Record

March 1994 *Federal Election Commission* *Volume 20, Number 3*

Table of Contents

Court Cases

FEC v. Survival Education Fund, Inc.

On January 12, 1994, the U.S. District Court for the Southern District of New York ruled that defendants' communications to the general public, although "undeniably hostile" to President Reagan, who was facing reelection, did not constitute prohibited corporate expenditures because they did not expressly advocate the defeat of a candidate, lacking required wording such as "vote against" or "defeat." 89 Civ. 0437 (TPG).

Survival Education Fund, Inc., and National Mobilization for Survival, Inc., paid $16,500 to distribute about 30,000 copies of two letters critical of President Reagan, who was up for reelection. The first letter, mailed in July

(continued on page 3)

Regulations

FEC Hears Testimony on Personal Use of Campaign Funds

Five witnesses presented conflicting views at a January 12 public hearing on proposed "personal use" rules. The rules would prohibit the use of campaign funds to pay the candidate's salary, household expenses, club membership dues or any expense that would exist irrespective of the campaign.

The ban on the personal use of campaign funds became law in January 8, 1980, but a "grandfather clause" exempted persons who were Members of Congress on that date. The Ethics Reform Act of 1989, however, repealed the grandfather clause effective January 1993, when the current Congress convened.[1] With the change in the law, the Commission drafted the proposed rules.

Under the draft rules, personal use would be defined as the use of campaign funds to pay for expenses that would exist irrespective of the candidate's campaign or responsi-

(continued on page 2)

[1] *Past Members who retired or resigned in earlier Congresses, however, may still convert a limited amount of excess campaign funds to personal use. See the summary of AO 1993-22 on page 5.*

April Reporting Reminder

Committees filing on a quarterly basis must file their first quarterly report by April 15. Those filing on a monthly schedule have a report due on April 20.

Please note that, in addition to filing quarterly reports, committees of candidates active in 1994 primary and runoff elections must file pre-election reports. PACs and party committees filing on a quarterly basis may also have to file pre-election reports.

For more information on 1994 reporting—including reporting dates for primaries, runoffs and the general election—see the January issue or order the 1994 reporting handout (call 800/424-9530 or 202/219-3420).

See also reporting dates for the Oklahoma special election, page 7.

Regulations

(continued from page 1)

bilities as a federal officeholder.[2] The draft rules also address related issues, such as whether a family member of the candidate may be on the campaign's payroll and whether the candidate may rent space to his or her campaign. (See the *October* 1993 Record for a summary of the proposed rules.)

Fred Wertheimer, president of Common Cause, generally supported the proposed rules but said that questionable expenses—for example, payments for entertainment (e.g., football games, stage shows) or for legal expenses unrelated to the campaign finance law—should be presumed to be for personal use unless the candidate can demonstrate that the payments had a legitimate campaign purpose. Agreeing with this approach, Elizabeth Hedlund (Center for Responsive Politics) urged the FEC to require campaigns to provide clear, specific descriptions of their expenditures. Other witnesses also supported expanded disclosure. Both Mr. Wertheimer and Ms. Hedlund said that their recommendations would deter campaigns from making prohibited "personal use" expenditures.

Two other witnesses, attorneys Jan W. Baran (Wiley, Rein & Fielding) and Robert F. Bauer (Perkins Coie), said that the draft rules were unclear, overbroad and open ended and would therefore result in the FEC's having to interpret them in advisory opinions and enforcement matters. They advocated a definition that would simply list specific prohibited payments (e.g., payments for the candidate's home mortgage). Alternatively, they urged the Commission to coordinate the rulemaking with the Congressional ethics committees, which oversee House and Senate rules on the use of campaign funds by Members of Congress.

Commenting on this issue, Lyn Utrecht, an attorney with Oldaker, Ryan and Leonard, said that FEC rules should conform to House and Senate rules to avoid confusion and inadvertent violations of FEC rules by Members of Congress. Mr. Wertheimer, however, argued that the House and Senate rules were irrelevant to the FEC's authority to enforce the Federal Election Campaign Act.

Responding to questions by the Commissioners, the witnesses commented on whether challengers should be treated differently under the proposed rules to offset a financial advantage of incumbents: In contrast to incumbent candidates, most challengers and open-seat candidates have to quit their jobs to campaign full time. Payment of a campaign salary to a candidate, however, would fall under the personal use ban, as would payment of the candidate's mortgage and other personal expenses. On the other hand, an employer's continued payment of salary to a candidate on a leave of absence could result in a prohibited or excessive contribution. While acknowledging that this is the case, the witnesses said that the FEC did not have authority to "level the playing field." Mr. Baran and Mr. Bauer, however, argued that the rules inconsistently treated salaries and mortgage payments as "personal use" expenditures when paid by the campaign but as "election-influencing" contributions when paid by someone else.

The Commission will consider both written comments and testimony on the proposed rules when drafting the final personal use rules. ✦

[2] *Members of Congress may use excess campaign funds for expenses in connection with official officeholder duties.*

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

800/424-9530
202/219-3420
202/219-3336 (TDD)

Trevor Potter, Chairman
Danny L. McDonald, Vice Chairman
Joan D. Aikens, Commissioner
Lee Ann Elliott, Commissioner
John Warren McGarry, Commissioner
Scott E. Thomas, Commissioner

John C. Surina, Staff Director
Lawrence M. Noble, General Counsel

Published by the Information Division
Louise D. Wides, Director
Stephanie Fitzgerald, Editor

Conferences

New Orleans and Pittsburgh Regional Conferences

The FEC will hold two 1994 regional conferences, a New Orleans conference on March 14-15 at the Omni Royal Orleans, and a Pittsburgh conference on April 28-29 at the Pittsburgh Vista Hotel.

Each 1½ day conference will feature workshops for candidates, party committees and corporate and labor PACs. The workshops will be presented by FEC Commissioners and staff and tax experts from the IRS.

The $115 registration fee for each conference covers three meals (two continental breakfasts and a lunch) and a reception. For more information call the FEC: 800/424-9530 or 202/219-3420. ✦

Court Cases

(continued from page 1)

1984—four months before the Presidential general election—asked readers to complete and return a "special election-year ANTI-WAR BALLOT" seeking "your No vote for President Reagan" on several policies pursued by his administration. The ballots, which were to be forwarded to the President, ended with the statement: "My vote in the November election will be influenced by your response to these demands." The second letter, a "1984 election survey," was headed "Ronald Reagan: Four More Years?" and asked readers to express their views on predictions that a second Reagan term would bring arms escalation, war in Central America and "life-threatening cuts in human services." The letter said that the survey results would be used "to educate Americans who will be voting."

In ruling that Survival Education Fund did not violate the prohibition on corporate expenditures (2 U.S.C. §441b(a)), the court relied on Supreme Court cases that interpreted §441b as applying only to communications that expressly advocate the election or defeat of a candidate in words such as "vote for," "elect," "support," "cast your ballot," "Smith for Congress," "vote against," "defeat," and "reject."[1]

Based on those rulings, the district court concluded that "[b]oth letters fell short of expressly advocating how the readers should vote." The court commented: "Obviously, the courts are not giving a broad reading of this statute." In the Court's view, "...expressions of hostility to the positions of an official, implying that that official should not be reelected—even when that implication is quite clear—do not constitute express advocacy which runs afoul of the statute." ✦

[1] FEC v. Massachusetts Citizens for Life, Inc., *479 U.S. 238, 248-249 (1986);* Buckley v. Valeo, *424 U.S. 1, 44 n. 52 (1976).*

Freedom Republicans, Inc. v. FEC

On January 18, finding that Freedom Republicans lacked standing to bring suit, the U.S. Court of Appeals for the District of Columbia ordered the district court to dismiss the case. No. 92-5214.

Background

In its complaint to the district court, Freedom Republicans alleged that the Republican Party's delegate-selection process and system of nonvoting, minority "auxiliaries" discriminated on the basis of race. The group claimed that the alleged discrimination was a violation of Title VI of the Civil Rights Act, which prohibits discrimination by any program or activity receiving federal funds. The plaintiffs asked that the court order the FEC to promulgate Title VI regulations governing the selection and appointment of delegates to federally financed party conventions. (Plaintiffs had also asked the court to withhold federal funds from the 1992 Republican national nominating convention but that request was not addressed in their motion for partial summary judgment.)

The district court had granted Freedom Republicans' motion, ordering the FEC to begin a Title VI rulemaking on the delegate-selection process of federally funded national party conventions. (The order was issued in April 1992 and clarified in May.) *Freedom Republicans, Inc. v. FEC*, 788 F. Supp. 600 (D.D.C. 1992).

Court of Appeals Decision

The court of appeals concluded that Freedom Republicans had no standing to bring suit against the Commission for the purpose of pressuring the Republican Party to change its delegate-selection rules. The court found that Freedom Republicans failed to meet two requirements for standing under Article III of the Constitution.

First, the organization failed to show that the allegedly discriminatory delegate-selection process was caused by the authorization of federal funding to the Republican convention. The court said that "the injury alleged in Freedom Republicans' complaint is not fairly traceable to any encouragement on the part of the government, but appears instead to be the result of decisions made by the Party without regard to funding implications." Second, Freedom Republicans failed to show that court action or action by the FEC would likely redress the injury. The court found no "adequate likelihood, as opposed to speculation, that the Party would choose to change its time-tested delegate-selection mechanism rather than forego the convention funding."

Accordingly, the court vacated the judgment of the district court and remanded the case with instructions to dismiss. ✦

Publications

FEC Publishes New Edition of Court Case Abstracts

The FEC recently published the eleventh edition of *Selected Court Case Abstracts*, summaries of court cases on the campaign finance law. The material is also available on line through the Commission's Data Access Program (DAP). The new edition includes *Record* summaries through the August 1993 issue. Legal citations and a subject index provide research aids. To order a free copy, call 800/ 424-9530 or 202/ 219-3420. For information on DAP, ask for Phyliss Stewart-Thompson. ✦

Party Activities

1994 Coordinated Party Expenditure Limits

The 1994 limits on coordinated party expenditures are now available. Party committees may make these special expenditures on behalf of 1994 general election candidates. Coordinated party expenditure limits are separate from the contribution limits; they also differ from contributions in that the party committee must spend the funds on behalf of the candidate rather than giving the money directly. Although these expenditures may be made in consultation with the candidate, only the party committee making the expenditures—not the candidate committee—must report them. (Coordinated party expenditures are reported on Line 25 of FEC Form 3X and itemized on Schedule F, regardless of amount.)

Table 1 shows which party committees have authority to make coordinated party expenditures; Table 2 shows the 1994 limits and the formulas used to calculate them; and Table 3 lists the state-by-state limits for 1994 Senate nominees. ✦

Table 1: Authority to Make Coordinated Party Expenditures on Behalf of House and Senate Nominees

National Party Committee	Yes, has authority to make expenditures on behalf of each nominee. May authorize[1] other party committees to make expenditures against its own spending limits.
State Party Committee	Yes, has authority to make expenditures on behalf of each nominee seeking election in state. May authorize[1] other party committees to make expenditures against its own spending limits.
Local Party Committee	No authority; may make coordinated expenditures only if authorized[1] by national or state party committee.

[1] The authorizing committee must provide prior, written authorization specifying the amount the committee may spend.

Table 2: 1994 Coordinated Party Expenditure Limits

	Amount	Formula
Senate Nominee	See Table 3	The greater of: $20,000 x COLA[1] or 2¢ x state VAP[2] x COLA
House Nominee in States with Only One Representative	$58,600	$20,000 x COLA
House Nominee in Other States	$29,300	$10,000 x COLA
Nominee for Delegate or Resident Commissioner[3]	$29,300	$10,000 x COLA

[1] COLA means cost-of-living adjustment. The 1993 COLA—used to determine the 1994 party expenditures limits—was 2.93.

[2] VAP means voting age population.

[3] The District of Columbia, Guam and the Virgin Islands elect Delegates; Puerto Rico elects a Resident Commissioner.

Table 3: 1994 Coordinated Party Expenditure Limits for Senate Nominees

State	Voting Age Population[1]	1994 Limit
Alabama	3,111,000	$ 182,305
*Alaska	410,000	$ 58,600
Arizona	2,866,000	$ 167,948
Arkansas	1,790,000	$ 104,894
California	22,618,000	$1,325,415
Colorado	2,628,000	$ 154,001
Connecticut	2,503,000	$ 146,676
*Delaware	525,000	$ 58,600
Florida	10,510,000	$ 615,886
Georgia	5,076,000	$ 297,454
Hawaii	873,000	$ 58,600
Idaho	767,000	$ 58,600
Illinois	8,630,000	$ 505,718
Indiana	4,244,000	$ 248,698
Iowa	2,080,000	$ 121,888
Kansas	1,847,000	$ 108,234
Kentucky	2,817,000	$ 165,076
Louisiana	3,052,000	$ 178,847
Maine	933,000	$ 58,600
Maryland	3,724,000	$ 218,226
Massachusetts	4,619,000	$ 270,673
Michigan	6,971,000	$ 408,501
Minnesota	3,290,000	$ 192,794
Mississippi	1,885,000	$ 110,461
Missouri	3,871,000	$ 226,841
*Montana	607,000	$ 58,600
Nebraska	1,168,000	$ 68,445
Nevada	1,037,000	$ 60,768
New Hampshire	841,000	$ 58,600
New Jersey	5,983,000	$ 350,604
New Mexico	1,136,000	$ 66,570
New York	13,730,000	$ 804,578
North Carolina	5,241,000	$ 307,123
*North Dakota	463,000	$ 58,600
Ohio	8,232,000	$ 482,395
Oklahoma	2,362,000	$ 138,413
Oregon	2,251,000	$ 131,909
Pennsylvania	9,177,000	$ 537,772
Rhode Island	765,000	$ 58,600
South Carolina	2,691,000	$ 157,693
*South Dakota	507,000	$ 58,600
Tennessee	3,831,000	$ 224,497
Texas	12,848,000	$ 752,893
Utah	1,195,000	$ 70,027
*Vermont	432,000	$ 58,600
Virginia	4,903,000	$ 287,316
Washington	3,862,000	$ 226,313
West Virginia	1,386,000	$ 81,220
Wisconsin	3,696,000	$ 216,586
*Wyoming	332,000	$ 58,600

**In these states, which have only one Representative, the spending limit for the House nominee is $58,600, the same amount as the Senate limit. In other states, the limit for each House nominee is $29,300, regardless of the Senate limit.*

[1] The voting age population figures are not yet official. In the unlikely event the official figures differ from those used here, readers will be notified in the April issue.

Advisory Opinions

AO 1993-22
Use of Excess Campaign Funds by Retired House Member

The transfer of $800,308 in remaining excess campaign funds from former Congressman Robert A. Roe's Campaign Committee to the Roe Committee, a nonconnected committee newly formed by Mr. Roe, was a permissible use of the funds. AOs 1988-41 and 1985-30. Mr. Roe now proposes to transfer $569,512 of these funds from the Roe Committee to the Robert A. Roe Charitable Foundation.[1] As trustee of the organization, he would choose the charities to support; he would also reserve the right to amend or revoke the trust or to use the funds for his own benefit should he become disabled. Although the proposed transfer would constitute a personal use[2] of excess campaign funds—prohibited under 2 U.S.C. §439a—it would be permissible in Mr. Roe's case because the funds were "grandfathered" under a limited exception to the prohibition.

As a Member of Congress who served on January 8, 1980, but not in the 103rd Congress, Mr. Roe is allowed to convert to personal use an amount equaling the November 11, 1989, unobligated balance of his Campaign Committee, the amount of the proposed transfer. See 11 CFR 113.2(d).

(continued on page 6)

[1] According to Mr. Roe, he will have to pay taxes on the funds contained in the transfer to the Foundation.

[2] The Commission is currently engaged in a rulemaking to offer guidance on what constitutes personal use. See page 1.

Advisory Opinions

(continued from page 5)

The funds remaining in the Roe Committee's account, however, would be subject to the personal use ban, although any reimbursement of Mr. Roe's ordinary and necessary expenses relating to his political activity as director of the Committee would not be a personal use. See AOs 1993-6 and 1983-27.

Multicandidate Status; Committee Name

The Roe Committee qualifies as a multicandidate committee based on the following:

- The Campaign Committee (now terminated) and the Roe Committee existed concurrently during the time of the transfers;
- The transfers were the only source of funds for the Roe Committee; and
- The Campaign Committee previously fulfilled the three criteria for multicandidate status. 2 U.S.C. §441(a)(2). See AOs 1988-41 and 1988-30.

Under 2 U.S.C. §432(e)(4), a candidate's name may not be included in the name of an unauthorized committee. Mr. Roe, however, is no longer a candidate. Consequently, the Roe Committee may continue to use its current name.

Reporting

In its first report, the Roe Committee reported the funds from the Campaign Committee as a transfer from an affiliated committee. The transfer to the Foundation should be reported under the category "other disbursements." The Foundation would not have any reporting obligations under the Federal Election Campaign Act unless it were to make contributions or expenditures that triggered registration and reporting requirements.

Date Issued: January 13, 1994; Length: 5 pages. ✦

AO 1993-23
PAC Disaffiliation

The PACs of Pacific Telesis Group (PTG) and its wholly owned subsidiary, PacTel, will become disaffiliated on the date that PacTel separates from PTG and becomes an independent company through a "spin-off"—i.e., the distribution of PTG's shares in PacTel to the shareholders of PTG.[1] On that date, PTG will no longer hold a controlling interest in PacTel; the governance and management of the two companies will be separate; and they will no longer share any directors, officers or employees.

Affiliation Factors

Separate segregated funds established by a parent and its subsidiary are automatically affiliated and thus share the same contribution limits. 11 CFR 110.3(a)(2)(i). When a direct parent-subsidiary relationship does not exist, FEC regulations list several factors to determine whether two organizations, and their respective PACs, are affiliated. 11 CFR 110.3(a)(3)(ii)(A)-(J). Several of those factors are relevant here.

- *Controlling Interest in Voting Stock.* After the spin-off, no group will hold a controlling interest in PacTel. Although PTG shareholders will constitute a large majority of PacTel shareholders, anticipated vigorous trading of both PTG and PacTel shares should introduce large numbers of different shareholders.
- *Governing Authority; Control over Decisionmakers; Common Officers and Employees.* Based on the separation agreement between the two companies, and PacTel's bylaws and articles of incorporation, the companies will be separately governed and managed; furthermore, they will not share common employees, officers or directors.
- *Movement of Personnel from One Organization to the Other Indicating Creation of Successor Organization.* Although some PTG employees will become PacTel employees, and vice versa, the spin-off and separation agreement will create a new corporation, neither the subordinate of PTG nor its successor.
- *Role in Forming the Other Organization.* PTG's creation of PacTel is superseded by its proposal to sever the relationship.

Based on this analysis, the two companies and their respective PACs should no longer be considered affiliated as of the spin-off date. By contrast, in two previous spin-off situations, the Commission said that the parent and spin-off companies remained affiliated because some attachment continued between them (e.g., overlapping board members; complete common identity of shareholders). See AOs 1987-21 and 1986-42.

Multicandidate Status; Contributions Limits

When PTGPAC and PACTEL-PAC become disaffiliated, each will retain its multicandidate status and thus may contribute up to $5,000, per candidate, per election. Contributions made before disaffiliation, however, will have to be aggregated with those made after. For example, if the two PACs gave an aggregate of $3,000 to a 1994 House primary campaign when they were affiliated, each PAC would be able to give another $2,000 after disaffiliation.

Date Issued: January 14, 1994; Length: 8 pages. ✦

[1] *The spin-off was preceded by an initial public offering of 12 to 14 percent of PacTel shares.*

AO 1993-25
Preemption of State Law Restricting Contributions from Lobbyists

Federal law preempts a Wisconsin law governing political contributions by lobbyists. That law would prohibit lobbyists from contributing to the U.S. Senate campaign of State Representative Robert T. Welch until June 1, 1994. The Federal Election Campaign Act (the Act) and FEC regulations preempt any state law that attempts to regulate federal campaign finance activity, including contributions to federal candidates. 2 U.S.C. §453; 11 CFR 108.7(b). Under the broad preemptive powers of the Act, only federal law could limit the time during which a lobbyist could contribute to the federal campaign of a state legislator. See also AOs 1992-43, 1989-12, 1988-21 and 1978-66.

Date Issued: January 31, 1994; Length: 3 pages. ✦

Advisory Opinion Requests

The advisory opinion requests (AORs) listed below are available for review and comment in the FEC's Public Records Office.

AOR 1994-1
Sponsorship of golf tournament fundraiser for trade association PAC; member recruitment at tournament. (Western Pistachio Association; January 24, 1994; 9 pages plus attachments) ✦

AOR 1994-2
Preemption of Minnesota law restricting fundraising. (Linda Berglin for United States Senate Volunteer Committee; January 31, 1994; 1 page plus attachments) ✦

Special Elections

Oklahoma Special Elections

Oklahoma has scheduled the following special elections to fill the 6th Congressional District seat vacated by the resignation of Representative Glenn English:

- March 8 primary election;
- April 5 runoff election (to be held if no candidate wins more than 50 percent of the vote in a party's primary) and
- May 10 general election.

This article explains the reporting requirements for PACs and party committees. (The FEC has sent reporting information to candidates on the Oklahoma primary ballot. For more complete information on reporting, see the January issue or order the 1994 reporting handout (800/424-9530 or 202/219-3420).

Reporting by Party Committees and PACs

Quarterly Filers. Party committees and PACs filing on a quarterly (rather than monthly) basis must file a special election report if they make previously undisclosed contributions or expenditures in connection with that election by the close-of-books date shown in the reporting table. 11 CFR 104.5(c)(1)(ii) and (h).

Monthly Filers. PACs filing on a monthly basis are not required to file pre- and post-special election reports. See 2 U.S.C. §434(a)(9); 11 CFR 104.5(h)(2).

24-Hour Reports on Independent Expenditures

PACs (including monthly filers) and other persons making independent expenditures in connection with an Oklahoma special election must file 24-hour reports if the committee or person makes independent expenditures aggregating

(continued on page 8)

Reporting Dates for Oklahoma Special Elections: March 8 Primary, April 5 Runoff and May 10 General

	Close of Books[1]	Reg./Cert. Mailing Date[2]	Filing Date[2]
Pre-Primary[3]	February 16	February 21	February 24
Pre-Runoff	March 16	March 21	March 24
April Quarterly	March 31	April 15	April 15
Pre-General	April 20	April 25	April 28
Post-General	May 30	June 9	June 9

[1] *The close of books is the end of the reporting period. The period begins the day after the closing date of the last report filed. If the committee is new and has not previously filed a report, the first report begins when the committee started raising and spending funds.*

[2] *Reports sent by registered or certified mail must be postmarked by the mailing date; otherwise they must be received by the federal and state offices by the filing date.*

[3] *The primary election was announced too late to publish the reporting dates in the February* Record.

Special Elections

(continued from page 7)

$1,000 or more during the following periods:

- Primary: February 17 – March 6
- Runoff: March 17 – April 3
- General: April 21 – May 8

The report must be filed with the federal and state offices within 24 hours after the expenditure is made. 11 CFR 104.4(b) and (c) and 104.5(g).

Where to File Oklahoma Special Election Reports

PACs and party committees generally file their reports with the FEC. However, twenty-four-hour reports on independent expenditures made for or against House candidates are filed with the Clerk of the House. 11 CFR 104.4(c)(3). (The address is given in Form 3X instructions.)

In addition to filing with the FEC, committees must simultaneously file copies of Oklahoma special election reports (including 24-hour reports) with the state office:

Oklahoma Ethics Commission
State Capitol Building, Room B-2A
Oklahoma City, OK 73105-4802

The state copy need include only the Summary Page and the schedule showing the contribution or expenditure. 2 U.S.C. §439(a)(2)(B). ✦

Index

The first number in each citation refers to the "number" (month) of the 1994 *Record* issue in which the article appeared. The second number, following the colon, indicates the page number in that issue. For example, "1:4" means that the article is in the January issue on page 4.

FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463

Official Business

Printed on recycled paper

Bulk Rate Mail
Postage and Fees Paid
Federal Election Commission
Permit Number G-31