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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SEP 11 4 56 PM '00

September 11, 2000

MEMORANDUM

TO: The Commission

FROM: Lawrence M. Noble
General Counsel *LM*

BY: Kim Leslie Bright
Associate General Counsel *KL*

SUBJECT: Suspension of Rules to Consider Draft Statements of Reasons --
Petitions to Deny Certification of Public Funds to Patrick J. Buchanan and Ezola
Foster (LRAs #598/599)

AGENDA ITEM
For Meeting of: 9-12-00
SUBMITTED LATE

Attached are the cover memorandum and draft Statements of Reasons addressing the petitions to deny certification of public funds to Patrick J. Buchanan and Ezola Foster. In order for the Commission to consider these matters along with the other Buchanan matters on the agenda, this Office requests that the Commission suspend its rules and consider these matters at its September 12, 2000 Special Open Session.



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

September 11, 2000

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence M. Noble
General Counsel

Kim Leslie Bright
Associate General Counsel

Gregory R. Baker
Special Assistant General Counsel

SUBJECT: Requests to Deny Certification of Public Funds to Patrick J. Buchanan and Ezola Foster (LRA #598/599)

On August 11, 2000 and August 29, 2000, the Office of General Counsel received submissions from Mr. James Mangia and the New York Delegation to the Reform Party convention ("New York Delegation") requesting that the Commission deny certification of public funds to Patrick J. Buchanan and Ezola Foster for the 2000 general election campaign.¹ The Office of General Counsel recommends that the Commission deny the requests by Mr. Mangia and the New York Delegation.² Attached for Commission approval are draft Statements of Reasons supporting the denial of the requests.

¹ On August 10, 2000, Dr. John Hagelin filed a challenge with the Commission which also requested that the Commission not certify public funds to Mr. Buchanan and Ms. Foster for the 2000 general election. On August 17, 2000, Dr. Hagelin withdrew his challenge.

² The challenge by the New York Delegation was submitted by the following 17 individuals: (1) Frank M. MacKay; (2) Cathy Stewart; (3) Philip Goldstein; (4) David Lewis; (5) Daniel Forbes; (6) Gerald Everett; (7) Lenora Fulani; (8) Eve Rose; (9) Robert Conroy; (10) Luvenia Suber; (11) Ainka Fulani; (12) Sheryl Williams; (13) Sarah Lyons; (14) Kitty Reese; (15) Jessie Fields; (16) Allen Cox; and (17) Tara Lewis.

The Office of General Counsel believes that the submissions fail to provide a sufficient basis for the Commission to conclude that Mr. Buchanan's application for public funds contains "patent irregularities suggesting the possibility of fraud," *Committee to Elect Lyndon LaRouche v. FEC*, 613 F.2d 834, 842 (D.C. Cir. 1979), and thus, deny Mr. Buchanan certification for public funding. This recommendation is consistent with past Commission determinations, as well as several court cases. See, e.g., Statement of Reasons, *Request to Deny Funds to H. Ross Perot and Perot '96*, approved October 17, 1996; *In re Carter-Mondale Reelection Committee, Inc.*, 642 F.2d 538 (D.C. Cir. 1980); *LaRouche v. FEC*, 996 F.2d 1263, 1267 (D.C. Cir. 1993). In accordance with these decisions, absent patent irregularities suggesting the possibility of fraud, the Commission is precluded from withholding funds from a candidate "once the objective criteria for eligibility are met, because of the important constitutional free speech considerations inherent in public campaign financing."³ *In re Carter-Mondale Reelection Committee, Inc.*, 642 F.2d at 544. The attached draft Statements of Reasons conclude that the allegations raised by Mr. Mangia and the New York Delegation do not meet this standard.⁴

RECOMMENDATIONS

The Office of General Counsel recommends that the Commission:

1. Deny the request filed by Mr. James Mangia to withhold certification of public funding to Patrick J. Buchanan and Ezola Foster for the 2000 general election;
2. Deny the request filed by the New York Delegation to the Reform Party Convention to withhold certification of public funding to Patrick J. Buchanan and Ezola Foster for the 2000 general election;
3. Approve the attached Statements of Reasons; and
4. Approve the appropriate notification letters.

³ The Commission has codified this standard with respect to primary matching fund eligibility determinations. Under 11 C.F.R. § 9039.3(a)(3), "[m]atching payments will not be withheld pending the results of an inquiry under this section unless the Commission finds patent irregularities suggesting the possibility of fraud in materials submitted by, or in the activities of, the candidate or his or her authorized committee(s)."

⁴ After the Commission has found that a candidate has satisfied the threshold statutory and regulatory requirements for eligibility to receive federal funding, it would be "a violation [of the candidate's] constitutional free speech rights to delay payment of those funds pending an investigation." *In re Carter-Mondale*, 642 F. 2d at 544.

Memorandum to the Commission
Requests to Deny Certification of Public Funds –
Patrick J. Buchanan and Ezola Foster
(LRA #598/599)
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Attachments

- A. Proposed Statement of Reasons Denying Mr. James Mangia's Submission Requesting that the Commission Deny Certification of Public Funds to Mr. Patrick Buchanan and Ms. Ezola Foster.
- B. Proposed Statement of Reasons Denying the New York Delegation's Submission Requesting that the Commission Deny Certification of Public Funds to Mr. Patrick Buchanan and Ms. Ezola Foster.

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
Request by Mr. James Mangia) LRA #598
to Deny Certification of Public Funds)
to Patrick J. Buchanan and)
Ezola Foster)
)

STATEMENT OF REASONS

I. INTRODUCTION

On _____, 2000, the Commission denied a submission filed by Mr. James Mangia requesting that the Commission withhold certification of public funding to Patrick J. Buchanan and Ezola Foster for the 2000 general election campaign under the Presidential Election Campaign Act, 26 U.S.C. §§ 9001-9013 ("Fund Act"). This Statement of Reasons sets forth the legal and factual basis for the Commission's determination.

II. BACKGROUND

On August 11, 2000, Mr. James Mangia filed a submission requesting that the Commission deny certification of Patrick J. Buchanan and Ezola Foster to receive public funding for the 2000 presidential general election. *See Attachment 1.* On August 31, 2000, Mr. Mangia filed a supplement. *See Attachment 2.* On September 6, 2000, Mr. Buchanan filed a response to the Mangia submission. *See Attachment 3.*

On August 14 and 18, 2000, Mr. Buchanan and Ms. Foster submitted letters of candidate agreements and certifications pursuant to 26 U.S.C. § 9003(c) and 11 C.F.R.

§ 9003.1. In a letter dated August 24, 2000, the Commission requested that the candidates provide evidence demonstrating that they had qualified to appear on the general election ballot in ten or more states as nominees of the Reform Party.

Subsequently, on August 25, 28 and 29, 2000, the candidates submitted documentation indicating that they have qualified to appear on the general election ballots as the nominees of the Reform Party in at least ten states.

In his submission, Mr. Mangia alleges that Mr. Buchanan "knowingly and willfully submitted and/or are preparing to knowingly and willfully submit false, fictitious and fraudulent information to the FEC, in violation of Federal Campaign Funding Law."¹ See Attachment 1, page 4. As a result, Mr. Mangia requests that until these allegations are fully investigated, the Commission should "withhold making its decision regarding certification of the Reform Party nominee for the Office of the President of the United States." *Id.* at 14.

The challenge asserts that Patrick J. Buchanan and his supporters attempted to "override the directives and resolutions by the PNC [Presidential Nominating Committee] and the Executive Committee and the proper and lawfully constituted Reform Party of the United States of America, now that the respondents have control of a rogue faction, claiming to be the Reform Party of the United States of America." *Id.* at 12. Mr. Mangia asserts that Mr. Buchanan and his supporters sought to abolish the Rules for the selection of Reform Party of the United States Nominees for President and Vice President of the United States, which is expressly prohibited in a presidential election year, "and conduct

¹ In his supplement, Mr. Mangia provided updated information regarding Mr. Buchanan's nomination and additional evidence supporting his claims. See Attachment 3.

an invalid floor vote at an illegal convention, or utilize the invalid and improper ballots to purportedly win the Reform Party Primary, and thereby wrongfully and fraudulently attempt to become the purported Reform Party Nominee for the Office of the President of the United States." *Id.* at 12-13.

The challenge concludes that the actions by Mr. Buchanan and his supporters constitute balloting and voter fraud. *Id.* at 13. Moreover, Mr. Mangia alleges that any representation to the Commission by Patrick Buchanan that he is the valid and lawful Reform Party nominee for Office of the President of the United States, constitutes a false, fictitious, and fraudulent representation to the Commission, in violation of 26 U.S.C. § 9012(d)(1).

Mr. Mangia also alleges that Angela "Bay" Buchanan violated the law by demanding that the Reform Party enter into a "secret agreement" to keep the names on the "Pat Buchanan supporter list" secret.² *Id.* at 13. The challenge states that federal election laws make it a criminal offense for the administrators of a presidential primary election to fail to retain the records of the primary for a period of 22 months, and that it is a crime for anyone to destroy such records before expiration of the 22-month period. *Id.* See 42 U.S.C. § 1974.

In his response to Mr. Mangia's submission, Mr. Buchanan asserts that the allegations involve matters relating solely to the "internal operations of the Reform Party of the United States of America, which are governed by its Constitution and other organizational documents, and not by the Act or the Fund Act." See Attachment 3, at 1

² The "Pat Buchanan supporter list" consisted of 500,000 names which were submitted to the Reform Party Nominating Committee for the purpose of participating in the Reform Party presidential primary. See Attachment 1, at 27.

and 2. Mr. Buchanan states that the Commission should not consider submissions "about the internal processes of the Reform Party leading up to the Convention or at the Convention, such as the seating of Convention delegates." *Id.* at 5. Mr. Buchanan further contends that the Commission should look only to the results of the Reform Party Convention, and should not "entertain Mr. Mangia's allegations of irregularity in the process under the Reform Party Rules." *Id.* at 7. Moreover, Mr. Buchanan asserts that he and Ms. Foster were in fact nominated by the Reform Party Convention and that any statement to the contrary is false. Mr. Buchanan asserts that the representation that John Hagelin is the nominee for the Office of President of the United States for the Reform Party of the United States of America is invalid, "as it has absolutely no legal support, and is clearly a claim asserted without authorization from the official Reform Party of the United States of America." *Id.* at 6. In addition, Mr. Buchanan asserts that Mr. Mangia's behavior at the National Committee Meeting demonstrates a lack of "good faith" on the part of Mr. Mangia and Dr. Hagelin. *Id.* at 9. Accordingly, Mr. Buchanan requests that the Commission dismiss Mr. Mangia's submission. *Id.* at 10.

III. COMMISSION DECISION

A. LEGAL FRAMEWORK

The Fund Act provides that the eligible candidates of a minor party in a presidential election shall be entitled to pre-election funding. 26 U.S.C. § 9004(a)(2)(A). *See also* 11 C.F.R. § 9004.2(b). Under 26 U.S.C. § 9004(a)(2), the amount of the minor party candidate's entitlement is the proportionate amount of the funding available for major party general election candidates, based on the ratio of the total popular votes received by the minor party candidate in the preceding election compared to the average

of the total popular votes received by the major party candidates for President in that election. *See also* 11 C.F.R. § 9004.2(b). The Fund Act provides that the Commission shall certify to the Secretary of the Treasury payment to eligible candidates in the full amount to which they are entitled not later than 10 days after they have met all applicable conditions for eligibility.

26 U.S.C § 9005(a). *See also* 11 C.F.R. § 9005.1(b).

The Fund Act defines "candidate" as an individual who has been nominated for election to the office of President of the United States or the office of Vice President of the United States by a major party, or has "qualified to have his name on the election ballot (or to have the names of electors pledged to him on the election ballot) as the candidate of a political party for election to either such office in 10 or more states." 26 U.S.C. § 9002(2).

The Commission's regulations define "political party" as an "association, committee, or organization which nominates or selects an individual for election to any Federal office, including the office of President or Vice President of the United States, whose name appears on the general election ballot as the candidate of such association, committee, or organization." 11 C.F.R. § 9002.15.

The Commission has on several occasions considered petitions to deny certification of public funds to presidential candidates. *See, e.g., In re Carter-Mondale Reelection Committee, Inc.*, 642 F.2d 538 (D.C. Cir. 1980). Additionally, the Commission has acted to deny funds based on information obtained internally, without a petition from an interested party, or based on inadequacies detected in a candidate's submission for matching funds. *See, e.g., Committee to Elect Lyndon LaRouche v. FEC*,

613 F.2d 834 (D.C. Cir. 1979) ("*CTEL*"); *LaRouche v. FEC*, 996 F.2d 1263 (D.C. Cir. 1993).

The Court of Appeals for the District of Columbia Circuit considered Commission action with respect to the matching fund certification process during the 1976 presidential election cycle and the submission of Lyndon LaRouche. See *CTEL*, 613 F.2d 834. In that case, the Commission denied Mr. LaRouche's submission for matching funds because of irregularities uncovered during an audit of his threshold submission. The *CTEL* court stressed the importance of "prompt payments to eligible candidates" so that they "will have the money [they] need at a time when its availability is most important to [the] campaign." *Id.* at 841. The court also noted that the "policy favoring prompt payments to eligible candidates ... circumscribe[s] to a certain extent the scope of the Commission's investigative role during the certification process." *Id.* Nevertheless, the D.C. Circuit upheld the Commission's action holding that the Commission may reject certification if a matching fund request: (1) was not properly documented to meet threshold requirements, and (2) contained "patent irregularities suggesting the possibility of fraud." *Id.* at 842.

During the 1980 election cycle, the Commission received a petition from the Carter-Mondale Reelection Committee, Inc. asserting that presidential candidate Ronald Reagan and vice-presidential candidate George Bush were not eligible for public funding in the general election based on various newspaper accounts reporting that certain laws had been or would be violated by the candidates. While the petition was pending before the Commission, the Carter-Mondale Committee petitioned the D.C. Circuit to adjudicate the issue. Following the Commission's certification of funds to the Reagan-Bush

campaign, the D.C. Circuit ruled that the petition filed with it was "premature on the statutory ground that it violates the FEC's exclusive jurisdiction." *In re Carter-Mondale*, 642 F.2d at 543. The court reiterated its position from the *CTEL* case that the Commission can investigate allegations concerning the certification of public funds when it "reasonably appears that a patent fraud or other major violation of law is being committed," while also being cautious to avoid "overstep[ping] its authority by interfering unduly in the conduct of elections." *Id.* at 544-45. The court also criticized the allegations made by the Carter-Mondale Committee as addressing future conduct and for being "highly speculative." *Id.* at 543.³

During the 1992 election cycle, the Commission denied certification to Lyndon LaRouche and considered a petition to deny public funding to the Clinton/Gore '92 General Election Committee. The Commission's denial of certification to Mr. LaRouche, which was based on his prior transactions with the Commission and his federal conviction on fraud charges, was overturned by the D.C. Circuit which ruled that the Commission was "not authorized to appraise candidates' good faith, honesty, probity, or general reliability." *LaRouche v. FEC*, 996 F.2d 1263, 1267 (D.C. Cir. 1993). The court noted that "any inquiry into the bonafides of candidates' promises would take the Commission into highly subjective territory that would imperil the assurance of even-handed treatment." *Id.*

³ In the 1984 election cycle, the National Conservative Political Action Committee filed a complaint against Walter Mondale and Geraldine Ferraro, requesting that the Commission withhold certification of public funds to their general election campaign. Similarly, the Republican National Committee and others petitioned to stop the certification of payment of public funds to the general election campaign of Michael Dukakis and Lloyd Bentsen in 1988. In both cases, the Commission denied the requests on the basis that the requests did not satisfy the standards set forth in *In re Carter-Mondale* for denying certification of funds insofar as patent fraud or a major violation of the law could not be detected. The D.C. Circuit affirmed the

In the same election cycle, the Commission considered a petition filed by the Republican National Committee ("RNC") against the Clinton/Gore '92 campaign wherein the RNC alleged that the Clinton/Gore campaign impermissibly received funding from the Democratic National Committee through payments for a "town meeting." The Commission rejected the petition since it did not reasonably appear that patent fraud or violations occurred in the subject transaction which would require the withholding of payments. *See In re Carter-Mondale*, 642 F.2d at 544. The Commission noted that the underlying factual issues were in dispute, and that the appropriate forum to address the questions was the enforcement or audit context. Statement of Reasons, *Petition to Deny Certification of Matching Funds to Governor Bill Clinton*, approved June 25, 1992.

Further applying the standards articulated by the courts, the Commission rejected three requests to suspend or deny certification of public funds in the 1996 presidential election cycle. *See* Statement of Reasons, *Request to Deny Public Funds to H. Ross Perot and Perot '96*, approved October 17, 1996 (the Commission denied the request by Mr. Herb Rosenberg to deny certification of public funds to Mr. Perot's 1996 general election campaign); Statement of Reasons, *Petition to Deny Certification of Matching Funds to the Dole for President Committee*, approved August 8, 1996 (the Commission denied the request by the Democratic National Committee to suspend matching payments to the Dole for President Committee); Statement of Reasons, *Petition to Deny Certification of Matching Funds to the Clinton/Gore '96 Primary Committee, Inc.*, approved September 12, 1996 (the Commission denied the request by the Dole for

Commission's decision to deny the RNC's petition to the stop certification of payments to Dukakis/Bentsen. *See Boulter v. FEC*, No. 88-1541 (D.C. Cir., August 3, 1988).

President Committee to suspend matching payments to the Clinton/Gore '96 Primary Committee).

The Presidential Election Campaign Fund Act makes it unlawful for any person to knowingly and willfully furnish false, fictitious, or fraudulent evidence or information to the Commission relevant to a certification by the Commission. 26 U.S.C.

§ 9012(d)(1)(A). The Fund Act provides for criminal penalties for any person who violates this provision. 26 U.S.C. § 9012(d)(2).

Under the Civil Rights Act of 1960, every officer of an election is required to "retain and preserve, for a period of twenty-two months all records and papers which come into his possession relating to any application, registration, payment of poll tax, or other act requisite to voting in such election" 42 U.S.C. § 1974. The Civil Rights Act further provides that, "[a]ny officer of election or custodian who willfully fails to comply with this section shall be fined not more than \$1,000 or imprisoned not more than one year, or both." *Id.*

B. DISCUSSION

The Commission has rejected Mr. Mangia's request to deny certification of Patrick J. Buchanan and Ezola Foster for public funding for the 2000 general election. The allegations made against Mr. Buchanan and Ms. Foster do not satisfy the substantial burden that must be met to withhold certification of public funds. While not purely ministerial, the Commission's review of public funding applications is limited to determining whether the applications adequately comply with the eligibility requirements set forth in the Fund Act. The Fund Act obligates the Commission to make an initial determination within 10 days of the candidate's meeting all applicable conditions for

eligibility. 26 U.S.C. § 9005. Absent patent irregularities suggesting the possibility of fraud, the Commission is precluded from withholding funds from a candidate "once the objective criteria for eligibility are met, because of the important constitutional free speech considerations inherent in public campaign financing." *In re Carter-Mondale Reelection Committee, Inc.*, 642 F.2d 538, 544 (D.C. Cir. 1980). To justify withholding funding, the Commission should have a reasonable belief that patent fraud or another major violation has occurred. *See LaRouche*, 996 F.2d at 1267. The Commission should also avoid basing its findings on speculative allegations and should favor a policy that allows for prompt payments of public funds, even if it must forgo a thorough investigation at the initial stage. *CTEL*, 613 F.2d at 841. The Commission does not possess evidence that Mr. Buchanan's application for public funds contains patent irregularities or the possibility of fraud.

Moreover, Mr. Mangia's allegations primarily relate to the Reform Party's internal rules and procedures. The Fund Act's definition of "candidate" explicitly requires the Commission to rely on the states' determinations of who appears on the general election ballot for each party. *See* 26 U.S.C. § 9002(2)(B); 11 C.F.R. § 9002.2(a)(2). The Commission should not entangle itself in the complexities of party rules or procedures as the Fund Act does not define eligibility in terms of a political party's actions. Thus, the Commission should not substitute its own judgment for that of a state with regard to who should appear on a state ballot as a party nominee. *See* Statement of Reasons, *Request to Deny Funds to H. Ross Perot and Perot '96*, approved October 17, 1996. Similarly, Mr. Mangia's submission relates to events of competing factions of the Reform Party and raises questions regarding which faction is the "true"

Reform Party. However, the Commission's regulations indicate that a "political party" is an association that nominates or selects an individual for federal office whose name appears on the general election ballot as the candidate for that association. See 11 C.F.R. § 9002.15. As Mr. Buchanan and Ms. Foster have submitted documentation demonstrating that they have qualified to appear on numerous general election ballots as Reform Party candidates, they meet the Fund Act's definition of "candidate," and the Reform Party, under whose designation they run, meets the definition of "political party." See also Advisory Opinion 1998-2 (The Commission has recognized the Reform Party as a political party).

Finally, Mr. Mangia alleges violations of the criminal provisions of the Fund Act and the Civil Rights Act of 1960. While the Commission has exclusive jurisdiction for the civil enforcement of the Fund Act, the Department of Justice is charged with prosecuting violations of the Civil Rights Act of 1960. Such violations are not relevant to certification decisions under the Fund Act. Rather, they are more appropriately considered in the context of an enforcement matter, audit, or similar investigation.

Therefore, consistent with past Commission practice and judicial precedent, the Commission rejects the request by James Mangia to withhold certification of public funds to Mr. Buchanan and Ms. Foster.

IV. COMMISSION DETERMINATION

For the foregoing reasons, the Commission has denied the request of Mr. James Mangia to deny certification of public funds for the 2000 general election to Mr. Patrick J. Buchanan and Ms. Ezola Foster.

Attachments

1. Mr. James Mangia's Submission Requesting that the Commission Deny Certification of Public Funds to Patrick Buchanan and Ezola Foster, dated August 10, 2000.
2. Supplement to Mr. James Mangia's Submission, dated August 29, 2000.
3. Mr. Patrick J. Buchanan's Response, dated September 5, 2000.