

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KEAN FOR CONGRESS COMMITTEE,)

Plaintiff,)

v.)

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

FEDERAL ELECTION COMMISSION,)

Defendant.)

NOTICE OF RECENT FEC ADVISORY OPINION

Plaintiff respectfully brings to this Court's attention the recent Advisory Opinion issued by the Federal Election Commission on September 10, 2004. A copy of this Advisory Opinion (No. 04-33) is attached as Exhibit A, and it sheds light on a fundamental issue before this Court: whether the actions of the FEC have been arbitrary, capricious, and contrary to law.

In the case before this Court, the FEC has taken the position that the ads directed against candidate Kean were issue ads, not ads expressly advocating the defeat of Tom Kean. In reaching this determination, the FEC applied one regulation (11 C.F.R. §100.22(a)), but it refused to apply another (11 C.F.R. §100.22(b)). The FEC has taken the position before this Court that it would apply the first regulation to the ads at issue because "[t]he first part of the Commission's express advocacy regulation tracks the Supreme Court's opinion in Buckley v. Valeo." Plf's Exh. 4 at 2. Under subpart (a), express advocacy includes "individual word(s) which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s)." Plfs Exh. 4 at 2 (quoting 11 C.F.R. § 100.22(a)).

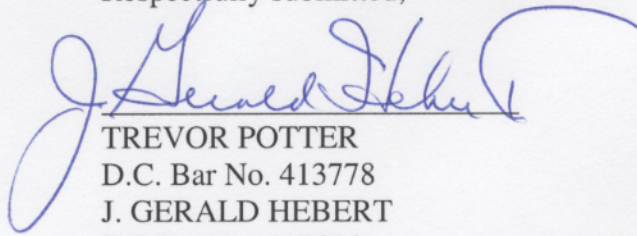
According to the FEC in its filings in this case, if it finds that a proposed ad does not constitute express advocacy under 11 C.F.R. § 100.22(a), then it cannot proceed to review the matter under the second regulation (11 C.F.R. § 100.22(b)) to determine if the ad is express advocacy because that regulation "has been held unconstitutional" by two courts outside this Circuit. Plf's Exh. 4 at 2 n.5.

Notwithstanding this claim by the FEC in this case, the FEC has recently relied on this latter regulation (11 C.F.R. 100.22(b)) in issuing Advisory Opinion 04-33. In that Advisory Opinion, the Commission was asked whether certain proposed ads were express advocacy or issue ads, the same issue present in this case. The FEC concluded, by a vote of 6 to 0, as follows in AO 04-33:

The proposed advertisement does not contain any of the illustrative phrases from 11 CFR 100.22(a) or similar phrases, or "individual word(s), which in context can have no other reasonable meaning than to urge the election" of Representative Kelly. *Id.* Also, "[w]hen taken as a whole and with limited reference to external events," it cannot be said that the advertisement "could only be interpreted by a reasonable person" as advocating Representative Kelly's election. 11 CFR 100.22(b).

Thus, the FEC applied both 11 C.F.R. § 100.22(a) and 11 C.F.R. § 100.22(b) to the ads that were the subject of AO 04-33, but the agency has refused to take that same approach in evaluating the ads at issue in this lawsuit. All three "controlling commissioners" who apparently refused to apply 11 C.F.R. 100.22(b) in this case because of alleged concerns about its constitutional status, nevertheless voted to apply it in AO 04-33. The Commission's failure to take that same approach here, in light of its handling of AO 04-33, is further authority for plaintiffs' proposition that the FEC has acted in the Kean for Congress matter in a manner that is arbitrary, capricious, and contrary to law.

Respectfully submitted,



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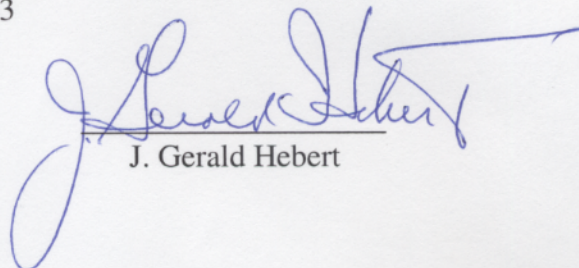
October 20, 2004

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of October, 2004, I served a copy of the foregoing Notice of Recent FEC Advisory Opinion on the following counsel of record by placing a true and correct copy of the same, in the United States mail, first class, postage prepaid, and addressed as follows:

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J. Gerald Hebert