

**BEFORE THE FEDERAL ELECTION COMMISSION**

In the Matter of )  
 )  
Patrick J. Buchanan and )  
Buchanan for President, Inc. )  
 )

**RESPONSE TO  
NOTICE OF REPAYMENT DETERMINATION**

Buchanan for President, Inc. ("the Committee") has received from the Audit Division of the Federal Election Commission a second Notice of Repayment Determination and pursuant to 11 C.F.R. § 9038.2(c)(2), it submits this letter in response.<sup>1</sup>

The Committee also requests an oral hearing on this matter as permitted by 11 C.F.R. § 9038.2(c)(2)(ii).

The Audit Division recommends that the Committee repay \$62,116 of the matching funds paid to the Committee. The Audit Division alleges that these matching funds were paid in connection with contributions that were "improperly reattributed" to a party other than the original contributor.<sup>2</sup> The Committee does not dispute that it must repay matching funds

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<sup>1</sup> The Committee's response was originally due on September 27, 1999. The Committee requested and received an extension until October 12, 1999.

<sup>2</sup> The remaining \$1,634 repayment is sought for matching funds paid in connection with contributions that were subsequently refunded to two specific contributors. The Committee does not understand the basis of this calculation or the rationale for requiring the repayment of only a portion of the matching funds apparently received in connection with these contributions. The Audit Division's calculation appears to be based on its recognition that it has previously reduced the amounts of matching funds received by the Committee for "projected errors" based on a statistical analysis of the Committee's submissions. The Committee could understand if the Audit Division determined that no repayment was required because the present "errors" fell within the number of submission "errors" projected for the original submission. It sees no rationale for reducing the amount of the repayment by a figure that represents the projected error rate that was applied to the initial submissions.

received if the Audit Division can show that particular discrete and identifiable contributions were improperly reattributed.

The Audit Division has not, however, made any such demonstration. Rather, it has relied upon an investigation of only a small sample (324) of the universe of reattributed contributions (7,220), which amounts to approximately 4%. Its "investigation" of this sample led it to conclude that 31 of the sample items (9.57%) should not have been matched.<sup>3</sup> It then "calculated" a repayment amount of \$62,116 for non-matchable contributions based on the projected error rate applied to the total population. (The Committee has not been able to locate in the limited material supplied to it an explanation of the calculation of the repayment amount.)

The Audit Division's decision to use a "sampling" technique to justify onerous repayment determinations fails to meet the requirements of due process. The courts have made clear that sampling comports with due process only in a small number of cases in which it is the only feasible method of audit and where a full audit would be a practical impossibility.<sup>4</sup> This is a stringent test, and nowhere in the Notice of Repayment Determination does the Audit Division attempt to demonstrate that it meets it.

The cases cited by the Audit Division have upheld the use of statistical sampling in situations in which the universe of claims to be audited were far in excess of the universe presented here. In Georgia v. Califano, for example, the audited population consisted of "many

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<sup>3</sup> The Audit Division concedes that 10 of the 31 contributions on which its error rate is based may have been reattributed to persons who did indeed provide funds to the contributor, thus making them the owners -- in law and equity -- of the amounts attributed to them. Nevertheless, in an extraordinary example of administrative arrogance, the Audit Division has included these items as errors because it had not done sufficient investigation to determine if the persons who gave the money to the contributors had a donative intent, although the Audit Division had no apparent reason to conclude that they lacked such an intent

<sup>4</sup> See Georgia v. Califano, 446 F. Supp. 404, 409 (N.D. Ga. 1977).

thousands of claims submitted each month by each state.<sup>5</sup> (emphasis added). Similarly, in Michigan Dep't of Educ. v. U.S. Dep't of Educ.,<sup>6</sup> the U.S. Department of Education was faced with examining a universe of 66,368 claims, an order of magnitude approximately 10 times the 7,220<sup>7</sup> contributions involved here.

Indeed, in the more analogous context of taxation cases, courts have repeatedly disapproved the use of statistical sampling, rejecting arguments that complete audits of business records spanning several years were burdensome, impractical or inconvenient. In Chartair, Inc. v. State Tax Comm'n, the court appeared to disapprove sampling as a matter of fairness, stating that an "honest, conscientious taxpayer who maintains comprehensive records as required has a right to expect that those records will be used in any audit to determine his ultimate tax liability."<sup>8</sup> The court declared that sampling would be warranted only where a taxpayer's inadequate recordkeeping made it impossible to conduct a complete audit.<sup>9</sup> Similarly, in Mohawk Airlines v. Tully, the court explained that "where, as here, records are readily available from which the exact amount of tax due can be determined, the estimate procedures adopted by

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<sup>5</sup> Id. at 409-10.

<sup>6</sup> Michigan Dep't of Educ. v. U.S. Dep't of Educ., 875 F.2d 1196, 1999 (6<sup>th</sup> Cir. 1989).

<sup>7</sup> Repayment Determination at 2. The Commission claims that the audited population consisted of "7220 matched contributions from all contributors who were associated with any reattribution submitted for matching." This is inconsistent with the figure of 7,278 identified as the audited population in an October 22, 1997 memorandum from Robert J. Costa to Lawrence M. Noble. Memorandum from Robert J. Costa to Lawrence M. Noble (Oct. 22, 1997) at 2. As a result of this inconsistency, the Committee cannot be sure of exactly how the universe of audited contributions was defined and why it changed between 1997 and 1999.

<sup>8</sup> 411 N.Y.S. 2d 41, 43 (N.Y. App. Div 1978).

<sup>9</sup> Id. at 43.

the State Tax Commission become arbitrary and capricious and lack a rational basis."<sup>10</sup> The outcome was the same in Names in the News v. New York State Tax Commissioner.<sup>11</sup> The sampling method employed in Chartair, Mohawk, and Names in the News, calculating the amount of tax due in a "test period" and extrapolating the test period amount to arrive at an amount due over a period of years, is an exact analogue to the method used by the FEC. As the court noted in Allen v. Comm'r of Social Services, for example, acknowledging the holdings in the tax cases, "[we] perceive[d] no reason to depart from such logic in the [Medicaid] case ... The mere fact that [the] records are voluminous and that a review thereof would be time-consuming for the Department does not, in our view, justify the use of the sampling method."<sup>12</sup> Consequently, the Committee does not agree that sampling, as opposed to a more complete review, was warranted in its case.

Moreover, in the cases upholding statistical sampling, the courts have made clear that sampling comports with due process only if the methods used are "valid and reliable,"<sup>13</sup> and the subject of the audit has had a full opportunity to review the methods used and the records and information on which the determination has been based. Unfortunately, the Committee has received so little information about the method employed by the FEC that the Committee cannot definitively address either the validity or reliability of the method.<sup>14</sup> Yet, even the Committee's

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<sup>10</sup> 429 N.Y.S.2d 759, 760 (N.Y.App. Div. 1980).

<sup>11</sup> 429 N.Y.S. 2d 755 (N.Y.App. Div. 1980).

<sup>12</sup> 500 N.Y.S. 2d 204, 206 (N.Y.App. Div. 1986).

<sup>13</sup> Webb v. Shalala, 49 F. Supp. 2a 1114, 1124 (N.D. Ark. 1999) (citing Ratanasen v. California, 11 F.3d 1467, 1472 (9<sup>th</sup> Cir. 1993) and Michigan Dep't of Educ., 875 F.2d at 1206).

<sup>14</sup> Courts have stated that "the use of statistical sampling and extrapolation" is not fair or proper where the aggrieved party is not given an "opportunity to rebut" the "determination of  
(Continued...)

preliminary review of Repayment Determination documents raises questions regarding the validity and reliability of the sampling method.<sup>15</sup>

As an initial matter, the Repayment Determination referred to the method as the "dollar unit sampling" method.<sup>16</sup> The Committee has received no documentation, such as a handbook or manual, explaining precisely the "dollar unit sampling" method.<sup>17</sup> Consequently,

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overpayment." Webb, 49 F. Supp. 2a at 1123 (quoting Illinois Physicians Union v. Miller, 675 F.2d 151, 156 (7<sup>th</sup> Cir. 1982)). The Committee has been effectively deprived of such an opportunity. The Committee made repeated requests for information and materials related to the Audit Staff's use of statistical sampling in the Repayment Determination. These requests were refused.

Then, on Friday, October 8, 1999, counsel for the Committee unexpectedly received a telephone call from the Commission indicating that some documents would be provided; the documents arrived in our office at nearly 4 p.m. The documents were provided by the FEC to counsel late in the afternoon on the eve of the Columbus Day holiday weekend, one business day before the Committee's response to the Repayment Determination was due. The Committee has not been afforded a sufficient opportunity to closely review these documents, and moreover, has been deprived of a reasonable opportunity to review the documents with an expert in statistical sampling. Consequently, the Committee's ability to effectively respond remains severely limited. For this reason, the Committee requests the opportunity to supplement its response to the Repayment Determination if necessary, after it has conducted a more thorough review of the documents.

<sup>15</sup> The methodology employed by the FEC to examine reattributed contributions consisted of a statistical sampling and contributor investigation/survey process that was used to arrive at an "error rate" of 9.57% ( $\pm$  3.69%) for reattributed contributions. The Commission then extrapolated the "error rate" to project a \$62,116 "dollar value of the errors" for the entire population of contributions.

<sup>16</sup> See Repayment Determination at 7; see also October 22, 1997 Memorandum from Robert Costa to Lawrence Noble at 2 (explaining that "DUS" was used to select the 325 sample items). No other materials provided to the Committee make mention of "DUS."

<sup>17</sup> Indeed, the FEC's production consisted of two memoranda and 28 survey responses "related to the sample items which were considered [by the FEC] to be improperly reattributed." See Letter from Joel J. Roessner, Attorney, FEC to John J. Duffy, Counsel for Buchanan for President, Inc. (dated Oct. 8, 1999) at 1 (Exhibit A). The FEC continues to refuse to produce any additional materials related to its communications with contributors on the basis that such communications are "protected from disclosure." Id. The FEC cites no authority for its asserted protection from disclosure, making it difficult for the Committee to contest the assertion.

(Continued...)

the Committee lacks sufficient information to thoroughly evaluate whether such a method is valid and reliable.

Moreover, the sampling error calculated by the FEC casts doubt on the reliability of its method. The "error rate" for reattributed contributions was determined to be 9.57%, with a sampling error of  $\pm 3.69\%$ . This sampling error amounts to nearly 33% of the error rate. Thus, even accepting the Audit Division's approach, it is impossible to accept, consistent with the requirements of due process, the application of the 9.57% error rate to "total population" to determine the amount of repayment due. At best, the Audit Division can use no more than a 5.88% error figure (9.57% - 3.69%), since this is the largest figure that the Audit Division's methods can truly establish.

In addition, the Audit Division has defined "errors" as reattributions by a contributor to a person who "did not have the right to withdraw funds from the contributor's bank accounts," and refused to consider the responses of contributors indicating that the retributee gave the contributor the money to make the donation.<sup>18</sup> This definition flatly contradicts regulations providing that contributions are matchable if reattributed to persons who owned the contributed funds who had the requisite donative intent, and highlights the unfairness of the Commission's determination.<sup>19</sup>

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Nonetheless, the Committee does not concede that such material is "protected from disclosure," and renews its request for any documents including memoranda, oral contacts, questionnaires, etc., that form the basis of the Audit staff's factual conclusions in the Repayment Determination. As explained above, the lack of such information severely limits the Committee's ability to meaningfully rebut the Repayment Determination.

<sup>18</sup> See Memorandum from Robert J. Costa, Assistant Staff Director, Audit Division, FEC, to Lawrence M. Noble, General Counsel, FEC (July 12, 1999) at 1.

<sup>19</sup> See Repayment Determination at 7 (citations omitted).

The FEC simply concluded that lack of equitable ownership of a bank account precluded a proper reattribution, failing to consider the possibility of equitable ownership of the funds within the bank account. The Committee's review of survey responses reveals that 10 of the 28 "improper" reattributors, more than one-third, reported receiving money from reattributees, apparently contemporaneously with the reattribution decision, to justify the reattribution.<sup>20</sup>

Stated differently, at least one-third of "improper" attributees were apparently the equitable owners of the reattributed contribution. The Audit Staff states that there is "insufficient evidence to verify" whether the reattributees in fact gave money to the contributors,<sup>21</sup> other, of course, than the statements of the respondents, which the Audit Division is for this limited purpose prepared to ignore or deem unreliable. All of their other statements, i.e., those that support the Audit Division's position, receive full credit. While the statements of the contributors may be the only evidence that reattributees gave money to the contributors to justify reattributions, there is, on the other hand, no evidence that they did not. In evidence as in life, something always prevails over nothing.

The "survey" process used by the FEC to "verify" errors raises numerous questions as to validity, reliability, due process and fairness as well. The Committee has been given only the survey response forms for the contributors whose reattributions were deemed "improper." The FEC refuses to provide any further information regarding the additional

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<sup>20</sup> The survey of contributors specifically asked if the contributor had received any money from the reattributee to make the contribution or reattribution in question. If equitable ownership of the contribution money is irrelevant, however, the Committee is very curious about why the FEC asked this question of contributors in the first place.

<sup>21</sup> Repayment Determination at 9.

interviews conducted with these contributors.<sup>22</sup> As a result, the Committee is effectively precluded from challenging the determination of error for these contributors.

The survey response of Anna Newton provides an example of why additional information should be made available to the Committee. Ms. Newton responded that she did not understand the meaning of "retribution" in the survey.<sup>23</sup> With no information aside from this, the Committee can only assume that Ms. Newton's lack of understanding persisted, rendering her unable to provide informed responses to the FEC. It is clearly unfair to base an "error" determination on an uninformed response, yet the FEC did so. Without additional information, the Committee cannot develop a complete understanding of whether the contributors comprehended the meaning of "retribution," and whether a contributor's lack of knowledge prompted survey responses that lead to an "error" determination by the FEC, where in actuality, the retribution was proper.

Other survey responses reveal that the Commission's error determinations are questionable or simply wrong. For example, Catherine Radecki indicates that her reattributed contributions were drawn on an escrow or trust account.<sup>24</sup> Yet, based on no other information that the Committee is aware of, her attributions were deemed improper. This determination is incorrect if Radecki's account is held in trust for any of the retributees, but we have no information about this possibility. For one of James A. Pettit, Jr.'s reattributions, he failed to indicate whether the retributee had access to his bank account.<sup>25</sup> This retribution was

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<sup>22</sup> See October 8, 1999 Letter from Joel Roessner to John Duffy at 1.

<sup>23</sup> Survey Response of Anna Newton, LRA #466 at 2 (Exhibit B).

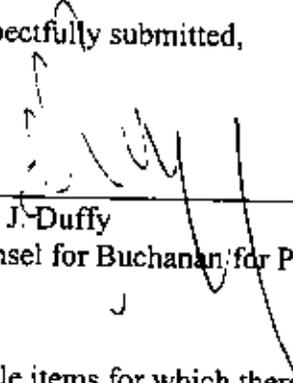
<sup>24</sup> Survey Response of Catherine Radecki, LRA #466 at 1 (Exhibit C).

<sup>25</sup> Survey Response of James A. Pettit, Jr., LRA #466 at 2 (Exhibit D).

summarily deemed improper, when it should not have been counted since it was unresponsive.<sup>26</sup> John W. Kremer responded that he did not make the reattributions in question, yet his reattributions were counted as errors.<sup>27</sup> Sheila M. Thomsen's reattribution to her husband, drawn on their joint account, was counted as an error.<sup>28</sup> But by the FEC's definition, a reattribution to a person holding a joint account with a contributor is proper. The many erroneous determinations revealed by the survey responses indicate that this entire Repayment Determination is rife with mistakes and cannot stand.

The FEC's refusal to provide the Committee with more complete information regarding its sampling method and the "survey" process prevents the Committee from effectively challenging the Repayment Determination. Moreover, a determination that employs methods of questionable validity and reliability, is characterized by the untimely production of relevant information, the outright refusal to produce such material, and is rife with errors, violates the most fundamental principles of due process and fairness and cannot be affirmed by the Commission.

Respectfully submitted,

  
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John J. Duffy  
Counsel for Buchanan, for President, Inc.

<sup>26</sup> See Repayment Determination at 3, n.5 ("Sample items for which there was no response, or for which there was an incomplete response to the survey were not treated as errors.") (emphasis added).

<sup>27</sup> Survey Response of John W. Kremer, LRA #466 at 2 (Exhibit E).

<sup>28</sup> Survey Response of Sheila M. Thomsen, LRA #466 (Exhibit F).

**EXHIBIT A**



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

October 8, 1999

**HAND DELIVERY**

John J. Duffy, Esquire  
Steptoe & Johnson LLP  
1330 Connecticut Avenue, NW  
Washington, D.C. 20036

Re: Buchanan for President, Inc. - Repayment Determination (LRA #512)

Dear Mr. Duffy:

This is in response to your letter dated August 24, 1999, received by facsimile transmission on August 25, 1999. You requested documents related to the Commission's July 15, 1999 determination that your clients, Patrick J. Buchanan and Buchanan for President, Inc. (collectively, "the Committee") must repay \$63,750 to the United States Treasury. See 26 U.S.C. § 9038(b)(1); 11 C.F.R. § 9038.2(b)(1)(iii). Specifically, you requested: 1) a memorandum dated October 22, 1998 from "Lawrence Noble to Robert Costa referenced in footnote 2" of Attachment E to the Notice of Repayment Determination; 2) a memorandum dated April 1, 1999 from the Office of General Counsel to Robert J. Costa and 3) "any documents including memoranda, oral contacts, questionnaires, etc. that form the basis of the Audit Staff's factual conclusions that certain of the 48 sample items appear to be 'improperly reattributed.'" In response to your request, this Office is forwarding the following documents:

Footnote 2 of Attachment E to the Notice of Repayment Determination refers to a memorandum dated October 22, 1997 (not 1998) from Robert J. Costa to Lawrence M. Noble, rather than from Mr. Noble to Mr. Costa. Since this appears to be the document you are requesting, a copy of it is enclosed. Also enclosed is a memorandum from Kim-Bright Coleman to Robert J. Costa dated April 1, 1999. This Office has also enclosed copies of the surveys completed by contributors related to the sample items which were considered to be improperly reattributed.

This Office is not providing to you copies of reports prepared by our investigators, which are protected from disclosure. Likewise, communications between the Audit staff and this Office, to the extent that such communications might be within scope of your inquiry, are not provided as they are also confidential and protected from disclosure. Copies of the contribution checks or reattribution statements, which should be in the Committee's records, are not included.

If you have any questions, please feel free to contact the attorney assigned to this matter, Delanie DeWitt Painter, at (202) 694-1650.

Sincerely,



Joel J. Roessner  
Attorney

**EXHIBIT B**

QUESTIONNAIRE

Anna L. Newton - LRA #466

Documents reviewed by the Federal Election Commission indicate that you made the following contributions to Buchanan for President, Inc. (the "Committee") during the 1996 presidential primary election campaign, and that all or a portion of these contributions were reattributed to the individuals listed below.

Date	Amount
03/07/95	\$296
05/24/95	\$50
06/21/95	\$150
06/21/95	\$100
07/14/95	\$100
09/05/95	\$296
11/24/95	\$300
05/28/96	\$100

Please answer the questions by checking the appropriate box:

1. I made the contributions listed above.

YES	NO
	X

If your answer is no, please list your contributions below by date and amount.

Half of these were made by James Newton + half by Anne Newton

2. The contributions were made by checks drawn on an escrow or trust account.

YES	NO
	X

3. <sup>meaning?</sup> reattributed the following amounts of my contributions to the following individuals on the following dates:

Name	Amount	Date	Yes	No
James Newton	\$300	12/29/95	N/A	N/A
Andrew Newton	\$100	07/03/96	N/A	N/A

If any of the above information is incorrect, please note corrections.

List any other individual to whom you reattributed any portion of any contribution and the amount and date of the reattribution.

Name \_\_\_\_\_  
 Address \_\_\_\_\_  
 Reattribution Date \_\_\_\_\_  
 Amount Reattributed \_\_\_\_\_

4. Please provide the current mailing address for James Newton.

133 ALAMEDA AVE  
FT. MYERS FL 33905

James Newton had the right to withdraw funds from any of your bank accounts.

YES	NO
X	

Did James Newton give you any money to make the contribution or reattribution?

YES	NO
	X

5. Please provide the current mailing address for Andrew Newton.

2136 SUNRISE BLVD.  
FT. MYERS FL 33907

Andrew Newton had the right to withdraw funds from any of your bank accounts.

YES	NO
	X

3  
Did Andrew Newton give you any money to make the contribution or  
retribution?

*I don't remember*  
*meeting?*

YES	NO

**EXHIBIT C**

# QUESTIONNAIRE

Catherine Radecki - LRA #466

Documents reviewed by the Federal Election Commission indicate that you made the following contributions to Buchanan for President, Inc. (the "Committee") during the 1996 presidential primary election campaign, and that all or a portion of these contributions were reattributed to the individuals listed below.

Date	Amount
07/11/95	\$25
09/14/95	\$38
11/15/95	\$20
01/30/96	\$25
02/19/96	\$1,000
03/12/96	\$25

Please answer the questions by checking the appropriate box:

1. I made the contributions listed above.

YES	NO
✓	

If your answer is no, please list your contributions below by date and amount.

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2. The contributions were made by checks drawn on an escrow or trust account.

*my bank*

YES	NO
✗	

3. I reattributed the following amounts of my contributions to the following individuals on the following date:

Name	Amount	Date	Yes	No
Jean McMahon	\$250	03/25/96		✗
Mary Strain	\$250	03/25/96		✗
Cornelius Strain	\$250	03/25/96		✗

If any of the above information is incorrect, please note corrections.

List any other individual to whom you reattributed any portion of any contribution and the amount and date of the reattribution.

Name \_\_\_\_\_  
 Address \_\_\_\_\_  
 Reattribution Date \_\_\_\_\_  
 Amount Reattributed \_\_\_\_\_

4. Please provide the current mailing address for Jean McMahon.

106 Bay Ave.  
Washington, D.C. 20543

Jean McMahon had the right to withdraw funds from any of your bank accounts.

YES	NO
	X

Did Jean McMahon give you any money to make the contribution or reattribution?

YES	NO
	X

5. Please provide the current mailing address for Mary Strain.

13705 N. Church Rd.  
Rathdrum, Idaho 83858

Mary Strain had the right to withdraw funds from any of your bank accounts.

YES	NO
	X

Did Mary Strain give you any money to make the contribution or reattribution?

YES	NO
	X

6. Please provide the current mailing address for Cornelius Strain.

13705 N. Church Rd.  
Rathdrum, Idaho 83858

Cornelius Strain had the right to withdraw funds from any of your bank accounts.

YES	NO
	X

Did Cornelius Strain give you any money to make the contribution or reattribution?

YES	NO
	X

**EXHIBIT D**

## QUESTIONNAIRE

James A. Pettit, Jr. - LRA #466

Documents reviewed by the Federal Election Commission indicate that you made the following contributions to Buchanan for President, Inc. (the "Committee") during the 1996 presidential primary election campaign, and that all or a portion of these contributions were reattributed to the individuals listed below.

Date	Amount
05/19/95	\$50
08/30/95	\$900
09/20/95	\$100
05/28/96	\$200

Please answer the questions by checking the appropriate box:

1. I made the contributions listed above.

YES	NO
<input checked="" type="checkbox"/>	<input type="checkbox"/>

If your answer is no, please list your contributions below by date and amount.

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2. The contributions were made by checks drawn on an escrow or trust account.

YES	NO
<input type="checkbox"/>	<input checked="" type="checkbox"/>

3. I reattributed the following amounts of my contributions to the following individuals on the following date:

Name	Amount	Date	Yes	No
Julia Pettit	\$200	09/12/95	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Emily Pettit	\$250	09/12/95	<input checked="" type="checkbox"/>	<input type="checkbox"/>
James Doscher	\$250	09/12/95	<input checked="" type="checkbox"/>	<input type="checkbox"/>

If any of the above information is incorrect, please note corrections.

List any other individual to whom you reattributed any portion of any contribution and the amount and date of the reattribution.

Name \_\_\_\_\_  
Address \_\_\_\_\_  
Reattribution Date \_\_\_\_\_  
Amount Reattributed \_\_\_\_\_

4. Please provide the current mailing address for Julia Pettit.

Julia Pettit had the right to withdraw funds from any of your bank accounts.

MISS JULIA ANN PETTIT  
97-30 108 Street  
RICHMOND HILL, N.Y. 11419

YES	NO
	X

Did Julia Pettit give you any money to make the contribution or reattribution?

YES	NO
	X

5. Please provide the current mailing address for Emily Pettit.

MISS EMILY JANE PETTIT  
97-30 108 Street  
RICHMOND HILL, N.Y. 11419

Emily Pettit had the right to withdraw funds from any of your bank accounts.

YES	NO

Did Emily Pettit give you any money to make the contribution or reattribution?

YES	NO
	X

6. Please provide the current mailing address for James Doscher.

MR. JAMES DOSCHER  
9750 108th St.  
RICHMOND HILL, NY 11419

James Doscher had the right to withdraw funds from any of your bank accounts.

YES	NO
	X

Did James Doscher give you any money to make the contribution or reattribution?

YES	NO
	X

**EXHIBIT E**

QUESTIONNAIRE

John W. Kremer - LRA #466

Jul 20 5 10 10 1996

Documents reviewed by the Federal Election Commission indicate that you made the following contributions to Buchanan for President, Inc. (the "Committee") during the 1996 presidential primary election campaign, and that all or a portion of these contributions were reattributed to the individuals listed below.

Date	Amount
03/31/95	\$30
06/30/95	\$25
08/14/95	\$30
09/26/95	\$50
11/17/95	\$75
01/15/96	\$50
02/09/96	\$50
02/17/96	\$112
03/05/96	\$100
03/23/96	\$110
04/25/96	\$115
05/13/96	\$50
07/08/96	\$115
08/06/96	\$100

Please answer the questions by checking the appropriate box:

1. I made the contributions listed above.

YES	NO
X	

If your answer is no, please list your contributions below by date and amount.

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2. The contributions were made by checks drawn on an escrow or trust account.

YES	NO
	X

3. I reattributed the following amounts of my contributions to the following individual on the following dates:

Name	Amount	Date	Yes	No
David Kremer	\$115	09/03/96		X
David Kremer	\$100	09/26/96		X

If any of the above information is incorrect, please note corrections.

List any other individual to whom you reattributed any portion of any contribution and the amount and date of the reattribution.

Name \_\_\_\_\_  
 Address \_\_\_\_\_  
 Reattribution Date \_\_\_\_\_  
 Amount Reattributed \_\_\_\_\_

4. Please provide the current mailing address for David Kremer. ?

\_\_\_\_\_  
 \_\_\_\_\_

David Kremer had the right to withdraw funds from any of your bank accounts.

YES	NO
	X

Did David Kremer give you any money to make the contribution or reattributions?

YES	NO
	X

**EXHIBIT F**

QUESTIONNAIRE

Sheila M. Thomsen - LRA #466

Jul 20 3 12 PM '98

Documents reviewed by the Federal Election Commission indicate that you made the following contributions to Buchanan for President, Inc. (the "Committee") during the 1996 presidential primary election campaign, and that all or a portion of these contributions were reattributed to the individuals listed below.

Date	Amount
01/30/95	\$20
03/17/95	\$250
06/27/95	\$200
08/21/95	\$50
10/23/95	\$50
11/02/95	\$25
11/17/95	\$400
01/22/96	\$100
01/31/96	\$50
02/16/96	\$100
04/11/96	\$1,000
09/13/96	\$75

*ED*

All ✓'s  
with -  
off DJT  
& SMT  
Union Bank  
Account  
# 07126283

Please answer the questions by checking the appropriate box:

1. I made the contributions listed above.

YES	NO
<input checked="" type="checkbox"/>	<input type="checkbox"/>

If your answer is no, please list your contributions below by date and amount.

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2. The contributions were made by checks drawn on an escrow or trust account.

YES	NO
<input type="checkbox"/>	<input checked="" type="checkbox"/>

*Handwritten signature*  
7/13/98

3. I reattributed the following amounts of my contributions to the following individuals on the following dates:

Name	Amount	Date	Yes	No
David J. Thomsen	\$100	03/20/96		
David A. Thomsen	\$1,000	06/06/96		

*TYPE*

If any of the above information is incorrect, please note corrections.

List any other individual to whom you reattributed any portion of any contribution and the amount and date of the reattribution.

Name \_\_\_\_\_  
 Address \_\_\_\_\_  
 Reattribution Date \_\_\_\_\_  
 Amount Reattributed \_\_\_\_\_

4. Please provide the current mailing address for David J. Thomsen.

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

David J. Thomsen had the right to withdraw funds from any of your bank accounts.

YES	NO
<input checked="" type="checkbox"/>	<input type="checkbox"/>

*HUSBAND WIFE*

Did David J. Thomsen give you any money to make the contribution or reattribution?

YES	NO
<input checked="" type="checkbox"/>	<input type="checkbox"/>

5. Please provide the current mailing address for David A. Thomsen.

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

David A. Thomsen had the right to withdraw funds from any of your bank accounts.

YES	NO
<input checked="" type="checkbox"/>	<input type="checkbox"/>

Did David A. Thomsen give you any money to make the contribution or reattribution?

YES	NO
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FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20461

October 8, 1999

**HAND DELIVERY**

John J. Duffy, Esquire  
Steptoe & Johnson LLP  
1330 Connecticut Avenue, NW  
Washington, D.C. 20036

Re: Buchanan for President, Inc. - Repayment Determination (LRA #512)

Dear Mr. Duffy:

This is in response to your letter dated August 24, 1999, received by facsimile transmission on August 25, 1999. You requested documents related to the Commission's July 15, 1999 determination that your clients, Patrick J. Buchanan and Buchanan for President, Inc. (collectively, "the Committee") must repay \$63,750 to the United States Treasury. See 26 U.S.C. § 9038(b)(1); 11 C.F.R. § 9038.2(b)(1)(iii). Specifically, you requested: 1) a memorandum dated October 22, 1998 from "Lawrence Noble to Robert Costa referenced in footnote 2" of Attachment E to the Notice of Repayment Determination; 2) a memorandum dated April 1, 1999 from the Office of General Counsel to Robert J. Costa and 3) "any documents including memoranda, oral contacts, questionnaires, etc. that form the basis of the Audit Staff's factual conclusions that certain of the 48 sample items appear to be 'improperly reattributed.'" In response to your request, this Office is forwarding the following documents:

Footnote 2 of Attachment E to the Notice of Repayment Determination refers to a memorandum dated October 22, 1997 (not 1998) from Robert J. Costa to Lawrence M. Noble, rather than from Mr. Noble to Mr. Costa. Since this appears to be the document you are requesting, a copy of it is enclosed. Also enclosed is a memorandum from Kim-Bright Coleman to Robert J. Costa dated April 1, 1999. This Office has also enclosed copies of the surveys completed by contributors related to the sample items which were considered to be improperly reattributed.

This Office is not providing to you copies of reports prepared by our investigators, which are protected from disclosure. Likewise, communications between the Audit staff and this Office, to the extent that such communications might be within scope of your inquiry, are not provided as they are also confidential and protected from disclosure. Copies of the contribution checks or reattribution statements, which should be in the Committee's records, are not included.

John J. Duffy, Esquire  
Buchanan for President, Inc. - Repayment Determination (LRA #512)  
Page 2

If you have any questions, please feel free to contact the attorney assigned to this matter.  
Delanie DeWitt Painter, at (202) 694-1650.

Sincerely,



Joel J. Roessner  
Attorney

RECEIVED  
FEDERAL ELECTION  
COMMISSION  
SECRETARIAT



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

Jul 8 2 23 PM '99

July 8, 1999

**MEMORANDUM**

**AGENDA ITEM**

For Meeting of: 7-15-99

**TO:** The Commission

**THROUGH:** James A. Pehrkon  
Staff Director

**FROM:** Lawrence M. Noble  
General Counsel

Kim Bright-Coleman  
Associate General Counsel

**SUBJECT:** Alexander for President, Inc., Buchanan for President, Inc.,  
Clinton/Gore '96 Primary Committee, Inc.: Matching Fund Error Rates  
(LRA # 559)

The Commission has received information from the Department of Justice Campaign Finance Task Force concerning potential corporate contributions to Alexander for President, Inc. ("the Alexander Committee") and Clinton/Gore '96 Primary Committee, Inc. ("the Clinton Committee") that had been matched with federal funds. Similarly, during the Commission audit of Buchanan for President, Inc. ("the Buchanan Committee"), the Audit Division discovered certain contributions that possibly should not have been matched with public funds. These three committees potentially owe repayments for the impermissibly matched contributions. 11 C.F.R. § 9038.2(b)(1)(iii); see 11 C.F.R. § 9034.3.<sup>1</sup> Since these matters address the same issue of non-matchability, this Office is presenting them to the Commission at the same time to facilitate consideration of the policy questions raised therein.

<sup>1</sup> Commission repayment determinations must be made prior to the expiration of the three-year notification period. 26 U.S.C. § 9038(c); 11 C.F.R. § 9038.2(a)(2). For the Alexander and Buchanan Committees, the three-year notification period expires on August 14, 1999. The Clinton Committee's three-year notification period expires on August 28, 1999.

The issue arises as to what amount should be repaid for matched contributions later determined to be non-matchable, and specifically, whether the repayment amounts should account for a sampling error rate that was applied to the committees' submissions for public funds. When examining publicly-funded committees' non-threshold matching fund requests, the Commission may use sampling to test the matchability of contributions. 11 C.F.R. § 9036.4(b). Through a sampling technique, the Commission determines the percentage of a given batch of contributions is non-matchable due to problems evident on the face of the checks (e.g., corporate checks). See 11 C.F.R. § 9036.4(b)(2). This error rate then dictates the size of the matching fund payment. *Id.* If no errors in a sample are discovered, 100% of the matchable submission amount is paid. *Id.* If errors are found, then the total amount paid on the submission is reduced by the appropriate error rate percentage. See *id.*

The matching fund error rate is also relevant in the context of making corrections for impermissibly matched public funds. Historically, the Audit Division has applied the error rate from the matching funds submission in instances involving matched checks that are rejected for insufficient funds. Cf. 11 C.F.R. § 9036.4(c)(1) (an adjustment to matching fund payments is made when a committee notifies the Commission that a check submitted for matching was returned for insufficient funds in the contributor's account). In these cases, the Audit Division prepares a worksheet that summarizes the amount of the error rate and applies this error rate against the "NSF Items." See Attachment 1.

The Audit Division has recommended that in the current situation involving the Alexander and Clinton Committees that the Commission continue to apply the error rate percentage to the repayments for non-matchable contributions consistent with the treatment of the insufficient funds checks. Attachment 2. According to the Audit Division, this approach is consistent with precedent and is administratively convenient since the error rate is applied to every contribution and does not require "the search of what may be voluminous and obsolete files for each and every transaction to make a determination whether it would have been matched as originally submitted."<sup>2</sup>

However, there have been occasions in the past where the Commission received repayments from committees for impermissibly matched public funds where no error rate has been applied. In these cases, involving sua sponte petitions from committees, the committees sent in repayment checks and did not apply the error rates to their repayments. The distinctive treatment of these funds can be explained by the fact that the committees were the parties sending in the checks, and in all likelihood, a matching fund

<sup>2</sup> With respect to capturing 100% of the repayments (i.e., not applying an error rate), the Audit Division describes this approach as "theoretically purer," but "practically far more difficult" to administer since it may require the review of each contribution to determine whether it would have been matched. Attachment 2 at 2.

error percentage would have been applied if the Commission were the party taking the action.<sup>3</sup>

The Office of General Counsel concurs with the Audit Division approach to apply the error rate percentage to the repayments at issue with the Alexander and Clinton Committees. The error rate reflects the actual amount that was matched and therefore, provides a more accurate calculation of the amount that should be repaid for non-matchable contributions. *Cf. Kennedy for President v. FEC*, 734 F.2d 1558, 1563 (D.C. Cir. 1984) (Commission has the responsibility to devise a "reasonable method for determining the extent to which matching funds, rather than private contributions, were used for unqualified purposes" when seeking repayments). Moreover, it has been the Commission's practice to apply this error rate percentage in most cases, and therefore, the Commission should continue to follow its precedent. In the Alexander case, since there were no errors in the Alexander matching fund submission, no error rate exists for application to a potential repayment. However, an error rate is recommended for application with the Clinton Committee since errors were detected in the original matching fund submissions.

The Audit Division makes a separate recommendation with respect to the Buchanan Committee since a sample projection was used to determine the dollar value of the contributions that were non-matchable. Attachment 2 at 2. According to the Audit Division, in the absence of a discrete listing of non-matchable contributions, the need to apply a matching fund error rate is obviated. *Id.* This Office concurs with the Audit Division since the sampling error rate is already calculated into the equation in instances where the non-matchable contributions are arrived at through a sampling process.

### RECOMMENDATION

The Office of General Counsel recommends that the Commission apply an error rate percentage when calculating potential repayments for non-matchable contributions for Alexander for President, Inc. and Clinton/Gore '96 Primary Committee, Inc., but to not apply this error rate percentage to Buchanan for President, Inc.

### Attachments

1. Summary of Submission Results of Review (sample).
2. Memorandum to Office of General Counsel from Audit Division, June 4, 1999.

<sup>3</sup> Theoretically, once the Commission receives these types of sua sponte repayments, it could rebate to the committee an amount that would constitute the error rate percentage. However, the Commission rebates have not been processed because they would normally constitute de minimis amounts and were not requested by the committees. In the future, this procedure could change to conform to the treatment of the NSF checks.

**SUMMARY OF SUBMISSION  
RESULTS OF REVIEW**

Committee: Dole For President, Inc.      Submission No: 11

Date Submitted: May 1, 1996      Resubmission No.: \_\_\_\_\_

The matching fund submission identified above has been reviewed in accordance with the Commission's review procedures. The results of the review are summarized below. For a thorough explanation of the Commission's Policy on the exceptions noted, see the Commission's Guideline for Presentation in Good order, Chapter V "Standard Exception Codes for Review of Matching Fund Submissions." Furthermore, requirements for resubmission of rejected contributions are also contained in Chapter V.

Exception Code	Subcategory Number	Amount Rejected	Error Percentage
A	_____	_____	_____
B	_____	_____	_____
C	_____	_____	_____
D	1	\$2,677.49	. 4%
E	_____	_____	_____
F	_____	_____	_____
G	4	\$2,677.49	. 4%
H	_____	_____	_____
I	_____	_____	_____
J	_____	_____	_____
<b>TOTAL</b>		<b>\$5,354.97</b>	<b>. 8%</b>

As a result of this review, the final amount shown on the following page will be certified to the Secretary of the Treasury.

ATTACHMENT 4  
Page 4 of 9

I am requesting the identification of the rejected contributions supporting the amounts noted above. I agree that this precludes the resubmission of the submission in its entirety and limits resubmission by the Committee to only the identified items. Further, payment is limited to solely the matchable face value of each resubmitted contribution which has been corrected.

Submission No. \_\_\_\_\_

\_\_\_\_\_  
(Signature of Candidate or Designee)

Amount Requested: \_\_\_\_\_

Date: \_\_\_\_\_

Name of Committee: \_\_\_\_\_

**SUMMARY OF SUBMISSION  
RESULTS OF REVIEW**

COMMITTEE: Dole For President, Inc.

SUBMISSION NO.: 11

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**SUMMARY OF REVIEW**

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AMOUNT REQUESTED: <u>\$669,371.81</u>	NSF PREVIOUSLY MATCHED: <u>\$ 3,849.56</u> (see II below)
ADJUSTED AMOUNT: <u>\$669,371.81</u> (See I. below)	REFUNDED CONTRIBUTIONS PREVIOUSLY MATCHED (see III below) <u>-0-</u>
REJECTED AMOUNT: <u>\$ 5,354.97</u>	OTHER ADJUSTMENT (see IV below) <u>-0-</u>
CERTIFIABLE PER REVIEW: <u>\$664,016.84</u>	FINAL AMOUNT CERTIFIED: <u>\$660,167.28</u>

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I. The original amount requested by this Submission was adjusted prior to the review in the amount of \$-0- for the following reason(s):

- ( ) NSF Items included in the Submission
  - ( ) Mathematical Errors
  - ( ) Other: \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_

II. ( X )

The NSF Adjustment shown on the Summary was made with respect to contributions matched in previous submissions. Each NSF item was adjusted in accordance with the percentage of the amount certified for payment for the submission. Following is a breakdown of the NSF Adjustment:

<u>Submission Number</u>	<u>Amount NSF Items</u>	<u>% Certified</u>	<u>Adjusted Amount</u>
2	\$ 465.00	99.6%	\$ 463.14
4	\$ 55.00	99.6%	\$ 54.78
5	\$ 500.00	99.6%	\$ 498.00
7	\$ 908.00	99.2%	\$ 900.74
8	\$ 418.00	99.2%	\$ 414.66
9	\$1176.00	100 %	\$1176.00
10	\$ 30.00	99.2%	\$ 29.76
11	\$ 315.00	99.2%	\$ 312.48

III. ( )

The adjustment for refunded contributions matched in previous submissions is calculated in the same manner as the NSF Adjustment above:

<u>Submission Number</u>	<u>Amount Refunded Items</u>	<u>% Certified</u>	<u>Adjusted Amount</u>
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IV. ( )

Other Adjustments



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20461

June 4, 1999

**MEMORANDUM**

**TO:** LAWRENCE M. NOBLE  
GENERAL COUNSEL

KIM BRIGHT-COLEMAN  
ASSOCIATE GENERAL COUNSEL  
PUBLIC FINANCING, ETHICS, AND  
SPECIAL PROJECTS SECTION

**THROUGH:** JAMES A. PEHRKON  
STAFF DIRECTOR

**FROM:** ROBERT J. COSTA  
ASSISTANT STAFF DIRECTOR  
AUDIT DIVISION

**SUBJECT:** RECOVERY OF MATCHING FUNDS FOR NON-MATCHABLE  
CONTRIBUTIONS

On May 27, 1999, a meeting was held between members of my staff and staff members from the Public Financing, Ethics, and Special Projects Section of your Office. The discussion revolved around how the repayment should be calculated in a case where contributions that were initially submitted for matching and, for reasons that were not apparent when they were submitted, are later found to be unmatchable. One example of such a situation are contributions in the name of another.

First, it is necessary to examine what our sample evaluation of a matching fund submission estimates. The percentages derived from the sample are an estimate of the number of matchable dollars in the submission. If the projection shows that the error rate is 3%, it suggests that 3% of the dollars are not matchable while 97% of the dollars are matchable. When we pay the candidate 97% of the dollars he requested, we are matching 100% of the matchable dollars and 0% of the non-matchable. Of course this is all subject to the stated confidence levels and sampling errors implicit in any statistical analysis. This analysis is not the same as saying that we are matching 97% of each dollar, even though it produces the same matching fund dollar amount.

When it is necessary to recover matching funds because it is learned that some of the contributions are not matchable for reasons that were not apparent when they were submitted, were later refunded, or were rejected by the contributor's bank, there are two possible calculations that can be done. The first involves examining each contribution in question and determining if it would have been determined to be matchable if it had been reviewed in the matching fund review process. If the answer is yes, then the entire amount of the contribution would be recovered. It is assumed that, in the example above, it was among the 97% that was matched 100%. If it would have been rejected in the submission review process, for example a contribution that was reimbursed by another person, not apparent from the documents submitted for matching, and was not signed by the listed contributor, a situation that was apparent as submitted, it is assumed to have been among the 3% that was not matched at all and no recovery is due.

The other option is to assume that the submission error rate should be applied to all contributions without the need to examine each one. Implicit in this procedure is the assumption that the rate of matchability in the target contributions as originally submitted is the same as the matching fund submission as a whole. Thus, if there is \$10,000 in contributions in question, and the match rate is 97%, the Commission would make a demand for \$9,700.

In the past the second alternative has been followed. Although it may be theoretically purer to follow the first alternative, it is practically far more difficult. It requires the search of what may be voluminous and obsolete files for each and every transaction to make a determination whether it would have been matched as originally submitted. The other procedure is far more efficient and is not likely to produce a materially different result. Therefore, the Audit Division will continue to apply the procedure that has been followed in the past.

One exception to the general procedure is the case of the Buchanan '96 Committee. In that case, the dollar value of the contributions that were later discovered to be non-matchable is itself a sample projection. It was necessary to define a sample error to exclude any contribution that would not have been matched as originally submitted. It is our opinion that to do otherwise could have caused a material over statement of the problem. However, that also obviates the need to make a further adjustment for submission error rates as would have been done if a discrete listing of transactions were available. We do not believe that this approach in this unique situation is a disparate treatment, but reflects the need to adapt our methodology to the situation at hand. We are getting to the same place by a different route, since our customary route is blocked.

Should you have any questions please contact Ray Lisi or Joe Stoltz.



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20543

February 16, 2000

**HAND DELIVERY**

Rhonda M. Rivens, Esq.  
Steptoe & Johnson  
1330 Connecticut Avenue, N.W.  
Washington, D.C. 20036-1795

Re: Request for Documents - Buchanan for  
President Committee, Inc. (LRA #512)

Dear Ms. Rivens:

This is in response to your letter to Kim Leslie Bright dated February 7, 2000, in which you requested certain documents. You state that these materials will enable you and your statistical expert to better prepare for the oral hearing on behalf of your clients, Patrick Buchanan and the Buchanan for President Committee, Inc. (the "Committee"), pursuant to 11 C.F.R. § 9038.2(c)(2)(ii), scheduled for March 1, 2000. Specifically, you requested:

- 1) the database containing the population of 7220 observations; 2) the database or spreadsheet of sample results containing 325 observations, corresponding to that discussed in [the Notice of Repayment Determination] Attachment E, page 4 of 7; 3) the basis for the calculation of the 3.69% margin of error referenced in Attachment E, page 2 of 7; and, 4) an explanation for each of the exclusions from the sample of 325 observations that are noted in Attachment E at page 4 of 7, similar to what is provided at pages 5-7 of Attachment E.

Materials responsive to your request are enclosed, including a computer diskette containing the information requested in item 1.

Sincerely,

Delanie DeWitt Painter  
Attorney

Enclosure

