

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KEAN FOR CONGRESS)
COMMITTEE)
205 West Milton Avenue)
Rahway, NJ 07065)
)
Plaintiff,)
)
v.)
)
FEDERAL ELECTION COMMISSION)
999 E Street, N.W.)
Washington, D.C. 20436)
)
Defendant.)
_____)

Civil Action No.: 1:04CV00007 (JDB)

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff, the Kean for Congress Committee (“Kean Committee”), on information and belief alleges as follows:

INTRODUCTION

1. This action arises under the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431 *et seq.* (“FECA”). Plaintiff seeks review under 2 U.S.C. § 437g(a)(8)(B) of the Federal Election Commission’s (“FEC” or “Commission”) dismissal of the Kean Committee’s administrative complaint dated May 31, 2000.

2. The Kean Committee’s administrative complaint challenged the actions of a Virginia corporation known as the Council for Responsible Government, and its so-called “Accountability Project” (collectively, “CRG”). In particular, the Kean Committee’s complaint

alleged that CRG secretly funded mailings which attempted to influence a New Jersey Congressional Seventh District Republican primary, in violation of federal law.

3. By letter dated November 10, 2003, counsel for the FEC advised that it “was equally divided on whether to find reason to believe the Counsel for Responsible Government, Inc. & its Accountability Project violated the Federal Election Campaign Act of 1971, as amended,” and that, “[a]ccordingly, on November 4, 2003, the Commission closed the file in this matter.”

4. The FEC’s November 10, 2003, letter further advised that “[a] Statement of Reasons providing a basis for the Commission’s decision will follow,” and that “dispositive portions of the file will be placed on the public record within 30 days.” The FEC failed to provide the basis for the Commission’s experience within the 30-day period, which expired on December 10, 2003.

5. On January 5, 2004, Plaintiff filed the Complaint initiating this action. Despite repeated inquiries to counsel for the FEC, as of that date the FEC had still failed to meet the regulatory requirement that it supply information regarding the basis for the Commission’s decision.

6. Finally, on or about January 16, 2004, the Commission released its Statement of Reasons (“SOR”) indicating that, in a 3-3 vote—at least four of the six FEC Commissioners must agree in order to take any action—it had failed to find reason to believe (“RTB”) that the CRG or William “Bill” Wilson or Gary Glenn, members of CRG’s Board of Directors, had violated the FECA. Also, in a 3-3 vote, the Commission failed to approve the factual and legal analyses recommended in the First General Counsel’s Report dated September 3, 2003; a document subpoena to CRG or deposition subpoenas to Bill Wilson, Gary Glenn, and William

Hillman, another member of CRG's Board of Directors; and written questions to CRG and its Board members.

7. Accordingly, by this First Amended Complaint Plaintiff seeks a judicial determination and declaration that the FEC's dismissal of the Kean Committee's complaint; that its failure to find RTB that CRG or its Board members violated the FECA; that its failure to approve discovery to investigate the Kean Committee's allegations; and that the FEC's controlling SOR for its actions were based on an impermissible interpretation of the FECA, and were arbitrary, capricious, an abuse of discretion, and otherwise contrary to law. Plaintiff further seeks an order requiring the FEC to conform to that declaration within 30 days. See 2 U.S.C. § 437g(a)(8)(C).

JURISDICTION AND VENUE

8. This Court has jurisdiction under 2 U.S.C. § 437g(a)(4)(C)(iii) and 28 U.S.C. § 1331.

9. Venue lies in this judicial district pursuant to 2 U.S.C. § 437g(a)(4)(C)(iii) and 28 U.S.C. § 1391(e).

PARTIES

10. Plaintiff Kean Committee is an unincorporated political association. The Kean Committee registered with the FEC pursuant to 11 C.F.R. § 102.1(a) on December 20, 1999. The Kean Committee's FEC Committee Identification Number is C00351742. Its treasurer is Matthew McDermott.

11. Defendant FEC is the federal agency charged with the administration and civil enforcement of the FECA. 2 U.S.C. § 437c(b).

BACKGROUND

The 2000 New Jersey Congressional Republican Primary

12. In 2000, Tom Kean, Jr. ran in the New Jersey Congressional Seventh Republican primary against Mike Ferguson, among other candidates. The New Jersey primary election was held on June 6, 2000.

13. In a May 24, 2000 Star-Ledger newspaper article, Gary Glenn is identified as a CRG Board member and quoted as stating that “[t]he very purpose of our group is to influence the outcome of elections The outcome we hope to bring about is the election of a congressman whose values are consistent with our philosophy. Clearly, we believe Mr. Ferguson is a candidate whose record and philosophy is consistent with our philosophy.” According to other newspaper reports, CRG spent over \$100,000 “to hurt the chances of Weingarten and Kean in June 6 primary, while boosting the chances of Warren Township educator Mike Ferguson.”

14. In or about May of 2000, the CRG disseminated numerous advertisements advocating the defeat of Tom Kean. The Kean Committee submitted two such advertisements, each consisting of two pages, with its administrative complaint. Superimposed against of photograph of Mr. Kean wearing a “Tom Kean Jr. for Congress” campaign button in the first advertisement is the following statement:

TOM KEAN, JR.

No experience. Hasn't lived in New Jersey for 10 years.
It takes more than a name to get things done.

The second page of the advertisement contains the following statement:

NEVER. Never worked in New Jersey. Never ran for office. Never held a job in the private sector. Never paid New Jersey property taxes. Tom Kean Jr. may be a nice young man and you may have liked his dad a lot — but he needs more experience dealing with local issues and concerns. For the last

5 years he has lived in Boston while attending college. Before that, he lived in Washington. New Jersey faces some tough issues. We can't afford on-the-job training. Tell Tom Kean Jr. . . . **New Jersey needs New Jersey leaders.**

15. In the second advertisement, superimposed against the same photograph of Mr. Kean is the following statement:

For the last 5 years Tom Kean Jr. has lived in Massachusetts. Before that, he lived in Washington, D.C. And all the time Tom Kean lived in Massachusetts and Washington, he never held a job in the private sector. And until he decided to run for Congress — Tom never paid property taxes. No experience. **TOM KEAN MOVED TO NEW JERSEY TO RUN FOR CONGRESS.** New Jersey faces some difficult problems. Improving schools, keeping taxes down, fighting overdevelopment and congestion. Pat Morrissey has experience dealing with important issues. It takes more than a name to get things done. Tell Tom Kean Jr. . . . **NEW JERSEY NEEDS NEW JERSEY LEADERS.**

The second page of the advertisement shows photographs of the following: former basketball player Larry Bird, Senator Ted Kennedy, what appears to be a statute of a Revolutionary War "Minuteman," and the same photograph of Tom Kean Jr. that appears elsewhere in the advertisements. Superimposed over the four photographs is the statement, "What do all of these things have in common? They all have homes in Massachusetts."

16. Mike Ferguson won the election and presently holds the Congressional seat sought by Mr. Kean. Mr. Kean lost the Republican primary by less than 3,400 votes.

The Kean Committee's Administrative Complaint

17. On or about May 31, 2000, the Kean Committee filed with the FEC a sworn administrative complaint and supporting exhibits alleging that the campaign mailings disseminated by the CRG violated numerous provisions of the FECA. The Kean Committee's administrative complaint was filed pursuant to 2 U.S.C. § 437g(a) and all applicable FEC

regulations. The FEC designated the administrative complaint matter under review (“MUR”) 5024.

18. The FECA prohibits contributions or expenditures by corporations in federal elections. 2 U.S.C. § 441b(a). The federal election laws also require that independent expenditures in support of, or in opposition to, a federal candidate and costing in excess of two hundred and fifty (\$250) dollars be publicly disclosed in a filing with the FEC, 2 U.S.C. § 434(c); 11 C.F.R. § 109.2; and that any group of persons whose principal purpose is to influence federal elections register with the FEC as a federal political committee and disclose its contributions and expenditures, see 2 U.S.C. §§ 431(4)(a), 433, 434. The federal election laws further require that any communication advocating the election or defeat of a clearly-identified candidate contain a disclaimer stating whether the communication was authorized by any candidate, see id. § 441d(a); 11 C.F.R. § 110.11(a)(1). The Kean Committee’s administrative complaint alleged that the challenged communications by the CRG, which was formed in or about May of 2000 for the express purpose of making political expenditures, violated each and every one of these legal requirements.

19. The FECA also provides that expenditures made by any person in cooperation, consultation, or concert with, or at the suggestion of, a candidate, the candidate’s authorized political committees, or their agents, shall be considered a contribution to such candidate. 2 U.S.C. § 441a(a)(7)(B)(i). The administrative complaint further alleged that CRG may have coordinated its expenditures with other federal candidates, such that the challenged communications may have constituted corporate contributions subject to disclosure.

20. Tom Kean, Jr. is currently a state senator in the 21st district of New Jersey. He is active in New Jersey public policy and politics and dedicated to serving the people of New

Jersey in this capacity. The Kean Committee, its candidate Tom Kean, Jr., and its supporters suffered direct political injury by the actions of the CRG that targeted Mr. Kean's campaign for the New Jersey Congressional Seventh District Republican primary in 2000. The CRG's campaign ads competitively disadvantaged the Kean Committee, the principal campaign committee of Mr. Kean, and palpably impaired its ability and the ability of its candidate to compete on equal footing in the 2000 election. The Kean Committee's only purpose for existence is to support and represent Mr. Kean in his efforts to run in or influence federal elections and to fulfill the resulting reporting responsibilities with the Federal Election Commission.

21. The CRG's failure to include in its challenged campaign communications a disclaimer stating whether the communications were authorized by any candidate as required by 2 U.S.C. § 441d, and its failure to publicly disclose its contributions and expenditures under 11 C.F.R. § 109.2 and 2 U.S.C. § 431(4), also deprived the Kean Committee, its candidate and its supporters of information to which it is entitled under the FECA. Mr. Kean has run for federal office in the past, and may do so again in the future—he is still relatively young and political life is famously difficult to predict. One of the issues to be considered in any decision of his concerning participation in another federal campaign is whether CRG could again spend unlimited funds (including corporate and labor money, illegal in federal elections, and excessive funds from individuals) for mailers such as those CRG disseminated to attack him in the 2000 election.

22. As a committee that is registered with the FEC and regularly files reports with the FEC, the Kean for Congress Committee is established and operated to participate in federal elections. Accordingly, by its administrative complaint, Kean for Congress urged the FEC to

take any and all action within its power to correct and prevent the illegal activities of the CRG, including requirements that it register with the FEC, that it report its contributions and expenditures, that it comply with all limitations as to source and amount of funds used to influence federal elections, and that it identify in any future campaign communications whether they were authorized by any candidate. The required disclosures will assist the Kean Committee in determining whether CRG is an organization that enjoys wide support by multiple donors or has relatively few, but larger, funding sources. The disclosures will reveal whether CRG's support comes primarily from in-state or out-of-state contributors/voters. Therefore, compliance with federal law will enable the Kean Committee to ascertain and evaluate CRG's funding and activities in 2000 and thus its ability to influence future federal elections. Equally important, it will ensure that any activity CRG undertakes against the Committee and its candidate in any future federal elections is not funded by illegal corporate and labor funds or legally-excessive individual funds.

23. The FEC failed to act on the Kean Committee's administrative complaint for more than 120 days. Accordingly, as an aggrieved party, the Kean Committee challenged the Commission's inaction under 2 U.S.C. § 437(g)(1), by filing a Complaint with this Court on September 18, 2001. See Kean for Congress Committee v. Federal Election Commission, Civ. No. 01-1979 (JDB). Thereafter, upon consultation with counsel for the FEC regarding the status of the Kean Committee's administrative complaint, the Kean Committee filed an unopposed Notice of Dismissal of the Complaint on February 4, 2002.

The Commission's Dismissal of the Administrative Complaint

24. By letter dated November 10, 2003, the FEC advised that the Commission was "equally divided" on whether to find reason to believe the CRG violated the FECA, and closed

the file on November 4, 2003. As of the filing of the Complaint initiating this action on January 5, 2004, however, the FEC had failed to provide a SOR setting forth a basis for the Commission's decision, in violation of FEC regulations. See 11 C.F.R. § 5.4(a)(4).

25. On or about January 16, 2004, the FEC released its SOR reflecting a 3-3 split on whether to find RTB that CRG and two of its Board members had violated the FECA, whether to approve the First General Counsel's Report dated September 3, 2003 ("GC's Report"), and whether to approve discovery on CRG and its Board members.

26. The GC's Report recommended in pertinent part that the Commission: (i) find RTB that CRG violated 2 U.S.C. §§ 434, 434, 441b(a), and 441d(a); (ii) find RTB that two of CRG's Board members, Bill Wilson and Gary Glenn, violated 2 U.S.C. § 441b(a); and (iii) approve a document subpoena to CRG, deposition subpoenas to CRG and its Board members, and written questions to CRG and its Board members. The GC's Report noted that Messrs. Wilson and Glenn were not made respondents at the time of the administrative complaint, but were internally generated as respondents by the FEC.

27. "[W]hen the Commission deadlocks and consequently dismisses a complaint, the 'declining-to-go-ahead' Commissioners are a 'controlling group' for purposes of the Commission's decision to dismiss the complaint." Common Cause v. Federal Election Comm'n, 108 F.3d 413, 415 (D.C. Cir. 1997). After the vote of 3-3 on the recommendations made in the GC's Report, the Commission dismissed the matter on a vote of 6-0.

28. The non-controlling group of Commissioners included Chair Ellen L. Weintraub, Commissioner Scott E. Thomas, and Commissioner Danny Lee McDonald. In its SOR dated December 16, 2003, the non-controlling group agreed with the legal analysis and recommendations contained in the GC's Report, which concluded — based upon applicable law

and the Commission's regulations — that the communications at issue contained express advocacy and were made in violation of 2 U.S.C. § 441b, stating: “We agreed with the General Counsel's recommendations and have no doubt that the brochures satisfy the tests for express advocacy laid out at both 11 C.F.R. § 100.22(a) and 100.22(b). It also supported the General Counsel's view that CRG failed to include an adequate disclaimer in the communications under 2 U.S.C. § 441d, and failed to register and report as a political committee with the FEC under 2 U.S.C. §§ 433 and 434.

29. The controlling group of Commissioners included Chairman Bradley A. Smith, Commissioner David M. Mason and Michael E. Toner. Completely disregarding as “unconstitutional” portions of the applicable FEC regulation regarding express advocacy, see 11 C.F.R. § 100.22(b), the controlling group concluded in its SOR dated January 13, 2004 that the communications at issue did not contain express advocacy, and therefore were not expenditures in violation of the FECA. The controlling group further found that its conclusion regarding express advocacy required that the Commission reject the Kean Committee's contention that CRG should be forced to register with the Commission, disclose its donors, and observe the FECA's contribution limits and prohibitions as a political committee. The controlling group's SOR concluded that “[t]he Commission thus rightly did not approve the Office of the General Counsel's request to conduct what could be an extensive investigation into the corporation's activity, including interrogatories, document subpoenas, and depositions to pursue this untenable theory, and closed the file on the matter.” The controlling group's SOR altogether failed to address the Kean Committee's allegation that CRG might have coordinated its expenditures with other federal candidates.

30. The controlling group of Commissioners attached copies of the challenged communications to its SOR. No additional materials from the administrative record were released with the SOR.

31. After dismissing Plaintiff's administrative complaint on November 4, 2003, the Commission revised its policy concerning public disclosure of materials from closed administrative matters. See 68 Fed. Reg. 70,426 (Dec. 18, 2003). Plaintiff's counsel asked the Commission to comply with its new policy in this case, and on March 1, 2004, FEC counsel released additional administrative records, including CRG's written response to the Kean Committee's administrative complaint, its articles of incorporation, and a redacted version of the GC's Report.

CAUSE OF ACTION

32. Plaintiff repeats and realleges all of the allegations of paragraphs 1 through 31.

33. The Commission's decision to close the file on the Kean Committee's administrative complaint, thereby dismissing the complaint; its failure to find RTB that CRG or its Board members violated the FECA; its failure to approve discovery to investigate the Kean Committee's allegations, including the question whether there was RTB that CRG coordinated its expenditures with other candidates; and the Commission's controlling SOR for its action were based on an impermissible interpretation of the FECA, and were arbitrary and capricious, an abuse of discretion, and otherwise contrary to law. See 2 U.S.C. § 437g(a)(8)(C).

WHEREFORE, Plaintiff, by its undersigned counsel, respectfully requests that the Court grant the following relief:

a) Declare that the Commission's decision to close the file on the Kean Committee's administrative complaint, thereby dismissing the complaint; its failure to find RTB that CRG or its Board members violated the FECA; its failure to approve discovery to investigate the Kean Committee's allegations, including the question whether there was RTB that CRG coordinated its expenditures with other candidates; and the Commission's controlling SOR for its action were based on an impermissible interpretation of the FECA, and were arbitrary and capricious, an abuse of discretion, and otherwise contrary to law;

b) Order the FEC to conform with such declaration within 30 days, see 2 U.S.C. § 437g(a)(8)(C);

c) Award legal fees and costs of suit incurred by Plaintiff; and

d) Grant such other and further relief as this Court deems just and proper.

Respectfully submitted,



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