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Litigation

[Holmes, et al. v. FEC \(Appeals Court\)](#)

Plaintiffs Laura Holmes and Paul Jost claim that the per-election limits on individual contributions to candidates violate the First and Fifth Amendments to the Constitution. The U.S. District Court for the District of Columbia Circuit declined to certify the constitutional questions to the *en banc* court of appeals and granted the FEC's motion for summary judgment. On April 26, 2016, the court of appeals affirmed the district court's decision not to certify the Fifth Amendment question, but reversed the court's decision not to certify the First Amendment question and to grant summary judgment to the Commission on plaintiffs' First Amendment claims. The court of appeals remanded the case to the district court to certify the First Amendment question.

Background

The Federal Election Campaign Act (the Act) allows individuals to contribute "to any candidate and his authorized political committees with respect to any election for Federal office." The individual contribution limits apply on a per-candidate, per-election basis, with a separate limit for each election in which the candidate participates (e.g., primary, general, runoff, etc.). See 52 U.S.C. §§ 30116(a)(1)(A) and 30101(1).

Rather than making separate primary and general election contributions, each plaintiff wanted to combine the \$2,600 limit for the primary election with the \$2,600 limit for the general election in order to contribute \$5,200 to their preferred candidate's general election campaign. (At the time of the complaint, the per-candidate, per-election limit was \$2,600. It has since increased to \$2,700 per candidate, per election.) The plaintiffs claim that the Act's per-election contribution limit violates their First and Fifth Amendment rights by "artificially bifurcating" their contributions between the primary and general elections with no anti-corruption purpose and by limiting the amounts they can contribute to the general election campaigns of their preferred candidates.

The district court rejected the plaintiffs' arguments described above as a "false construct" and frivolous. It

found their Constitutional claims were matters of settled law and declined to certify the questions to the *en banc* court of appeals. The court also granted the Commission's motion for summary judgment. The plaintiffs appealed the court's decision not to certify their constitutional questions.

Court of Appeals Decision

The court of appeals acknowledged the low bar to certification, and that a district court may refuse to certify claims that are "wholly insubstantial," "obviously frivolous," and "obviously without merit." However, the court concluded that the plaintiffs' First Amendment challenge was not "obviously frivolous" or "without merit." The court further stated, "We do not think a district court may decline to certify a constitutional question simply because the plaintiff is arguing against Supreme Court precedent so long as the plaintiff mounts a non-frivolous argument in favor of overturning that precedent. That the plaintiff will be fighting a losing battle in the lower courts does not necessarily make the question 'wholly insubstantial,' 'obviously frivolous,' or 'obviously without merit'." The court also disagreed with the lower court's analysis of Supreme Court precedent, finding that *Buckley v. Valeo* did not specifically address plaintiffs' First Amendment challenge. The court also concluded that certifying the First Amendment question fulfills the Act's purpose of accelerating potential Supreme Court review.

The plaintiffs also challenged the per-election contribution limits as unconstitutionally depriving them of their Fifth Amendment right to equal protection by favoring contributors to incumbent candidates who do not face substantial primary opposition. While the lower court declined to certify the claim on the basis that the issue is "settled law," the court of appeals reached the same result under different reasoning. The certification procedure under 52 U.S.C § 30110 applies only to constitutional challenges to the Act. In this case, the court found the Fifth Amendment claim was "so clearly a challenge to [Commission] regulations, and therefore outside the scope of §30110," that it failed to raise a substantial federal question for jurisdictional purposes.

The court affirmed the district court's decision not to certify the Fifth Amendment question, but reversed the court's decision not to certify the First Amendment question and to grant summary judgment to the Commission on that claim. The court remanded the case to the district court to certify the First Amendment question to the court of appeals *en banc*.

(Posted 04/29/2016; By: Zainab Smith)

Resources:

- *Holmes, et al. v. FEC* [Ongoing Litigation Update](#)

[Stop Reckless Economic Instability Caused by Democrats, et al. v. FEC \(Appeals Court\)](#)

On April 22, 2016, the U.S. Court of Appeals for the Fourth Circuit issued an order in *Stop Reckless Economic Instability Caused by Democrats ("Stop PAC"), et al. v. FEC* denying the plaintiffs' petition for rehearing and rehearing *en banc* of the appeals court's February 2016 ruling in this case. Plaintiffs had challenged the differing contribution limits for multicandidate and non-multicandidate political action committees (PACs).

The plaintiffs — a group of political committees and a federal candidate — contended that the limits infringed on their First Amendment rights of association and expression, as well as the Fifth Amendment's guarantee of equal protection. The appeals court's [February 2016 ruling](#) dismissed as moot the challenge to the limits for non-multicandidate committees, and affirmed the [district court's judgment](#) that the multicandidate limits do not violate the equal protection guarantee of the Fifth Amendment.

(Posted 04/25/2016; By: Dorothy Yeager)

Resources:

- [Order](#) [PDF]
- *Stop Reckless Economic Instability Caused by Democrats, et al. v. FEC* [Ongoing Litigation Page](#)

[McChesney, et al. v. FEC \(8:16-cv-00168\) \(New\)](#)

On April 15, 2016, Bart McLeay for U.S. Senate, Inc., and Robert McChesney, in his official capacity as Treasurer ("Plaintiffs") filed suit against the Commission, Matthew Petersen, in his official capacity as FEC Chairman, and the United States in the U.S. District Court for the District of Nebraska. Plaintiffs allege that a final determination and civil money penalty assessed against them under the Commission's Administrative Fine Program (AFP) are invalid.

Background

Bart McLeay was a candidate for the United States Senate in the 2014 primary election. In June 2015, the Commission notified plaintiffs that it intended to assess a civil penalty against them for late filing of reports of contributions received prior to the 2014 primary election (48-hour notices). The final determination and penalty assessment occurred in March 2016.

Plaintiffs allege that the Commission did not follow proper procedures to extend the AFP penalties schedule that expired on December 31, 2013. Plaintiffs allege that the schedule extension occurred without proper notice or consideration at a public meeting. Because of the alleged unlawful nature of the Commission's AFP extension, Plaintiffs ask that the Commission's final determination be set aside and the penalty be voided. Plaintiffs also seek an order that the Commission pay plaintiffs' court costs and attorney's fees.

(Posted 04/28/2016; By: Christopher Berg)

Resources:

- *McChesney et al. v. FEC* [Ongoing Litigation Page](#)

[Campaign Legal Center, et al. v. FEC \(New\)](#)

On April 22, 2016, Campaign Legal Center and Democracy 21 (plaintiffs) filed suit against the Commission in the U.S. District Court for the District of Columbia. The plaintiffs are challenging the Commission's dismissal of five administrative complaints as arbitrary, capricious and contrary to law. The complaints alleged that several entities and individuals violated 52 U.S.C. § 30122, which prohibits making contributions in the name of another, and thereby evaded certain disclosure provisions of the Federal Election Campaign Act (the Act).

Background

The Act expressly prohibits any person from making a "contribution in the name of another" or knowingly permitting his or her name to be used to effect such a contribution, and that no person shall knowingly accept a contribution made by one person in the name of another person. 52 U.S.C. § 30122. The Commission's regulations state that examples of a contribution in the name of another include "giving money, or anything of value, all or part of which was provided to the contributor by another person (the true contributor) without disclosing the source of the money..." and "making a contribution of money or anything of value and attributing as the source of the money or thing of value another person when in fact the contributor is the source." 11 CFR 110.4(b) (2).

Challenge to Dismissal of Administrative Complaints

The plaintiffs had filed five sworn administrative complaints with the Commission against various entities and individuals alleging that they had violated the Act by using so-called "straw donors," including limited liability companies (LLCs), to make contributions in the name of another, thereby evading the Act's disclosure requirements.

The first complaint, which was designated Matter Under Review (MUR) 6485 by the Commission, was against W Spann LLC. The plaintiffs allege that the LLC was used as a conduit to hide the true source of a \$1 million dollar contribution to a political action committee called Restore Our Future, which was supporting a then-presidential candidate in 2011. The plaintiffs allege that a single individual formed W Spann LLC for the sole purpose of concealing his contribution to the Super PAC supporting that candidate.

The second and third complaints, MURs 6487 and 6488, involved two LLCs that the plaintiffs allege were used as conduits to "hide the true source of two \$1 million contributions to Restore Our Future" in 2011. The plaintiffs contend that a single individual made the contributions through the LLCs, which were dormant.

The fourth complaint, MUR 6711, alleged that an individual contributed more than \$12 million to a Super PAC named FreedomWorks for America using the names of a corporation and an LLC established solely to make such contributions. The final complaint, designated as MUR 6930, also involved allegations that contributions were made to a Super PAC from an LLC and others in order to hide the true source of the donors.

On February 26, 2016, the Commission considered and voted on whether to find "reason to believe" that a violation of the Act had occurred with respect to each of the plaintiffs' administrative complaints. In each case, the Commission did not find reason to believe by the required four votes. As a result, the Commission dismissed all five complaints.

The plaintiffs allege that the Commission's failure to find "reason to believe" and its dismissal of the five administrative complaints was arbitrary, capricious and contrary to law. Accordingly, the plaintiffs are asking the district court to make a declaration to that effect that and order the Commission to conform to such declaration within 30 days. The plaintiffs are also asking the court to award legal fees and costs of the suit incurred by the plaintiffs and grant any other relief that the court deems appropriate.

(Posted 04/29/2016; By: Myles Martin)

Resources:

- *Campaign Legal Center, et al. v. FEC* [Ongoing Litigation Page](#)

Public Funding

[FEC Declares Jill Stein Eligible to Receive Federal Matching Funds](#)

On April 14, 2016, the Federal Election Commission announced that Jill Stein is eligible to receive federal matching funds. Stein is seeking the Green Party nomination for president for 2016.

To become eligible for matching funds, candidates must raise a threshold amount of \$100,000 by collecting \$5,000 in 20 different states in amounts no greater than \$250 from any individual. Other requirements to be declared eligible include agreeing to an overall spending limit, abiding by spending limits in each state, using public funds only for legitimate campaign-related expenses, keeping financial records and permitting an extensive campaign audit.

Based on documents filed by Jill Stein for President on March 28, 2016, contributions from the following states were verified for threshold purposes: Arizona, California, Colorado, Florida, Georgia, Illinois, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Texas, Virginia, Washington and Wisconsin. All of the materials included with this submission may be viewed [here](#). Based on Stein's initial threshold submission, the Commission has requested that the United States Treasury make an initial payment of \$100,000 to Stein's campaign.

Once declared eligible, campaigns may submit additional contributions for matching funds on the first business day of every month. The maximum amount a primary candidate could receive is currently estimated to be about \$48.01 million.

The presidential public funding program is financed through the \$3 check-off that appears on individual income tax returns. The program now has two elements: matching payments to participating candidates during the primary campaign and grants available to nominees to pay for the general election campaign. On April 3, 2014, President Barack Obama signed legislation to end the public funding of presidential nomination conventions.

(Posted 04/15/2016; By Dorothy Yeager)

Resources:

- [FEC Press Release](#)
- Brochure: [Public Funding of Presidential Elections](#)
- Brochure: [The \\$3 Tax Checkoff](#)

Advisory Opinions

[AO 2016-01: Website's Distribution of News Content to Users Qualifies for Media Exemption](#)

The costs Ethiq corporation incurs to distribute political news stories, commentary, and editorials through its website and app qualify for the Federal Election Campaign Act's (the Act)"media exemption." As a result, these expenses are neither contributions nor expenditures under the Act.

Background

Ethiq is a for-profit corporation that maintains a website and markets an app through which it proposes to distribute various political news and commentary to its users. These users may submit information about their preferences and opinions on various topics (both political and non-political) that Ethiq will then analyze via an algorithm that will help Ethiq tailor the content that is ultimately provided to each user. The information sent to each user may include news and commentary on political candidates and various businesses that may share the user's views, and issues in which the user is interested. Since Ethiq proposes to tailor the content based on user opinion and interest, different users may receive different content. The news content that Ethiq provides may include political commentary, including references to clearly identified federal candidates, pending legislation, and coverage of candidate speeches and campaigns. Ethiq states that it will not work with any candidates to produce, edit or provide content to its users, nor will it support or oppose any candidates or political parties. Ethiq asks whether its proposed activities may be considered to be exempt from the Act's definition of "contribution" or "expenditure" because the proposed activities fall under the Act's so-called "media exemption" or "press exemption."

Analysis

The Act and Commission regulations generally define the term "contribution" and "expenditure" to include money or anything of value given or paid by any person for the purpose of influencing a federal election. 11 CFR 100.52 and 11 CFR 100.111. However, both the Act and Commission regulations specifically exempt "[a]ny cost incurred in covering or carrying a news story, commentary, or editorial by any...Web site, newspaper, magazine, or other periodical publication, including any Internet or electronic publication" from the definition of "contribution" or "expenditure" unless "the facility is owned or controlled by any political party, political committee, or candidate" 11 CFR 100.73, 100.32; *see, also*, 52 U.S.C. §30101(9)(B)(i).

The Commission conducts a two-step analysis to determine whether this so-called "media exemption" or "press exemption" applies. First, the Commission asks whether the entity engaging in the proposed activity is a press entity. Assuming it is, the Commission then considers whether the entity is owned or controlled by a political party, committee, or candidate, and also whether the entity is acting as a true press entity in conducting the activity at issue (*i.e.*, whether the entity is acting in its legitimate press function). In applying this standard, the Commission considers whether the entity's materials are available to the general public and whether they are comparable in form to those ordinarily issued by the entity. *See*, for example, [AOs 2005-16 \(Fired Up\)](#) and [2000-13 \(iNEXTV\)](#).

Ethiq's website and app will provide news and information about candidates and businesses through both curated and original content. Ethiq will employ journalists to produce original content and will retain ultimate editorial control of that content, similar to the way newspaper and magazine editors manage the content of their respective publications. Based on these facts, the Commission concluded that Ethiq is a *bona fide* press entity.


Since Ethiq is not owned or controlled by any political party, political committee, or candidate and because it will make its news material available to the general public and distribution of such content will be consistent with its ordinary business operation, the Commission concluded that Ethiq meets the second part of the analysis to determine whether the media exemption applies. The fact that information will be based on a user's stated preferences does not change the journalistic nature of the news content provided.

Since Ethiq qualifies as a press entity and is neither owned nor controlled by any candidate, political party or political committee, and will be engaged in typical press activities by providing news-related content to its users, the Commission concluded that Ethiq's proposed activities are within the scope of the Act's media exemption.

Date Issued: April 14, 2016; 5 pages

(Posted: 04/19/2016; by: Myles Martin)

Resources:

- [Advisory Opinion 2016-01](#) [PDF]
- [Commission Discussion of AO 2016-01](#) 

[Pending Advisory Opinion Requests as of April 30, 2016](#)

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 2016-04](#) [PDF] Abbreviated name of SSF. (Grand Trunk Western Railroad — Illinois Central Railroad PAC received on March 15, 2016)

(Posted 05/02/2016; By: Dorothy Yeager)

Resources:

- [Advisory Opinion Search](#)

Compliance

[FEC Cites Committees for Failure to File April Quarterly Financial Report](#)

On April 29, 2016, the Federal Election Commission cited three campaign committees for failing to file the April Quarterly Report required by the Federal Election Campaign Act of 1971, as amended (the Act).

As of April 28, 2016, the required disclosure report had not been received from:

- Picus for Congress (CA-12)
- Friends for Mike Webb (VA-08)
- Phil Wyman for US Senate (CA)

The report was due on April 15, 2016, and should have included financial activity for the period January 1, 2016 through March 31, 2016.

Some individuals and their committees have no obligation to file reports under federal campaign finance law, even though their names may appear on state ballots. If an individual raises or spends \$5,000 or less, he or she is not considered a "candidate" subject to reporting under the Act.

The Commission notified committees of their potential filing requirements on March 22, 2016. Those committees that did not file by the due date were sent notification on April 22, 2016 that their reports had not been received and that their names would be published if they did not respond within four business days.

Other political committees that support Senate and House candidates in elections, but are not authorized units of a candidate's campaign, are also required to file quarterly reports, unless they report monthly. Those committee names are not published by the Commission.

Further Commission action against non-filers and late filers is decided on a case-by-case basis. Federal law gives the Commission broad authority to initiate enforcement actions, and the Commission has implemented an Administrative Fine program with provisions for assessing monetary penalties.

(Posted 4/29/2016)

Resources:

- [FEC Non-Filer Press Release](#) (April 29, 2016)
- [Compliance Map](#)
- [The Administrative Fine Program](#)
- [FEC Reporting Dates](#)
- [Late Filing and Other Enforcement Penalties](#) (Reports Analysis Division)

[FEC Cites Committee in Indiana for Failure to File 12-Day Pre-Primary Financial Report](#)

On April 29, 2016, the Federal Election Commission cited a campaign committee for failing to file the 12-Day Pre-Primary Election Report required by the Federal Election Campaign Act of 1971, as amended (the Act), for the Indiana primary election that is being held on May 3, 2016.

As of April 28, 2016, the required disclosure report had not been received from:

- Brent Waltz for Congress (IN-09)

The pre-primary report was due on April 21, 2016, and should have included financial activity for the period April 1, 2016, through April 13, 2016. If sent by certified or registered mail, the report should have been postmarked by April 18, 2016.

Some individuals and their committees have no obligation to file reports under federal campaign finance law, even though their names may appear on state ballots. If an individual raises or spends \$5,000 or less, he or she is not considered a "candidate" subject to reporting under the Act.

The Commission notified committees involved in the Indiana primary election of their potential filing requirements on March 28, 2016. Those committees that did not file by the due date were sent notification on April 22, 2016 that their reports had not been received and that their names would be published if they did not respond within four business days.

Other political committees that support Senate and House candidates in elections, but are not authorized units of a candidate's campaign, are also required to file quarterly reports, unless they report monthly. Those committee names are not published by the FEC.

Further Commission action against non-filers and late filers is decided on a case-by-case basis. Federal law gives the FEC broad authority to initiate enforcement actions, and the FEC has implemented an Administrative Fine program with provisions for assessing monetary penalties.

(Posted 4/29/2016)

Resources:

- [FEC Non-Filer Press Release](#) (April 29, 2016)
- [Compliance Map](#)
- [The Administrative Fine Program](#)
- [FEC Reporting Dates](#)
- [Late Filing and Other Enforcement Penalties](#) (Reports Analysis Division)

[FEC Cites Committee in Maryland for Failure to File 12-Day Pre-Convention Report](#)

On April 28, 2016, the Federal Election Commission cited a campaign committee for failing to file the 12-Day Pre-Convention Report required by the Federal Election Campaign Act of 1971, as amended (the Act), for Maryland's Green Party Convention that is being held on May 1, 2016.

As of April 27, 2016, the required disclosure report had not been received from:

- Flowers for Senate (MD)

The pre-convention report was due on April 19, 2016, and should have included financial activity for the period April 1, 2016, through April 11, 2016. If sent by certified or registered mail, the report should have been postmarked by April 16, 2016.

Some individuals and their committees have no obligation to file reports under federal campaign finance law, even though their names may appear on state ballots. If an individual raises or spends \$5,000 or less, he or she is not considered a "candidate" subject to reporting under the Act.

The Commission notified committees involved in Maryland's Green Party Convention of their potential filing requirements on March 25, 2016. Those committees that did not file by the due date were sent notification on April 20, 2016 that their reports had not been received and that their names would be published if they did not respond within four business days.

Other political committees that support Senate and House candidates in elections, but are not authorized units of a candidate's campaign, are also required to file quarterly reports, unless they report monthly. Those committee names are not published by the FEC.

Further Commission action against non-filers and late filers is decided on a case-by-case basis. Federal law gives the FEC broad authority to initiate enforcement actions, and the FEC has implemented an Administrative Fine program with provisions for assessing monetary penalties.

(Posted 4/29/2016)

Resources:

- [FEC Non-Filer Press Release](#) (April 28, 2016)
- [Compliance Map](#)
- [The Administrative Fine Program](#)
- [FEC Reporting Dates](#)
- [Late Filing and Other Enforcement Penalties](#) (Reports Analysis Division)

[FEC Cites Committees in Maryland and Pennsylvania for Failure to File 12-Day Pre-Primary Financial Report](#)

On April 22, 2016, the Federal Election Commission cited three campaign committees for failing to file the 12-Day Pre-Primary Election Report required by the Federal Election Campaign Act of 1971, as amended (the Act), for the primary elections that are being held on April 26, 2016.

As of April 21, 2016, the required disclosure report had not been received from:

- Mary Ellen Balchunis for Congress (PA-07)
- Strait for Congress (MD-04)
- Citizens to Elect Violet Staley (MD)

The pre-primary report was due on April 14, 2016, and should have included financial activity for the period January 1, 2016, through April 6, 2016. If sent by certified or registered mail, the report should have been postmarked by April 11, 2016.

Some individuals and their committees have no obligation to file reports under federal campaign finance law, even though their names may appear on state ballots. If an individual raises or spends \$5,000 or less, he or she is not considered a "candidate" subject to reporting under the Act.

The Commission notified committees involved in the primary elections of their potential filing requirements on March 21, 2016. Those committees that did not file on the due date were sent notification on April 15, 2016, that their reports had not been received and that their names would be published if they did not respond within four business days.

Other political committees that support Senate and House candidates in elections, but are not authorized units of a candidate's campaign, are also required to file quarterly reports, unless they report monthly. Those committee names are not published by the FEC.

Further Commission action against non-filers and late filers is decided on a case-by-case basis. Federal law gives the FEC broad authority to initiate enforcement actions, and the FEC has implemented an Administrative Fine program with provisions for assessing monetary penalties.

(Posted 4/25/2016)

Resources:

- [FEC Non-Filer Press Release \(April 22, 2016\)](#)
- [Compliance Map](#)
- [The Administrative Fine Program](#)
- [FEC Reporting Dates](#)
- [Late Filing and Other Enforcement Penalties](#) (Reports Analysis Division)

Outreach

[FEC to Host May 25 Webinar for Trade Associations and Their PACs](#)

The Commission will hold a one-day online seminar for trade associations and their political action committees (PACs) on Wednesday, May 25, 2016. Commission staff will conduct several technical workshops on the federal campaign finance laws affecting trade associations and their 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.



Attendees can choose one of two options for the morning session, Basics and Best Practices or Recent Developments in the Law. The afternoon will feature a two-part workshop on Trade Association PAC operations. Participants will be able to download electronic copies of the workshop materials in advance, and will receive additional instructions and technical information shortly before the event. For more information, and a detailed agenda, please visit the Trade Association Webinar web page: <http://www.fec.gov/info/conferences/2016/tradewebinar.shtml>

The cost to participate is \$80. Refunds (minus a \$20 registration fee) will be made for all cancellations received by Friday, May 20; no refund will be made for cancellations received after that date.

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

Webinar Schedule:

May 25, 2016

Morning Sessions

- Option 1: Basics and Best Practices, 10:30 AM - 12:00 PM EDT
- Option 2: Recent Developments in the Law, 10:30 AM - 12:00 PM EDT

Afternoon Sessions

- Trade Association PAC Operations Part 1, 1:15 - 2:45 PM EDT
- Trade Association PAC Operations Part 2, 3:00 - 4:30 PM EDT

(Posted 05/02/2016; By: Isaac Baker)

Resources:

- [FEC Educational Outreach Opportunities](#)