



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

AUG 16 2001

Mr. David L. Yarno, Treasurer  
Committee to Elect Conrad Lee  
4409 138<sup>th</sup> Ave. S.E.  
Bellevue, WA 98006-2205

RE: MUR 5159  
Committee to Elect Conrad Lee and  
David L. Yarno, as treasurer

Dear Mr. Yarno:

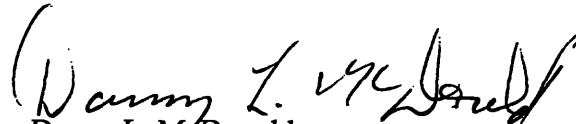
On August 7, 2001, the Federal Election Commission found reason to believe that the Committee to Elect Conrad Lee ("Committee") and you, as treasurer, violated 2 U.S.C. §§ 433, 434, 441a(a)(1)(A), and 441b, provisions of the Federal Election Campaign Act of 1971, as amended ("the Act"). However, after considering the circumstances of this matter, the Commission also determined to take no further action and closed its file. The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information. A Statement of Reasons providing a basis for the Commission's decision will follow.

The confidentiality provisions at 2 U.S.C. § 437g(a)(12) no longer apply and this matter is now public. In addition, although the complete file must be placed on the public record within 30 days, this could occur at any time following certification of the Commission's vote. If you wish to submit any factual or legal materials to appear on the public record, please do so as soon as possible. While the file may be placed on the public record before receiving your additional materials, any permissible submissions will be added to the public record upon receipt.

Mr. David L. Yarno, Treasurer  
MUR 5159  
Page 2

If you have any questions, please contact Michael E. Scurry, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

  
Danny L. McDonald  
Chairman

Enclosure  
Factual and Legal Analysis

cc: Conrad Lee  
4409 138<sup>th</sup> Ave. S.E.  
Bellevue, WA 98006-2205

21-04-405-2507

1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3  
4 RESPONDENTS: Committee to Elect Conrad Lee and MUR: 5159  
5 David L. Yarno, as treasurer  
6

7 **I. GENERATION OF MATTER**

8 This matter was generated by a complaint filed with the Federal Election Commission by  
9 Bryan Griggs. See 2 U.S.C. § 437g(a)(1).

10 **II. FACTUAL AND LEGAL ANALYSIS**

11 **A. The Law**

12 The Federal Election Campaign Act of 1971, as amended (the "Act"), defines a  
13 contribution as "any gift, subscription, loan, advance, or deposit of money or anything of value  
14 made by any person for the purpose of influencing any election for Federal office." 2 U.S.C.  
15 § 431(8)(A)(i). An expenditure is defined as "any purchase, payment, distribution, loan,  
16 advance, deposit, or gift of money or anything of value, made by any person for the purpose of  
17 influencing any election for Federal office." 2 U.S.C. § 431(9)(A)(i). The Commission has  
18 defined "anything of value" to include, among other things, all in-kind contributions, *i.e.*, "the  
19 provision of any goods or services without charge or at a charge which is less than the usual and  
20 normal charge for such goods or services . . . ." 11 C.F.R. §§ 100.7(a)(1)(iii) and 100.8(a)(1)(iv).  
21 Pursuant to 2 U.S.C. § 441b, it is unlawful for corporations, national banks, and labor  
22 organizations to make a contribution or expenditure in connection with any election for federal  
23 office. Pursuant to Washington law, however, corporations and labor unions can make  
24 contributions to committees registered in that state. The Act further provides that a person

(including a committee) may make up to \$1,000 in contributions per election to any candidate for federal office, or his authorized committee. 2 U.S.C. § 441a(a)(1)(A).<sup>1</sup>

The definitions of "contribution" and "expenditure" both include similar "coattail exemptions," which exclude payments made by candidates (including for both State and local offices) or their authorized committees for the cost of campaign materials referencing another candidate that are used in connection with volunteer activities, including bumper stickers, "but not including the use of . . . direct mail, or similar types of general public communication or political advertising." 2 U.S.C. § 431(8)(B)(xi) and 11 C.F.R. § 100.8(b)(17). In the case of contributions, the exemption only applies if the "payments are made from contributions subject to the limitations and prohibitions of this Act," and with respect to "expenditures," if "[t]he payment of the portion of the cost of such materials allocable to Federal candidates [is] made from contributions subject to the limitations and prohibitions of the Act." *Id.* "Direct mail" means any "mailings by commercial vendors or mailings made from lists which were not developed by the candidate." 11 C.F.R. §§ 100.7(b)(16) and 100.8(b)(17).

An independent expenditure is "an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate." 2 U.S.C. § 431(17). The term "clearly

<sup>1</sup> Under Washington law, individuals are limited to contributions of \$600 per election to legislative candidates and party committees are limited to amounts based on the number of registered voters; the latter could lead to excessive contributions under the Act. See Washington Public Disclosure Commission <<http://www.pdc.wa.gov/filerasst/2000lmts.htm>> (accessed July 3, 2001).

identified" means, *inter alia*, that the name of the candidate involved appears. 2 U.S.C. § 431(18)(A).

Pursuant to 11 C.F.R. § 100.22,

*Expressly advocating* means any communication that –

(a) Uses phrases such as "vote for the President," "re-elect your Congressman," "support the Democratic nominee," "cast your ballot for the Republican challenger for U.S. Senate in Georgia," "Smith for Congress," "Bill McKay in '94," "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Hickory," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say "Nixon's the One," "Carter '76," "Reagan/Bush" or "Mondale!"; or

(b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because-

(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

(2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.<sup>2</sup>

Payments involving both expenditures on behalf of one or more clearly identified federal candidates and disbursements on behalf of one or more clearly identified non-federal candidates

<sup>2</sup> Two appellate courts have determined that part (b) of this regulation is invalid. *Maine Right to Life v. FEC*, 98 F.3d 1 (1<sup>st</sup> Cir. 1996) and *FEC v. Christian Action Network*, 110 F.3d 1049 (4<sup>th</sup> Cir. 1997). On September 22, 1999, the Commission unanimously adopted a statement formalizing a pre-existing policy of not enforcing subsection (b) in the First and Fourth Circuits. In January 2000, a district court in Virginia issued a nationwide injunction preventing the Commission from enforcing 11 C.F.R. 100.22(b) anywhere in the country. *Virginia Society for Human Life, Inc. v. FEC*, 83 F.Supp.2d 668 (E.D. Va. 2000). The FEC has filed an appeal of the injunction. The analysis in this Factual and Legal Analysis relies only on 11 C.F.R. § 100.22(a). See discussion *infra*.

are allocated according to the proportion of space devoted to each candidate as compared to the total space devoted to all candidates. 11 C.F.R. § 106.1(a)(1). The regulations further provide that an authorized expenditure made by a candidate or political committee on behalf of another candidate shall be reported as an in-kind contribution to the candidate on whose behalf the expenditure was made. 11 C.F.R. § 106.1(b).

Pursuant to 2 U.S.C. §§ 433 and 434, any organization that qualifies as a "political committee" must register with the Commission and file periodic reports of all receipts and disbursements. The Act defines a political committee as "any committee, club, association, or other group of persons which receives contributions . . . or which makes expenditures aggregating in excess of \$1,000 during a calendar year." 2 U.S.C. § 431(4)(A). For the purposes of the Act, the term "person" is defined as including "an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons . . . ." 2 U.S.C. § 431(11).

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court construed the Act's references to "political committee" in such a manner as to prevent their "reach [to] groups engaged purely in issue discussion." The Court recognized that "[t]o fulfill the purpose of the Act [the definition of 'political committee'] need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." 424 U.S. at 79.<sup>3</sup>

<sup>3</sup> In *Akins v. FEC*, 101 F.3d 731 (D.C. Cir. 1996) (*en banc*), the court held that the Commission's application of the "major purpose" test to find political committee status in MUR 2804 was inappropriate. The court held that the statutory language defining "political committee" is not ambiguous, 101 F.3d at 740, but further noted that the Supreme Court's discussion of "major purpose" in *Buckley* and *MCFL* applied only to independent expenditures, not to coordinated expenditures and direct contributions. *Id.* at 741-42. The Supreme Court subsequently vacated this decision for other reasons, *see FEC v. Akins, et al.*, 524 U.S. 11 (1998), without ruling on the criteria for an organization to be deemed a "political committee."

The Commission has taken the position that, "when determining if an entity should be treated as a political committee, the standard used is whether the organization's major purpose is campaign activity; that is, making payments or donations to influence any election to public office." Advisory Opinion 1996-3.<sup>4</sup> But see *FEC v. GOPAC*, 917 F. Supp. 851, 863 (D.D.C. 1996) (court held that "campaign activity" means "federal" campaign activity for purposes of defining the term "political committee" under the Act).<sup>5</sup>

Regardless of any "political committee" analysis, any person that is not a "political committee" must still report any "independent expenditure" activity in an aggregate amount or value in excess of \$250 during a calendar year to the Commission under 2 U.S.C. §434(c).

#### **B. The Complaint**

Complainant alleges he received a bumper sticker, which he attached to his complaint, on or about September 9, 2000, by bulk mail from the Lee Committee, along with a fundraising letter.<sup>6</sup> The attached bumper sticker contains the phrases, side-by-side, in approximately the same-sized type: "George W. Bush for White House, Conrad Lee for State House." The bumper sticker states at the bottom: "Paid for by: Committee to Elect Conrad Lee (R) 4409 138<sup>th</sup> Avenue SE, Bellevue, WA 98006."

According to Complainant, "The Bumper sticker gave the impression that Conrad Lee was endorsed by the Bush Campaign and vice versa. It also allowed Conrad Lee, District Co-Chair for the George Bush campaign to circumvent Federal Campaign laws by contributing to

<sup>4</sup> Even if an entity becomes a political committee, it is not obligated to use only hard money or to disclose all of its non-federal activity. Political committees may set up separate federal and non-federal accounts. 11 C.F.R. § 102.5(a). Wholly non-federal activity may be paid for from the non-federal account and need not be reported to the Commission.

<sup>5</sup> Advisory Opinion 1996-3 was issued on April 19, 1996, after the *GOPAC* decision, which is dated February 29, 1996.

<sup>6</sup> Complainant was an opponent of Conrad Lee in the primary race for election to the Washington House of Representatives in the 41<sup>st</sup> district.

1 the campaign of George Bush in violation of the laws governing this activity.” Complainant also  
2 enclosed with his complaint a copy of a memorandum, which he states he received from the  
3 “republican party,” and which apparently indicated to Complainant that if his campaign had done  
4 the action he is complaining about here, “we would have risked legal problems.” The enclosed  
5 memorandum is dated September 15, 2000, is addressed to the Bush-Cheney 2000 Strategy and  
6 Political Divisions from the Bush-Cheney 2000 Legal Division Re: “FEC Coattail Exemption—  
7 Opportunity for Down Ballot Candidates to Promote Bush-Cheney Ticket.” The memorandum  
8 appears to describe the legal criteria for qualifying for the Act’s “coattail exemption” and notes  
9 “[w]hen down ballot candidates take advantage of this exemption, the candidates’ campaign  
10 committees can pay to produce the collateral materials without Bush-Cheney having to pay  
11 anything.” It further states, “This is an excellent opportunity for our down ballot campaign allies  
12 to spend money promoting Governor Bush and Secretary Cheney without the campaign having to  
13 pay for it.”

14 Complainant alleges that he contacted the Bush campaign, and “they denied giving any  
15 authorization to” the Lee Committee to distribute the bumper stickers. Complainant estimates  
16 that the Lee Committee printed and mailed over 30,000 of the bumper stickers to households in  
17 the Bellevue area covering the 41<sup>st</sup> legislative district of Washington.

### 18 C. The Response

19 By letter received January 11, 2001, Conrad Lee submitted a response to Complainant’s  
20 allegations, in which he contends that the complaint is not justified. Lee claims that no  
21 contribution was made to Bush by the mailer, the “meat” of which he claims was a letter to the  
22 voters advocating Lee’s election. He also claims that the mailer only incidentally included the  
23 bumper sticker, and that it was meant to benefit his own election, not Bush’s. According to Lee,



1 there was no contribution as he was trying to convey his own political position in his own  
2 election. He claims that the mailer was sent only to identified Republicans in the district, with  
3 fewer than 8,000 copies mailed. Moreover, Lee states that the mailing was made during the  
4 Washington State Primary Election, long after the state's Presidential Primary was over, and that  
5 the General Election was still months away. He expresses his hope that there will be no  
6 reason-to-believe findings, no action will be taken, and that the file will be closed. The Lee  
7 Committee did not separately respond.

#### 8 D. Analysis

9 George W. Bush was a candidate for President of the United States in September 2000.  
10 The phrase on the bumper stickers, "George W. Bush for White House," can in context have no  
11 other reasonable meaning than to urge the election of Mr. Bush, and therefore is express  
12 advocacy. *See* 11 C.F.R. § 100.22(a). Accordingly, the bumper stickers would constitute an  
13 independent expenditure by the Lee Committee or, if coordinated, an in-kind contribution by the  
14 Lee Committee to the Bush campaign, unless the "coattail exemption" applies. In order to come  
15 within the exemption, the bumper stickers must have been used in connection with volunteer  
16 activity, not mailed by commercial vendors, and mailed from lists developed by the candidate. In  
17 addition, the funds used to pay for the bumper stickers must have come from contributions  
18 subject to the limitations and prohibitions of the Act. *See* 11 C.F.R. §§ 100.7(b)(16) and  
19 100.8(b)(17).

20 Conrad Lee's response does not address who distributed the mailings enclosing the  
21 bumper stickers, the source of the list(s) from which names and mailing addresses were obtained,  
22 or whether the funds used to pay for the bumper stickers came from contributions subject to the  
23 limitations and prohibitions of the Act. However, it appears from a review of the Lee Committee

1 reports filed with the State of Washington that the Lee Committee accepted corporate  
 2 contributions, and that such funds were commingled with funds used to pay for the production  
 3 and distribution of the bumper stickers.<sup>7</sup> Accordingly, if the coattail exemption does not apply,  
 4 then the Lee Committee made an independent expenditure, which should have been reported  
 5 pursuant to section 434(c) of the Act.

6 If the coattail exemption does not apply, the Lee Committee may be a political committee  
 7 for purposes of the Act. In addition to likely meeting the monetary threshold for political  
 8 committee status in connection with the production and distribution of the bumper stickers,  
 9 which advocated the election of George W. Bush, *see* 2 U.S.C. § 431(4)(A)<sup>8</sup>, presumably the  
 10 remainder of the Lee Committee's resources were devoted to campaign activity, namely the  
 11 election of Conrad Lee. If the Lee Committee was a political committee under the Act, it was  
 12 required to file with the Commission pursuant to 2 U.S.C. §§ 433 and 434.

13 Therefore, there is reason to believe the Committee to Elect Conrad Lee and David L.  
 14 Yarno, as treasurer, violated 2 U.S.C. §§ 433, 434, 441a(a)(1)(A), and 441b.

<sup>7</sup> Mr. Lee's claim that the bumper stickers were intended to benefit his election, not Bush's, is not relevant to the applicability of the coattail exemption. The legislative history of 2 U.S.C. § 431(8)(A)(xi) makes it clear that Congress considered and rejected such a test as a factor in determining whether an expenditure would qualify for the coattail exemption. *See* H.R. Rep. No. 422, 96<sup>th</sup> Cong., 1<sup>st</sup> Sess., at 10 (1979) reprinted in *FEC Legislative History of Federal Campaign Act Amendments of 1979* at 185 (1983).

<sup>8</sup> Payments involving expenditures on behalf of a federal candidate and disbursements on behalf of a non-federal candidate must be allocated according to the proportion of space devoted to each candidate. 11 C.F.R. § 106.1(a)(1). The allocation for the bumper stickers here is 50% for both Lee and Bush, based on the equal space given to each candidate on the bumper stickers. Therefore, if there was a contribution or expenditure, 50% of the total cost of the creation, production, and distribution of the bumper stickers must be allocated to the federal candidate. Using the candidate's figure of the distribution of the bumper stickers to just 8,000 households, as opposed to the 30,000 estimated by the complainant, postage would have had to be only \$.25 per mailing to reach \$1,000 allocated to the Bush campaign, and that is without adding in the costs of creation and production of the bumper stickers.