No. 80-1136

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

FEDERAL ELECTION COMMISSION,
Petitioner-Appellee,

v.

MACHINISTS NON-PARTISAN POLITICAL LEAGUE,
Respondent-Appellant.

On Appeal from the United States District Court for the District of Columbia

---

REPLY BRIEF FOR RESPONDENT-APPELLANT

JOSEPH L. RAUH, JR.
JOHN SILARD
JUDY LYONS WOLF
RAUH, SILARD & LICHTMAN
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 331-1795

Attorneys for
Respondent-Appellant

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

60

TABLE OF CITATIONS

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1136

FEDERAL ELECTION COMMISSION,
Petitioner-Appellee,

v.

MACHINISTS NON-PARTISAN POLITICAL LEAGUE,
Respondent-Appellant.

On Appeal from the United States District Court for the District of Columbia

---

REPLY BRIEF FOR RESPONDENT-APPELLANT

We have placed before this Court three major issues —denial of procedural due process, violation of First Amendment rights of privacy of political association and communication, and absence of authority in the Federal Election Commission to investigate the pre-candidacy candidate-draft activities which are here in issue. We show in this Reply that the Commission's brief fails to answer any of these crucial objections to the order of the Court below:

1. *Procedural Due Process.* We argue in our Brief (pp. 44-48) that Fifth Amendment due process has been violated in several crucial respects. Our showing is shrugged aside by a footnote in the Commission's Brief (n. 12, p. 18), which merely recites the procedural steps

taken by the Commission without deigning to answer our specific reliance on the Supreme Court's *Watkins* ruling. Moreover, there is no answer given to our demonstration that the Commission has refused to resolve its own authority to act under the incredible and erroneous view —reflected in the letter of its counsel of January 21, 1980—that there is "*no procedure*" whereby the Commission may rule on a jurisdictional objection to its investigation once it has commenced. Yet respondent's objection duly made before the Commission to its subpoena provided just that occasion, and should have led to such a Commission ruling. Indeed, in a brief recently filed by the Commission in a pending District Court case the very opposite of its "no procedure" claim is voiced; there the Commission asserts that under the § 437g enforcement process "Any defenses to Commission action in this procedure, constitutional or otherwise, can be raised at any point during this enforcement process." [1]

2. *The First Amendment.* In our brief we set forth and analyzed twelve Supreme Court cases which require a "subject of overriding and compelling state interest" before disclosure of First Amendment activities may be compelled. The Commission's Brief (pp. 18-20) gives short shrift to the First Amendment issue, declining to take any note of these Supreme Court authorities. Instead, the Commission suggests (*id.*) that this Court's recent *LaRouche* decision "did not require the Commission to establish a 'compelling interest' prior to the enforcement of the subpoenas." But surely this Court did not and cannot cast aside the vital constitutional principal stemming from *NAACP* v. *Alabama* and the numerous other Supreme Court rulings. Indeed, it was precisely because of that principal that the Supreme

[1] *Mott* v. *Federal Election Commission,* Civil Action 79-3375, United States District Court for the District of Columbia, Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss, p. 3 (filed 2/22/80).

Court in *Buckley* limited the disclosure requirements of this very statute to activities and to spending which is "related to the campaign of a particular federal candidate." That ruling repels the possibility that the Federal Election Commission can rove indiscriminately with subpoena power into all forms of political activity, or into candidate-draft efforts which are not "related to the campaign of a particular federal candidate" because the very point of the draft activity is that there *is no acceptable candidate* so an effort is being mounted to draft one. As made clear in our brief, there cannot be a "compelling interest" in seeking disclosure of materials pertaining to a subject beyond the Commission's authority.[2]

3. *Commission Authority Over Candidate-Draft Efforts.* On the central question whether in 1979 candidate-draft committees were within the Commission's authority under the statute, its brief is utterly unresponsive. The familiar line of subpoena-enforcement decisions is cited, but there is no recognition at all of this Court's recent observation (in *Deutsche Lufthansa*) that an agency subpoena will not be enforced "where there is a patent lack of jurisdiction," nor is any case cited by the Com-

---

[2] Significantly, the First Amendment rights which would be surrendered here under the order below, without any substantial or demonstrable governmental interest, are not only those of respondent but also those of numerous private citizens and groups. Among the materials covered by the Commission's sweeping subpoena are over thirty separate documents originating from outside MNPL or IAM constituting political strategy memos, communications from individual citizens who are Kennedy supporters, extensive lists of individual citizens active in various local draft Kennedy groups, and even letters containing detailed personal comments (both favorable and adverse) on local political leaders. Thus the First Amendment transgression here would violate the rights not only of respondent but also of many other groups and individuals entitled to undertake political activity without fear of needless governmental compulsion to surrender privacy of association and communication. These would be surrendered under the order below, for under the statute all the materials gathered by the Commission in its investigation are made public when the Commission proceedings are completed.

mission where, as here, a subpoena was enforced though the *subject matter of the investigation was plainly not within the agency's statutory authority.*[3]

Moreover, this is the kind of case where the jurisdictional objection to the agency's investigation hinges entirely on a legal interpretation of its authority, not on any particular facts concerning the challenged activities. It has been recognized that *Oklahoma Press* does not foreclose a jurisdictional inquiry by the court in an agency subpoena enforcement proceeding where "the issue involved is strictly a legal one not involving the agency's expertise or any factual determinations." *Borden Inc.* v. *FTC*, 495 F.2d 785, 787 (C.A. 7, 1974). Cases applying that rule include *Jewel Companies Inc.* v. *FTC*, 432 F.2d 1155, 1159 (C.A. 7, 1970) and *FTC* v. *Miller*, 549 F.2d 452 (C.A. 7, 1977). Thus, if candidate-draft committees were not included in the statute's definition of "political committee" in 1979 when the events here involved took place, then the Commission's lack of authority is an appropriate defense in this subpoena enforcement proceeding for there is nothing in the particular expenditures or activities of these groups in the months before Senator Kennedy became a candidate which could bring them within the statute's coverage or the Commission's authority.[4]

---

[3] The Commission purports to make some distinction between the question of its "authority" to conduct this investigation of candidate-draft committees and its statutory "jurisdiction" over such committees. Whatever novel distinction is being suggested, it cannot possibly answer the governing decision in *Oklahoma Press* requiring that agency investigations be within the authority granted. For if, as is clear, the Commission had no jurisdiction in 1979 over committees seeking to draft a person to become a candidate, then its "reason to believe" notice which initiated this investigation was unlawful and there is no statutory authority to support its sweeping interrogation.

[4] The Commission (Brief, p. 16) asserts that determination of the coverage of a statute such as the FECA may involve "questions of fact as well as questions of law and indeed may turn on facts discovered through enforcement of a subpoena." But the Commis-

And when it comes to the Commission's contention (p. 23), contrary to our presentation, that candidate-draft committees "are political committees as defined by the Act and are subject to its limitations," the Commission's brief becomes completely disingenuous:

First, it is contended (at pp. 23-24) that a 1980 amendment of the statute to include, for the first time, reporting to the Commission by candidate-draft committees does not show that prior to the 1980 change such committees were not already within the statute. Yet the Commission's own annual report for 1976 (see our Brief at 15), which it studiously overlooks, confessed that it would take a Congressional amendment "to bring draft movements within the reporting provisions *and contributions limitations.*"

Second, the Commission fails to note or answer in any way our repeated citation of the *Buckley* ruling that political committees are only those groups supporting an "identified candidate." While the Commission is correct in contending (at p. 24) that such a reading ignores the "plain meaning of the statute" in its generalized definition of political committees, that is the *same plain meaning* which the Supreme Court chose to ignore in *Buckley* in holding unambiguously that under the statute a political committee is only an organization "under the control of a candidate" or seeking his nomination or election.

We find it baffling that this central contention, repeatedly asserted in our brief and based on the governing Supreme Court precedent, is left absolutely unan-

---

sion has nowhere suggested what facts concerning the pre-candidacy activities of the draft-Kennedy committees in 1979 could possibly establish Commission jurisdiction over them. When the Supreme Court in *Buckley* has expressly confined the statute's "political committee" coverage to committees supporting an *identified candidate*, it is clear that there are no conceivable facts which could have brought these groups within the statute or the Commission's authority.

swered in the Commission's brief. Surely, to obtain judicial support, *the Commission must explain how it can be investigating the operations of candidate-draft committees many months before Senator Kennedy accepted candidacy, when the Supreme Court has confined the statute's coverage to committees supporting an existing candidate's campaign.*

After months of litigation the Commission has yet to make that explanation. Without it there is no possible predicate for judicial enforcement of its sweeping demand for disclosure of political association and communication protected by the First Amendment against unjustified governmental intrusion.

Respectfully submitted,

JOSEPH L. RAUH, JR.
JOHN SILARD
JUDY LYONS WOLF
RAUH, SILARD & LICHTMAN
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 331-1795

Attorneys for
Respondent-Appellant