

# Record

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## Publications

### Official Results for 1996 Federal Elections Published

The FEC has released *Federal Elections 96*, a 167-page publication containing the official primary, runoff and general election results for the 1996 Presidential and congressional elections. This is the eighth edition of this biennial series, and it is designed to provide an historical record of federal election results.

For each state, the publication lists the names of candidates on the ballot, write-in candidates, party affiliations and the number and percentage of votes each candidate received as provided by state election officials.

The publication is available for review at many state election offices. This edition is also available at the FEC's web site—<http://www.fec.gov>. For more information or to obtain a copy of *Federal Elections 96*, call the Public Records office at 1/800-424-9530 (press 3) or at 202/219-4140. ♦

## Court Cases

### Clifton v. FEC

On June 6, the U.S. Court of Appeals for the First Circuit declared invalid two parts of the FEC's regulations that govern publication of voter guides and voting records by corporations and labor organizations. The court declared the voting record regulation at 11 CFR 114.4(c)(4) invalid only insofar as the FEC may purport to prohibit mere inquiries to candidates and the voter guide regulation at 11 CFR 114.4(c)(5) invalid only insofar as it limits contact with candidates to written inquiries and replies and imposes an equal space and prominence restriction.

The plaintiffs petitioned the court for a rehearing in this case, but that petition was denied on June 27. The FEC filed a petition for rehearing and suggestion for rehearing en banc on July 21.

### Background

Robin Clifton and co-plaintiff Maine Right to Life Committee, Inc. (MRLC), initiated this lawsuit in March 1996, asking the court to find that the FEC's regulations governing the use of corporate treasury funds to prepare and distribute voter guides and voting records to the

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## Court Cases

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public were unconstitutional. 11 CFR 114.4(c)(4) and (5). MRLC is a nonprofit membership corporation that advocates pro-life stances, and Mr. Clifton is a Maine voter who receives the group's publications.

FEC regulations prohibit corporations from distributing voting records to the public if the materials expressly advocate the election or defeat of a clearly identified federal candidate. Even without such express advocacy, any decisions on content and distribution of the voting records may not be coordinated with a candidate or political party. Furthermore, in the case of voter guides that are prepared after receiving written responses from the candidate to questions posed by the corporation or labor organization, the regulations require that:

- Contact with the candidate be limited to written questions and written answers;

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- Each candidate be given the same prominence and space in voting guides; and
- The publications not contain an "electioneering message."

The district court invalidated the regulations, stating that they regulate issue advocacy and, therefore, go beyond the Commission's authority. [See page 1 of the July 1996 Record.](#)

The FEC contended that its regulations (11 CFR 114.4(c)(4) and (5)) enforced 2 U.S.C. §441b, which prohibits corporate contributions in connection with any federal election. According to the court, the FEC maintained that a "voting record or voter guide...that fails to comply with its regulations is either a contribution or can be banned in the interests of preventing prohibited contributions."

### Appeals Court Rejects Commission Argument

The appeals court found that to avoid First Amendment concerns, it would construe 2 U.S.C. §441b narrowly. Under this construction, both the Commission's restriction on oral contact between MRLC and candidates and its insistence that voter guides provide equal space to candidates were unlawful.

The appeals court found that the FEC's requirement of equal space was a "content-based" restriction because it would affect the content of the MRLC's voting guides. The court said that "[T]here is a strong First Amendment presumption against content-affecting government regulation of private citizen speech, even where the government does not dictate the viewpoint." The court cited a case where the Supreme Court struck down Florida's "right of reply" statute, which guaranteed political candidates equal space to reply to criticism printed in the *Miami Herald*.<sup>1</sup>

<sup>1</sup> *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974).

With regard to the Commission's requirement that contact between corporations and candidates be limited to written communications when such corporations are preparing voter guides, the court said that the regulation treads "heavily upon the right of citizens, individual or corporate, to confer and discuss public matters with their legislative representatives or candidates for such office." The court said that such a ban on communications served as a "handicap" for discourse between legislators—and would-be legislators—and those they wish to represent.<sup>2</sup>

With respect to both regulations, the court rejected the FEC's argument that such restrictions were justified to prevent illegal corporate contributions to candidates. While the court acknowledged the Commission's legitimate concern with uncovering prohibited contributions, it said that the agency should be able to investigate such impermissible actions through its enforcement proceedings.

The court did not take up MRLC's challenge to the regulation concerning "electioneering message" and instead referred the matter back to the district court. MRLC's challenge concerned the FEC's regulations at 11 CFR 114.4(c)(5)(ii)(D) and (E), which

<sup>2</sup> *In a dissenting opinion, Senior Circuit Judge Hugh H. Bownes wrote that the written-contact-only regulation does not infringe on the First Amendment. Citing Buckley v. Valeo, the judge said that the Supreme Court had acknowledged that some governmental interests outweigh the possibility of constitutional infringement. He wrote: "At this stage of American history, it should be clear to every observer that the disproportionate influence of big money is thwarting our freedom to choose those who govern us. This sad truth becomes more apparent with every election. If preventing this is not a compelling governmental interest, I do not know what is."*

state that certain kinds of voter guides—those that are prepared after receiving written responses from candidates—must not include an “electioneering message” or “score or rate the candidates’ responses in such a way as to convey an electioneering message.” MRLC had argued that these regulations were unconstitutionally vague. The court concluded that it would not decide this matter because, at the district court level, there had been inadequate briefing as to the content, purpose and severability of these regulations.

U.S. Court of Appeals for the First Circuit, 96-1812; U.S. District Court for the District of Maine, 96-66-P-H. ♦

### **FEC v. DSCC (95-2881)**

On July 7, the U.S. District Court for the Northern District of Georgia, Atlanta Division, ordered the Democratic Senatorial Campaign Committee (DSCC) to pay a \$175 penalty for violating the Federal Election Campaign Act (the Act) during the 1992 senatorial race in Georgia. The sum amounts to 1 percent of the DSCC’s violation of \$17,500.

The court ruled in January that the DSCC had violated 2 U.S.C. §441a(h) when it gave the \$17,500 to a senatorial candidate’s runoff election after having already contributed the same amount to that candidate during the primary and general elections. [See page 2 of the March 1997 Record.](#)

In determining an appropriate penalty, the court considered these four factors:

- Good or bad faith actions by the defendant,
- Injury to the public resulting from the defendant’s conduct,
- Ability of the defendant to pay the penalty and
- Vindication of the FEC’s authority.

The court found that the DSCC did act in good faith because it had believed that it was acting lawfully when it made the second \$17,500 contribution. The court also determined that the second contribution did no harm to the public. While the FEC had argued that “any violation of the [Act’s] limits undermines a public perception of integrity of the election process,” the court disagreed with such a blanket assertion. It also found that the FEC did not require vindication in this case and noted that the DSCC’s ability to pay did not justify assessing it with a large penalty, which is what the FEC had requested.

In its deliberations, the court also considered the penalty negotiated with the National Republican Senatorial Committee in a conciliation agreement for a violation of a different provision of the Act—2 U.S.C. §441d—in connection with the same election. That penalty amounted to 1 percent of the approximately \$500,000 violation, or \$5,000.

U.S. District Court for the Northern District of Georgia, Atlanta Division, 95-2881. ♦

### **DSCC v. FEC (96-2184)**

On May 30, the U.S. District Court for the District of Columbia granted the Democratic Senatorial Campaign Committee’s (DSCC’s) motion for summary judgment in this case and ordered the FEC to take action, within 30 days, on the committee’s administrative complaint filed in 1993 against the National Republican Senatorial Committee (NRSC). The court also stated that if the FEC failed to take action within 30 days, then the DSCC could initiate its own lawsuit against the NRSC pursuant to 2 U.S.C. §437g(a)(8)(C).

### **Background**

The DSCC initially filed a lawsuit against the FEC after the

agency failed to act within 120 days on its administrative complaint alleging that the NRSC had made illegal “soft money” expenditures to influence a Senate election in Georgia. 2 U.S.C. §437g(a)(8)(A). The DSCC said that the NRSC had funneled the money through various nonprofit organizations that were known to be closely aligned with the Republican Party.

When the FEC failed to take action, the DSCC filed suit in court (DSCC I). In April 1996, the district court of the District of Columbia granted summary judgment in favor of the DSCC, holding that the FEC’s failure to act was contrary to law ([see page 5 of the July 1996 Record](#)). The court reasoned that the FEC had not taken any meaningful action until almost 600 days after the complaint was filed. While admonishing the agency to take action expeditiously, the court did not set up a time table for the FEC to complete its investigation, following the tradition of deference that courts generally give to law enforcement agencies in exercising their prosecutorial prerogatives. The court warned the FEC, however, that, should it fail to act in a reasonable time, “the need for additional judicial intervention may well be compelling.” In a second suit, filed by the DSCC in November 1996 (DSCC II), the court ordered the FEC to file monthly status reports on its progress in the investigation ([see page 2 of the January 1997 Record](#)).

### **Arguments from Both Sides**

After waiting an additional four months and nearing the five-year statute of limitations for this case, the DSCC filed this motion for summary judgment, citing the FEC’s “near glacial pace” in the investigation and arguing again that the agency’s actions were contrary to law.

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