



FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)	
)	MUR 5604
William D. Mason; Friends of William D. Mason)	
and Thomas Regas, in his official capacity as)	
Treasurer)	

**STATEMENT OF REASONS OF CHAIRMAN ROBERT D. LENHARD AND
COMMISSIONERS STEVEN T. WALTHER AND ELLEN L. WEINTRAUB**

In this matter, a candidate for reelection as Cuyahoga County Prosecutor, William D. Mason (the "Mason Committee"), had volunteers distribute a leaflet which supported both Mason's re-election to County office and John Kerry's Presidential candidacy in the 2004 election. A complaint was filed with this agency alleging that the cost of the Mason Committee's leaflet was both an in-kind contribution to the Kerry-Edwards 2004 campaign and an "expenditure" that counted toward the monetary threshold that would make the Mason Committee a federal "political committee." The complaint also alleged that the leaflet did not have a disclaimer that met the standards of federal law.¹

In crafting the Federal Election Campaign Act of 1971, as amended (FECA), Congress made clear that state and local candidates and political parties can spend money on materials (including handbills) that are used in volunteer activities, and that those payments are not

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“contributions” or “expenditures” under the law, even if the handbill advocates the election of federal candidates along with the election of state and local candidates.² 2 U.S.C.

§§ 431(8)(B)(ix)&(x) and 431(9)(B)(viii) (“coattails exemption”).³ Congress also made clear that this exemption for volunteer activity does not extend to communications by “broadcasting, newspapers, magazines, billboards, direct mail, or similar types of general public communication or political advertising.” See, e.g., 2 U.S.C. 431(8)(B)(x). The Commission’s regulations maintain this distinction between volunteer materials (including handbills and brochures) on the one hand and paid public communications and political advertising (including television, radio and newspaper advertising) on the other. 11 CFR §§ 100.88 and 100.148.

We agree with the Office of General Counsel (“OGC”) that the Mason Committee’s volunteer activity met all of the requirements of the “coattails exemption” and as a consequence, the payment was neither an in-kind contribution to the 2004 Kerry-Edwards campaign nor an “expenditure” that would count toward the Federal “political committee” monetary threshold. This resolved the central legal issues specifically raised in the complaint.

We write to explain why we believe that the Mason Committee’s leaflet did not run afoul of the new restrictions Congress placed on state and local candidates in the Bipartisan Campaign Reform Act of 2002 (BCRA), i.e., restrictions on state and local candidates paying for “public communications” that promote, support, attack, or oppose (PASO) a clearly identified federal candidate.

¹ The handbill stated that it was paid for by the Mason Committee.

² We agree with the Office of General Counsel that a leaflet such as this one qualifies as a “handbill,” which is the term that is used in the statute. First General Counsel’s Report, at page 4.

³ Under the coattails exemption, any costs allocable to Federal candidates must be made from contributions subject to the limitations and prohibitions of the Act. The Mason Committee’s state disclosure reports show that the committee had sufficient FECA-compliant funds to cover the costs allocable to the Kerry portion of the handbill.

In adopting the BCRA amendments to FECA, Congress required that state and local candidates that fund public communications that PASO a clearly identified federal candidate must use only funds that are subject to the limits, prohibitions and reporting requirements of FECA.⁴ 2 U.S.C. 441i(f)(1). Congress defined a “public communication” to include any communication “by means of broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising.” 2 U.S.C. 431(22). We do not believe the Mason Committee leaflet fits the definition of an “other form of general public political advertising,” and thus it is not a public communication under section 431(22).

In passing the BCRA amendments that increased the regulation of state and local candidate’s use of “public communications,” Congress did not intend to supersede or implicitly repeal the coattails exemption. Congress has been explicit that a handbill that meets the test of the coattails exemption is different and distinct from “broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising.” 2 U.S.C. 431(9)(B)(viii). The BCRA amendments specifically define a public communication to include “broadcast, cable, satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public or any other form of general public political advertising.” 2 U.S.C. 431(22). We conclude that Congress intended these two sections to be read in harmony, rather than to have the latter implicitly repeal the former. Thus,

⁴ This is similar to, but not the same as, the requirements for the coattails exemption, which requires that communications be paid for with funds that are in compliance with the limitations and prohibitions of FECA. The BCRA amendments require both of those things, as well as that the requirement that the funds comply with the reporting requirements of FECA. It is the Mason Committee’s failure to use funds that complied with the reporting requirements of FECA that would define the violation if we were to follow the OGC analysis.

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to the degree that an expenditure qualifies for the coattails exemption, it is not a public communication.

Our colleagues agree with us that the Mason Committee leaflet is not a “public communication,” but they draw the further conclusion that because handbills are distinguished from “general public communication or political advertising” at 2 U.S.C. 431(8)(b), they can never qualify as “general public political advertising” and hence as “public communications” under 2 U.S.C. 431(22). Were that to be true, the consequence would be that many regulations that are tied to the definition of a “public communication” would not apply to handbills (and presumably the other materials discussed in the coattails exemption) regardless of who paid for them and how they were paid for, and whether they were used in connection with volunteer activity.⁵ A blanket exclusion of handbills from the definition of “public communication” would also be inconsistent with many of the agency’s other regulations. For example, Commission regulations require disclaimers on public communications that qualify as exempt activities. See 11 CFR 110.11(e). If exempt activities could never qualify as public communications, this regulation would never apply. Commission regulations also specifically provide that bumper stickers and pins, two items that are eligible for the coattails exemption, do not require disclaimers. 11 CFR 110.11(f) (disclaimer exemption); 11 CFR 100.148 (coattails exemption). If these items are already exempt from the disclaimer requirements by virtue of their eligibility to the coattails exemption, the regulatory exemption is redundant.

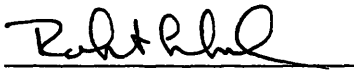
We choose a narrower analysis and conclude that for the same reasons that the Mason Committee’s handbill was eligible for the “coattails exemption” and therefore exempt from the

⁵ Presumably, pins, bumper stickers, brochures, poster, party tabloids and yard signs could never be “public communications.” While this might make sense were they used in conjunction with volunteer activity under the

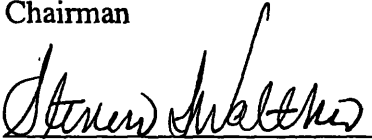
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Commission's definitions of "contribution" and "expenditure," the Mason Committee's handbill was also not "general public political advertising" and therefore not a "public communication." Having concluded that the handbill in this matter was not a "public communication," there was no need to analyze whether FECA's disclaimer and soft money provisions may have been violated. Therefore, we voted to find no reason to believe that Friends of William D. Mason and Thomas Regas, in his official capacity as treasurer, violated 2 U.S.C. §§ 441d(a)(3), 441d(c) and 441i(f)(1), take no further action and close the file.

March 13, 2007



Robert D. Lenhard
Chairman



Steven T. Walther
Commissioner



Ellen L. Weintraub
Commissioner

terms of the coattails exemption, we are not prepared to read them out of that definition without regard to how they are paid for or by whom.