Record

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James E. Akins et al. v. FEC

On December 6, 1996, the U.S. Court of Appeals for the District of Columbia Circuit, sitting en banc, reversed the district court's decision in this case in favor of several former government officials and told the FEC to revisit a seven-year-old complaint alleging that the American Israel Public Affairs Committee (AIPAC) failed to register as a political committee in violation of the Federal Election Campaign Act (the Act).

The case centers around the Commission's interpretation of the definition of political committee. The Act defines a political committee as any committee, association or other group that receives contributions or makes expenditures in excess of $1,000 during a calendar year. 2 U.S.C. §431(4)(A).

Over the years, the FEC has relied on the statute and interpretations in *Buckley v. Valeo* and *FEC v. Massachusetts Citizens for Life Inc.* (*MCFL*)—both cases invoked a "major purpose" test—to determine whether a group should be considered a political committee.

However, the appeals court said that, when considering the political committee status of a group that makes contributions or coordinated

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Reports

Electronic Filing Gets Underway at FEC

Political committees and other filers can take advantage of the FEC's just-implemented voluntary electronic filing program when they report financial activity that has taken place since January 1. This means that those committees filing on a monthly basis will have the first opportunity to use the new system when they file the report due February 20.

Electronic filing—mandated by legislation passed by Congress in 1995 and implemented in an interim form on January 1, 1997—should make reporting disclosure information more efficient for both filers and the FEC.

The process also will make electronically-filed reports almost immediately available at the FEC's web site for review by the public and regulated community. The information will be posted a few hours after it arrives at the FEC's offices. Currently, it takes up to 48 hours before the disclosure information can be processed and put out for public review.

Exactly how electronic filing will work has been the subject of much study and planning by the FEC's data division. To smooth the transi-

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tion from paper to electronic filing, committees that plan to file electronically should call the FEC's data division before they begin. The division can provide technical information to help committees get started and can tell them what tools are available—for example, templates for database programs—to make their current software produce documents that conform to what the agency requires. Committees can reach the data division at 1-800-424-9530 or 202-219-3730.

Technical specifications, a validation program and other information are included in a downloadable "Electronic Filing Tool Kit" at the FEC's web site at http://www.fec.gov. Committees also can call the FEC's data division to request that technical programs be mailed to them on diskette. Currently, there are no programs or tools designed for Macintosh users, though the format can be created by most Macintosh computers.

In addition to using the FEC as a resource, filers who have purchased software to help them keep track of reporting information may want to telephone their software manufacturer. Many of these companies have been working with the FEC in integrating the agency's requirements into their software packages.

Here is an outline of how the electronic filing process will work:

- Committees that choose to file electronically will mail the FEC a diskette containing all of the information that should be included on written disclosure reports for that reporting period. The information must be formatted to FEC specifications. 11 CFR 104.18(b).
- Committee treasurers must include a signed copy of the first page of the report or include a separate file on the diskette containing the signed first page as an image file.
- Committees should run a validation program (the FEC provides this on its web site) before mailing the diskette to the FEC. The program makes sure that the information on the diskette is in the form that the FEC accepts. The program also computes a "checksum" that can be used by the FEC to verify that it received the filing completely and correctly. FEC staff also will run the validation program on any diskette they receive. A diskette that is not in the correct form will not be accepted. 11 CFR 104.18(c). Electronic reports are subject to the same deadlines as reports filed on paper. If incorrectly submitted electronic filing has to be redone, it will be considered late if it does not reach the FEC in the correct format by the deadline date.
- Each report also will be tagged with a unique identifier. If there is a discrepancy between the information sent by the filer and the information received by the FEC, the parties can use the unique identifier to identify the original disclosure of the information received by the Commission. The use of the unique identifier will help ensure the security of electronically filed reports.
- Committees have the option to download a program that will convert their computer-generated information into printed versions that look very much like paper copies of FEC forms. Committees may want to use this software to double-check the information on disk in a more familiar format.
- Once the FEC has received the reporting disk and verified that it is in the correct format, the system will automatically e-mail and fax a verification notice to committees.
- The reports then are loaded onto the FEC's computer system and onto its web site at a special section where electronically filed reports will be stored. Anyone with internet access will be able to review and download the disclosure information from the committees.
- At this first stage of the implementation period, the FEC will generate a printout of the information on the disk, and the paper copy of the information will be processed along with conventional paper filings. This action is to maintain consistency throughout the disclosure and review process.

In 1998, the Commission intends to implement the second phase of electronic filing. Filers will be able to file disclosure reports via modem in addition to mailing a diskette. They also will be able to receive a diskette from the FEC with rudimentary electronic filing software. And the FEC will develop a process that will allow electronically filed material to be integrated into the Commission's current disclosure and review system without the need for staff to create a printed copy. The ultimate goal is to create a paperless reporting process. ✦

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expenditures to federal candidates—as opposed to independent expenditures—the FEC should strictly follow the definition found in the Act and not use a major purpose test.

The upshot of the court's reversal is that the Commission must again review the complaint it received about AIPAC. In 1992, the FEC found it likely that the group made more than $1,000 in campaign contributions to federal candidates, but did not find probable cause to believe the group was a political committee (after using the major purpose test to evaluate AIPAC's activities) and closed the case.

Background

In 1989, James Akins and several other government officials filed an administrative complaint with the FEC against AIPAC. They alleged that AIPAC, an incorporated, tax-exempt organization with a multi-million dollar budget and an active lobbying effort on behalf of Israel, had made contributions to and expenditures on behalf of federal candidates greater than $1000 and, therefore, was in violation of the Act for failing to register as a political committee.

After the FEC investigated and dismissed the complaint, Akins filed a lawsuit in the U.S. District Court for the District of Columbia against the FEC for failing to proceed against AIPAC. Akins challengedthe Commission's interpretation of a political committee.

In district court, the FEC successfully argued that precedents in *Buckley* and *MCFL* held that an organization that receives contributions or that makes expenditures of more than $1,000 becomes a political committee only if its major purpose is the influencing of federal elections. In *Buckley*, for example, the U.S. Supreme Court said that a political committee "need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." The Supreme Court continued that line of reasoning in *MCFL*, saying "an entity subject to regulation as a 'political committee' under the Act is one that is either 'under the control of a candidate or the major purpose of which is the nomination or election of a candidate.'"

The district court ruled in favor of the FEC and Akins appealed. A three-judge panel of the appeals court initially affirmed the lower court ruling. However, the appeals court determined it would rehear the case with a full complement of judges present (en banc).

Appeals Court Decision to Reverse

The appeals court has now found that the FEC erred in its interpretation of the two Supreme Court decisions as they relate to the definition of political committee.

The court has a different interpretation, which focuses on the constitutional distinction between independent expenditures and contributions.[1] It found that both *Buckley* and *MCFL* invoked the major purpose test within the context of independent expenditures—not contributions, which is what was in question in the complaint against AIPAC.

In sum, the court found "There is no constitutional problem with applying §431(4)(A) to AIPAC or to other organizations making campaign *contributions* (or coordinated expenditures) exceeding the statutory limits." Thus, according to the court, the major purpose test is applicable for determining political committee status when evaluating an organization that has only made independent expenditures.

The court also rejected the Commission's arguments that the court lacked jurisdiction in this case because the appellants lacked standing.

U.S. Court of Appeals for the District of Columbia Circuit, 94-5088; U.S. District Court for the District of Columbia, 92-1864. ❖

[1] *Independent expenditures are funds used for communications that expressly advocate the election or defeat of a clearly identified candidate without cooperation or consultation with that candidate or his or her committee. Contributions include any payment, service or thing of value given to influence a federal election and include coordinated expenditures made in cooperation or consultation with a candidate.*

FEC v. Larry Williams

On December 26, 1996, the U.S. Court of Appeals for the Ninth Circuit reversed a district court ruling and dismissed this case.

The district court had ruled in the FEC's favor, finding that Larry Williams had made contributions in the names of 22 others and imposing an injunction and a $10,000 civil penalty against him. But the appeals court reversed that decision after a 2-1 majority of the judges said the FEC waited too long—approximately nine months after the five-year statute of limitations on filing a lawsuit had expired—before filing suit against Mr. Williams.

Background

In September 1988, the FEC received an administrative complaint from a former employee of Mr. Williams, alleging violations of the Federal Election Campaign Act (the Act). The allegations revolved around a fundraising program for Jack Kemp's run for the 1988 Republican nomination for President. Anyone who contributed $1,000 or more to Mr. Kemp's

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campaign was eligible to buy a Super Bowl ticket for $100. Mr. Williams purchased 40 Super Bowl tickets for $4,000 and made them available to the campaign's fundraising program. He solicited friends and employees to make $1,000 donations to the Kemp campaign, and advanced or reimbursed $1,000 to 22 contributors. He then resold the Super Bowl tickets and kept the receipts.

The FEC investigated and found probable cause to believe that Mr. Williams had violated 2 U.S.C. §441f.[1] The agency filed suit on October 19, 1993, after failing to conclude a conciliation agreement with Mr. Williams.

On January 31, 1995, the U.S. District Court for the Central District of California handed down its decision. Shortly afterward, Mr. Williams appealed.

Appeals Court Decision

In a split decision, the appeals court reversed the district court's order. The appeals court held that the general five-year statute of limitations at 28 U.S.C. §2462 applied to the FEC's action seeking to assess civil penalties against Mr. Williams.[2] The court ruled that the time limit started running at the time the alleged offenses occurred—not at the time they were reported. The court also found that §2462 barred the FEC from seeking injunctive relief because the "claim for injunctive relief is connected to the claim for legal relief."

The allegations involved acts that took place in 1987 and early 1988. The court found that the statute of limitations had run out in 1992 and early 1993. The FEC did not file a lawsuit against Mr. Williams until October 1993, though the Commission had begun to respond to the administrative complaint in late 1988 and had attempted to reach a conciliation agreement in 1993.

The FEC argued that the statute of limitations should be temporarily tolled (i.e., the clock stops ticking) any time before the agency receives a complaint and during mandated periods of review and conciliation attempts that generally must occur before a lawsuit can be filed. However, the court was not moved by the FEC's arguments. It said that, although the doctrine of "equitable tolling"[3] applies in principle to §2462, it is not applicable to the Williams case. The Commission had ample opportunity through its normal disclosure and investigatory processes, the court stated, to learn of Mr. Williams's alleged violations of the Act.

U.S. Court of Appeals for the Ninth Circuit, 95-55320; U.S. District Court for the Central District of California, 93-6321-ER (BX). ✦

[1] *The FEC also found reason to believe that Mr. Williams violated 2 U.S.C. §441a(a)(1)(A) in making $1,694 in contributions in his own name, exceeding the $1,000 cap on individual contributions per election.*

[2] *The appeals court cited several cases to back up its claim that the Act is indeed subject to 28 U.S.C. §2462:* 3M Co. v. Browner, *17 F.3d 1453 (D.C. Cir. 1994);* FEC v. National Republican Senatorial Comm., *877 F.Supp. 15 (D.D.C. 1995) and* FEC v. National Right to Work Comm. *Inc. 916 F.Supp. 10 (D.D.C. 1996).*

[3] *Equitable tolling provides that "where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered."* Holmberg v. Armbrecht, *327 U.S. 392, 397 (1946).*

FEC v. Elkin McCallum

On December 11, 1996, the U.S. District Court in Massachusetts issued a judgment and consent order to which both parties agreed. Under the order, Elkin McCallum must pay a $50,000 civil penalty to the FEC for making excessive contributions to the Tsongas for President Committee.

The FEC filed the lawsuit against Mr. McCallum alleging that he had made $250,000 in loans to Paul Tsongas's campaign in 1991 and 1992. These loans constituted excessive contributions. Specifically, the FEC alleged that Mr. McCallum had made the following contributions:

- He purchased a ticket for $1,000 to a Tsongas Committee fundraiser on April 8, 1991;
- He contributed $100,000 to the Tsongas Committee on August 13, 1991, and $50,000 on October 21, 1991; and
- He wrote a $100,000 check on February 10, 1992, payable to Mr. Tsongas's chief fundraiser, Nicholas Rizzo, intending it to be a loan to the Tsongas Committee.

The Federal Election Campaign Act (the Act) states that an individual has a $1,000 contribution limit for a candidate or that candidate's authorized committee per election and that the definition of contribution includes loans. 2 U.S.C. §§431(8)(A)(i) and 441a(a)(1)(A). Additionally, FEC regulations make it unlawful for a person to make a loan that exceeds the contribution limits whether or not it is repaid. 11 CFR 100.7(a)(1)(i)(A).

In a settlement agreement, Mr. McCallum did not contest the

allegations. In addition to the civil penalty, the court permanently enjoined Mr. McCallum from making excessive contributions.

U.S. District Court for the District of Massachusetts, 96-11418 WGY. ❖

RNC et al. v. FEC

The U.S. Supreme Court denied a request from the Republican National Committee, National Republican Senatorial Committee and National Republican Congressional Committee to hear this case. The U.S. Court of Appeals for the District of Columbia had upheld most of the FEC's "best efforts" regulations found at 11 CFR 104.7(b). The regulations instruct committees how to make their best efforts in obtaining the name, address, occupation and employer of contributors who give more than $200 in a year. See page 10 of the April 1996 issue of the *Record*. ❖

Advisory Opinions

AO 1996-48
Use of Press Exemption for Cable Broadcast of Candidate Commercials and Biographies

The C-SPAN and C-SPAN 2 networks are bona fide press entities and may broadcast candidate biographies and campaign commercials of congressional and Presidential contenders as part of their regular programming without those actions being considered campaign contributions or expenditures.

National Cable Satellite Corporation (NCSC) is a nonprofit corporation created by the cable television industry. It produces public affairs programming throughout the United States 24 hours a day on its two cable channels—C-SPAN and C-SPAN 2. Inherent in its mission is providing the public with balanced and unfiltered news about developments in public policy and the role officials from local, state and federal governments play in those endeavors.

In that regard, the cable company planned to produce a series of television programs—among them, "Road to the Capital" and "Road to the White House"—to provide in-depth coverage of elections involving federal candidates. NCSC would air video biographies and campaign commercials created by the campaigns at no charge to those campaigns. Neither candidates nor their campaigns would have any control over the timing of the broadcasts or the context in which the campaign commercials and biographies aired.

In order to avoid the appearance that NCSC had endorsed any of the candidates, each presentation would be introduced by a narrator who would explain that the commercials and biographies were produced by the campaigns. In addition, the size of the screen image would be minimized to allow space for a written message identifying the campaign commercials as such.

The Act and FEC regulations prohibit corporations, including nonprofit corporations, from making contributions or expenditures in connection with a federal election. However, the Act and regulations exempt expenditures for "any news story, commentary, or editorial distributed through the facilities of any broadcasting station … unless such facilities are owned or controlled by any political party, political committee, or candidate." 2 U.S.C. §431(9)(B)(i) and 11 CFR 100.7(b)(2) and 100.8(b)(2). Recently revised FEC regulations make clear that this "press exemption" applies to both cable and traditional television news programmers. 61 Fed. Reg. 18049 (April 24, 1996).

The programs on the election, the candidates and the campaign issues, sponsored by C-SPAN and C-SPAN 2, would qualify for the press exemption because the cable stations are considered press entities; they appear not to be controlled by a party, political committee or candidate; and they would be acting in their capacity as "press" entities in distributing news stories, commentaries or editorials, as evidenced by the facts that:

- NCSC would retain control over the timing of the broadcasts and the context in which they would be used;
- NCSC would take steps to ensure that viewers did not conclude that the programs represented an endorsement of the candidates depicted (see above); and
- The campaign commercials and biographies would be aired because they have significant news value and assist viewers in understanding the complex issues discussed by the candidates.

Date Issued: December 6, 1996; Length: 4 pages. ❖

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Flashfax documents may be ordered 24 hours a day, 7 days a week, by calling **202/501-3413** on a touch tone phone. You will be asked for the numbers of the documents you want, your fax number and your telephone number. The documents will be faxed shortly thereafter.

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Change of Address

Political Committees

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