

Record

November 1993

Federal Election Commission

Volume 19, Number 11

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Budget

Electronic Filing and Enhanced Enforcement Proposed in 1995 Budget

On October 1, 1993, the Commission sent OMB and Congress a budget request for \$29.8 million and 347 full time equivalent staff (FTE) for fiscal year 1995. The document asks for \$6.3 million more than the anticipated FY 1994 appropriation. The increase would be used primarily to pay for the following programs:

- Electronic filing of campaign finance reports submitted to the Federal Election Commission and enhancement of the FEC's computer equipment. The program would cost nearly \$4 million and require 7 additional staff for FY 1995.
- The 1996 Presidential funding program. Additional auditors would replace GAO auditors who, during previous Presidential cycles, had been detailed to the FEC on a non-reimbursable basis.
- Audits of 20 to 25 political committees (out of a total of more than 8,000). This program, which would be carried out under 2 U.S.C. §438(b), would assure that committees with the most egregious reporting problems would be audited, even in Presidential election years.

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Court Cases

FEC v. Colorado Republican Federal Campaign Committee

A Colorado district court recently ruled that a communication by a party committee is subject to the coordinated party expenditure limits under 2 U.S.C. §441a(d) only if it "expressly advocates" the election or defeat of a candidate. The court defined "express advocacy" as a direct plea for specific action, using words such as "elect," "support," "defeat" or "reject."

Based on these conclusions, on August 31, 1993, the U.S. District Court for the District of Colorado granted summary judgment to the defendant Committee. The court held that the Committee's \$15,000 expenditure for a radio ad, because it did not contain "express advocacy," was not subject to the coordinated party expenditure limit. The FEC had claimed that the advertisement had caused the Committee to exceed its party expenditure limit in a Senate race.

The Advertisement

In April 1986—four months before the Democratic primary and seven months before the November general election—the Committee ran a radio ad in response to a series of television

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Budget

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- Enforcement of the \$25,000 annual limit on contributions from individuals. At a cost of \$238,600, the program would need 4 additional staff.

If the electronic filing program were fully funded, the Commission would begin to implement it in time for the 1996 elections. It would be available for the national party committees and large PACs, which file reports with the FEC. (House and Senate committees, which file with the Clerk of the House and the Secretary of the Senate, respectively, would not be included in this program.) Under this proposal, the Commission would begin to develop a program whereby smaller PACs and party committees could file data by

magnetic disk. In addition, the FEC would develop software specifications for those committees that wanted to file computer-generated paper copies of FEC reports.

The request for funds to implement electronic filing came in response to suggestions from Congressional oversight committees. While acknowledging that the system should increase the breadth and scope of data collected (e.g., more detailed disbursement data) and reduce the time required to capture the data, the Commission made clear that the program would be expensive, particularly during development and installation. Furthermore, if the agency chose to maintain a consistent data base (i.e., posting itemized expenditures on hardcopy filers), FEC staff would have to manually capture more data from reports filed on paper.

Commenting on the budget submission, the Commission's request stated that "with the fate of proposed campaign finance reform legislation in doubt, it is even more imperative that the Commission receive adequate funds to vigorously enforce the existing laws and promote the widest possible disclosure of campaign finance data." ♦

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

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

Scott E. Thomas, Chairman
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Published by the Information
Division

Louise D. Wides, Director
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Conferences

FEC to Hold December PAC Conference in Washington, DC

On December 13 and 14, the FEC will hold a 1½ day conference in Washington, DC, for corporations, trade associations, labor organizations and their PACs. FEC Commissioners and staff will conduct workshops for each type of organization.

The \$125 registration fee covers conference materials and three meals (two continental breakfasts and one lunch).

The conference will be held at the Washington Hilton and Towers Conference Center, 1919 Connecticut Avenue, NW, Washington, DC 20009 (202/483-3000). To receive the group rate of \$120 per night for a single room, make your reservation by November 21 and notify the hotel that you will be attending the FEC conference.

For more information, or to place your name on the mailing list for registration materials, call the FEC: 800/424-9530 or 202/219-3420. ♦

Computer Resources

DAP Brochure Published

The FEC recently published a brochure to explain the agency's Direct Access Program (DAP). This program provides on-line computer access to campaign finance information, advisory opinions and court case abstracts. (For a full description of the program, see the January *Record*.)

To order a copy of this brochure, or to receive additional information about DAP, contact the Data Systems Division at 800/424-9530 or 202/219-3730. ♦

Court Cases

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ads sponsored by the campaign committee of then-Congressman Wirth, a Democrat.

The Committee's ad contrasted Mr. Wirth's statements in his TV ads with his Congressional voting record, and concluded with the words: "Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts."

The Committee reported the \$15,000 payment as an operating expense for "voter information to Colorado voters—advertising."

Under the Federal Election Campaign Act, the Committee was authorized to spend up to a certain limit on coordinated party expenditures made "in connection with the general election campaign" of the Republican Party candidate running in the U.S. Senate race in Colorado, 2 U.S.C. §441a(d)(3). The Committee, however, had assigned its entire 1986 spending authority to the National Republican Senatorial Committee.

The Commission argued that the radio ad constituted a coordinated party expenditure and that the Committee, no longer having any spending authority, had violated the §441a(d) limit.

The Court's Decision

Coordinated vs. Independent Expenditures. The court rejected the Committee's argument that the ad was an "independent expenditure" (rather than a coordinated expenditure)—and thus not subject to spending limits—because it was aired before the Republican candidate had been nominated. The court noted that the FEC and the courts have said that party committees are incapable of making independent expenditures. The court concluded that the Committee's expenditure "was made on behalf of the Republican candidate, whomever that might be; and it is irrelevant that no particular person had been designated."

"*In Connection With.*" Pursuant to §441a(d), the Committee's expenditure would be subject to the §441a(d) limits only if it were made "in connection with" the general election campaign of the Senate nominee.

The court looked to the Supreme Court's interpretation of "in connection with" in *Federal Election Commission v. Massachusetts Citizens for Life, Inc. (MCFL)*, which involved the prohibition on corporate and labor contributions and expenditures under 2 U.S.C. §441b. In *MCFL*, the Supreme Court held that "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of §441b." *MCFL*, 479 U.S. 238, 249 (1986). The district court found that the rule of statutory construction—i.e., identical words used in different parts of the same statute have the same meaning—applied to sections 441b and 441a(d) because they had a similar purpose, to regulate expenditures by multiperson organizations. The court therefore concluded: "'[E]xpress advocacy' is required in order for a coordinated expenditure to be 'in connection with' the general election campaign of a candidate for federal office under section 441a(d)(3)."

Relying on its interpretation in Advisory Opinion 1985-14, the FEC argued that "in connection with," as used in §441a(d), meant that a communication was subject to the expenditure limit if it contained an electioneering message and a reference to a clearly identified candidate (as opposed to express advocacy of a clearly identified candidate). The court, however, found that, because coordinated party expenditures implicate free speech concerns, the "express advocacy" standard was necessary to prevent undue regulation of political speech.

"*Express Advocacy.*" After concluding that "express advocacy" was necessary for coordinated expenditures to be subject to §441a(d) limits, the court considered whether

the committee's radio ad constituted "express advocacy." "When determining whether speech constitutes 'express advocacy,'" the court said, "the focus is on the actual wording used." The court pointed out that the Supreme Court, in *Buckley v. Valeo*, defined "express advocacy" as "express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' or 'reject.'" *Buckley*, 424 U.S. 1, 46 n.52 (1976).

Using this language as a "bright-line" test for express advocacy, the court said that "[t]he Advertisement does not contain any words which expressly advocate action. At best, as plaintiff suggests, the Advertisement contains an indirect plea for action."

While the FEC never reached the issue of whether the ad constituted "express advocacy," the agency did argue that the ad urged the public to vote against Mr. Wirth in favor of the eventual Republican nominee based on the surrounding circumstances: The ad responded to Mr. Wirth's TV ads; he was identified as a Senate candidate; and the disclaimer identified the Republican Committee as the ad's sponsor. The court, however, declined to consider the surrounding circumstances, holding that the *Buckley* Court created a bright-line test for express advocacy. ♦

FEC v. Maggin for Congress Committee

On June 29, 1993, the U.S. District Court for the District of New Hampshire held defendants Elliott S. Maggin for Congress Committee and its treasurer, Andi T. Johnson, in civil contempt of court for failing to pay civil penalties and the FEC's costs and attorneys fees (No. C86-40-L). The assessments have remained unpaid since they were imposed under an August 1986 court order.

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Court Cases

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The court further ordered Ms. Johnson to provide the FEC with financial records on her resources and liabilities within 20 days and to appear before the court 30 days after submitting the records. A \$10,000 civil penalty and interest on the earlier penalties will be assessed against her if she fails to provide the information.

Under the 1986 judgment, the court found that the defendants had violated the Federal Election Campaign Act by failing to file a 1984 quarterly report. The court ordered each defendant to pay a \$5,000 civil penalty and permanently enjoined them from further violations of the Act. Defendants were also ordered to pay \$2,569 to cover the FEC's costs and attorneys fees. ♦

Motor Voter

Commission Seeks Comments on Mail-in Registration Form and Biennial Reporting

The FEC recently asked election officials and other interested parties for their help in creating a national mail-in voter registration form, one of the Commission's new responsibilities under the National Voter Registration Act (the motor voter law). The form must be ready by January 1995.

The agency also asked for guidance on what voting information the FEC should request from the states for compilation in biennial reports to Congress. Beginning in June 1995 and every two years thereafter, the agency will be required to report to Congress on the impact of the motor voter law and on ways to improve state and federal procedures.

The Commission requested the comments in an advance notice of proposed rulemaking published in the Federal Register on September 30; comments were due November 1 (58 FR 51132). The notice is summarized below. Eventually, the FEC will prescribe regulations on the specifics of the form and the information to be provided by the states to the FEC. (Under the motor voter law, the Commission has a limited authority to create rules in these areas only; it has no enforcement powers.)

In drafting final rules, the agency will also consider the results of surveys conducted by the FEC's Clearinghouse on Election Administration. The surveys will provide information on state laws and registration procedures.

The Clearinghouse has taken a number of steps to provide information to the states on their responsibilities under the motor voter law, another of the FEC's responsibilities. In its most recent effort, this fall the Clearinghouse met with key state officials at regional conferences in

Seattle, Dallas, Chicago, Boston and Atlanta.

National Mail-in Voter Registration Form

Content. The motor voter law requires the form to include several items, such as voter eligibility requirements.

As to information to be filled in by the applicant, the form may require only that information which is "necessary" to process the application and administer the election process. The Commission asked for comments on what information would be "necessary" but pointed out that there could be conflicts between current practice and what is "necessary" under the law.

Format. The Commission raised a number of issues on the format of the voter registration form. One concern was how to accommodate the different state voter-eligibility requirements and the different information on where to mail the form.

Placing a top priority on creating a "user friendly" form, the agency also asked to what extent the form could be designed for special populations: foreign language versions for those jurisdictions covered by the language minority requirements of the Voting Rights Act; the use of large type for the visually impaired, as recommended by the Americans with Disabilities Act; and the use of simplified language and format to meet the needs of the marginally literate.

The Commission suggested that one practical way to meet these several needs would be to develop a booklet with tear-out application forms.

Report to Congress

The FEC also asked for suggestions on what information it should report to Congress and how the information could be obtained without unduly burdening state officials.

While the reports will cover some basic statistics on registration and

Federal Register

Copies of Federal Register notices are available from the Public Records Office.

1993-22

11 CFR Part 8: National Voter Registration Act; Advance Notice of Proposed Rulemaking (58 FR 51132, September 30, 1993)

1993-23

11 CFR Parts 100 and 113: Personal Use of Campaign Funds; Extension of Comment Period and Notice of Hearing Request (58 FR 52040, October 6, 1993)

1993-24

11 CFR Parts 107, 114: and 9008: Presidential Election Campaign Fund and Federal Financing of Presidential Nominating Conventions; Announcement of Hearing (58 FR 52700, October 12, 1993)

voting, the FEC observed that other data might also be helpful: statistics on registration at public assistance or public services offices, and the percentage of registrants who voted, broken down by type and/or location of registration. The agency sought comment on how this information could be gathered without violating privacy rights. ♦

Public Funding

Robertson's 1988 Campaign Required to Repay \$290,794 in Public Funds

Pat Robertson's 1988 Presidential campaign, Americans for Robertson, must repay \$290,794 in public funds to the U.S. Treasury. The campaign had received over \$10.4 million in primary matching funds.

The final repayment amount, approved by the Commission on September 23, represents the pro rata portion of over \$950,000 in nonqualified campaign expenses incurred by the campaign. (Only the portion of nonqualified campaign expenses that were defrayed with public funds are subject to repayment. A ratio formula is used to determine that amount.) The campaign was also ordered to refund \$105,635 to news media organizations for travel overcharges.

In the final audit report, the Commission had initially asked for a \$388,544 repayment but, based on the campaign's response to that report, reduced the amount by \$97,750.

The final audit report (containing the initial repayment determination) and the Commission's statement of reasons supporting the final repayment determination are available for review in the FEC's Public Records Office. A summary of the repayment findings appears below.

Break Down of Repayment

The \$290,794 final repayment consists of several components:

- For exceeding the Iowa and New Hampshire expenditure limits by \$789,409, the campaign must repay \$240,882, the pro rata portion. (The agency also determined that the campaign had exceeded the overall spending limit by \$648,525 but based the repayment on the larger amount, the excessive state spending.)
- The campaign must repay \$22,728 for nonqualified campaign expenses associated with the Republican National Convention. The expenses were incurred after the candidate's date of ineligibility, when the campaign was required to limit its activities to winding down the campaign. The convention expenses, however, did not appear to be legitimate wind-down costs.
- The campaign failed to document \$17,008 in transfers and must pay the pro rata portion, \$5,190.
- Finally, the campaign must make a \$21,994 repayment representing the pro rata portion of other nonqualified campaign expenses, including \$71,761 in tax penalties.

Press Travel Refund

The campaign must refund \$105,635 to news media firms that were overcharged for travel on campaign aircraft. The campaign failed to use the prescribed method for determining how much to charge the media for travel (i.e., dividing the actual transportation costs among the individuals on a campaign flight). Instead, it charged passengers the first class airfare.

Challenge to Repayment

In its December 1992 oral presentation, the Robertson campaign disputed the FEC's initial repayment determination, claiming that the agency had failed to notify the campaign of the final repayment amount within the three-year deadline. (See 26 U.S.C. §9038(c).) The

Commission, however, said that the campaign had raised the issue too late for agency consideration.

As explained in the FEC's statement of reasons, an oral presentation must be based on the written materials submitted in response to the initial repayment determination. 11 CFR 9038.2(c)(2) and (3). The agency said that the Robertson campaign, by failing to include the three-year notification argument in its written response, waived its right to raise the argument during the oral presentation or at any future stage of the repayment proceedings, including a court challenge to the final repayment.¹ 11 CFR 9038.5(b). Consequently, the agency did not consider the argument in reaching the final repayment determination for the Robertson campaign. ♦

¹ By contrast, the Dukakis and Simon Presidential campaigns raised a similar notification argument in a timely fashion. After considering their arguments, however, the Commission concluded that the three-year requirement had been satisfied when the campaigns were notified of the preliminary repayment calculation included in the interim audit report. (See the April 1993 issue, page 11.) The two campaigns again raised the notification issue in court suits challenging the agency's final repayment determinations. (See the August issue, page 7.)

Advisory Opinions

AO 1993-12 Indian Tribe as a Federal Contractor

The Mississippi Band of the Choctaw Indians qualifies as a "federal contractor" because the tribe has entered into procurement contracts with agencies of the federal government. As a result, the tribe may not make contributions in connection with federal elections during the term of these agreements. 2 U.S.C. §441c.

The Choctaw Tribe entered into three types of agreements with the government: self-determination contracts, grant agreements and procurement contracts. Self-determination contracts with the U.S. Department of the Interior provide funds to the tribe to run programs otherwise provided by Interior for the benefit of the tribe.¹ Grant agreements provide federal funds (e.g., for vocational training) to the tribe because of its status as a government entity. The procurement contracts involve the sale of tribe-produced items to the federal government (e.g., Bureau of Indian Affairs).

Under Commission regulations, the ban on contributions by federal contractors applies to a person who enters into a contract with the government to provide property or services. 11 CFR 115.1. The tribe's self-determination contracts and grant agreements do not involve the provision of property or services to the government, but its procurement contracts do—making the tribe a federal contractor.

As a federal contractor, the tribe may not make contributions in connection with federal elections.

Moreover, the Act and Commission regulations do not permit federal contractors to segregate the proceeds of their contracts from other funds as a means of avoiding the prohibitions of section 441c. The Commission noted, however, that individual members of the tribe could make personal contributions or form a nonconnected political committee. 11 CFR 115.6 and AOs 1985-23, 1984-10 and 1984-12.

Date Issued: September 17, 1993;
Length: 7 pages. ♦

AO 1993-16 Solicitable Class for Corporate SSF

Blue Cross of California (BCC) proposed to solicit contributions to its separate segregated fund (SSF) from three classes of employees. Only one of those classes—regional sales managers—can be solicited as "executive or administrative personnel" under 11 CFR 114.5.

Under that regulation, an SSF may solicit contributions, at any time, from its executive or administrative personnel, stockholders and the families of both groups.¹ 11 CFR 114.5(g). "Executive or administrative personnel" is defined as corporate employees who are paid on a salary basis and "have policymaking, managerial, professional, or supervisory responsibilities." 11 CFR 114.1(c).

All three classes of employees that BCC planned to solicit—telemarketing representatives, lead telemarketing representatives and regional sales managers—are paid, in part, on a salary basis, but only the sales managers have sufficient supervisory responsibilities to qualify as "executive or administrative personnel." Unlike the other classes, the managers routinely monitor the quality of sales

work, plan sales strategies and handle other "supervisory, administrative and professional responsibilities." By contrast, the two classes of telemarketing representatives focus primarily on sales.

Date issued: September 30, 1993;
Length: 5 pages. ♦

Regulations

Personal Use Comment Period Extended

The Commission has extended, by 45 days, the comment period for its proposed regulations on personal use of campaign funds. (For a summary of the proposed rules, see the October *Record*.) Comments must be received by November 13. See 58 FR 52040.

Additionally, anyone interested in testifying at a public hearing on the proposed rules should notify the Commission before the end of the comment period.

Comments and requests to testify must be in writing, and should be sent to Ms. Susan E. Propper, Assistant General Counsel, 999 E Street, NW, Washington, DC 20463. The comments will be made available for public review in the FEC's Public Records Office. ♦

Michigan Special Election

Party committees and PACs may have to file pre- and post-general election reports if they made (or intend to make) contributions or expenditures in connection with the December 7 special general election in Michigan's 3rd Congressional District. For further information, see the October 1993 *Record*, page 6, or call the Commission.

¹ *Indian Self-Determination and Educational Assistance Act*, 25 U.S.C. §450.

¹ *Twice a year, a corporation may solicit contributions from the rest of its employees.* 11 CFR 114.6(a).

Compliance

MURs Released to the Public

Listed below are FEC enforcement cases (Matters Under Review or MURs) recently released for public review. The list is based on the FEC press releases of September 27 and October 4, 1993. Files on closed MURs are available for review in the Public Records Office.

MUR 3524

Respondents: (a) Oregon Republican Party, Craig C. Brenton, treasurer; (b) Re-Elect Packwood Committee, Geoffrey Brown, treasurer (OR)
Complainant: Democratic Senatorial Campaign Committee (DC)
Subject: Failure to report properly costs associated with advertisements; failure to report in-kind contribution
Disposition: (a) \$10,000 civil penalty; (b) no reason to believe

MUR 3534

Respondents: (a) Clinton for President Committee, Robert Farmer, treasurer (AR); (b) Andrew Jackson (SC); (c) Darrell Jackson (SC); (d) Heyward Bannister (SC); (e) Sunrise Enterprise of Columbia, Inc. (SC); (f) Bible Church of Atlas Road, Inc. (SC)
Complainant: Robert Lee Williams (SC)
Subject: Distribution of campaign literature
Disposition: (a)-(f) Rejected General Counsel's recommendations and instead found no reason to believe

MUR 3536

Respondents: (a) William J. McCuen (AR); (b) persons unknown
Complainant: Beryl Anthony, Jr. (DC)
Subject: Fraudulent misrepresentation
Disposition: (a) and (b) Reason to believe but took no further action

MUR 3714/3612

Respondents (all in PA): (a) Pennsylvania Association of Broadcasters, Richard Wyckoff, president; (b) Richard Thornburgh; (c) Senator Harris Wofford; (d) Fred Friendly; (e) WPXI Television; (f) Senator Arlen Specter; (g) Citizens for Arlen Specter, Stephen Harmelin, treasurer; (h) Lynn Yeakel; (i) Lynn Yeakel for U.S. Senate, Sidney Rosenblatt, treasurer; (j) KSKA-TV; (k) League of Women Voters of Pennsylvania, Diane Edmundson, chair
Complainant: William D. White (PA)
Subject: Debate; corporate contributions
Disposition: (a) Reason to believe but took no further action; (b)-(k) took no action

MUR 3785

Respondents: (a) MIG Political Action Committee, Kathleen L. Gutin, treasurer (FL); (b) Robert D. Barwick (FL)
Complainant: FEC initiated
Subject: Excessive contributions; failure to identify source of contribution
Disposition: (a) \$4,000 civil penalty; (b) \$1,500 civil penalty

MUR 3792

Respondents: Your Ballot Guide, Jill Barad, treasurer (CA)
Complainant: FEC initiated
Subject: Failure to report on time
Disposition: \$1,000 civil penalty

MUR 3799

Respondents: Barnett People for Better Government, Inc.—Federal, Brian Babcock, treasurer (FL)
Complainant: FEC initiated
Subject: Excessive contributions
Disposition: \$1,900 civil penalty ♦

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