BEFORE THE FEDERAL ELECTION COMMISSION

MAY 26 11 13 AM '98

In the Matter of	)	
	)	
Erskine Bowles	)	
	)	MURs 4544 and 4407
	)	
	)	

MOTION TO QUASH

Erskine Bowles, through counsel, and pursuant to 11 C.F.R. § 111.15, moves to quash the subpoena issued by the Federal Election Commission (the "Commission" or "FEC") to him in connection with Matters Under Review ("MURs") 4544 and 4407.

Introduction

The Commission has apparently issued this subpoena in connection with its investigation of Democratic National Committee ("DNC") and any state Democratic Party legislative media advertisements run during 1995 and 1996. (See Document Request Numbers 1 through 4, wherein such advertisements are specifically mentioned.)[1] The Commission should quash this subpoena for the following reasons: 1) the document requests and interrogatories are defectively overbroad, and 2) the subpoena relates to matters outside the scope of the Commission's jurisdiction, and therefore, is contrary to law. The advertisements in question did not expressly advocate the election or defeat of a clearly identified candidate, nor did they mention an election or even urge anyone to vote. These communications were thus constitutionally protected. It is not disputed that the Commission, upon a procedurally proper finding, has jurisdiction to examine the question of whether the ads contained an electioneering message, provided that the Commission limits its examination to advertisements which contain words of express advocacy.

---

[1] The subpoena for documents and interrogatories is dated February 23, 1998. Counsel for Mr. Bowles believed that there was no need for a direct response by Mr. Bowles personally as a result of a letter from Deputy Counsel to the President, Ms. Cheryl Mills, Esq., to FEC General Counsel Lawrence Noble dated March 5, 1998. Exhibit A. By letter of May 14, 1998, FEC attorney Joel J. Roessner advised that a response is due from Mr. Bowles for the interrogatories. Exhibit B. As that letter reflects, Mr. Bowles is not aware of any documents responsive to the subpoena in his personal possession. He does, however, respectfully submit that for the reasons that have previously been submitted to the Commission, the document requests are defectively overbroad and exceed the jurisdiction of the Commission.

A. The subpoena is defective because it is overbroad.

The interrogatories in the subpoena are defectively overbroad.

Interrogatory Numbers 1 through 4 are defectively overbroad because they concern all advertisements paid for by the DNC or a State Democratic Party, thereby encompassing activity beyond the scope of the Federal Election Campaign Act of 1971, as amended, 1 U.S.C. § 431 *et seq.* ("FECA").

Interrogatory Number 5 improperly requests information about each meeting and conversation during which there was discussion "...concerning the planning, organization, development and/or creation of television, radio or print advertisements." The request is defectively overbroad because it does not specify the type of advertisements sought or who paid for them.

Moreover, all of the interrogatories erroneously assume a level of knowledge that Mr. Bowles does not have, *e.g.* Interrogatory 13: "Identify each and every television, radio, or print advertisement that November 5 planned, organized, developed and/or created for Clinton/Gore." Mr. Bowles resigned from his prior White House position as Deputy Chief of Staff at the end of 1995, and returned to North Carolina until after the 1996 election. There is no way he would have the knowledge assumed in Interrogatory 13 or any of the other twelve interrogatories.

B. The Commission's request is outside the scope of its jurisdiction, and therefore, is contrary to law.

The Commission subpoena specifically refers to advertisements aired by the DNC during 1995 and early 1996 that are clearly outside the scope of the Commission's jurisdiction.

The Commission has dealt with legislative issue advocacy ads in its advisory opinions and enforcement proceedings. In determining the treatment of such ads under the FECA, the Commission has in the past always applied a two-prong test to the content of a communication in order to determine whether it is issue advocacy or candidate-related. The Commission has thus reviewed the content (i.e., text and images) of an ad and found them to be candidate-related only if "the communication both 1) depicted a clearly identified candidate and 2) conveyed an electioneering message...." FEC Advisory Opinion 1985-14, Fed. Election Camp. Fin. Guide (CCH) ¶5766 (1985). This test has been repeatedly relied upon in Commission Advisory Opinions and enforcement proceedings. See FEC Advisory Opinion 1995-25, Fed. Election Camp. Fin. Guide (CCH) ¶6162 (1995) (hereinafter "AO 1995-25"), MUR 2216 (August 1, 1989), MUR 2370 (June 5, 1986), MUR 4246 (May 6, 1997) and the MUR which eventually led to FEC v. Colorado Republican Campaign Committee, 839 F. Supp. 1448 (D. Colo. 1993); 59 F.3d 1015 (10th Cir. 1995) *rev'd*, 116 S. Ct. 2309 (1996).

In AO 1995-25 the Commission sanctioned as issue advocacy a series of RNC media ads which specifically criticized President Clinton on certain legislative issues. The Commission acknowledged in its opinion that such ads were intended to gain popular support for the Republican legislative agenda and to influence the public's positive view of Republicans. The Commission in its opinion specifically concluded that the "stated purpose" of the ads "encompasses the related goal of electing Republican candidates to Federal office." AO 1995-25 The DNC issue ads were specifically designed to and did comply with the Commission's holding in AO 1995-25.

The Commission's efforts to limit expenditures for communications which do not contain express advocacy have been repeatedly rejected by the courts, many of which have held that the Federal Election Campaign Act does not cover communications which lack express advocacy. Most recently the Court of Appeals for the Fourth Circuit, citing to the Commission's "string of losses" on this issue, summed up existing case law on the topic by concluding that those cases "unequivocally require 'express' or 'explicit' words of advocacy of election or defeat of a candidate." FEC v. Christian Action Network, 894 F. Supp. 946 (W.D. Va. 1995), *aff'd*, No. 95-2600 (4th Cir. 1996); see also Pierce v. Underwood, 487 U.S. 552, 568-71 (1988); Maine Right to Life Committee v. FEC, 914 F. Supp. 8, 10-12 (D. Me. 1996).

Conclusion

The Commission should quash the subpoena issued to Mr. Bowles because it is overbroad and outside the scope of its jurisdiction, thus contrary to law, and erroneously assumes a level of knowledge he does not have.

Respectfully submitted,

Earl J. Silbert
SCHWALB, DONNENFELD & SILBERT
1025 Thomas Jefferson Street, N.W.
Suite 300 East
Washington, D.C. 20007
(202) 965-7910

Counsel for Erskine Bowles

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of May, 1998, I served copies of the foregoing Motion to Quash by hand delivery to the following:

Lawrence Noble, Esquire
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Joel J. Roessner, Esquire
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Earl J. Silbert