE: 11/1/89TIME: 12:25 pmCONFIRMATION REQUESTED                      YES X NONUMBER OF PAGES: (including cover page) 12

DOCUMENT (S) SENT FROM:

NAME JEFF ESKIN, Esq.

DOCUMENT (S) SENT TO:

NAME KEN MENDENHALL

Please Deliver  
Upon Receipt

TTED FROM 702 TS: 4900

10.31.88 18:44 P.C.

FRIENDS--

Richard Bryan

214  
964 7751

October 31, 1988

Dear Station Manager:

A disturbing trend has emerged in the last few weeks of this year's campaign for the United States Senate in Nevada.

At least three so-called "independent" organizations have announced that they intend to run negative commercials against Governor Richard Bryan on radio and television.

Your station is not obliged to accept these "independent" committee advertisements for broadcast, nor is it required to account in any way for its decision to reject them. *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94 (1973); *You Can't Afford Dodd Committee*, 81 F.C.C. 2d 579 (1980). The repeated efforts of these kind of organizations to obtain just such a private right to access have been consistently rejected by the Federal Communications Commission ("F.C.C."), *National Conservative Political Action Committee*, 89 F.C.C. 2d 625 (1982). There are numerous valid reasons for refusing to broadcast the ads.

#### Background: Questionable Activities

The campaigns of organizations such as the above are marked by highly derogatory attacks on the candidates they seek to defeat. Even more frequently, the advertisements distort and misrepresent the candidate's position on the issues addressed.

#### Liability for Libelous Broadcasts by Independent Committees

Under Section 315 (a) of the Federal Communications Act, broadcast stations are expressly prohibited from censoring in any way material submitted by a candidate for broadcast. Since the stations may not censor or otherwise exercise editorial control over such materials, they are not legally liable in any libel actions arising out of representation made by a candidate in their broadcasts. *Farmers Educational and Cooperative Union v. WDAY, Inc.*, 368 U.S. 525 (1959)

SMITTED FROM 702 731 4940

10.31.82 18140 P.03 -FR12403962AN

This immunity does not, however, apply to representation made in political broadcasts by non-candidates, such as "independent" committees like those mentioned above. Broadcast stations are fully liable for libelous attacks made by such committees upon U.S. Senate candidates in their political broadcasts. In Re Complaint of Senator Thomas F. Eagleton, 81 F.C.C. 2d 423 (1980); Felix v. Westinghouse Radio Stations, 186 U.S. 909 (1951).

The F.C.C.'s Broadcast Bureau has stated the fundamental principle of law as follows:

With the exception of statements made during "uses" by legally qualified candidates for public office, which cannot be censored, a broadcaster may be subject to defamation proceedings under the jurisdiction of the appropriate local courts. Therefore, it is left to each station or network to make its own determinations of whether material contemplated for broadcast may contain statements which may subject it to potential liability.

Letter to J. Curtis Herge, attorney for NEPRC, from Broadcast Bureau Staff, dated November 28, 1981, p.4.

#### Personal Attack

Stations must also afford a free opportunity to respond to candidates who are victims of a "personal attack" by persons other than legally qualified candidates, their authorized spokesmen, or those associated with their campaign. 47 C.F.R. Sec. 73.1920(a), (b)(3), provided that the personal attack does not occur during bona fide news events. 47 C.F.R. Sec. 73.1920(b)(4). In order for the personal attack rule to come into play, the attack must occur during "the presentation of views on a controversial issue of public importance." 47 C.F.R. Sec. 73.1920(a).

A "personal attack" is an attack made upon the "honesty, character, integrity or like personal qualities of" the candidate. 47 C.F.R. Sec. 73.1920(a).

Under the F.C.C. regulations, a station has an affirmative obligation in the event of a "personal attack": Within one week it must notify the person or group attacked of the date and time and identification of the broadcast, send a script or tape of the attack (or if a script or tape is not available, as accurate a summary as possible) to the victim of the attack, and afford the victim a reasonable opportunity to reply on the station's facility, without charge. 47 C.F.R. Sec. 73.1920(a)(1)-(3).

RECEIVED FROM 702 731 4 ) 10.31.88 18:45 .04 \*FRIENDSHIP\*  
 In the event that the station does not comply with this  
 affirmative duty to notify a candidate of an attack, and to  
 afford that candidate a reasonable opportunity to respond without  
 charge, the target of the attack is entitled to bring a  
 complaint before the F.C.C. and to seek remedial administrative  
 action by the agency.

Finally, we have enclosed for your review an example of the  
 National Right To Life's abortion radio ad which misrepresents  
 Senator Heent's voting record on abortion. Documents indicating  
 the Senator's votes to federally fund abortions are provided  
 herein. Governor Bryan's abortion position is also included for  
 your consideration. We respectfully request that you refuse to  
 run these political advertisements which are inaccurate and  
 distort the candidates' positions.

If you have any questions, please call 731-1988 or 732-3144.

Sincerely,

Jeffrey L. Eskin, Esq.

11 MARCH

TO

12165547781

P.W.

110-24-31 1 17149

PERKINS COIE D.C. \*

8249418 2

# PERKINS COIE

A LAW PARTNERSHIP INCLUDING PROFESSIONAL CORPORATION  
1110 Vermont Avenue N.W. | Washington, D.C. 20005 | (202) 477-5030

October 31, 1988

*Steve  
Pittendugh*

Dear Station Manager:

It has come to our attention that the National Right to Life PAC intends to run negative commercials against Senator Burdick on television. This advertisement is purportedly highly derogatory and I urge your station to reject this "independent" advertisement.

Your station is not obliged to accept these "independent" committee advertisements for broadcast, nor is it required to account in any way for its decision to reject them. Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 (1973); You Can't Afford Dodd Committee, 81 F.C.C. 2d 879 (1980). The repeated efforts of these kinds of organizations to obtain just such a private right to access have been consistently rejected by the Federal Communications Commission ("F.C.C."), National Conservative Political Action Committee, 89 F.C.C. 2d 524 (1982). There are numerous valid reasons for refusing to broadcast the ads.

### Background: Questionable Activities

The campaigns of organizations such as the above are marked by highly derogatory attacks on the candidates they seek to defeat. Even more frequently, the advertisements distort and misrepresent the candidate's position on the issues addressed.

EXHIBIT B

PLAINTIFF'S  
EXHIBIT

6



7-60 THU 13:07

P. 02

LECT ET '82 11:34 INC.

PARCE

TO

12152247751

F.62

NT BY:

110-24-88 1 17148

PERKINS CODE D.C.-

1268418 2

- 2 -

Liability for Libelous Broadcasts by Independent Committees

Under Section 315(a) of the Federal Communications Act, broadcast stations are expressly prohibited from censoring in any way material submitted by a candidate for broadcast. Since the stations may not censor or otherwise exercise editorial control over such materials, they are not legally liable in any libel actions arising out of representations made by a candidate in their broadcasts. Varner Educational and Cooperative Union v. WMAV, Inc., 360 U.S. 526 (1959).

This immunity does not, however, apply to representation made in political broadcasts by non-candidates, such as independent committees like those mentioned above. Broadcast stations are fully liable for libelous attacks made by such committees upon U.S. Senate candidates in their political broadcasts. In re Complaint of Senator Thomas V. Eagleton, 81 F.C.C. 2d 423 (1980); Kelly v. Washington Radio Station, 186 U.S. 209 (1931).

The F.C.C.'s Broadcast Bureau has stated the fundamental principle of law as follows:

With the exception of statements made during "uses" by legally qualified candidates for public office, which cannot be censored, a broadcaster may be subject to defamation proceedings under the jurisdiction of the appropriate local courts. Therefore, it is left to each station or network to make its own determinations of whether material contemplated for broadcast may contain statements which may be subject to potential liability.

Letter to J. Curtis Harow, Attorney for NCPAC, from Broadcast Bureau Staff, dated November 10, 1981, p.4.

Persons' Attack

Stations must also afford a fair opportunity to respond to candidates who are victims of a "personal attack" by persons other than legally qualified candidates, their authorized spokesmen, or those associated with their campaign. 47 C.F.R. § 73.1920(a), (b)(3), provided that the personal attack does not occur during bona fide news events. 47 C.F.R. § 73.1920(b)(4). In order for the personal attack rule to come into play, the attack must occur during "the presentation of views on a controversial issue of public importance." 47 C.F.R. § 73.1920(a).

P. 02

EX 27 '20 11:25 AM

FARGO TO 12:05 PM  
PERKINS COLE D. C.

P. 03

320418 4

- 3 -

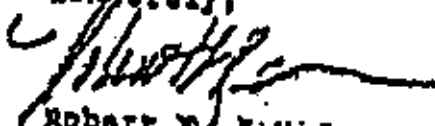
A "personal attack" is an attack made upon the "honesty, character, integrity or like personal qualities of" the candidate. 47 C.F.R. § 73.1920(a).

Under the F.C.C. regulations, a station has an affirmative obligation in the event of a "personal attack": Within one week it must notify the person or group attacked of the date, time and identification of the broadcast, send a script or tape of the attack (or if a script or tape is not available, an accurate summary as possible) to the victim of the attack, and afford the victim a reasonable opportunity to reply on the station's facility, without charge. 47 C.F.R. 55.73.1920(a)(1)-(3).

In the event that the station does not comply with this affirmative duty to notify a candidate of an attack, and to afford that candidate a reasonable opportunity to respond without charge, the target of the attack is entitled to bring a complaint before the F.C.C. and to seek remedial administrative action by the agency.

If you have any questions, please call Ross Keyes, the Burdick Campaign Coordinator, at 701/253-0460.

Sincerely,



Robert N. Bauer  
Counsel, Burdick Campaign  
Committee, Inc.

03373

216  
864  
7751

2-88 WED 14: 3 THE SYSTEMS HQ JE P.02  
 31-88 MON 14:47 SANDRA FAUCHER, NRL PAC P.02  
 EDY 3500 TEL No. 402-483-7577 Oct 31, 88 12:57 No.003 P.02/03

# Bob Kerrey

FOR UNITED STATES SENATE

7602 Pacific • Omaha, Nebraska 68114  
 Telephone (402) 391-3411  
 Tuesday, October 11, 1988

Dear General Manager,

It has come to my attention that groups claiming to be non-connected or independent political action committees may be attempting to purchase time on your station to broadcast advertisements misrepresenting Bob Kerrey's position on issues of national importance. These groups also intend to air material that amounts solely to personal attacks and unfounded innuendo. These misrepresentations so seriously distort Bob Kerrey's record and slander him personally, that I would ask that you consider carefully whether your station should acquiesce in this conduct by accepting this material for broadcast on your facility.

Your station is not obliged to accept these advertisements for broadcast, nor is it required to account in any way for its decision to reject them. Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 (1973); You Can't Afford Padd Committee, 81 F.C.C. 2d 579 (1980). The repeated efforts of groups like these to obtain just such a private right of access have been consistently rejected by the Federal Communications Commission ("FCC"). National Conservative Political Action Committee, 89 F.C.C. 2d 626 (1982). There are numerous valid reasons for refusing to broadcast the ads.

## Liability for Libelous Broadcasts by Independent Committees

Under § 315(a) of the Federal Communications Act, broadcast stations are expressly prohibited from censoring in any way material submitted by a candidate for broadcast. Since the stations may not censor or otherwise exercise editorial control over such materials, they are not legally liable in any libel actions arising out of representations made by a candidate in their broadcasts. Farmers Educational and Cooperative Union v. WDAY, Inc., 360 U.S. 525 (1959).

This immunity does not, however, apply to representations made in political broadcasts by non-candidates, such as "independent" committees. Broadcast stations are fully liable for libelous attacks made by such committees upon U.S. candidates in their political broadcasts. In Re Complaint of Senator Thomas F. Eagleton, 81 F.C.C. 2d 423 (1980); Felix v. Westinghouse Radio Stations, 186 F.2d 1 (3rd Cir. 1950), cert. denied, 341 U.S. 909 (1951).

PLAINTIFF'S  
EXHIBIT

7

0V- 2-88 WED 16 11 THE SYSTEMS HI USE  
 1-31-88 MON 12:57 P. 18

EEDY 3500

TEL No. 402-483-7577

Oct 31, 88 12:57 No. 003 P. 03/03

Here, again, the FCC's Broadcast Bureau has had occasion to affirm this point in response to objections from independent committees, namely, that:

With the exception of statements made during "uses" by legally qualified candidates for public office, which cannot be censored, a broadcaster may be subject to defamation proceedings under the jurisdiction of the appropriate local courts. Therefore, it is left to each station or network to make its own determinations of whether material contemplated for broadcast may contain statements which may subject it to potential liability.

Letter to J. Curtis Herge, attorney for NCPAC, from Broadcast Bureau Staff, dated November 20, 1981, p. 4.

### Personal Attack

Stations must also afford a free opportunity to respond to candidates who are victims of a "personal attack" by persons other than legally qualified candidates, their authorized spokesmen, or those associated with their campaign, 47 C.F.R. §§ 73.1920(a), (b)(3), provided that the personal attack does not occur during bona fide newscasts or news interviews, or during on-the-spot coverage of bona fide news events. 47 C.F.R. § 73.1920(b)(4). In order for the personal attack rule to come into play, the attack must occur during "the presentation of views on a controversial issue of public importance." 47 C.F.R. § 73.1920(a).

A "personal attack" is an attack made upon the "honesty, character, integrity or like personal qualities of" the candidate.

Under the FCC regulations, a station has an affirmative obligation in the event of a "personal attack": Within one week it must notify the person or group attacked of the date and time and identification of the broadcast, send a script or tape of the attack (or if a script or tape is not available, as accurate a summary as possible) to the victim of the attack, and afford the victim a reasonable opportunity to reply on the station's facility, without charge. 47 C.F.R. §§ 73.1920(a)(1)-(3).

In the event that the station does not comply with this affirmative duty to notify a candidate of an attack, and to afford that candidate a reasonable opportunity to respond without charge, the target of the attack is entitled to bring a complaint before the FCC and to seek remedial administrative action by the agency.

Thank you for your consideration of this matter.

Sincerely,



Bill Hoppner  
 Chairman, Kerrey for U.S. Senate

PLAINTIFF'S  
EXHIBIT

32



October 31, 1988

Dear Station Manager:

A disturbing trend has emerged in the last few weeks of this year's campaign for the United States Senate in Nevada.

At least three so-called "independent" organizations have announced that they intend to run negative commercials against Governor Richard Bryan on radio and television.

Your station is not obliged to accept these "independent" committee advertisements for broadcast, nor is it required to account in any way for its decision to reject them. Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 (1973); You Can't Afford Dodd Committee, 81 F.C.C. 2d 379 (1980). The repeated efforts of these kind of organizations to obtain just such a private right to access have been consistently rejected by the Federal Communications Commission ("F.C.C."), National Conservative Political Action Committee, 89 F.C.C. 2d 626 (1982). There are numerous valid reasons for refusing to broadcast the ads.

Background: Questionable Activities

The campaigns of organizations such as the above are marked by highly derogatory attacks on the candidates they seek to defeat. Even more frequently, the advertisements distort and misrepresent the candidate's position on the issues addressed.

Liability for Libelous Broadcasts by Independent Committees

Under Section 315 (a) of the Federal Communications Act, broadcast stations are expressly prohibited from censoring in any way material submitted by a candidate for broadcast. Since the stations may not censor or otherwise exercise editorial control over such materials, they are not legally liable in any libel actions arising out of representation made by a candidate in their broadcasts. Farmers Educational and Cooperative Union v. WDAY, Inc., 360 U.S. 525 (1959)

This immunity does not, however, apply to representation made in political broadcasts by non-candidates, such as "independent" committees like those mentioned above. Broadcast stations are fully liable for libelous attacks made by such committees upon U.S. Senate candidates in their political broadcasts. In Re Complaint of Senator Thomas F. Eagleton, 81 F.C.C. 2d 423 (1980); Felix v. Westinghouse Radio Stations, 186 U.S. 909 (1951).

The F.C.C.'s Broadcast Bureau has stated the fundamental principle of law as follows:

With the exception of statements made during "uses" by legally qualified candidates for public office, which cannot be censored, a broadcaster may be subject to defamation proceedings under the jurisdiction of the appropriate local courts. Therefore, it is left to each station or network to make its own determinations of whether material contemplated for broadcast may contain statements which may subject it to potential liability.

Letter to J. Curtis Herge, attorney for NCPAC, from Broadcast Bureau Staff, dated November 20, 1981, p.4.

### Personal Attack

Stations must also afford a free opportunity to respond to candidates who are victims of a "personal attack" by persons other than legally qualified candidates, their authorized spokesmen, or those associated with their campaign. 47 C.F.R. Sec. 72.1920(a), (b)(3), provided that the personal attack does not occur during bona fide news events. 47 C.F.R. Sec. 73.1920(b)(4). In order for the personal attack rule to come into play, the attack must occur during "the presentation of views on a controversial issue of public importance." 47 C.F.R. Sec. 73.1920(a).

A "personal attack" is an attack made upon the "honesty, character, integrity or like personal qualities of" the candidate. 47 C.F.R. Sec. 73.1920(a).

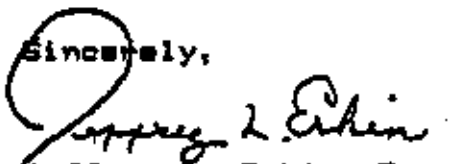
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In the event that the station does not comply with this affirmative duty to notify a candidate of an attack, and to afford that candidate a reasonable opportunity to respond without charge, the target of the attack is entitled to bring a complaint before the F.C.C. and to seek remedial administrative action by the agency.

Finally, we have enclosed for your review an example of the National Right To Life's abortion radio ad which misrepresents Senator Hecht's voting record on abortion. Documents indicating the Senator's votes to federally fund abortions are provided herein. Governor Bryan's abortion position is also included for your consideration. We respectfully request that you refuse to run these political advertisements which are inaccurate and distort the candidates' positions.

If you have any questions, please call 731-1988 or 732-3144.

Sincerely,

  
Jeffrey L. Eskin, Esq.

2021 27:

10-21-88 1 12:00 1 10:00 1 10:00

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October 21, 1988

Station Manager  

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Dear Station Manager:

A disturbing trend has emerged in the last few months of this year's campaign for the United States Senate in

At least three so-called "independent" organizations have announced that they intend to run negative commercials against television radio and

Your station is not obliged to accept these "independent" committee advertisements for broadcast, nor is it required to account in any way for its decision to reject them. Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 (1973); You Can't Afford Dodd Committee, 21 F.C.C. 2d 579 (1980). The repeated efforts of these kinds of organizations to obtain just such a private right to access have been consistently rejected by the Federal Communications Commission ("F.C.C."), National Conservative Political Action Committee, 89 F.C.C. 2d 626 (1982). There are numerous valid reasons for refusing to broadcast the ads.

Background: Questionable Activities

The campaigns of organizations such as the above are marked by highly derogatory attacks on the candidates they seek to defeat. Even more frequently, the advertisements distort and misrepresent the candidate's position on the issues addressed.

PLAINTIFF'S  
EXHIBIT

33



### Liability for Libelous Broadcasts by Independent Committees

Under Section 315(a) of the Federal Communications Act, broadcast stations are expressly prohibited from censoring in any way material submitted by a candidate for broadcast. Since the stations may not censor or otherwise exercise editorial control over such materials, they are not legally liable in any libel actions arising out of representations made by a candidate in their broadcasts. Farmers Educational and Cooperative Union v. WDAY, Inc., 360 U.S. 525 (1959).

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Letter to J. Curtis Hagan, attorney for NCPAC, from Broadcast Bureau Staff, dated November 20, 1981, p.4.

### Personal Attack

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A "personal attack" is an attack made upon the "honesty,

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- 3 -

character, integrity or like personal qualities of the candidate. 47 C.F.R. § 73.1920(a).

Under the F.C.C. regulations, a station has an affirmative obligation in the event of a "personal attack": Within one week it must notify the person or group attacked of the date and time and identification of the broadcast, send a script or tape of the attack (or if a script or tape is not available, as accurate a summary as possible) to the victim of the attack, and afford the victim a reasonable opportunity to reply on the station's facility, without charge. 47 C.F.R. §§ 73.1920(a)(1)-(3).

In the event that the station does not comply with this affirmative duty to notify a candidate of an attack, and to afford that candidate a reasonable opportunity to respond without charge, the target of the attack is entitled to bring a complaint before the F.C.C. and to seek remedial administrative action by the agency.

If you have any questions, please call

Sincerely,

Robert F. Bauer, Counsel  
Democratic Senatorial Campaign  
Committee

**JEFFREY L. ESKIN**  
ATTORNEY AT LAW  
VALLEY BANK CENTER, SUITE 1000  
101 CONVENTION CENTER DRIVE  
LAS VEGAS, NEVADA 89109  
702 738-3400

October 28, 1988

ATTENTION:

Dear

Please be advised that the undersigned submits this letter on behalf of Friends for Bryan, Richard Bryan's authorized Campaign Committee for election to the United States Senate (hereafter "Bryan Committee").

KOLO is currently running political advertisements sponsored by the American Medical Association Political Action Committee (hereafter "AMPAC"). The Bryan Committee strongly protests your airing of the AMPAC ads and requests that you reconsider your policy of televising this material. After your review, the Bryan Committee would respectfully request that these advertisements be cancelled.

The Bryan Committee believes that these ads violate the Federal Election Campaign Act of 1971 as amended ("FECA"), 2 U.S.C. §431 et seq., and related regulations of the Federal Election Commission ("FEC") 11 C.F.R §100.1 et seq. AMPAC is spending monies in support of the general election campaign of Senator Hecht well in excess of the \$5,000.00 limit for multicandidate political committees and therefore is in violation of §441(a)(2) of the FECA. AMPAC treats these expenditures as "independent" and, therefore, free of any limit. If these expenditures are not, in fact, independent, then a significant violation of the lawful contribution limits has been committed.

PLAINTIFF'S  
EXHIBIT

34

FECA defines the term "independent expenditure" as follows:

"The term "independent expenditure" means an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate. 2 U.S.C. §431(17).

The Bryan Committee challenges the independence of these expenditures. A Federal Election Commission investigation is required in order to determine whether these expenditures are independent. Accordingly, a complaint has been drafted and shall be filed shortly with the Federal Election Commission, a copy of which is enclosed for your review.

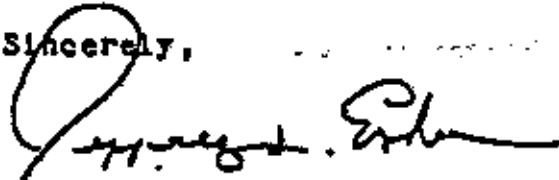
AMPAC is organized as a separate segregated fund of the American Medical Association -- a national trade association for physicians. One of AMA's major functions is to lobby Congress on behalf of its members - physicians. As a successful lobbying association, AMA has established day-to-day contact with Members of the Senate. AMA enjoys frequent opportunities to discuss legislative issues and the details of reelection activities of its allies in Congress. The AMA has found a friend in Senator Hecht. Senator Hecht has taken a visible role in cosponsorship of a key legislative initiative of the AMA - The National Liability Reform Act of 1987. The relationship developed through these lobbying efforts with individual Members of Congress and staff raises serious questions about the alleged independence as defined by 2 U.S.C. §431(17) between AMPAC and the candidate's reelection committees. The Bryan Committee doubts that these expenditures were totally independent as required by 2 U.S.C. §431(17) et seq.

The complaint before the FEC requests a prompt and immediate investigation, prompt conciliation with respondents to remedy the violation alleged, and appropriate

penalties. However, in light of the fact that these advertisements are being aired on the eve of the election where damage can be extensive and mitigation is often difficult, the Bryan Committee respectfully requests that you fully evaluate and reconsider your position of the acceptance of these advertisements and thereafter cancel these ads.

Thank you for your immediate attention to this request.

Sincerely,



Jeffrey L. Eskin, Esq.

JLE/cth

Enclosure

**JEFFREY L. ESKIN**  
ATTORNEY AT LAW  
VALLEY BANK CENTER, SUITE 1808  
101 CONVENTION CENTER DRIVE  
LAS VEGAS, NEVADA 89108  
(702) 732-2400

October 28, 1988

**ATTENTION:**

**Dear**

Please be advised that the undersigned submits this letter on behalf of Friends for Bryan, Richard Bryan's authorized Campaign Committee for election to the United States Senate (hereafter "Bryan Committee").

Your station is currently running political advertisements sponsored by the Auto Dealers and Drivers for Free Trade Pac (hereafter "Auto Dealers"). These advertisements depict Senator Hecht by way of artist's drawings and photograph. This constitutes a "use" under 47 U.S.C. §315.

47 U.S.C. §315(a) provides in pertinent part as follows:

"If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: PROVIDED, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section."

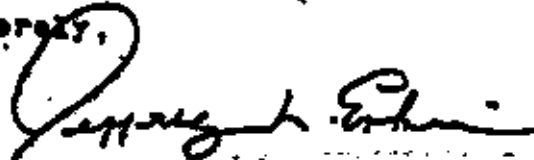
On behalf of Friends for Bryan, demand is respectfully made to afford the Bryan Committee equal opportunities to buy television use pursuant to 47 U.S.C. §315 relating to

**PLAINTIFF'S  
EXHIBIT**

all advertisements airing which are sponsored by the Auto Dealers. You will be contacted in order to arrange for the purchase of this additional television use.

Thank you for your anticipated cooperation.

Sincerely,



Jeffrey L. Eskin, Esq.

JLE/eth