

RECORD

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COMMISSIONERS

FEC ELECTS NEW OFFICERS

On December 16, 1986, the Federal Election Commission unanimously elected Scott E. Thomas as Chairman and Thomas J. Josefiak as Vice Chairman. They will serve one-year terms commencing January 1, 1987. Mr. Thomas succeeded Commissioner Joan D. Aikens in the Chairmanship. Mr. Josefiak succeeded Commissioner John Warren McGarry as Vice Chairman.

Mr. Thomas, a Democrat, was appointed to the Commission by President Reagan in October 1986. From 1983 until his appointment as Commissioner, Mr. Thomas served as Executive Assistant to Tom Harris, a former FEC Commissioner. Before accepting this staff position, Commissioner Thomas served the agency as an Assistant General Counsel for Enforcement in the Office of General Counsel. He first joined the Commission as a legal intern in 1975. His term as FEC Commissioner is scheduled to expire on April 30, 1991.

A native of Wyoming, Mr. Thomas holds a Bachelor of Arts degree from Stanford University and a Juris Doctor degree from Georgetown University Law Center.

Commissioner Josefiak, a Republican, has been serving on the Commission since August 1985. From 1981 until his appointment as Commissioner, Mr. Josefiak served as Special Deputy to the Secretary of the Senate, who, by law, is an ex officio member of the Commission. Prior to his appointment as Special Deputy, Commissioner Josefiak served as legal counsel to the National Republican Congressional Committee. He also served as minority special counsel on federal election law for the Committee on House Administration, U.S. House of Representatives. Prior to that, he was legislative assistant to Congressman Silvio O. Conte (R-Mass.) His term as Commissioner is also scheduled to expire on April 30, 1991.

A native of Massachusetts, Mr. Josefiak holds a Bachelor of Arts degree from Fairfield University, Fairfield, Connecticut, and a Juris Doctor degree from Georgetown University Law Center.

REGULATIONS

CONTRIBUTION LIMITS: FINAL RULES TRANSMITTED TO CONGRESS

On January 6, 1987, the Commission transmitted to Congress amended regulations governing the election law's contribution limits for persons and multicandidate political committees. 11 CFR 110.1 and 110.2. Once these regulations have been before Congress for 30 legislative days, the Commission will announce their effective date. (For a summary of the revised rules, see pages 3-6 of the ~~December 1986~~ Record.) *Jan. '87*

The amended regulations, together with the Commission's explanation and justification, were published in the Federal Register on January 9, 1987. 52 Fed. Reg. 760. A copy of this material may be obtained by calling 376-3120 or toll-free 800/424-9530. *continued*

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REGULATIONS

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PUBLIC HEARING ON BANK LOAN RULES

On March 11, 1987, the Commission will hold a public hearing on FEC rules which govern loans made by banks to federal candidates and political committees. 11 CFR Part 100. Persons who wish to testify at the public hearing should submit their requests to appear and comments in writing to Ms. Susan Propper, Assistant General Counsel, Federal Election Commission, 999 E Street, N.W., Washington, D.C. 20463. Questions may be addressed to Ms. Propper by calling 376-5690 or toll free 800/424-9530.

On August 5, 1986, the FEC published a notice concerning these issues in the Federal Register. 51 Fed. Reg. 28154. In response to the notice, the Commission received 14 comments on bank loan issues. After reviewing these comments and testimony from the upcoming hearing, the Commission will decide whether to publish a notice of proposed rulemaking on bank loans.

In the August Federal Register notice, the Commission indicated that problems had arisen when it tried to determine whether a bank loan was made "in the ordinary course of business," as required under the Act. See 2 U.S.C. §431(8)(B) (vii); 11 CFR 100.7(b)(11) and 100.8(b)(12). Specifically, what does the statute mean when it states that a bank loan must be "made on a basis which assures repayment"? While the August notice raised this issue within the context of the Presidential public financing program, the Commission seeks comments on the impact of the loan requirement on all federal election participants--both publicly financed campaigns and other federal political committees and candidates. Should the requirement that a bank loan be "made on a basis which assures repayment" be interpreted to mean that:

1. A candidate or political committee must secure a bank loan with some form of traditional collateral; or
2. A candidate or political committee may use a candidate's expectation of receiving contributions or public funds as loan collateral, provided the funds are deposited in a separate "collateral account"; or
3. A bank loan made to a candidate or political committee does not have to be secured, but it

must be: 1) made in writing and 2) subject to a due date or amortization schedule.* (The loan would also have to comply with other requirements of the Act and Regulations, such as being offered at the customary interest rate.)

The agency welcomes other alternative interpretations of the bank loan requirement.

In the recent Federal Register notice announcing the public hearing, the FEC also posed questions concerning the general experience of lending institutions with candidates and political committees and similar debtors. For example:

- o What factors do lending institutions consider when making loans to candidates and political committees?
- o Do lending institutions have standard practices concerning extensions of credit to political debtors?
- o Are there any special problems in seeking repayment from political debtors? Does the time frame for instituting collection proceedings vary between political and nonpolitical debtors?
- o Do banks treat differently loan requests from candidates (who may use personal assets for collateral) and loan requests from the candidate's authorized committee(s)?

Copies of the August 5, 1986, and January 22, 1987, Federal Register notices on bank loan rules may be obtained by calling 376-3120 or toll-free, 800/424-9530.

**This alternative would constitute a revision of current Commission policy.*

PUBLIC APPEARANCES

2/5	Title Industry PAC Washington, D.C. Commissioner Lee Ann Elliott
2/12	American Society of Travel Agents, Inc. Portland, Oregon Commissioner Lee Ann Elliott
2/18-21	George Washington University Captiva Island, Florida Penelope Bonsall, Director National Clearinghouse on Election Administration

The Record is published by the Federal Election Commission, 999 E Street, N.W., Washington, D.C. 20463. Commissioners are: Scott E. Thomas, Chairman; Thomas J. Josefiak, Vice Chairman; Joan Aikens; Lee Ann Elliott; Danny Lee McDonald; John Warren McGarry; Walter J. Stewart, Secretary of the Senate, Ex Officio; Benjamin J. Guthrie, Clerk of the House of Representatives, Ex Officio. For more information, call 202/376-3120 or toll-free 800/424-9530.

OPINIONS

ADVISORY OPINION REQUESTS

The following chart lists recent requests for advisory opinions. The full text of each AOR is available to the public in the Commission's Office of Public Records.

AOR	Subject
1986-44	Corporation's plan to match employee contributions to PAC with corporate donations to charity. (Date made public: December 9, 1986; Length: 1 page)
1986-45	Interest payments by principal campaign committee to candidate (lender). (Date made public: December 24, 1986; Length: 6 pages, plus 4-page supplement)

ADVISORY OPINIONS: SUMMARIES

An Advisory Opinion (AO) issued by the Commission provides guidance with regard to the specific situation described in the AOR. Any qualified person who has requested an AO and acts in accordance with the opinion will not be subject to any sanctions under the Act. Other persons may rely on the opinion if they are involved in a specific activity which is indistinguishable in all material aspects from the activity discussed in the AO. Those seeking guidance for their own activity, however, should consult the full text of an AO and not rely only on the summary given here.

AO 1986-39: Excess Campaign Funds Used to Establish Trust For Minor

Mr. Vincent Carrafiello, a 1986 Congressional candidate from Connecticut, may use excess campaign funds of his principal campaign committee to establish a trust fund for a minor. The child will be the sole beneficiary of the trust fund, and his grandparents will act as trustees. (The child, who lost his parents and is being cared for by his grandparents, is not related to Mr. Carrafiello.)

The Act and FEC Regulations permit candidates to use their excess campaign funds for a variety of lawful purposes, provided they do not convert the excess funds to personal use. 2 U.S.C. §439a and 11 CFR 113.2. Since the proposed trust fund will not provide any financial benefits to Mr. Carrafiello, the establishment of the fund does not constitute a "personal use" of excess campaign funds.

The Commission distinguished its conclusion in this opinion from previous opinions concerning excess campaign funds. In those opinions, the Commission concluded that the spending of excess funds would directly or indirectly benefit the former candidate financially.

The Commission noted that the Act did not supersede any Connecticut law that might govern the proposed establishment of the trust fund. (Date made public: December 5, 1986; Length: 3 pages)

AO 1986-40: Corporate Donations to State Party Committee's Building Fund

The West Virginia Republican State Executive Committee (the Party), which maintains both a Federal and state account to support candidates, plans to raise funds for the construction or purchase of a building that will house the Party's offices. The Party may solicit and accept corporate donations to a separate account established for the party's building fund provided:

- o The Party does not acquire its new office building for the purpose of influencing the election of any candidate to any federal office; and
 - o No corporate donations for the building fund are deposited in the Party's federal account.
- Since the building fund is not considered a "political committee" subject to the Act, donations deposited in the building fund account do not have to be reported. 11 CFR 100.7(b)(2).

Under the Act and FEC Regulations, donations designated for the construction or purchase of an office facility by a state or national party committee are not considered "contributions" or "expenditures" subject to the Act, provided the facility is not acquired to serve a specific election-influencing purpose. See above and 2 U.S.C. §431(8)(B)(viii); 11 CFR 100.7(b)(12) and 100.8(b)(13). These donations may not be deposited in the party's federal account because, under FEC Regulations, a federal committee may only solicit and accept contributions from donors who are informed that their contributions: 1) will be used for federal elections and 2) are subject to the limits and prohibitions of the Act. 11 CFR 102.5(a)(2).

Since the Act specifically addresses party building funds and clearly permits donations to them, it supersedes any West Virginia law prohibiting or limiting the Party's acceptance of corporate donations to the building fund. 2 U.S.C. §453; 11 CFR 108.7. Commissioner Thomas J. Josefiak filed a dissent. (Date issued: December 18, 1986; Length: 5 pages, including dissent)

continued

**AO 1986-41: Trade Association's Plan to
Compensate Employees Who
Make Contributions**

The Air Transport Association of America (ATA), an unincorporated trade association, may not provide additional compensation to some of its employees for the purpose of enabling them to contribute to ATA PAC, a nonconnected political committee* sponsored by ATA, or to other federal political committees and candidates. ATA's proposed compensation plan would result in the making of contributions prohibited under the Act, that is, contributions by one person (ATA) in the name of another person (an ATA employee). 2 U.S.C. §441f. As explained in FEC Regulations, this kind of prohibited contribution includes: "[g]iving money or anything of value, all or part of which was provided to the contributor by another person [the true contributor] without disclosing the source of money or the thing of value to the recipient candidate or committee at the time the contribution is made." 11 CFR 110.4(b)(2)(i). (Date issued: December 5, 1986; Length: 4 pages)

COURT CASES

**FEC v. MCFL:
SUPREME COURT DECISION**

In FEC v. Massachusetts Citizens for Life, Inc. (MCFL) the Supreme Court of the United States decided, by a 5 to 4 vote, that the law's prohibition on corporate expenditures is unconstitutional as applied to independent expenditures** made by a narrowly defined type of nonprofit corporation. The Court's December 15, 1986, decision affirmed an appeals court ruling.

*A political committee which supports or opposes candidates for federal office but which is not established or administered by any candidate, political party, corporation or labor organization. For more information, see the FEC's Campaign Guide for Nonconnected Committees.

**An independent expenditure is an expenditure for a communication that expressly advocates the election or defeat of a clearly identified candidate but that is not made at the request of, or with the prior consent or suggestion of, a candidate or authorized candidate committee. Furthermore, an independent expenditure must be made without any consultation or coordination with a candidate or authorized committee. 2 U.S.C. Section 431(17).

Scope of Ruling

Acknowledging that "the class of organizations affected by our holding today will be small," the Court delineated the type of corporation which would be permitted to make independent expenditures under this ruling. "MCFL has three features essential to our holding that it may not constitutionally be bound by §441b's restriction on independent spending." These three criteria are as follows:

1. The organization must be formed "for the express purpose of promoting political ideas, and cannot engage in business activities. If political fundraising events are expressly denominated as requests for contributions that will be used for political purposes, including direct expenditures, these events cannot be considered business activities."
2. The organization must have "no shareholders or other persons affiliated so as to have a claim on its assets or earnings."
3. The organization must not have been established by a business corporation or a labor union, and must adopt a policy "not to accept contributions from such entities."

Background

The suit concerned material published and distributed to the general public by the Massachusetts Citizens for Life (MCFL), a nonprofit, nonstock corporation. The September 1978 publication, called the "Special Election Edition," urged readers to "vote pro-life" and, in listing Massachusetts Federal and non-Federal candidates, identified each as either supporting or opposing MCFL's position on three pro-life issues. The "Special Edition" also featured photographs of candidates who agreed with MCFL on all three issues (and one candidate who was publicly known to hold a pro-life position).

The Commission had argued that the publication constituted a partisan communication and that MCFL, by distributing the material to the general public, had made corporate expenditures in violation of 2 U.S.C. §441b. In a June 1984 decision, the district court held that MCFL's spending did not constitute prohibited expenditures under §441b. Alternatively, the court stated that the provision was unconstitutional, as applied. On July 31, 1985, the appeals court overturned the lower court's decision that MCFL's publication costs were exempt from the prohibition on corporate spending but agreed with the district court on the constitutionality issue, ruling that the provision violated MCFL's First Amendment rights. The appeals court concluded that "application of section 441b to indirect, uncoordinated expenditures by a nonprofit ideological corporation expressing its view of political candidates violates the organization's First Amendment rights."

MCFL in Violation of §441b

The Supreme Court unanimously affirmed the appeals court ruling that, as the FEC had argued, MCFL's expenditures were in violation of §441b. In making this determination, the Court rejected MCFL's arguments to the contrary.

MCFL had contended that, in making its expenditures, it had not provided anything to a candidate. Because of this, its spending was not within the reach of §441b(b)(2), which defines "expenditure" to include anything of value provided to a candidate or political committee. The Court, in holding that §441b's scope is broader than MCFL's interpretation, stated that the legislative history "clearly confirms that §441b was meant to proscribe expenditures in connection with an election."

The Court also rejected MCFL's argument that its publication costs did not constitute prohibited expenditures because the material did not "expressly advocate" the election of candidates. Citing its opinion in *Buckley v. Valeo*, the Court noted it had previously concluded "that a finding of 'express advocacy' depended upon the use of language such as 'vote for,' 'elect,' 'support,' etc." *Buckley*, 424 U.S. 44, n. 52 (1976). Applying this test to the MCFL's publication, the court stated: "Just such an exhortation appears in the 'Special Edition.' The publication not only urges voters to vote for 'pro-life' candidates, but also identifies and provides photographs of specific candidates fitting that description. The Edition cannot be regarded as a mere discussion of public issues that by their nature raise the names of certain politicians. Rather, it provides in effect an explicit directive: vote for these (named) candidates. The fact that its message is marginally less direct than 'Vote for Smith' does not change its essential nature."

MCFL had also argued that its publication was a "Special Edition" of its regular newsletter and therefore payments for issuing the material were exempt from the definition of expenditure under the statute's exception for news stories, commentaries and editorials distributed through periodical publications and other news media. 2 U.S.C. §431(9)(B)(i). The Court did not need to rule on whether MCFL's newsletter qualified for the press exemption because it considered the "Special Edition" a campaign flyer rather than an issue of the newsletter. "No characteristic of the Edition associated in any way with the normal MCFL publication." The Court emphasized that it was essential to make a distinction between regular publications and campaign flyers "since we cannot accept the notion that the distribution of such flyers by entities that happen to publish newsletters automatically entitles such organizations to the press exemption."

Section 441b's Infringement on Free Speech

In determining whether §441b was unconstitutional as applied to MCFL's independent expenditures, the Court first examined the provision's effect on political speech protected by the First Amendment.

The FEC had argued that, although §441b prohibited MCFL from making expenditures from its corporate treasury funds, the law provided another avenue for MCFL to exercise political speech: It could establish a separate segregated fund (also called a political action committee or PAC) and make contributions and expenditures using money specifically solicited for the fund. The Court maintained that "even to speak through a segregated fund, MCL must make very significant efforts," and mentioned in particular the recordkeeping and solicitation requirements the law imposes on such funds. In conclusion, the Court stated: "These additional regulations may create a disincentive for such organizations to engage in political speech....The fact that the statute's practical effect may be to discourage protected speech is sufficient to characterize §441b as an infringement on First Amendment activities."

Section 441b Unconstitutional as Applied

In ruling that §441b is unconstitutional as applied to MCFL's activities in this case, a decision from which four Justices dissented, the Court first explained that "[w]hen a statutory provision burdens First Amendment rights, it must be justified by a compelling state interest." The Court disagreed with the Commission's arguments that §441b's prohibition on MCFL's expenditures was justified.

The FEC had noted the long legislative history supporting §441b's prohibition on corporate activity and argued that the courts have consistently ruled that those restrictions are justified by the governmental interest in protecting the election process from the effects of the accumulation of wealth. After examining the legislative history and past Supreme Court decisions, the Court concluded that this governmental interest is valid with respect to expenditure restrictions applied primarily to profit-making corporations but not to corporations such as MCFL, "formed to disseminate political ideas." The Court, therefore, found no compelling justification for treating business corporations and MCFL alike "in the regulation of independent spending."

The Court also rejected the FEC's argument that §441b serves to prevent a corporation such as MCFL from spending individuals' money for political purposes that they might not support. The Court pointed out that individuals who contribute to MCFL do so because they support its political aims and expect that the organization will spend the funds "in a manner that best serves the shared

continued

political purposes of the organization and the contributor."

In responding to the Commission's argument that a contributor, while supporting the political views of MCFL, may not wish donations to be used to support or oppose particular candidates, the Court said that this problem could be resolved by "simply requiring that contributors be informed that their money may be used for such a purpose."

Finally, the FEC had maintained that, if the §441b prohibition were not applied to expenditures by corporations such as MCFL, then the political process would be in danger of corruption, since business corporations and labor unions could funnel undisclosed treasury funds into a nonprofit organization to be converted to political spending. In rejecting this argument, the Court cited 2 U.S.C. §434(c), which requires groups that are not political committees to report information on their independent expenditures once they exceed \$250 in one year. In reporting under this provision, a group must include the identification of persons funding independent expenditures if they contribute an aggregate of over \$200 during a year. "These reporting obligations provide precisely the information necessary to monitor MCFL's independent spending activity and its receipt of contributions," the Court stated. Furthermore, the Court pointed out that "should MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee," subject to the restrictions and extensive reporting requirements the law applies to such entities.

In conclusion, the Court ruled that "§441b's restriction of independent spending is unconstitutional as applied to MCFL, for it infringes protected speech without a compelling justification for such infringement." However, the Court did not directly rule on the constitutionality of §441b's restrictions on "commercial enterprises," since that was not at issue in this suit.

Justice William J. Brennan, Jr., who wrote the majority opinion, was joined by Justices Thurgood Marshall, Lewis F. Powell, Jr. and Antonin Scalia and, in part, by Justice Sandra Day O'Connor.

Dissents

Chief Justice William H. Rehnquist, joined by Justices Byron R. White, Harry A. Blackmun and John Paul Stevens, dissented from "the conclusion that the statutory provisions are unconstitutional as applied to [MCFL]." Chief Justice Rehnquist observed that the differences between business corporations and corporations like MCFL "are 'distinctions in degree' that do not amount to 'differences in kind.'...As such, they are more properly drawn by the legislature than the judiciary....Congress expressed its judgment in §441b that the threat posed by corporate political acti-

vity warrants a prophylactic measure applicable to all groups that organize in the corporate form. Our previous cases have expressed a reluctance to fine-tune such judgments; I would adhere to that counsel here."

In his judgment, "[t]he three part test gratuitously announced in today's dicta...adds to a well-defined prohibition a vague and barely adumbrated exception certain to result in confusion and costly litigation."

COMMON CAUSE v. FEC (Suit Four)

On December 30, 1986, the United States District Court for the District of Columbia declared that the FEC's dismissal of an administrative complaint filed in 1980 by Common Cause* was, in part, contrary to law. The case was remanded to the FEC for action consistent with the court's opinion.

Background

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

In its suit, Common Cause alleged that the FEC had wrongfully dismissed the complaint.

Court Ruling

FEC Determination to Dismiss Complaint on Committees' Use of Candidate's Name. The first legal issue addressed by the court was Common Cause's allegation that AFC, FCM and NCPAC violated the Act (2 U.S.C. §432(e)(4)) by using the name of a candidate, Ronald Reagan, in their respective committee names. Under the Act,

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

**NCCC has subsequently become the National Congressional Club.

only an authorized committee may use a candidate's name in its name. In this case, the committees involved were not authorized by any candidate. Evidence revealed that each committee had used the word "Reagan" in its respective fundraising project when soliciting funds and otherwise communicating with the public. The FEC argued that, because the official registered names of the committees did not contain Reagan's name and that the use of "Reagan" was merely for the purpose of identifying a particular fundraising project, the Act had not been violated.

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

FEC Determination Not to Investigate Coordination. In the original administrative complaint, by a vote of 3-3, the FEC reached no conclusion as to whether there was reason to believe AEP and NCCC had coordinated their expenditures with the official Reagan campaign. (With regard to the other three committees, the Commission did find "reason to believe" and did conduct an investigation. See below.) This decision, which resulted in an automatic dismissal of this portion of the complaint, was contrary to the recommendation made by the FEC's General Counsel. Moreover, the Commission submitted no explanation for its decision.

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

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

In its suit, Common Cause contended that a determination of coordination should be based on the "totality of circumstances." According to

Common Cause, the FEC should have considered circumstances such as interlocking membership of persons at the policy-making level, prior alliances with the official committees and the use of common vendors by the committees. The FEC argued, however, that evidence of "direct coordination" was a necessary prerequisite to a determination of "impermissible coordination," and it found no evidence of direct coordination.

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

FEC v. CONGRESSMAN CHARLES E. ROSE

On December 2, 1986, the U.S. Court of Appeals for the District of Columbia Circuit issued an opinion in FEC v. Congressman Charles E. Rose (Civil Action No. 85-1455), which reversed an earlier decision by the U.S. District Court for the District of Columbia. The appeals court determined that the FEC was not liable for litigation costs and attorney's fees which Congressman Rose incurred in a suit he had brought against the FEC. The appeals court concluded that, under the statute governing such fee awards, the Equal Access to Justice Act, "the district court [had] erred in holding that the FEC's position in the case was not 'substantially justified.'" The appeals court therefore remanded the case to the district court, with orders to dismiss Congressman Rose's application to have the FEC bear his court costs.

Background

In June 1983, pursuant to the election law's procedures for obtaining administrative relief, Congressman Rose petitioned the U.S. District Court for the District of Columbia. (Rose v. FEC, First Suit; Civil Action No. 83-1687) Mr. Rose asked the court to issue an order directing the FEC to take final action, within 30 days, on an administrative complaint he had filed with the FEC in October 1982. See 2 U.S.C. §§437g(a)(8)(A) and (C). However, after the Commission petitioned the District Court for the Eastern District of North Carolina to enforce subpoenas issued as part of its investigation into Mr. Rose's complaint, Mr. Rose requested that his suit be dismissed. (For a summary of the suit, see page 10 of the August 1983 Record.)

Claiming that the FEC had taken no subsequent action on his complaint, Mr. Rose filed a second suit with the district court in July 1984. (Rose v. FEC, Second Suit; Civil Action No. 84-

continued

2278) On October 4, the district court found that the FEC had acted contrary to law by failing to resolve the complaint. However, after reviewing the case on appeal, on October 24, 1984, the appeals court summarily reversed the district court's original decision and remanded the case to the district court for reconsideration.

Upon reconsidering the case, the district court granted Mr. Rose's motion for summary judgment in the suit on October 31, 1984. The court later granted his petition, asking that the FEC be held liable for Mr. Rose's litigation costs and attorney's fees.

On July 24, 1984, the FEC appealed the district court's determination that the agency was liable for these litigation expenses.

Appeals Court's Ruling

Initially, the appeals court noted that its determination concerning the FEC's liability for Mr. Rose's litigation costs and attorney's fees should be based on the Equal Access to Justice Act (EAJA), as amended in 1985. Under the 1985 amendments to this statute, a government agency is not liable for litigation costs and attorney's fees if the agency can show "that both its position in the litigation and its conduct that led to the litigation were substantially justified." To determine whether a government agency's actions were "substantially justified," the court may not use the standard used to challenge an agency's action on an administrative complaint (i.e., whether the action was "arbitrary and capricious"). Rather, in applying the EAJA standard, the court "is obliged to reexamine the facts under a different legal standard to determine whether that conduct is slightly more than reasonable."

While the appeals court found that the district court had used the "correct legal standards" in making its determination with regard to the FEC's liability, the appeals court nevertheless concluded that the district court "fell into error in applying those standards." The court concluded that "the FEC's handling of Congressman Rose's administrative complaint was 'substantially justified.' Far from suggesting unjustifiable delay, the record demonstrates prompt and sustained agency attention to Representative Rose's complaint and thorough consideration of the issues it raised."

The court also found that the FEC's litigation position was substantially justified. "The Commission, in truth, had no practical alternative to defending against Mr. Rose's action. It cannot be forgotten that the Congressman was advancing interpretations of the Campaign Act that would

have drastically altered the agency's operations. And the arguments are dead wrong."*

FEC v. CITIZENS PARTY

On December 30, 1986, the U.S. District Court for the Northern District of New York granted the FEC's application for a default judgment against the Citizens Party.

As part of the judgment, the court ordered the defendant to pay a \$5,000 civil penalty to the U.S. Treasurer. The court also enjoined the defendants from further violations of the election law's reporting provisions.

In filing suit against the Citizen's Party and its treasurer in December 1985, the FEC claimed that the defendants had violated the law by failing to file the following reports for the 1984 election year: two quarterly reports, a post-general election report and a year-end report. (See 2 U.S.C. §§434(a)(4)(A)(i)-(iii)).

NEW LITIGATION

FEC v. John R. Clark, Jr.

The FEC filed an action against John R. Clark, Jr., for his failure to pay the \$250 civil penalty stipulated in a conciliation agreement concluded between Mr. Clark and the Commission.**

The FEC asks the court to:

- o Declare that Mr. Clark violated the terms of the agreement;
- o Assess a \$5,000 penalty against him for this violation;
- o Order Mr. Clark to comply with the agreement; and
- o Permanently enjoin Mr. Clark from further violations of the election law.

U.S. District Court for the Middle District of Florida, Civil Action No. 86-1841-CIV-T-17B.

*The appeals court had rejected Mr. Rose's argument that the Act required the FEC to act on his administrative complaint within a 120-day time frame. Instead, the court confirmed the FEC's argument that the FEC's handling of the complaint should be judged under the deferential standard of review prescribed in the Administrative Procedures Act.

**In the conciliation agreement, Mr. Clark admitted violating the election law by knowingly permitting his name to be used to make a contribution in the name of another person.

Common Cause v. FEC (Suit Five*)

On December 17, 1986, Common Cause filed a second suit challenging the FEC's dismissal of an administrative complaint which the organization had filed with the agency in September 1984.**

The district court had remanded Common Cause's first suit to the FEC for a statement of reasons concerning the agency's dismissal of the complaint.*** (*Common Cause v. FEC*; Civil Action No. 85-0968) In response, on October 27, 1986, the FEC sent Common Cause two statements (one signed by two Commissioners and the other, by one Commissioner), which explained the agency's reasons for dismissing the complaint. Claiming that the FEC's statements did not provide "a reasoned basis for its dismissal of Common Cause's administrative complaint," the organization filed a second suit, in which it asked the court to:

- o Declare that the Commission's decision to dismiss Common Cause's administrative complaint was contrary to law; and
- o Issue an order directing the Commission to act on the allegations in the complaint within 30 days of the court's ruling on the case.

U.S. District Court for the District of Columbia, Civil Action No. 86-3465, December 17, 1986.

FEC v. Americans for Jesse Jackson

Pursuant to 2 U.S.C. §437g(a)(5), the Commission asks the court to declare that Americans for Jesse Jackson, a political committee,*** violated:

- o 2 U.S.C. §433(a) by failing to file a statement of organization with the Commission;
- o 2 U.S.C. §434 by failing to file reports of receipts and expenditures;
- o 2 U.S.C. §432(e)(4) by using the name of Jesse Jackson in its name; and
- o 2 U.S.C. §441d(a)(3) by failing to include a sufficient statement of identification on its solicitation communication.

*Number distinguishes this suit from other actions brought by Common Cause against the FEC.

**In its administrative complaint, Common Cause claimed that President Reagan's 1984 re-election campaign had violated the election law by failing to report and pay for the expenses of a campaign-related trip to Illinois to address the Veterans of Foreign Wars.

***Americans for Jesse Jackson was not authorized by Presidential Candidate Jesse Jackson (1984).

The FEC further asks the court to:

- o Assess a civil penalty against the Committee for the greater of \$5,000 or an amount equal to 100 per cent of the amount involved in each violation; and
- o Permanently enjoin the Committee from further violations of the election law.

U.S. District Court for the District of Maryland, Civil Action No. Y886-3766, December 17, 1986.

FEC v. Jolyn Robichaux, et al.

Pursuant to 2 U.S.C. §437g(a)(6)(A), the Commission asks the court to declare that Jolyn Robichaux and ten other defendants violated section 441a(a)(1)(A) of the election law by making excessive contributions to the Hayes for Congress Committee (the Committee). (The Committee served as Charles Hayes' principal campaign committee in a 1983 special election held to fill an Illinois House seat.)

Specifically, the FEC asks the court to declare that:

- o Six of the defendants made excessive contributions to the Committee by endorsing a \$25,000 bank loan payable to the Committee* and that one of these endorsers also made an excessive direct contribution to the Committee;
- o Five of the defendants made excessive contributions by endorsing a \$50,000 bank loan payable to the Committee.

The FEC further asks the court to:

- o Permanently enjoin the defendants from further violations of the election law; and
- o Assess a civil penalty against each defendant amounting to the greater of \$5,000 or 100 percent of the total amount involved in his/her violation.

U.S. District Court for the Northern District of Illinois, Civil Action No. 86C9659, December 11, 1986.

*Under the election law and FEC Regulations, endorsements and guarantees of loans, including those made by members of the candidate's family, count as contributions to the extent of the outstanding balance of the loan. 2 U.S.C. Section 431(a)(A)(i) and 11 CFR 100.7(a)(1)(i)(C).

STATISTICS

1986 PAC COUNT

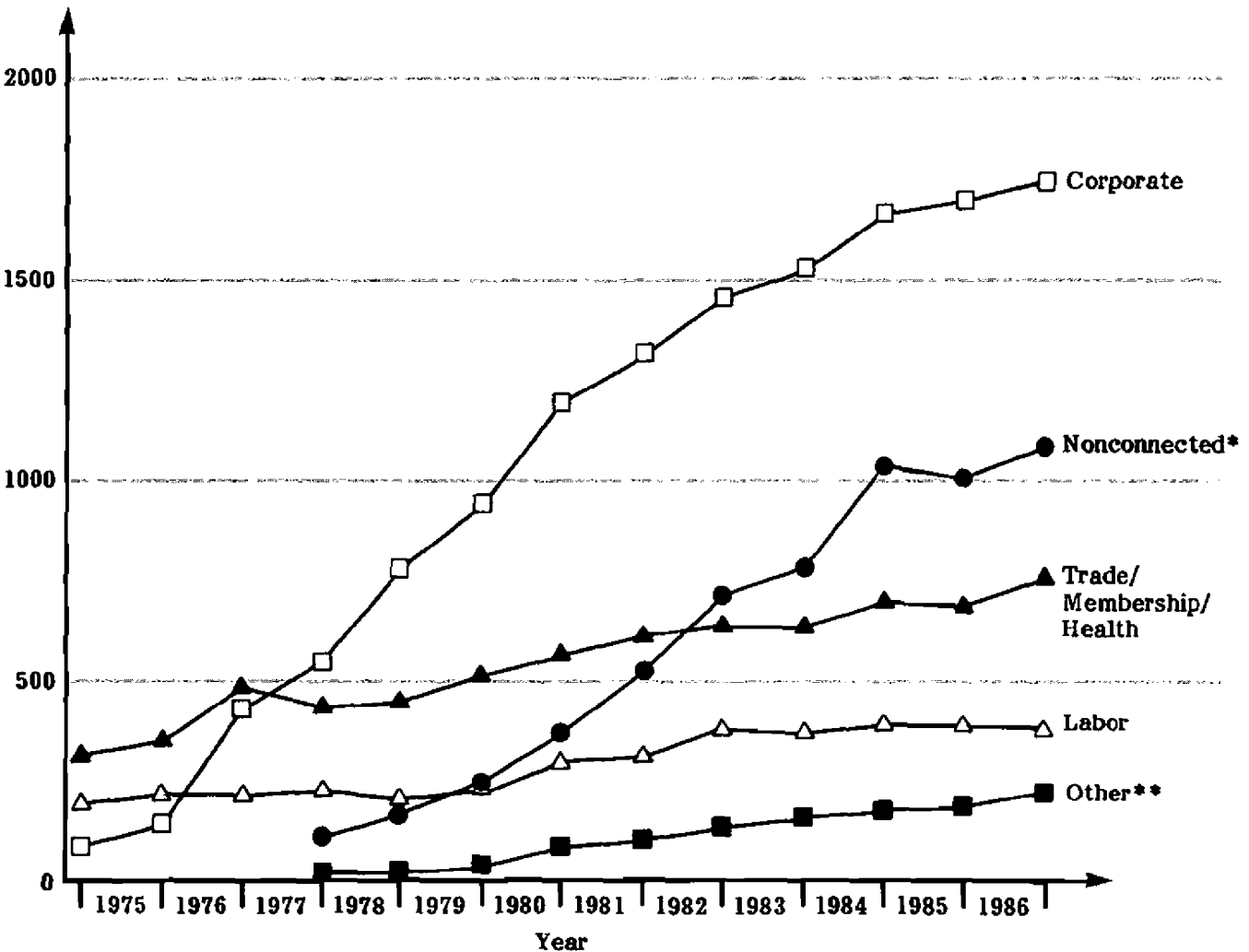
By the end of December 1986, 4,157 PACs were registered with the FEC. This figure represents a net increase of 165 PACs during 1986. (The term PAC or political action committee

refers to any political committee not authorized by a federal candidate or established by a political party.)

The graph below plots the total number of PACs in existence from 1973 through 1986. The graph does not reflect the financial activity of PACs. More detailed information may be obtained from the FEC's January 12, 1987, press release, which is available from the FEC's Public Records Office. Call: 376-3120 locally or, toll free, 800/424-9530.

PAC GROWTH

Number of PACs



*For the years 1974 through 1976, the FEC did not identify subcategories of PACs other than corporate and labor PACs. Therefore, numbers are not available for Trade/Membership/Health PACs and Nonconnected PACs.

**Includes PACs formed by corporations without capital stock and cooperatives. Numbers are not available for these categories of PACs from 1974 through 1976.

AUDITS

AUDITS RELEASED TO THE PUBLIC

The following is a chronological listing of audits released by the Commission between February 11, 1985, and January 9, 1987. The audit reports are available to the general public in the Public Records Office.

Final Audit Report	Date Made Public
Friends of George McGovern	2/11/85
Dallas Welcoming Committee	6/20/85
Sonia Johnson - Citizen for President	6/25/85
Jesse Jackson For President Committee, New Yorkers For Jackson and Jackson For President Committee-California	7/19/85
Al Swift For Congress Committee	7/25/85
John Glenn Presidential Committee, Inc.	8/19/85
Cranston For President Committee, Inc.	8/22/85
1984 Democratic National Convention Committee, Inc.	9/5/85
1984 San Francisco Democratic Convention Host Committee, Inc.	9/5/85
The LaRouche Campaign	10/29/85
Maine Democratic State Committee	11/14/85
Fund For a Conservative Majority	11/26/85
Draft Augustine for Congress and Augustine for Congress	12/13/85

Final Audit Report	Date Made Public
Atkins for Congress Committee	1/27/86
Phil Shea for Congress Committee	1/28/86
Addendum to the Final Audit Report for the Hollings for President, Inc.	2/25/86
Addendum to the Final Audit Report for the Friends of George McGovern	3/4/86
Nebraska Democratic State Central Committee	3/28/86
Massachusetts Republican State Committee	4/23/86
Committee on Arrangements for the 1984 Republican National Convention	4/28/86
Garden State Political Action Committee	5/1/86
Americans With Hart, Inc.	6/26/86
Reagan-Bush '84 (primary campaign)	7/10/86
Maine Freeze Voter	7/15/86
Georgia Democratic Elections Committee-Federal	9/22/86
New Jersey Education Political Action Committee	9/30/86
Life Amendment Political Action Committee	10/1/86
Mondale for President Committee, Inc. (primary campaign)	10/28/86
National Organization for Women Political Action Committee	11/6/86
Pennsylvania Democratic State Committee	1/9/87

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CHANGE OF ADDRESS

Registered political committees are automatically sent the Record. Any change of address by a registered committee must, by law, be made in writing as an amendment to FEC Form 1 (Statement of Organization) and filed with the Clerk of the House, the Secretary of the Senate, or the FEC, as appropriate.

Record subscribers (who are not political committees), when calling or mailing in a change of address, are asked to provide the following information:

1. Name of person to whom the Record is sent.
2. Old address.
3. New address.
4. Subscription number. The subscription number is located in the upper left hand corner of the mailing label. It consists of three letters and five numbers. Without this number, there is no guarantee that your subscription can be located on the computer.

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