UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1136

FEDERAL ELECTION COMMISSION,

Petitioner-Appellee,

v.

MACHINISTS NON-PARTISAN POLITICAL LEAGUE,

Respondent-Appellant.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

CHARLES N. STEELE
General Counsel

KATHLEEN IMIG PERKINS
Assistant General Counsel

MIRIAM AGUIAR
Attorney

FEDERAL ELECTION COMMISSION
1325 K Street, N.W.
Washington, D.C. 20463

(202) 523-4060

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COUNTERSTATEMENT OF ISSUES PRESENTED

1. Whether the district court properly enforced the subpoena issued by the Federal Election Commission after the court determined that the inquiry was within the Federal Election Commission's authority and that the subpoena was sufficiently specific and reasonably relevant to the investigation.

2. Whether the district court properly determined not to consider jurisdictional issues raised in connection with the Federal Election Commission's subpoena enforcement action.

RULE 8(b) STATEMENT

A. This case was before this court on application for stay pending appeal filed by the respondent-appellant on February 4, 1980, after the district court declined to grant a stay of its order enforcing the Commission's subpoena, the subject-matter of this appeal.

B. A related case, Federal Election Commission v. Citizens for Democratic Alternatves in 1980, (hereinafter "CDA"), No. 80-1256 (D.C. Cir. March 7, 1980) is presently before this court on appeal of the district court's order enforcing a Commission subpoena for documents in connection with the same investigation. On March 7, 1980, the district court denied CDA's application for a stay pending appeal of the district court's February 29, 1980 order, Federal Election Commission v. Citizens for Democratic Alternatives in 1980, Misc. Action No. 80-0009 (D.D.C. March 7, 1980), and on the same day, this court also denied CDA's application for a stay, Federal Election Commission v. Citizens for Democratic Alternatives in 1980, No. 80-1256 (D.C. Cir. March 7, 1980). On March 10, 1980, CDA produced documents and materials requested by the subpoena.

COUNTERSTATEMENT OF THE CASE

This action is before this court on appeal by the Machinists Non-Partisan Political League (hereinafter "MNPL") a multi-candidate political committee registered with the Commission and subject to the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431

et seq., (hereinafter "the Act" or "FECA").[1] The Federal Election Commission (hereinafter "FEC" or "Commission"), after noncompliance by MNPL, filed a petition in the United States District Court for the District of Columbia for an order to show cause why its subpoena should not be enforced. The district court, by order dated January 30, 1980, granted the Commission's petition and ordered MNPL to comply with the subpoena to produce documents and materials and to answer written questions, and dismissed as moot MNPL's counterclaims and motion for a preliminary injunction. MNPL filed a notice of appeal of these orders on January 30, 1980.

I. PROCEEDINGS BEFORE THE COMMISSION

The subpoena with which the district court ordered compliance is part of the Commission's investigation instituted after the Carter-Mondale Presidential Committee, Inc. (hereinafter "C-M") filed a signed, sworn complaint with the FEC on October 4, 1979. 2 U.S.C. § 437g(a). The C-M complaint alleged that nine "draft-Kennedy" committees[2] were in violation of certain provisions of the Act.

1/ The Federal Election Campaign Act was amended effective January 8, 1980, Pub. L. No. 96-187, 96th Cong., 2d Sess., 93 Stat. 1339. Citations which support or explain the Commission's actions in this matter prior to January 8, 1980 will be to the provisions of FECA in effect at that time, with cross references to the Act, as amended in 1980.

2/ The nine draft-committees which are also respondents in the present Commission matter are: Florida for Kennedy Committee; New Hampshire Democrats for Change; Democrats for Change in 1980; National Call for Kennedy; Illinois Citizens for Kennedy; Committee for Alternatives to Democratic Presidential Candidate; Minnesotans for a Democratic Alternative; D.C. Committee for a Democratic Alternative; and Citizens for a Democratic Alternative in 1980.

Specifically, the complaint alleged:

(1) that the nine named draft committees were affiliated within the meaning of 2 U.S.C. §§ 433, 441a(a)(5), 11 C.F.R. § 110.3(a)(1)(ii)(D), and therefore subject to a single $5,000 contribution limitation, 2 U.S.C. § 441a(a)(1)(C), (2)(C);

(2) that MNPL had exceeded this contribution limitation in violation of 2 U.S.C. § 441a(a)(2)(C), setting forth specific instances of MNPL contributions to the allegedly affiliated draft-Kennedy committees which, in the aggregate, exceeded $ 5,000; and

(3) that certain officers and members of MNPL, as individuals and through MNPL, helped to organize and coordinate activities of the draft-Kennedy committees, a fact relevant to determining whether these committees are affiliated. 3/

On October 16, 1979, the Commission found reason to believe that violations of FECA and Commission regulations had been committed by MNPL and notified MNPL of this finding by letter dated October 19, 1979. 2 U.S.C. § 437g(a)(2)(A). This letter of notification included a description of the legal basis for the Commission's preliminary finding and an outline of relevant statutory provisions. 4/ The Commission had previously provided

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3/ On November 4, 1979, the C-M Committee filed an amendment to its complaint, alleging, inter alia, that Senator Kennedy had become a candidate within the definition of 2 U.S.C. § 431(b), now § 431(2), by September 1, 1979.

4/ Pursuant to Commission practice in all enforcement actions (prior to the 1980 amendments to the Act), MNPL was given an opportunity to demonstrate why no further action should be taken by the Commission. The Act in effect at that time designated no specific time period for such response, nor did any provision of the Act prohibit a Commission investigation, including the issuance of subpoenas, before receipt of such a response.

The FEC notes that the 1980 amendments to the Act now provide that "[b]efore the Commission conducts any vote on the complaint," a potential respondent, be given 15 days "to demonstrate, in writing,...that no action should be taken against such person on the basis of the complaint." 2 U.S.C. § 437g(a)(3), effective January 8, 1980.

MNPL with a copy of the complaint immediately after it was filed. 2 U.S.C. § 437g(a)(2), now 2 U.S.C. §§ 437g(a)(1), (2). Counsel for MNPL, on October 31, 1979, requested an extension of time in which to submit its response. Subsequently, MNPL was informed that the Commission had granted the extension until November 8, 1979, but that the Commission's investigation would not be stayed during that time inasmuch as the Commission had a statutory duty to proceed expeditiously in this matter. 2 U.S.C. § 437g(a)(3)(A), now § 437g(a)(2), (3), (4), (8).[5/]

Thus, having found reason to believe that violations of the Act had been committed by MNPL, the Commission, on November 5, 1979, issued to MNPL a subpoena to produce documents and materials and an order to answer written questions concerning allegations made by the C-M complaint. MNPL filed a motion to quash the subpoena on November 14, 1979, 11 C.F.R. § 111.3, which after consideration, the Commission denied on November 27, 1979. The Commission notified MNPL by letter dated November 29, 1979, of its denial of the motion to quash and set a new date, December 13, 1979, for production of the subpoenaed material.

MNPL also filed a motion with the Commission to dismiss the C-M complaint for lack of jurisdiction. Since the questions raised in this motion required factual determinations concerning,

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5/ See National Right to Work Committee v. Thomson, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9042 (D.D.C. 1977)(the clear purpose of § 437g is to provide for expeditious resolution of complaints).

inter alia, the exact nature of the activities of the named draft-Kennedy committees, and the date on which Senator Kennedy became a candidate within the meaning of the Act, the Commission postponed a determination on the jurisdictional issues until such time as its investigation was completed. The Commission also denied MNPL's request for oral argument. MNPL was informed, by letter dated December 14, 1979, that the Commission would fully consider the issues raised with respect to the coverage of the Act before considering taking further action in the form of a "reasonable cause to believe" finding that MNPL had violated the Act.[6/] MNPL subsequently informed the Commission that it would not comply with the Commission's subpoena and in fact did not produce the documents on December 13, 1979, as required by the subpoena.

II. PROCEEDINGS IN THE DISTRICT COURT

The Commission, after non-compliance by MNPL, filed a petition for an order to show cause why its subpoena should not be enforced on December 31, 1979. MNPL filed a memorandum in opposition to the Commission's subpoena enforcement petition on January 17, 1980, and the Commission filed a reply on January 25, 1980. A full hearing on the Commission's petition was held on February

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6/ The 1979 Amendments to FECA, effective January 8, 1980, substituted "probable cause to believe" as the second level of Commission determinations. The Commission may now proceed to a vote on "probable cause to believe" only after an investigation and after all respondents have been given an opportunity to submit briefs to the Commission. 2 U.S.C. §§ 437g(a)(3), (4).

28, 1980 before the Honorable John Pratt. See Joint Appendix (hereinafter "J.A.") at 31-74. By order dated January 30, 1980, the court ordered MNPL to comply with the Commission's subpoena and set February 5, 1980, as the date for production of the subpoenaed documents and materials. Judge Pratt declined to issue a stay of his order.

MNPL appealed Judge Pratt's order to this court on January 30, 1980, and filed an application for a stay with this court on February 4, 1980. The Commission's memorandum in opposition to the stay was filed with this court on February 14, 1980, and MNPL filed its reply on February 22, 1980, supplemented on February 25, 1980. The Commission then filed with this court a motion to expedite its disposition of MNPL's motion for stay pending appeal on March 11, 1980, and MNPL filed a response on March 12, 1980. This court by order dated April 2, 1980, granted the Commission's motion to expedite its decision on appellant's application for a stay and denied MNPL's application for a stay pending appeal. MNPL subsequently filed, on April 7, 1980, a motion for reconsideration and for immediate oral argument. The Commission filed its response to the motion for oral argument on April 14, 1980.[7/]

7/ The Commission in its response indicated that "after discussion with counsel for MNPL, the Commission anticipates that full production will be made by April 16, 1980." However, by letter dated April 15, 1980, counsel for MNPL notified the Commission that production would not be made at least until this court rules on its petition for reconsideration of its decision denying MNPL's application for a stay.

ARGUMENT

I. THE DISTRICT COURT PROPERLY CONCLUDED THAT THE COMMISSION'S SUBPOENA SATISFIED THE REQUIREMENTS FOR ENFORCEABILITY.

The scope of issues considered in determining whether to enforce an agency subpoena "must be narrow because of the important governmental interest in the expeditious investigation of possible unlawful activity." Federal Trade Commission v. Texaco, 180 U.S. App. D.C. 390, 400, 555 F.2d 862, 872 (1977)(en banc), cert. denied, 431 U.S. 974 (1977). This court has recently affirmed the well-established principle that "[an] agency's investigative order, whether it is a subpoena or an information report order, must be enforced if it does not transcend the agency's investigatory power, the demand is not unduly burdensome or too indefinite, and the information sought is reasonably relevant." Appeal of FTC Line of Business Report Litigation, 193 U.S. App. D.C. 300, 318, 595 F.2d 685, 703 (1978), cert. denied, ____ U.S. ____, 99 S.Ct. 362 (1978). Accord, United States v. Morton Salt Co., 338 U.S. 632, 652 (1950); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946); Federal Trade Commission v. Texaco, 180 U.S. App. D.C. at 400, 555 F.2d at 872; Federal Trade Commission v. Owens-Corning Fiberglass Corp., et al., No. 79-1443 at 14 (D.C. Cir. March 13, 1980).

The district court applied these "guidelines of enforceability" in its review of the Commission's petition to enforce the subpoena. Transcript of January 28, 1980 Hearing, J.A. at 66.

The Court fully considered arguments presented by both MNPL and the Commission in light of the standard for enforcement of an agency's subpoena as set forth in Morton Salt, determined that the Commission's subpoena fell within these parameters, and granted the Commission's petition to enforce its subpoena. J.A. at 66-68.

A. The Inquiry is Within the Commission's Investigatory Authority.

This court has recently held that the Commission has broad authority under FECA to issue subpoenas in furtherance of the Commission's powers and duties conferred by the Act, and that the district courts have the power to enforce such subpoenas upon petition by the FEC. Federal Election Commission v. Committee to Elect Lyndon LaRouche, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9044 (D.D.C. 1977) aff d, ____ U.S. App. D.C. ____, 613 F.2d 834 (1979), cert. denied, 48 U.S.L.W. 3514 (1980). Congress clearly vested broad authority in the Commission to administer the FECA.[8/]

The Commission has exclusive primary jurisdiction with respect to civil enforcement of the Act, 2 U.S.C. §§ 437c(b)(1), 437d(e), 437g and has statutory responsibility to conduct

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8/ The Commission also has the power to make rules necessary to implement the provisions of the Act, 2 U.S.C. § 437d(a)(8), to render advisory opinions, 2 U.S.C. § 437d(a)(7), and to initiate civil actions to enforce the provisions of the Act. 2 U.S.C. § 437d(a)(6).

investigations to determine whether there is probable cause to believe that violations of the Act have been or are about to be committed. 2 U.S.C. § 437g(a). The Act specifically provides that:

> If the Commission, upon receiving a complaint under paragraph (1) or on the basis of information ascertained in the normal course of carrying out its its supervisory responsibilities, determines, by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act...the Commission shall, through its chairman or vice chairman, notify the person of the alleged violation. Such notification shall set forth the factual basis for such alleged violation. The Commission shall make an investigation of such alleged violation, which may include a field investigation or audit, in accordance with the provisions of this section.

2 U.S.C. § 437g(a)(2)(emphasis added).

To carry out this statutory duty, the Act explicitly grants the Commission power

> to require by special or general orders, any person to submit, under oath, such written reports and answers to questions as the Commission may prescribe...and to require by subpoena...the production of all documentary evidence relating to the execution of its duties....

2 U.S.C. § 437d(a)(1), (3). See also Federal Election Commission v. Committee to Elect Lyndon LaRouche, supra. In addition, 2 U.S.C. § 437d(b) provides that if a respondent refuses to obey a subpoena or an order of the Commission, the Commission is to seek compliance by petitioning any United States district court.

Respondent-Appellant does not deny that the Commission is authorized by statute to conduct investigations of alleged violations of federal election laws. Rather, MNPL raises such collateral issues as the Commission's alleged lack of jurisdiction, the coverage

of the Act, and constitutional due process challenges to the Commission's enforcement process. The Commission asserts as the courts have held, that such collateral or substantive issues are inappropriate and premature when raised at the subpoena enforcement stage of an investigation. See Argument II, infra. As the Commission's investigation in this matter is clearly authorized by statute, the district court was not in error in holding that "this inquiry is within the authority of the Federal Election Commission" to investigate the allegations made in the C-M complaint, and in issuing an order for MNPL to comply with the Commission's subpoena in pursuance of that investigation. J.A. at 66.

B. The Subpoena's Demand is not too Indefinite.

As the district court held, the Commission's subpoena is as "specific" as possible in light of the nature of the subject matter and the allegations made in the complaint which are the subject of the Commission's investigation. J.A. at 66-67. The Commission's subpoena describes with sufficient specificity the information sought and, where appropriate, sets forth specific examples of the types of documents and materials that would fall within the parameters of the request.

This court has held that some burden on subpoenaed parties is to be expected and may be necessary, and that an administrative agency's subpoena will not be held unduly burdensome so long as the information requested is reasonable. Federal Trade Commission v. Texaco, 180 U.S. App. D.C. at 410, 555 F.2d at 882. The FEC's

power to issue subpoenas was held, by this court to be necessarily broad in order to allow the agency to vigorously pursue its congressional mandate to oversee federal election laws. Federal Election Commission v. Committee to Elect Lyndon LaRouche, 613 F.2d at 860-861. See also United States v. Morton Salt, 338 U.S. at 652; Oklahoma Press Publishing Co. v. Walling, 327 U.S. at 209; Endicott Johnson v. Perkins, 317 U.S. 501 (1954); Securities and Exchange Commission v. Wall Street Transcript Corp., 422 F.2d 1371, 1375 (2d Cir. 1970).[9/] When viewed in light of these holdings the subpoena issued to MNPL was reasonable in its request, and the district court was correct in finding that, due to the nature of the subject matter, the subpoena was not too indefinite or overbroad but rather specific in its demands. J.A. at 66.

9/ The Commission's power to issue subpoenas and orders is analogous to that of the Federal Trade Commission, as set forth in the Federal Trade Commission Act. Compare 15 U.S.C. § 49 with 2 U.S.C. § 437d(a)(1), (3). In a recent decision, this court, citing Federal Trade Commission v. Texaco, held:

> ...the onus of demonstrating that a request is unduly burdensome is the corporation's. When the inquiry is conducted pursuant to a lawful objective, its reasonableness will be presumed absent a showing that compliance threatens to disrupt or unduly hinder the normal operation of a business.

Appeal of FTC Line of Business Report Litigation, 193 U.S. App. D.C. at 318, 595 F.2d at 703, citing Federal Trade Commission v. Texaco, 180 U.S. App. D.C. at 410, 555 F.2d at 882. MNPL has not argued that compliance with the Commission's subpoena will unduly hinder its normal operation.

C. The Information Sought is Reasonably Relevant.

The Commission's subpoena issued to MNPL seeks information concerning the activities of MNPL with regard to the financing, establishment, and organization of the draft-Kennedy committees which are the subject of the C-M complaint. Such information is relevant and necessary to the Commission's investigation of the allegations in tne C-M complaint that the named draft-Kennedy committees are affiliated, that, MNPL's role in the circumstances may have led to such affiliation, and that contributions by MNPL to these committees exceeded the limitations of 2 U.S.C. § 44la(a)(l) if affiliation is shown.

The Supreme Court in United States v. Morton Salt, supra, held that an administrative agency is "analogous to a Grand Jury... [and]...can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." United States v. Morton Salt, 338 U.S. at 642-43. Accord, Appeal of FTC Line of Business Report Litigation, 193 U.S. App. D.C. at 317, 595 F.2d at 702. The Commission, in this matter, is acting on a formal complaint filed against MNPL and the other respondents which sets forth numerous factual allegations to support its legal contention that the Act has been violated. Under such circumstances, "a wide range of investigation is necessary and appropriate." Federal Trade Commission v. Texaco, 180 U.S. App. D.C. at 405, 555 F.2d at 877. Therefore, as determined by the district court, the "information is reasonably relevant if the Commission is going

to carry out its statutory duties as set forth in the Act." J.A. at 67. Since the Commission has a statutory duty to conduct investigations of alleged violations of the Act, 2 U.S.C. § 437g(a)(2), and since the Commission, in this matter, received a verified complaint alleging, with particularity, violations of the Act, and issued the subpoena in connection with its investigation of allegations made therein, the information sought by the subpoena is not "plainly incompetent or irrelevant to any lawful purpose." Endicott Johnson Corp. v. Perkins, 317 U.S. at 509; Accord, Oklahoma Press Publishing Co. v. Walling, 327 U.S. at 186; Federal Trade Commission v. Winters National Bank and Trust, 601 F.2d 395, 398 n.7 (6th Cir. 1979); Casey v. Federal Trade Commission, 578 F.2d 793 (9th Cir. 1978); United States v. Empire Gas Corp., 547 F.2d 1147 (8th Cir. 1976), cert. denied, 430 U.S. 915 (1977).

II. THE DISTRICT COURT PROPERLY CONCLUDED THAT JURISDICTIONAL ISSUES WERE IMPROPERLY RAISED IN AN ACTION TO ENFORCE THE COMMISSION'S SUBPOENA.

This court followed the principle set forth by the Supreme Court in Endicott Johnson v. Perkins, supra, when it held that the "court's role in proceeding to enforce an administrative subpoena is a strictly limited one." Federal Trade Commission v. Texaco, 180 U.S. App. D.C. at 399-400, 555 F.2d at 871-72. Substantive and statutory defenses such as questions of jurisdiction and the coverage of a regulatory statute are improper and premature at the subpoena enforcement stage of an administrative investigation. Endicott Johnson

Corp. v. Perkins, 317 U.S. at 509; Federal Trade Commission v. Texaco, 180 U.S. App. D.C. at 407, 555 F.2d at 879; Federal Maritime Commission v. Port of Seattle, 521 F.2d 431, 434-36 (9th Cir. 1975); Securities and Exchange Commission v. Savage, 513 F.2d 188, 189 (7th Cir. 1975); Securities and Exchange Commission v. Wall Street Transcript Corp., 422 F.2d at 1375. Nor must an administrative agency conclusively resolve such jurisdictional questions before proceeding with an investigation with regard to alleged violations of a statute over which it has enforcement responsibility. Oklahoma Press Publishing Co. v. Walling, 327 U.S. at 212; Endicott Johnson v. Perkins, 317 U.S. at 508-9. An agency "must be free without undue influence or delay to conduct an investigation which will adequately develop a factual basis for a determination as to whether particular activities came within the [agency's] regulatory authority." Federal Maritime Commission v. Port of Seattle, 521 F.2d at 436, quoting Securities and Exchange Commission v. Brigadoon Scotch Distributing Co., 480 F.2d 1047, 1052-53 (2d Cir. 1973). In subpoena enforcement proceedings

> [t]he question at issue is not...the nature of the legal obligation, violation of which the evidence is sought to show. It is rather whether evidence relevant to the violation, whatever the obligation's character, can be drawn forth by the exercise of the subpoena power.

Oklahoma Press Publishing Co. v. Walling, 327 U.S. at 211. Accord, United States v. Powell, 379 U.S. 48 (1964); United States v. Morton

Salt Co., supra. As the Supreme Court noted in Hannah v. Larche, 363 U.S. 420 (1960),

> The investigative process could be completely disrupted if investigative hearings were transferred into trial-like proceedings.... Fact-finding agencies would be diverted from their legitimate duties and would be plagued by the injection of collateral issues that would make the investigation interminable .... This type of proceeding would make a shambles of the investigation and stifle the agency in its gathering of facts.

363 U.S. at 433-44. United States v. Southwest National Bank, 598 F.2d 600, 602 (5th Cir. 1979).

There are important practical reasons for this narrowing of the issues properly considered by a district court in a proceeding to enforce an administrative agency's subpoena. A determination of the coverage of a regulatory statute, such as FECA, involves questions of fact as well as questions of law and indeed may turn on facts discovered through enforcement of a subpoena. As the district court recognized, the Commission must be permitted to obtain factual information concerning the activities undertaken by an entity or committee, in this case the draft-Kennedy committees and MNPL, in order to enable it to make a finding whether such an entity is subject to the provisions of the Act and thus subject to the jurisdiction of the Commission.[10/] Federal Maritime Commission v. Port of Seattle,

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10/ The court stated that "it has been well established that this type of matter, lack of jurisdiction, is something that has to be addressed in the first instance to the Commission itself when the enforcement proceeding, if any takes place." J.A. at 67. MNPL's right to challenge the Commission's jurisdiction is thus preserved and may be appropriately raised by MNPL if and when an action to enforce the Act is brought by the Commission.

521 F.2d at 434 ("...to make a responsible determination of its jurisdiction, the Commission must have access to information.... There is no way the Commission can make a credible showing of its statutory coverage without such information"). To hold otherwise, and to require the Commission to establish jurisdiction and coverage of the Act before conducting an investigation, "would require the [FEC] to answer at the outset of its investigation the possibly doubtful questions of fact and law that the investigation is designed and authorized to illuminate." Federal Trade Commission v. Texaco, 180 U.S. App. D.C. at 407, 555 F.2d at 879, quoting Securities and Exchange Commission v. Savage, 513 F.2d at 189. As this court recently affirmed, "where...the [agency] does not plainly lack jurisdiction, and the jurisdictional question turns on issues of fact, the agency is not obliged to prove its jurisdiction in a subpoena enforcement proceeding prior to the conclusion of the agency's adjudication." Federal Trade Commission v. Ernstthal, ____ U.S. App. D.C. ____, 607 F.2d 488, 490 (1979) (emphasis added).

Thus, the district court clearly followed legal principles well-established in this court by holding that the issues raised by MNPL as to the coverage of the Act and the Commission's lack of jurisdiction over the activities of the respondents were not proper objections to be considered by the district court in this subpoena enforcement action. Indeed, to ask the court to decide jurisdictional issues at the fact-finding investigative stage in an enforcement process would necessarily require the court

to "perform the very task of fact-finding... which the legislature committed to [this] agency." B. Schwartz, Administrative Law at 116 (1976). MNPL's challenge to the FEC's jurisdiction is preserved and may be properly raised, if necessary, in the context of a subsequent enforcement action filed by the Commission against MNPL.[11/] Federal Trade Commission v. Texaco, 180 U.S. App. D.C. at 407, 555 F.2d at 879; Federal Maritime Commission v. Port of Seattle, 521 F.2d at 434.

MNPL argued before the district court and reargues before this court that the well-established standard for subpoena enforcement actions set forth in United States v. Morton Salt Co., supra, should be rejected and replaced with a "compelling interest" standard in order for an agency to secure a court's enforcement of its subpoena. Respondent-Appellant Brief (hereinafter "R-A" Brief) at 34.[12/] MNPL's reasoning is premised on the theory that protected

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11/ Indeed, prior to any possible enforcement action in the district court, MNPL will have full opportunity to present its views on the question of the FEC's jurisdiction, and any other matters, to the Commission. MNPL must be provided an opportunity to submit a brief to the Commission before the Commission proceeds to a vote on probable cause or no probable cause to believe that the Act has been violated. 2 U.S.C. § 437g(a)(3), effective January 8, 1980.

12/ Appellant also argues that since the Commission did not resolve jurisdictional challenges raised by MNPL before issuing a subpoena in furtherance of a lawful investigation, reserving action on MNPL's motion to dismiss, appellant has been denied procedural due process and therefore the district court's order enforcing the Commission's subpoena should not be affirmed. R.A. Brief at 44. Although the Commission maintains that case law supports its contention that such collateral issues are inappropriately and prematurely raised in administrative subpoena enforcement proceedings, the Commission has followed statutorily prescribed procedures in handling this matter and has permitted MNPL a reasonable opportunity to respond to the Commission's

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first amendment activities of MNPL are implicated by the Commission's subpoena. The position taken by MNPL simply ignores case law in this area. The Supreme Court addressed similar allegations of invasion of protected first amendment activities in Oklahoma Press Publishing Co. v. Walling, 327 U.S. at 194. The Court therein applied the same standard used by the district court in this action; that is, whether the agency had the authority to issue the subpoena, whether the subpoena was not too indefinite or overbroad, and whether the requests were reasonably relevant to the inquiry. Id. at 208, 218. Accord, Securities and Exchange Commission v. Wall Street Transcript Corp., 422 F.2d at 1380 (allegations

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12/ continued

findings. By initiating an investigation pursuant to the receipt of a signed, sworn complaint and finding reason to believe that violations of the Act had occurred, 2 U.S.C. §§ 437g(a)(1), (2); by notifying the respondent by letter of its decision and allowing MNPL an opportunity to respond, 2 U.S.C. §§ 437g(a)(2), (3); by conducting an expeditious investigation and issuing a subpoena in furtherance thereof, 2 U.S.C. §§ 437d (a)(3), (4), (9), 437g(a)(2); by considering MNPL's motion to quash, 11 C.F.R. § 111.3, and promptly notifying MNPL of its decision; and by filing an action to enforce its subpoena in the district court, 2 U.S.C. § 437d(b), the Commission precisely followed the enforcement procedures outlined in the Act, complying with constitutional due process requirements. The Commission's denial of MNPL's request for oral argument does not violate due process.

Similarly, the Commission postponed its decision on MNPL's motion to dismiss, for such a decision would have required the Commission to make a factual determination on issues raised in the complaint and on its own jurisdiction without benefit of a full investigation of the case. However, the Commission did promptly notify MNPL that it would fully consider all issues raised before taking further action. Letter from Charles N. Steele, General Counsel, to Joseph L. Rauh, Jr., Counsel for MNPL (December 14, 1979).

of first amendment considerations do not require a departure from the established standard for district court enforcement of agency subpoenas).

MNPL's position is also inconsistent with and ignores this court's recent decision in Federal Election Commission v. Committee to Elect Lyndon LaRouche, supra. In LaRouche, this court upheld the Commission's power to compel the production of testimony and evidence in its efforts to investigate possible violations of federal election laws, and did not require the Commission to establish a "compelling interest" prior to enforcement of the subpoenas.[13/]

Assuming, arguendo, that this court determines not to follow the Morton Salt and Texaco standard but to resolve the jurisdictional issue herein, the Commission maintains that it has statutory jurisdiction to proceed with the investigation and to issue subpoenas

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13/ The district court recognized that there is a "compelling interest" at stake in this action -- the enforcement of the Act. J.A. at 61. The Supreme Court has specifically held that the need to ensure that this congressionally mandated federal regulation is complied with is such an important governmental interest. Buckley v. Valeo, 424 U.S. 1, 67-8, 84-5 n.113 (1976). Buckley found a "substantial public interest in disclosure identified by the legislative history of the Act [which] outweighs the harm generally alleged." Buckley v. Valeo, 424 U.S. at 71. The Court, in holding the FECA consistent with the first amendment, distinguished the disclosure provisions of the Act from the provisions challenged in Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963); Bates v. City of Little Rock, 361 U.S. 516 (1960); Shelton v. Tucker, 364 U.S. 479 (1960); Talley v. California, 362 U.S. 60 (1960); NAACP v. Alabama, 357 U.S. 449 (1958); and Sweeny v. New Hampshire, 354 U.S. 234 (1957). R-A Brief at 34-39.

to MNPL and to the nine other draft-Kennedy committees in connection with its investigation of the C-M complaint. MNPL is a multi-candidate political committee registered with the Commission, and seven of the nine draft committees have also registered with the Commission as political committees. MNPL and the other named respondents are thus clearly subject to the provisions of the Act. Since the Commission, mandated by statute to enforce and administer the Act, is vested with the exclusive jurisdiction with respect to civil enforcement of the Act, and since the Commission initiated the present investigation pursuant to the receipt of a complaint which alleged violations of the Act by MNPL and which raised questions of affiliation,[14/] the respondents and the subject matter of the investigation are both within the Commission's investigatory jurisdiction.[15/]

Indeed, MNPL in its Brief for respondent-appellant to this court admitted that

> [c]ommencing in February 1979, the IAM through activities by President Winpisinger, by MNPL or by local IAM officials, encouraged and assisted the formation of draft-Kennedy groups in several states -- including particularly Iowa, Illinois and Florida -- as part of

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14/ Counsel for MNPL has admitted that MNPL encouraged and assisted in forming these groups. R-A Brief at 7.

15/ The district court properly held that the question of jurisdiction is a factual question which is something that has to be addressed in the first instance to the Commission itself, when the enforcement proceeding, if any, takes place. J.A. at 14. Indeed, the Commission's review of information contained in the subpoenaed documents may warrant a Commission finding that the matters are outside the Commission's jurisdiction or a finding of no "probable cause," 2 U.S.C. § 437g(a)(5)(B), now 2 U.S.C. § 437g(a)(3), that a violation of the Act occurred, thus terminating this investigation.

> a "grass roots effort" committed to "promoting the acceptance of Presidential candidacy by Senator Kennedy.

R-A Brief at 7-8.[16/] The Florida for Kennedy Committee (hereinafter "FFKC") which MNPL assisted in forming and to which MNPL made "contributions on July 9 and August 21, 1979," R-A Brief at 8-10, requested an advisory opinion on July 18, 1979, AOR 1979-40, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 3461, in which FFKC stated that it was a political committee, having registered with the Commission as such on May 22, 1979.[17/] The FFKC stated in its request for an advisory opinion:

> The purpose of the Committee is to raise issues relevant to the 1980 Presidential Election and to cause Senator Kennedy to become a candidate for the Office of President... The Committee would like to raise and spend money for the purpose of influencing the selection, at Florida's county caucuses, of individuals who agree ideologically with the issues to be raised by the FFKC and who would express their preference for Senator Kennedy in the non-binding straw ballot to be held in November 1979 at the Florida Democratic Party Convention.

AOR 1979-40, supra at 1.

16/ MNPL is the separate segregated fund established and administered by the International Association of Machinists (hereinafter "IAM"). IAM is a labor organization within the meaning of 2 U.S.C. § 441b and is prohibited by § 441b from making any "contribution or expenditure in connection with any [federal] election...or in connection with any primary election or political convention or caucus held to select candidates" for federal office. 2 U.S.C. § 441b(a) (emphasis added).

17/ Seven of the nine draft-Kennedy committees named as respondents in this matter and which MNPL has admitted having encouraged and assisted in forming and to which MNPL made contributions, R-A Brief at 7-10, have registered as political committees with the Commission. One of the purposes of the Commission's investigation is to determine whether the other two committees are also political committees as defined by FECA.

Draft committees are political committees as defined by the Act and are subject to its limitations. A "political committee" is defined as one which receives contributions or makes expenditures which aggregate in excess of $1,000 per year. 2 U.S.C. § 431(4). "Contributions" and "expenditures" are defined as gifts, loans, advances or anything of value made by any person for the purpose of influencing any election for Federal office. 2 U.S.C. § 431(8) and (9). And the Act defines "election" so as to include a primary election held to select delegates to a national nominating convention and a primary election to express a preference for individuals to be nominated for the office of President.[18/] 2 U.S.C. § 431(1), 11 C.F.R. § 100.2(a). Since the activities of the draft committees may have been undertaken to influence the nomination for election of Senator Edward Kennedy to the office of President, the Commission's investigation could reveal that the activities fall within the definition of political committees.

18/ MNPL has cited Federal Election Commission v. Central Long Island Tax Reform Immediately Committee, (hereinafter "CLITRIM"), No. 79-3014 (2nd Cir. February 5, 1980), reh. denied March 5, 1980), to support its position that the Supreme Court in Buckley, supra, limited FECA to extend only to contributions or independent expenditures which expressly advocate the election or defeat of a clearly identified candidate. MNPL's reliance on CLITRIM is misplaced. CLITRIM concerned whether monies spent by CLITRIM were in fact "independent expenditures" under § 431(17) and thus reportable under § 434(c). The court affirmed Buckley's holding that the term "independent expenditure" as used in the Act requires express advocacy of the election or defeat of a clearly identified candidate. The Second Circuit did not consider the definitions of "contribution" or "expenditure" under §§ 431(8), (9) which are not limited to "express advocacy" but rather include anything of value made "for the purpose of influencing" the nomination or election of any individual to federal office.

MNPL argues, however, that the Act's definition of "political committee" is limited to entities controlled by or organized to promote a candidate for federal office and since the activities of the draft-Kennedy committees occurred before Senator Kennedy became a candidate,[19/] such activities are beyond the Commission's jurisdiction. This argument ignores the plain meaning of the statute. Congress clearly did not limit the terms "contribution" and "expenditure" as defined in 2 U.S.C. § 431(8), (9) to payments made in support of a "candidate," 2 U.S.C. § 431(2), but rather extended those terms to include activities in support of the nomination or election of any individual to federal office. Indeed, Congress, in other sections of the Act, explicitly used the statutorily defined term "candidate", see, e.g., 2 U.S.C. §§ 431(2), 441a(a)(8), but declined to so qualify the definition of "contribution" and "expenditure."

In support of its argument, MNPL relies on the FECA Amendments of 1979, Pub. L. No. 96-187, 96th Cong., 2d Sess., 93 Stat. 1339. However, the legislative history of the 1979 Amendments clearly indicates that even prior to their enactment, Congress considered draft committees political committees subject to the jurisdiction of the Act. H.R. Rep. No. 96-422, 96th Congress, 1st Sess. at 15 (1979). The 1979 Amendments relate solely to the reporting responsibilities of draft committees, 2 U.S.C. § 434(a)(1), and were enacted "to insure that organizations set up to 'draft' individuals who are not actually candidates will be required to report." Id. (emphasis

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19/ See note 3 supra.

added). The amendments do not indicate that such committees were not subject to other provisions of FECA prior to the 1979 Amendments. Rather, Congress, by enacting the reporting requirements for draft committees in the 1979 Amendments, adopted a legislative recommendation which had been made annually by the Commission since 1976,[20/] and legislated against the backdrop of AO 1979-40 in which the Commission clearly interpreted FECA as extending to draft committees.

The Commission has consistently interpreted FECA as not requiring that a group support a particular candidate for federal office to be a political committee under the Act. Advisory Opinions 1975-81, 1979-40, 1979-41, Fed. Elec. Camp. Fin. Guide (CCH) ¶¶ 5183, 5425, 5427. Thus, MNPL's reliance on AO 1979-26, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5408, R.A. Brief at 16, to demonstrate the Commission's recognition that the statute did not apply prior to candidacy is misplaced. In AO 1979-26, the Commission applied a limited exception to the definition of "contribution;" funds received and payments made solely for the purpose of determining whether an individual should become a candidate are not contributions. 11 C.F.R. § 100.7(b)(1). AO 1979-26 is consistent with the Commission's position that it may investigate whether or not certain groups are affiliated for purposes of the contribution limitation as alleged in the C-M complaint. See also AO 1979-40,

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20/ See Commission Annual Reports cited by MNPL, R-A Brief at 14-15. These recommendations clearly ask only that the reporting provisions of the Act be made applicable to draft committees and neither state nor infer that draft committees were not already subject to other FECA provisions. Rather, the recommendations clearly state that individual contributions to draft committees were then limited to $5,000, the limit applicable to political committees.

supra. The Commission, in AO 1979-49, Fed. Elec. Camp. Fin. Guide (CCH) § 5433, requested by the Independent Campaign to Elect William E. Simon President, an unauthorized political committee, reaffirmed its holding of AO 1979-40. The Commission stated that an authorized committee could, consistent with FECA, accept contributions from individuals of up to $5,000 in accordance with 2 U.S.C. § 44la(a)(l)(c) and further recognized, in accordance with Buckley, that since independent expenditures are expenditures which expressly advocate the election or defeat of a clearly identified candidate, "expenditures made by the committee [could] not be properly categorized as 'independent expenditures' since Mr. Simon [was] not a candidate for nomination." AO 1979-49 at 10,469.

The case before this court concerns a registered political committee's alleged violations of the Act. Documents and materials requested in the Commission's subpoena issued to MNPL which has been enforced by the district court will enable the Commission, charged with the administration and enforcement of the Act, to render a determination on whether the activities conducted by MNPL and the nine named draft committees are subject to the Commission's jurisdiction and whether violations of the Act alleged in the C-M complaint in fact occurred. See J.A. at 50-5l. This court, by denying MNPL's application for stay pending appeal, granted the Commission the authority to proceed with its lawful investigation of the alleged violations of the Act and required

MNPL to produce, for Commission review, the subpoenaed documents in furtherance of such investigation. The Commission requests that this court affirm the district court's ruling which ordered MNPL to produce such documents. However, counsel for MNPL has informed the Commission that, notwithstanding this court's recent denial of its application for a stay, MNPL will not produce any documents for the Commission's inspection until this court renders a decision on the merits of this case. Letter from John Silard to Charles N. Steele (April 16, 1980).

CONCLUSION

For reasons set forth herein, the Commission respectfully requests that this court affirm the district court's order to enforce the Commission subpoena issued to MNPL.

Respectfully submitted,

Charles N. Steele
General Counsel

Kathleen Imig Perkins
Assistant General Counsel

Miriam Aguiar
Attorney

FEDERAL ELECTION COMMISSION
1325 K Street, N.W.
Washington, D.C. 20463

(202) 523-4060

APRIL 25, 1980