

First Amendment referee

The FEC's misguided attempts to protect election data

By Herbert E. Alexander and Joel Federman

The actions of the FEC in recent months have demonstrated a profound insensitivity to First Amendment freedoms. In a series of rulings, the FEC has chosen to downplay or ignore free-speech and free-press issues in favor of enforcing a broad interpretation of relatively minor points of election law.

An especially striking case that calls into question the commission's posture toward constitutional rights involves Public Data Access, Inc., (PDA), a private firm that provides reports on unpublished government data from such federal agencies as the Census Bureau, the Environmental Protection Agency, the National Institutes of Health, and the FEC.

PDA's conflict with the commission arises from an advisory opinion it requested regarding the legality of its activities. PDA purchased copies of the FEC's database of individuals who contributed \$500 or more to federal candidates during the 1983-84 election cycle. From that data, PDA compiled lists of 250,000 campaign contributors who reside or work in each of the nation's 435 congressional districts. It also developed lists of corporate executives who contributed large sums to candidates.

PDA intends to sell the lists to public-interest groups and journalists who will use the data to illuminate the influence of various regions and groups on the political process.

The FEC, however, in a unanimous advisory opinion (AO 1986-25), chose to see PDA's lists in an entirely different light. The commission found "the format and content of PDA's lists are essentially indistinguishable from those of a list broker used for soliciting contributions for commercial purposes." The sale of such lists by PDA, the commission concluded, is prohibited by the Federal Election Campaign Act, which protects individual contributors

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from being exploited by those who would use public-disclosure information for commercial or political gain. Because PDA offers the lists to "all who wish to buy them," the commission considers the firm's publishing activities to fall under the act's "commercial and fund-raising" regulatory auspices.

Firm Commitment

PDA insists it will continue to sell its lists. The firm believes the decision is unconstitutional and unenforceable. Michael Tanzer, president of PDA, told *PACs and Lobbies* newsletter the commission's ruling is "just an opinion. As a matter of law, it has no meaning." Tanzer plans to continue selling the information and then fight the FEC administratively if the commission brings a case against the firm.

In addition, the firm recently announced a joint agreement with Amward Publications, Inc., (the corporate owner of *PACs and Lobbies* newsletter) and a third company to publish *The Washington Political Register*. *The Register* will index by name and business affiliation almost 2,000 Washington individuals who are large and frequent contributors to political campaigns. Amward's Edward Zuckerman, who is compiling the volume, says he expects the FEC to be "mindful and respectful of our right to publish publicly disclosed information." He adds the First Amendment considerations the FEC ignored in its PDA advisory opinion would be "exactly the considerations we expect the agency to make in any potential enforcement proceeding (against the *Register*)."

In the PDA case, the commission was faced with balancing two competing concerns: (1) the public's right to know the content of FEC campaign-disclosure documents, and (2) the privacy of individual contributors, who might be inundated with solicitations for funds by list brokers.

Especially when one considers the specifics of the PDA case, the FEC's decision to prohibit the firm from selling its lists demonstrates imbalanced thinking that suppresses First Amendment values. Commission regulations provide that use of public-disclosure information is permissible as long as the "principal purpose" is other than for

soliciting contributions or for other commercial purposes. Thus, the commission had to decide whether the principal purpose of PDA's business was to enhance public knowledge of public information or simply to broker lists for profit.

The commissioners knew that PDA is partially owned by the Council on Economic Priorities, a nonprofit group with a long-established reputation for compiling nonpartisan reports on issues of public interest. PDA had described to the commissioners the primary market for its lists as public-interest and nonprofit groups, researchers, and journalists. It had promised to place a warning on each page of each individual list it sold, stating the list should not be copied or sold for commercial use or to solicit funds. More important, PDA, in compiling its lists, deletes the mailing address from the original FEC database, thus undercutting the commercial or fund-raising viability of the lists. Regardless, commissioners chose to see the PDA lists as falling under its "commercial purpose" regulations.

The Courts Weigh In

The constitutionality of the prohibition on the use of contributor data only recently had been called into question during an appeal of a legal suit by the National Republican Congressional Committee (NRCC) against the Legi-Tech Corporation.

Earlier this year, the NRCC went to court to block Legi-Tech, a California company, from telecommunicating FEC records on campaign donors to its clients. Apparently fearful the provision of the FECA that prohibits the use of FEC disclosure data for commercial purposes would not withstand constitutional inquiry, the NRCC took the unusual step of applying for and receiving copyright protection for its own FEC reports. In rejecting the NRCC's initial bid for a temporary injunction, U.S. District Court Judge Gerhard Gesell decided that permitting copyright law to protect this information would "totally frustrate" the meaning of the act.

The NRCC then filed a complaint with the FEC alleging Legi-Tech had violated the statute and immediately thereafter appealed Gesell's ruling to

the U.S. circuit court. The committee fared no better there. After looking briefly at the legislative history, the appellate court concluded Congress might have intended a *narrower* prohibition than that asserted by the NRCC—one aimed less at protection of the proprietary rights of political committees and more at the protection of donors from unwanted solicitations.

Noting the commission had not ruled on the NRCC complaint, thus leaving open the possibility that the FEC could decide Legi-Tech's activities fall outside the statutory prohibition, the court chose to await FEC disposition of the

complaint before making its own ruling final. With a warning that the "commercial use" provision might be unconstitutional, Judge J. Skelly Wright, a member of the three-judge panel, asked the commission to take the constitutional issues into account in its consideration of the Legi-Tech case.

Mindful of the court's ruling, FEC General Counsel Charles Steele attached a memorandum to his office's draft of the PDA ruling, advising the commission how to respond to the court's concern. Steele recommended the FEC ignore the constitutional issue, arguing that the proper role of a regula-

tory body is to enforce the law as it understands it, rather than to pass judgement on its constitutionality. Commissioners, apparently, agreed with Steele's assessment.

By ignoring or discounting First Amendment considerations, the FEC ruled to prohibit PDA from making public-disclosure data more readily available to researchers and reporters. In perspective, PDA simply is attempting to provide the service of bringing data that is already part of the public record closer to the public. In light of recent Gramm-Rudman-Hollings-inspired cutbacks to its own computerized-disclosure program, the FEC should be encouraging endeavors of this sort. PDA should be applauded by the commission for taking up some of the slack. Instead, the commission has attempted to prohibit the firm's activities.

Historical Insensitivity

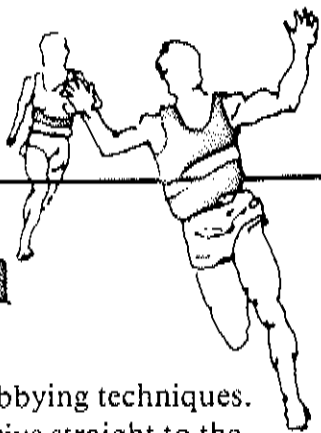
The PDA case extends a long history of FEC decisions that betray an insensitivity to First Amendment concerns. For example, the commission demonstrated an equally callous attitude toward freedom of the press in 1980 and 1981 when it pursued actions against the Reader's Digest Association (RDA) and the biweekly conservative newsletter, the *Pink Sheet on the Left*.

In February, 1981, the RDA filed suit in U.S. district court to halt an FEC investigation into whether the firm had violated federal election law by making expenditures to disseminate videotapes of a computer reenactment of Senator Edward Kennedy's accident at Chappaquiddick. The videotapes were made to promote a *Reader's Digest* article concerning the accident.

Although U.S. District Judge Pierre Level allowed the commission to continue its inquiry, he also ruled RDA was not compelled to provide documents and information about the tapes that the FEC had subpoenaed.

Also in 1981, the FEC filed suit to force Phillips Publishing, Inc., to answer questions about a promotion accompanying a copy of the *Pink Sheet on the Left*. The promotion was highly critical of Senator Kennedy's bid for the presidency. The commission sought to determine whether the company had illegally spent corporate funds to advocate the senator's defeat. In July, 1981, U.S. District Judge Thomas A. Flannery denied the FEC request to enforce its subpoenas for information, stating that a conjecture a violation might have occurred is not sufficient to warrant an FEC investigation into highly sensitive areas of freedom of

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Another current case of FEC harassment involves the commission's investigation of a complaint by former Representative George Hansen (R-Idaho) against the Campaign Finance Research Institute. The institute, a non-profit corporation, is an offshoot of the "Project for Investigative Reporting on Money and Politics," founded by philanthropist Phillip M. Stern.

Hansen charged the organization's grant to a journalist resulted in the prelection publication of a series of articles in an Idaho newspaper critical of his personal finances. Hansen, who subsequently was defeated in his bid for reelection, claimed the \$1,750 grant constituted a prohibited corporate contribution because it had been made "in connection with an election."

Having found reason to believe a violation had occurred, the FEC subpoenaed a variety of records from the group—including copies of all applications for grants it had received, regardless of whether they had been approved—as well as confidential descriptions of potential research projects submitted by reporters. The institute balked, arguing that turning over the applications to a government agency would damage its credibility

among journalists and thus would discourage them from seeking further funding. The FEC filed suit to enforce the subpoenas, but the institute largely prevailed.

Last September, the commission, discovering no evidence to suggest the project's activities were politically motivated, voted to close its file on the case. The commission, however, refused to issue an official finding that there was no probable cause to believe that any violation of FECA had occurred. In withstanding a complete acquittal of the project, the commissioners followed the recommendation of General Counsel Charles Steele, who earlier had justified the mixed result by arguing that a complete exoneration is impossible, because "there is an open area of inquiry [the grant applications], but it is doubtful that the court will enforce our request for materials pertinent to the inquiry . . ."

The Steele statement clearly exposes the apparent inability of the FEC to bring itself to admit the constitutional principle the court upheld. Instead, it insists on clinging stubbornly to an invalid conception of its own authority.

New Commissioners Confirmed

Republican Thomas J. Josefiak and Democrat Scott Thomas were confirmed by the Senate last October 3 as the newest members of the FEC. Josefiak took the seat of Frank P. Reiche in 1985 as an unconfirmed recess appointee. Thomas replaces Tom Harris, who had been a member of the commission since its founding.

Harris brought to the commission a rare intellect. He also had long experience in political activity, and his legal expertise made him a leader on the commission. His persuasive argumentation occasionally resulted in narrow and legalistic interpretations based often on his perception of "legislative intent," but sometimes they strained credibility or reality.

Harris's seat, from the outset, was considered to be the "labor" seat on the commission. He had been the associate general counsel of the AFL-CIO and had worked for that organization for two decades prior to joining the commission. Thomas, other than serving as Harris's executive assistant, has no ties to organized labor.

Viewing the history of the commission, it could be suggested that there have been three phases in FEC appointments. In the first stage, appointments were limited to distinguished private citizens and former members of Congress. The middle stage included indi-

viduals who had been prominent party workers or congressional staff members who could be trusted by the parties. Appointments in this phase included people of the stature of John Warren McGarry and Max Friedersdorf.

The current stage of appointments involves people who possess neither the experience nor stature of the earlier groups but who still can be counted on by the parties. Josefiak and Thomas, for example, are young, ambitious, and unlikely to make waves if they want to be reappointed or to advance. ■

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