

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 FEDERAL ELECTION COMMISSION, :

4 Petitioners :

5 v. : No. 80-939

6 DEMOCRATIC SENATORIAL CAMPAIGN :
7 COMMITTEE ET AL.; :

8 And :

9 NATIONAL REPUBLICAN SENATORIAL :
10 COMMITTEE, :

11 Petitioners :

12 v. : No. 80-1129

13 DEMOCRATIC SENATORIAL CAMPAIGN :
14 COMMITTEE :

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Washington, D.C.

Tuesday, October 6, 1981

16 The above-entitled matter came on for oral
17 argument before the Supreme Court of the United States
18 at 1:00 o'clock p.m.

19 APPEARANCES:

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Federal Election Commission against the Democratic Senatorial Campaign Committee and the consolidated case. Mr. Steele, you may proceed whenever you're ready.

ORAL ARGUMENT OF CHARLES N. STEELE, ESQ.
ON BEHALF OF PETITIONER, FEC

MR. STEELE: Mr. Chief Justice, and may it please the Court, this case involves the expenditures provided in the Federal Election Campaign Act for political party committees made in connection with the general election campaigns of candidates of that political party.

The amount awarded by the statute, allotted by the statute, is two cents per voter; technically, two cents per voter age population, which is the amount that the statute sets for the expenditures.

The case arose before the Federal Election Commission on a complaint filed by the Democratic Senatorial Campaign Committee. That complaint challenged the practice of the National Republican Senatorial Campaign Committee and the state party committees of the Republican Party, in which they agreed that the state party committee's allocation under the statute would be expended by the National Republican Senatorial Campaign Committee.

QUESTION: Mr. Steele, only on behalf of the

1 candidate in that state?

2 MR. STEELE: Yes, and the statute makes that very
3 clear, as I think the statutory history will show.

4 QUESTION: I see. That differs from the transfer
5 provision, doesn't it?

6 MR. STEELE: The transfer of authority in this
7 case was from the state parties in the individual states of
8 the spending limit of two cents per voter that they would
9 otherwise have for the candidates for the Senate in their
10 state.

11 QUESTION: In that state.

12 MR. STEELE: In that state, yes.

13 The Democratic Senatorial Campaign Committee
14 sought the Commission's reversal of an earlier decision for
15 a similar practice in 1978. Complaint before the Commission
16 explicitly asked that that decision be overruled; that the
17 Commission seek injunctions and civil penalties against the
18 practice of the National Republican Senatorial Campaign
19 Committee.

20 The Commission on July 11, 1980 found no reason to
21 believe that that allegation stated a violation of the act
22 and refused to take action on the complaint. The Democratic
23 Senatorial Campaign Committee sought review as the statute
24 provides in the District Court for the District of Columbia
25 under the statutory provision 437g(a)(8), which provides

1 that the District Court may review the Commission's action
2 on a complaint and determine whether it was contrary to law.

3 The Democratic Senatorial Campaign Committee
4 appealed that decision to the Court of Appeals; the Court of
5 Appeals reversed the decision of the District Court, finding
6 that the statute's manifest purpose banned the practice of
7 these agreements, found that the basis on which the
8 Commission in earlier decisions had established this rule
9 presented a shifting basis, gave no deference to the
10 Commission's interpretation of the statute and ordered that
11 the Commission proceed forthwith under the enforcement
12 responsibilities in the statute, which DSCC had invoked by
13 its complaint.

14 Those enforcement responsibilities are set forth
15 in our brief and I don't intend to go through them in great
16 detail. They provide for complaints filed, notice to the
17 opposite parties. If the Commission finds reason to
18 believe, investigation, conciliation and eventual results
19 would be that the Commission would find probable cause to
20 believe.

21 QUESTION: Mr. Steele, when you said that the
22 Court of Appeals found that the Commission had shifted its
23 position, would that be roughly analogous to the NLRB?

24 MR. STEELE: I think that is analogous to the NLRB
25 and other administrative law cases I think was the analogy

1 that they were drawing on. We would submit that it is
2 different here in that what the Commission is doing is
3 exercising a prosecutorial authority rather than an
4 adjudicatory authority such as the National Labor Relations
5 Board Act.

6 QUESTION: Hasn't this Court recognized the fact
7 that the NLRB may, from time to time, shift its position,
8 and either one may be right?

9 MR. STEELE: It certainly has, and I think the
10 cases that we've cited reflect that. The Commission would
11 submit that there was no shifting basis in its approach to
12 these; that indeed, the very fact that the DSCC sought
13 reversal of the decision in MUR 780, as it is noted in the
14 Commission's records, is evidence of the fact that the
15 Commission came to the same results in earlier cases. But I
16 do think that in the cases that you cite, that even if there
17 had been a shift, that that would still be within the
18 discretionary authority of the Commission if it was
19 rationalized and so forth and so on.

20 But I do think this Court has recognized that --
21 the ability of an administrative agency to re-examine its
22 position should not be foreclosed.

23 The case raises issues both procedural and
24 substantive in this case. Substantively, the question,
25 which I will address in a moment, is whether the Commission

1 was correct in its interpretation of the statute. I would
2 like for a moment, however, to touch upon the procedural
3 issue because I think the two are intertwined in such a way
4 as to demonstrate the problem that the Commission has in the
5 procedural aspects with the decision of the court below.

6 The central issue in the case, in a sense, is
7 whether the statute so clearly prohibits the sort of
8 agreement that was entered into here; that it was
9 unwarranted for the FEC not to prosecute the case, not to go
10 forward under the provisions that it has for seeking
11 enforcement of the act.

12 The Court of Appeals stated that in its opinion,
13 it was not a discretionary exercise of Commission power that
14 was at issue here, but solely the interpretation of a
15 statute. And it is precisely on that point that the
16 Commission thinks that the court below erred; erred in
17 relationship to other cases that it has decided with regard
18 to the Federal Election Campaign Act in the Commission's
19 exercise of its enforcement responsibilities, and erred more
20 broadly in the overall context of administrative law.

21 Indeed, as we have submitted in our brief, it
22 would seem that the exercise of the prosecutorial power, the
23 power to enforce the statute, is one that throughout the
24 jurisprudence of this country has been seen as a
25 discretionary one. What you have here is the decision by

1 the Commission that it should not go forward in that mode.
2 The decision of the Commission was based on a legal
3 analysis; there was not a factual investigation here.

4 Nonetheless, the decision of the court below
5 suggests that the Commission must go forward. Now, as we
6 have said in our brief, the Commission is structured in a
7 way unlike many other commissions. It requires -- it's a
8 six-member body, it requires the positive votes of four
9 members to bring such an action.

10 QUESTION: What was the vote here? Unanimous?

11 MR. STEELE: The vote here was unanimous. The
12 vote in all three of the earlier decisions which we have
13 referred to in our case, one advisory opinion back in 1976
14 and in the two enforcement cases in 1978, all of them were
15 unanimous. They were all six-nothing with the exception of
16 one of the two MUR's where there were only five members
17 present, but it was also unanimous.

18 Those safeguards for the Commission's processes
19 include, as I noted, the four votes required. There is, of
20 course, the composition of the Commission. It is balanced
21 so that there can be no vote of four members, by all the
22 members of one party, as the statute prohibits the
23 Commission from having more than three members of any one
24 party.

25 With regard to the merits, the Commission submits

1 that its interpretation was not only reasonable, but was
2 really quite consistent with the statute. I would
3 emphasize, however, that it seems to the Commission that the
4 standard that should be here applied is not whether its
5 interpretation was the only one, but only whether its
6 interpretation in light of the act, the words of the act,
7 the context of the act, was a reasonable one.

8 So, as far as the Commission is concerned, even if
9 the statute is at least ambiguous it should prevail in this
10 case, because the interpretation placed upon it by the court
11 below that required the Commission to go forward was that
12 the statutory mandate was clear.

13 The review provision in 437g(8) provides that the
14 Commission's actions will be reviewed to see if they are
15 contrary to law. And the Commission concedes, as I think
16 would be true even without that statute but with the
17 statutory provision there, that obviously any dismissal of a
18 complaint is reviewable by the courts. The Commission is
19 not contesting that those decisions are not reviewable. The
20 question is what the standard is that would be applied.

21 In examining the merits, I would urge upon this
22 Court to note, first of all, that the decision of the
23 Commission and of the District Court in no way increased the
24 limits that the statute provides for the spending in
25 question. 441a(d)(A)(3) provides that the national

1 committee of a political party may send two cents per voter
2 age population, and that the state committee may spend two
3 cents per voter age population.

4 That total, four cents for the party, has not been
5 increased by the decision of the commission below. What the
6 decision of the commission below said was, that the state
7 party, which has a two cents per voter age population
8 authority for spending under the statute, that the state
9 party could assign that to the National Republican
10 Senatorial Committee; that there was no bar in the statute
11 to that action.

12 The argument of the Democratic Senatorial Campaign
13 Committee accepted by the court below was that the statute,
14 by providing separate limits for the national party and the
15 state party, makes explicit that that limit must be spent by
16 the national committee or must be spent by the state
17 committee, and that there could be no transfer of it.

18 Initially in 1976, when the Democratic National
19 Committee filed a complaint and then withdrew it, there was
20 an advisory opinion by the Commission. The Commission under
21 437f, 2 USC 437f, is authorized to issue advisory opinions
22 to any person who requests them about specific transactions
23 in which they are engaged.

24 In that opinion, the Commission very clearly
25 stated that in its view the National Republic Congressional

1 Committee there, not the senatorial campaign committee. The
2 two committees in question, one for the senatorial side, one
3 for the congressional side, for the House side, are two
4 separate committees. But for purposes of the statute, they
5 are the same because they represent the same interests, one
6 for the Senate side, one for the House side.

7 The Commission's decision in AO 1976-108
8 explicitly stated that under its interpretation of the
9 statute, referred to the legislative history of the 1976
10 amendments after this Court's decision in Buckley, that the
11 National Republic Congressional Committee was a committee of
12 the National Committee of the party. That is to say that it
13 could be -- the National Committee could assign to that
14 committee its spending limits. That the National Republic
15 Congressional Committee could spend its funds on a
16 delegation from the Republic National Committee.

17 QUESTION: Mr. Steele, may I ask, I noticed that
18 the only thing argued below, I gather, was the validity of
19 the agency agreements and not any validity of fund
20 transfers. My question is this: could everything they
21 attempted to do by agency agreements, they have done under
22 441a(a)(4) by transfer of funds if the congressional
23 committees are not political committees within a(a)(4)?

24 MR. STEELE: They would be -- the transfer
25 provision would provide it to them as political committees

1 of the same party. And we would argue certainly, the fact
2 that they could transfer all the funds would allow them to
3 do the identical matter that they did here.

4 QUESTION: Then why all the fuss? What difference
5 does it make?

6 MR. STEELE: Well, the decision of the court below
7 was that there was loss of control; that here the state, by
8 giving up its spending authority to the National Republican
9 Senatorial Committee no longer retained control.

10 QUESTION: And transferred the funds, if the
11 prohibition of a(a)(4) doesn't apply to it, and if the state
12 committee had transferred to the senatorial committee,
13 apparently the same thing could have been accomplished,
14 couldn't it?

15 MR. STEELE: Yes. Or by our reasoning the same
16 thing could have been accomplished by the National
17 Republican Senatorial Committee, transferring the funds --

18 QUESTION: Under agency agreement.

19 MR. STEELE: Yes.

20 QUESTION: Well, my question is really, why do we
21 have to fuss over the agency agreement if they could do it
22 under a(a)(4) under the transfer provision?

23 MR. STEELE: I don't think that you do, and
24 indeed, I think that's the case that the Democratic
25 Senatorial Campaign Committee is trying to make. That there

1 is a difference there, but we would see no difference there.

2 QUESTION: While you've been interrupted may I
3 just ask, in your view is the National Republican Senatorial
4 Committee, the committee that's a party to this case, a,
5 quote, "national committee of a political party" within the
6 meaning of 441a(d)(3)?

7 MR. STEELE: Yes, it is. And I would cite the
8 decision that I was just mentioning, AO 1976-108, in which
9 the Commission explicitly stated that on the basis of
10 legislative history from the 76 amendments. That's cited at
11 -- I'm sorry, I don't have the page in our brief, but it's
12 listed in our table on pages 25 and 29, and the Commission
13 there explicitly held that.

14 QUESTION: If that's correct, then again, the case
15 is all over, isn't it? Because they have not spent more
16 than that section permits them to spend, is that correct? I
17 don't quite understand why we have to even get into the
18 transfer of spending authority.

19 MR. STEELE: I don't see why you do, either.
20 Again, I think that that is our case, and I think you're
21 stating it for me.

22 The argument on the other side, I believe, is that
23 by aggregating these two -- the statute 441a(d)(3) provides
24 a two cents for the national committee and a two cents for a
25 state party committee, and that somehow the statute by

1 providing those separate limits, which we agree that that
2 allows the state committee not to transfer that to the
3 national, so that the state committee has the authority to
4 retain that spending power if it wishes, and that there's
5 nothing in the statute -- there's no mention in the statute
6 of any prohibition of any arrangement like this, that at the
7 very best the court below had to rely on the inference that
8 by stating the two separate limits, that it meant that there
9 should be no transfer.

10 The court below also stated that its belief that
11 the purpose of the statute was to strengthen the state
12 parties -- again, even conceding that that's so, which I
13 don't think there's much citation of legislative history to
14 support that, it would seem to us that the statute under the
15 Commission's interpretation allows that. It allows the
16 state, if it wishes to, to retain that spending authority.

17 To turn for just a moment to the Court of Appeals
18 decision below with regard to the question as to the
19 shifting basis, not only would we contend, as I said in
20 response to Justice Rehnquist's question, that even had
21 there been a shift here that it enabled the agency to make
22 that kind of decision and that's one of the purposes of
23 having this kind of process. But we would submit that
24 throughout all three of those decisions, the basic elements
25 which I have set forth in discussing the merits, were there

1 stated.

2 The basic authority that the Commission relied on
3 in all of them, including AO 1976-108, was the transfer
4 authority. The court said that in some of the earlier MUR's
5 the emphasis was on that and on the failure of the statute
6 to explicitly prohibit this kind of transfer, and said that
7 later decisions of the Commission suggested a shifting basis
8 in that we then noted in this MUR in particular that later
9 developments, that the Congress had legislation specifically
10 in front of it -- the House of Representatives had
11 legislation specifically in front of it which would have
12 prohibited the transfers proposed by the House
13 Administration Committee.

14 There was a rule against that bill going forward,
15 and we set forth in the decision in this case, the
16 administrative decision in this case, MUR 1234 sets forth
17 six or seven quotations from various congressmen,
18 Congressmen Frenzel, Stockman, Conable, Mikva, Davis, both
19 sides of the aisle, that the very purpose of that bill, the
20 reason that they were speaking against it, of the rule to
21 report the bill out, was because it was going to prohibit
22 these kind of transfers.

23 And on that basis we would think that the
24 Commission's decision is not only reasonable but is in
25 accord with the legislative history.

1 I would reserve any further comment.

2 CHIEF JUSTICE BURGER: Very well. Mr. Baran?

3 ORAL ARGUMENT OF JAN W. BARAN, ESQ.

4 ON BEHALF OF THE PETITIONER, NRSC

5 MR. BARAN: Mr. Chief Justice, may it please the
6 Court, petitioner, National Republican Senatorial Committee,
7 a committee of the Republican Party, seeks reversal of the
8 Court of Appeals decision, just as the Federal Election
9 Commission does.

10 Our essential reason, set forth in our brief, is
11 that the statute in question, which I'll refer to as
12 Subsection (d)(3), simply does not prohibit the conduct that
13 the Democratic Committee is complaining of.

14 The limits, as Mr. Steele has indicated, have not
15 been exceeded with respect to the total dollar amount, and
16 it was noted so by Judge Wilke in his dissent, as well.
17 What is being complained of is a method utilized within the
18 political party for most effectively spending the money on
19 behalf of senatorial candidates. And that method, which has
20 been used by the Republican Party in 1978 and in 1980 on
21 occasion and only voluntarily, is for the state committees
22 of the Republican Party to designate the petitioner, NRSC,
23 as an agent for purposes of spending funds on behalf of
24 these candidates.

25 The respondent has never in the course of the

1 administrative proceeding or before any of the courts below
2 suggested that the total amount of money spent for any
3 specific Senate candidate in any state has been exceeded by
4 the Republican Party.

5 Unlike the Federal Election Commission, we do
6 address the potential, although we feel unnecessary to
7 reach, constitutional issues that would arise if the Court
8 of Appeals decision were upheld. As Judge Wilke noted in
9 his dissent, the interpretation that has been engrafted on
10 this statute by the Court of Appeals would place a
11 restriction in the way of the political party in terms of
12 most effectively supporting its Senate candidates, even
13 though it would be within the statutory limitation.

14 Unlike the compelling governmental interest that
15 has been recognized by this Court in Buckley v. Valeo, which
16 is the prevention of corruption and the appearance of
17 corruption, that interest is not advanced in furtherance of
18 any such restriction.

19 The respondent in their briefs suggest solely a
20 government interest in revitalizing the state committees of
21 the political parties. The Republican Party is certainly
22 touched by this outpouring of concern on the part of the
23 Democratic Committee for the wellbeing of Republican state
24 committees. It certainly is unprecedented, to say the least.

25 But in terms of actual purpose behind Subsection

1 (d)(3), there is no reflection in the legislative history,
2 as we note in our brief, that there was any intention on the
3 part of Congress when they passed Subsection (d)(3) back in
4 1974 to limit its benefits solely and narrowly to the state
5 committee. The Congress was concerned with providing a
6 still substantial role in private financing for political
7 parties generally, but certainly not just for the state
8 committees.

9 And furthermore, as noted earlier by Mr. Steele,
10 there are provisions within the statute itself that would
11 indicate that Congress views the parties as basically one
12 large entity and one large organization within the United
13 States for financing purposes, to the point where unlike
14 virtually any other component of campaign financing, any of
15 the committees of the same party can shift unlimited funds
16 back and forth to each other; implicitly recognizing that
17 it's up to the political parties to make a decision on how
18 to best structure their campaign financing within the
19 overall limitations contained in the act.

20 For those reasons, as set forth in greater detail
21 in our brief, the petitioner NRSC requests reversal of the
22 Court of Appeals decision. If there are no questions, I
23 will conclude my argument. Thank you.

24 CHIEF JUSTICE BURGER: Mr. Bauer?

25 ORAL ARGUMENT OF ROBERT F. BAUER, ESQ.

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ON BEHALF OF RESPONDENT, DSCC

MR. BAUER: Mr. Chief Justice and may it please the Court, what is striking about the last few minutes of argumentation offered by the FEC and the NRSC is that in construing the plain language of the provision in question, what Mr. Baran referred to as (d)(3), neither side offered any analysis of the plain terms of that provision.

That is until Justice Stevens asked general counsel Steele whether NRSC was a national committee within the meaning of that section. General counsel Steele responded that it was, which is a mis-analysis of the plain terms of the provision which lies at the heart of the agency's difficulty from the beginning of this case.

The terms in Section (d)(3), Subsection (d)(3), are not ambiguous. They are separately defined in the definitions provision of the FECA. The definition about which Justice Stevens inquired, the national committee, is defined under Section 431(14) of the FECA as the organization -- that is, one organization -- which by virtue of the bylaws of a political party is responsible for the day-to-day operation of such political party at the national level.

The NRSC is decidedly not the national committee of a political party. It is a sub-unit of the national party structure, but the Commission itself has recognized

1 that it is the Republican National Committee, which is not a
2 party to this case, which is the national committee under
3 Subsection (d)(3).

4 More to the point is the analysis of what state
5 committees are. Once again, Congress separately defines
6 state committees in the definitions provision of the act,
7 and it is concededly -- in fact, conceded by all the parties
8 to this litigation -- that NRSC is not a state committee.

9 How is it, then, that the agency has construed
10 this provision, which confers defined limits on specifically
11 defined entities, to allow NRSC not named or referred to in
12 that provision to rest unto itself the limit that Congress
13 has assigned to another?

14 One of the problems in this case has been the
15 agency's inability over a course of decisionmaking to offer
16 a single consistent rationale for overcoming the plain terms
17 of this provision.

18 QUESTION: Mr. Bauer, before you get too far
19 along, it would be very helpful to me if you identified the
20 language in the statute that prohibits what the NRSC has
21 done. Because if they're not a national committee within
22 the meaning of 441(a)(d)(3), I take it 441(a)(d)(3) just
23 simply doesn't apply to NRSC.

24 MR. BAUER: That is absolutely correct, Justice
25 Stevens, with one exception I should note here. And that is

1 that in 1976, the Federal Election Commission promulgated a
2 regulation following oral comment, hearings and submission
3 to Congress subject to the one House veto provision, which
4 purported to allow the national committee, under Subsection
5 (d)(3), to assign its spending rights to any agent. This
6 was the sole exception, as the FEC interpreted it at that
7 time, and as Congress approved it at that time, to the
8 defined limits and defined committees of Subsection (d)(3).

9 In this litigation, however, for the first time
10 before the Court of Appeals the FEC disavowed its prior
11 interpretation of this regulation and now claims that it has
12 no bearing whatsoever to Subsection (d)(3), but instead
13 applies only to Subsection (d)(2) involving presidential
14 elections.

15 QUESTION: Mr. Bauer, following up on Justice
16 Stevens' question, where is the prohibitory language about
17 which he asked? I've got open the Brief of the FEC at pages
18 2 and 3, which purportedly set forth the statutes involved.

19 MR. BAUER: Justice Rehnquist, Congress --

20 QUESTION: For the prohibitory language --

21 MR. BAUER: There is no language which prohibits
22 assignments by name. However, the construction of the
23 provision itself and an analysis of the relationship to that
24 provision of other provisions to the act, suggest a
25 conclusion very contrary to that suggested here by Mr.

1 Baran. Party committee limits are not fungible. They are
2 not assignable, unless Congress expressly so state. And in
3 some instances -- and this, it seems to us, answers the
4 argument fully -- in some instances, Congress has provided
5 precisely and specifically for the assignment of limits by
6 one party committee to another, but it has been explicit
7 where it has done so, and it has not done so in Subsection
8 (d)(3).

9 QUESTION: So your reasoning is basically
10 expressio unius est exclusio alterius.

11 MR. BAUER: That is correct, Justice Rehnquist.
12 It also draws strength from the point that I just suggested
13 to you, and that is that where Congress did intend party
14 committee limits to be assignable, it expressly stated so.
15 In Subsection (d)(3), for example, Congress expressly
16 authorizes state committees to assign their limits
17 altogether to, or to share them with, subordinate committees
18 of the state party.

19 Similarly, NRSC, as a congressional committee,
20 possesses a \$17,500 contribution limitation, which it is
21 expressly authorized, again by the FECA, to share with the
22 national committee of a political party, of its party. So
23 Congress was very clear that if limits were to be assigned,
24 it wished to have the final say-so in the matter, and it did
25 not provide for this assignment authority in Subsection

1 (d)(3).

2 QUESTION: Mr. Bauer, what about a(a)(4)?

3 MR. BAUER: a(a)(4) also does not have the effect,
4 it decidedly does not have the effect, of rendering the
5 limits themselves, the integrity of the limits, for party
6 committees and nullity. It is essentially the position of
7 the FEC that because party committees can transfer funds
8 freely among themselves, then the limits that Congress has
9 given specific party committees should be disregarded.

10 QUESTION: But if the congressional committees do
11 not fall within the prohibition of 431a(a)(4), why can't
12 they clearly exchange with the state committees?

13 MR. BAUER: They absolutely can exchange funds
14 freely with the state committees, Justice Brennan. What
15 they cannot do -- they can exchange money. Money may be
16 freely traded. What cannot be freely traded or assigned is
17 the spending authority itself, which Congress made specific
18 to different party committees. Money may pass freely, but
19 congressionally-assigned spending rights may not.

20 QUESTION: What may they do with the money? They
21 may transfer it freely. What may they do with it?

22 MR. BAUER: They might use it for Subsection
23 (d)(3) purposes, (d)(2) purposes; they may use it for
24 contribution limitations, they might use it to fund their
25 administrative expenses. In fact, the legislative history

1 which is in the record of this case suggests that when
2 Congress crafted the transfer provision, all that it really
3 had in mind was sort of a general facilitation of
4 intra-party cooperation, and Senator Hatfield referred, for
5 example, specifically to the possibility that one committee
6 could help another extinguish its debts. But there is no --

7 QUESTION: What is it that they may not do?

8 MR. BAUER: The transfer provision is, in two
9 instances which directly bear on this case, barred, or at
10 least its use is barred.

11 QUESTION: Where is that?

12 MR. BAUER: In the Federal Election Commission
13 regulations at Section 100.7. In those --

14 QUESTION: Are you saying that the Commission
15 ignored its own regulations?

16 MR. BAUER: Well, in this particular instance the
17 use of the transfer provision is barred where state party
18 committees are engaging in certain activities which are not
19 involved in (d)(2). But I was responding to Justice
20 Brennan's question about whether there is ever any explicit
21 bar on transfers for a particular purpose, and there is. In
22 the --

23 QUESTION: In fact, by regulation, you suggest?

24 MR. BAUER: It is by regulation, the Commission
25 having drawn upon language in the legislative history of

1 those provisions. Congress had provided --

2 QUESTION: And what is that bar?

3 MR. BAUER: The bar is that if the state party
4 committees are to spend for certain special purposes --

5 QUESTION: They being?

6 MR. BAUER: They being unlimited, get out the vote
7 and voter registration expenses in presidential campaigns,
8 and so-called volunteer activities, where they can purchase
9 without limit bumper stickers, buttons, yard signs, which
10 volunteers may use. In those cases, the state committees
11 alone have that spending authority and they may not accept
12 funds for that purpose from the national committee of their
13 party.

14 QUESTION: And that's by regulation.

15 MR. BAUER: And that is by Commission regulation
16 drawing upon language in the legislative history.

17 QUESTION: And this is the only regulation that --

18 MR. BAUER: That is the only regulation on this
19 point.

20 QUESTION: Where do we find that in the briefs?

21 MR. BAUER: It would be found in our brief, Your
22 Honor, and I can --

23 QUESTION: I gather this whole issue was not
24 canvassed by the Court of Appeals, as I read its opinion.
25 Am I right?

1 MR. BAUER: The Court of Appeals did draw upon the
2 provisions in question.

3 QUESTION: Except that it says, the parties have
4 not argued the validity of funds transfers.

5 MR. BAUER: That's correct, not under Section
6 (d)(2).

7 QUESTION: But only of agency agreements.

8 MR. BAUER: That's correct, under --

9 QUESTION: Well, what we're talking about now was
10 not considered by the Court of Appeals.

11 MR. BAUER: What we're talking about now was only
12 considered by the Court of Appeals for one point which is
13 critical here. And that is that Congress has been
14 continually concerned that state party committees have a
15 financial lever with which they can maintain their position
16 in the electoral process. They have provided for an array
17 of special spending provisions which state party committees
18 and only those committees may use. And the purpose in those
19 provisions as in Subsection (d)(2) is to guarantee the
20 position of these parties in an age of national fund raising
21 power and expensive media power.

22 QUESTION: I interrupted you and you were going to
23 tell us where that regulation was.

24 QUESTION: Where in your brief is it?

25 MR. BAUER: In our brief, Your Honor, it is cited

1 --

2 QUESTION: Is it set forth?

3 MR. BAUER: Oh, it is set forth in great detail.

4 QUESTION: Where?

5 MR. BAUER: It is set forth in the material on the
6 legislative history, which appears beginning page 23 and
7 concludes on page 30, and the provisions that I am
8 discussing appear at pages 28 through 30. The same
9 provisions that I have discussed in response to yourself and
10 Justice Brennan.

11 And in those provisions, there is manifested
12 broadly this congressional concern that state party
13 committees have discrete and integral limits which cannot be
14 freely traded away in contravention of congressional
15 purposes.

16 QUESTION: Mr. Bauer, I really need more help from
17 you. You've taken us into the regulations, and I'd like to
18 stick with the statute, if I could, for a little bit. And
19 it would help me if you could explain to me where --
20 assuming that the NRSC is not a national committee within
21 the meaning of 441a(3), where in the statute is there a
22 prohibition against NRSC expending money?

23 MR. BAUER: There is no prohibition, certainly, on
24 NRSC expending money, Justice Stevens. In fact, NRSC has in
25 Section 441a(h) a discrete contribution limitation which it

1 shares with the national committee of \$17,500. So it has
2 never been the position of the respondent in this case that
3 NRSC is barred from spending funds. Nor has it been our --

4 QUESTION: What has it done that's illegal, other
5 than spend funds?

6 MR. BAUER: It has assumed the congressional --
7 the spending authority assigned --

8 QUESTION: I thought it didn't need a spending
9 authority; if there's no bar on its spending funds, how did
10 it violate the statute?

11 MR. BAUER: The statute, Your Honor, provides
12 generally for all committees, party and non-party, that
13 where funds are spent in support of a clearly-identified
14 candidate in cooperation with that candidate, the amounts
15 that can be spent are limited.

16 QUESTION: And what is it that limits the amount
17 that can be spent by NRSC?

18 MR. BAUER: NRSC as other committees, as other
19 party committees are, is subject to specific spending limits
20 in the --

21 QUESTION: What is it, and in what section of the
22 statute may I find it?

23 MR. BAUER: You may find it in Section 441a(h),
24 where that and the other congressional campaign committees
25 are cited by name.

1 QUESTION: And is that section quoted in the
2 briefs?

3 MR. BAUER: Yes, it is, Justice Stevens.

4 QUESTION: 441a(h).

5 MR. BAUER: That's correct, 441a(h).

6 The question of whether Congress intended
7 political committees of a party to have discrete limits --

8 QUESTION: I hate to do this, but which brief at
9 which page, do you know?

10 MR. BAUER: I suspect in all the briefs, Justice
11 Stevens, but in our brief it is cited at pages 26 and 37.

12 QUESTION: Is it quoted anywhere?

13 MR. BAUER: It is not cited at length in any of
14 the briefs, to my knowledge.

15 QUESTION: Not quoted, even "that is the
16 provision" that you allege they violated?

17 MR. BAUER: Your Honor, our allegation has not
18 been that they're violating 441a(h). Our --

19 QUESTION: But if they didn't violate that, and
20 that's the only statutory provision that prohibits them from
21 spending money, how can they have violated the statute if
22 they didn't violate that?

23 MR. BAUER: Justice Stevens, the problem lies in
24 the history of this litigation. There used to be, until the
25 FEC disavowed it, an additional source of spending by NRSC

1 by regulation. In 1976, as I mentioned --

2 QUESTION: Well, I was hoping I could get the
3 basic framework of the statute. You must rely on
4 regulations to find a violation, I take it.

5 MR. BAUER: No, Your Honor, because absent that
6 regulation by the Commission which provided NRSC with a
7 separate, with a separate source of funding, and a
8 considerably substantial one, absent that regulation it is
9 absolutely correct that by receiving an assignment of funds
10 from the state party committees -- excuse me, receiving an
11 assignment of authority from the state party committees,
12 NRSC's expenditures did violate the act. It, in fact,
13 violated 441a(h). Absent the regulation.

14 QUESTION: Did they violate any section other than
15 441a(h)?

16 MR. BAUER: No, Your Honor, they did not.

17 The question of whether or not party committee
18 limits have been deemed by Congress to be specific can be
19 answered by reference to the legislative history of
20 Subsection (d)(2). That provision, leaving aside its plain
21 terms which do not refer to NRSC, was enacted in 1974, and
22 the legislative history shows that Congress was well aware
23 of the congressional committees in 1974. In fact, there was
24 pending on the floor of the Senate at that time a proposal
25 to exempt the congressional committees altogether from

1 spending limits, and that proposal was rejected.

2 In 1976, the question of NRSC spending authority
3 was raised yet again, and this time it was raised through a
4 \$17,500 contribution limit, which it shares with the
5 national committee of its party. But not at that time nor
6 in the years before did Congress elect to confer upon NRSC a
7 share in the state committee's spending authority under
8 Subsection (d)(3). It was a considered question by
9 Congress, and Congress addressed it forthrightly.

10 Similarly, the transfer provision is no answer.
11 While it is true that funds can be transferred freely
12 between committees, it is also clear from the scheme of the
13 act and its legislative history that party committee limits
14 are not fungible. Unless Congress has expressly stated that
15 those limits are to be shared or assigned, and it has in the
16 provisions I cited to Justice Rehnquist, assignability is
17 barred.

18 In the last analysis, the FEC and NRSC in this
19 case have shrugged their shoulders and said, what difference
20 does it make; form over substance. It doesn't matter
21 whether the state committees spend the funds or whether NRSC
22 does.

23 Respondent submits that the question of form or
24 substance in matters of policy are not for the agency to
25 make. It is for Congress to make policy judgments in the

1 election scheme.

2 In any event, the question of form which is before
3 this Court, is decidedly one of substance. For in this
4 Subsection (d)(3), as in other provisions of the act which
5 I've cited in the colloquy with Justice Rehnquist, Congress
6 made specific provision for special spending rights by state
7 committees and their subordinate units, and it did so
8 because of a very strongly expressed concern that these
9 committees would not be in a position to maintain their role
10 absent this special provisions of Congress.

11 The record in this case shows that the
12 congressional concern was by no means unfounded, for
13 uncontroverted in that record is evidence that in 1978 when
14 these state committee-NRSC authority assignments were first
15 made, state party committees spent virtually no money under
16 the authority provided under Subsection (d)(3).

17 QUESTION: But that was their own choice, wasn't
18 it? I mean, they're not compelled to make their assignment
19 to the national senatorial committee.

20 MR. BAUER: That is correct, Justice Rehnquist.
21 At the same time, Congress did not foreclose from holding
22 out an incentive to these entities to try to maintain their
23 own place. And certainly, the availability of this
24 assignment authority only makes it easier for state
25 committees to essentially abdicate the role. It is far

1 easier for a national fund-raising base like NRSC to raise
2 the money for congressional elections across the country
3 than for, say, the state committees of Missouri, Kentucky,
4 Iowa and Alabama. Yet Congress held out to those committees
5 that incentive to do so, to raise the money and then spend
6 it in their own congressional elections, and the
7 assignability of those limits completely contradicts this
8 congressional purpose.

9 So it is that the record shows that through this
10 spending pattern, Section 441a(d)(3) has essentially been
11 stood on its head. What was intended as an incentive to
12 state and local party organizations has instead been turned
13 into a supplement to national fund raising power. And as
14 this court noted in Buckley, in an age of media politics,
15 expensive polling techniques and other refined forms of
16 campaigning, money, very expensive money, certainly talks.
17 And without the special provision made for the state
18 committees, the aggregation of power will be pulled further
19 and further toward the national center of the country, which
20 is a result Congress sought to avoid.

21 QUESTION: Mr. Bauer, would you just enumerate for
22 me what are the limitations on state committee expenditures?

23 MR. BAUER: Justice Brennan, state committees may
24 --

25 QUESTION: They want to transfer agency or

1 whatever you want to call it with the NRSC, but you say they
2 can't.

3 MR. BAUER: They cannot transfer the spending
4 authority. They may transfer funds for whatever purpose
5 they choose to other party committees.

6 QUESTION: I don't see what that means. If
7 they've got \$50,000, you're saying they can transfer the
8 \$50,000 but they can't transfer whatever the requirement is
9 that they spend the \$50,000, is that it?

10 MR. BAUER: That is correct, and I think the
11 significance --

12 QUESTION: What is it that they have to spend the
13 \$50,000 on?

14 MR. BAUER: Well, this is -- that is probably the
15 most significant point in our case, Justice Brennan, and it
16 goes to what Justice Stevens asked me about NRSC's own
17 spending limit.

18 Let us assume for purposes here, without again
19 addressing the FEC regulation, that NRSC is limited to
20 \$17,500 to a candidate. And let us assume that a state
21 committee then transfer to NRSC \$50,000. All that NRSC can
22 do to influence the outcome of a specific candidate's
23 election is spend \$17,500.

24 QUESTION: And what happens to the rest of the
25 money?

1 MR. BAUER: Presumably, NRSC makes some
2 arrangement to spend it for some other purpose, but not in
3 congressional elections, which is precisely why if the
4 committee's limits were respected, the additional money that
5 the committee would retain at the state and local level --

6 QUESTION: Now, if the state committee had kept
7 the \$50,000, what may they do with it?

8 MR. BAUER: They may make a contribution to a
9 candidate of \$5000 per election; they may make expenditures
10 equivalent to two cents multiplied by the voting age
11 population of the state.

12 QUESTION: But those are limitations on how much
13 of the \$50,000 they may spend on a particular candidate.

14 MR. BAUER: That's precisely correct, Justice
15 Brennan.

16 QUESTION: In this case, what do they propose to
17 do with this money?

18 MR. BAUER: The NRSC took the transfers of
19 authority from the state committees, thereby substantially
20 increasing its own limit, and indeed --

21 QUESTION: But has it distributed any money?

22 MR. BAUER: It has distributed millions under this
23 transfer of authority to Senate candidates.

24 QUESTION: They have used the authority and spent
25 the money.

1 MR. BAUER: That is correct. They have used state
2 committee authority, and NRSC has spent the money, its
3 money, for --

4 QUESTION: And you say they can't do either.

5 MR. BAUER: It may receive the transfers, but it
6 may not double its own limit with the limit of the state
7 committees.

8 QUESTION: Let me back up a little, Mr. Bauer. If
9 you have addressed the question of the interpretation placed
10 on this statute by the agency I missed it. Now certainly,
11 of all the agencies created by Congress, I would assume that
12 the people selected for this kind of a commission, which is
13 unique, three from each party -- is that correct?

14 MR. BAUER: That's correct, sir.

15 QUESTION: Would hardly be political neophytes.
16 They'd be people who are very sophisticated politically,
17 which might not necessarily be true of an appointee to the
18 Federal Communications Commission or Federal Power
19 Commission, who might or might not be sophisticated in the
20 particular area.

21 Now, what weight should be given by the Judiciary
22 to the interpretation of the congressional mandate by this
23 uniquely expert and sophisticated commission? Now, those
24 are my objectives. You don't have to adopt them. What
25 weight should be given?

1 MR. BAUER: Chief Justice Burger, I think they
2 should receive the substantial weight and the substantial
3 deference that is ordinarily accorded, perhaps no more than
4 that, to agencies that are charged with administering
5 particular statutes. But this case really raises the
6 threshold to something very different. And that is the
7 question of whether an agency can disrespect the law.

8 The plain terms of this provision, and the
9 construction of the statute as a whole suggests that they
10 are permitting the bandying about the assignment of
11 authority which Congress intended to be specific to
12 particular committees.

13 Now, if there was room open under this provision
14 for different interpretations of which committees may spend
15 and which committees may not, respondent might not be here.
16 But this provision could not be clearer. Congress selected
17 particular terms and then went to great lengths to define
18 them.

19 QUESTION: But it seemed clear just the other way
20 to the six members of the Commission who passed on it
21 initially, is that not so?

22 MR. BAUER: That's correct, Your Honor. But
23 respondent submits, and as a committee subject to the
24 continuing regulation of the Federal Election Commission it
25 has a special stake in expressing its concern, that

1 unanimity of opinion on that agency not be considered
2 sufficient to overcome the plain terms of any provision.

3 QUESTION: Even your own Democrats.

4 MR. BAUER: Even our own Democrats, Justice
5 Brennan. Honest differences of opinion, but on this case we
6 happen to think we have the law on our side.

7 QUESTION: Mr. Bauer, can I go back to the statute
8 again, because I think I'm beginning to understand your
9 argument.

10 (General laughter.)

11 If I understand it, you're saying that Subsection
12 (h) which places a limit on the contributions the National
13 Republican Senatorial Committee can make to any state
14 candidate is \$17,500. And that when it spends more money
15 than that in behalf of the candidate, it is, in effect,
16 making an additional contribution to the candidate.

17 MR. BAUER: That is absolutely correct, Justice
18 Stevens.

19 QUESTION: And therefore, you've violated the
20 prohibition against contributions in excess of this amount.

21 MR. BAUER: And I might emphasize to nail that
22 point home, because I know you're eager for me to do so,
23 that the act specifically defines Subsection (d)(2)
24 expenditures as contributions. There has been much weight
25 placed for constitutional purposes by NRSC on the identity

1 of this spending as, quote, "expenditures." But the statute
2 itself defines coordinated expenditures, expenditures which
3 are arranged with the candidate, as no different
4 functionally than contributions.

5 QUESTION: So your violation in this case that you
6 rely on is the amount over \$17,500 that they spend for any
7 given candidate. Does the record tell us whether they did,
8 in fact, spend more than \$17,500?

9 MR. BAUER: Yes, it does. The Joint Appendix of
10 the Court of Appeals has notarized affidavits with
11 substantial figures for each state.

12 QUESTION: I'm just amazed that nobody quoted
13 Subsection (h) in their briefs.

14 MR. BAUER: Well, Your Honor, one of the murkier
15 moments in this litigation was, I fear, created by the
16 Federal Election Commission because it used to be that --

17 QUESTION: But one of the beauties of the
18 adversary system is we don't have to rely on our adversary
19 to quote the relevant statutory language.

20 MR. BAUER: That is correct. But the regulation
21 which we relied on to suggest that maybe NRSC had a higher
22 than \$17,500 contribution limit, that regulation was in
23 force until all of a sudden in this litigation the FEC
24 changed its mind, said it didn't apply. So a regulation
25 interpreted one way --

1 QUESTION: How much higher than \$17,500 was --

2 MR. BAUER: It was the two cents per voting age
3 population in each state as agent of the National Committee
4 of the political party.

5 QUESTION: And that could amount to how much?

6 MR. BAUER: It could amount, under the figures in
7 the Joint Appendix, to slightly in excess of three million
8 dollars, nationally.

9 So it was in light of that confusion over what
10 precisely NRSC's spending authority was that I think all
11 parties backed away from addressing themselves forthrightly
12 to 441a(h) versus perhaps some other provision.

13 While I do not believe that it merits excessive
14 attention here, NRSC has offered yet another in a long
15 string of interpretations to support the FEC's position.
16 And that is a constitutional claim, which I do not think
17 this Court need reach in light of the plain terms of the
18 provision.

19 The NRSC's claim has to be understood first of all
20 as not a challenge to the constitutionality of any
21 limitation on state party committee spending. None of the
22 parties to this litigation are quarreling over whether
23 Congress can constitutionally limit political party
24 spending. The question instead is whether, within this
25 overall scheme of limits, Congress may direct that certain

1 committees can spend a certain amount and other committees a
2 different amount for specific and well-defined purposes.

3 There is no evidence in the record certainly to
4 support NRSC's contention that its First Amendment rights
5 are impermissibly burdened by an agency proscription. Nor
6 is it likely that that evidence could be developed.
7 Political parties have exceptionally, exceptionally broad
8 avenues of spending participation available to them under
9 the act. Avenues which are not available to non-party
10 committees, and Subsection (d)(3) is one example.

11 And whatever infringement may, in fact, result
12 from proscribing these agency agreements and enforcing
13 congressional will, they are certainly marginal when
14 measured against the government's very compelling concern
15 with maintaining the state and local political party role in
16 the electoral process.

17 That's a concern which, of course, is Federalist
18 at heart. There is a substantial body of scholarly opinion
19 supporting the view that this is absolutely necessary, and
20 we would not be quarreling about it if the agency in this
21 case had done what we urge this Court now to do, and that is
22 affirm the Court of Appeals decision below, have Subsection
23 (d)(3) construed as it was written, and thereby bring the
24 agency back into conformity with the rule of law under this
25 statutory scheme.

1 CHIEF JUSTICE BURGER: Do you have anything
2 further, Mr. Steele?

3 ORAL ARGUMENT OF CHARLES N. STEELE, ESQ.
4 ON BEHALF OF PETITIONER, FEC -- REBUTTAL

5 MR. STEELE: With regard to the question of why
6 441a(h) was not set forth in the briefs, the fact is that
7 the complaint that was lodged with the Commission alleged a
8 violation of 441a(d)(3), and perhaps I might just refer,
9 Justice Stevens, you to that section as seeming to set forth
10 the prohibition that you were asking for.

11 The beginning of that Section, a(d)(1), says,
12 "notwithstanding any other provision of law with respect to
13 limitations on expenditures or limitations on contributions,
14 the national committee of a political party and a state
15 committee of a political party, including any subordinate
16 committee, may make expenditures in connection with the
17 general election campaign of candidates for federal office,
18 subject to the limitations set forth."

19 Those limitations are set forth in Subsections (2)
20 and (3). (2) pertains to the presidential election. (3),
21 which was what was put at issue before the Commission and
22 before the courts, pertains to the congressional elections.

23 QUESTION: I understand that. But my problem all
24 along has been, and I think Justice Rehnquist may have made
25 a similar observation, that this is authorizing language,

1 it's not prohibitory language, in (1), (2) and (3). And I
2 have to start with a prohibition somewhere in the statute in
3 order to find a violation.

4 MR. STEELE: I understand. The prohibition --

5 QUESTION: Do you not agree that what you've
6 referred to is authorizing language.

7 MR. STEELE: Yes, it is. The prohibition
8 language, in almost perhaps an inverted way, comes in
9 Subsection (3) where it says, "the national committee of a
10 political party or a state committee of a political party,
11 including any subordinate committee, may not make any
12 expenditure in connection with the general election campaign
13 of a candidate for federal office in a state who is
14 affiliated with such party, which exceeds..."

15 QUESTION: I understand that. But, of course,
16 then the one issue is whether or not NRSC is, quote, "The
17 National Committee," and your opponent says that's a term
18 defined in the statute, and that this is not that particular
19 committee.

20 MR. STEELE: Yes. And as we have said, it is not
21 the national committee. What we have set forth in the brief
22 and in the advisory opinion that I referred you to, is that
23 there are subordinate committees of the national committee.
24 Indeed, DSCC itself makes expenditures on behalf of the DNC,
25 and that that delegation has never been questioned. That is

1 the delegation explicitly set forth in 110.7 of our
2 regulations. So that the delegation by the national
3 committee of its spending authority to subordinate
4 committees has been accepted by the Commission.

5 QUESTION: Let me again just put to one side
6 delegation questions. Did I correctly understand you in
7 your opening argument to take the position that the National
8 Republican Senatorial Committee is, quote, "a national
9 committee" within the meaning of (d)(3)?

10 MR. STEELE: It is a subordinate committee; it is
11 not the national committee.

12 QUESTION: It is not the national committee now.
13 But is it a committee referred to in (d)(3)? There's no
14 other language -- oh, you say it is a subordinate committee
15 of what?

16 MR. STEELE: Of the national committee.

17 QUESTION: But there is no reference to
18 subordinate committee of the national committee in (d)(3),
19 is there?

20 MR. STEELE: That's correct. That was the
21 question posed to the Commission in AO 1976-108 where the
22 Commission, again relying on the statutory history of the
23 1976, the conference report of the 1976 amendments, came to
24 the conclusion it's the view of the Commission that the
25 specified campaign committees are committees of their

1 respective national political parties. And on that basis,
2 seized them as being -- we set forth in a footnote in our
3 brief the various committees. So the Commission has viewed
4 the national committee as having many subordinate committees.

5 I apologize if my answer earlier misled you.

6 QUESTION: I'm still, I must confess but I'll
7 study it further, a little uncertain of your position on
8 whether the statute itself in (d)(3) makes reference to the
9 National Republican Senatorial Committee, which isn't
10 mentioned by name in Subsection (h).

11 MR. STEELE: Yes, that was a later enacted
12 statute, I might note. That was passed in 1976, and a(d)(3)
13 was passed in 1974. It is not specifically mentioned in
14 a(d)(3). The Commission's position would be that it is --
15 that NRSC and the DSCC are subordinates to the national --

16 QUESTION: But that section also does not mention
17 subordinate committees of the national committee.

18 MR. STEELE: That's correct.

19 QUESTION: So what is the legal significance of
20 classifying those committees as subordinate committees of
21 the national committee? I really have lost the argument.

22 MR. STEELE: The significance of it is that they
23 are all part of the same national committee, as far as the
24 Commission is concerned. They are branches of the same --

25 QUESTION: You construe the statute as though it

1 read the national committee of a political party or any
2 subordinate committee of a national committee of a political
3 party may --

4 MR. STEELE: Yes. Which is not explicit in the
5 statute.

6 QUESTION: I see.

7 CHIEF JUSTICE BURGER: Thank you, gentlemen, the
8 case is submitted.

9 (Whereupon, at 2:00 p.m. the oral argument in the
10 above-entitled matter ceased.)

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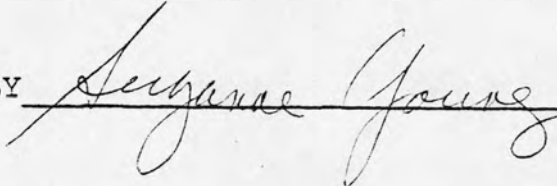
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