EXHIBIT A

than (a)(12)(A). This provision establishes that

> "No action by the Commission or any person, and no information derived, in connection with any conciliation attempt by the Commission under subparagraph (A) may be made public by the Commission without the written consent of the respondent and the Commission."

The "conciliation" process referred to in this provision is a phase of the FEC proceedings which is normally entirely distinct from the investigative-discovery phase. The statute clearly contemplates that the conciliation attempts will normally not commence until after the Commission's factual investigation has concluded and four members of the Commission have voted to find that there is "probable cause" to believe that the Act has been violated. 2 U. S. C. §437g(a)(4)(A)(i). While it is not difficult to imagine situations in which the conciliation and investigatory processes will blend into one another, the exhibit filed in support of the Commission's brief makes it clear that the documents at issue were turned over during a wholly distinct investigatory phase of this proceeding. Accordingly, section (a)(4)(B)(i) cannot plausibly be construed as protecting the documents currently covered by this court's order.

This linguistic analysis is buttressed by the policies which underlie (a)(4)(E)(i). The point of that provision seems to have been Congress' desire to facilitate the informal exchange of information and views, so necessary to any conciliation process. *See* H. Rep. No. 96-422, *supra*, at 21. Where, as here, the information in question was obtained before conciliation was even begun, and where, as here, the information was not obtained informally, but only after recourse to the courts, no conciliation related policy is served by a continuation of the protective order. In short, neither of the FECA confidentiality provisions is applicable to the facts of this case.

This leaves IMPAC's Freedom of Information argument. IMPAC cites several portions of the Freedom of Information Act, 5 U. S. C. § 552, which would arguably exempt the documents at issue in this case from FOIA's mandatory disclosure provisions. However, even assuming that these provisions do apply to these documents, they still do not provide a basis for maintaining the protective order. The Supreme Court has expressly held that FOIA exemptions do not create any right of confidentiality on the part of persons whose documents are in the possession of the government. *Chrysler Corp., supra,* at 290-294. This result seems to leave the disclosure question squarely within the discretion of the Commission. Because IMPAC has claimed no special privilege with respect to any of the documents on file, the court is unaware of any reason why it should view the FEC's decision to exercise its discretion in this case as unwarranted.

For all of the above reasons, the motion of the Federal Election Commission must be granted. All protective orders entered in this case are hereby dissolved.

[¶ 9147] MANDAMUS WAS NOT AVAILABLE TO COMPEL COMMISSION ACTION

A writ of mandamus could not be issued to compel the Federal Election Commission to expedite consideration of a complaint. The statute specifically sets forth the conditions under which aggrieved parties may seek court action on a Commission complaint. Furthermore, the Commission was not acting in an arbitrary manner in following its normal manner of considering the complaint, and to compel speedier action would involve disregarding the safeguards stipulated in the law. **Back reference.—Law ¶ 129.**

Durkin for U. S. Senate Committee v. Federal Election Commission, David Melville, Robert Monier, Curt Clinkscales, and Defeat Durkin Committee, United States District Court for the District of New Hampshire, No. C80-503D, October 30, 1980.

[Memorandum Opinion in Full Text]

PETTINE, Chief J.: This action was filed on Monday, October 27, in the District of New Hampshire. When both judges there recused themselves, it was transferred to the District of Rhode Island on October 28. By order of the Hon. Frank Coffin, Chief Judge of the First Circuit, I am sitting by designation as a judge on the District Court for the District of New Hampshire.

The peculiar facts of this case have required that it be given expedited treatment. After speaking by telephone with counsel for the plaintiff and defendant Federal Election Commission on the afternoon of the 28th, I requested both sides to submit

briefs. Those briefs arrived at approximately noon on the 29th. I have had two telephone conferences with council for the plaintiff and the Commission this morning, October 30, one of which is on record. I have not spoken with counsel for Defeat Durkin Committee or the individual defendants. To my knowledge, they have not been served. Plaintiff and counsel for the Commission have agreed that no additional oral argument is necessary before I render a decision.

Background

Plaintiff organization is coordinating the reelection drive of the Democratic Senator from New Hampshire, John Durkin. It is duly registered with the Federal Election Commission as an "authorized political committee." Defendant Defeat Durkin Committee is an entity advocating the defeat of Sen. Durkin through a fairly intensive media campaign centered around newspaper advertisements highly critical of the Senator's voting record. Defendant Monier is alleged to be an organizer and Director of the Committee, while defendant Clinkscales is allegedly the Committee's media adviser. Defendant Melville is apparently the source of the Committee's funds. According to plaintiff, he has already contributed more than $8,000, and he plans to contribute another $50,000 to $100,000.

Plaintiffs contend that Defeat Durkin Committee and the individual defendants are flagrantly violating the Federal Election Campaign Act (FECA). It alleges that the Committee is a "political committee" which receives and expends more than $1,000 annually, and which has not registered with the Federal Elections Commission or made periodic filings as required by the FECA. It further alleges that Melville has illegally made contributions in excess of the $1,000 ceiling established by FECA.

Plaintiff presented these allegations to the Federal Election Commission in a complaint filed Friday, October 24. It requested expedited consideration by the Commission. On Monday, October 27, Richard Dunfey, plaintiff's campaign manager, called the Commission to see if its request would be honored. According to an affidavit submitted by Mr. Dunfey, the Commission's Associate Counsel for Enforcement told him that it was unlikely that action would be taken on the complaint before the election. Plaintiff then promptly filed suit seeking:

—to enjoin Defeat Durkin Committee from spending further monies without registering;

—to enjoin the Committee from expending any monies that had been illegally contributed;

—a declaration that the Committee had violated federal registration and filing laws;

—a declaration that Melville had violated federal contribution limits;

—a writ of mandamus ordering the Federal Elections Commission to give the complaint expedited consideration.

After the case was transferred to me, plaintiff amended its complaint to elaborate its claims against the Commission. In this first amended complaint, plaintiff requested that this Court direct the Commission to (1) conduct an immediate investigation; (2) render a final decision by 5:00 p. m. October 30 (today); (3) enjoin the Defeat Durkin Committee from further illegal activity; and (4) order the media to cease disseminating Defeat Durkin Committee ads. Plaintiff further amended its complaint today, striking its request that the Commission be ordered to reach a final decision on the merits by this evening.

Because the election is five days away, this Court has felt compelled to decide the complex questions raised by plaintiff's complaint in an extremely short period of time. Of necessity, an opinion prepared in less than a day cannot give these issues the plenary consideration they merit. Nevertheless, counsel have urged the Court that a decision is needed today and it is obvious that an opinion rendered after sufficient deliberation would come too late.

Claims Against Defeat Durkin Committee and the Individual Defendants

It is well-established that a private individual cannot bypass the carefully delineated administrative procedures of the Federal Election Campaign Act (FECA) and obtain direct judicial consideration of alleged violations of the Act. See *Walther v. Barnett*, 474 F. Supp. 1051 (D. D. C. 1979); *Walther v. Baucus* [¶ 9077], 467 F. Supp. 93 (D. Mont. 1979); 2 U. S. C. §§ 437c(b)(1), 437d(e). In other words, there is no private right of action under the FECA, and thus this Court has no subject matter jurisdiction over claims that Defeat Durkin Committee and its organizers and contributors have violated the registration, filing, and contribution requirements of the statute.

Claims Against the Federal Elections Commission

According to the plaintiff's amended complaint:

> The federal question is whether the Federal Election Commission erred in refusing to expedite an investigation prior to the November 4th Senate election in New Hampshire in light of the alleged flagrant violations of federal election law.

Plaintiff asks this Court to issue a writ of mandamus ordering the Commission to conduct an "immediate investigation."

The FECA clearly does not give this Court the power to take such action. 2 U. S. C. §§ 437g(a)(8)(A) to (C) confer jurisdiction on the U. S. District Court for the District of Columbia to review, at the instance of an aggrieved party, the Commission's dismissal of a complaint or its failure to act on a complaint *within 120 days*. A private party's resort to suit in other federal courts is limited to the case where the D. C. District Court has issued an order to the Commission which the latter fails to obey within 30 days. See 2 U. S. C. § 437g (a)(8)(C). See also §§ 437c(b)(1), 437d(e). Obviously, the instant suit does not satisfy the statutory preconditions.

Plaintiff contends, however, that there are other sources for this Court's power to compel the Commission to act. It points to the judicial review sections of the Administrative Procedures Act, 5 U. S. C. §§ 701 *et seq.*, and in particular to § 706 which empowers a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed." At the outset, I have reservations about the applicability of the APA to this case. Section 701(a)(2) excludes from the purview of the Act "agency action . . . committed to agency discretion by law." As discussed at greater length below, it appears that the decision whether to expedite consideration of an FECA complaint is committed to the Commission's discretion; if so, it is unreviewable, at least under the APA.

The Court recognizes that the exception for action "committed to agency discretion by law" is narrowly construed, for it insulates agency activity from the restraining influences of judicial oversight. See *Citizens to Preserve Overton Park v. Volpe*, 401 U. S. 402 (1971). Fortunately, it is not necessary for me definitively to resolve the question whether the instant case falls within that narrow exception, because plaintiff's APA argument fails on another ground. The gist of its argument is that the detailed scheme of agency action and judicial review set out in the FECA does not preclude judicial scrutiny of the Commission's activities under the aegis of other statutory review provisions. In rejecting a similar argument in the context of § 717 of the Civil Rights Act of 1964, the Supreme Court reasoned:

> The balance, completeness, and structural integrity of § 717 are inconsistent with the petitioner's contention that the judicial remedy afforded by § 717(c) was designed merely to supplement other putative judicial relief. His view fails, in our estimation, to accord due weight to the fact that unlike these other supposed remedies, § 717 does not contemplate merely judicial relief. Rather, it provides for a careful blend of administrative and judicial enforcement powers. Under the petitioner's theory, by perverse operation of a type of Gresham's law, § 717, with its rigorous administrative exhaustion requirements and time limitations, would be driven out of currency were immediate access to the courts under other, less demanding statutes permissible. The crucial administrative role that each agency together with the Civil Service Commission was given by Congress in the eradication of employment discrimination would be eliminated "by the simple expedient of putting a different label on [the] pleadings." *Preiser v. Rodriguez*, 411 U. S. 475, 489-490 (1973). It would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading.

Brown v. General Services Administration, 425 U. S. 820, 832-33 (1976) (footnote omitted).

It appears to this Court that the reasoning of *Brown* applies equally to this case. The FECA is Congress' carefully crafted response to a delicate, highly political issue. Perhaps in recognition that the laudatory aims of the statute could be perverted by unscrupulous campaigners into a means of harassing and discrediting their opponents, Congress surrounded the complaint investigation process with strict procedural safeguards. The Commission's great power must be exercised within detailed time frame; the rights to notice of allegations and opportunity for response are jealously guarded; stringent confidentiality standards must be met; certain minimum efforts to reach voluntary compliance must be made before violators are coerced into obedience. Only after the Commission has dismissed a complaint, or failed to implement the investigative process within 120 days does the Act contemplate judicial intervention.

Obviously, Congress has not chosen the quickest way to expose and remedy violations of the FECA. Permitting private parties directly to seek preliminary injunctive relief in the courts, or allowing the court to spur Commission action before 120 days has elapsed might well have produced faster compliance with the Act. However, considering the volatile area involved here, Congress may well have believed that the statute's "careful blend of administrative and judicial enforcement powers" constituted "all deliberate speed." This Court does not believe Congress intended that private parties could employ the general review provisions of the APA to precipitate judicial intervention in the FECA enforcement scheme.

This reasoning applies as well to plaintiff's contention that 28 U. S. C. § 1361 empowers the Court to act in this case. Section 1321 states that district courts "have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." In *Carter-Mondale Re-election Committee, Inc. and Democratic National Committee v. Federal Election Commission, et al.* [¶ 9132], Nos. 80-1841 and 80-1842 (D. C. Cir. Sept. 12, 1980), the District of Columbia Circuit rejected the suggestion that this section could be used to shortcut the FECA review process and to justify judicial attempts to expedite the Commission's investigative activity prior to passage of 120 days. This Court concurs in that conclusion.[1]

Even were it not for the preemptive effect of the FECA's comprehensive review scheme, there are several serious questions regarding the availability of mandamus in the present circumstances. In addition to the issues discussed in more detail below, there is disagreement as to whether § 1361 is in fact an independent source of jurisdiction. Compare *Elliot v. Weinberger*, 564 F. 2d 1219 (9th Cir. 1977) with *RoAne v Mathews*, 538 F. 2d 852 (9th Cir. 1976). See *Caswell v. Califano*, 583 F. 2d 9 (1st Cir. 1978); *Cervoni v. Secretary of HEW*, 581 F. 2d 1010 (1st Cir. 1978). Moreover, the issuance of mandamus requires, *inter alia*, "a clear right in the plaintiff to the relief sought." *Cervoni v. Secretary of HEW*, 581 F. 2d at 1019. In the Court's view, it is not at all clearcut that the duties the FECA imposes on the Commission necessarily create correlative rights in the class of complainants. If the plaintiff was aware of the existence of these issues, it has not given the Court the benefit of its thinking on them. In view of the time constraints under which this opinion was rendered and the dearth of argument on these difficult, yet crucial, questions of law, the following does not purport to be a comprehensive, scholarly discussion. Rather, it can only outline some of the most serious reservations I have about the appropriateness of resort to the extraordinary remedy of mandamus here.

In order for mandamus properly to issue, there must be "a plainly defined and peremptory duty on the part of the defendant to do the act in question." *Cervoni v. Secretary of HEW*, 581 at 1019. There is a split of authority as to the meaning of this requirement. Several cases take the position that mandamus will not lie if the official act involves any exercise of discretion. E. g., *Kennecott Copper Corp. v. Costle*, 572 F. 2d 1349 (9th Cir. 1978); *Short v. Murphy*, 512 F. 2d 374 (6th Cir. 1975); *Martinez v. Bell*, 468 F. Supp. 719 (C. D. N. Y. 1978); *Craig v. Colburn*, 414 F. Supp. 185 (D. Kan. 1976), *aff'd* 570 F. 2d 916 (10th Cir. 1978). Others take the more liberal view that mandamus is sometimes appropriate outside the area of purely ministerial functions; these courts allow the writ's use to correct official conduct that has gone "far beyond any rational exercise of discretion." *Marinoff v. HEW*, 456 F. Supp. 1120, 1121 (S. D. N. Y 1978), *aff'd* 595 F. 2d 1208 (2d Cir.), *cert. denied*, 442 U. S. 913. E. g. *EEOC v. Carter Carburetor*, 577 F. 2d 43 (2d Cir. 1978), *cert. denied*, 439 U. S. 829; *NAACP v. Levi*, 418 F. Supp. 1109 (D. D. C. 1976); *Abbruzzese v. Berzak*, 412 F. Supp. 201 (D. N. J. 1976) *aff'd* 601 F. 2d 107 (3d Cir. 1979). The First Circuit has emphasized that mandamus is available "only under exceptional circumstances of clear illegality." *Cervoni*

[1] In support of its contrary position, plaintiff points to cases that have permitted use of mandamus to compel agency officials to expedite consideration of Social Security claims. *E. g., White v. Matthews*, 559 F. 2d 852 (2d Cir. 1977). See *Caswell v. Califano*, 583 F. 2d 9 (1st Cir. 1978). It is true that the Social Security Act provides that a claimant may obtain judicial review only after a final agency decision, see 42 U. S. C. § 405(g), and that this is to be the exclusive review procedure, see 42 U. S. C. § 405(h). The statute is silent, however, on the question whether a court may intervene not to *preempt* the agency's decision on the merits but to force the agency to *reach such a decision* in the first place. The Social Security Act's silence on this distinct question is in marked contrast to the FECA's express provision for judicial intervention after 120 days of agency inaction. The Court believes this critical statutory difference renders the Social Security cases inapposite to the issue here.

v. Secretary of HEW, 581 F. 2d at 1019. An official's decision is not to be disturbed unless "it is clearly wrong and his official action is arbitrary and capricious." *Id.*

This Court does not see how it could be contended that the decision whether or not to expedite investigation of a particular FECA complaint is a purely ministerial function. Plaintiff has not pointed to any section of the Act that creates a "plainly defined and peremptory duty" on the part of the Commission to give special, more rapid consideration to its complaint. Even under the more liberal view of the reach of mandamus, this does not appear to be an appropriate case for its invocation. The Court cannot say that the Commission's action "extends beyond any rational exercise of discretion." *NAACP v. Levi*, 418 F. Supp. at 1109. Plaintiff claims that the Commission's decision in the *Nashua Telegraph* cases, MURS 1167, 1168, 1170, "fully supports expedited consideration of plaintiff's complaint." The issue, however, is not whether plaintiff's complaint merits expedited consideration, but whether the Commission's refusal to speed up its investigative process in this case is arbitrary, capricious, and clearly wrong. Obviously, many people who file FECA complaints 10 days before Election Day will consider their cases as urgent; in light of the short period remaining in which to capture the voters' loyalty, most of them are probably correct in their assessment that time is of the essence. Nevertheless, the Commission clearly cannot give all of these cases special treatment. It would be both an impossible burden and an intolerable interference for the courts to secondguess the Commission's decision as to the priority each case deserves.[3]

Finally, even if this Court were convinced that mandamus is available and appropriate here, it is not clear just what "duty" the Commission could be ordered to perform. Plaintiff would have me force the Commission to begin investigation of its complaint immediately. The FECA explicitly requires, however, that the party accused of a violation be given 15 days to "demonstrate, in writing, to the Commission, . . . that no action should be taken against such person on the basis of the complaint." 2 U. S. C. § 437g(a)(1). Thus, to give plaintiff the relief it seeks, this Court would have to order the Commission to bypass statutory directives governing the course of the investigative process. Rather than commending the Commission to *perform* its statutory duty, I would in effect be ordering it to *ignore* that duty. Plaintiff has laid considerable emphasis on the *Nashua Telegraph* cases, and there has been vigorous argument as to their factual background and their meaning. My assessment of their import has been much hindered by plaintiff's failure to provide me with copies. However, one thing seems fairly clear. Although the Commission *directed* the respondents in those cases to file an early answer, the respondents *voluntarily* complied. In other words, there was no test of the Commission's power to cut down the length of the statutory response period. Considering the explicitness of the statutory provisions, I think the existence of such a power is, at best, problematic. Obviously, a mere assertion by the Commission that it possesses the ability to shortcut the statute in emergencies would not mean that its attempts to do so are lawful; this Court could not order the Commission to violate the statute regardless of the Commission's past practices. Here, the Commission has notified the Defeat Durkin Committee and the individual defendants of the complaint. There is no allegation that any of these parties have voluntarily waived their statutory right to a 15-day response period. By the terms of the statute, the Commission cannot act until they have responded or until 15 days have passed.

The Court recognizes plaintiff's frustration in this case, for it appears that the FECA's procedural scheme does not permit rapid resolution of violations occurring in the critical period right before an election. However, this deficiency is properly the subject of an appeal to the legislature for amendment of the statute. This is not a case where the Court is being asked to effectuate the purposes and intent of a statutory scheme by resolving a problem unforeseen, and unprovided for, by the statute's creators. The fact that Congress included a special rule shortening the required conciliation period for complaints filed

[3] In oral argument, counsel for the Commission stated that the Commission's reluctance to give special, expedited treatment to plaintiff's complaint rests, at least in part, on its belief that the existence of a violation is not clear cut, but rather depends on the complex determination whether Defeat Durkin Committee is a "political committee"—a question purportedly requiring extensive factual investigation. If that is so, then the Commission may well believe that its time in these last few days before the election is better spent on cases where the wrong doing is indisputable. In any event, this Court cannot say that such a policy would be arbitrary and completely without rational basis.

within 45 days of the election, *see* 2 U. S. C. § 437a(4)(A)(ii), indicates its awareness that some provision for more rapid resolution of election-eve complaints was necessary. Whether this one special provision, when coupled with the post-election availability of stiff fines and possible criminal sanctions for pre-election violations, is sufficient to curb election-eve wrongdoing is a matter for legislative rather than judicial determination.

Moreover, it must be pointed out that the plaintiff is itself partially to blame for its inability to obtain relief now against the individual defendants and Defeat Durkin Committee. In its brief, it admits that the allegedly illegal activity has been going on since August. No explanation is offered for why plaintiff has waited for two months to attempt to instigate Commission investigation. In such circumstances, the equities of its position are less than compelling.

Therefore, this Court, being of the opinion that it has no jurisdiction over this claim, denies plaintiff's request for a temporary restraining order and orders this action dismissed.

[¶ 9148] PROHIBITION ON CONTRIBUTIONS BY NATIONAL BANKS IS CONSTITUTIONAL

The Federal Corrupt Practices Act, which prohibits contributions by national banks, does not violate the First or Fifth Amendments and is constitutional. The law regulates secret contributions; these cannot be a form of speech since they are secret. As to equal protection, a prohibition against unsound banking practices seems rational and so is not discriminatory. **Back reference.—Law ¶ 141.**

Federal Election Commission v. T. Bertram Lance, United States Court of Appeals, Fifth Circuit, No. 78-1859, January 15, 1981.

[Opinion in Full Text]

TJOFLAT, Circuit J.: The Federal Election Commission (FEC or Commission) brought this action to enforce an administrative subpoena requiring T. Bertram Lance to appear for a deposition and to produce certain documents. The subpoena is incident to an enforcement investigation of possibly illegal loans, some in the form of overdrafts, made by two national banks to the Bert Lance for Governor Campaign of 1974. The Commission began the investigation after determining, pursuant to 2 U. S. C. § 437g(a)(2) (1976), that there was "reason to believe" the banks and the Bert Lance Campaign Committee had violated the Federal Corrupt Practices Act, 2 U. S. C. § 441b (1976) (FCPA or Act).[1] Upon Lance's failure to

[1] The sections of 441b pertinent to this case provide:

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a *contribution or expenditure* in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b) . . .

(2) For purposes of this section and section 791(h) of title 15, the term *"contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business)* to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include (A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject; (B) on partisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and (C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

(Emphasis added.)

From 1925 until 1976, the proscriptions now set out in section 441(b) were codified as section 610 of the Federal Corrupt Practices Act of