



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

APR 21 10 30 AM '95

April 21, 1995

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

SUBJECT: Draft AO 1995-10

Attached is a proposed draft of the subject advisory opinion.

We request that this draft be placed on the agenda for April 27, 1995.

Attachment

**SUBMITTED LATE
AGENDA ITEM**
For Meeting of: APR 27 1995

DRAFT

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

ADVISORY OPINION 1995-10

Margaret Person Currin
Currin Law Firm
333 Fayetteville Street Mall
Post Office Box 269
Raleigh, NC 27602-0269

Dear Ms. Currin:

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

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

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

1
2
3 until February 3, 1995. At a date soon after December 13,
4 the Committee apparently obtained such "minimal records and
5 information" from the former treasurer, or other personnel,
6 as were required to file a year end report with the
7 Commission (covering all of the Committee's 1994 financial
8 activity) and to file future FEC reports.

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

15 Complete donor data is available to assure that all
16 contribution reports are in compliance with the FEC
17 Act. The bookkeeper was able to re-create the
18 Committee's disbursements from July 1-August 1,
19 1994 so that that portion of the year-end report
20 was complete. As a safeguard, the 1994 year-end
21 report was amended in a timely manner after
22 obtaining and reviewing a copy of the partial
23 report filed for that one-month period by the
24 former treasurer.

25 Even though, according to your explanation, sufficient
26 records and information have been made available to the
27 Committee to enable it to satisfy all the reporting
28 requirements of the Act, there are numerous other records and
29 related information that are still retained by the former
30 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."

1
2
3 In a letter (dated January 23, 1995) from Committee
4 Counsel to the former treasurer's Counsel, the withheld
5 records are generally referred to as FEC "compliance data
6 which [the Committee] needs both in the short term and for
7 overall compliance." The letter asserts a "final request
8 that complete copies of all FEC compliance materials and all
9 records related to the 1996 election be provided to the new
10 treasurer forthwith." The letter lists the specific records
11 sought: all FEC reports, all reattribution/redesignation
12 letters, card file of refunds/reattributions/redesignations,
13 paid invoices, tax reports, bank statements, payroll records,
14 check books, batch control sheets, all other FEC compliance
15 materials relative to the 1996 campaign.

16 For his part, Counsel to the former treasurer has
17 asserted repeatedly that North Carolina law governs this
18 dispute and supports his position that the subject records
19 and information are the property of the former treasurer.
20 Counsel further contends that the current Committee is a new
21 and different committee from the "old committee" which
22 existed during the former treasurer's tenure, and that
23 Senator Helms cannot control the disposition of the "old
24 committee's" assets or records. Counsel has advised the
25 former treasurer that she should retain possession of the
26 "old committee's" records in order to comply with the Act and
27 be in a position to respond to any inquiry by the Commission.
28 Counsel has further represented that the former treasurer has
29 provided the "new" Committee with the information needed for
30

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:

(1) The Committee and all its agents, past or present, are required to maintain and keep all records, as specified in the Act and Commission regulations, for the relevant three year period.

(2) Such records must be made available to the Commission in the event of any audit, investigation, or other proceeding conducted under 2 U.S.C. §§437d(a), 437g, or 438(b).

(3) To the extent North Carolina law purports to govern any person's recordkeeping duties as set forth in the Act and Commission regulations, it is preempted and superseded by the Act, but North Carolina law is not preempted as to any issue of title to, or ownership of, Committee records or other property.

(4) The Act does not confer rights or grant remedies to any person with respect to the legal and factual question of title and ownership of Committee records or other property.

(5) The Committee's current treasurer will not be in violation of the recordkeeping requirements of the Act with respect to records required to be created and maintained before August 1, 1994, provided the Committee undertakes its best efforts to obtain those records, including a lawsuit to establish its title and ownership.

(6) The Committee will not be in violation of the recordkeeping requirements of the Act solely on account of the former treasurer's failure to deliver the pre-August 1, 1994 records to the Committee's current treasurer. However,

1
2
3 the Committee's liability for any failure to file complete
4 and accurate reports, or for knowingly accepting any unlawful
5 contribution, would not be affected by its apparent lack of
6 control or complete access to such records, and the
7 Commission will not regard the Committee's lack of control or
8 access as an affirmative defense to any such liability.

9 (7) Until such time as the Committee acquires the
10 records in question from its former treasurer, it must
11 identify her on its Statement of Organization as a custodian
12 of its records (i.e. books and accounts) which cover the
13 period ending August 1, 1994.

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

20 The regulations also impose other record keeping and
21 record retention obligations on political committees. 11 CFR

22
23 1/ For example, the treasurer is required to keep: an account
24 of all contributions received by the committee; the name and
25 address of each person who contributes over \$50 to the
26 committee along with date and amount of each such
27 contribution; the name, address, date, amount, and additional
28 donor identification data for contributions from any person
29 that exceed a total of \$200 during the same calendar year;
30 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).

3 104.14(b). These include the duty to keep a variety of bank
4 records pertaining to information required to be reported,
5 vouchers, worksheets and other documents which must provide
6 in sufficient detail the necessary information and data from
7 which reports filed by the political committee may be
8 verified, explained, clarified, and checked for accuracy and
9 completeness. 11 CFR 104.14(b)(1). There is a minimum three
10 year preservation and retention requirement for all such
11 records and documents which runs from the filing date of the
12 report wherein the record-related transaction is disclosed.
13 11 CFR 102.9(c), 104.14(b)(3).

14 Treasurers and their agents are required to perform each
15 of the foregoing duties, as well as those set forth in
16 section 102.9 and other provisions of Commission regulations.
17 See, for example, 11 CFR 103.3 [treasurer must examine all
18 contributions received for evidence of illegality as to
19 donors and to comply with contribution limits]; 11 CFR
20 104.1(a) and 104.14(a) [treasurer must file and sign periodic
21 financial activity reports for political committee].

22 The Act and Commission regulations impose the foregoing
23 duties and obligations upon every political committee, and
24 the committee's treasurer has the primary and personal duty
25 to perform them. 11 CFR 102.9 and 102.9(d) [treasurer and
26 authorized agents shall fulfill all recordkeeping duties and
27 must use best efforts to do so]; 11 CFR 104.14(d) [treasurer
28 personally responsible for complete, accurate and timely
29 filing of reports and other required statements].
30

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. Dranesi for Congress Committee, No. 85-4039 (MHC) (D.N.J. Sept. 5, 1990) (unpublished opinion) [treasurer's liability distinct from 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. 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 as to election to which contribution attributed for purposes of contribution limits].

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 as regards the Committee's obligations to organize itself in

1
2
3 the manner specified in the Act, to keep records, and to file
4 reports relying on the information maintained in its records.
5 In contrast, North Carolina law would not be superseded or
6 preempted with respect to the determination of who has title
7 to and ownership of Committee records or other property.

8 The Act states that its provisions, and the rules
9 prescribed thereunder, "supersede and preempt any provision
10 of State law with respect to election to Federal office." 2
11 U.S.C. §453. The House committee that drafted this provision
12 intended "to make certain that the Federal law is construed
13 to occupy the field with respect to elections to Federal
14 office and that the Federal law will be the sole authority
15 under which such elections will be regulated." H.R. Rep. No.
16 93-1239, 93d Cong., 2d Sess. 10 (1974). According to the
17 Conference Committee report on the 1974 Amendments to the
18 Act, "Federal law occupies the field with respect to . . .
19 the conduct of Federal campaigns, and similar offenses, but
20 does not affect the States' rights" as to other areas such as
21 voter fraud and ballot theft. H.R. Rep. No. 93-1438, 93d
22 Cong., 2d Sess. 69 (1974). The Conference report also states
23 that Federal law occupies the field with respect to reporting
24 and disclosure of political contributions to and expenditures
25 by Federal candidates and political committees, but does not
26 affect state laws as to the manner of qualifying as a
27 candidate, or the dates and places of elections. Id. at
28 100-101.

29 When the Commission promulgated regulations at 11 CFR
30

3 108.7 on the effect of the Act on state law, it stated that
4 the regulations follow section 453. Specifically, Federal
5 law supersedes state law with respect to the organization and
6 registration of political committees supporting Federal
7 candidates, disclosure of receipts and expenditures by
8 Federal candidates and political committees, and the
9 limitations on contributions and expenditures regarding
10 Federal candidates and political committees. Federal
11 Election Commission Regulations, Explanation and
12 Justification, House Document No. 95-44, at 51 (1977). 11
13 CFR 108.7(b). The regulations provide that the Act does not
14 supersede state laws concerning the manner of qualification
15 as a candidate or political party organization, dates and
16 places of elections, voter registration, voting fraud and
17 similar offenses, or candidates' personal financial
18 disclosure. 11 CFR 108.7(c). The Commission explained that
19 "[t]hese types of electoral matters are interests of the
20 states and are not covered in the act." House Document
21 95-44, at 51.

22 The possible application of North Carolina law to the
23 Committee's dispute with its former treasurer over ownership
24 and title to Committee records requires close scrutiny, given
25 the foregoing language with respect to the Act's coverage of
26 the organizational and disclosure requirements applicable to
27 political committees. The organizational requirements for an
28 authorized principal campaign committee of a Federal
29 candidate are significant, but not extensive. Among the
30

3 requirements are that: the committee is authorized in writing
4 by the candidate on whose behalf it functions and includes
5 the candidate's name in the committee name, it always has a
6 treasurer in order to accept contributions or make
7 expenditures, it has a custodian of its books and accounts,
8 and it maintains at least one bank (or qualified credit
9 union) depository account. 2 U.S.C. §§432(a), 432(e), 432(h)
10 and 433(b)(3). The identification of these personnel and the
11 committee's bank account information must be disclosed when
12 the committee registers with the Commission and thereafter
13 whenever there are changes in personnel, bank accounts or
14 other necessary data. 2 U.S.C. §433(a), (b), and (c).

15 These organizational requirements, along with the
16 related recordkeeping and reporting rules described above,
17 represent the legal framework in which the Committee must
18 conduct its operations. To the extent that North Carolina
19 law may encroach upon or purport to regulate Committee
20 activity as to these matters, it would be superseded and
21 preempted by the Act and Commission regulations. See
22 Advisory Opinion 1980-36 (Ohio statute purporting to require
23 Federal candidate to identify her campaign committee chairman
24 and secretary on campaign advertisements held preempted by
25 the Act.) See also Advisory Opinion 1989-27 (Massachusetts
26 statute prohibiting principal campaign committee of Federal
27 candidate, who was State employee, from accepting or
28 soliciting contributions held preempted to the extent it
29 applied to committee fundraising conducted by other personnel
30

acting for the committee.)

By the same token, the Commission has always recognized 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 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 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 1994 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].^{2/}

^{2/} 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

1
2
3 The situation presented here is not a contract or debt
4 of the Committee, but instead involves the possible
5 application of state property law to determine title to or
6 ownership of the records of an unincorporated association.
7 Contract or debt claims, in essence, present issues of
8 property rights as between different parties. Accordingly,
9 the Commission concludes here, as it did in the cited
10 opinions, that the Act and Commission regulations would not
11 preempt or supersede the application of North Carolina law on
12 the narrow issue of who has title or ownership rights in the
13 Committee records at issue here.

14 At the same time, the Commission emphasizes that
15 irrespective of whether the Committee prevails in its further
16 efforts to obtain the records held by the former treasurer,
17 the Committee's obligations (and those of its current
18 treasurer) to comply with all the disclosure requirements,
19 contribution limits and prohibitions, and all other
20 provisions of the Act and Commission regulations remain

21
22 (Footnote 2 continued from previous page)
23 association. The Act and Commission regulations are silent
24 as to the membership of a principal campaign committee (or
25 other candidate-authorized committee). Whether or not a
26 principal campaign committee has members or a membership
27 policy, the committee clearly remains an ongoing organization
28 because the Act requires that it continuously file reports
29 until the proper filing of its termination report which is
30 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 actively 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.

1
2 unaffected by the dispute. In short, the Committee and its
3 treasurer are in the same position regarding those
4 obligations as would be the case if there was no dispute.
5 This means, for example, that the treasurer is personally
6 responsible for the timely filing of complete and accurate
7 reports. 11 CFR 104.14(d). He is also subject to liability
8 if he "knowingly accept[s] a contribution made for the
9 benefit or use of a candidate . . . in violation of any
10 limitation" in section 441a(a). 2 U.S.C. §441a(f).
11

12 The Committee believes with good reason that it needs
13 actual possession of the pre-August 1 records to perform its
14 duty to keep records and otherwise comply with the Act. The
15 Commission notes that the Committee may need to demonstrate
16 that it has taken "best efforts" to acquire the records in
17 question. 2 U.S.C. §432(i), 11 CFR 102.9(d). This showing
18 must be made in the event the Committee claims at some future
19 time that the former treasurer's retention of the records
20 prevented the Committee's compliance with the Act. In the
21 circumstances presented, a showing of best efforts would
22 require that the Committee initiate and pursue a civil action
23 in the appropriate state or Federal court against the former
24 treasurer or any other persons who have custody of the
25 records. In the meantime, the Committee must amend its
26 Statement of Organization (FEC Form 1) to identify the former
27 treasurer as the custodian of Committee records predating
28 August 1. 2 U.S.C. §§433(b)(3), 433(c). The Committee may
29 note, if desired, that its title to or ownership of the
30

records is disputed by the former treasurer who holds them notwithstanding the protest of the Committee.

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

Sincerely,

Danny L. McDonald
Chairman

Enclosures (AOs 1995-7, 1989-27, 1989-2, 1988-44, 1984-58, 1981-42, 1980-36, and 1975-102)