



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1995-10

Margaret Person
Currin Law Firm
333 Fayetteville Street Mall
Post Office Box 269
Raleigh, NC 27602-0269

Dear Ms. Currin:

This responds to your letters dated March 10 and February 15, 1995, requesting an advisory opinion on behalf of the Helms for Senate Committee ("the Committee") concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to a dispute over ownership of Committee records.

You state that on August 1, 1994 (all dates hereafter are 1994, unless stated otherwise), a new treasurer was appointed for the Committee by Senator Jesse Helms who is a candidate for the 1996 Senate election cycle in North Carolina. He has authorized the Committee as "his one and only" principal campaign committee. The new treasurer is J.C.D. ("Jack") Bailey who replaced the former treasurer, Elisabeth Smith. Soon after his appointment, a dispute developed between Mr. Bailey and the former treasurer regarding certain information and Committee records, as well as other Committee assets, which were apparently developed or acquired before the tenure of Ms. Smith ended on August 1.

Counsel to the Committee (and its treasurer) engaged in extensive negotiations with Counsel for the former treasurer to resolve the dispute. The negotiations are reflected in at least 11 items of correspondence during the period August 19 until February 3, 1995. At a date soon after December 13, the Committee apparently obtained such "minimal records and information" from the former treasurer, or other personnel, as were required to file a year end report with the Commission (covering all of the Committee's 1994 financial activity) and to file future FEC reports.

You explain that the Committee believes "that this matter [the dispute with the former treasurer] has raised no question about the completeness and accuracy of the Committee's 1994 year-end report or the Committee's ability to file complete and accurate compliance reports in the future." You further state:

Complete donor data is available to assure that all contribution reports are in compliance with the FEC Act. The bookkeeper was able to re-create the Committee's disbursements from July 1-August 1, 1994 so that that portion of the year-end report was complete. As a safeguard, the 1994 year-end report was amended in a timely manner after obtaining and reviewing a copy of the partial report filed for that one-month period by the former treasurer.

Even though, according to your explanation, sufficient records and information have been made available to the Committee to enable it to satisfy all the reporting requirements of the Act, there are numerous other records and related information that are still retained by the former treasurer. You indicate that these records are subject to the Commission rule at 11 CFR 102.9 which provides that Committee records must be retained "for a minimum of three years."

In a letter (dated January 23, 1995) from Committee Counsel to the former treasurer's Counsel, the withheld records are generally referred to as FEC "compliance data which [the Committee] needs both in the short term and for overall compliance." The letter asserts a "final request that complete copies of all FEC compliance materials and all records related to the 1996 election be provided to the new treasurer forthwith." The letter lists the specific records sought: all FEC reports, all reattribution/redesignation letters, card file of refunds / reattributions / redesignations, paid invoices, tax reports, bank statements, payroll records, check books, batch control sheets, all other FEC compliance materials relative to the 1996 campaign.

For his part, Counsel to the former treasurer has asserted repeatedly that North Carolina law governs this dispute and supports his position that the subject records and information are the property of the former treasurer. Counsel further contends that the current Committee is a new and different committee from the "old committee" which existed during the former treasurer's tenure, and that Senator Helms cannot control the disposition of the "old committee's" assets or records. Counsel has advised the former treasurer that she should retain possession of the "old committee's" records in order to comply with the Act and be in a position to respond to any inquiry by the Commission. Counsel has further represented that the former treasurer has provided the "new" Committee with the information needed for its 1994 year-end report and its future FEC reports. Lastly, Counsel explains that the records still retained by the former treasurer, which cover the pre-August 1 activity of the Committee, as well as "the documents that support its FEC reports are readily available to the FEC should they require information." Letter dated February 3, 1995 from former treasurer's Counsel to Committee Counsel.

In view of these circumstances you request an opinion on two questions:

(1) Does the Act preempt North Carolina law concerning the composition of the Committee and the duties and liabilities of the Committee regarding its record keeping responsibilities?

(2) Can the Committee remain in compliance with the Act and Commission regulations if the records of the Committee prior to August 1, 1994, remain in the sole possession of the former treasurer?

In addition, if the former treasurer's retention of Committee records for financial activity before August 1 does not comply with the Act and Commission regulations, the Committee requests assistance from the Commission "in directing the former treasurer to turn over these records, or copies thereof, to the Treasurer [Mr. Bailey] so that [the Committee] can continue to comply with applicable FEC laws and regulations."

Subject to the discussion below and for the reasons stated therein, the Commission concludes as follows:

(1) The Act and Commission regulations recognize only the Committee and its duly designated treasurer as having legal title to and control over all Committee records that are required to be created, obtained, and maintained under the Act and Commission regulations.

(2) The Act and Commission regulations preempt and supersede North Carolina law to the extent it would purport to vest ownership rights or title to such records in any person other than the Committee and its treasurer, but the Act does not provide a statutory remedy to the Committee to compel its former treasurer or any other person to deliver such records to the Committee.

(3) The Committee and its current treasurer will be in compliance with the recordkeeping requirements of the Act with respect to records required to be created and maintained before August 1, 1994, only if the Committee can establish that it has taken best efforts to obtain those records.

(4) The Committee will not be in violation of the recordkeeping requirements of the Act solely on account of the former treasurer's failure to deliver the pre-August 1, 1994 records to the Committee's current treasurer. However, the Committee's liability for any failure to file complete and accurate reports, or for knowingly accepting any unlawful contribution, would not be affected by its apparent lack of control or full access to such records, and the Commission will not regard the Committee's lack of control or access as an affirmative defense to any such liability.

(5) Until such time as the Committee acquires the records in question from its former treasurer, it must identify her on its Statement of Organization as a custodian of its records (i.e. books and accounts) which cover the period ending August 1, 1994.

The Act and Commission regulations delineate in considerable detail the accounts and related records that must be created and maintained by a political committee, its treasurer and

other committee agents. 2 U.S.C. 432(c), 11 CFR 102.9. In several respects, the requirements of these provisions directly impose obligations on the treasurer.^{1/}

The regulations also impose other record keeping and record retention obligations on political committees. 11 CFR 104.14(b). These include the duty to keep a variety of bank records pertaining to information required to be reported; vouchers, worksheets and other documents which must provide in sufficient detail the necessary information and data from which reports filed by the political committee may be verified, explained, clarified, and checked for accuracy and completeness. 11 CFR 104.14(b)(1). There is a minimum three year preservation and retention requirement for all such records and documents which runs from the filing date of the report wherein the record-related transaction is disclosed. 11 CFR 102.9(c), 104.14(b)(3).

Treasurers and their agents are required to perform each of the foregoing duties, as well as those set forth in section 102.9 and other provisions of Commission regulations. See, for example, 11 CFR 103.3 [treasurer must examine all contributions received for evidence of illegality as to donors and to comply with contribution limits]; 11 CFR 104.1(a) and 104.14(a) [treasurer must file and sign periodic financial activity reports for political committee].

The Act and Commission regulations impose the foregoing duties and obligations upon every political committee, and the committee's treasurer has the primary and personal duty to perform them.^{2/} Furthermore, at least one Federal district court decision has held that a treasurer had personal liability for the payment of civil penalties imposed on a defunct political committee for its violations of the Act. Federal Election Commission v. Dramesi for Congress Committee, No. 85-4039 (MHC) (D.N.J. Sept. 5, 1990) (unpublished opinion) [treasurer's liability distinct from liability of committee for FECA violations, and since Congress chose to hold an individual, the treasurer, responsible for compliance with FECA it follows that "an individual will also stand responsible for his indiscretions as a treasurer."] This personal liability will not be abated or avoided in circumstances where a violation may result entirely or partially from the fact that the required committee records were not held by or under the control of the treasurer.^{3/}

With respect to the preemption of North Carolina law in this situation, the Commission concludes that the Act and Commission regulations would supersede and preempt state law pertaining to the Committee's obligations to organize itself in the manner specified in the Act, to keep records, and to file reports relying on the information maintained in its records. Furthermore, North Carolina law would also be superseded and preempted with respect to the determination of who has title to and ownership of Committee records that are required to be maintained under the Act and Commission regulations.

The Act states that its provisions, and the rules prescribed thereunder, "supersede and preempt any provision of State law with respect to election to Federal office." 2 U.S.C. 453. The House committee that drafted this provision intended "to make certain that the Federal law is construed to occupy the field with respect to elections to Federal office and that the Federal law will be the sole authority under which such elections will be regulated." H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 10 (1974). According to the Conference Committee report on the 1974 Amendments to the Act, "Federal law occupies the field with respect to . . . the conduct of Federal campaigns, and similar offenses, but does not affect the States' rights" as to other areas

such as voter fraud and ballot theft. H.R. Rep. No. 93-1438, 93d Cong., 2d Sess. 69 (1974) [emphasis added]. The Conference report also states that Federal law occupies the field with respect to reporting and disclosure of political contributions to and expenditures by Federal candidates and political committees, but does not affect state laws as to the manner of qualifying as a candidate, or the dates and places of elections. Id. at 100-101.

When the Commission promulgated regulations at 11 CFR 108.7 on the effect of the Act on state law, it stated that the regulations follow section 453. Specifically, Federal law supersedes state law with respect to the organization and registration of political committees supporting Federal candidates, disclosure of receipts and expenditures by Federal candidates and political committees, and the limitations on contributions and expenditures regarding Federal candidates and political committees. Federal Election Commission Regulations, Explanation and Justification, House Document No. 95-44, at 51 (1977). 11 CFR 108.7(b). The regulations provide that the Act does not supersede state laws concerning the manner of qualification as a candidate or political party organization, dates and places of elections, voter registration, voting fraud and similar offenses, or candidates' personal financial disclosure. 11 CFR 108.7(c). The Commission explained that "[t]hese types of electoral matters are interests of the states and are not covered in the Act." House Document 95-44, at 51.

The Act governs the conduct of campaigns for Federal office and prescribes the organizational and disclosure requirements applicable to political committees.^{4/} The noted organizational requirements, along with the related recordkeeping and reporting rules described above, represent the legal framework in which the Committee must conduct its operations. North Carolina law may not encroach upon Committee operations or the duties of the Committee's treasurer or other agents as to these matters because they go to the essence of the oversight duties and responsibilities placed upon the treasurer of a political committee. Since the treasurer has potential liability for violations of the Act which may stem from lack of access to or control over political committee records, it follows that the Act gives the Committee a right of control and ownership of the records.^{5/}

This result does not alter the Commission view that in many respects the financial transactions and other operations of a political committee are subject to and governed by state law. For example, the Commission has long held and recently reaffirmed that personal liability of a Federal candidate on a bank loan, or other debt incurred for campaign purposes, is governed by state law and not by the Act. Advisory Opinion 1995-7, citing Advisory Opinion 1989-2. Similarly, the Commission has held more generally that the determination of liability for any debt or contract of a political committee is governed by state law and not the Act. See Advisory Opinions 1984-58, 1981-42 and 1975-102; see also Advisory Opinion 1988-44 [running of state statute of limitations on debt owed by committee does not extinguish debt under state law and Commission relies on that result for purposes of the Act's debt reporting rules]. To the same effect is the recent decision of the (Fifth Circuit) United States Court of Appeals in Karl Rove & Company v. Thornburgh, 39 F.3d 1273, 1280 (5th Cir. 1994) [State law controls as to liability of former Federal candidate on contract of his authorized committee, and Act would not preempt application of state law on that issue].^{6/}

The situation presented here, however, does not involve a contract or debt of the Committee, or the personal liability of its authorizing candidate for a campaign loan. Instead, it raises the legal issue of the possible application of State law in a manner that may impair the ability of the Committee treasurer to perform his obligations under the Act and Commission regulations. As noted above, the treasurer's duties and the proper performance of those duties are central to a political committee's compliance with the Act and Commission regulations. Those duties arise irrespective of whether the committee has unpaid creditors or outstanding bank loans. Accordingly, the Commission has concluded that the Act and Commission regulations would preempt and supersede the application of North Carolina law on the issue of who has title or ownership rights in the Committee records at issue here.

At the same time, the Commission emphasizes that irrespective of whether the Committee prevails in its further efforts to obtain the records held by the former treasurer, the Committee's obligations (and those of its current treasurer) to comply with all the disclosure requirements, contribution limits and prohibitions, and all other provisions of the Act and Commission regulations, remain unaffected by the dispute. In short, the Committee and its treasurer are in the same position regarding those obligations as would be the case if there was no dispute. This means, for example, that the treasurer is personally responsible for the timely filing of complete and accurate reports. 11 CFR 104.14(d). He is also subject to liability if he "knowingly accept[s] a contribution made for the benefit or use of a candidate . . . in violation of any limitation" in section 441a(a). 2 U.S.C. 441a(f).

The Committee believes with good reason that it needs the pre-August 1 records to perform its duties to keep records and otherwise comply with the Act. The Commission notes that the Committee may need to demonstrate that it has taken "best efforts" to acquire the required information. 2 U.S.C. 432(i), 11 CFR 102.9(d). This showing must be made in the event the Committee claims at some future time that the former treasurer's retention of the records prevented the Committee's compliance with the Act. In the meantime, the Committee should amend its Statement of Organization (FEC Form 1) if the former treasurer remains the custodian of Committee records predating August 1. 2 U.S.C. 433(b)(3), 433(c). The Committee may note, if desired, that the records remain with the former treasurer notwithstanding the protest of the Committee. Nothing in this advisory opinion shall prevent the former treasurer from retaining copies of Committee records, created and maintained during her term, if the former treasurer returns the records to the Committee.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Sincerely,

(Signed)

Danny L. McDonald
Chairman

Enclosures (AOs 1995-7, 1989-27, 1989-2, 1988-44, 1984-58, 1981-42, and 1975-102)

1 For example, the treasurer is required to keep: an account of all contributions received by the committee; the name and address of each person who contributes over \$50 to the committee along with date and amount of each such contribution; the name, address, date, amount, and additional donor identification data for contributions from any person that exceed a total of \$200 during the same calendar year; the full identification of each political committee that makes any contribution along with its date and amount; the name and address of every person who receives a disbursement from the committee along with the date, purpose and amount thereof, with additional documents (receipt, invoice, or canceled check) for disbursements exceeding \$200.2 U.S.C. 432(c); 11 CFR 102.9(a) and 102.9(b).

2 11 CFR 102.9 and 102.9(d) [treasurer and authorized agents shall fulfill all recordkeeping duties and must use best efforts to do so]; 11 CFR 104.14(d) [treasurer personally responsible for complete, accurate and timely filing of reports and other required statements].

3 See 11 CFR 103.3(b) [treasurer responsible for reviewing all contributions to determine if they are in excess of contribution limits when aggregated with other contributions from same donor] and 11 CFR 102.9(f) [treasurer's failure to maintain documentation concerning designations, redesignations, reattributions and dates of contributions will nullify any attempted revisions regarding election to which contribution attributed for purposes of contribution limits].

4 Among the requirements are: the committee must be authorized in writing by the candidate on whose behalf it functions and must include the candidate's name in the committee name, it must always have a treasurer in order to accept contributions or make expenditures, it must have a custodian of its books and accounts, and it must maintain at least one bank (or qualified credit union) depository account. 2 U.S.C. 432(a), 432(e), 432(h) and 433(b)(3). The identification of these personnel and the committee's bank account information shall be disclosed when the committee registers with the Commission and thereafter whenever there are changes in personnel, bank accounts or other necessary data. 2 U.S.C. 433(a), (b), and (c).

5 See Advisory Opinion 1989-27 [Massachusetts statute could restrict personal campaign activity of State employee, who was Federal candidate, but was superseded and preempted by the Act to extent it restricted principal campaign committee of such candidate from accepting or soliciting contributions through the efforts of other personnel acting for the committee.]

6 The Rove opinion also considered the issue of membership in the principal campaign committee authorized by the Federal candidate. It concluded that the state common law of unincorporated associations would apply and that membership in such a committee was a question of fact governed by the intent of both parties--the putative member and the association. The Act and Commission regulations are silent as to the membership of a principal campaign committee (or other candidate-authorized committee). Whether or not a principal campaign committee has members or a membership policy, the committee clearly remains an ongoing organization because the Act requires that it continuously file reports until the proper filing of its termination report which is subject to Commission review and approval. 2 U.S.C. 433(d)(1), 11 CFR 102.3(a) and (b). The facts in this opinion indicate that the Committee is active. It is accepting contributions and making expenditures, and it has never sought to terminate either before or after August 1. Therefore, the position of the former treasurer, that a "new committee" was established after August 1, is not a valid interpretation of the Act or Commission regulations.