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Litigation

[Republican Party of Louisiana et al. v. FEC \(New\)](#)

On August 3, 2015, the Republican Party of Louisiana (LAGOP), the Jefferson Parish Republican Parish Executive Committee and the Orleans Parish Republican Executive Committee (collectively, plaintiffs) filed suit in the U.S. District Court for the District of Columbia challenging the constitutionality of portions of the Federal Election Campaign Act (the Act or FECA) that specify how state and local parties must finance and disclose certain "federal election activity" that they plan to engage in, including fundraising costs for such activity. They argue that the provisions are unconstitutional under the First Amendment because they burden the plaintiffs' "core political speech and association" and that there is no sufficiently "cognizable" governmental interest justifying the challenged provisions.

Background

State and local political parties may each establish federal and nonfederal accounts for the purpose of conducting activities in connection with federal and nonfederal elections. Funds raised in connection with federal elections, including for "federal election activity," are subject to the limitations and prohibitions of the Act (federal funds), while funds that are raised for nonfederal elections are generally regulated by state law (nonfederal funds). 52 U.S.C. §§ 30125(b)(1), (c). State and local political parties that establish both federal and nonfederal accounts may allocate the costs of certain activities, such as administrative costs (i.e., rent, utilities, etc.). See 11 CFR 102.5 and 106.7.

Congress has identified certain "federal election activity" (FEA) that state, district and local political parties must finance using federal funds (or at least a minimum percentage of federal funds). 52 U.S.C. § 30125(b)(1). FEA includes activities such as get-out-the-vote activity, voter identification, generic campaign

activity,^{FN1} and voter registration activity conducted within a specific time period prior to a federal election. 52 U.S.C. § 30101(20). FEA also includes public communications that promote, attack, support, or oppose (PASO) any clearly identified federal candidate when made at any time, and the salaries and wages of state and local party employees who spend more than 25 percent of their compensated time on a federal election during any given month. See 52 U.S.C. § 30101(20). Voter registration activity, get-out-the-vote activity, voter identification or generic campaign activity that qualifies as FEA is required to be paid for either exclusively with federal funds or with an allocation of federal and "Levin funds." 52 U.S.C. § 30125(b).

If a particular activity conducted by a state, district or local party committee in connection with both federal and nonfederal elections does not qualify as FEA (such as voter registration held more than 120 days before a regularly scheduled federal election), Commission regulations permit that activity to be paid for with an allocation of federal and nonfederal funds. 11 CFR 106.7(b). However, state, district and local parties must make disbursements for FEA from a federal account. 11 CFR 300.30(c). The Act further requires state, district and local party committees that engage in FEA to file monthly disclosure reports with the Commission. 52 U.S.C. § 30104(e)(2).

The plaintiffs wish to make "non-individualized, independent communications" exhorting voter registration and voting; some of these communications will qualify as FEA because they will be made during the relevant FEA time frames prior to federal elections in 2016 in Louisiana. Plaintiffs' proposed activities include creating a website to assist potential voters in registering to vote and disseminating various email messages and broadcasts, with some, for example, urging recipients to register to vote or to vote for Republican candidates. The plaintiffs maintain that, based on Louisiana's schedule of elections in 2016, these activities will become FEA in the fall of 2015 and thus require the parties to finance these activities using funds raised in accordance with the Act's limitations. See 52 U.S.C. § 30116.

The plaintiffs also wish to undertake other activities such as voter identification, generic campaign activity, and communications that may PASO federal candidates; the plaintiffs maintain that some of these activities will qualify as FEA based on the timing, medium and content of the communications. To pay for such communications, plaintiff LAGOP wishes to establish an "independent communications-only account" (ICA) which could receive funds without being restricted by FECA's contribution limits. Plaintiffs do not intend to comply with each of the limitations on allocated payments with "Levin funds."

Court Challenge

The plaintiffs challenge the Act's provision that requires state and local political parties to pay for particular kinds of FEA — such as "independent, non-individualized communications that exhort registering/voting" — with funds raised in accordance with the Act's source and amount restrictions as unconstitutional under the First Amendment as applied to these proposed activities. They also challenge the Act's provisions requiring that fundraising costs for such types of FEA be raised pursuant to FECA's source and amount restrictions and that they be reported. They allege that these requirements substantially burden their core political speech and association rights and that there is no "cognizable" governmental interest

¹ "Generic campaign activity" means a campaign activity that promotes a political party and does not promote a candidate or nonfederal candidate. 52 U.S.C. § 30101(21).

to justify the restrictions. The plaintiffs argue that these "independent, non-individualized communications" pose no risk of *quid-pro-quo* corruption or its appearance.

Similarly, plaintiff LAGOP contends that its proposed ICA-funded communications pose no risk of *quid-pro-quo* corruption or its appearance. This ICA, plaintiffs maintain, would be "constitutionally similar to the non-contribution accounts of nonconnected committees," which such committees may use to pay for independent expenditures with funds raised in excess of FECA's contribution limits.

The plaintiffs further argue that provisions of the Act that require FEA to be paid for with funds raised in accordance with the Act's source and amount restrictions, including fund-raising costs for such activity, and FECA's requirement that such FEA be reported are all unconstitutional facially and as applied to all "independent FEA." They contend that the Supreme Court has required evidence of *quid-pro-quo* corruption (or its appearance) to uphold such restrictions and that there has been no proven instance of any such corruption that supports a "cognizable" governmental interest in justifying the restrictions at issue here. See [McConnell v. FEC](#).

The plaintiffs have requested that a three-judge panel be convened to consider this litigation.

Posted 08/21/2015; By: Myles Martin

Resources:

- *Republican Party of Louisiana et al. v. FEC* [Ongoing Litigation Page](#)

[CREW v. FEC \(D.D.C. 1:14-cv-01419\) \(District Court\)](#)

On August 13, 2015, the United States District Court for the District of Columbia (the "Court") granted the Commission's motion to dismiss portions of a complaint filed by Citizens for Responsibility and Ethics in Washington ("CREW"). The claims that were the subject of the Commission's motion alleged that the Commission's dismissal of CREW's administrative complaints had effectively created a "de facto regulation" that violated the Administrative Procedure Act ("APA").

Background

In 2012, CREW and Melanie Sloan filed complaints with the FEC alleging that Americans for Job Security (MUR 6538) and American Action Network (MUR 6589) should have registered as political committees because their major purpose was the nomination or election of federal candidates. The Commission, by a vote of three to three, did not find reason to believe that either AJS or AAN had violated the Federal Election Campaign Act ("FECA"), and closed both cases.^{FN1}

¹ Under the Act, a political committee is a group that receives contributions or makes expenditures of more than \$1,000 during a calendar year. 52 U.S.C. § 30101(4)(A). Beginning with its decision in [Buckley v. Valeo](#), the Supreme Court has held only organizations whose "major purpose" is the nomination or election of a federal candidate can be considered "political committees" under the Act. See also [FEC v. MCFL](#).

On August 20, 2014, CREW filed suit against the FEC, seeking judicial review of the Commission's dismissal of its administrative complaints under FECA's judicial review provision, 52 U.S.C. § 30109(a)(8), and alleging that the Commission's dismissal decisions effectively established a "de facto regulation" regarding the major purpose test, in violation of the APA. The Commission's motion sought dismissal of CREW's APA claims.

Decision

In granting the FEC's motion to dismiss CREW's APA claims, the Court noted that the APA "prescribes procedures for administrative agencies engaged in rulemaking," but concluded that the decisions identified by CREW were "ordinary adjudications." Even had these decisions announced a new interpretation, they would not be regulations within the meaning of the APA. The Court further stated that CREW has an adequate means to challenge the Commission's dismissals of their complaints through FECA's judicial review provision, which precludes APA review. As a result, the Court dismissed CREW's claims based on the APA.

(Posted 08/20/2015; By: Christopher Berg)

Resources:

- *CREW v. FEC* [Ongoing Litigation Page](#)

[Combat Veterans for Congress PAC v. FEC \(Appeals Court\)](#)

On July 28, 2015, the U.S. Court of Appeals for the D.C. Circuit affirmed the district court's dismissal of administrative fine challenges filed by Combat Veterans for Congress PAC.

Background

In 2010, Combat Veterans for Congress PAC ("CVCP") submitted three reports after the statutory filing deadlines. As a result, the Commission began administrative enforcement proceedings against CVCP and found reason to believe (RTB) that CVCP and its treasurer, in his official capacity, violated 52 U.S.C. § 30104(a) by failing to file the reports on time.^{FN1} The Commission imposed fines totaling \$8,690 for the violations. CVCP challenged the Commission's findings and argued that the actions of its treasurer at the time made it impossible for CVCP to file its reports on time. The Commission confirmed the penalties against CVCP and its successor treasurer in a Final Determination dated October 27, 2011. CVCP filed a Petition for Review with the district court on December 7, 2011 arguing, among other things, that the Commission's enforcement action was invalid because it lacked the requisite four affirmative votes for a RTB finding; its former treasurer was solely liable in his personal capacity for failing to file the reports on time; the Commission failed to provide CVCP an in-person hearing; and the Commission's failure to mitigate the penalties was an abuse of discretion.

District Court Decision

The district court found no evidence that the Federal Election Campaign Act (the "Act") imposed liability on treasurers in their personal capacity to the exclusion of committees and treasurers in their official capacity. The court deferred to the FEC's decision not to prosecute the former treasurer in his personal capacity, citing the Commission's considerable

¹ *At the time of the enforcement proceedings, Michael Curry was listed as CVCP's treasurer and custodian of records. By time the enforcement proceedings ended, David Wiggs was named the successor treasurer and, in addition to CVCP, was assessed the administrative fine in his official capacity.*

prosecutorial discretion and no evidence that the Commission abused its discretion. It also referenced requirements in the Act and Commission regulations that political committees *and* treasurers file periodic reports of receipts and disbursements (see 52 U.S.C. § 30104(a)(1) and (4); 11 CFR 104.5(c)), and noted the Commission's policy and practice to name as respondents in enforcement matters the political committee and its current treasurer, in his or her official capacity.

The district court also rejected CVCP's claim that it was unlawful for the Commission to decline to grant an in-person hearing, finding that the phrase "opportunity to be heard" can be interpreted to include not merely oral, but written advocacy, and that a decision regarding the need for an in-person hearing is properly left to the agency. The court also rejected CVCP's arguments that the FEC failed to mitigate the CVCP fines finding the fines compliant with statutory guidelines, and similarly rejected CVCP's various claims of Constitutional violations finding them undeveloped and unsupported. The district court declined to consider CVCP's challenges to the Commission's voting procedures because they had not first been presented to the agency itself and were based on documents outside the administrative records.

Appeals Court Decision and Analysis

The court of appeals affirmed the district court's decision. On appeal, CVCP argued that the district court failed to address its challenges to the FEC's voting procedures and, among other objections, that the Commission's RTB determinations were void because they lacked affirmative votes from at least four Commissioners.

Under the Act, an enforcement action can only begin after an affirmative vote of four Commissioners that finds RTB that a person has committed a violation of the Act. 52 U.S.C. § 30109(a)(2). Following an investigation, and upon the general counsel's recommendation, the Commission will determine, again by an affirmative vote of four Commissioners, whether there is probable cause to believe that the person violated the Act. 52 U.S.C. § 30109(a)(2), (4)(A)(i). After a finding of probable cause, the Commission must attempt to resolve the matter by informal methods, but may resort to filing a civil suit after another affirmative vote by four Commissioners. 52 U.S.C. § 30901(a)(4)(A)(i), (6)(A).

Congress authorized the Commission's Administrative Fines Program to provide a streamlined procedure to handle reporting violations. First, the Commission conducts a 24-hour, no objection vote on a RTB finding, then provides the respondent with notice and an opportunity to be heard. 52 U.S.C. § 30109(4)(C)(i). Pursuant to an agency directive, the no objection vote requires circulation of ballots to each Commissioner. Any ballots not marked and returned within 24 hours are counted as "yes" votes. [FEC Directive 52 \(Sept. 10, 2008\)](#). At that point, the Commission may find a violation of the Act and issue a civil money penalty without an additional probable cause finding. 52 U.S.C. § 30109(4)(C)(i)-(ii). However, if the respondent challenges the RTB finding, the Commission will consider the respondent's arguments and will circulate ballots for a "tally vote" on its final determination, whereby votes are marked and counted and any ballots not returned within one week are deemed abstentions.

For each of CVCP's three late filings, the Commission used the 24-hour, no objection procedure to find RTB. Consistent with agency procedures, the Commission secretary certified that the Commissioners "voted affirmatively" and decided the issue "by votes of 6-0," though some Commissioners did not return a ballot. The Commission unanimously found CVCP liable for the violations in its final determination by tally vote.

In its court complaint, CVCP argued that the Commission's RTB procedures did not meet the Act's requirement for an "affirmative vote" of at least four Commissioners. The appeals court determined that the case did not require the court to decide that issue because even if the Commission's use of its voting procedure was in error, CVCP failed to show that the voting procedure caused it any prejudice. In addition, the court reasoned that "any prejudice [CVCP] might have suffered was rendered harmless by the Commission's subsequent ratification of its reason-to-believe finding with a concededly valid tally vote." With regard to the tally votes, the appeals court referenced the rules of the agency in holding that ballots signed by Commission staff acting on a Commissioner's instructions were validly cast and that "the practice is reasonable, not proscribed by statute, and rooted in longstanding principles of agency."

Finally, the appeals court rejected all of CVCP's other arguments for the reasons given by the district court. CVCP argued that its former treasurer's negligence made it impossible for it to file its reports on time, that the Commission should have held the former treasurer solely liable, that the Commission should have mitigated the penalties assessed against CVCP and that a related Commission regulation was unlawful. The appeals court dismissed these arguments and affirmed the lower court's decision.

(Posted 08/04/2015; By Zainab Smith)

Resources:

- [Combat Veterans v. FEC Ongoing Litigation Page](#)
- [Administrative Fine Program](#)
- [Documents on Enforcement and Compliance Practices](#)

Advisory Opinions

[AO 2015-05: Testamentary Bequests to Party via an Escrow Agent](#)

A trustee may use an independent third-party escrow agent (the "agent") to receive and later disburse funds bequeathed to the Libertarian National Committee (the "LNC"). Each year, the agent will disburse to the LNC the maximum amount allowable by the Federal Election Campaign Act (the "Act") until the funds are exhausted.

Background

Under the terms of the late Joseph Shaber's trust, trustee Alexina Shaber was to distribute to the LNC a gift of \$50,000, plus 50 percent of the residual funds in the trust estate (approximately \$175,000). In February 2015, Ms. Shaber disbursed to the LNC \$33,400, the maximum contribution to the general account of a national party committee allowed under the Act and Commission regulations, leaving approximately \$191,600 to be distributed. The LNC has declined to accept donations to a convention, recount or building fund account established pursuant to the [Consolidated and Further Continuing Appropriations Act, 2015](#), so Ms. Shaber is unable to make additional disbursements this year.

In order to avoid extending the trust administration and incurring related expenses, Ms. Shaber asks if she may make a final distribution of the LNC's full share under the trust to an independent third-party escrow agent. The LNC will have no control over the funds maintained by the agent, and the agent will not be affiliated with the LNC. Until the funds are exhausted, the agent will disburse to the LNC the full amount allowable under the contribution limits each year.

Analysis

The Act and Commission regulations limit annual contributions by an individual to a national party committee to \$25,000 per calendar year, indexed for inflation in odd-numbered years. 52 U.S.C. §30116(a)(1)(B), (c); 11 CFR 110.1(c)(1); 52 U.S.C. § 30101 (11). In previous Advisory Opinions, the Commission has determined that the testamentary bequest of a decedent is subject to that and other individual contribution limits. [AO 2004-02](#); [AO 1999-14](#).

The Commission approved a proposal similar to Ms. Shaber's in Advisory Opinion 2004-02 (NCEC), because the terms of the trust limited contributions to the maximum permitted under the Act. The testators or executors of the estates would select the trustees, who would exercise no discretion regarding the amount of contributions. Likewise, the recipient committee would have no involvement in the administration of these trusts, and could not pledge or assign the anticipated funds.

Consistent with that precedent, Ms. Shaber may deliver the remaining amount of the bequest to an independent third-party escrow agent to disburse annually to the LNC the maximum amount permissible under the Act and Commission regulations until the funds are exhausted. The LNC may not control the funds maintained in the escrow account, nor may the committee pledge, assign or otherwise obligate the anticipated contributions before they are disbursed.

Date Issued: August 11, 2015; 4 pages.

(Posted 08/13/2015; By: Christopher Berg)

Resources:

- [Advisory Opinion 2015-05](#) [PDF]
- [Commission Discussion of AO 2015-05](#) 

[Pending Advisory Opinion Requests as of August 31, 2015](#)

Advisory Opinion Requests (AORs) pending before the Commission as of the end of the month are listed below. Procedures for commenting on pending AORs are [described here](#).

- [AOR 2015-03](#) [PDF]
Vendor collecting and forwarding contributions from individuals to political committees (Democracy Rules, Inc., June 4, 2015; Extension of time to respond granted August 11, 2015)
- [AOR 2015-06](#) [PDF]
Contributions by Member of Congress to foreign candidate (Maxine Waters, July 28, 2015)
- [AOR 2015-07](#) [PDF]
Payment for food, beverages and valet parking at campaign events (Hillary for America, August 7, 2015)
- [AOR 2015-08](#) [PDF]
Use of web platform to collect pledges for and make contributions to candidates (Repledge, August 19, 2015)

(Posted 08/31/2015; By: Dorothy Yeager)

Resources:

- [Advisory Opinion Search](#)

Outreach

FEC to Host San Diego Conference in October

The Commission will hold a regional conference in San Diego, California, on October 20-21, 2015. Commissioners and staff will conduct a variety of technical workshops on the federal campaign finance laws affecting federal candidates, parties and PACs. Workshops are designed for those seeking an introduction to the basic provisions of the law as well as for those more experienced in campaign finance law. To view the conference agenda or to register for the conference, please visit the conference website at <http://www.fec.gov/info/conferences/2015/sandiego.shtml>.



Hotel Information. The conference will be held at The Westin San Diego, centrally located at 400 West Broadway. To make hotel reservations and reserve the contracted group rate, visit the following link: <https://www.starwoodmeeting.com/Book/FederalElectionCommission> or call (888) 627-9033. To receive the group rate, guests must make reservations by September 18 and must identify themselves as members of the "Federal Election Commission Conference." Please wait to make hotel and air reservations until you have received confirmation of your conference registration from our contractor, Sylvester Management Corporation.

Room Rates			
Single	Double	Triple	Quad
\$219	\$219	\$239	\$259

Registration Information. The registration fee is \$590 per attendee, which includes a \$30 nonrefundable transaction fee. The registration fee increases to \$615 per attendee for registrations received after September 18, 2015. A refund (minus the transaction fee) will be made for all cancellations received by September 18, 2015; no refund will be made for cancellations received after that date. Complete registration information is available online at <http://www.fec.gov/info/conferences/2015/sandiego.shtml>.

Workshop Materials. Attendees may elect to receive electronic copies of workshop materials in advance for use on their personal electronic devices. Alternatively, conference attendees may elect to receive a binder with printed materials at the conference. If you choose to receive materials electronically, please download them prior to the conference, as internet access may not be available in meeting rooms.

FEC Conference Questions

Please direct all questions about conference registration and fees to Sylvester Management Corporation (Phone: 1-800/246-7277; email: Rosalyn@sylvestermanagement.com). For other questions about the conference and workshops, call the FEC's Information Division at 1-800/424-9530, or send an email to conferences@fec.gov.

(Posted 08/06/2015; By: Isaac Baker)

Resources:

- [FEC Educational Outreach Opportunities](#)

FEC to Host September FECFile Webinar for Campaign Committees

The Commission will host a FECFile webinar on September 30, 2015, for campaign committees. The webinar will demonstrate the Commission's FECFile software and address questions FECFile users may have concerning electronic filing.

Webinar Information. The sessions will be available online only. Additional instructions and technical information will be provided upon registration.



Registration Information. The registration fee is \$25 per workshop. A full refund will be made for all cancellations received by Friday, September 25; no refunds will be made for cancellations received after that date. Complete registration information is available on the FEC's website at <http://www.fec.gov/info/outreach.shtml#roundtables>.

Registration Questions

Please direct all questions about registration and fees to Sylvester Management at 1-800/246-7277 or email Rosalyn@sylvestermanagement.com. For other questions, call the FEC's Information Division at 800/424-9530 (press 6), or send an email to Conferences@fec.gov.

(Posted 08/26/2015; By: Isaac Baker)

Webinar Schedule:

September 30, 2015

Webinar Only

- FECFile & E-Filing for Campaign Committees, 1:00 — 2:30 p.m. (Eastern)

Resources:

- [FEC Educational Outreach Opportunities](#)