

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

FEDERAL ELECTION COMMISSION,

Plaintiff,

v.

CASE NO. 1:04-cv-00079-MP-AK

REFORM PARTY OF THE
UNITED STATES OF AMERICA, et al.,

Defendants.

ORDER

This matter is before the Court on Doc. 186, Motion to Dismiss the Defendant's Amended Counterclaim, filed by Plaintiff Federal Election Commission. A hearing on this motion was held on Thursday, January 17, 2008. At the hearing, Plaintiff Federal Election Commission ("FEC") moved to dismiss Defendant Reform Party of the United States of America's ("Reform Party") Amended Counterclaim, Doc. 182, for either a lack of jurisdiction, or for failure to state claim on which relief can be granted. The Reform Party has filed a Memorandum in Opposition to the FEC's motion to dismiss, Doc. 237, to which the FEC has filed a Reply, Doc. 245. In addition, Defendant Beverly Kennedy has filed an amicus brief on this matter, as have several non-parties. Docs. 240, 241, 244.

Background

This case arises from a suit brought by the Federal Election Commission against the Reform Party and its officers for the recovery of \$333,558.00 in public funds previously determined by the Secretary of the Treasury to be owed by the Reform Party. An audit by the FEC revealed that expenditures by the Reform Party during the 2000 presidential campaign were not permissible uses of public funds, or were inadequately documented. After being informed of

the repayment obligation, the Reform Party filed a petition for review in the D.C. Circuit, which dismissed the petition as untimely. The FEC then filed the instant action in this Court, seeking repayment of the public funds. The Court granted summary judgment on the FEC's claims, and rejected the Reform Party's defenses, finding that once the D.C. Circuit dismissed the Reform Party's petition for review as untimely, the Reform Party was foreclosed from raising claims or defenses that had not properly been presented before the D.C. Circuit. The judgment declared that the FEC was entitled to recovery of the \$333,558.00, and enjoined the Reform Party "from diverting any of its assets to any other expenditures other than payment of federal taxes until it completes its repayment obligation."

On appeal, the Eleventh Circuit affirmed the Court's decision, and remanded the case for additional proceedings to address any unresolved issues that may be presented in the Reform Party's amended counterclaim. The Eleventh Circuit refrained from addressing the Reform Party's First Amendment arguments, since they were raised for the first time on appeal, and suggested that these claims be directed to the Court in a motion to modify the injunction.

The Reform Party's Amended Counterclaim

In the counterclaim, the Defendant Reform Party seeks a declaration that the Court's earlier-entered injunction violates the Defendant's right to free speech under the First Amendment to the United States Constitution, because it constitutes an invalid spending restraint on political speech by a political party. First, the Reform Party argues that the injunction effectively prohibits fund-raising by restricting the number of issues that can be raised and the size of the audience reached, since the Party can spend money only on its repayment obligation.

Second, the Reform Party argues that the injunction prohibits it from giving voice to the

political views of its members by selecting and supporting candidates, because “[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.” Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

Finally, the Reform Party contends that the injunction prevents it from expending its limited resources not only on core political speech, but also on various forms of solicitation, which would allow the Reform Party to generate the resources with which to pay the claim by the FEC of \$333,558. Even if the injunction passed constitutional muster, the Reform Party states that it does not serve a valid governmental interest by restricting a political party’s financial activities.

The Federal Election Commission’s Motion to Dismiss

The FEC moves the Court to dismiss the amended counterclaim filed by the Reform Party for lack of subject-matter jurisdiction, or, in the alternative, for failure to state a claim upon which relief can be granted. The amended counterclaim challenges on First Amendment grounds an injunction entered by this Court. The FEC argues that the fundamental flaw of the amended counterclaim is its failure to allege that the FEC itself has taken any action that is unlawful. Because of this, the FEC raises two arguments. First, the FEC states that the Court lacks subject-matter jurisdiction over the counterclaim because the Government has not waived its sovereign immunity. Second, the FEC states that the Reform Party has stated no claim against the FEC because the amended counterclaim does not allege that any action by the FEC violates the Reform Party’s statutory or constitutional rights.

A. Lack of Subject Matter Jurisdiction

The first ground raised by the FEC is that federal courts lack jurisdiction over a claim

against an agency of the federal government unless Congress, by statute, expressly and unequivocally waives the United States' immunity to suit. Jurisdiction in this case is based on federal question jurisdiction, 28 U.S.C. § 1331, specifically reliance on the Fund Act, 26 U.S.C. § 9011(b). Section 9011(b)(1) authorizes certain persons to "institute such actions, including actions for declaratory judgment or injunctive relief as may be appropriate to implement or construe [the Fund Act]." Because the Reform Party's amended counterclaim does not request the Court to construe any provision of that statute, but instead challenges particular injunctive relief that the Fund Act does not address, the FEC states that section 9011(b) is inapplicable. Without an applicable statute to create jurisdiction, the FEC contends that the lack of a waiver of sovereign immunity forecloses Reform Party's amended counterclaim.

In its Response, the Reform Party argues that the Court has jurisdiction to entertain declaratory judgment actions under the Fund Act, and the government has waived sovereign immunity by the express language of the Fund Act. Section 9011(b) of the Fund Act expressly gives standing to "[t]he Commission, the national committee of any political party, and individuals eligible to vote for President . . . to institute such actions, including actions for declaratory judgment or injunctive relief, as may be appropriate to implement or construe any provision of this chapter." 26 U.S.C. § 9011(b)(1). To hear such actions, Congress expressly provided for jurisdiction of such actions in the district courts of the United States. 26 U.S.C. § 9011(b)(2). The Reform Party construes their request for declaratory relief as an attack on the constitutionality of the injunctive relief allegedly authorized by Fund Act, and the regulation referenced in the Court's opinion as applied. Based on this, the Reform Party believes that the Fund Act expressly grants jurisdiction to hear its request for declaratory relief.

The FEC in its Reply states that the counterclaim does not ask this Court to “implement or construe” any provision of the Fund Act, but to modify this Court’s own specific injunctive relief that is, by definition, not part of a legislative enactment. Citing legislative history, the FEC contends that the purpose of allowing private parties to seek judicial review under the Fund Act is to inform such parties about how to comply with the Fund Act’s requirements—not to provide a vehicle for parties to challenge the relief granted in an action by the government to recover public funds. Furthermore, even if the Reform Party’s construction of the statute were correct, the FEC notes that jurisdiction still would not be proper in this Court, because judicial review of the Fund Act requires the convening of a three-judge court pursuant to 28 U.S.C. § 2284.

B. Failure to State a Claim

The second ground raised by the FEC is that the Court—not the FEC—issued the injunction, and therefore the FEC did nothing that would support the pending counterclaim. The Reform Party does not provide any support its proposition that a mere request to a court for relief can ground a First Amendment allegation against the requesting party. Furthermore, the FEC argues that the counterclaim fails to state a claim because even if the FEC had not requested injunctive relief, the Court has the inherent authority to grant it and any other relief to which the FEC is entitled on its substantive claim.

The Reform Party responds that its amended counterclaim does state a claim since it seeks a declaration of the rights of a party vis-à-vis other parties and the FEC under the Fund Act. In its Reply, the FEC states that a request for relief—whether by the FEC or the Reform Party—is not part of the substantive claims in this action for repayment of funds owed to the

United States Treasury. Rather, it is part of the power of the Court to enter any relief it deems appropriate. The rights of the parties under the Fund Act have already been determined, and the Court is the one who fashioned the relief owed under these rights. Because of this, the proper avenue for relief is not a counterclaim against the FEC, but a modification of the language used in the injunction at the district court level.

The FEC states that it is not aware of any excuses for the Reform Party's failure to seek modification of the injunction in accord with the relevant rules, but that it does not oppose a limited modification of the injunction. The modification the FEC has proposed would allow the Reform Party to spend money to raise funds to meet its repayment obligations, so long as any such expenditures are reported to the FEC on a monthly basis.

Analysis

Under either of the FEC's theories, the Reform Party's amended counterclaim must be dismissed. The Reform Party is clearly challenging an order of the Court, not an action by the FEC. Because the relief requested by the Reform Party can only be provided by the Court, rather than the FEC, the counterclaim fails to state a claim. For the same reason, subject matter jurisdiction is lacking, since the Reform Party does not seek for the Court to "implement or construe" any provision of the Fund Act, but instead seeks for the Court to modify its own injunction. Therefore, the central issue in this case is not whether the FEC violated the Reform Party's First Amendment rights, but whether the injunction ordered by the Court should be modified.

The primary case relied upon by the Reform Party in its counterclaim is Buckley v. Valeo, 424 U.S. 1 (1976). In Buckley, the Supreme Court overturned on First Amendment

grounds provisions of Federal Election Campaign Act relating to contribution and expenditure limitations that imposed direct quantity restrictions on political communications and association by persons, groups, candidates, and political parties. The Supreme Court stated that

[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

Id. at 19. The Supreme Court found that a primary effect of these expenditure limitations was to restrict the quantity of campaign speech by individuals, groups, and candidates. These restrictions, while neutral as to the ideas expressed, limited political expression "at the core of our electoral process and of the First Amendment freedoms," and therefore were unconstitutional. Williams v. Rhodes, 393 U.S. 23, 32, 89 S.Ct. 5, 11, 21 L.Ed.2d 24 (1968).

Content-neutral laws affecting the freedom of speech are subject to a balancing test, where a legitimate governmental objective to be constitutional must burden no more speech than is necessary. "In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." Cantwell v. Connecticut, 310 U.S. 296, 304, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940). In Buckley, the challenged law sought to prevent corruption by limiting monetary contributions towards political candidates, limiting expenditures for advocacy on behalf of political candidates, and placing a cap on expenditures by political campaigns. The Supreme Court found that while the governmental objective was permissible, the means chosen were not narrowly drawn to meet the perceived harm. "In the

area of First Amendment freedoms, government has the duty to confine itself to the least intrusive regulations which are adequate for the purpose.” Lamont v. Postmaster General, 381 U.S. 301, 310, 85 S.Ct. 1493, 1498, 14 L.Ed.2d 398 (1965) (Brennan, J., concurring).

In the instant case, the Reform Party received approximately \$2.5 million in public funds to help finance its 2000 presidential nominating convention, from which it was ordered to repay \$333,558.00. Under the injunction ordered by the Court, the Reform Party is prohibited “from diverting any of its assets to any other expenditures other than payment of federal taxes until it completes its repayment obligation.” To date, the Reform Party has not paid any of the amount owed.

The injunction clearly implicates First Amendment activity, since it prohibits the Reform Party from expending its assets to promote political views or candidates. The injunction, however, presents no First Amendment violation since it is narrowly tailored to address a specific harm. In the order granting summary judgment, the Court found that the Reform Party had “failed to meet [its] obligation” under the regulations to ““give preference to the repayment over all other outstanding obligations.”” The central argument by the Reform Party is that this injunction effectively hobbles the party, since it cannot spend money on efforts to raise the money to satisfy the debt, and since it cannot satisfy the debt, it is precluded from engaging in meaningful political activity. To address this problem, the FEC proposes a limited modification of the Court’s injunction.

The FEC strongly opposes any modification of the Court’s injunction that would divert money from the Reform Party repaying its debt. In particular, the FEC opposes any change that would permit the financing of the battles among the various Reform Party factions. The FEC

states that a limited modification of the Court's injunction would, however, be consistent with the priority the law accords an FEC repayment determination, see 11 C.F.R. § 9008.12(a)(3), and would be in the FEC's and the public's best interests. The FEC proposes that the injunction be modified as follows:

Until it completes its repayment obligation, the Reform Party is enjoined from diverting any of its assets to expenditures other than payment of federal taxes or raising funds for the sole purpose of meeting that repayment obligation. Any expenditures made for the purpose of raising funds to meet the repayment obligation shall be reported to the FEC on a monthly basis.

The modification the FEC has proposed would address the First Amendment concerns by allowing the Reform Party to spend money to raise funds to meet its repayment obligations. Therefore, while the Court agrees that the Reform Party's Amended Counterclaim should be dismissed, the injunction should also be modified to allow the Reform Party to begin to satisfy its debt. Accordingly, it is hereby

ORDERED AND ADJUDGED:

1. The Federal Election Commission's Motion to Dismiss the Defendant's Amended Counterclaim, Doc. 186, is granted, and the Amended Counterclaim, Doc. 182, filed by the Reform Party of the United States of America is dismissed.
2. The Court grants the motion to modify the injunction, and the injunction ordered in Doc. 127 is modified to read:

Until it completes its repayment obligation, the Reform Party of the United States of America is enjoined from diverting any of its assets to expenditures other than payment of federal taxes or raising funds for the sole purpose of meeting that repayment obligation. Any expenditures made for the purpose of raising funds to meet the repayment obligation shall be reported to the Federal Election Commission on a monthly basis.

DONE AND ORDERED this 28th day of February, 2008

s/Maurice M. Paul
Maurice M. Paul, Senior District Judge