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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

April 24, 1995

**SUBMITTED LATE
AGENDA ITEM**

For Meeting of: APR 27 1995

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble 
General Counsel

N. Bradley Litchfield 
Associate General Counsel

SUBJECT: Alternative Draft AO 1995-10

Attached is an alternative draft of the subject advisory opinion for the Commission's consideration on the agenda for April 27, 1995. (The upper right corner of each page is designated with a handwritten letter A.)

The alternative draft concludes that the FECA preempts North Carolina law as to ownership of those records (pre-August 1, 1994) of the Helms Committee that are required to be maintained under the Act and Commission regulations. Thus, the current treasurer has a possessory right to those records as agent for the Helms Committee, notwithstanding the claim of the former treasurer who presently retains them. The FECA does not, however, provide a remedy that would compel the former treasurer to deliver the records to the Helms Committee.

Attachment

DRAFT

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3 ADVISORY OPINION 1995-10

4 Margaret Person Currin
5 Currin Law Firm
6 333 Fayetteville Street Mall
7 Post Office Box 269
8 Raleigh, NC 27602-0269

9 Dear Ms. Currin:

10 This responds to your letters dated March 10 and
11 February 15, 1995, requesting an advisory opinion on behalf
12 of the Helms for Senate Committee ("the Committee")
13 concerning application of the Federal Election Campaign Act
14 of 1971, as amended ("the Act"), and Commission regulations
15 to a dispute over ownership of Committee records.

16 You state that on August 1, 1994 (all dates hereafter
17 are 1994, unless stated otherwise), a new treasurer was
18 appointed for the Committee by Senator Jesse Helms who is a
19 candidate for the 1996 Senate election cycle in North
20 Carolina. He has authorized the Committee as "his one and
21 only" principal campaign committee. The new treasurer is
22 J.C.D. ("Jack") Bailey who replaced the former treasurer,
23 Elisabeth Smith. Soon after his appointment, a dispute
24 developed between Mr. Bailey and the former treasurer
25 regarding certain information and Committee records, as well
26 as other Committee assets, which were apparently developed or
27 acquired before the tenure of Ms. Smith ended on August 1.

28 Counsel to the Committee (and its treasurer) engaged in
29 extensive negotiations with Counsel for the former treasurer
30 to resolve the dispute. The negotiations are reflected in at
least 11 items of correspondence during the period August 19

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until February 3, 1995. At a date soon after December 13, the Committee apparently obtained such "minimal records and information" from the former treasurer, or other personnel, as were required to file a year end report with the Commission (covering all of the Committee's 1994 financial activity) and to file future FEC reports.

You explain that the Committee believes "that this matter [the dispute with the former treasurer] has raised no question about the completeness and accuracy of the Committee's 1994 year-end report or the Committee's ability to file complete and accurate compliance reports in the future." You further state:

Complete donor data is available to assure that all contribution reports are in compliance with the FEC Act. The bookkeeper was able to re-create the Committee's disbursements from July 1-August 1, 1994 so that that portion of the year-end report was complete. As a safeguard, the 1994 year-end report was amended in a timely manner after obtaining and reviewing a copy of the partial report filed for that one-month period by the former treasurer.

Even though, according to your explanation, sufficient records and information have been made available to the Committee to enable it to satisfy all the reporting requirements of the Act, there are numerous other records and related information that are still retained by the former treasurer. You indicate that these records are subject to the Commission rule at 11 CFR 102.9 which provides that Committee records must be retained "for a minimum of three years."

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In a letter (dated January 23, 1995) from Committee Counsel to the former treasurer's Counsel, the withheld records are generally referred to as FEC "compliance data which [the Committee] needs both in the short term and for overall compliance." The letter asserts a "final request that complete copies of all FEC compliance materials and all records related to the 1996 election be provided to the new treasurer forthwith." The letter lists the specific records sought: all FEC reports, all reattribution/redesignation letters, card file of refunds/reattributions/redesignations, paid invoices, tax reports, bank statements, payroll records, check books, batch control sheets, all other FEC compliance materials relative to the 1996 campaign.

For his part, Counsel to the former treasurer has asserted repeatedly that North Carolina law governs this dispute and supports his position that the subject records and information are the property of the former treasurer. Counsel further contends that the current Committee is a new and different committee from the "old committee" which existed during the former treasurer's tenure, and that Senator Helms cannot control the disposition of the "old committee's" assets or records. Counsel has advised the former treasurer that she should retain possession of the "old committee's" records in order to comply with the Act and be in a position to respond to any inquiry by the Commission. Counsel has further represented that the former treasurer has provided the "new" Committee with the information needed for

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its 1994 year-end report and its future FEC reports. Lastly, Counsel explains that the records still retained by the former treasurer, which cover the pre-August 1 activity of the Committee, as well as "the documents that support its FEC reports are readily available to the FEC should they require information." Letter dated February 3, 1995 from former treasurer's Counsel to Committee Counsel.

In view of these circumstances you request an opinion on two questions:

(1) Does the Act preempt North Carolina law concerning the composition of the Committee and the duties and liabilities of the Committee regarding its record keeping responsibilities?

(2) Can the Committee remain in compliance with the Act and Commission regulations if the records of the Committee prior to August 1, 1994, remain in the sole possession of the former treasurer?

In addition, if the former treasurer's retention of Committee records for financial activity before August 1 does not comply with the Act and Commission regulations, the Committee requests assistance from the Commission "in directing the former treasurer to turn over these records, or copies thereof, to the Treasurer [Mr. Bailey] so that [the Committee] can continue to comply with applicable FEC laws and regulations."

Subject to the discussion below and for the reasons stated therein, the Commission concludes as follows:

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3 (1) The Act and Commission regulations recognize only
4 the Committee and its duly designated treasurer as having
5 legal title to and control over all Committee records that
6 are required to be created, obtained, and maintained under
7 the Act and Commission regulations.

8 (2) The Act and Commission regulations preempt and
9 supersede North Carolina law to the extent it would purport
10 to vest ownership rights or title to such records in any
11 person other than the Committee and its treasurer, but the
12 Act does not provide a statutory remedy to the Committee to
13 compel its former treasurer or any other person to deliver
14 such records to the Committee.

15 (3) The Committee and its current treasurer will be in
16 compliance with the recordkeeping requirements of the Act
17 with respect to records required to be created and maintained
18 before August 1, 1994, only if the Committee can establish
19 that it has taken best efforts to obtain those records.

20 (4) The Committee will not be in violation of the
21 recordkeeping requirements of the Act solely on account of
22 the former treasurer's failure to deliver the pre-August 1,
23 1994 records to the Committee's current treasurer. However,
24 the Committee's liability for any failure to file complete
25 and accurate reports, or for knowingly accepting any unlawful
26 contribution, would not be affected by its apparent lack of
27 control or full access to such records, and the Commission
28 will not regard the Committee's lack of control or access as
29 an affirmative defense to any such liability.
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(5) Until such time as the Committee acquires the records in question from its former treasurer, it must identify her on its Statement of Organization as a custodian of its records (i.e. books and accounts) which cover the period ending August 1, 1994.

The Act and Commission regulations delineate in considerable detail the accounts and related records that must be created and maintained by a political committee, its treasurer and other committee agents. 2 U.S.C. §432(c), 11 CFR 102.9. In several respects, the requirements of these provisions directly impose obligations on the treasurer.^{1/}

The regulations also impose other record keeping and record retention obligations on political committees. 11 CFR 104.14(b). These include the duty to keep a variety of bank records pertaining to information required to be reported; vouchers, worksheets and other documents which must provide in sufficient detail the necessary information and data from which reports filed by the political committee may be verified, explained, clarified, and checked for accuracy and

^{1/} For example, the treasurer is required to keep: an account of all contributions received by the committee; the name and address of each person who contributes over \$50 to the committee along with date and amount of each such contribution; the name, address, date, amount, and additional donor identification data for contributions from any person that exceed a total of \$200 during the same calendar year; the full identification of each political committee that makes any contribution along with its date and amount; the name and address of every person who receives a disbursement from the committee along with the date, purpose and amount thereof, with additional documents (receipt, invoice, or canceled check) for disbursements exceeding \$200. 2 U.S.C. §432(c); 11 CFR 102.9(a) and 102.9(b).

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completeness. 11 CFR 104.14(b)(1). There is a minimum three year preservation and retention requirement for all such records and documents which runs from the filing date of the report wherein the record-related transaction is disclosed. 11 CFR 102.9(c), 104.14(b)(3).

Treasurers and their agents are required to perform each of the foregoing duties, as well as those set forth in section 102.9 and other provisions of Commission regulations. See, for example, 11 CFR 103.3 [treasurer must examine all contributions received for evidence of illegality as to donors and to comply with contribution limits]; 11 CFR 104.1(a) and 104.14(a) [treasurer must file and sign periodic financial activity reports for political committee].

The Act and Commission regulations impose the foregoing duties and obligations upon every political committee, and the committee's treasurer has the primary and personal duty to perform them.^{2/} Furthermore, at least one Federal district court decision has held that a treasurer had personal liability for the payment of civil penalties imposed on a defunct political committee for its violations of the Act. Federal Election Commission v. Dramesi for Congress Committee, No. 85-4039 (MHC) (D.N.J. Sept. 5, 1990) (unpublished opinion) [treasurer's liability distinct from

^{2/} 11 CFR 102.9 and 102.9(d) [treasurer and authorized agents shall fulfill all recordkeeping duties and must use best efforts to do so]; 11 CFR 104.14(d) [treasurer personally responsible for complete, accurate and timely filing of reports and other required statements].

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liability of committee for FECA violations, and since Congress chose to hold an individual, the treasurer, responsible for compliance with FECA it follows that "an individual will also stand responsible for his indiscretions as a treasurer."] This personal liability will not be abated or avoided in circumstances where a violation may result entirely or partially from the fact that the required committee records were not held by or under the control of the treasurer.^{3/}

With respect to the preemption of North Carolina law in this situation, the Commission concludes that the Act and Commission regulations would supersede and preempt state law pertaining to the Committee's obligations to organize itself in the manner specified in the Act, to keep records, and to file reports relying on the information maintained in its records. Furthermore, North Carolina law would also be superseded and preempted with respect to the determination of who has title to and ownership of Committee records that are required to be maintained under the Act and Commission regulations.

The Act states that its provisions, and the rules prescribed thereunder, "supersede and preempt any provision

^{3/} See 11 CFR 103.3(b) [treasurer responsible for reviewing all contributions to determine if they are in excess of contribution limits when aggregated with other contributions from same donor] and 11 CFR 102.9(f) [treasurer's failure to maintain documentation concerning designations, redesignations, reattributions and dates of contributions will nullify any attempted revisions regarding election to which contribution attributed for purposes of contribution limits].

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of State law with respect to election to Federal office." 2
U.S.C. §453. The House committee that drafted this provision
intended "to make certain that the Federal law is construed
to occupy the field with respect to elections to Federal
office and that the Federal law will be the sole authority
under which such elections will be regulated." H.R. Rep. No.
93-1239, 93d Cong., 2d Sess. 10 (1974). According to the
Conference Committee report on the 1974 Amendments to the
Act, "Federal law occupies the field with respect to . . .
the conduct of Federal campaigns, and similar offenses, but
does not affect the States' rights" as to other areas such as
voter fraud and ballot theft. H.R. Rep. No. 93-1438, 93d
Cong., 2d Sess. 69 (1974) [emphasis added]. The Conference
report also states that Federal law occupies the field with
respect to reporting and disclosure of political
contributions to and expenditures by Federal candidates and
political committees, but does not affect state laws as to
the manner of qualifying as a candidate, or the dates and
places of elections. Id. at 100-101.

When the Commission promulgated regulations at 11 CFR
108.7 on the effect of the Act on state law, it stated that
the regulations follow section 453. Specifically, Federal
law supersedes state law with respect to the organization and
registration of political committees supporting Federal
candidates, disclosure of receipts and expenditures by
Federal candidates and political committees, and the
limitations on contributions and expenditures regarding

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3 Federal candidates and political committees. Federal
4 Election Commission Regulations, Explanation and
5 Justification, House Document No. 95-44, at 51 (1977). 11
6 CFR 108.7(b). The regulations provide that the Act does not
7 supersede state laws concerning the manner of qualification
8 as a candidate or political party organization, dates and
9 places of elections, voter registration, voting fraud and
10 similar offenses, or candidates' personal financial
11 disclosure. 11 CFR 108.7(c). The Commission explained that
12 "[t]hese types of electoral matters are interests of the
13 states and are not covered in the Act." House Document
14 95-44, at 51.

15 The Act governs the conduct of campaigns for Federal
16 office and prescribes the organizational and disclosure
17 requirements applicable to political committees.^{4/} The noted
18 organizational requirements, along with the related
19 recordkeeping and reporting rules described above, represent
20 the legal framework in which the Committee must conduct its
21 operations. North Carolina law may not encroach upon
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24 4/ Among the requirements are: the committee must be
25 authorized in writing by the candidate on whose behalf it
26 functions and must include the candidate's name in the
27 committee name, it must always have a treasurer in order to
28 accept contributions or make expenditures, it must have a
29 custodian of its books and accounts, and it must maintain at
30 least one bank (or qualified credit union) depository
account. 2 U.S.C. §§432(a), 432(e), 432(h) and 433(b)(3).
The identification of these personnel and the committee's
bank account information shall be disclosed when the
committee registers with the Commission and thereafter
whenever there are changes in personnel, bank accounts or
other necessary data. 2 U.S.C. §433(a), (b), and (c).

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Committee operations or the duties of the Committee's treasurer or other agents as to these matters because they go to the essence of the oversight duties and responsibilities placed upon the treasurer of a political committee. Since the treasurer has potential liability for violations of the Act which may stem from lack of access to or control over political committee records, it follows that the Act gives the Committee an implied right of control to and ownership of the records.^{5/}

This result does not alter the Commission view that in many respects the financial transactions and other operations of a political committee are subject to and governed by state law. For example, the Commission has long held and recently reaffirmed that personal liability of a Federal candidate on a bank loan, or other debt incurred for campaign purposes, is governed by state law and not by the Act. Advisory Opinion 1995-7, citing Advisory Opinion 1989-2. Similarly, the Commission has held more generally that the determination of liability for any debt or contract of a political committee is governed by state law and not the Act. See Advisory Opinions 1984-58, 1981-42 and 1975-102; see also Advisory Opinion 1988-44 [running of state statute of limitations on

^{5/} See Advisory Opinion 1989-27 [Massachusetts statute could restrict personal campaign activity of State employee, who was Federal candidate, but was superseded and preempted by the Act to extent it restricted principal campaign committee of such candidate from accepting or soliciting contributions through the efforts of other personnel acting for the committee.]

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debt owed by committee does not extinguish debt under state law and Commission relies on that result for purposes of the Act's debt reporting rules]. To the same effect is the recent decision of the (Fifth Circuit) United States Court of Appeals in Karl Rove & Company v. Thornburgh, 39 F.3d 1273, 1280 (5th Cir. 1994) [State law controls as to liability of former Federal candidate on contract of his authorized committee, and Act would not preempt application of state law on that issue].^{6/}

The situation presented here, however, does not involve a contract or debt of the Committee, or the personal liability of its authorizing candidate for a campaign loan. Instead, it raises the legal issue of the possible application of State law in a manner that may impair the ability of the Committee treasurer to perform his obligations

^{6/} The Rove opinion also considered the issue of membership in the principal campaign committee authorized by the Federal candidate. It concluded that the state common law of unincorporated associations would apply and that membership in such a committee was a question of fact governed by the intent of both parties--the putative member and the association. The Act and Commission regulations are silent as to the membership of a principal campaign committee (or other candidate-authorized committee). Whether or not a principal campaign committee has members or a membership policy, the committee clearly remains an ongoing organization because the Act requires that it continuously file reports until the proper filing of its termination report which is subject to Commission review and approval. 2 U.S.C. §433(d)(1), 11 CFR 102.3(a) and (b). The facts in this opinion indicate that the Committee is active. It is accepting contributions and making expenditures, and it has never sought to terminate either before or after August 1. Therefore, the position of the former treasurer, that a "new committee" was established after August 1, is not a valid interpretation of the Act or Commission regulations.

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under the Act and Commission regulations. As noted above, the treasurer's duties and the proper performance of those duties are central to a political committee's compliance with the Act and Commission regulations. Those duties arise irrespective of whether the committee has unpaid creditors or outstanding bank loans. Accordingly, the Commission has concluded that the Act and Commission regulations would preempt and supersede the application of North Carolina law on the issue of who has title or ownership rights in the Committee records at issue here.

At the same time, the Commission emphasizes that irrespective of whether the Committee prevails in its further efforts to obtain the records held by the former treasurer, the Committee's obligations (and those of its current treasurer) to comply with all the disclosure requirements, contribution limits and prohibitions, and all other provisions of the Act and Commission regulations remain unaffected by the dispute. In short, the Committee and its treasurer are in the same position regarding those obligations as would be the case if there was no dispute. This means, for example, that the treasurer is personally responsible for the timely filing of complete and accurate reports. 11 CFR 104.14(d). He is also subject to liability if he "knowingly accept[s] a contribution made for the benefit or use of a candidate . . . in violation of any limitation" in section 441a(a). 2 U.S.C. §441a(f).

The Committee believes with good reason that it needs

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3 actual possession of the pre-August 1 records to perform its
4 duties to keep records and otherwise comply with the Act.

5 The Commission notes that the Committee may need to
6 demonstrate that it has taken "best efforts" to acquire the
7 records in question. 2 U.S.C. §432(i), 11 CFR 102.9(d).

8 This showing must be made in the event the Committee claims
9 at some future time that the former treasurer's retention of
10 the records prevented the Committee's compliance with the
11 Act. In the meantime, the Committee must amend its Statement
12 of Organization (FEC Form 1) to identify the former treasurer
13 as the custodian of Committee records predating August 1. 2
14 U.S.C. §§433(b)(3), 433(c). The Committee may note, if
15 desired, that its ownership of the records is disputed by the
16 former treasurer who holds them notwithstanding the protest
17 of the Committee.

18 This response constitutes an advisory opinion concerning
19 application of the Act, or regulations prescribed by the
20 Commission, to the specific transaction or activity set forth
21 in your request. See 2 U.S.C. §437f.

22 Sincerely,

23
24 Danny L. McDonald
25 Chairman

26 Enclosures (AOs 1995-7, 1989-27, 1989-2, 1988-44, 1984-58,
27 1981-42, and 1975-102)
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