FEC Record December 2012

Contents

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

Commissioners:
Caroline C. Hunter, Chair
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Donald F. McGahn II
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Steven T. Walther

Staff Director:
Alec Palmer

General Counsel:
Anthony Herman

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Toll free 800-424-9530
Local 202-694-1100
E-mail info@fec.gov

Greg Scott, Director
Alex Knott, Sr. Writer/Editor
Dorothy Yeager, Production Manager

Litigation

Herron for Congress v. FEC

On November 8, 2012, the United States District Court for the District of Columbia rejected a challenge to the Commission's dismissal of an administrative complaint Herron for Congress filed in connection with its 2010 campaign. The court ruled that it lacks jurisdiction to decide the merits of the case because the claim is moot and because the plaintiff lacks standing.

Background

Herron for Congress was the principal campaign committee of Roy Herron, the Democratic nominee in the 2010 race for the 8th District of Tennessee. On September 29, 2010, the committee filed a complaint with the FEC, alleging that the opposing campaign, Steven Fincher for Congress, had obtained a bank loan for $250,000, but had reported it as a loan from Rep. Fincher to his committee. The complaint further alleged that the loan had been obtained outside the ordinary course of business as it had been insufficiently collateralized.

After investigation, Commission staff found that the loan was improperly reported, but the Commission did not find reason to believe that the loan was insufficiently collateralized, nor did it find reason to believe that the Fincher Committee knowingly and willfully violated the Federal Election Campaign Act. The Commission voted to close the file. Herron for Congress challenged that decision by filing suit in the US District Court for the District of Columbia, alleging that the Commission's dismissal of its administrative complaint was contrary to law.

Ruling

The court found that Herron for Congress's claim was moot, as the election during which it claimed to be wronged was in the past, its results irreversible, and that it was thus "impossible for this or any court to grant meaningful relief with respect to that election." The court stated that it was up to Herron for Congress to demonstrate that its claim was not moot by showing

that the controversy is "capable of repetition, yet evading review." Because Mr. Herron is only "considering" a future run for office, and because his campaign committee could not therefore demonstrate that it will be subjected to the same allegedly unlawful action again, the court concluded that Herron for Congress's case was moot.

The court further found that Herron for Congress lacks standing, as its claim is based on nothing more than, "the generalized interest in having the FEC act in a lawful manner." This did not give rise to standing. Under any approach to Herron for Congress's case, the court concluded that it merely sought an opinion that "might prove helpful to a campaign [Mr. Herron] has not yet decided to launch," and that the court thus lacks jurisdiction. The court denied Herron for Congress's motion for declaratory and injunction relief and granted the FEC's cross motion for summary judgment.

(Posted 11/15/12; By: Christopher Berg)

Resources:

- District Court Order
- District Court Memorandum Opinion
- Herron for Congress Litigation Page
- Matter Under Review 6386

Wagner et al., v. FEC

On November 2, 2012, the U.S. District Court for the District of Columbia upheld the Federal Election Campaign Act's (the Act's) long-standing prohibition on federal contractors making contributions in connection with federal elections and granted the Commission's motion for summary judgment. The plaintiffs had challenged the prohibition as violating both the First Amendment and the equal-protection guarantee in the Fifth Amendment. The court rejected both arguments in its decision.

Background

The Act prohibits federal government contractors from making contributions, either directly or indirectly, to any political party, committee or candidate for public office, or to any person for any political purpose or use. 2 U.S.C. §441c. Plaintiffs Wendy E. Wagner, Lawrence M.E. Brown and Jan W. Miller are individuals each with federal contracts for personal services. So long as they remain under contract with the federal government, Section 441c prohibits them from making contributions to candidates, parties or other political committees.

The plaintiffs filed a motion for a preliminary injunction in January 2012, which the court denied on April 16, 2012. Following that decision, both the plaintiffs and the Commission filed motions for summary judgment.

Court Decision

First Amendment. The plaintiffs alleged that Section 441c's ban on contributions by federal contractors is not justified by a sufficiently important governmental interest, and that there is a lack of evidence that contractor contributions lead to corruption.

The court rejected both of those arguments, concluding that the ban is closely drawn to the government's interest in preventing actual and apparent corruption, and noting that Congress enacted the ban in 1940 following a scandal that involved federal contractors and *quid pro quo* corruption. The court also cited scandals in states that permit contributions from contractors, concluding that "their experiences substantiate the corruption worries that attend contributions by government contractors."

The plaintiffs also argued that the ban is both over-inclusive and under-inclusive because it covers contributions made by all federal contractors, but not others who received federal grants, loans or guarantees, or who seek government political positions such as ambassadorships.

The court rejected those arguments, concluding that the decision to prohibit contributions from all federal contractors, but to exclude others from the ban is the prerogative of Congress.

Equal Protection. The plaintiffs challenged Section 441c as violating the equal-protection guarantee in the Fifth Amendment because they claimed that they were similarly situated to several groups that can make such contributions. Plaintiffs noted that while individual contractors cannot make contributions, corporate contractors are free to establish a federal political action committee (also known as a separate segregated fund, or SSF) for the purpose of making contributions. The plaintiffs also noted that employees, officers and shareholders of corporate contractors could make contributions using their personal funds. Finally, the plaintiffs argued that they are held to a different standard than that of federal employees, many of whom may make contributions to candidates and parties.

The court held that individual contractors are not similarly situated under the law to corporate contractors' PACs or their officials, who are legally distinct from the corporation. The court also rejected the comparison to federal employees, noting that it is not clear that contractors are more restricted than federal employees, and that in any event, "[t]he dissimilar roles of contractors and employees…justify the distinct regulatory schemes the Government has fashioned."

The court denied the plaintiffs' motion for summary judgment and granted the Commission's motion for summary judgment. The plaintiffs have appealed the decision to the United States Court of Appeals for the District of Columbia Circuit.

(Posted: 11/14/12; By: Myles Martin)

Resources:

- Wagner v. FEC Litigation Page

Stop This Insanity Inc. et al. v. FEC

On November 5, 2012, the U.S. District Court for the District of Columbia denied a request for a preliminary injunction and dismissed a suit filed by Stop This Insanity, Inc. (STI), its separate segregated fund (SSF) and potential contributors. The suit challenged the Commission's application of the Federal Election Campaign Act (the Act) in its response to STI's advisory opinion request (AOR).

Background

In its AOR, STI asked if it could establish a non-contribution account associated with its existing SSF — Stop This Insanity, Inc. Employee Leadership Fund (the Leadership Fund). The Leadership Fund would solicit unlimited contributions for its non-contribution account from members of its restricted class, as well as other individuals, political committees, corporations and labor organizations. Those contributions would be used to fund independent expenditures. The Commission could not reach a majority response. See AOR 2012-01.

STI, the Leadership Fund and a group of potential contributors challenged the Commission's application of the limits on contributions to political committees, the individual biennial contribution limit, the ban on corporate contributions and the restrictions on SSF solicitations as an unconstitutional limit on their First Amendment rights of freedom of speech and association. See 2 U.S.C. §§441a(a)(1)(C), 441a(a)(3), 441b(a) and 441b(b)(4)(A)(i). The plaintiffs sought preliminary and permanent injunctive relief and a declaratory judgment.

District Court's Decision

The court denied the plaintiffs' request for a preliminary injunction and granted the Commission's motion to dismiss the case.

Throughout its opinion, the court sought to distinguish STI's claims from those in earlier cases, such as *EMILY's List* and *SpeechNow*, which contributed to the development of the so-called hybrid nonconnected PACs the Leadership Fund sought to emulate.

Among other things, the court noted that the Leadership Fund is an SSF, rather than a nonconnected PAC. Unlike a nonconnected PAC, an SSF may receive unlimited and undisclosed administrative support from its sponsoring corporation or labor organization. In exchange, the SSF must limit its solicitations to a restricted class of individuals associated with the connected organization.

The court rejected STI's challenge to that restriction, concluding that "SSFs are creatures of statute—they were crafted by Congress to enjoy certain benefits that other, non-connected PACs cannot enjoy, and it is therefore eminently reasonable and important for connected PACs to abide by Congress's countervailing restriction on the universe of people to whom SSFs' solicitations may be directed." The court further explained that, "Granting the plaintiffs the relief they request would force the FEC to ignore the congressionally mandated limits on the fundraising activities of SSFs without a sound constitutional basis for doing so."

The court also questioned whether a hybrid PAC could effectively avoid the appearance of corruption that serves as a rationale for contribution limits: "When a single entity is allowed to make both limited direct contributions and unlimited independent expenditures, keeping the bank accounts for those two purposes separate is simply insufficient to overcome the appearance that the entity is in cahoots with the candidates and parties that it coordinates with and supports." Accordingly, the court concluded that, "Insofar as the Leadership Fund chooses to remain as a single entity that engages in both direct candidate contributions and express advocacy communications, … the Leadership Fund may not solicit contributions beyond the limits on such solicitations contained in 2 U.S.C. §441b(b)(4) and … also may not accept any contributions in excess of the limits contained in 2 U.S.C. §§441a(a)(1)(C) and 441a(a)(3)."

Finally, the court rejected the plaintiffs' argument that the statute's restrictions would cause it irreparable harm, finding it "highly dubious in light of the numerous alternative ways that the plaintiffs could engage in unlimited political speech."

(Posted 11/13/12; By: Alex Knott)

Resources:

- *Stop This Insanity* Memorandum Opinion [PDF]
- *Stop This Insanity* litigation page
- AOR 2012-01

Johnson v. FEC

Gary E. Johnson and James P. Gray, Presidential and Vice Presidential nominees of the Libertarian Party, respectively, applied to the FEC for pre-election public funding for the 2012 general election as "minor party" candidates. They asserted that, as nominees of a minor party under 26 U.S.C. §9004(a)(2)(A), they were entitled to public funding. On September 18, 2012, the Commission rejected the application because the Libertarian Party had received less than five percent of the popular vote in the 2008 Presidential election and therefore did not meet the definition of "minor party" in 26 U.S.C. §9002(7). The Commission also noted that Johnson and Gray had not been candidates in 2008 and therefore did not qualify for public funding under a different provision of the law.

On September 26, 2012, Johnson, Gray, and the Gary Johnson 2012, Inc. campaign committee (the "Plaintiffs") filed a complaint in the U.S. District Court for the Central District of California arguing that they were entitled to pre-general election funding. The district court dismissed the case for lack of jurisdiction, holding that challenges to Commission determinations regarding such public funds may be brought only in the U.S. Court of Appeals for the District of Columbia Circuit under 26 U.S.C. §9011(a).

On October 17, 2012, the Plaintiffs filed a Petition for Review and an Emergency Motion for Mandatory Injunction in the U.S. Court of Appeals for the District of Columbia Circuit asking it to direct the FEC to make an immediate disbursement of the pre-general election public funds. They argued that the FEC wrongfully denied the pre-election funding because of a misapplication of the definition of "minor party." They argued that,

although the term "minor party" is used in 26 U.S.C. §9004(a)(2)(A), it was an inadvertent use of the term by Congress, and was not meant to be subject to the technical definition of "minor party" in 26 U.S.C. §9002(7). Instead, they argued, the term should be interpreted according to the plain meaning of the words.

The appellate court issued a *per curiam* Order on October 19, 2012, denying the Plaintiffs' emergency motion, finding that they did not meet the "stringent requirements for the injunctive relief sought… or [demonstrate] a 'clear and indisputable' right to mandamus relief." On October 31, 2012, the Plaintiffs voluntarily dismissed the matter without prejudice, before the court could issue a decision on the Plaintiffs' Petition for Review.

U.S. Court of Appeals for the District of Columbia Circuit No. 12-1418

(Posted 11/2/12; By: Zainab Smith)

Resources:

- *Johnson v. FEC* litigation page
- Brochure: Public Funding of Presidential Elections

Virginia James v. FEC

On October 31, 2012, the U.S. District Court for the District of Columbia dismissed a lawsuit brought against the Commission by Virginia James. The plaintiff challenged the Federal Election Campaign Act's (the Act) biennial limit on an individual's contributions to federal candidates.

Background

In addition to an individual's per-committee contribution limit, the Act limits the aggregate amount that an individual may contribute to federal candidates, parties and PACs in a two-year period. This biennial limit is adjusted for inflation in odd-numbered years. In 2011-12, an individual can contribute no more than $46,200 to candidates and no more than $70,800 to party committees and PACs. 2 U.S.C. §§441a(a)(3)(A) and (B).

The *James* suit challenged the constitutionality of 2 U.S.C. §441a(a)(3)(A), which limits individual contributions to federal candidates to $46,200 over the course of a two-year election cycle. Ms. James, a New Jersey resident, asserted she would like to make contributions to federal candidates in increments of $2,500 or less that would collectively exceed the biennial limit of $46,200.

Court Decision

Ms. James filed suit against the Commission on August 31. At the time, the three-judge court was considering *McCutcheon v. FEC* (D.D.C. Civ. No. 12-1034). The plaintiffs in that case had challenged several of the Act's aggregate contribution limits, including the same $46,200 limit that Ms. James challenged. On September 19, the court stayed James' suit until the *McCutcheon* case was resolved. On September 28, the court rejected all of the *McCutcheon* plaintiffs' claims, dismissed that lawsuit and turned back to the *James* case.

In its opinion in *James*, the district court found no basis to distinguish between the two cases. The court's opinion in *James* quotes from the *McCutcheon* opinion and reiterates many of the same findings. The opinion rejected the claim that the biennial limit on contributions to candidates is unconstitutionally low and overbroad. The court also disagreed with the argument that contribution limits should be subject to strict scrutiny, stating that contribution limits primarily implicate the First Amendment right of association, not expression, and that individuals are able to vindicate their associational interests through other means.

The court concluded that the outcome of the *James* suit was dictated by the court's earlier decision in *McCutcheon* and dismissed the suit.

U.S. District Court for the District of Columbia: Case 1:12-cv-01451

(Posted 11/2/12; By: Isaac J. Baker)

Resources:

- *James v. FEC* Ongoing Litigation Page
- *McCutcheon, et al. v. FEC* Ongoing Litigation Page
- Brochure: The Biennial Contribution Limit

For more articles on Litigation, please consult the annual indexes available in the Record Archive.

Compliance

FEC Cites Committees for Failure to File October Quarterly and 12-Day Pre-General Financial Reports

The Federal Election Commission cited three campaign committees on November 2, 2012, for failing to file the October Quarterly Election Report and 19 committees for failing to file the 12-Day Pre-General Election Report required by the Federal Election Campaign Act of 1971, as amended, (the Act).

As of November 1, 2012, the required October Quarterly disclosure report had not been received from:

- Committee to Elect Wendy Rosen for Congress (MD/01)
- Brosch for Congress (NC/12)
- Charles W. Bradley (TX/33)

The report was due on October 15, 2012, and should have included financial activity for the period July 1, 2012, through September 30, 2012.

The Commission notified quarterly filing committees of their potential filing requirements on September 21, 2012. Those committees that did not file on the due date were sent notification on October 22, 2012 that their reports had not been received and that their names would be published if they did not respond within four business days.

As of November 1, 2012, the required Pre-General disclosure report had not been received from:

- Bill Gaylor for US Senate (FL)
- Borgia for Florida (FL)
- Jose Peixoto for US Congress (FL/26)
- Concepcion for US Congress 2012 (IL/04)
- Rex Bell for Congress (IN/06)
- Robert Tillman for Congress (KS/04)
- Committee to Elect Steve Woods US Senate (ME)
- Committee to Elect Wendy Rosen for Congress (MD/01)
- Committee to Elect Dan Fishman (MA/06)
- Friends of Cobby M. Williams (MS/02)
- Erik Anderson Committee (NC/03)
- Brosch for Congress (NC/12)
- Mansfield for Congress (PA/02)
- Porter for Congress (PA/03)
- John Murphy for Congress (PA/16)
- Linda for Congress 2012 (TX/05)

- Charles W. Bradley (TX/33)
- Haugenvet.com (WA/03)
- MacGovern for US Senate (VT)

The report was due on October 25, 2012, and should have included financial activity for the period October 1, 2012, through October 17, 2012. If sent by certified or registered mail, the report should have been postmarked by October 22, 2012.

The Commission notified committees of their potential pre-general filing requirements on October 1, 2012. Those committees that did not file on the due date were sent notification on October 26, 2012 that their reports had not been received and that their names would be published if they did not respond within four business days.

Some individuals and their committees have no obligation to file reports under federal campaign finance law, even though their names may appear on state ballots. If an individual raises or spends $5,000 or less, he or she is not considered a "candidate" subject to reporting under the Act.

Other political committees that support Senate and House candidates in elections, but are not authorized units of a candidate's campaign, are also required to file quarterly reports, unless they report monthly. Those committee names are not published by the FEC.

Further Commission action against non-filers and late filers is decided on a case-by-case basis. Federal law gives the FEC broad authority to initiate enforcement actions, and the FEC has implemented an Administrative Fine program with provisions for assessing monetary penalties.

(Posted 11/5/2012; By: Dorothy Yeager)

Resources:

- FEC Non-Filer Press Release
- FEC Reporting Dates
- Late Filing and Other Enforcement Penalties (Reports Analysis Division)

For more articles on Compliance, please consult the annual indexes available in the Record Archive.

Public Funding

Commission Certifies Federal Matching Funds for Gary Johnson

The Commission has certified Gary Johnson's presidential campaign eligible for an additional $4,484.00 in federal matching funds for the 2012 primary election. The certification is based on the agency's review of the campaign's most recent matching fund submission. The United States Treasury Department transferred the certified amount on November 15. To date, the Commission has certified the Libertarian nominee eligible for a total of $308,235.20 in matching funds.

Johnson is one of three candidates to be declared eligible for federal matching funds in 2012. The Commission has also certified $351,961.10 in federal matching funds to Charles E. "Buddy" Roemer III and $333,331.22 to Jill Stein for the primary.

To become eligible, candidates must raise a threshold amount of $100,000 by collecting $5,000 in 20 different states in amounts no greater than $250 from any individual. Other requirements to be declared eligible include agreeing to an overall spending limit, abiding by spending limits in each state, using public funds only for legitimate campaign-related expenses, keeping financial records and permitting an extensive campaign audit.

The presidential public funding program is financed through the $3 check-off that appears on individual income tax returns. The program has three elements: grants to parties to help fund their nominating conventions, grants available to nominees to pay for the general election campaign, and matching payments to participating candidates during the primary campaign.

(Posted 11/16/12; By: Dorothy Yeager)

Resources:

- FEC Press Release
- Press Office Backgrounder on Presidential Election Campaign Fund
- Brochure: Public Funding of Presidential Elections
- Brochure: The $3 Tax Checkoff

Commission Certifies Federal Matching Funds for Jill Stein

The Commission has certified Jill Stein's presidential campaign eligible for an additional $72,942.09 in federal matching funds for the 2012 primary election. The certification is based on the agency's review of the campaign's most recent matching fund submission. The United States Treasury Department transferred the certified amount on November 1. To date, the Commission has certified the Green Party nominee eligible for a total of $333,331.22 in matching funds.

Stein is the third candidate to be declared eligible for federal matching funds in 2012. The Commission has certified $351,961.10 in federal matching funds to Charles E. "Buddy" Roemer III and $303,751.20 to Gary Earl Johnson for the primary.
To become eligible, candidates must raise a threshold amount of $100,000 by collecting $5,000 in 20 different states in amounts no greater than $250 from any individual. Other requirements to be declared eligible include agreeing to an overall spending limit, abiding by spending limits in each state, using public funds only for legitimate campaign-related expenses, keeping financial records and permitting an extensive campaign audit.

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(Posted 11/5/12; By Dorothy Yeager)

Resources:

- FEC Press Release
- Press Office Backgrounder on Presidential Election Campaign Fund
- Brochure: Public Funding of Presidential Elections
- Brochure: The $3 Tax Checkoff

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