



# THE FEDERAL ELECTION COMMISSION

# RECORD

1325 K Street N.W., Washington, D.C. 20463

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## OPINIONS

### ADVISORY OPINION REQUESTS

Advisory Opinion Requests (AORs) pose questions on the application of the Act or Commission Regulations to specific factual situations described in the AOR. The following chart lists recent AORs with a brief description of the subject matter, the date the requests were made public and the number of pages of each request. The full text of each AOR is available to the public in the Commission's Office of Public Records.

AOR	Subject	Date Made Public	No. of Pages
1981-31	Property made available to candidate for use in fundraising raffle.	8/3/81	1
1981-32	Testing the waters for a 1984 Presidential candidacy.	8/3/81	4
1981-33	Fundraising items donated by federal savings and loan association to local political clubs.	8/3/81	5
1981-34	Funds transferred from association's special legislative account to its separate segregated fund.	8/6/81	5
1981-35	Committee formed by California Congressmen solely to influence Congressional reapportionment.	8/10/81	1

## THE LAW IN THE COURTS

### FEC v. T. BERTRAM LANCE

On July 2, 1981, citing a lack of appellate jurisdiction, the Supreme Court dismissed an appeal brought by T. Bertram Lance from the U.S. Court of Appeals for the Fifth Circuit, construed Lance's papers as a petition for a writ of *certiorari* and declined to hear the case. In *FEC v. T. Bertram Lance* (Civil Action No. 78-1859), the appeals court had affirmed an earlier decision by the U.S. District Court for the Northern District of Georgia, which ordered enforcement of a deposition the FEC had issued to Mr. Lance. Motions by the appellant to stay the appeals court's decision had been denied by the appeals court on February 19, 1981, and by the Supreme Court on March 11, 1981.

#### FEC's Claim

The FEC had issued the subpoena to Mr. Lance as part of an investigation into Mr. Lance's 1974 gubernatorial campaign in Georgia, which involved possible violations of 2 U.S.C. §441b (formerly §610 of the Federal Corrupt Practices Act). This provision prohibits national banks from making – or candidates from accepting – contributions in connection with any election to any political office.\* The Commission's investigation began in September 1977.

#### District Court Ruling

The district court ordered Mr. Lance to comply with the subpoena. The court reasoned that the subpoena was well within the Commission's "broad and inclusive" statutory authority to investigate violations of the Federal Election Campaign Act (the Act).

#### Appeals Court: Panel

A panel of the appeals court rejected the arguments made by Mr. Lance for quashing the subpoena and affirmed the district court order enforcing the subpoena. Specifici-

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\* Under the Act, a loan from a national bank becomes a prohibited contribution if it is not made according to applicable banking laws and in the ordinary course of business. 2 U.S.C. §431 (8)(B)(vii).

cally, Mr. Lance claimed that the FEC was investigating matters outside its jurisdiction. He contended that both the Constitution and the Act barred any FEC investigation of contributions made by national banks to his 1974 campaign. The panel responded to this claim by affirming the FEC's argument that it was "...specifically given authority over this provision." (P.L. 93-433, 88 Stat. 1281 (October 15, 1974).) "Moreover, the Supreme Court held that any party seeking enforcement of §610 (now §441b) after January 1, 1975, must seek redress with the Commission." *Cort v. Ash*, 422 U.S. 66(1974).

Mr. Lance further claimed that the subpoena violated the equal protection and *ex post facto* provisions of the Constitution by attempting to apply §441b to campaign activities that occurred before the enactment of the FECA in 1975. The panel, on the other hand, affirmed the FEC's argument that these provisions presented no impediment to the FEC's investigation: "The prohibition against the making of campaign contributions by national banks has been in effect since 1907. Tillman Act, 34 Stat. 864. The mere recodification of 18 U.S.C. §610 as 2 U.S.C. §441b cannot absolve the respondent... from liability for substantive violations which were not changed by the incorporation of §441b into Title 2."

As to the defendant's claim that the statute of limitations barred the investigation, the panel found that there was no statute of limitations applicable to a civil proceeding undertaken to enforce the Act, 2 U.S.C. 5437g. The panel upheld the FEC's argument that the statute of limitations applied only to criminal prosecutions. "Even assuming *arguendo* that the three year statute of limitations was applicable to a future civil action brought by the Commission," the FEC argued, "the Commission has information suggesting that violations have occurred within the three years. Moreover, as noted, the existence of violations outside the statutory period themselves provide reason to investigate to ascertain whether further violations occurred within the three year period."

Finally, the defendant contended that, since the FEC already had information available to it from other government agencies, enforcement of the subpoena should be denied on grounds of undue burden and harassment. The panel rejected this claim, confirming the FEC's argument that "the existence of prior investigations by other agencies touching on similar issues does not preclude an agency from investigating matters within its jurisdiction." *FEC v. Texaco*, 555 F. 2d at 878-79. The appeals court panel determined, however, that the constitutional challenges asserted by Mr. Lance should be heard by the court sitting *en banc*.

#### Appeals Court: En Banc

On January 16, 1981, the appeals court, sitting *en banc*, issued an opinion that adopted the earlier panel decision, affirmed the district court's subpoena enforcement order and rejected a claim, presented by Mr. Lance in his appeal, that §441b was unconstitutional on its face. The appeals court adopted three of the arguments given by the appeals court panel, but rejected the *ex post facto* argument, stating that it was not ripe for adjudication. The court concluded that the prohibition on unsound banking practices (extensions of credit to a campaign that are outside the ordinary course of business) did not violate the First Amendment because the transactions in question involved "no speech elements at all." The bank drafts were transacted privately and were "...not the sort of public expression or support for Lance and his views that would make them even 'symbolic speech.'"

As to Mr. Lance's argument that §441b was unconstitutionally vague, the court noted, "The vagueness doctrine has been developed in the context of, and it is applicable to, penal statutes." The court concluded that the vagueness issue was not ripe for adjudication because the court was "...unwilling to assume that the present investigation of Lance will result in his criminal prosecution."

The court also rejected Mr. Lance's claim that §441b abridged Fifth Amendment rights by imposing greater restrictions on national banks in connection with elections than on other entities. The court held that since "...the Banks' contributions contain no cognizable elements of speech...we think the statute must be upheld if there is a rational relationship between the prohibition...and the purpose that prohibition serves...Since we have no difficulty in concluding that a prohibition against banks engaging in unsound banking practices is rational, we reject Lance's equal protection claim."

#### FEC v. PHILLIPS PUBLISHING, INC.

On July 16, 1981, the U.S. District Court for the District of Columbia denied an FEC petition for court enforcement of two subpoenas the Commission had issued to Phillips Publishing, Inc. (*FEC v. Phillips Publishing, Inc.*, Civil Action No. 81-0079). The court granted the respondent's motion to enjoin any further FEC investigation of either Phillips Publishing, Inc. or its biweekly newsletter, *The Pink Sheet on the Left (The Pink Sheet)*.

#### FEC's Claim

The FEC had issued the subpoenas to the staff of Phillips Publishing, Inc. as part of an investigation into a complaint filed by the Kennedy for President Committee on March 18, 1980. The Kennedy Committee claimed that

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the publishing company had distributed a promotional mailing for *The Pink Sheet* that expressly advocated the defeat of Senator Edward Kennedy (D-Mass.) in his bid for the 1980 Presidential nomination. The Kennedy Committee alleged that, in making expenditures for the mailing, the respondent had violated the following provisions of the Act:

- §433, by failing to register as a political committee;
- §434(c)(1), by failing to report independent expenditures for the mailing in excess of \$250;
- §435(b),\* by failing to include a notice on the mailing indicating that committee reports were available at the FEC and could be purchased;
- §441(b), by making a prohibited corporate expenditure advocating the defeat of a candidate in a federal election; and
- §441(d), by failing to identify who had paid for and authorized the mailing.

In responding to these allegations, Phillips Publishing, Inc. contended that, since *The Pink Sheet* was a periodical and was not controlled by any political party, candidate or committee, the promotional mailing constituted a news activity exempted from the Act's definition of contribution or expenditure. 2 U.S.C. §431(9)(B)(i). In finding reason to believe the alleged violations had occurred, the FEC concluded that this issue, as well as others, had to be investigated further to make a factual determination with regard to the respondent's claim that the promotional mailing constituted an exempted news activity. Based on a facial comparison, the Commission noted, for example, that the title of the solicitation letter was not printed in the same format as that of the regular *Pink Sheet* newsletter, that the mailing did not contain legends normally carried on *The Pink Sheet* and that the respective contents of the mailing and *The Pink Sheet* were dissimilar. Moreover, the promotional mailing was not distributed through the facilities of a periodical publication.

On April 8, 1981, after company officials to whom the subpoenas had been directed failed to respond, the Commission filed its petition with the district court. On May 29, 1981, Phillips Publishing, Inc. filed a motion to dismiss the FEC's petition and a motion to bar any further investigation of *The Pink Sheet* and the promotional mailing.

#### District Court Ruling

In denying the FEC's petition for enforcement of the subpoenas, the court found that the FEC had sufficient information to determine that the mailing met the criteria for the news story exemption. "As early as April 1980, the FEC received responses from Phillips Publishing, through its counsel, stating that *The Pink Sheet* and its publisher 'are not political committees, do not solicit or receive any political contributions, or make any contributions to any candidate. . . .'" Moreover, the court said, ". . . the solicitation letter was to publicize *The Pink Sheet* and to obtain new subscribers, both of which are normal, legitimate press functions. . . ." The court concluded, therefore, that the FEC's petition for further information should be denied.

\* This section was stricken from the Federal Election Campaign Act (the Act) by the 1979 Amendments to the Act (Pub. L. No. 96-187, January 8, 1980).

## INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS v. FEC

On December 16, 1980, the U.S. District Court for the District of Columbia dismissed *International Association of Machinists and Aerospace Workers (IAM) v. FEC* (Civil Action No. 80-0354). The court's decision upheld an FEC determination dismissing an administrative complaint that IAM and six other parties had filed with the Commission. The court granted, however, plaintiffs' motion to have the court certify constitutional challenges raised in the suit to an *en banc* appeals court, pursuant to 2 U.S.C. §437h. Accordingly, on June 3, 1981, the district court certified to the U.S. Court of Appeals for the District of Columbia Circuit three questions as to the constitutionality of 2 U.S.C. §441b(b)(3). The FEC filed a motion to dismiss the claims on July 15, 1981.

#### Plaintiffs' Claims

In their suit, plaintiffs claimed that the FEC had acted contrary to law in dismissing an administrative complaint filed by plaintiffs on October 9, 1979. The complaint alleged that eleven corporations had systematically violated 2 U.S.C. §441b(b)(3) by soliciting contributions to their separate segregated funds (political action committees or PACs) from "unprotected" administrative personnel under "inherently coercive" conditions. Citing the Supreme Court's ruling in *Civil Service Commission v. National Association of Letter Carriers* (413 U.S. 548(1973)), plaintiffs claimed that the corporate solicitation methods were coercive because immediate supervisors approached their employees for contributions at work. Plaintiffs cited a number of examples as evidence of coercion, including the fact that employees had made larger contributions, on the average, than members of the general public with comparable incomes and the fact that some of the PAC contributions were made to out-of-state candidates and to candidates whose party affiliation differed from that of the employees.

#### District Court Ruling: Merits of the Case

In reviewing plaintiffs' claims, the district court recognized the deference to be accorded the FEC's determination and concluded that the Commission's dismissal of IAM's complaint was not arbitrary, capricious or contrary to law. Applying the standard for permissible corporate solicitations set forth in *Pipefitters Local Union No. 562 v. U.S.* (407 U.S. 385 (1972)), and later codified in §441b(b)(3) of the Act,\* the court stated: "[N]owhere does FECA [Federal Election Campaign Act] forbid corporate supervisors from asking their subordinates for contributions as long as they comply with the provisions of Section 441b(b)(3)." The court concluded that "[p]laintiffs' presentation to the FEC, although detailed, is composed entirely of circumstantial evidence. Neither the administrative complaint nor the complaint in this Court, offers direct evidence of wrongdoing."

#### District Court Ruling: Constitutional Issues

Plaintiffs had also asked the district court to certify to the appeals court three constitutional challenges to §441b(b)(3) if the court upheld the FEC's determination to dismiss plaintiffs' administrative complaint. Plaintiffs claimed

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that the corporate solicitations described in its complaint violated:

- First Amendment rights of free speech by sanctioning "coercive" solicitations of employees;
- Fifth Amendment rights of equal protection by denying labor unions "...comparable economic power over thousands of career employees. . ."; and
- First Amendment rights of shareholders by compelling them to finance coercive political solicitations.

The FEC moved that these challenges be dismissed on grounds that they failed to state a claim on which relief could be granted and plaintiffs lacked standing to raise the issues. The court found, however, that "...plaintiffs' claims are neither frivolous nor so insubstantial as to warrant dismissal for failure to state a claim." As to plaintiffs' standing to raise the constitutional issues, the court held that "...the plaintiffs have made a threshold showing of a 'distinct and palpable injury' of a level sufficient to satisfy Article III [of the Constitution]."

## NEW LITIGATION

### Citizens for LaRouche v. FEC

Plaintiffs' suit challenges pending FEC investigations concerning contributions submitted for primary matching funds by the Citizens for LaRouche Committee, Lyndon H. LaRouche's principal campaign committee for the 1980 Presidential primaries. Plaintiffs ask the district court to declare that:

- The FEC's investigation was motivated "solely by bad faith";
- Constituted an abuse of due process;
- Violated plaintiffs' constitutional rights; and
- Unconstitutionally applied the provisions of the Act permitting an FEC investigation (2 U.S.C. §§437g and 437(a)(2)).

Plaintiffs further seek preliminary and permanent injunctions directing the FEC to:

- Refrain from any further investigation until it can demonstrate to the court that its investigations are within the scope of its investigative and enforcement authority; and
- Provide the LaRouche Committee with a detailed, factual notice of any FEC investigation sanctioned by the court, including identification of any individuals involved in the investigation. Further, the FEC must limit its investigation to relevant facts.

(U.S. District Court for the Southern District of New York, July 17, 1981, Civil Action No. 81 Civ. 4468)

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\* Under this provision of the election law, solicitations are considered noncoercive if they inform employees of: 1) the political purposes for which contributions will be used and 2) of their right to refuse to contribute without reprisal.

800 LINE

## POLITICAL ADS AND SOLICITATIONS

### Do political ads have to include any type of special notice?

Yes. When a public communication expressly advocates the election or defeat of a **clearly identified candidate** or solicits contributions (through any broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing or any other type of general public political advertising), it must display one of the following authorization notices (2 U.S.C. R441d(a)), as appropriate:

1. *Authorized and Financed by Candidate's Authorized Committee.* If the communication is authorized and financed by the campaign (e.g., the candidate or his/her authorized political committees or agents), the communication must state that it has been paid for by the committee.

**Example:** *Paid for by the John Doe for Congress Committee.*

**Note:** Where a candidate or his/her committee pays for or furnishes the material, authorization by the candidate is assumed and need not be specifically stated.

2. *Authorized but Not Financed by Candidate's Authorized Committee.* If the communication is authorized by the campaign but paid for by another person, the communication must identify the person who has paid for it and state that it has been authorized by the candidate or the candidate's committee.

**Example:** *Paid for by the XYZ Committee and authorized by the John Doe for Congress Committee.*

3. *Not Authorized and Not Paid for by Candidate's Authorized Committee.* If the communication is not paid for and not authorized by the campaign, the communication must identify the person who has paid for it and state that it has not been authorized by the candidate or the candidate's committee.

**Example:** *Paid for by the XYZ Committee and not authorized by any candidate.*

### Do solicitations for funds also require a notice?

Yes. Any solicitation to the general public through public media (e.g., television, magazine or direct mailing) must include the same kind of notice as described above.

### Is a political committee required to use the authorization notice when it solicits funds for its own use? For a candidate?

Yes. If a political committee uses any type of public media for a solicitation (see above), it must include the authorization notice.

*continued*

**Note:** A separate segregated fund (PAC) or the corporation or labor organization that sponsors it is **not** required to use the authorization notice on solicitations it makes to solicitable personnel because the solicitations are sent to a restricted audience — not the general public. (See AO 1980-71.)

**Must the authorization notice always appear on the first page of the solicitation?**

No. FEC Regulations require only that the notice be displayed clearly and conspicuously on the solicitation or political ad. 11 CFR 110.11(a)(1).

**If a mailing is made to solicit contributions to a candidate's campaign, must the authorization notice appear on each item in the mailing?**

No. The solicitation notice need appear on only one of the items in the mailing (e.g., the contributor card), provided it is displayed clearly and conspicuously. (See AO 1980-145.)

**Must the political committee sponsoring the communication include its address and/or the name of its treasurer in the notice?**

No.

**Must the political committee sponsoring the ad or solicitation include its full name or may it use an abbreviated title?**

It must use its full, official name.

**Must the authorization notice include a statement that "A copy of our report is filed with the Federal Election Commission and is available for purchase from the Federal Election Commission, Washington, D.C."?**

No. This used to be a requirement, but it was deleted from the Act with the passage of the 1979 Amendments.

**Must a political committee display the authorization notice on small campaign items such as concert tickets sold for a fundraiser?**

No. The authorization notice does not have to be used on small campaign items (e.g., concert tickets for a fundraiser, bumper stickers, pins, buttons or pens).

**Must an authorization notice also comply with the requirements of state law?**

No. To the extent that contributions and expenditures are made with respect to federal elections, the Act and FEC Regulations preempt applicable provisions of state law covering their reporting and disclosure. 2 U.S.C. §453 and 11 CFR 108.7(b). (See also AO 1981-27.)

**May a newspaper or magazine charge higher rates for political ads than for regular commercial advertisements?**

No. The rates for political ads must be comparable to those charged for noncampaign advertisements. 11 CFR 110.11(b).

## CLEARINGHOUSE

### STREAMLINED ORDERING SYSTEM FOR CLEARINGHOUSE TOPICAL REPORTS

The FEC's National Clearinghouse on Election Administration recently announced a new, simplified system for ordering its topical reports on election administration. By depositing \$75 in an account with the Superintendent of Documents, U.S. Government Printing Office, election administrators and other interested parties may establish a standing order to purchase reports issued during 1981, rather than ordering each report separately. Subscribers will automatically receive all topical reports issued **after** the date of their deposit.

For information on this new system, as well as a description of reports available, please call the Clearinghouse on the Commission's toll-free line: 800-424-9530 or locally 202-523-4183.

## STATISTICS

### 1979-80 FINANCIAL ACTIVITY OF NONPARTY POLITICAL COMMITTEES

Nonparty (noncandidate) committees contributed a total of \$60.5 million to Congressional and Presidential candidates during the 1979-80 election cycle, according to summary figures released by the Commission on August 4, 1981. U.S. Senate and House candidates received a total of \$55.3 million from nonparty committees for their 1979-80 election campaigns, and Presidential campaigns received \$2 million. Nonparty committees also contributed \$3.2 million for other purposes, such as retiring debts from former Congressional campaigns.

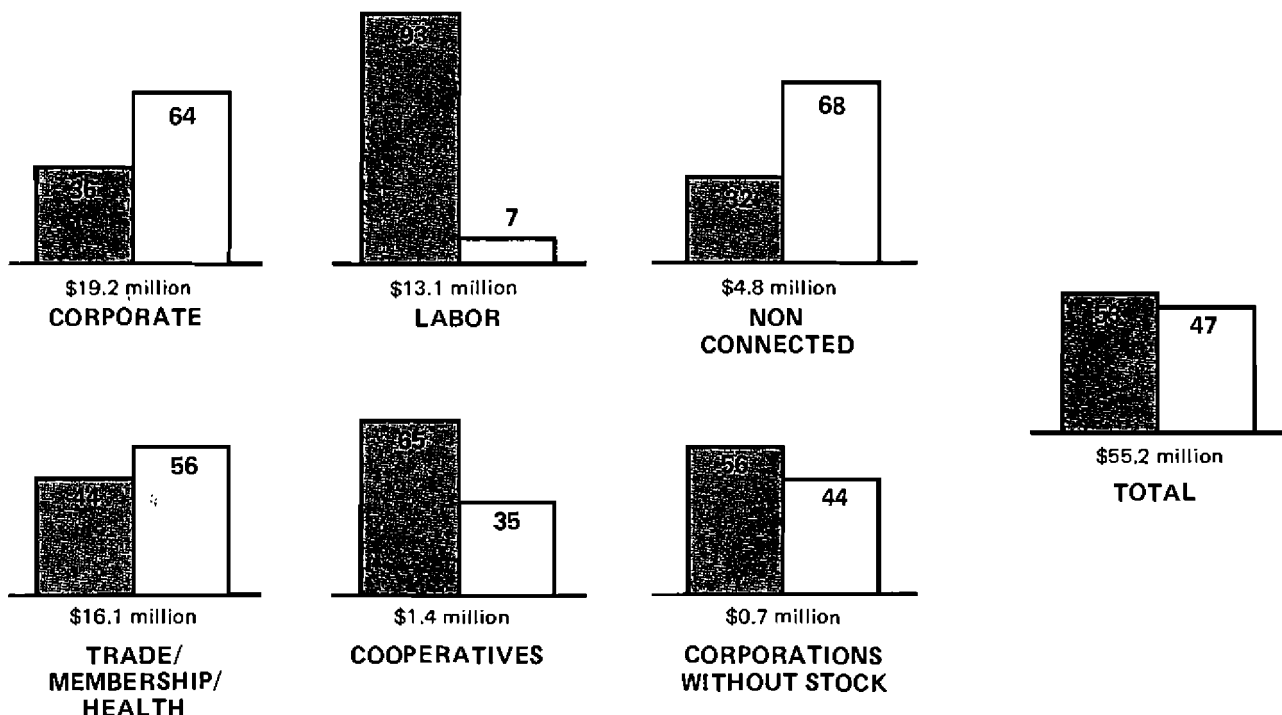
The FEC's computer data shows that nonparty committees began the election cycle with almost \$15 million cash on hand. They raised an additional \$137.8 million and spent \$133.2 million between January 1, 1979, and December 31, 1980. Contributions to 1980 Congressional campaigns alone represented 42 percent of all nonparty committee spending. Contributions to all federal candidates, including Presidential candidates and candidates for past, present and future Congressional elections, represented 45 percent of spending.

Nonparty committees spent approximately \$14 million, or 10.5 percent of their funds, on independent expenditures to promote or defeat certain candidates. They also contributed to political parties and other noncandidate groups, but the Commission has not yet released final figures for these contributions.

*continued*

**NONPARTY CONTRIBUTIONS TO  
1980 CONGRESSIONAL CANDIDATES**

 DEMOCRATS  
 REPUBLICANS



These graphs show, on a percentage basis, how each type of nonparty committee divided its contributions between 1979-80 Democratic and Republican Congressional candidates (1/1/79 - 12/31/80).

Source: FEC press release, "Costs of Campaigning Increase," August 10, 1981.

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