UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-2600

FEDERAL ELECTION COMMISSION,

Plaintiff-Appellant,

v.

CHRISTIAN ACTION NETWORK and
MARTIN MAWYER,

Defendants-Appellees.

DEFENDANTS-APPELLEES' APPLICATION FOR FEES

Defendants-Appellees Martin J Mawyer and Christian Action Network hereby apply to the court[1] for an award of fees and other expenses pursuant to the Equal Access to Justice Act, 28 U.S.C.A. § 2412. Defendants-Appellees state:

1. Defendants-Appellees were the prevailing parties in this action.

2. Plaintiff Federal Election Commission was an agency of the United States within the meaning of 28 U.S.C.A. §2412;

3. Each Defendant-Appellee is a party within the meaning of 28 U.S.C.A. § 2412 (d)(1)(C).

[1] Because of confusion among the circuits on the proper court to hear an application filed after appeal, defendants' counsel have simultaneously filed this application in the Court of Appeals and the District Court. Counsel have also filed in the Court of Appeals a motion asking the Court of Appeals to determine where this application should be heard. Compare *Garcia v. Schweiker*, 829 F.2d 396 (3rd Cir. 1987)(district court should hear applications for EAJA fees including fees for appellate work) with *McCarthy v. Bowen*, 824 F.2d 182 (2d Cir. 1987)("the application should always be filed with the court of appeals....").

4. The position of the Plaintiff-Appellant Federal Election Commission, a United States agency, was in bad faith and was not substantially justified.

This application is supported by affidavits of counsel containing itemized statements of the attorneys' fees incurred and an affidavit of Defendant-Appellee Martin J Mawyer establishing that he and Christian Action Network meet the financial qualifications for an award of fees as prevailing parties.

Consistent with 28 U.S.C.A. §2412(b), Defendants-Appellees request an award of $61,052.32 for attorneys fees and expenses plus any additional fees expended by reason of any opposition to this application. Alternatively, under 28 U.S.C.A. §2412(d)(2)(A) Defendants-Appellees request an award of $56,369.50 for attorneys fees and expenses plus any additional fees expended by reason of any opposition to this application.

Dated: 11-27-96

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BRIEF IN SUPPORT APPLICATION FOR FEES AND OTHER EXPENSES

Because the Federal Election Commission (FEC) brought this suit in bad faith and without substantial justification for claiming (as discussed below), the court may award Defendants-Appellees their reasonable attorneys' fees as part of the costs pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C.A. § 2412. Beyond question, Defendants-Appellees were the prevailing parties, the District Court having dismissed the Complaint on motion which was upheld on appeal on August 2, 1996, by the Fourth Circuit Court of Appeals. The Federal Election Commission has filed no petition for certiori and the 90 day period for that petition expired October 31, 1996. Accordingly, this application is brought within thirty days after the Court of Appeals judgment became final.

I. 28 U.S.C.A. § 2412 Permits Award of Attorneys' Fees

28 U.S.C.A. § 2412, in effect on the date of filing this action[2] provided in part:

> (b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such award.
>
> . . .
>
> (d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to other costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United states in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.
>
> (B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing on behalf of the party stating the actual time expended and the rate at which fees or other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

As to subparagraph (b), the common law allows the award of attorneys' fees when the other party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *Hyatt v. Shalala*, 6

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[2] 28 U.S.C.A. § 2412 was amended effective March 29, 1996, for actions commenced after that date to expand private litigants' rights against excessive demands by the government even when the government prevails and to increase the cap on hourly rates for attorneys' fees awards to $125 per hour.

F.3d 250 (4th Cir. 1993).

This application is filed within thirty days after the time for filing petition for certiori has expired and is therefore timely. See *Melkonyan v. Sullivan*, 501 U.S. 89, 115 L.Ed.2d 78 (1991).

II. The Prevailing Defendants-Appellees are Parties within the Meaning of 28 U.S.C. A. § 2412.

Former 28 U.S.C.A. §2412(d)(2)(B) applicable to this case defined party as follows:

> (B) "party" means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed....

The attached affidavit of Martin Mawyer with its attached financial statement for Christian Action Network (CAN) establishes that they are parties within the above definition.

III. The Federal Election Commission's Position was in bad faith and not Substantially Justified.

A. This case was the latest in a long string of FEC defeats on precisely the same issue of express advocacy.

Beginning with *Buckley v. Valeo*, 424 U.S. 1, 46 L.Ed.2d 659, 96 S.Ct. 612 (1976), the courts have not been shy about requiring express words of electoral exhortation before allowing regulation under Federal Election Campaign Act (FECA). The *Buckley* court even furnished the FEC with a list of examples of express words of advocacy in the well-known footnote 52: "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject." 424 U.S. 1 at 42-44, 46 L.Ed.2d 659 at 701-702. As was plain in the CAN advertisements, no such words, or any words like them, were present.

Before this action, FEC represented to the public through its own regulations that

> (2) "expressly advocating" means any communication containing a message advocating election or defeat, including but not limited to the name of the candidate, or expressions such as *vote for, elect, support, cast your ballot for,* and *Smith for* Congress, or *vote* against, defeat, or *reject.*

45 F.R. 15118, Mar. 7, 1980. [Italics in original.] The FEC can hardly claim ignorance of the express words legal test.

Yet, the FEC has persisted in bringing one unsuccessful suit after another to shop for courts that would expand FEC authority to intrude on First Amendment freedoms: *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 93 L.Ed.2d 539, 107 S.Ct. 616 (1986), *Federal Election Commission v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2d Cir. 1980), *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 839 F.Supp. 1448 (D. Colorado 1993) *rev'd on other grounds* 59 F.3d 1015 (10th Cir. 1995) *vacated on other grounds,* Case No. 95-489, ___ U.S. ___ (6/26/96), *Federal Election Commission v. Survival Education Fund, Inc. et al.*, unreported case no. 89 Civ. 0347, 1994 U.S. Dist. LEXIS 210 (U.S.D.C. S.D. N.Y. 1/12/94) *aff'd in part and rev'd in part on other grounds*, 65 F.3d 285 (2d Cir. 1995)(Copy of Dist. Ct. decision attached), *Federal Election Commission v. American Federation of State, County and Municipal Employees*, 471 F.Supp. 315 (D.D.C. 1979), *Federal Election Commission v. National Organization for Women*, 713 F.Supp. 428 (D.D.C. 1989). The FEC was similarly on the losing end as a defendant when it tried to enact regulations broadening the express advocacy standard: *Faucher v. Federal Election Commission*, 928 F.2d 468 (1st Cir. 1991) *cert. den. sub nom* ___ U.S. ___, 116 L.Ed.2d 52, 112 S.Ct. 79 (1991)(regulation restricting corporate issue advocacy unconstitutional).

Oddly, the FEC knew the difference between implied advocacy was express advocacy when it was a defendant in *Orloski v. Federal Election Commission*, 795 F.2d 156 (D.C. Cir. 1986). In *Orloski*, the Commission successfully argued for a bright-line test and against a totality-of-the-circumstances test and the court correctly agreed saying,

> Administrative exigencies mandate that the FEC adopt an objective, bright-line test for distinguishing between permissible and impermissible corporate donations....
>
> A subjective test based upon the totality of the circumstances would inevitably curtail permissible conduct.

795 F.2d 156 at 165. Given this long history of judicial and administrative precedent, the FEC acted in bad faith in bringing the present action and had no substantial basis for its position seeking millions in civil penalties for, at most, implied advocacy.

The FEC argued that this case was unique, because it was newly testing the power of images to expressly advocate electoral action. To the contrary, this case was not the FEC's first loss on that issue. In *Federal Election Commission v. American Federation of State, County and Municipal Employees*, 471 F.Supp. 315 (D.D.C. 1979), the District Court found that a Nixon-Ford poster with an image of President Ford wearing "Pardon Me" button circulated to union members during 1976 campaign was not express advocacy. Thus, the FEC's position in this case was disingenuous. Furthermore, the CAN newspaper article had no images, as well as no express words advocating electoral action.

The FEC's improper quest to intimidate political speakers by unfounded litigation is well described in the 1996 special report of the Fair Government Foundation, "The FEC's Express War on Free Speech," a copy of which is attached and incorporated herein as argument.

B. The FEC brought this case in bad faith, knowing there were no explicit words exhorting electoral action, either (1) to intimidate CAN, and others in like position, with the unlimited spending power of the federal government (and consequent cost of legal defense) or (2) to gain improper access to CAN's donor lists or both.

Only by turning the English language on its head could the FEC have possibly prevailed in any claim that the CAN video and newspaper advertisement were express advocacy. To the extent that they were arguably electoral advocacy, the advocacy was implied, not express. Implied can never be express, no matter how clear the implication. "Express" and "implied" are mutually exclusive terms. In the CAN advertisements, the FEC could never identify any words that expressed electoral advocacy, because no such words existed, yet the FEC persisted in this prosecution. Why?

CAN can suggest two possibilities, neither of which constitute reasonable justification for the FEC's action. First, the FEC seeks to intimidate CAN and others similarly situated against speaking out on issues during election times. This intimidation by litigation is wholly improper in a free society and should be discouraged by awarding the attorneys' fees sought in this application.

In the FEC investigation phase, as shown in the record of this case, the FEC demanded access to CAN's contributor lists. This demand was wholly improper under *National Association for the Advancement of Colored People v. Alabama,* 357 U.S. 449, 78 S. Ct. 1163 (1958), and *Federal Election Commission v. Machinists Non-Partisan League*, 655 F.2d 380 (D.C. Cir. 1981). It is inconceivable that the FEC counsel was unaware of these cases (the FEC having been a party to one of them), yet still made the improper request. Was this the real reason for the action? Or was the FEC request part of an in terrorem tactic to discourage political issue speech during election times? In either event, the FEC's position was in bad faith and not substantially justified.

The FEC's reign of terror is well known and continuing. In addition to the attached report of the Fair Government Foundation, the bad faith FEC agenda has been publicly exposed in newspaper editorials. For example, an Op-Ed piece by William P. Barr published in the *Wall Street Journal* on August 14, 1996, copy attached, describes the FEC's suit against the Christian Coalition (unrelated to the present Defendants-Appellees) in which the FEC attacks voters guides that contain no express advocacy. It points out that,

> Over the last 20 years, the Federal Election Commission has mounted a sustained assault on First Amendment freedoms. It has persistently attempted to expand its authority over campaign spending limits into a sweeping license to suppress issue-oriented speech by citizens groups.

Similarly, the FEC's bad faith campaign against issue-oriented political speech was decried in a August 7, 1996, editorial (attached) that eloquently describes the FEC's persistent bad faith:

> The First Amendment is the one pesky impediment to the commission's power grab. Thankfully the courts persist in ruling, quite correctly, that federal election law does not say what the FEC claims it does and in any case does not trump the people's right to talk politics....
>
> If its legal case is so hopeless, why does the commission keep litigating against windmills? Because the FEC loses nothing for trying. The commission can attempt ad nauseam to expand its regulatory portfolio, and when the FEC's lawyers are slapped down, they merely go on to the next quest for bureaucratic empire. This doesn't mean that there aren't costs involved, just that those costs are borne by the groups targeted by the FEC, which have to pay hefty legal bills in order to defend themselves against the FEC's bogus charges and novel theories....
>
> And even if the FEC does realize that its expansionism is going nowhere, the commission gets to have its fun interfering in elections. Is it any accident that the FEC has brought a lawsuit against the Christian Coalition just months before a presidential election? The commission may not have a chance at winning in court, but it may succeed in frightening any number of ministers and congregations into barring the coalition from distributing voter guides this year....
>
> The excesses of the FEC will never be checked as long as the commission pays no price for its partisan leanings and its bureaucratic imperialism.

CAN and Martin Mawyer ask this court to make the FEC pay a price for its bureaucratic

imperialism. Plainly, the FEC's effort to push its bureaucratic agenda to expand its jurisdiction over political speech in the face of consistent opposing judicial opinion shows the FEC's case was brought in bad faith and was wholly unjustified on legal grounds. The FEC should pay a price as a deterrent against its continuing unjustified assault on First Amendment rights.

IV. No Special Circumstances Make an Award Unjust.

Defendants-Appellees did nothing to prolong this litigation or make it more expensive. They filed their motion to dismiss in response to the complaint and filed no extraneous motions. Unlike the FEC, they incurred no expert expense for preparation of a report to tell the court whether the CAN speech involved contained explicit words of express advocacy.

V. Calculation of Fees

The calculation of fees differs depending on the basis for the court's EAJA award. If the court awards fees based upon the FEC's bad faith under 28 U.S.C.A. § 2412(b), the court may award reasonable fees and expenses. *Hyatt v. Shalala*, 6 F.3d 250 (4th Cir. 1993). If the court bases the award upon mere lack of substantial justification under 28 U.S.C.A. § 2412(d)(1)(A), the fees are subject to a $75 per hour cap adjusted based upon inflation and special circumstances. Furthermore, if the court awards fees, those fees should include fees for preparation of this application and any additional work if the application is opposed. See *Commissioner, Immigration and Naturalization Service v. Jean*, 496 U.S. 154 (1990)

The work was performed primarily by three lawyers: Alan P. Dye and Frank M. Northam of Webster Chamberlain & Bean of Washington D.C., lawyers with special expertise in Federal Election Commission matters at hourly rates from $175 to $205.00 per hour, and David Wm. T.

Carroll of Columbus, Ohio at an hourly rate of $150.00 per hour. The attached affidavits of Frank M. Northam and David Wm. T. Carroll respectively explain their backgrounds and justify the reasonableness of their hourly rates. Mr. Carroll, the non-specialty lawyer with the lower hourly rate, performed most of the briefing and argument work but relied on Webster, Chamberlain & Bean's special expertise to review that work and to provide authority (particularly unreported authority) in the area of expertise, a reasonable division of labor.

A. Fees for Administrative Proceedings Precedent to Court Action.

Defendants-Appellees acknowledge that ordinarily, 28 U.S.C.A. § 2412 does not authorize an award of attorneys fees for non-adjudicative administrative proceedings, but in *Sullivan v. Hudson*, 490 U.S. 877 (1989), the Court allowed an EAJA award of fees in a nonadjudicative proceeding resulting from a remand to the administrative agency. The Court reasoned,

> Our past decisions interpreting other fee-shifting provisions make clear that, where administrative proceedings are intimately tied to the resolution of the judicial action and necessary to the attainment of the results Congress sought to promote by providing for fees, they should be considered part and parcel of the action for which fees may be awarded.

490 U.S. 877 at 888.

Here, the administrative proceedings were a statutory prerequisite to the FEC filing the civil action. Under 2 U.S.C.A. § 437g, there are conditions precedent to the FEC filing suit, which involves the respondent. In 2 U.S.C.A. § 437g(a)(1), the FEC must give an opportunity for a respondent to demonstrate in writing why no action should be taken. Similarly, in 2 U.S.C.A. § 437g(a)(3), FEC must give a respondent the opportunity to file a brief opposing explaining why a probably cause finding should not be made. These proceedings are statutorily mandated and are "part and parcel" of the civil action eventually filed by the FEC. In this case, Defendants-Appellees

counsel did participate and tried to explain to the FEC why its positions eventually taken in the litigation lacked merit. During that phase, counsel conducted research useful to the later litigation, so those fees should be reimbursed.

B. Fees for Award under 28 U.S.C.A. § 2412(b)

This section will calculate the reasonable fees without regard to the statutory cap that applies only to fee awards under 28 U.S.C.A. § 2412(d)(1)(A). This application requests the following if the Court agrees that the FEC acted in bad faith.

Fees incurred during administrative proceedings:

David Wm. T. Carroll	$9,075.00
Webster Chamberlain & Bean	$3693.00
Total	$12,768.00

Fees incurred for district court action and circuit court appeal:

David Wm. T. Carroll	$21,030.00
Webster Chamberlain & Bean	$25,964.00
Total	$46,994.00

Fees for preparation of the application only:[3]

David Wm. T. Carroll (estimate)	$1,950.00
Total case fees	$61,712.00

The above fees do not include fees not yet incurred, but awardable, if the FEC contests this application.

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[3] Does not include fees that may result from responding to brief opposing this application, if any, or other additional work such as appeals.

C. Fees for Award under 28 U.S.C.A. § 2412(d)(1)(A)

Former 28 U.S.C.A. § 2412(d)(2)(A) applicable to this case stated.

> (2) For the purposes of this subsection--
>
> (A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney's fees (the amount of the fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated as a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines than an increase in the cost of living or special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.); ....

Since the 1981 enactment of the $75 per hour cap, inflation has increased prices throughout the economy. 28 U.S.C.A. § 2412 permits the court to increase the cap based upon inflation and special circumstances. Attached is a copy of the Bureau of Labor Statistics Consumer price index-All Urban Consumers, base period 1982-1984, obtained via the Internet from the Bureau of Labor on November 20, 1996. The EAJA was enacted in 1981, which had a Consumer Price index value of 90.9. The cost of living adjustment (COLA) should be calculated based on the nearest date when the claimant became a prevailing party, because the applicants "should not have the purchasing power of their fees eroded by such inflation." *Garcia v. Schweiker*, 829 F.2d 396, 402 (3d Cir. 1987). The index value for 1995 (1996 is not yet available) was 152.4. Applied to the $75 cap, the current value is about $125. (152.4 ÷ 90.9 × $75.00 = $125.78). This amount is still below the market rates and the rates lawyers in this case typically charge clients for similar work. Rates have risen substantially since 1981. See Affidavits of David Wm. T. Carroll and Frank M. Northam. As

the Fourth Circuit has recognized in an EAJA case, "'[e]xcept in unusual circumstances,' any time 'there is a significant difference in the cost of living since 1981 in a particular locale that would justify an increase in the fee, then an increase should be granted.'" *Payne v. Sullivan*, 977 F.2d 900, 903 (4th Cir. 1992).

Furthermore, there are very few lawyers which special expertise in Federal Election Commission matters. Defendants-Appellees believe that Alan P. Dye's and Frank M. Northam's special expertise is a special factor justifying Webster, Chamberlain & Bean's full rates despite the statutory cap, because there is a limited number of attorneys available with that expertise. Therefore, the fee award under 28 U.S.C.A. § 2412(d)(1)(A) should be as follows:

Fees incurred during administrative proceedings:

David Wm. T. Carroll	60.50 hours @ 125.00 =	$7,562.50
Webster Chamberlain & Bean		
Alan Dye	12.10 hours @ 205.00 =	$2,480.50
Frank Northam	6.50 hours @ 186.53[4] =	1,212.50
Total WC&B		$3,693.00
Total fees for administrative		$11,255.50

Fees incurred for district court action and circuit court appeal:

David Wm. T. Carroll	140.20 hours @ 125.00	$17,525.00
Webster Chamberlain & Bean		
Alan Dye	14.70 hours @ 221.60[5] =	$3,257.50
Frank Northam	115.00 hours @ 196.53[6] =	22,601.50
Raymond Chasen	1.75 hours @ 60.00 =	105.00

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[4] Effective rate, dividing billed amount by total hours.

[5] Effective rate, dividing billed amount by total hours.

[6] Effective rate, dividing billed amount by total hours.

Total WC&B Fees	$25,964.00
Total Civil Action Fees & Expenses	$43,489.00
Fees for preparation of application only: David Wm. T. Carroll (est.) 13 hours @ 125.00	$1,625.00
Total case fees	$56,369.50

VI. Conclusion

Given the long history of express advocacy cases in which the Federal Election Commission has consistently taken similar losing positions to this case despite clear direction from the United States Supreme Court, the FEC brought this case in bad faith and without substantial justification.

If the court agrees that the FEC brought the case in bad faith, the court may and should award the entire reasonable fee. If the court finds that the FEC's position was merely without substantial justification, Defendants-Appellees ask the court to consider the special circumstances of inflation and the expertise of Webster Chamberlain & Bean in FEC matters to increase the base rate set forth in 28 U.S.C.A. § 2412(d)(2)(A).

Dated: 11-27-96

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ATTORNEYS FOR DEFENDANTS-APPELLEES

Certificate of Service

On November 27, 1996, a copy of the foregoing Application was served by ordinary U.S. Mail, postage prepaid, upon the following:

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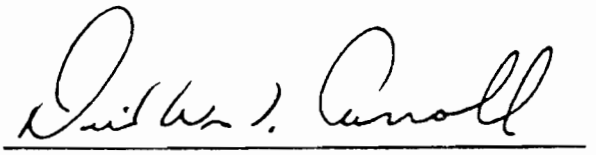
Counsel for the Federal Election Commission



David Wm. T. Carroll