

Record

August 2008

Federal Election Commission

Volume 34, Number 8

Table of Contents

Commission

- 1 New Commissioners Join the Commission
- 3 Commission Statement on Davis v. FEC

Court Cases

- 1 Davis v. FEC
- 6 SpeechNow v. FEC
- 8 Bialek v. Mukasey
- 8 DNC v. FEC

Public Funding

- 9 Commission Certifies Primary Matching Fund Payments

10 Advisory Opinions

Outreach

- 10 Roundtable on Pre-Election Communications

10 Index

Commission

New Commissioners Join the Commission

On June 24, 2008, the U.S. Senate confirmed five new commissioners: Cynthia L. Bauerly, Caroline C. Hunter, Donald F. McGahn II, Matthew S. Petersen and Steven T. Walther. On July 10, 2008, the Commission elected Mr. McGahn as Chairman and Mr. Walther as Vice Chairman. The new commissioners join current Commissioner Ellen L. Weintraub.

Chairman Donald F. McGahn II

Prior to joining the Commission, Chairman McGahn was the head of McGahn & Associates PLLC, a Washington, DC, based law practice specializing in political law. He represented and advised a number of political clients, including federal and state candidates, Members of the U.S. House and Senate, national state and local party committees, leadership PACs, corporations and corporate PACs, non-profits, trade associations and others involved in the political process on issues such as campaign finance law and government ethics.

From 1999 to 2008, Chairman McGahn served as the General Counsel for the National Republican Congressional Committee

Court Cases

Davis v. FEC

On June 26, 2008, the Supreme Court ruled that provisions of the Bipartisan Campaign Reform Act (BCRA) known as the “Millionaires’ Amendment” (2 U.S.C. §319(a) and (b)) unconstitutional burden the First Amendment rights of self-financed candidates. The decision overturned an earlier ruling by the U.S. District Court for the District of Columbia that the Millionaires’ Amendment posed no threat to self-financed candidates’ First Amendment or Equal Protection rights.

Background

On March 30, 2006, Jack Davis, a candidate for the House of Representatives in New York’s 26th District, filed a Statement of Candidacy with the FEC declaring his intent to spend over \$350,000 of his own funds on his campaign.

On June 6, 2006, Davis asked the U.S. District Court for the District of Columbia to declare the Millionaires’ Amendment provisions unconstitutional on their face, and to issue an injunction barring the FEC from enforcing those provisions. Mr. Davis argued that the Millionaires’ Amendment violates the First Amendment by chilling

(continued on page 2)

(continued on page 4)

Commission

(continued from page 1)

(NRCC) in Washington, DC. He also served as Counsel for the Illinois Republican Party from 2005 to 2008.

Prior to serving as General Counsel for the NRCC, Chairman McGahn practiced law with the Washington, DC, office of Patton Boggs LLP as a member of the firm's litigation group. He advised and represented elected officials, candidates, national and state parties and others on election law issues. In addition to political law, he handled all matters of complex litigation and was recognized for significant *pro bono* work for the Lawyers' Committee for Civil Rights Under Law.

Chairman McGahn clerked for the Honorable Charles R. Alexander

Federal Election Commission 999 E Street, NW Washington, DC 20463

800/424-9530
202/694-1100
202/501-3413 (FEC Faxline)
202/219-3336 (TDD for the hearing impaired)

Donald F. McGahn II, Chairman
Steven T. Walther, Vice Chairman
Cynthia L. Bauerly,

Commissioner

Caroline C. Hunter,
Commissioner

Matthew W. Petersen,
Commissioner

Ellen L. Weintraub,
Commissioner

Thomasesnia Duncan,
General Counsel

Published by the Information Division of the Office of Communications

Greg J. Scott, Assistant Staff Director

Amy L. Kort, Deputy Assistant Staff Director

Meredith E. Metzler, Editor

<http://www.fec.gov>

at the Court of Common Pleas in Clarion, PA. He received his law degree from Widener University School of Law and his undergraduate degree from the University of Notre Dame.

Vice Chairman Steven T. Walther

Vice Chairman Walther, was first sworn in as a Commissioner on January 10, 2006, as a recess appointee. Although his name was placed before the Senate for confirmation in June 2007, his recess term expired on December 31, 2007, before the Senate acted. On June 24, 2008, he was unanimously confirmed by the Senate and was sworn in on June 27, 2008, to resume the balance of his statutory term.

Prior to his appointment, Vice Chairman Walther was an attorney in private practice at Walther, Key, Maupin, Oats, Cox & Legoy, which he co-founded in 1972. Mr. Walther has been active in numerous professional legal and judicial activities. He has served as a member of the Board of Governors of the American Bar Association and currently serves as co-chair of the ABA Center for Human Rights. He has been active in ABA initiatives focusing on international relations—especially in programs which promote development of fair and open election laws—and has served as the ABA Representative to the United Nations.

He was on the Board of Trustees of the National Judicial College and served for many years as a lecturer and educator on rule of law, human rights and international law issues for judges in both the United States and Russia. He is a former president of the State Bar of Nevada, the Western States Bar Conference and the National Caucus of State Bar Associations.

Vice Chairman Walther received a B.A. from the University of Notre Dame with a major in Russian. He received his J.D. from the Boalt Hall School of Law, University of

California, Berkeley, and recently served as president of the Boalt Hall Alumni Association.

Commissioner Cynthia L. Bauerly

Prior to her appointment to the Commission, Ms. Bauerly served as Legislative Director for Senator Charles E. Schumer of New York. She directed all aspects of the Senator's legislative agenda by setting and implementing legislative priorities, managing policy staff, advising the Senator on floor strategy, campaign finance and ethics policy, overseeing committee and subcommittee activities and coordinating with communications staff.

In 2004 and 2005, Ms. Bauerly specialized in intellectual property and business litigation with Fredrikson & Byron in Minneapolis, Minnesota. From February until November 2005, she was the policy director for Amy Klobuchar's successful U.S. Senate campaign in Minnesota.

From 2002 to 2004, Ms. Bauerly served as Senator Schumer's counsel on the Senate Judiciary and Rules Committees. In this position, she advised Senator Schumer on a broad range of policy matters including election reform, campaign finance, technology, telecommunications, intellectual property, antitrust, legal process reform and immigration.

Prior to her work for Senator Schumer, she specialized in complex litigation and appellate law at Jones Day in Washington, DC. She previously served as a judicial clerk for the Honorable Florence-Marie Cooper of the U.S. District Court for the Central District of California and the Honorable Theodore R. Boehm of the Indiana Supreme Court.

Ms. Bauerly graduated *cum laude* from Indiana University School of Law-Bloomington and received a Master of Public Affairs from Indiana University's School of

Environmental and Public Affairs. Ms. Bauerly is a *summa cum laude* graduate of Concordia College in Moorhead, Minnesota.

Commissioner Caroline C. Hunter

Ms. Hunter previously served as the Vice-Chair of the United States Election Assistance Commission (EAC). She was nominated to the EAC in 2006 and confirmed by the U.S. Senate on February 15, 2007.

Prior to joining the EAC, Ms. Hunter served as deputy director of the White House Office of Public Liason from January to October 2006. From 2005 to 2006, she served as executive officer at the U.S. Department of Homeland Security, Office of Citizenship and Immigration Services Ombudsman.

From 2001 to 2005, Ms. Hunter was associate counsel and then deputy counsel at the Republican National Committee, where she provided guidance on election law and the implementation of the Help America Vote Act.

Ms. Hunter graduated *cum laude* from the University of Memphis School of Law and received her bachelor of arts degree from The Pennsylvania State University.

Commissioner Matthew S. Petersen

From 2005 until his appointment to the Commission, Mr. Petersen served as Republican chief counsel to the U.S. Senate Committee on Rules and Administration. As chief counsel, Mr. Petersen provided counsel on issues relating to federal campaign finance and election administration laws as well as the Standing Rules of the Senate.

Prior to his position with the Senate Rules Committee, Mr. Petersen served as counsel to the U.S. House of Representatives Committee on House Administration. During his tenure, Mr. Petersen was extensively involved in the crafting of the Help America Vote Act

of 2002 (HAVA) and the House-Senate negotiations that culminated in HAVA's passage. From 1999 to 2002, Mr. Petersen specialized in election and campaign finance law at the law firm of Wiley Rein LLP in Washington, DC.

Mr. Petersen received his law degree from the University of Virginia School of Law, where he was a member of the Virginia Law Review. He graduated *magna cum laude* with a bachelor of arts degree in philosophy from Brigham Young University. He also received an A.S. degree with high honors from Utah Valley State College.

—Meredith Metzler

Commission Statement on Davis v. FEC

On June 26, 2008, the Supreme Court issued its decision in *Davis v. FEC*, 554 U.S. ___, No. 07-320, and found Sections 319(a) and 319(b) of the Bipartisan Campaign Reform Act of 2002¹—the so-called “Millionaires’ Amendment” (the “Amendment”)—unconstitutional because they violate the First Amendment to the U.S. Constitution.² The Court’s analysis in *Davis* precludes enforcement of the House provision and effectively precludes enforcement of the Senate provision as well.

This public statement outlines the general principles the Commission will apply to conform to the Court’s decision.

- The Commission will no longer enforce the Amendment and will initiate a rulemaking shortly to

¹ 2 U.S.C. § 441a-1.

² Under the “Millionaires’ Amendment,” when a candidate’s personal expenditures exceeded certain thresholds, that candidate’s opponent(s) became eligible to receive contributions from individuals at an increased limit and to benefit from enhanced coordinated party expenditures.

AO Search System Available

The FEC has an Advisory Opinion Search System available on its web site at <http://www.fec.gov>.

This search function allows users to search for advisory opinions (AOs) by the AO number or name of requestor, or to enter search terms or perform an advanced search for documents.

The system quickly provides relevant AOs, along with all related documents including advisory opinion requests, comments and any concurring or dissenting opinions issued by Commissioners. The search function also provides summary material and links to other AOs cited in the opinion.

When the search system was first launched, it included AOs issued from 1997 to the present. The system has now been updated to include AOs dating back to 1990. The AO search system is available at <http://saos.nictusa.com/saos/searchao>.

conform its rules to the Court’s decision.

- As of June 26, 2008, any FEC disclosure requirements related solely to the Amendment need not be followed. There is no longer a need to file the Declaration of Intent portion of the Statement of Candidacy (Lines 9A and 9B of Form 2), FEC Form 10, Form 11, Form 12, or Form 3Z-1.
- All other filing obligations unrelated to the Amendment remain the same. For example, contributions a candidate makes to his or her own campaign must still be reported.
- As of June 26, 2008, opponents of self-financed candidates who triggered the Amendment may not accept increased contributions.

(continued on page 4)

Commission

(continued from page 3)

- As of June 26, 2008, political parties may no longer make increased coordinated expenditures on behalf of opponents of self-financed candidates whose personal expenditures would have triggered the Amendment.

Regarding pending FEC matters that have not reached a final resolution, the Commission intends to proceed as follows:

- The Commission is reviewing all pending matters involving the Amendment and will no longer pursue claims solely involving violations of the Amendment. Moreover, the Commission will no longer pursue information requests or audit issues solely concerning potential compliance with the Amendment. However, not all activity related to the Amendment was affected by the *Davis* decision. If, for example, someone accepted a contribution *above* the amount allowed under the Amendment's increased limits, or accepted increased contributions without being eligible, the Commission will consider such matters

New Campaign Guide Available

The 2008 *Campaign Guide for Nonconnected Committees* is now available on the Commission web site at <http://www.fec.gov/info/publications.shtml>. Paper copies will be available by September 2008.

For each type of committee, a *Campaign Guide* explains, in clear English, the complex regulations regarding the activity of political committees. It shows readers, for example, how to fill out FEC reports and illustrates how the law applies to practical situations.

Please contact the Information Division at 800/424-9530 to order paper copies.

as part of its normal enforcement process.

- The Commission will not require that candidates who received increased contributions in accordance with the Amendment before June 26, 2008, return those funds so long as the funds are properly expended in connection with the election for which they were raised. Similarly, the Commission will not request that political parties, if any, that made increased coordinated expenditures before June 26 consistent with the Amendment take any remedial action. Additionally, the Commission will not pursue individual contributors who made increased contributions, that were in accordance with the Amendment, before June 26, 2008.

Campaigns or party organizations with specific questions regarding their reporting obligations may contact the Reports Analysis Division at (800) 424-9530.

Court Cases

(continued from page 1)

speech by self-financed candidates, and violates the Equal Protection Clause of the Fifth Amendment by giving a competitive advantage to self-financed candidates' opponents.

Under the Millionaires' Amendment, candidates who spend more than certain threshold amounts of their own personal funds on their campaigns may render their opponents eligible to receive contributions from individuals at an increased limit. 2 U.S.C.

§ 441a-1. For House candidates, the threshold amount is \$350,000. This level of personal campaign spending could trigger increased limits for the self-financed candidate's opponent depending upon the opponent's own campaign expenditures from personal funds and the amount of funds the candidate has raised from other sources in the year

prior to the year of the election. If increased limits are triggered, then the eligible candidate may receive contributions from individuals at three times the usual limit of \$2,300 per election and may benefit from party coordinated expenditures in excess of the usual limit.

District Court Decision

The district court held that Mr. Davis's First Amendment challenge failed at the outset because the Millionaires' Amendment did not "burden the exercise of political speech."

According to the district court, the Millionaires' Amendment "places no restrictions on a candidate's ability to spend unlimited amounts of his personal wealth to communicate his message to voters, nor does it reduce the amount of money he is able to raise from contributors. Rather, the Millionaires' Amendment accomplishes its sponsors' aim to preserve core First Amendment values by protecting the candidate's ability to enhance his participation in the political marketplace." In particular, the court cited the fact that Mr. Davis himself has twice chosen to self-finance his campaign. The court found that Mr. Davis failed to show how his speech had been limited by the benefits his opponents receive under the statute.

Mr. Davis additionally alleged that the disclosure requirements for self-financed candidates under the Millionaires' Amendment imposed an unfair burden on his right to speak in support of his own candidacy. The district court found that the Millionaires' Amendment reporting requirements are no more burdensome than other BCRA reporting requirements that the Supreme Court has already upheld.

The court also rejected the second prong of Mr. Davis's facial challenge, regarding the Equal Protection provision of the Fifth Amendment. In order to argue that a statute violates the Equal Protec-

tion Clause of the Fifth Amendment, a plaintiff must show that the statute treats similarly situated entities differently.

The district court found that the Millionaires' Amendment did not violate the Equal Protection Clause of the Fifth Amendment because Mr. Davis could not show that the statute treated similarly situated entities differently. The district court held that self-funded candidates, who can choose to use unlimited amounts of their personal funds for their campaigns, and candidates who raise their funds from limited contributions are not similarly situated. According to the court, "the reasonable premise of the Millionaires' Amendment is that self-financed candidates are situated differently from those who lack the resources to fund their own campaigns and that this difference creates adverse consequences dangerous to the perception of electoral fairness." Thus, the court found no violation of the Fifth Amendment.

The District court granted the FEC's request for summary judgment in this case and denied Mr. Davis's request for summary judgment.

Supreme Court Decision

On June 26, 2008, the Supreme Court issued an opinion reversing the district court's decision. The Court held that the Millionaires' Amendment unconstitutionally violated self-financed candidates' First Amendment or Equal Protection rights. The Court also rejected the FEC's arguments that Davis lacked standing and that the case was moot.

Standing. The FEC argued that Davis lacked standing to challenge the unequal contribution limits of the Millionaires' Amendment, 2 U.S.C. §319(a), because Davis' opponent never received contributions at the increased limit and therefore, Davis had suffered no injury. The Court rejected this argument, not-

ing that a party facing prospective injury has standing whenever the threat of injury is real, immediate and direct. The Court further noted that Davis faced such a prospect of injury from increased contribution limits at the time he filed his suit.

Mootness. The FEC also argued that Davis' argument was moot because the 2006 election had passed and Davis' claim would be capable of repetition only if Davis planned to self-finance another election for the U.S. House of Representatives. The FEC also argued that Davis' claim would not evade review as he could challenge the Amendment in court should the Commission file an enforcement action regarding his failure to file personal expenditure reports. Considering that Davis had subsequently made a public statement expressing his intent to run for a House seat and trigger the Millionaires' Amendment again, the Court concluded that Davis' challenge is not moot.

First Amendment and Equal Protection. In considering Davis' claim that imposing different fundraising limits on candidates running against one another impermissibly burdens his First Amendment right to free speech, the Court noted that it has never upheld the constitutionality of such a law. The Court referred to *Buckley v. Valeo*, in which it rejected a cap on a candidate's expenditure of personal funds for campaign speech and upheld the right of a candidate to "vigorously and tirelessly" advocate his or her own election. While the Millionaires' Amendment did not impose a spending cap on candidates, it effectively penalized candidates who spent large amounts of their own funds on their campaigns by increasing their opponents' contribution limits. The Court determined that the burden thus placed on wealthy candidates is not justified by any governmental interest in preventing corruption or the appearance of corruption, and that

equalizing electoral opportunities for candidates of different personal wealth was not a permissible Congressional purpose.

(continued on page 6)

Enforcement Query System Available on FEC Web Site

The FEC continues to update and expand its Enforcement Query System (EQS), a web-based search tool that allows users to find and examine public documents regarding closed Commission enforcement matters. Using current scanning, optical character recognition and text search technologies, the system permits intuitive and flexible searches of case documents and other materials.

Users of the system can search for specific words or phrases from the text of all public case documents. They can also identify single matters under review (MURs) or groups of cases by searching additional identifying information about cases prepared as part of the Case Management System. Included among these criteria are case names and numbers, complainants and respondents, timeframes, dispositions, legal issues and penalty amounts. The Enforcement Query System may be accessed on the Commission's web site at <http://www.fec.gov>.

Currently, the EQS contains complete public case files for all MURs closed since January 1, 1999. In addition to adding all cases closed subsequently, staff is working to add cases closed prior to 1999. Within the past year, Alternative Dispute Resolution (ADR) cases were added to the system. All cases closed since the ADR program's October 2000 inception can be accessed through the system.

Court Cases

(continued from page 5)

The Court remanded the matter for action consistent with its decision. On June 26, 2008, the Commission issued a public statement outlining the general principles the Commission will apply to conform to the Court's decision. The full statement is printed on page 3.

U.S. Supreme Court, No. 07-320.
—Gary Mullen

SpeechNow.org v. FEC

On July 1, 2008, the U.S. District Court for the District of Columbia denied SpeechNow.org's (SpeechNow) request for a preliminary injunction and rejected the group's argument that it is likely to succeed on the merits of the case.

Commission Calendar Always Up-to-Date

Between issues of the *Record*, you can stay up-to-date on the latest FEC activity by visiting the Commission Calendar on our web site at <http://www.fec.gov/calendar/calendar.shtml>.

The Calendar lists Commission meetings, reporting deadlines, conferences and outreach events, advisory opinion and rulemaking comment periods and other useful information. Each calendar entry links directly to the relevant documents, so you can quickly access detailed information on the subjects that interest you.

While you're visiting www.fec.gov, be sure to explore the rest of our site to review the latest campaign finance reports and data, research enforcement actions and litigation, read press releases and get help complying with the law. Visit today and add our site to your favorites.

Background

On February 14, 2008, SpeechNow, a group formed to make independent expenditures, and several individual plaintiffs, filed a complaint in the U.S. District Court for the District of Columbia challenging the constitutionality of the Federal Election Campaign Act (the Act) provisions governing political committee registration, contribution limits and disclosure.

The plaintiffs seek a declaration that, as applied, those provisions unconstitutionally abridge their rights of free speech and association. Additionally, they request preliminary and permanent injunctions blocking the FEC from enforcing the provisions against them.

Under the Act, a group whose major purpose is to influence the election of candidates to office becomes a "political committee" when it collects contributions or makes expenditures in excess of \$1,000 during a calendar year. 2 U.S.C. §431(4). The definition of "contribution" includes any gift, loan or anything of value made by any person to influence an election for federal office. 2 U.S.C. §431(8). Similarly, an "expenditure" includes any purchase, payment or anything of value made by any person to influence a federal election. 2 U.S.C. §431(9).

Political committees must register with the FEC and are subject to limits on the contributions they receive and make. 2 U.S.C. §441a(a). They also must periodically disclose their receipts and disbursements. 2 U.S.C. §434(a) and (b).

A political committee may make unlimited "independent expenditures," which are defined as expenditures expressly advocating the election or defeat of a clearly identified candidate that are not made in concert or coordination with a candidate or a political party. 2 U.S.C. §431(17).

Individuals may make unlimited independent expenditures from their

personal funds. An individual who makes such expenditures may have reporting requirements but will not trigger registration with the FEC as a political committee. 2 U.S.C. §434(c). Individual contributions are subject to limits, including an overall biennial limit on federal contributions.

Complaint

SpeechNow is a nonprofit, unincorporated association organized as a section 527 entity under the Internal Revenue Code. The organization was formed by individuals who seek to pool their resources to make independent expenditures expressly advocating the election or defeat of federal candidates. SpeechNow plans to accept contributions only from individuals, not corporations or other sources prohibited under the Act. The individual plaintiffs wish to contribute to SpeechNow, both in federally permissible amounts and in amounts exceeding the federal limits.

SpeechNow submitted an advisory opinion request with the Commission on November 19, 2007, asking whether its activities, raising funds from individuals to pay for independent communications that contained express advocacy, would require it to register as a political committee under the Act. The General Counsel's Office prepared a draft opinion for Commission discussion stating that contribution limits would apply to contributions given to SpeechNow, and that SpeechNow would be required to register as a political committee once it raised or spent more than \$1,000 in a calendar year for the purpose of influencing federal elections. Since the Commission only had two of the requisite four members at the time the draft was considered, it could not issue an advisory opinion. The Commission notified SpeechNow of that fact on January 28, 2008.

The plaintiffs contend that the Act unconstitutionally restricts their

freedom of speech and freedom of association guaranteed under the First Amendment. By requiring registration as a political committee and limiting the monetary amount that an individual may contribute to a political committee, SpeechNow and the other plaintiffs assert that the Act unconstitutionally restricts the individuals' freedom of speech by limiting the amount that an individual can contribute to SpeechNow and thus the amount the organization may spend. SpeechNow also argues that the reporting required of political committees is unconstitutionally burdensome.

The plaintiffs asked the court to find the contribution limits, reporting requirements and political committee registration requirements unconstitutional as applied to their proposed activities. The plaintiffs also requested that the court preliminarily and permanently enjoin the FEC from enforcing these provisions against SpeechNow and the individual plaintiffs.

District Court Decision on Preliminary Injunction

The District Court denied SpeechNow's request for a preliminary injunction, refusing to apply strict scrutiny review and holding that sufficiently important government interests support limits on contributions to political committees, including groups like SpeechNow who intend to spend all of their money on independent expenditures.

SpeechNow argued that limits on contributions to committees that make only independent expenditures implicate the same First Amendment interests as limits on independent expenditures themselves, and therefore should be subject to strict scrutiny as expenditure limits generally are. The court disagreed, finding that limits on contributions to committees that make only independent expenditures are not the same as direct limits on expenditures of either the

organization or its donors.

"[C]ontributors to SpeechNow are not, through their donations," the court explained, "engaging in direct speech. SpeechNow, as a legally separate organization, is speaking as their proxy." Citing *Buckley* and *McConnell*, the court held that strict scrutiny did not apply because the limits do not restrict the amount that the political committee can spend on independent expenditures, but rather limit the source and amounts of contributions. Accordingly, the court concluded that the \$5,000 limit is subject to intermediate scrutiny, meaning that the regulation need only be "closely drawn" to further a "sufficiently important" government interest.

Applying intermediate scrutiny, the district court held that limits on contributions to committees making solely independent expenditures serve important government interests by preventing actual and apparent corruption. Looking to the past behavior of so-called "527 groups" that did not register with the Commission yet had close ties with the major political parties and made millions of dollars of expenditures influencing the federal elections of 2004, the court found that such "nominally independent" organizations are "uniquely positioned to serve as conduits for corruption both in terms of the sale of access and the circumvention of the soft money ban."

Additionally, the court explained that the \$5,000 limit on contributions to political committees like SpeechNow "promotes the important government interests underlying the Act's disclaimer requirements." The court held that SpeechNow's proposed course of action would conceal from the public the source of the advertisement's funding in the advertisement itself and would allow wealthy donors to hide behind "dubious and misleading names," thus evading the Act's disclaimer requirements.

In denying the preliminary injunction, the Court stated that since the regulations are "closely drawn to match the government interests in preventing corruption and the circumvention of the Act's disclaimer requirements, plaintiffs have failed to demonstrate a likelihood of success on their claim that [the Act's] \$5,000 contribution limit is unconstitutional as applied to independent expenditure committees."

U.S. District Court for the District of Columbia, 1:08-cv-00248-JR.

—Meredith Metzler
(continued on page 8)

Back Issues of the Record Available on the Internet

This issue of the *Record* and all other issues of the *Record* starting with January 1996 are available on the FEC web site as PDF files. Visit the FEC web site at <http://www.fec.gov/pages/record.shtml> to find monthly *Record* issues.

The web site also provides copies of the *Annual Record Index* for each completed year of the *Record*, dating back to 1996. The *Annual Record Index* list *Record* articles for each year by topic, type of Commission action and, in the case of advisory opinions, the names of individuals requesting Commission action.

You will need Adobe® Acrobat® Reader software to view the publication. The FEC's web site has a link that will take you to Adobe's web site, where you can download the latest version of the software for free.

Court Cases

(continued from page 7)

Bialek v. Mukasey

On June 24, 2008, the U.S. Court of Appeals for the 10th Circuit affirmed the District Court's dismissal of plaintiff Barry Bialek's suit against the U.S. Attorney General and the FEC, agreeing that the Attorney General has discretion over whether to investigate and prosecute criminal violations of the Federal Election Campaign Act (the Act) and is not required to wait for a referral from the Commission.

Background

According to the complaint filed February 14, 2007, Mr. Bialek made contributions towards John Edwards' 2004 Presidential campaign. In November 2005, the U.S. Attorney General began an investigation into possible violations of the Act by the plaintiff. See [April 2007 Record](#), page 5.

FEC Accepts Credit Cards

The Federal Election Commission now accepts American Express, Diners Club and Discover Cards in addition to Visa and MasterCard. While most FEC materials are available free of charge, some campaign finance reports and statements, statistical compilations, indexes and directories require payment.

Walk-in visitors and those placing requests by telephone may use any of the above-listed credit cards, cash or checks. Individuals and organizations may also place funds on deposit with the office to purchase these items. Since pre-payment is required, using a credit card or funds placed on deposit can speed the process and delivery of orders. For further information, contact the Public Records Office at 800/424-9530 or 202/694-1120.

The plaintiff filed a complaint with the District Court in Colorado, alleging that the Commission must refer, by a vote of the majority of the Commission, a matter to the Attorney General prior to the Attorney General investigating or prosecuting a violation of the Act.

In June 2007, the District Court granted the Commission's motion to dismiss the plaintiff's suit with prejudice, holding that the Attorney General's discretion over whether to investigate a potential criminal violation of the Act does not require a referral from the Commission. See [August 2007 Record](#), page 3.

Court Decision

The appellate court affirmed the district court's decision. The appellate court agreed with the district court that Congress did not expressly limit the Attorney General's authority to investigate and prosecute criminal violations of the Act and that the Commission's actions are not a prerequisite to the Attorney General's investigation.

The Act provides the Commission with exclusive jurisdiction to enforce the civil provisions of the Act. 2 U.S.C. 437c(b)(1). The Commission may refer a violation to the Attorney General if, by four votes of the Commissioners, the Commission determines that there is probable cause to believe that a "knowing and willful" violation occurred. 2 U.S.C. 437g(a)(5)(C).

The plaintiff claimed that because the Act grants the Commission exclusive jurisdiction over civil violations and contains a referral provision, criminal violations must first be handled by the Commission, and the Attorney General may only become involved in the matter once the Commission has voted to refer the violation. The appellate court agreed with the district court's rejection of the argument, holding that there is a presumption against any limitation on the Attorney General's prosecutorial authority and Congress must show "clear

and unambiguous" intent to restrict the Attorney General's authority to investigate and prosecute criminal offenses. The Act does not explicitly limit the Attorney General in any way. The court held that nothing in the plain language of the Act nor the legislative history required a referral prior to prosecution by the Attorney General.

The appellate court found that the Commission and the Department of Justice have concurrent jurisdiction to investigate knowing and willful violations of the Act. Both agencies may initiate investigations and make referrals to each other.

U.S. Court of Appeals for the Tenth Circuit, 07-cv-00321-WYD-PAC.

—Meredith Metzler

DNC v. FEC

On June 24, 2008, the Democratic National Committee (DNC) filed a complaint in the U.S. District Court for the District of Columbia alleging that the Commission failed to act timely upon the DNC's administrative complaint filed with the Commission against Senator John McCain's Presidential campaign.

Background

According to the court complaint, the DNC filed an administrative complaint with the Commission on February 25, 2008, alleging that Senator McCain and his Presidential campaign violated the Presidential Primary Matching Payment Account Act (the Matching Payment Act). The DNC alleged that Senator McCain's campaign entered into a binding agreement with the Commission for the receipt of primary matching funds. Senator McCain subsequently informed the Commission that he was withdrawing from the Matching Payment Program, but the DNC alleged that his purported withdrawal violated the Matching Payment Act. The DNC alleged that Senator

McCain had pledged the matching funds as collateral for a bank loan and thus may not withdraw from the program.

The DNC filed a court complaint on April 14, 2008, that is similar to its June 24 complaint. The DNC's April complaint claimed that the Commission would not be able to act on its administrative complaint in a timely manner and thus the court should grant the DNC the right to pursue enforcement of the Act in court against Senator McCain and his committee. The District Court dismissed the April complaint, stating that it lacked jurisdiction to hear the case because the Federal Election Campaign Act (the Act) allows a party to file in court only after 120 days have passed from the filing of an administrative complaint. See 2 U.S.C. §437g(a)(8)(A) and the [June 2008 Record](#), page 3. The Act requires the affirmative vote of at least four commissioners to take certain actions on administrative complaints. Although the Commission currently has six commissioners, when the DNC's February administrative complaint and April court complaint were filed, the Commission only had two commissioners.

Complaint

The DNC asks the court to:

- Declare that the Commission's alleged failure to act on the DNC's administrative complaint is contrary to law; and
- Enter an order directing the FEC to conform to such declaration within 30 days and authorizing the DNC to bring a civil action against the McCain campaign to remedy the violations if the Commission does not resolve the complaint within 30 days.

U.S. District Court for the District of Columbia, 1:08-cv-01083.

—Meredith Metzler

Public Funding

Commission Certifies Primary Matching Fund Payments

On July 15, 2008, the Commission certified \$7,441,898.38 in federal matching funds to six Presidential candidates for the 2008 election.¹ This brings the total matching fund certifications for the 2008 campaign thus far to \$26,729,403.03. The Commission also determined that the independent campaign of Ralph Nader is eligible to receive matching funds.

Under the Presidential Primary Matching Payment Account Act, the federal government will match up to \$250 of an individual's total contributions to an eligible Presidential primary candidate. A candidate must establish eligibility to receive matching payments by raising in excess of \$5,000 in each of at least 20 states (i.e. over \$100,000). Although an individual may contribute up to \$2,300 to a primary candidate, only a maximum of \$250 per individual applies toward the \$5,000 threshold in each state. Candidates who receive matching payments must agree

¹ Please note that other candidates have declined to participate in the Matching Fund program.

to limit their spending and submit to an audit by the Commission. 26 U.S.C. §§9033(a) and (b); 11 CFR 9033.1 and 9033.3.

These totals, shown in the chart below, reflect matching funds for contributions submitted by qualified candidates from January through June. The Commission certifies payments to the Secretary of the Treasury and then funds are disbursed. Although the Treasury had matching funds available for payments during the latter part of that period (see the February 2008 Record, page 3, for information concerning a prior lack of sufficient funds), the Commission had been unable to make certifications until recently when its quorum was restored. With a full complement of six members now serving, the Commission unanimously approved the certifications. Additional contributions may be submitted for certification depending on the specific financial circumstances for each eligible campaign.

The Presidential public funding program is financed through the \$3 checkoff that appears on individual income tax returns. The program has three elements: grants to parties to help fund their nominating conventions (\$16,820,000 to each major party), grants available to nominees to pay for the general election campaign (\$84,100,000 to each major party nominee who chooses to

(continued on page 10)

Matching Funds for 2008 Presidential Candidates: July Certification

Candidate	Certification Amount
Joseph Biden (D)	\$1,135,035.94
Christopher Dodd (D)	\$514,173.62
John Edwards (D)	\$4,057,452.60
Duncan Hunter (R)	\$353,527.32
Dennis Kucinich (D)	\$970,521.05
Ralph Nader (I)	\$411,187.85
Total	\$7,441,898.38

Public Funding

(continued from page 1)

participate by agreeing not to accept private contributions for the general election) and matching payments to participating candidates during the primary campaign (up to a maximum of \$21,025,000).

—Meredith Metzler

Advisory Opinions

Alternative Disposition of Advisory Opinion Request AOR 2008-3

On July 14, 2008, the requester withdrew its request for an advisory opinion. MovingAds had sought guidance concerning the application of disclaimer requirements to mobile billboard advertisements.

Advisory Opinion Requests

AOR 2008-06

Preparation and distribution of slate cards by a state party committee (Democratic Party of Virginia, June 30, 2008)

AOR 2008-07

Use of campaign funds for Senator's legal expenses (Senator David Vitter and David Vitter for U.S. Senate, July 9, 2008)

Outreach

Roundtable on Pre-Election Communications

On August 27, 2008, the Commission will host a roundtable workshop at its Washington, D.C., headquarters on rules for specific types of pre-election communications, including:

- Electioneering communications disseminated within 60 days of the general election,
- Independent expenditures; and
- Coordinated communications (including revised time frames).

These types of communications have been the subject of recent litigation and rulemakings, which will be highlighted during the workshop.

The registration fee for this workshop is \$75. Payment by credit card is required prior to the seminar. A full refund will be made for all cancellations received before 5 p.m. Eastern Time, August 22. Complete information and the registration form are available on the FEC web site at <http://www.fec.gov/info/outreach.shtml#roundtables>. Attendance is limited and registration will be accepted on a first-come, first-served basis.

Further questions about the workshop should be directed to the Information Division by phone at 800/424-9530 (press 6) or locally at 202/694-1100, or via e-mail to Conferences@fec.gov.

—Dorothy Yeager

Index

The first number in each citation refers to the numeric month of the 2008 *Record* issue in which the article appeared. The second number, following the colon, indicates the page number in that issue. For example, "1:4" means that the article is in the January issue on page four.

Administrative Fines

Update, 2:4; 4:9

Advisory Opinions

Alternative Disposition of Advisory Opinion Requests, AOR 2007-36, 3:8; AOR 2008-3, 8:10
2007-19: Nonprofit Corporation Qualifies as Membership Organization, 1:15

2007-22: Campaign Committee May Accept Volunteer Services from Foreign Nationals, 1:16

2007-23: State Party Committee Status for Independence Party of New York, 1:17

2007-24: Payment for Joint campaign Activities, 1:18

2007-25: Limited Liability Partnership Taxed as a Corporation, 2:7

2007-26: Disposal of Excess State Campaign Funds by Federal Candidate, 1:19

2007-27: Nonconnected Committee Solicitations for SSF Contributions, 2:8

2007-28: Federal Candidates/Officeholders Fundraising for Ballot Measure Committees, 2:8

2007-29: Donation to a Candidate for Local Party Office is Not Personal Use, 1:21

2007-30: Matching Credit Card Contributions Under Public Funding Program, 1:21

2007-31: Earmarked Contributions Forwarded to a Presidential Candidate by a Nonconnected Committee's Checks Not Matchable, 2:9

Campaign Guides Available

For each type of committee, a *Campaign Guide* explains, in clear English, the complex regulations regarding the activity of political committees. It shows readers, for example, how to fill out FEC reports and illustrates how the law applies to practical situations.

The FEC publishes four *Campaign Guides*, each for a different type of committee, and we are happy to mail your committee as many copies as you need, free of charge. We encourage you to view them on our web site www.fec.gov.

If you would like to place an order for paper copies of the *Campaign Guides*, please call the Information Division at 800/424-9530.

2007-32: Political Committee Status of Independent Expenditure Organization, 3:8

2007-34: Federal Candidate's Endorsement of Nonfederal Candidate, 2:10

2007-35: Internet Toolbar Affinity Program for Political Committees, 3:8

2008-2: Eligibility for Candidate Salary Payments, 6:4

Alternative Dispute Resolution

Update, 3:4; 5:4

Commission

Commission Amends Rules that Govern its Procedures, 3:3

Commission Publishes Notice of New and Revised Systems of Records, 2:4

Commission Statement on Davis v. FEC, 8:3

Message from the Chairman, 1:1

New Chairman Elected, 1:2

New Commissioners Join the Commission, 8:1

New Vice Chair Elected, 3:2

Compliance

MUR 5888: Failure to File Timely Under Millionaires' Amendment, 2:1

MUR 5895: Personal Use and Prohibited Contributions, 3:1

Nonfilers, 3:4; 4:9; 6:5; 7:6

Correction

2008 Coordinated Party Expenditure Limits, 4:10

Court Cases

____ v. FEC

– Citizens United, 2:1

– Davis, 8:1

– DNC, 6:2, 8:8

– Morgan, 1:4

– SpeechNow.org, 4:6, 8:6

– Shays III, 6:1, 7:1

– Tierney, 5:2

Beam v. Gonzales, 5:3

Bialek v. Mukasey, 8:8

FEC v. ____

– Adams, 5:1

– Hearn, 1:5
– Reform Party of the USA, 4:1
Marcus v. Mukasey, 5:3

Legislation

House Delegate for Northern Mariana Islands, 6:5

Public Funding

Commission Certifies Primary Matching Fund Payments, 2:3, 8:9
Dodd and Biden Certified for Matching Funds, 1:22
Kucinich and Hunter Certified for Matching Funds, 2:4

Outreach

Conference for Corporations and their PACs, 2:10

Conferences Scheduled for 2008, 1:23; 2:11; 3:14; 4:10

June 23-24 Conference for Trade Associations, Membership Organizations and Labor Organizations, 5:6; 6:6

Orlando Regional Conference for House and Senate Campaigns, Political Party Committees and Corporate/Labor/Trade PACs, 1:23

Roundtable on Pre-Election Communications, 8:10

Seminar for Nonconnected Political Action Committees, 4:10; 5:6

Party Activities

2008 Coordinated Party Expenditure Limits, 3:6; 4:10

Regulations

Final Rules and Explanation for Electioneering Communications, 1:1

Reports

April Reporting Reminder, 4:1
California Special Election Reporting: 12th District, 3:4

Illinois 14th District Special Election Reporting, 1:13

Indiana Special Election Reporting: 7th District, 2:5

July Reporting Reminder, 7:1

Louisiana Special Election Reporting: 1st and 6th Districts, 2:6

Maryland Special Election Reporting: 4th District, 6:4

Mississippi Special Election Reporting: 1st District, 4:3
Reports Due in 2008, 1:5

Statistics

House and Senate Candidate Committees Raise \$507 Million in 2007, 5:1

Number of PACs Increases Slightly in 2007, 3:7

Party Activity Summary through April 2008, 7:5

Party Committee Contributions Update, 4:7

Web Site

Enhanced Presidential Campaign Finance Map, 6:5

FEC Web Site Offers Podcasts

In an effort to provide more information to the regulated community and the public, the Commission is making its open meetings and public hearings available as audio recordings through the FEC web site, as well as by podcasts. The audio files, and directions on how to subscribe to the podcasts are available under *Audio Recordings* through the *Commission Meetings* tab at <http://www.fec.gov>.

The audio files are divided into tracks corresponding to each portion of the agenda for ease of use. To listen to the open meeting without subscribing to the podcasts, click the icon next to each agenda item. Although the service is free, anyone interested in listening to podcasts must download the appropriate software listed on the web site. Podcast subscribers will automatically receive the files as soon as they become available—typically a day or two after the meeting.

FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463

Official Business
Penalty for Private Use, \$300

PRESORTED STANDARD
U.S. POSTAGE
PAID
FEDERAL ELECTION COMMISSION

