

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN, INC.,)
1600 20th Street, NW,)
Washington, DC 20009,)
)
CRAIG HOLMAN,)
309 Maryland Avenue, NE #3,)
Washington, DC 20002,)
)
and)
)
TAYLOR LINCOLN,)
207 Randolph Place, NE,)
Washington, DC 20002,)
)
Plaintiffs,)
v.)
)
FEDERAL ELECTION COMMISSION,)
999 E Street, NW,)
Washington, DC 20463,)
)
Defendant.)
_____)

No. 1:09-cv-00762-RWR

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Introduction

1. This complaint is a petition for review under 2 U.S.C. § 437g(a)(8) of an order of the Federal Election Commission (the FEC or the Commission) dismissing an administrative complaint filed with the Commission by plaintiff Public Citizen, Inc., as well as individual plaintiffs Craig Holman and Taylor Lincoln. Public Citizen’s administrative complaint sought action by the Commission against another organization, Americans for Job Security (AJS), on the ground that AJS had unlawfully failed to register with the FEC as a political committee and had violated other legal requirements of the Federal Election Campaign Act (FECA) applicable

to political committees. The Commission divided equally over whether there was reason to believe that AJS had violated the law, and as a result dismissed Public Citizen's complaint. The Commissioners supplied statements of reasons for their votes only after the filing of the initial complaint in this action, and after the time for filing an action challenging their decision would have expired had the complaint not already been filed. The FEC's action was contrary to law, arbitrary and capricious, and an abuse of discretion because the allegations of Public Citizen's complaint provided reason to believe that AJS had violated the law, and the views of the three Commissioners who opposed proceeding with the complaint reflected erroneous interpretations of FECA and of Supreme Court precedents concerning the constitutional limitations on the FEC's authority.

Jurisdiction

2. The Commission voted to dismiss Public Citizen's complaint on February 25, 2009. This action was filed within 60 days of the Commission's vote, as required by 2 U.S.C. § 437g(a)(8)(B). *See Jordan v. FEC*, 68 F.3d 518 (D.C. Cir. 1995). This Court has jurisdiction over this action seeking review of the FEC's dismissal of Public Citizen's complaint under 2 U.S.C. § 437g(a)(8)(A) and 28 U.S.C. § 1331.

Parties

3. Plaintiff Public Citizen, Inc., is a nonprofit membership organization headquartered in Washington, DC. Public Citizen advocates the interests of consumers and members of the public before Congress, administrative agencies and the courts on a wide range of issues. Prominent among Public Citizen's concerns has been combating the corruption of our political system, and as a result Public Citizen has long supported campaign finance legislation and advocated its enforcement. In connection with those activities, Public Citizen studies and

reports on the role of money in elections, and has an interest in access to information on the amounts of contributions and expenditures of organizations that seek to influence electoral outcomes. In addition, many of Public Citizen's members are registered voters, who similarly have an interest in access to information about who is contributing and expending money in connection with elections in which they vote.

4. Plaintiff Craig Holman is employed by Congress Watch, a division of Public Citizen, as its Legislative Representative for Campaign Finance Reform. He has a Ph.D. in Political Science and has studied the impact of money on politics for many years, both before and after joining Public Citizen. Dr. Holman's duties, as well as his independent research interests, involve the study of contributions to and expenditures by political organizations of various types, including political committees that report contributions and expenditures to the FEC.

5. Plaintiff Taylor Lincoln is employed as Director of Research at Public Citizen's Congress Watch. In that role, he has devoted substantial time and effort to the study of the political activities of nonprofit organizations and has a strong interest in acquiring information about their contributions and political expenditures.

6. The Federal Election Commission is an independent regulatory agency of the government of the United States. It is responsible for the administration and enforcement of FECA, 2 U.S.C. §§ 431-457, which governs the financing of federal elections. The duties of the FEC are to disclose campaign finance information, to enforce the provisions of the law such as the limits and prohibitions on contributions, and to oversee the public funding of Presidential elections. The FEC is headed by six Commissioners, no more than three of whom can be members of any one political party, and it cannot take official action without the votes of at least

four Commissioners. Currently three of the Commissioners are Republicans and three are Democrats.

The Americans for Job Security Complaint

7. On April 11, 2007, Dr. Holman and Mr. Lincoln, together with Laura MacCleery, who was then Director of Public Citizen's Congress Watch, submitted a complaint to the FEC on behalf of Public Citizen against an organization called Americans for Job Security.

8. According to its website, www.savejobs.org, AJS "put[s] forth a pro-growth, pro-jobs message to the American people." AJS claims tax exemption under section 501(c)(6) of the Internal Revenue Code, which applies to "business leagues." Under IRS regulations, intervening in political campaigns may not be the primary activity of a 501(c)(6) tax-exempt organization.

9. FECA and implementing FEC regulations require organizations whose "major purpose" is to support or oppose the election of candidates to federal office and who receive political contributions or make political expenditures (as defined under FECA) exceeding \$1000 to register as political committees. Political committees are required to report contributions and expenditures to the FEC. Independent political committees (that is, those that are neither campaign committees of a candidate nor committees of a political party) are subject to a statutory \$5000 limit (adjusted for inflation) on the amount of contributions they may receive annually from any individual, and may not receive contributions from corporations or labor unions.

10. AJS is not, and has never been, registered with the FEC as a political committee, nor has it reported contributions and expenditures to the FEC under the rules applicable to political committees. On information and belief, AJS has accepted contributions from

individuals that exceed the annual limits applicable to political committees and has received contributions from corporations.

11. Public Citizen's complaint asked the FEC to take action against AJS for failing to register as a political committee, failing to report contributions and expenditures, accepting contributions in excess of \$5000 from individuals, and accepting contributions from corporations. The complaint was supported by an extensive analysis of AJS's political advertisements during the 2000, 2002, and 2004 election cycles. That analysis showed that advertising made up the majority of AJS's budget, and that AJS's advertising was overwhelmingly aimed at supporting or opposing candidates for federal office. The complaint thus documented that AJS's "major purpose" was supporting or opposing candidates for political office, and it further demonstrated that AJS had engaged in substantial expenditures within the meaning of FECA and the FEC's implementing regulations, thus subjecting it to the requirements applicable to political committees.

The FEC's Action

12. Under 2 U.S.C. § 437g(a), any person who believes a violation of FECA has occurred may file a complaint with the FEC and may bring an action for review in this Court if the Commission fails to act on the complaint within 120 days. The FEC did not act on Public Citizen's complaint within 120 days, but Public Citizen chose to allow the FEC to complete its review and take action on the complaint rather than bringing an action based on the agency's delay.

13. During the many months in which Public Citizen's complaint was pending, the composition of the Commission changed with the advent of four new Commissioners, including three Republicans.

14. Since the new Commissioners took office, there have been a number of enforcement matters in which the Commission has deadlocked three-to-three on whether to proceed with enforcement actions, with the three new Republican Commissioners voting not to proceed. As a result, those matters have been dismissed by the Commission. In at least some of those instances, the Commission's action was contrary to the advice of its own General Counsel.

15. On March 16, 2009, the FEC's Assistant General Counsel Sidney Rocke sent a letter to plaintiffs Lincoln and Holman, as well as Ms. MacCleery, informing them that the Commission had considered the allegations of Public Citizen's complaint (denominated by the Commission as "MUR 5910") and was "equally divided" on whether to find reason to believe that AJS had violated various provisions of FECA. The letter further stated that, "[a]ccordingly, on February 25, 2009, the Commission voted 4-2 to take no further action," and that, "[a]t the same time, the Commission closed the file in this matter." The letter went on to advise that "[t]he Federal Election Campaign Act allows a complainant to seek judicial review of the dismissal of this action."

16. The FEC's March 16, 2009, letter also stated that "[a] Statement of Reasons providing a basis for the Commission's decision will follow," and that "[d]ocuments related to the case will be placed on the public record within 30 days."

17. As of the filing of the initial complaint in this action on April 24, 2009, more than 30 days had passed since the March 16, 2009, letter, and nearly 60 days since the FEC's vote to dismiss the action. Because the 60th day after the vote to dismiss was Sunday, April 26, 2009, the time for filing a complaint seeking judicial review would have expired on Monday, April 27, 2009. The Commission had not yet, however, provided a statement of reasons for its actions to the complainants or to the public. On April 23, 2009, the Commission placed certain documents

related to the case on the public record, but those documents consisted only of the administrative complaint, an appearance of counsel and request for extension of time to respond on behalf of AJS, an order granting AJS an extension of time, three responsive documents submitted by AJS, copies of the March 16, 2009, letters sent to Public Citizen and to AJS notifying them of the dismissal of the complaint, and a document certifying the Commission's votes on February 25, 2009. None of the materials placed in the public record as of the date of the filing of the initial complaint in this action (which materials could be found by accessing the "enforcement query system" page of the FEC's website (<http://eqs.nictusa.com/eqs/searcheqs>) and searching for materials using the number assigned by the FEC to Public Citizen's complaint, 5910) sets forth the Commission's reasons for dismissing the complaint.

18. The certification of the Commission's February 25, 2009, vote that had been placed in the public record as of the date of the filing of the initial complaint in this action revealed that the Commission's staff had prepared a "Factual and Legal Analysis" supporting proposed findings that there was reason to believe that AJS had violated numerous provisions of FECA by not registering as a political committee, not reporting contributions and expenditures, accepting contributions in excess of \$5000 and prohibited corporate contributions, and making expenditures for express campaign advocacy. The certification also showed that the staff had recommended issuing compulsory process to AJS and witnesses to gather evidence concerning these suspected violations. As of April 24, 2009, the Commission had not made the staff's analysis supporting the recommended actions available to the public. According to the certification, the three Democratic members of the Commission voted to make the proposed findings, approve the staff's analysis, and issue compulsory process, while the three Republican members voted not to. Following the deadlock, the certification shows that one of the

Democratic Commissioners joined with the three Commissioners who had voted not to proceed in order to provide the needed fourth vote for a decision to take no further action, following which all six Commissioners voted to close the file.

19. On April 28, 2009, the Commission made available to the public two statements of reasons explaining the positions of the three Commissioners who had voted not to proceed and the three who had voted to proceed with the AJS complaint. The signatures on the statement of reasons of the three Commissioners who voted not to proceed with the AJS matter were dated April 27, 2009, while the signatures on the statement of reasons of the three Commissioners who voted to proceed were dated April 23, 2009, but both statements were in fact made available to the public (and to the plaintiffs in this action) on the same day, April 28, 2009.

20. The statement of reasons of the three Commissioners who voted to proceed attached a copy of the factual and legal analysis prepared by the FEC's Office of General Counsel, which recommended that the FEC proceed with further investigation of AJS. The factual and legal analysis examined advertisements AJS had run in the 2004 and 2006 election cycles and concluded that there was reason to believe that they contained express candidate advocacy within the meaning of FECA and the FEC's regulations, and thus that AJS had made expenditures exceeding \$1000 in each of those years. The factual and legal analysis further concluded that there was reason to believe that AJS's "major purpose" was to influence federal elections because most of its public communications appeared to focus on candidate advocacy. Based on these conclusions, the factual and legal analysis recommended that the FEC proceed with its investigation of AJS because there was reason to believe that AJS had violated FECA by failing to register as a political committee and/or by making prohibited expenditures using corporate contributions and without including disclaimers required by FECA.

21. The statement of reasons of the three Commissioners who voted to proceed endorsed the Office of General Counsel’s factual and legal analysis and stated that on that basis those Commissioners found it reasonable to believe that AJS may have violated the law.

22. The statement of reasons of the three Commissioners who voted not to proceed rejected the Office of General Counsel’s recommendations. These Commissioners concluded that there was no reason to believe that AJS had violated the law because, as a matter of law, none of its challenged advertisements contained express advocacy within the meaning of FECA and its implementing regulations. This conclusion reflected the three Commissioners’ interpretation of Supreme Court decisions defining the First Amendment limitations on the Commission’s power to regulate express advocacy and its equivalents. In addition, these three Commissioners stated that even if AJS had engaged in some express advocacy, it was not a political committee because its “major purpose” was not campaign advocacy, a conclusion based in part on the Commissioners’ view that AJS had engaged in some advertising that was not related to candidates for office.

Claim for Relief — 2 U.S.C. § 437g(a)(8)(C) — Dismissal Contrary to Law

23. Under 2 U.S.C. § 437g(a)(8)(A), any party aggrieved by the Commission’s dismissal of a complaint may petition this Court for review, and the Court shall grant the petition upon a showing that the dismissal of the complaint is “contrary to law.” 2 U.S.C.

§ 437g(a)(8)(C). Dismissal of a complaint is “contrary to law” if it rests on an impermissible interpretation of FECA or its implementing regulations or if it is otherwise arbitrary and capricious or an abuse of discretion. *See Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986).

24. Plaintiffs Public Citizen, Holman, and Lincoln are aggrieved by the FEC’s dismissal of the complaint.

25. The FEC's dismissal of the AJS complaint rests on the legally erroneous views of three Commissioners that, as a matter of law, AJS has not engaged in express advocacy and does not have a major purpose of influencing elections. The FEC's action is contrary to law, arbitrary and capricious, and an abuse of discretion because the allegations of the complaint, and the information provided to the FEC in support of it, are sufficient to provide reason to believe that AJS is a political committee and therefore has violated FECA by not registering as such, not complying with its obligations to report contributions and expenditures, and not complying with FECA's limits on amounts and sources of contributions.

Relief Requested

Wherefore, the plaintiffs pray for the following relief as authorized by 2 U.S.C.

§ 437g(a)(8)(C):

- i. an order declaring that the dismissal of Public Citizen's complaint is contrary to law;
 - ii. an order directing the FEC to conform to the Court's declaration within 30 days;
- and
- iii. all other proper relief.

Respectfully submitted,

/s/

Adina H. Rosenbaum, DC Bar No. 490928
Scott L. Nelson, DC Bar No. 413548
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, DC 20009
(202) 588-1000

Attorneys for Plaintiffs

June 22, 2009

