UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Jon Epstein,
Plaintiff

v. Civil Action No. 81-0336

Federal Election Commission,
Defendant

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO THE FEDERAL ELECTION COMMISSION'S MOTION FOR SUMMARY JUDGMENT

I. STATEMENT OF THE CASE

On August 28, 1980, the plaintiff filed an administrative complaint with the Federal Election Commission, alleging that Reader's Digest Association, Inc., had violated the ban on corporate expenditures in connection with an election. This violation resulted from the placing of an advertisement in the August 27, 1980, issue of the Washington Post(Plaintiff Exhibit #1 to the instant Memorandum).

On October 31, 1980, the first General Counsel Report concerning plaintiff's administrative complaint was transmitted from the FEC Office of General Counsel to the Commission(Plaintiff Exhibit #1 in Support of Plaintiff's Rule 56(f) Motion, incorporated herein by reference). On November 3, 1980, the Commission, by a 2-2 vote with one abstention, rejected the no-reason-to-believe-a-violation-occurred recommendation of the first General Counsel Report(Plaintiff Exhibit #2 in Support of Plaintiff's Rule 56(f) Motion, incorporated herein by reference).

The plaintiff initiated the instant civil action on February 11,1981, alleging that the Commission, contrary to law, had failed to act on plaintiff's administrative complaint. On March 12, 1981, the day after the Federal Election Commission received service of process in the instant case, the second General Counsel's Report dealing with plaintiff's administrative complaint was transmitted to the Commission(Defendant FEC's Exhibit #4 in support of its summary judgment motion, incorporated herein by reference).

The Commission, on March 24, 1981, by a five to one vote, adopted

the recommendation of the General Counsel's Office to dismiss the administrative complaint and to find that no violation of election law had occurred.

By Order of this Court, the plaintiff, on May 19, 1981, was permitted to file a supplemental complaint, challenging the validity of the Commission's dismissal of the administrative complaint.

II. THE CONSISTENCY OF THOSE GENERAL COUNSEL REPORTS WHICH DEAL WITH THE SAME LEGAL ISSUES AS PLAINTIFF'S ADMINISTRATIVE COMPLAINT IS A MATERIAL FACT IN GENUINE DISPUTE.

The plaintiff remains steadfast in his view that the consistency of those General Counsel Reports which deal with the same legal issues as plaintiff's administrative complaint is a material fact in genuine dispute.

As the plaintiff earlier noted in his Reply Memorandum supporting a Rule 56(f) Motion, a question exists as to whether the General Counsel Reports should be treated as statements of agency reasoning.

The plaintiff has contended that these General Counsel Reports should be treated as statements of agency reasoning. In addition to the discussion of this question contained in Plaintiff's Reply Memorandum supporting a Rule 56(f) Motion, the plaintiff makes one further argument.

Though the FEC inserts in The FEC Record a disclaimer with respect to the legal analysis contained in the General Counsel Reports, the agency in this same publication discusses the legal analysis of the General Counsel Reports at length in explaining Commission actions on Matters Under Review. Thus, in the June 1981 issue of The FEC Record(Plaintiff Exhibit #2 to the instant Memorandum), the FEC, in summarizing MURs 1167, 1168, 1170, 1178, and 1179, uses the legal analysis contained in the General Counsel Reports to explain the actions of the Commission. In essence, the Federal Election Commission, regardless of the disclaimer, employs the General Counsel Reports as teachings of agency law via an agency publication which is sent to all political committees required to register with the Commission.

Assuming the General Counsel Reports are statements of agency reasoning, the plaintiff contends a material fact remains in dispute. A question of law, the amount of deference to be accorded Federal Election Commission dismissals of administrative complaints, is dependent on a question of fact, the consistency of legal analysis in those General Counsel Reports that deal with the same legal issues as plaintiff's administrative complaint. The link between deference and consistency was distinctly established in Democratic Senatorial Campaign Committee v. Federal Election Commission, No. 80-2074(D.C. Cir., Oct. 9, 1980),(Pet. for cert. granted March 2, 1981).

The material fact in dispute, the consistency of the legal analysis in the General Counsel Reports, can not be fully resolved without discovery of those General Counsel Reports which are not on the public record but which deal with the same legal issues as plaintiff's administrative complaint. However, the Court's Order of July 17, 1981, effectively prevents this discovery.

III. THE COMMISSION'S DISMISSAL OF PLAINTIFF'S ADMINISTRATIVE COMPLAINT IS ENTITLED TO MINIMAL DEFERENCE AT BEST.

A. If the General Counsel Reports are not treated as statements of agency reasoning, the FEC dismissal of plaintiff's administrative complaint is entitled to minimal deference.

In Democratic Senatorial Campaign Committee, supra at 9 of the slip opinion, the Court stated in explaining why the FEC was not entitled to substantial deference:

> First, the Commission has presented no reasoned explanation of its decision. It merely pronounced that it found "no reason to believe" that the NRSC violated the Act in making expenditures as agent of the national and State committees. [footnote omitted]

Basically, there is nothing to give deference to.

With respect to plaintiff's administrative complaint, the Commission accepted the recommendation of the second General Counsel's Report while rejecting the same recommendation in the first

General Counsel's Report; yet both General Counsel Reports, in their basic analysis of the administrative complaint, are identical. For all the plaintiff knows, the initiation of the instant civil action may have been the basis of the FEC's dismissal of the administrative complaint.

B. If the General Counsel Reports are treated as statements of agency reasoning, the FEC dismissal of plaintiff's administrative complaint is entitled to minimal deference.

The only thing consistent about the FEC's approach to cases similar to plaintiff's administrative complaint is the constant presence of a great deal of inconsistency.

Plaintiff's Exhibit #3 to the instant memorandum consists of parts of MUR #200/213, an administrative complaint involving newspaper advertisements placed by the Okonite Company. Rather than use a "major purpose" test to determine whether a prohibited corporate expenditure had been made, an "effect" test was employed by the General Counsel. Thus, at 4 of the General Counsel's Report which recommended a reason-to-believe-a-violation-occurred finding, the General Counsel of the Commission stated:

> In our view, the proximity of the general election overshadows the purported informative role of the Okonite advertisements and gives them a clear political effect.

At 14 of the General Counsel's Report which recommended a reasonable-cause-to-believe-a-violation-occurred finding, the General Counsel of the FEC stated:

> Commission policy has been consistent with congressional intent in interpreting the prohibition on corporate contributions and expenditures strictly and preserving "in connection with" as a standard distinct from "for the purpose of influencing."

In MUR #627(Plaintiff's Exhibit #3 in Support of Plaintiff's Rule 56(f) Motion, incorporated herein by reference), an "effect" test was also used to determine whether a prohibited expenditure had been made. In the FEC's memorandum in opposition to plaintiff's

Rule 56(f) motion, the Commission contends at 5-6 that since the administrative respondent in MUR #627 was not a member of the institutional press, it was necessarily treated differently.

The plaintiff contends that no such distinction can be made. The United States Supreme Court in recent cases has indicated that non-media corporations and businesses can not be prohibited from discussing issues of public and/or commercial importance. First National Bank of Boston v. Bellotti, 435 U.S. 765(1978); Consolidated Edison Company v. Public Service Commission, 100 S. Ct. 2326(1980); Bigelow v. Virginia, 421 U.S. 809(1975).

In Bellotti, supra at 802, Chief Justice Burger, in a concurring opinion, stated after discussing the difficulties of distinguishing between media and non-media corporations:

> Because the First Amendment was meant to guarantee freedom to express and communicate ideas, I can see no difference between the right of those who seek to disseminate ideas by way of a newspaper and those who give lectures or speeches and seek to enlarge the audience by publication and wide dissemination.

Basically, no distinction should be made between the advertisements of media and non-media corporations.

The FEC also avoided using a purpose test in MUR #895(parts of which represent Exhibit #4 to the instant memorandum). In this MUR, a corporation sent to its employees a letter stating the position of two Congressional candidates on the issues and the corporate view of the candidates' position on the issues. In suggesting that a prohibited corporate expenditure had been made in this MUR, the General Counsel in his report avoided using any kind of "effect" or "purpose" test but merely noted that the communication to the employees did not fall within one of the statutory exceptions to the definition of an "expenditure in connection with an election."

Reviewing the situation, one finds that the contention of the Commission that it has been consistent in determining what represents an "expenditure in connection with an election" is nonsensical. Sometimes the FEC uses a "purpose" test; sometimes the Commission uses an "effect" test; and, occasionally, as in MUR #895, the FEC simply assumes that the expenditure is in connection with an election.

IV. THE FEDERAL ELECTION COMMISSION'S DISMISSAL OF PLAINTIFF'S ADMINISTRATIVE COMPLAINT WAS CONTRARY TO LAW.

A. The Content of the advertisement.

At the top left hand corner of the advertisement is the underlined phrase, "A Search for Solutions." This section of the ad was not reproduced in the FEC Exhibit #1 in support of its motion for summary judgment, and thus apparently was not included in the administrative record upon which the Commission acted. The omission of part of the subject matter of the administrative complaint from the administrative record upon which the Commission acted is yet another reason to avoid giving deference to the Commission's dismissal of the administrative complaint.

At the top of the ad, Reader's Digest, not anybody else, asks in bold print, "Which Political Party Should Lead the Next Congress." Likewise, Reader's Digest, not the two Congressmen, stated the following two electoral advocacies in the ad: "Why You Should Vote Republican" and "Why You Should Vote Democratic." In the September 1981 issue of Reader's Digest, these two electoral advocacies represent the titles of the two articles by the Congressmen; in the advertisement, however, these two electoral advocacies are the words of Reader's Digest.

Under each of the two electoral advocacies, a U.S. Congressman's article in Reader's Digest is excerpted. Each of the Congressmen in the advertisement suggests that one vote for the Congressional candidates of the Congressman's party and vote against the Congressional candidates of the other major political party.

At the bottom right hand corner of the ad, Reader's Digest gives an address to which one may send a request for reprints of articles appearing in the periodical.

B. A "purpose" test and a "normal press function" test should not be used to determine the existence of prohibited corporate expenditures in connection with an election because the adoption of either test will severely weaken the Congressional ban on corporate political expenditures.

The Federal Election Commission used a "major purpose" test in

determining the validity of the ad by Reader's Digest. In a recently decided case in the District of Columbia Circuit, a U.S. District Court suggested that one must see if the corporate expenditure by a publisher is part of the normal press function in order to determine a 2 U.S.C. 441b(a) violation. FEC v. Phillips Publishing Company, Misc. 81-00079(D.D.C., filed July 16, 1981).

The major purpose test is worthless because any periodical, with respect to promotional expenditures that advocate the election or defeat of politicians, can validly contend it is simply trying to sell the periodical. Thus, for a left wing periodical, a good way to gain readers who will be attracted to the themes of the periodical, is to advocate the defeat of right wing politicians and the election of left wing politicians in the promotional materials of the periodical.

For example, in its efforts to sell newspapers, the Revolutionary Worker could advertise its support of communist candidates and the defeat of candidates representing mainstream politics; such an advertisement might well encourage people who have communist leanings to buy the Revolutionary Worker, a communist newspaper. Likewise, the New Republic could have advertised its electoral support of John Anderson as a device to attract the subscriptions of independently-minded voters. And Reader's Digest might have published electoral advocacies of the candidates of the two major parties in an effort to gain mainstream readers for a mainstream periodical.

Thus, using a purpose standard, left wing publications could sponsor electoral advocacies of left wing candidates via advertising, right wing publications could promote electoral advocacies of right wing candidates, and mainstream publications could promote mainstream candidates. If a purpose standard were used to judge the expenditures of non-media corporations, such corporations could promote, via advertising, the candidacies of popular politicians as a means of getting consumers to buy their products; thus, General Motors could

in Massachusetts advertise its support for Senator Kennedy while in Illinois it might wish to endorse Senator Percy, both endorsements being given as means to sells automobiles.

Basically, use of the purpose standard wipes out the Congressional ban on corporate expenditures in connection with an election. Adoption of the "normal press function" test would have the same result, for the promotion of one's product is part of the normal press function. Express electoral advocacies in promotional materials could be an excellent way to attract new readers and would have to be considered part of the normal press function. Using the "normal press function" test, left wing publications could promote the candidates who were left-of-center via advertising, right wing publications could do the same for right wing candidates, environmentally-oriented publications could promote enivironmentally-oriented candidates, health magazines could promote health-oriented candidates, etc.

C. The advertisement by Reader's Digest is not a debate within the meaning of 11 CFR 110.13 and 114.4(e)(2).

The plaintiff notes that the Federal Election Commission at 2 of the first General Counsel's Report dealing with plaintiff's administrative complaint stated that "...activity which falls within the news story/ commentary exemption is not covered by the debate regulations. (See Federal Register, Vol. 44, No. 249, pg. 76734.)". Thus, the two articles themselves would not be considered a debate, at least according to the Commission.

The plaintiff contends that the advertisement is also not a debate within the meaning of the regulations. Representatives Kemp and Wright are not electoral opponents. 11 CFR 110.13(b) requires that the debate "...not promote one candidate over another." Because Representatives Kemp and Wright are not electoral opponents, it might be difficult for Reader's Digest to promote one over the other, resulting in the conclusion that the regulations were meant to apply to candidates who were electoral opponents.

of the debate regulations.

Lastly, the ad is composed of excerpts from two articles. Reader's Digest should not be allowed to pick and choose from the two articles and present the excerpts as a debate. A debate is a discussion between two or more people, not the sponsor's interpretation of that discussion. Otherwise, a sponsor could skew a debate through its interpretation of the discussion. If the two Congressmen approved of the excerpts, plaintiff contends that such approval results in a corporate contribution in connection with an election, an idea that will be discussed in the following section.

D. The Reader's Digest advertisement represented either a contribution or an expenditure in connection with an election, and probably represented an independent expenditure as defined in 2 U.S.C. Sec. 431(17) and (18).

In looking at the advertisement, the quotations from the two Congressmen should be taken into consideration; the prohibition of 2 U.S.C. 441b(a) would be of little value if a corporation could contend that the views put forth were merely those of individuals. Reader's Digest is spending money to sponsor electoral statements, be they corporate statements or the statements of the two Congressmen.

If the excerpts were approved by the two Congressmen, the regulations of the Federal Election Commission would label the expenditure of Reader's Digest a contribution to the two Congressmen, for the ad would likely represent a republication of campaign material. 11 CFR 109.1(d)(1).

If no coordination was present between Reader's Digest and the two Congressmen in setting up the advertisement, a prohibited independent expenditure has been made by Reader's Digest. Representative Jack Kemp suggests to the readers of the Washington Post that they support each and every Republican candidate for Congress and oppose each and every Democratic Congressional candidate; Representative

Wright suggests that the readers of the Washington Post vote for each and every Democratic candidate for Congress and oppose the Republican Congressional candidates.

Though the name of each and every Democratic and Republican Congressional candidate is not mentioned in the ad, the identity of these candidates is apparent by unambiguous reference in accordance with 2 U.S.C. Sec. 431(18)(C).

The phrases, "Which Political Party Should Lead the Next Congress," followed by "Why You Should Vote Republican" and "Why You Should Vote Democratic," are statements of express advocacy, as defined both by the FEC regulations and the U.S. Supreme Court in Buckley v. Valeo, 424 U.S. 1(1976).

Plaintiff points out that the "major purpose" test has been ignored by the Courts in defining what is an independent expenditure. In F.E.C. v. Central Long Island Tax Reform Immediately Committee, 616 F.2d 45(Second Circuit, 1980), the Court stated at 53:

> The history of Sections 434(e) and 441d thus clearly establish that, contrary to the position of the FEC, the words "expressly advocating" means exactly what they say....The FEC would apparently have us read "expressly advocating the election or defeat" to mean for the purpose, express or implied, of encouraging election or defeat. This would, by statutory interpretation, nullify the change in the statute ordered in Buckley v. Valeo and adopted by Congress in the 1976 amendments. The position is totally meritless.

The plain meaning definition of express advocacy was also adopted by the Court in FEC v. American Federation of State, County and Municipal Employees, 471 F. Supp. 315(D.D.C. 1979).

In essence, Reader's Digest has made an independent expenditure as defined by federal election law, an expenditure which was not reported as required by 2 U.S.C. Sec. 434(c)(1) and which is prohibited by the legislative ban on corporate expenditures in connection with an election. Reader's Digest can conduct its "Search for Solutions" in its magazine with absolutely no legislative restraints; 2 U.S.C. Sec. 441b(a), however, prevents a political search for solutions in the advertising pages of the nation's newspapers.

E. Conclusion

In Cort v. Ash, 422 U.S. 66(1975), the United States Supreme Court at 81-82 suggested that the purpose of the prohibition on corporate political expenditures was to prevent possible corruption of the electoral process and to protect the rights of dissenting shareholders.

Advertisements such as the one placed by Reader's Digest in the Washington Post crushes the rights of those shareholders who do not support either of the two major political parties. More importantly, the ad presents the potential for corruption of the political process: the advertisement distorts the electoral system by impressing upon voters the sanctity of the two major political parties and Reader's Digest may have bought itself some influence within the executive and legislative decisionmaking processes through the placement of the ad.

The "expenditure in connection with an election" prohibition originated in the Taft-Hartley Act of 1947. Senator Taft in explaining this prohibition stated at 93 Congressional Record 6437 (June 5, 1947):

> I would say the word "expenditure" does not mean the sale of newspaper for money for their worth. If they are sold to subscribers and if the newspaper is supported by subscriptions, then I would not say that constituted such an expenditure. But if the newspapers were given away--even an ordinary newspaper--I think that would violate the Corrupt Practices Act. That act would be violated, it seems to me, if such a newspaper were given away as a political document in favor of a certain candidate. I think that would have been so under the present law, and I think we make it more clearly so, perhaps, by this measure.

Plaintiff hopes the Court will uphold the integrity of the Congressional prohibition on union and corporate political expenditures.

Respectfully submitted,

Aug. 1, 1981

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury that on August , 1981, the above memorandum and supporting exhibits was mailed, in the form of a Xerox copy, to the following individual, first class postage prepaid:

Mr. R. Scott Rinn
Office of the General Counsel
Federal Election Commission
1325 K Street, N.W.
Washington, D.C. 20463.

Aug 7, 1981

Jan Epstein