



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

THIS IS THE BEGINNING OF MUR # 3449

DATE FILMED 8-7-95 CAMERA NO. 4

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FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

MJ000427

November 12, 1991

MEMORANDUM

TO: LAWRENCE M. NOBLE  
GENERAL COUNSEL

THROUGH: JOHN C. SURINA  
STAFF DIRECTOR

FROM: ROBERT J. COSTA  
ASSISTANT STAFF DIRECTOR  
AUDIT DIVISION

SUBJECT: DUKAKIS/BENTSEN COMMITTEE, INC. AND DUKAKIS/BENTSEN  
GENERAL ELECTION LEGAL AND ACCOUNTING COMPLIANCE FUND -  
REFERRALS TO OFFICE OF GENERAL COUNSEL

Attached please find Exhibits A, B, and D containing matters approved for referral to the Office of General Counsel. The Commission approved this action on October 24, 1991.

If you have any questions, please contact Lorenzo David or Rick Halter at 219-3720.

Attachments:

Exhibit A - Unreported Draft Account Activity

Exhibit B - Apparent Excessive In-Kind Contribution -  
Legal Services

Exhibit D - Sequentially Numbered Money Orders

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Unreported Draft Account Activity

Sections 434(b)(4) and (5) of Title 2 of the United States Code state, in relevant part, that each report shall disclose for the reporting period and the calendar year, the total amount of all disbursements, and the name and address of each person to whom an expenditure in an aggregate amount or value in excess of \$200 within the calendar year is made by the reporting committee to meet a candidate or committee operating expense, together with the date, amount, and purpose of such operating expenditure.

The GEC maintained a draft account which was used primarily by state campaign offices to pay expenses. A review of the activity in the draft account revealed that drafts, totaling \$3,153,346.34, which cleared the account during November and December 1988 were not included on the GEC's disclosure reports covering this period. GEC officials stated that after the general election available staff was not sufficient to handle the reporting of the large volume of transactions clearing the draft account.

The GEC attempted to report the activity on its January and February 1989 disclosure reports. On April 5, 1989, the GEC filed amended 1988 reports disclosing the draft activity.

In the interim audit report the Audit staff recommended that the GEC provide any additional comments deemed necessary regarding the unreported drafts.

Regarding the unreported draft activity the GEC states in their response "These drafts were coded into the computer for listing on the FEC report as soon as documentation was received from the employee who had authorized the expenditure. However, owing to the enormous volume of drafts, the amount of detail required, the small number of staff available after the election to process the documentation, and the difficulty in contacting former staffers after the election, the FEC reports for the months of November and December did not contain complete information.

Recommendation

The Audit staff recommends that this matter be referred to the Office of General Counsel in accordance with the Commission-approved Materiality Thresholds.

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Apparent Excessive In-Kind Contributions -  
Legal Services

Section 9003.3(b)(1) of Title 11 of the Code of Federal Regulations states that a major party candidate or his or her authorized committee(s) may solicit contributions to defray qualified campaign expenses to the extent necessary to make up any deficiency in payments received from the Fund due to the application of 11 C.F.R. 9005.2(b).<sup>1/</sup>

Section 100.7(b)(14) of Title 11 of the Code of Federal Regulations states, in part, that legal or accounting services rendered to or on behalf of an authorized committee of a candidate are not contributions if the person paying for such services is the regular employer of the individual rendering the services and if such services are solely to ensure compliance with the Act or 26 U.S.C. 9001 et seq. and 9031 et seq.

According to a letter, dated September 14, 1988, from a law firm to the GEC, an agreement was reached between the law firm and the GEC whereby the law firm agreed to update a 1980 electoral college memorandum. The letter states that the services to be provided do not seem to be contributions because they do not relate to a general election as defined.

On June 9, 1989, the GEC issued a \$17,942.41 check to the law firm in payment of expenses associated with the law firm's work on the memorandum. The expenses were identified as courier services, duplicating, postage, transportation, meals, secretarial services, etc. In a letter dated April 25, 1989, the law firm indicated that as of the close of the year, \$76,905.50 in professional services had been incurred but no charges had been made. These charges were comprised of hourly rates for partners, associates, paralegals, and summer associates and were exclusive of the \$17,942.41 billed to the GEC.

The only reporting relative to this activity was the payment of \$17,942.41 which was reported by the GEC as a compliance expense. When questioned about the activity, a GEC official stated that when the firm offered to do the work it was presumed that all the work would be volunteer activity. The GEC stated that the activity was not compliance related and that it is the position of the GEC that the activity is volunteer exempt activity pursuant to 11 C.F.R. §100.7(b)(3). On October 23, 1989, the GEC sent a letter to the law firm requesting confirmation that the services provided were exempt volunteer activity.

<sup>1/</sup> There was no deficiency in payments from the Fund; the candidate received his full entitlement - \$46,100,000.

9 5 0 4 3 6 8 0 3 4 6

In a letter dated November 1, 1989, the law firm stated that "all lawyers who work on a pro bono matter accepted by this firm do so on a voluntary basis, but their compensation from the firm does not vary depending on how much pro bono or regular work they do for the firm." (Emphasis in original.) The letter goes on to say that the law firm relied on 11 C.F.R. §100.7(b)(13) which exempts from the definition of contribution legal services rendered to or on behalf of a political committee of a political party if the person paying for the services is the regular employer of the individual rendering the services and such services are not attributable to activities which directly further the election of any designated candidate for Federal office. Based on the law firm's response, it is unclear why the law firm billed and the GEC paid for expenses which were not purportedly attributable to activities which directly further the election of the candidate.

In the interim audit report the Audit staff recommended that the GEC provide evidence that the law firm's activity is not a contribution to the GEC. This evidence should include but is not limited to an explanation of the work performed by the law firm's personnel on the electoral college memorandum and an explanation as to why the GEC was billed for the expenses associated with the services performed. In addition a copy of the Electoral College memorandum should also be provided.

In response to the interim audit report the GEC provided copies of correspondence between the GEC and the law firm regarding the Electoral College memorandum and a copy of the memorandum itself. The memorandum detailed requirements of the Electoral College voting process and noted any irregularities the GEC should be aware of which could result in the candidate losing Electoral College votes. The law firm also prepared a summary of applicable laws in each state to accompany the memorandum.

The GEC argues that "Even if the 1988 election had been a matter for the Electoral College to decide, the legal work should not be treated as a 'contribution' (which is defined at 11 C.F.R. Section 100.7(a) to include 'services ... made for the purposes of influencing any election to federal office') because an Electoral College dispute is not an 'election' as the term is defined by 11 C. F. R. Section 100.2(b). As Mr. Josephson reiterates in his letter of November 1, 1989, 'the Electoral College election, which is the only election with respect to which this firm rendered any legal services and incurred any reimbursements, is not a general, primary, run-off, caucus or convention, special or any other kind of election within the meaning of 11 C.F.R. Section 100.2.'" The response continues that since the work involved did not influence the general election it does not matter whether the law firm's work was volunteered or not since it is outside the purview of the Commission.

9 5 0 4 3 6 8 0 3 4 7

The Audit staff disagrees with the argument that the work performed by the law firm did not influence the general election. It is the opinion of the Audit staff that the Electoral College is part of the entire general election process and expenses incurred by the GEC related to the Electoral College are qualified campaign expenses which are subject to the overall expenditure limitation.

Regarding the GEC's argument that the legal work performed by the law firm is exempt volunteer activity under 11 C.F.R. Sections 100.7(b)(3) and (13), the Commission has in past advisory opinions allowed partners in law firms to work for presidential campaigns without creating a contribution from the partnership when the partner volunteers his services to the campaign and his compensation is based on a share in the partnership, not related to his working hours. (See AO 1979-58 and AO 1980-107.) Therefore, the activities of partners involved in preparing the Electoral College memorandum may have been permissible volunteer activity, however the activities of other law firm employees do not appear to be exempt volunteer activity because the law firm paid regular compensation to all of the associate lawyers and support personnel for the time they spent on legal work for the GEC. According to a billing statement prepared by the law firm, billable costs totalling \$11,017.50 relating to one partner were included in the \$76,905.50. The remaining \$65,888.00 represented work performed by associates, paralegals, summer associates, and other personnel.

It therefore appears that at least \$65,888.00 represents a contribution from the law firm to the GEC.

The GEC also argues in its response that the \$17,942.41 paid the law firm in expenses related to work on the Electoral College memorandum was not related to the general election. The response states that the payment of the \$17,942.41 was charged incorrectly to the GEC and that a reimbursement will be made to the GEC from the GELAC (the candidate's general election legal and accounting fund).

It is the opinion of the Audit staff that since the expenses were related to the Electoral College memorandum that they represent qualified campaign expenses subject to the overall expenditure limitation. The expenses are not related to compliance with the Act and should not be reported as compliance expenditures.

#### Recommendation

The Audit staff recommends that this matter be referred to the Office of General Counsel in accordance with Commission-approved Materiality Thresholds.

9 5 0 4 3 6 8 0 3 4 8

December 24, 1990

MEMORANDUM

TO: LAWRENCE M. NOBLE  
GENERAL COUNSEL

THROUGH: JOHN C. SURINA  
STAFF DIRECTOR

FROM: ROBERT J. COSTA *lh for RJC - 12/24/90*  
ASSISTANT STAFF DIRECTOR  
AUDIT DIVISION

SUBJECT: DUKAKIS/BENTSEN GENERAL ELECTION LEGAL AND  
ACCOUNTING COMPLIANCE FUND ("GELAC") -  
SEQUENTIALLY NUMBERED MONEY ORDERS

Subsequent to the completion of the audit fieldwork, the GELAC provided photo copies of contributor checks which were not available during the fieldwork phase of the audit.

This matter is being forwarded to your office at this time with the understanding that it will be analyzed in conjunction with the analysis to be performed relative to the proposed Final Audit Report in the Dukakis-Bentsen Committee, Inc. It is anticipated that the proposed report will be forwarded in early calendar 1991

Our review of this material revealed three instances involving 126 sequentially numbered money orders. Please refer to Attachment I; photocopies of the money orders are appended at Attachments II - VIII.

The dates on the money orders range from May 31, 1988, through June 15, 1988 and are in amounts ranging from \$10 to \$500. Of the 126 money orders, 114 totaling \$14,600.00, were issued through Marine Midland Payment Services, Inc.\*

\*/ A similar pattern was noted in our referral to your office on July 16, 1990, regarding consecutively numbered money orders drawn on Marine Midland Bank which were discovered during a review of the Dukakis for President Committee receipts. A comparison of the two series of money orders, although drawn on the same banking institution, does not, on its face, indicate any connection between them.

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Seven \$100 money orders were issued through the Bank of Smithtown. The five remaining money orders, totalling \$60.00, were drawn on the North Community Bank.

The surnames listed on the purchaser's line for the majority of the money orders appear to be of a Greek national origin. The addresses listed are located in or near the New York City area.

The five undated money orders from the North Community Bank Chicago, Illinois, payable to Dukakis Compliance Fund, appear, based on the similarities found in the hand printing on the face of the instrument, to have been prepared by a single individual. (See Attachment II)

The seven \$100 money orders from the Bank of Smithtown are all dated June 1, 1988, and are made payable to the Dukakis for President Compliance Fund. Here again the similarities in the writing appear to indicate that the same person prepared the money orders. (See Attachment III)

The money orders from Marine Midland Payment Services, Inc. appear to fall into distinct patterns. The first group contains 41 money orders which were all dated June 15, 1988 and are made payable to Dukakis Compliance Fund. The numbers run consecutively from 0051144 through 0051185 (0051183 missing) and at a minimum the date and payee line appear to be written by the same hand. (See Attachment IV)

The second group contains 13 money orders (0051080 - 0051092) all dated June 2, 1988 and are made payable to Dukakis for President Compliance Fund. The payee line is distinctive since on each payee line the word Fund is written below the line. (See Attachment V)

The third group involves 18 money orders numbered from 0051113 - 0051120 and 0051129 - 0051138 dated June 9, 1988 and June 14, 1988 respectively. The money orders are all made payable to Dukakis for President Compliance Fund and appear to be written in the same hand as the second group mentioned above. (See Attachment VI)

The fourth group contains 31 money orders (numbers 0155634 - 0155682, with four breaks in the sequence) all dated June 2, 1988, with both the date typed and the payee line typed Dukakis for President Compliance Fund.\*/ (See Attachment VII)

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\*/ Two money orders (0155640-41) although in the sequence, do not have similarities to the rest of the money orders in the sequence. (See Attachment VII, Page 2)

9 5 0 4 3 6 8 0 3 5 0

The final group contains 11 money orders (0155674 - 0155680, 0155684 - 0155687) dated between May 31, 1988, and June 2, 1988, all made payable to Dukakis for President Compliance Fund. Here again the date and payee lines on all of the money orders appear to be in the same hand. (See Attachment VIII)

Regarding the money orders from Bank of Smithtown (Attachment III), and groups two, three and five from Marine Midland (Attachment V, VI, and VIII), it is the opinion of the Audit staff that "Compliance Fund" appears to have been added to the payee line after the fact and appears to be written in a different hand than "Dukakis for President". This may be significant since a major finding in the Dukakis for President Committee audit involves a situation where contributions solicited for the primary campaign were maintained in a separate account from which they were later transferred to the General Election Compliance Fund. (See Proposed Final Audit Report - Dukakis for President Committee, Finding II.C. Statement of Net Outstanding Campaign Obligations and Repayment of Surplus Funds Joint Escrow Account, Page 17 - currently undergoing legal review (Attachment IX)).

It should also be noted that a review of the Dukakis for President Committee's contributor data base disclosed that the majority of the contributors noted on the above money orders were not listed as making any contributions to Gov. Dukakis's primary campaign. This could also be an indication that the funds were originally intended to be contributions to the primary campaign however the payee line was changed to the General Election Compliance Fund. According to a Committee official the hand written letters "FRONN" on many of the money orders refers to a Compliance Fund fundraiser held on Long Island on June 14, 1988. Any investigation of this matter should also pursue whether these contributions were solicited for the primary campaign or the Compliance Fund.

The copies attached are not of very good quality since they were reproduced from microfilm copies. The microfilm copies are available for review in the Audit Division if you should like to view them.

The Audit Division recommends that this matter be referred to your office. If you have any questions, please contact Ray Lisi or Lorenzo David at 376-5320.

**Attachments:**

Attachment I - Summary of Sequentially Numbered Money Orders.

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- Attachment II - Copies of North Community Bank Money Orders  
#M430038 - M430042
- Attachment III - Copies of Bank of Smithtown Money Orders  
#308946 - 308952
- Attachment IV - Marine Midland Payment Services, Inc.  
Money Orders #E0051144 - E0051182  
#E0051184 - E0051185
- Attachment V - Money Orders #0051080 - 0051092
- Attachment VI - Money Orders #0051113 - 0051120,  
#0051129 - 0051138
- Attachment VII - Money Orders #0155634 - 0155641,  
#0155644 - 0155659, #0155661 - 0155665,  
#0155671, 0155682
- Attachment VIII - Money Orders #0155674 - 0155680,  
#0155684 - 0155687
- Attachment IX - Statement of Net Outstanding Campaign  
Obligations and Repayment of Surplus Funds

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ATTACHMENT 1

DUKAKIS/BENTSEN COMMITTEE, INC. COMPLIANCE FUND  
SUMMARY OF CONSECUTIVELY NUMBERED MONEY ORDERS

<u>Range of Money Orders</u>	<u>#of Money Orders</u>	<u>Dollar Value</u>
<u>Marine Midland Payment Services, Inc.</u>		
0051080 - 0051092	13	\$ 1,300.00
0051113 - 0051120	8	1,150.00
0051129 - 0051138	10	850.00
0051144 - 0051182	39	3,900.00
0051184 - 0051185	2	400.00
0155634 - 0155641	8	2,000.00
0155644 - 0155659	16	1,600.00
0155661 - 0155665	5	500.00
0155671	1	100.00
0155674 - 0155680	7	700.00
0155682	1	100.00
0155684 - 0155687	4	2,000.00
<u>Bank of Smithtown</u>		
308946 - 308952	7	700.00
<u>North Community Bank</u>		
M430038 - M430042	<u>5</u>	<u>60.00</u>
<b>Totals</b>	<b>126</b>	<b>\$ 15,360.00</b>

95043680353

Fa 744

M 430038

COMMUNITY BANK  
CLARK • 1126 W. WESTERN  
CHICAGO, ILL. 60604

DATE

*Stankakis Compliance Fund*

THOUSAND ONE HUNDRED DOLLARS

NOT VALID  
OVER \$500.00

PERSONAL MONEY ORDER

*3127 N. Central  
Chicago Ill*

⑆3003⑆ ⑆071001533⑆ 9957051⑆

⑆000001⑆

Fa 744

M 430038

COMMUNITY BANK  
CLARK • 1126 W. WESTERN  
CHICAGO, ILL. 60604

DATE

*Stankakis Compliance Fund*

THOUSAND ONE HUNDRED FIFTY DOLLARS

NOT VALID  
OVER \$500.00

PERSONAL MONEY ORDER

*3127 N. Central  
Chicago Ill*

⑆3004⑆ ⑆071001533⑆ 9957051⑆

⑆000001⑆

Fa 744

M 430041

COMMUNITY BANK  
CLARK • 1126 W. WESTERN  
CHICAGO, ILL. 60604

DATE

*Stankakis Compliance Fund*

THOUSAND ONE HUNDRED DOLLARS

NOT VALID  
OVER \$500.00

PERSONAL MONEY ORDER

*2474 N. Central  
Chicago Ill*

⑆3004⑆ ⑆071001533⑆ 9957051⑆

⑆000001⑆

95043680354

95043680355

COMMUNITY BANK  
 1234 N. WESTERN  
 CHICAGO, ILL. 60610

FR 744 M 43082

**Dukakis Compliance Fund**

**TEN THOUSAND 10000cts**

NOT VALID OVER \$500.00

PERSONAL MONEY ORDER

*11064* *11/15/88*  
*11/15/88*

⑆430067⑆ ⑆07100⑆533⑆ 9957051⑆ /000000

COMMUNITY BANK  
 1234 N. WESTERN  
 CHICAGO, ILL. 60610

FR 744 M 43088

**Dukakis Compliance Fund**

**TWENTY THOUSAND 20000cts**

NOT VALID OVER \$500.00

PERSONAL MONEY ORDER

*22300* *11/15/88*  
*11/15/88*

⑆430067⑆ ⑆07100⑆533⑆ 9957051⑆ /000000

SMITH TOWN NEW YORK  
POST OFFICE BOX 100000

DATE June 1 1997 FROM 3088

100000

Check for President Compliance for

NAME OF SMITH TOWN : Pat Vecchio 15  
: Freeport NY 11520

PHONE NO. : 516 494 0013

SMITH TOWN NEW YORK  
POST OFFICE BOX 100000

DATE 6/1 1997 FROM 3088

100000

Check for President Compliance for

NAME OF SMITH TOWN : Andri Venetis  
: 1085 Fourth Rd North

PHONE NO. : 516 494 0013

SMITH TOWN NEW YORK  
POST OFFICE BOX 100000

DATE 6/1 1997 FROM 3088

100000

Check for President Compliance for

NAME OF SMITH TOWN : Kathie Tsapelis  
: 87 Smith St Freeport

PHONE NO. : 516 494 0013

95043680356

**PERSHALL MONEY ORDER**  
NOT VALID OVER \$5000

DATE 6/1 FLORIN 3000

**1000000000**

Check for President Compliance Fund

**BANK OF SMITHTOWN**  
SMITHTOWN, NEW YORK

• 1000000000  
• 9250000000 - report M

⑆308959⑆ ⑆021608597⑆ ⑆018999001⑆ ⑆000000⑆

**PERSHALL MONEY ORDER**  
NOT VALID OVER \$5000

DATE 6/1 FLORIN 3000

**1000000000**

Check for President Compliance Fund

**BANK OF SMITHTOWN**  
SMITHTOWN, NEW YORK

• 1000000000  
• 9250000000 - report M

⑆308959⑆ ⑆021608597⑆ ⑆018999001⑆ ⑆000000⑆

**PERSHALL MONEY ORDER**  
NOT VALID OVER \$5000

DATE June 1, 1988 FLORIN 3000

**1000000000**

Check for President Compliance Fund

**BANK OF SMITHTOWN**  
SMITHTOWN, NEW YORK

• 1000000000  
• 125 Union Ave. CTR

⑆308959⑆ ⑆021608597⑆ ⑆018999001⑆ ⑆000000⑆

95043680357

**FEDERAL RESERVE NOTE**

**FRENCH**

DATE June 1 1952

**ONE HUNDRED DOLLARS**

**Pay to the order of President Compliance Fund**

**FEDERAL RESERVE BANK OF SMITHTOWN**

Pay to the order of \_\_\_\_\_

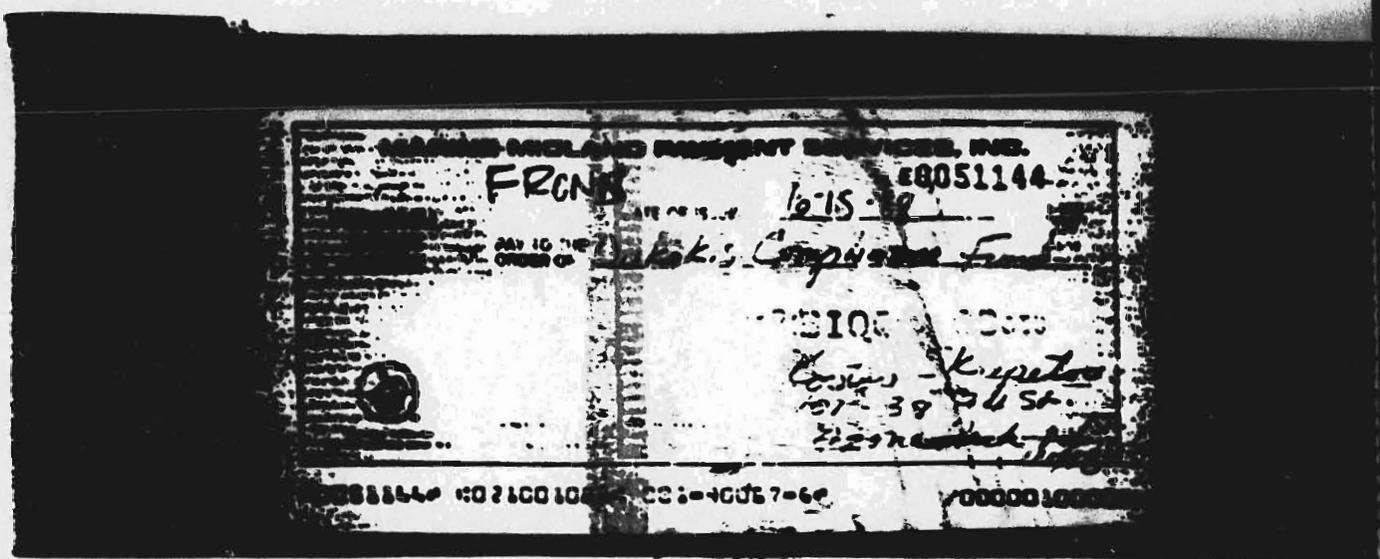
675 E. Main Street, Commack, N.Y.

⑆08951⑆ ⑆02140859⑆ ⑆089900⑆

⑆00000⑆

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95043680359



MARINE MIDLAND PAYMENT SERVICES, INC.  
**FRONT** NO. E0051148  
 DATE OF SALE 6-15-88  
 PAY TO THE ORDER OF Dukakis Compliance Fund  
 \$100,000.00  
 Vick Mantak  
 405 W. 51 St  
 NY, NY 10023  
 001-90067-60 700000100000

MARINE MIDLAND PAYMENT SERVICES, INC.  
**FRONT** NO. E0051147  
 DATE OF SALE 6-15-88  
 PAY TO THE ORDER OF Dukakis Compliance Fund  
 \$100,000.00  
 Kinoshon Mantak  
 405 W. 51 St  
 NY, NY 10023  
 001-90067-60 700000100000

MARINE MIDLAND PAYMENT SERVICES, INC.  
**FRONT** NO. E0051150  
 DATE OF SALE 6-15-88  
 PAY TO THE ORDER OF Dukakis Compliance Fund  
 \$100,000.00  
 Vito Longuech  
 74 Hamlet Ave  
 Orange, NY  
 001-90067-60 700000100000

MARINE MIDLAND PAYMENT SERVICES, INC.  
**FRONT** NO. E0051149  
 DATE OF SALE 6-15-88  
 PAY TO THE ORDER OF Dukakis Compliance Fund  
 \$24,000.00  
 Anthony Mantak  
 NY, NY  
 001-90067-60

95043680360

95043680361

FRONT 60051151  
 DATE OF ISSUE 6-15-88  
 Dukat's Camp Home Fund  
 924 MMB310061000  
 Alan Zentros  
 10 Alta St.  
 Sayville, NY

FRONT 60051151  
 DATE OF ISSUE 6-15-88  
 Dukat's Camp Home Fund  
 924 MMB310061000  
 Alan Zentros  
 10 Alta St.  
 Sayville, NY

FRONT 60051151  
 DATE OF ISSUE 6-15-88  
 Dukat's Camp Home Fund  
 924 MMB310061000  
 Alan Zentros  
 10 Alta St.  
 Sayville, NY

95043680362

MARINE MIDLAND PAYMENT SERVICES, INC.  
**FRONT** #0051154  
 DATE OF PAY 6-15-88  
 PAY TO THE ORDER OF *Dulakis Compliance Fund*  
 MARSHALL ISLANDS  
*Antonia Kovacs*  
*At Home*  
*1000 K...*  
 #0051154 #021001088# 001-90067-6# /0000010000

MARINE MIDLAND PAYMENT SERVICES, INC.  
**FRONT** #0051155  
 DATE OF PAY 6-15-88  
 PAY TO THE ORDER OF *Dulakis Compliance Fund*  
 MARSHALL ISLANDS  
*Mike Pandakakis*  
*164 Stagg Street*  
*Port of Spain*  
 #0051155 #021001088# 001-90067-6# /0000010000

MARINE MIDLAND PAYMENT SERVICES, INC.  
**FRONT** #0051156  
 DATE OF PAY 6-15-88  
 PAY TO THE ORDER OF *Dulakis Compliance Fund*  
 MARSHALL ISLANDS  
*Steve Kart...*  
*28 Union St*  
*Port of Spain*  
 #0051156 #021001088# 001-90067-6# /0000010000

MARINE MIDLAND PAYMENT SERVICES, INC.  
**FRONT** #0051157  
 DATE OF PAY 6-15-88  
 PAY TO THE ORDER OF *Dulakis Compliance Fund*  
 MARSHALL ISLANDS  
*Steve Kart...*  
*28 Union St*  
*Port of Spain*  
 #0051157 #021001088# 001-90067-6# /0000010000

95043680363

FRONT 6-15-88

Dukakis Compliance Fund

24 MMB \$100.00

George F. ...  
by ...  
Center ...

00110010884 001-90067-60 /000000

FRONT 6-15-88

Dukakis Compliance Fund

24 MMB \$100.00

George F. ...  
by ...  
Center ...

00110010884 001-90067-60 /000000

MARINE MIDLAND PAYMENT SERVICES, INC.

FRONT 6-15-88

Dukakis Compliance Fund

24 MMB \$100.00

George F. ...  
by ...  
Center ...

00110010884 001-90067-60 /000000

MARINE MIDLAND PAYMENT SERVICES, INC.

FRONT 6-15-88

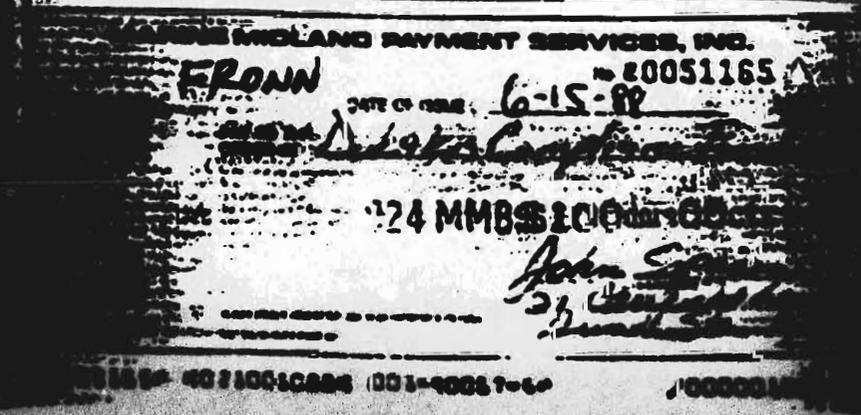
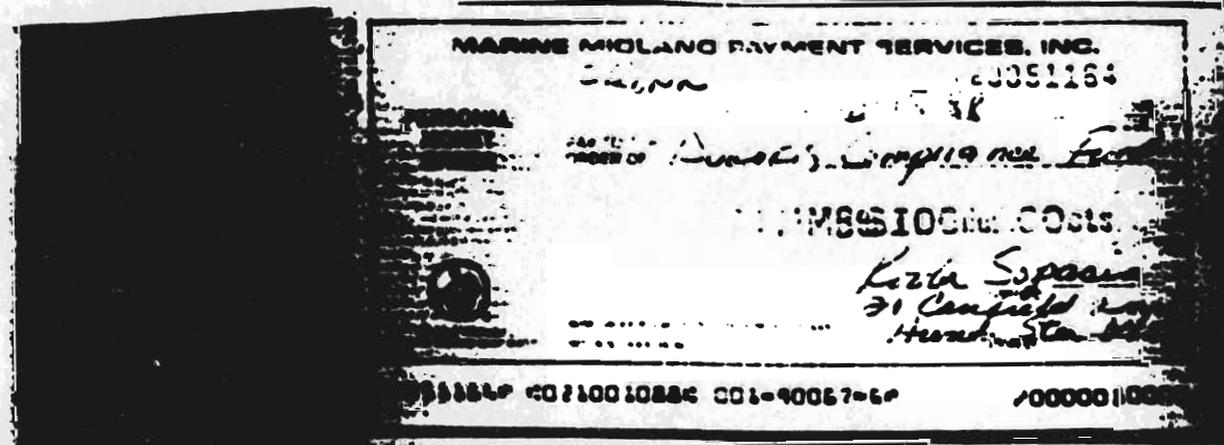
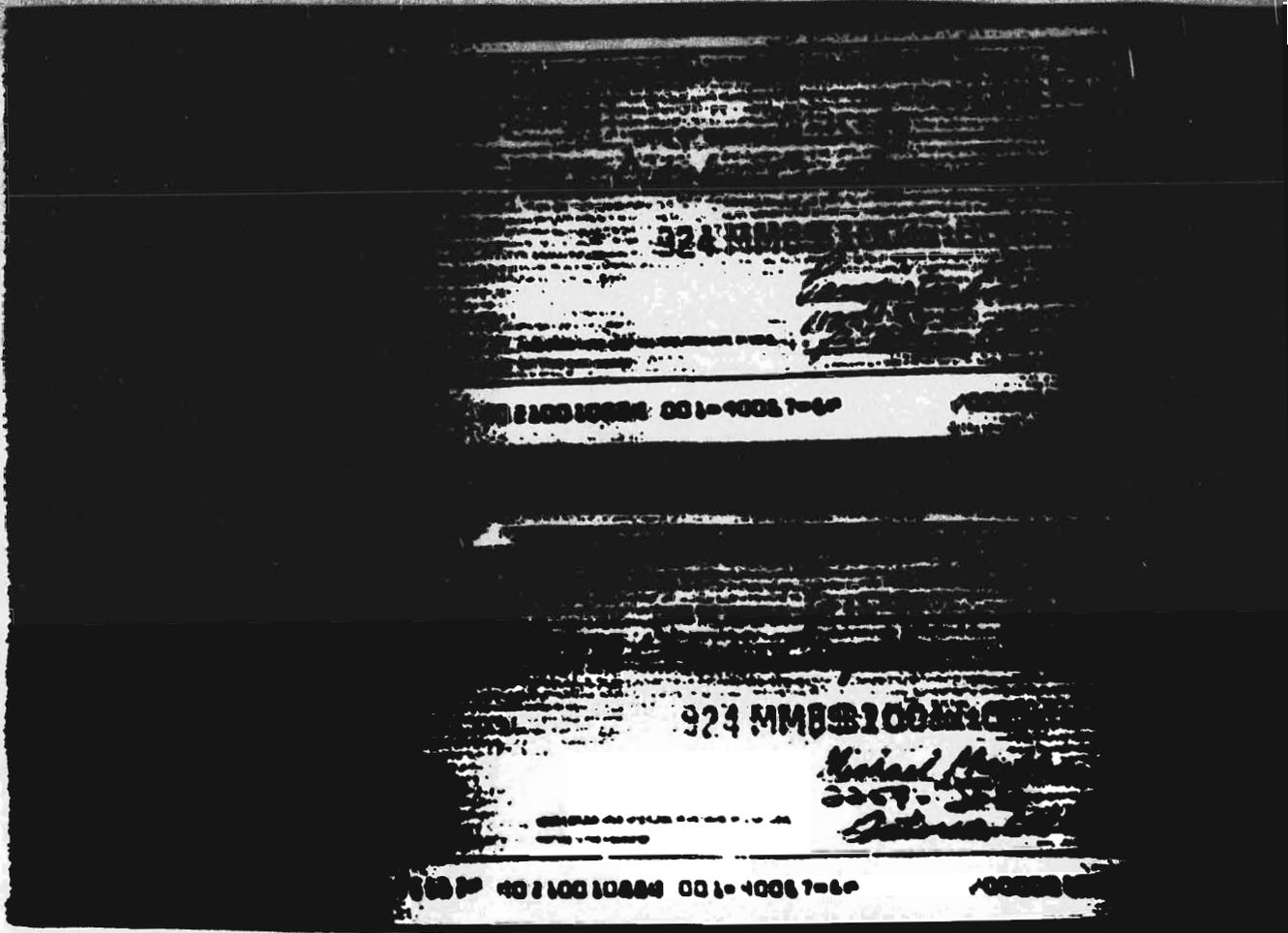
Dukakis Compliance Fund

24 MMB \$100.00

George F. ...  
by ...  
Center ...

00110010884 001-90067-60 /000000

95043680364





95043680366

MARINE MIDLAND PAYMENT SERVICES, INC.  
 #E0051170  
 DATE OF ISSUE 6-15-88  
 Dukes Compliance Fund  
 \$24 MM \$100 in 00cts  
 George Katerakis  
 31-05 [unclear]  
 [unclear]  
 00210010884 001-90067-60 /000001000

MARINE MIDLAND PAYMENT SERVICES, INC.  
 #E0051171  
 FROM  
 DATE OF ISSUE 6-15-88  
 Dukes Compliance Fund  
 \$21 MM \$100 in 00cts  
 Alex Bobris  
 85 [unclear]  
 [unclear]  
 00210010884 001-90067-60 /000001000

MARINE MIDLAND PAYMENT SERVICES, INC.  
 #E0051172  
 FROM  
 DATE OF ISSUE 6-15-88  
 Dukes Compliance Fund  
 \$24 MM \$100 in 00cts  
 [unclear]  
 [unclear]  
 [unclear]  
 00210010884 001-90067-60 /000001000



95043680368

MARINE MIDLAND PAYMENT SERVICES, INC.

FRONT

PERSONAL CHECK

DATE OF ISSUE 6-15-88

PAY TO THE ORDER OF *Duke's Compliance*

AMOUNT \$1000.00

*Stamata*  
223 *Stamata*  
*Stamata*

⑆0051176⑆ ⑆021001088⑆ 001-9067-6⑆ ⑆00000000⑆

MARINE MIDLAND PAYMENT SERVICES, INC.

FRONT

DATE OF ISSUE 6-15-88

PAY TO THE ORDER OF *Duke's Compliance*

AMOUNT \$1000.00

*Stamata*  
223 *Stamata*  
*Stamata*

⑆0051176⑆ ⑆021001088⑆ 001-9067-6⑆ ⑆00000000⑆

MARINE MIDLAND PAYMENT SERVICES, INC.

FRONT

DATE OF ISSUE 6-15-88

PAY TO THE ORDER OF *Duke's Compliance*

AMOUNT \$1000.00

*Stamata*  
223 *Stamata*  
*Stamata*

⑆0051176⑆ ⑆021001088⑆ 001-9067-6⑆ ⑆00000000⑆

MARINE MIDLAND PAYMENT SERVICES, INC.

FRONT

DATE OF ISSUE 6-15-88

PAY TO THE ORDER OF *Duke's Compliance*

AMOUNT \$1000.00

*Stamata*  
223 *Stamata*  
*Stamata*

⑆0051176⑆ ⑆021001088⑆ 001-9067-6⑆ ⑆00000000⑆



95043680370

MARINE MIDLAND PAYMENT SERVICES, INC.

PERSONAL MONEY ORDER

FROM

PAY TO THE ORDER OF *D. Kaker's Compliance Fund*

6-15-88

MR 3200

*Mr. Pappas*  
*1000 ...*

00011884 40210010884 001-90067-60 00000000000

MARINE MIDLAND PAYMENT SERVICES, INC.

PERSONAL MONEY ORDER

FROM

PAY TO THE ORDER OF *D. Kaker's Compliance Fund*

6-15-88

MR 3200

*Abel Vasilov*  
*342 Hillside St*  
*Staten Island, NY*

00011884 40210010884 001-90067-60 00000000000

95043680371

WELAND PAYMENT SERVICES, INC.

NO E0051080

DATE OF ISSUE 6-02-88

PAY TO THE ORDER OF Dukakis for President Campaign

924 MM \$100 and 00 Cts

Mr. Blotz  
33 Court City Dr  
New York, NY

0051080 00210010880 001-90067-60 000001000

924 MM \$100 and 00 Cts

Sophia  
Bob

00210010880 001-90067-60 00000

WELAND PAYMENT SERVICES, INC.

NO E0051080

DATE OF ISSUE 6-02-88

PAY TO THE ORDER OF Dukakis for President Campaign

924 MM \$100 and 00 Cts

Mr. Spilatis  
P. L. Test - NY

0051080 00210010880 001-90067-60 000001000



**MIDLAND PAYMENT SERVICES, INC.**  
 # E0051086  
 DATE OF ISSUE 6-02-88  
 PAY TO THE ORDER OF Lukakis For President Campaign  
 1000000000  
 34  
 E.A. NY 112

E0051086 #021001088# 001-90067-6# 0000010000

9 5 0 4 3 6 8 0 3 7 3

MARINE MIDLAND PAYMENT SERVICES, INC.

NO. E0051087

DATE OF ISSUE 6-02-88

PAY TO THE ORDER OF Dutakis for President Campaign

924 MMBS \$100.00

10 - Kasz's  
Malville N.H.

0051087 0021001088 001-90067-6

00000100

MIDLAND PAYMENT SERVICES, INC.

NO. E0051088

DATE OF ISSUE 6-02-88

PAY TO THE ORDER OF Dutakis for President Campaign

924 MMBS \$100.00

George H. Lopez  
25 Smith  
Sayville N.H.

01088 0021001088 001-90067-6

00000100

MIDLAND PAYMENT SERVICES, INC.

NO. E0051089

DATE OF ISSUE 6-02-88

PAY TO THE ORDER OF Dutakis for President Campaign

924 MMBS \$100.00

John Kasick  
25 Smith  
Smith N.H.

01089 0021001088 001-90067-6

00000100

95043680374

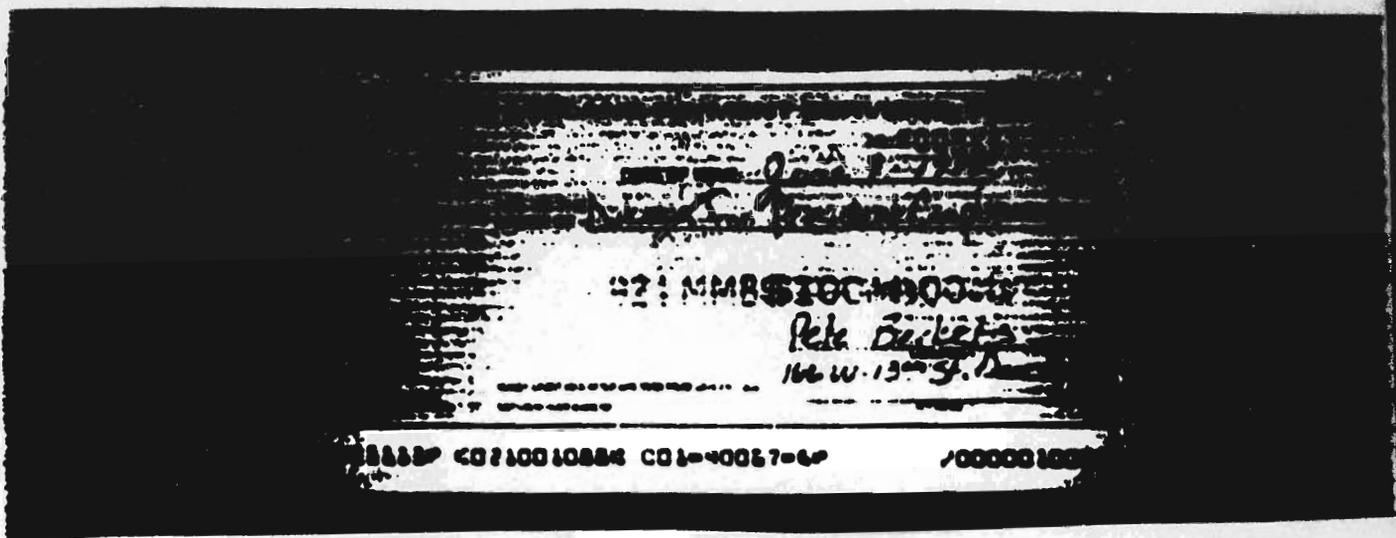
95043680375

MIDLAND PAYMENT SERVICES, INC.  
 # E0051091  
 DATE OF ISSUE 6-02-88  
 PAY TO THE ORDER OF Dukakis For President Campaign  
 \$100.00  
 MICHAEL  
 11720  
 ⑆0051091⑆ ⑆021001088⑆ 001-90067-6⑆ ⑆000001000⑆

MIDLAND PAYMENT SERVICES, INC.  
 # E0051090  
 DATE OF ISSUE 6-02-88  
 PAY TO THE ORDER OF Dukakis For President Campaign  
 \$100.00  
 MICHAEL  
 11720  
 ⑆0051090⑆ ⑆021001088⑆ 001-90067-6⑆ ⑆000001000⑆

MIDLAND PAYMENT SERVICES, INC.  
 # E0051090  
 DATE OF ISSUE 6-02-88  
 PAY TO THE ORDER OF Dukakis For President Campaign  
 \$100.00  
 TOMMY  
 11720  
 ⑆0051090⑆ ⑆021001088⑆ 001-90067-6⑆ ⑆000001000⑆

95043680376



95043680377

ISLAND PAYMENT SERVICES, INC. #E0051115

DATE OF ISSUE June 9, 1988

PAY TO THE ORDER OF Duke for President Campaign

123 MMR \$100.00

Caroline Varrato  
 21 Wallingford Lane  
 Spring Brook, CT

⑆000001000⑆ ⑆021001088⑆ 001-90067-6⑆

ISLAND PAYMENT SERVICES, INC. #E0051115

DATE OF ISSUE June 9, 1988

PAY TO THE ORDER OF Duke for President Campaign

001 MMR \$100.00

George Harris  
 34 Park Street  
 Park Hill, MA

⑆000001000⑆ ⑆021001088⑆ 001-90067-6⑆

ISLAND PAYMENT SERVICES, INC. #E0051115

DATE OF ISSUE June 9, 1988

PAY TO THE ORDER OF Duke for President Campaign

123 MMR \$100.00

Pauline Berkeley  
 106 W 13th St  
 New York, NY

⑆000001000⑆ ⑆021001088⑆ 001-90067-6⑆

MAILING SERVICE, INC.

E0051118

DATE OF ISSUE June 9, 1988

Pay to the order of Dukakis for President Campaign

371 MMBS\$100.00cts

Via Tsakiris  
Rt 6 Malabar, MA 01902

00210010884 001-90067-60

7000001000

MAILING SERVICE, INC.

E0051117

DATE OF ISSUE June 9, 1988

Pay to the order of Dukakis for President Campaign

321 MMBS\$100.00cts

Helen Tsakiris  
Rt 6 Malabar, MA 01902

00210010884 001-90067-60

7000001000

324 MMBS\$50.00cts

Kerley, Kerley  
334 Colman Ave  
Holliston, MA 01902

00210010884 001-90067-60

7000001000

95043680378



95043680380

DATE OF ISSUE *June 14, 1981*

PAY TO THE ORDER OF *Director of Social Security Administration*

ONE THOUSAND DOLLARS

*Director of Social Security Administration*

1000000000

THE MIDLAND PAYMENT SERVICE

DATE OF ISSUE *June 14, 1981*

PAY TO THE ORDER OF *Director of Social Security Administration*

ONE THOUSAND DOLLARS

*Director of Social Security Administration*

1000000000

DATE OF ISSUE *June 14, 1981*

PAY TO THE ORDER OF *Director of Social Security Administration*

ONE THOUSAND DOLLARS

*Director of Social Security Administration*

1000000000

9 5 0 4 3 6 8 0 3 8 1

DECLARED PAYMENT RECEIVED

DATE OF THIS June 14, 1961

PAID TO THE Director of Prisons

324 MMB910001000

Asst. Prisoner  
35 West  
in California

00210010886 001-90067-60 /00000100

DECLARED PAYMENT RECEIVED

DATE OF THIS June 14, 1961

PAID TO THE Director of Prisons

324 MMB910001000

Martin Piskos  
32 Green  
Post 1066 San

00210010886 001-90067-60 /00000100

DECLARED PAYMENT RECEIVED

DATE OF THIS June 14, 1961

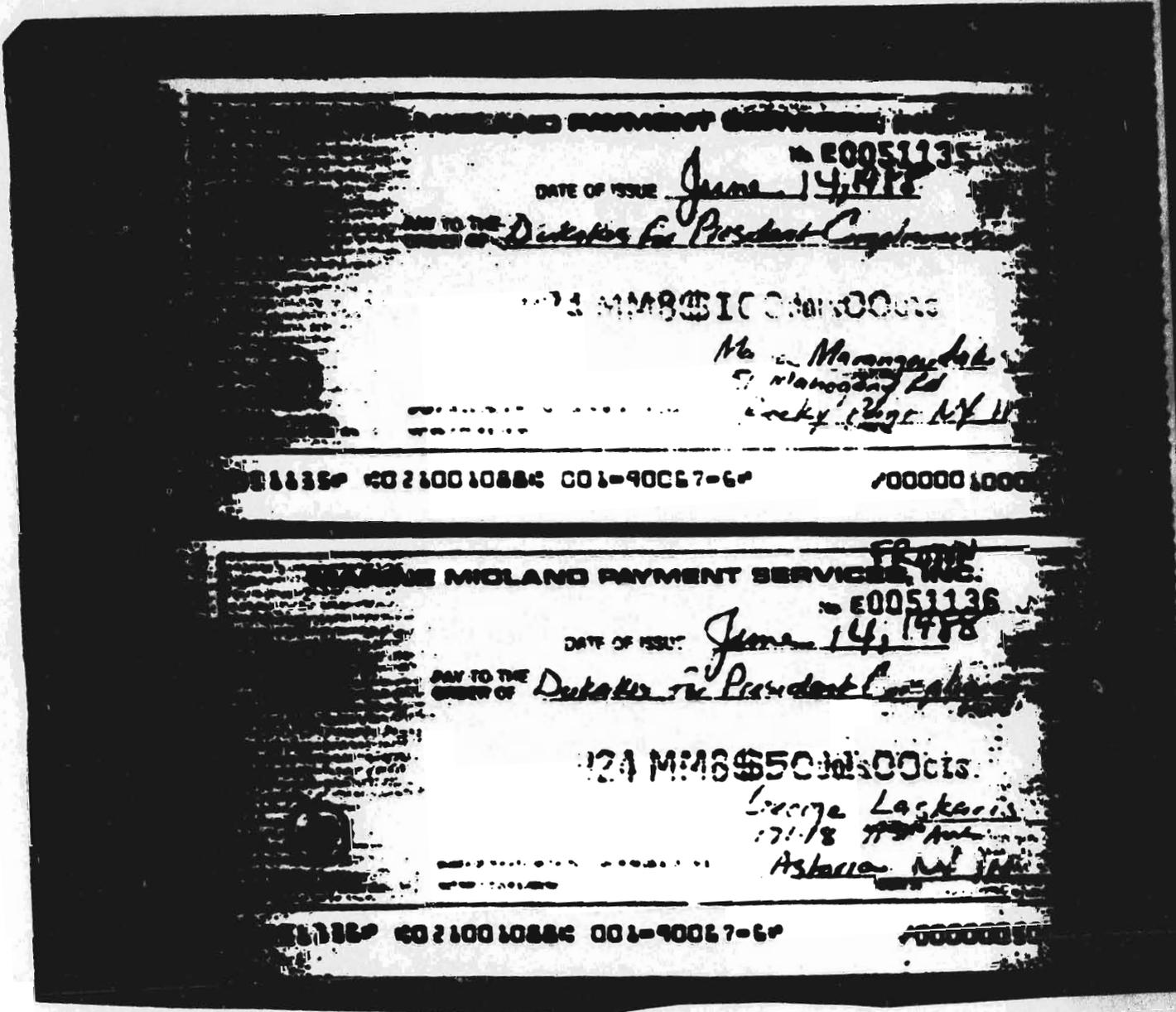
PAID TO THE Director of Prisons

324 MMB910001000

John  
20  
St...

00210010886 001-90067-60 /00000100

95043680382



**CANCELLED PAYMENT ORDER**  
No. E0051135  
DATE OF ISSUE June 14, 1978

PAY TO THE ORDER OF Director for President Campaign

100 00 00 00 00 00 00 00 00 00

Mr. Managoulak  
51 Main Street  
Brooklyn, NY 11201

⑆00000000⑆ ⑆021001088⑆ 001-90067-6⑆

**CANCELLED PAYMENT ORDER**  
No. E0051136  
DATE OF ISSUE June 14, 1978

PAY TO THE ORDER OF Director for President Campaign

50 00 00 00 00 00 00 00 00 00

George Laskaris  
171-78 11th Ave  
Astoria, NY 11001

⑆00000050⑆ ⑆021001088⑆ 001-90067-6⑆

95043680383

UNRECORDED PAYMENT SERVICE

NO. 00051137

DATE OF ISSUE June 14, 1978

PAY TO THE ORDER OF Debtors for Pass. Inst. Compliance

101 MM8850 000000

1000000000

---

101 MM8850 000000

Nick K...

...

...

1000000000

95043680384

MARINE MIDLAND PAYMENT SERVICES, INC. *FRONT*  
 # 40155634  
 DATE OF TOLA June 2, 1988  
 PAY TO THE ORDER OF DEBITS FOR PRESENT COMPLIANCE FUND  
 \$ MARINE MIDLAND 250 AND 00 CTS  
 40155634 00000750000

MARINE MIDLAND PAYMENT SERVICES, INC. *FRONT*  
 # 40155635  
 DATE OF TOLA June 2, 1988  
 PAY TO THE ORDER OF DEBITS FOR PRESENT COMPLIANCE FUND  
 \$ MARINE MIDLAND 250 AND 00 CTS  
 40155635 00000750000

MARINE MIDLAND PAYMENT SERVICES, INC. *FRONT*  
 # 40155636  
 DATE OF TOLA June 2, 1988  
 PERSONAL MONEY ORDER DEBITS FOR PRESENT COMPLIANCE FUND  
 \$ MARINE MIDLAND 250 AND 00 CTS  
 40155636 00000750000

MARINE MIDLAND PAYMENT SERVICES, INC. *FRONT*  
 # 40155637  
 DATE OF TOLA June 2, 1988  
 PERSONAL MONEY ORDER DEBITS FOR PRESENT COMPLIANCE FUND  
 \$ MARINE MIDLAND 250 AND 00 CTS  
 40155637 00000750000

95043680385

MARINE MIDLAND PAYMENT SERVICES, INC.

NO E0155638

DATE OF ISSUE June 2, 1988

PAY TO THE ORDER OF ARMED FOR FREEDOM COMPLIANCE FUND

MARINE MIDLAND **250** AND CENTS

⑆00000⑆ ⑆021001088⑆ ⑆01-90067-6⑆

MARINE MIDLAND PAYMENT SERVICES, INC.

NO E0155639

DATE OF ISSUE June 2, 1988

PAY TO THE ORDER OF ARMED FOR FREEDOM COMPLIANCE FUND

MARINE MIDLAND PAYMENT SERVICES, INC.

NO E0155640

DATE OF ISSUE Nov - 11 - 88

PAY TO THE ORDER OF ARMED FOR FREEDOM COMPLIANCE FUND

MARINE MIDLAND **250** AND CENTS

MANUALS LIBRARY

NOV 11 1988

⑆00000⑆ ⑆021001088⑆ ⑆01-90067-6⑆

⑆00000⑆

MARINE MIDLAND PAYMENT SERVICES, INC.

NO E0155641

DATE OF ISSUE Nov - 11 - 88

PAY TO THE ORDER OF ARMED FOR FREEDOM COMPLIANCE FUND

MARINE MIDLAND PAYMENT SERVICES, INC.



95043680336

MARINE MIDLAND PAYMENT SERVICES, INC.  
 No. 40155645  
 DATE OF THE June 2, 1987  
 PAY TO THE ORDER OF CHECKS FOR PRESENT CASHING FUND  
 MARINE MIDLAND PAYMENT SERVICES, INC.  
 10000010000

MARINE MIDLAND PAYMENT SERVICES, INC.  
 No. 40155647  
 DATE OF THE June 2, 1987  
 PAY TO THE ORDER OF CHECKS FOR PRESENT CASHING FUND  
 MARINE MIDLAND PAYMENT SERVICES, INC.  
 10000010000

MARINE MIDLAND PAYMENT SERVICES, INC.  
 No. 40155846  
 DATE OF THE June 2, 1987  
 PAY TO THE ORDER OF CHECKS FOR PRESENT CASHING FUND  
 MARINE MIDLAND PAYMENT SERVICES, INC.  
 10000010000

95043680387

MARINE MIDLAND PAYMENT SERVICES, INC. No. 00155648

DATE OF ISSUE JUNE 2, 1988

PAY TO THE ORDER OF DEPOSIT FOR PRESIDENT COMPLIANCE FUND

**MARINE MIDLAND PAYMENT SERVICES, INC.**

27 WEST 60TH STREET  
NEW YORK, N.Y. 10019

⑆0000010000⑆ 001-90067-6⑆ 0021001088⑆

MARINE MIDLAND PAYMENT SERVICES, INC. *FRANK*

PERSONAL MONEY ORDER

⑆0000010000⑆ 001-90067-6⑆ 0021001088⑆

**MARINE MIDLAND PAYMENT SERVICES, INC.**

27 WEST 60TH STREET  
NEW YORK, N.Y. 10019

MARINE MIDLAND PAYMENT SERVICES, INC. *FRANK*

PERSONAL MONEY ORDER

⑆0000010000⑆ 001-90067-6⑆ 0021001088⑆

**MARINE MIDLAND PAYMENT SERVICES, INC.**

27 WEST 60TH STREET  
NEW YORK, N.Y. 10019

MARINE MIDLAND PAYMENT SERVICES, INC. *FRANK*

PERSONAL MONEY ORDER

⑆0000010000⑆ 001-90067-6⑆ 0021001088⑆

**MARINE MIDLAND PAYMENT SERVICES, INC.**

27 WEST 60TH STREET  
NEW YORK, N.Y. 10019

95043680388

MARINE MIDLAND PAYMENT SERVICES, INC. FROM

NOV 2, 1958

PAY TO THE ORDER OF **CHEQUES FOR PRESIDENT COMPLIANCE FUND**

**MARINE IOC**

⑆05555⑆ ⑆021001088⑆ ⑆01-90027-6⑆ /0000010000⑆

MARINE MIDLAND PAYMENT SERVICES, INC. FROM

JUN 2, 1958

PAY TO THE ORDER OF **CHEQUES FOR PRESIDENT COMPLIANCE FUND**

**MARINE IOC**

⑆05555⑆ ⑆021001088⑆ ⑆01-90027-6⑆ /0000010000⑆

MARINE MIDLAND PAYMENT SERVICES, INC. FROM

JUN 2, 1958

PAY TO THE ORDER OF **CHEQUES FOR PRESIDENT COMPLIANCE FUND**

**MARINE IOC**

⑆05555⑆ ⑆021001088⑆ ⑆01-90027-6⑆ /0000010000⑆



95043680390

**MARINE MIDLAND PAYMENT SERVICES, INC.**  
 # 80155653

DATE OF THIS Jan 2, 1981

PAY TO THE ORDER OF DEBITS FOR FEDERAL COMPLIANCE FUND

**MARINE MIDLAND 100 AND 100**

APPROVED BY [Signature]  
 TITLE [Title]  
 ADDRESS [Address]

⑆⑆⑆⑆⑆⑆⑆⑆ ⑆071001088⑆ ⑆01-90067-6⑆ ⑆000001000⑆

**MARINE MIDLAND PAYMENT SERVICES, INC.**  
 # 80155653

DATE OF THIS Jan 2, 1981

PAY TO THE ORDER OF DEBITS FOR FEDERAL COMPLIANCE FUND

**MARINE MIDLAND 100 AND 100**

APPROVED BY [Signature]  
 TITLE [Title]  
 ADDRESS [Address]

⑆⑆⑆⑆⑆⑆⑆⑆ ⑆071001088⑆ ⑆01-90067-6⑆ ⑆000001000⑆

**MARINE MIDLAND PAYMENT SERVICES, INC.**  
 # 80155653

DATE OF THIS Jan 2, 1981

PAY TO THE ORDER OF DEBITS FOR FEDERAL COMPLIANCE FUND

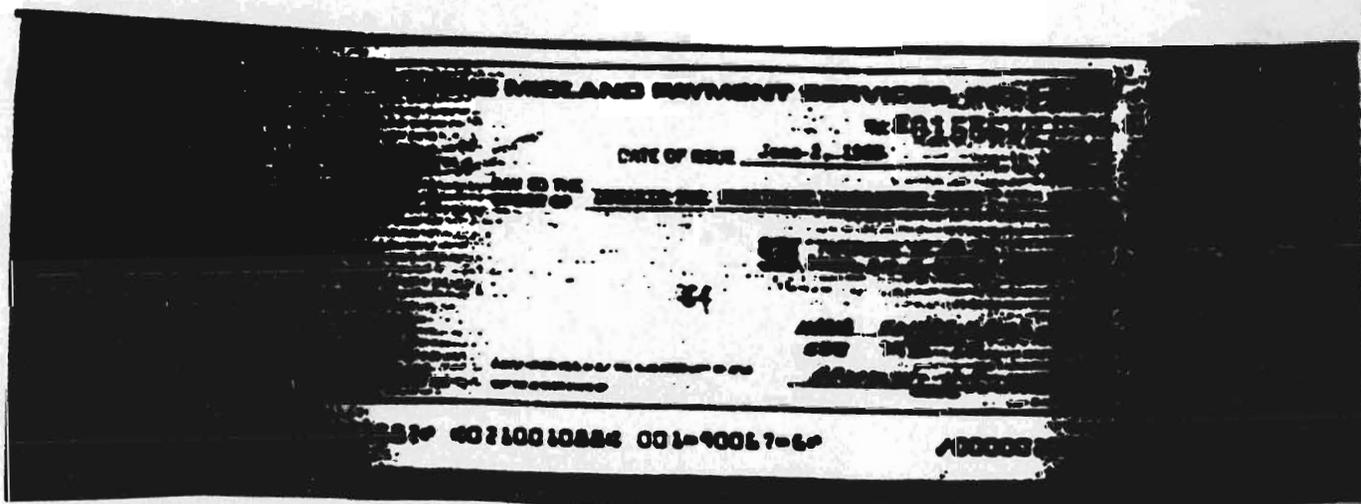
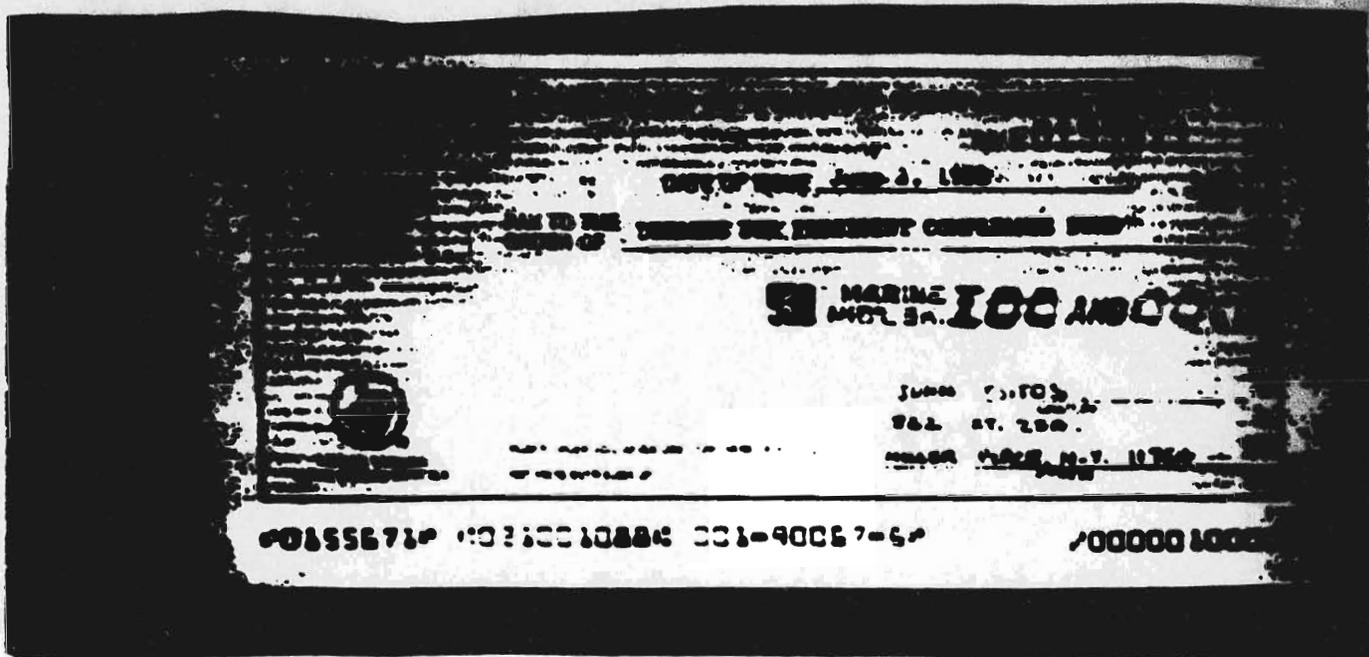
**MARINE MIDLAND 100 AND 100**

APPROVED BY [Signature]  
 TITLE [Title]  
 ADDRESS [Address]

⑆⑆⑆⑆⑆⑆⑆⑆ ⑆071001088⑆ ⑆01-90067-6⑆ ⑆000001000⑆



95043680392



95043680393

MARINE MIDLAND PAYMENT SERVICES, INC. No. 40155674

DATE OF ISSUE Aug - 10 - 88

PAY TO THE ORDER OF AMERICA'S AIR FORCE

**100 AND 00/100**

1000000000

40155674 40210010884 001-90067-64

MARINE MIDLAND PAYMENT SERVICES, INC. No. 40155675

DATE OF ISSUE Aug - 1 - 88

PAY TO THE ORDER OF AMERICA'S AIR FORCE

**100 AND 00/100**

1000000000

40155675 40210010884 001-90067-64

MARINE MIDLAND PAYMENT SERVICES, INC. No. 40155676

DATE OF ISSUE Aug - 1 - 88

PAY TO THE ORDER OF AMERICA'S AIR FORCE

**100 AND 00/100**

1000000000

40155676 40210010884 001-90067-64

MARINE MIDLAND PAYMENT SERVICES, INC. No. 40155677

DATE OF ISSUE Aug - 11 - 88

PAY TO THE ORDER OF AMERICA'S AIR FORCE

**100 AND 00/100**

1000000000

40155677 40210010884 001-90067-64

95043680394

MARINE MIDLAND PAYMENT SERVICES, INC. FROM

• E0155678

PERSONAL CHECK

DATE OF CHECK

PAID TO THE ORDER OF

MARINE MIDLAND PAYMENT SERVICES, INC.

10000010000

MARINE MIDLAND PAYMENT SERVICES, INC. FROM

• E0155679

PERSONAL CHECK

DATE OF CHECK

PAID TO THE ORDER OF

MARINE MIDLAND PAYMENT SERVICES, INC.

10000010000

MARINE MIDLAND PAYMENT SERVICES, INC. FROM

• E0155680

PERSONAL CHECK

DATE OF CHECK

PAID TO THE ORDER OF

MARINE MIDLAND PAYMENT SERVICES, INC.

10000010000

95043680375

MARINE MIDLAND PAYMENT SERVICES, INC. **FRONT**  
 # 40155884  
 PERSONAL MONEY ORDER  
 DATE: JUN 2, 1960  
 PAY TO THE ORDER OF: [REDACTED]  
 \$500  
 MARINE MIDLAND PAYMENT SERVICES, INC.  
 10000050000

MARINE MIDLAND PAYMENT SERVICES, INC. **FRONT**  
 # 40155885  
 PERSONAL MONEY ORDER  
 DATE: JUN 2, 1960  
 PAY TO THE ORDER OF: [REDACTED]  
 \$500 AND 100/100  
 MARINE MIDLAND PAYMENT SERVICES, INC.  
 10000050000

MARINE MIDLAND PAYMENT SERVICES, INC. **FRONT**  
 # 40155886  
 PERSONAL MONEY ORDER  
 DATE: JUN 2, 1960  
 PAY TO THE ORDER OF: [REDACTED]  
 \$500  
 MARINE MIDLAND PAYMENT SERVICES, INC.  
 10000050000

MARINE MIDLAND PAYMENT SERVICES, INC. **FRONT**  
 # 40155887  
 PERSONAL MONEY ORDER  
 DATE: JUN 2, 1960  
 PAY TO THE ORDER OF: [REDACTED]  
 \$500 AND 100/100  
 MARINE MIDLAND PAYMENT SERVICES, INC.  
 10000050000

C. Statement of Net Outstanding Campaign Obligations  
and Repayment of Surplus Funds

Section 9034.5(a) of Title 11 of the Code of Federal Regulations states, in part, that within 15 calendar days after the candidate's date of ineligibility, as determined under 11 CFR 9033.5, the candidate shall submit a statement of net outstanding campaign obligations (NOCO).

The NOCO statement shall contain, in addition to other items, cash on hand as of the close of business on the last day of eligibility (including all contributions dated on or before that date whether or not submitted for matching).

Section 9038.3(c)(1) of Title 11 of the Code of Federal Regulations requires a candidate whose net outstanding campaign obligations reflect a surplus on the date of ineligibility to repay to the Secretary, within 30 calendar days of the ineligibility date, an amount which represents the amount of matching funds contained in the surplus. The amount shall be an amount equal to that portion of the surplus which has the same ratio to the total surplus that the total amount received by the candidate from the matching payment account bears to the total deposits made to the candidate's account.

Section 9038(b)(3) of Title 26 of the United States Code states that amounts received by a candidate from the matching payment account may be retained for the liquidation of all obligations to pay qualified campaign expenses incurred for a period not exceeding 6 months after the end of the matching

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\*/ This amount is subject to change based on the review of records received in response to Findings II.B.3. and II.C.1.

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payment period. After all obligations have been liquidated, the portion of any unexpended balance remaining in the candidate's accounts which bears the same ratio to the total unexpended balance as the total amount received from the matching payment account bears to the total of all deposits made into the candidate's accounts, shall be promptly repaid to the matching payment account.

On August 5, 1988, the candidate submitted a NOCO statement which indicated that the Committee was in a deficit position at July 20, 1988, Governor Dukakis' date of ineligibility. During audit fieldwork conducted in 1989, the Audit staff reviewed the components of the NOCO statement and reached agreement with Committee officials on all of the components except the cash on hand total as discussed below.

#### Joint Escrow Account

Section 110.1(b)(2)(ii) of Title 11 of the Code of Federal Regulations states that in the case of a contribution not designated in writing by the contributor for a particular election, the contribution shall be considered made with respect to the next election after the contribution is made.

The Committee opened a checking account entitled "joint escrow account" on June 10, 1988. A review of the joint escrow account revealed that \$896,627.90 of the \$1,447,750.42 deposited into the account represented contributions dated on or before July 20, 1988.\*/ It is the opinion of the Audit staff that these contributions represent contributions to Governor Dukakis' primary campaign and should be included in the cash on hand total at July 20, 1988, which would result in the campaign being in a surplus position on that date.

The Committee disagreed with the Audit staff's position and provided a letter outlining their position. In the letter the Committee contends that it halted its primary election fundraising efforts in June 1988, because it was likely to raise more than it could legally spend and it was evident that after the California primary (June 7, 1988), Governor Dukakis was assured of the Democratic Party presidential nomination. The letter further states that "since both of these facts were generally known, the Committee believed that there was a strong likelihood that subsequent contributions received were, in fact, intended by the contributors to be designated for the benefit of Mike Dukakis' general election campaign, or the Dukakis General Election Legal

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\*/ Of the \$896,627.90, checks representing approximately 61%, or \$551,241.35, were dated prior to June 1, 1988.

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and Compliance (GELAC) Fund."\*/ The letter continues "The Committee believes that it has, without the guidance of Regulations, acted prudently and reasonably to confirm what it reasonably believed to be the intentions of the post primary election donors whose contributions could "influence" only the general election." The Committee refers to MUR 2154 and states that the inferred intent of the contributors was ultimately confirmed in writing.

Regarding the Committee's statement that it halted its primary fundraising in June of 1988, the evidence appears to refute that contention. During the period June 10, 1988 through July 20, 1988, approximately 1.1 million was received by the Committee and deposited to the joint escrow account. Of this amount, only \$27,735.00 could be associated with a solicitation to the GELAC.\*\*/ The Committee's argument that it acted prudently without guidance of regulations is also without merit. The regulations are clear in this instance and relate specifically to the issue at hand. Under 11 C.F.R. §110.1(b)(2)(ii), a contribution received by the Committee which is not designated in writing for a particular election shall be considered made with respect to the next election; in this case, the nomination of Governor Dukakis at the Democratic National Convention, which marks the end of the primary election.

Regarding the reference to MUR 2154, in that case, the question was whether excessive primary contributions were redesignated to a committee's general election compliance fund within a reasonable amount of time. The regulations at 11 C.F.R. §110.1(b)(3), which were not in effect at the time MUR 2154 was opened, offer specific guidance for redesignating excessive contributions to another election. In the case at hand, we are not dealing with excessive contributions but rather contributions received which were within the individual's \$1,000 contribution limitation. Therefore, the facts in MUR 2154 are not analogous to the present situation.

It should also be noted that in May 1988, a member of the Committee's legal staff contacted a Commission Audit staff member to inquire whether the operation of the joint escrow account was acceptable. Upon reviewing these facts, the Committee was notified that it was the position of the Audit Division that the contributions represented contributions to the primary campaign and would be considered a part of the surplus at the date of ineligibility.

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\*/ The apparent inference drawn by the Committee relative to the contributions at issue is, in the opinion of the Audit staff, without merit.

\*\*/ In calculating the total representing primary contributions, the Audit staff did not include checks made payable to the GELAC, checks accompanied by a GELAC solicitation, or contributions which would have been excessive during the primary.

Based on the facts noted above, it is apparent that upon becoming aware that the Committee would most likely have a surplus at the date of ineligibility, the Committee attempted to eliminate the surplus by virtue of transmittals via the joint escrow account to the GELAC. The Audit staff has included as cash on hand on the date of ineligibility all contributions dated on or before July 20, 1988, which were deposited into the joint escrow account, except those designated for the GELAC.

The Commissioners discussed the activity related to the joint escrow account and resultant repayment implications in meeting on January 23, 1990, and adopted the approach taken in Recommendation #8. The following is a quote of a statement made by one of the Commissioners prior to the Commission reaching its decision regarding Recommendation #8.

9 5 0 4 3 6 8 0 3 9 9

"The Commission's regulations do not address this issue. The regulations do sanction the redesignation of excessive contributions to the legal and accounting compliance fund (11 C.F.R. §9003.3(a)(1)(iii)) and the redesignation of contributions made after the beginning of the general election expenditure report period but designated for the primary ("post-primary designated contributions") (id.). The latter provision is somewhat analogous to the situation at hand because it permits the redesignation of otherwise permissible primary contributions. On its face, the regulation would seem to allow the redesignation of post-primary designated contributions even if the primary would have a debt afterward. However, it would be inconsistent with the Commission's congressional mandate to allow a committee to, in essence, create debt that would lead to entitlement for post ineligibility matching funds. In other words, a committee should not be able to claim a net debt, and hence entitlement to post ineligibility matching funds, if it dissipated its permissible primary contributions to do so. Taken to its extreme, a committee could redesignate all of its unmatched contributions (The redesignation of matched contributions would result in other problems, such as loss of entitlement) and unnecessarily create a huge deficit with a resulting claim for matching funds.

"The current language of §9003.3(a)(1)(iii) pertaining to redesignation of post-primary designated contributions, effective April 8, 1987, evolved from a somewhat similar provision in the previous version of 11 C.F.R. §9003.3. However, the prior version made clear that such redesignations were permissible only if the primary committee retained sufficient funds to pay its remaining debts."

"Contributions which are made after the beginning of the expenditure report period but which are designated for the primary election may be deposited in the legal and accounting compliance fund; Provided, that the candidate already has sufficient funds to pay any outstanding campaign obligations incurred during the primary campaign....[11 C.F.R. §9003.3(a)(1)(iii) (effective July 11, 1983).]"

"Though the current language did not retain this protective phrasing, there appears to have been no intent to alter the prior approach. See 52 Fed. Reg. 20865, 20866 (June 3, 1987). Indeed, as noted, it would be contrary to public policy to allow the creation of debt and the consequent entitlement to post ineligibility matching funds. Accordingly, the Committee should be permitted to redesignate and transfer-out to the GELAC only so much of the contributions as would not leave the Committee in a net debt position (\$686,282.26 worth). The remaining amount in question, \$210,345.64 (\$896,627.90 - \$686,282.26), cannot be redesignated and transferred-out, must be repaid by GELAC, and must therefore be included in Committee's cash on hand figure."

"Because the Committee did not keep records sufficient to enable the auditors to determine whether the redesignations in question took place within 60 days as the regulations at 11 C.F.R. §110.1(b)(5) would require, and because the 60 day time period has been incorporated for other redesignation situations under §9003.3(a)(1)(iii), the Committee still has the burden of demonstrating that the contributions it wishes to treat as redesignated were processed within the 60 day time frame. For now, the Commission should treat the full \$896,627.90 as primary contributions and hence as part of the cash on hand totals."

The Commission further determined that redesignations of contributions would be considered timely received if it can be demonstrated that a written redesignation was received no later than 60 days from the date on the contributor's check.

Absent such evidence, the contributions in question will remain as part of cash on hand for NOCO purposes.

As noted on the NOCO statement contained in the interim audit report, the Committee was in a surplus position on Governor Dukakis' date of ineligibility. Application of the repayment ratio contained at 11 C.F.R. §9038.3(c)(1) to the then calculated surplus equates to a repayment figure of \$204,288.50. It was also noted that any adjustments to the NOCO statement due to a change in winding down costs, etc., may result in a change in

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this figure. In addition, after receipt of the Committee's response concerning other issues in the report, a revised NOCO statement, including a change in the surplus repayment, if warranted, would be included in the final audit report.

In the interim audit report, the Audit Staff recommended that within 30 calendar days of service of the report the Committee should provide evidence that the contribution checks dated prior to July 21, 1988, included in Audit's cash-on-hand for NOCO purposes, were redesignated to the GELAC within 60 days of receipt. In making the decision the Committee should consider the date on the contribution check as the receipt date and provide the Audit Staff with evidence as to the date of receipt of the contributor's redesignation.

In response to the interim audit report, the Committee stated that it was not the practice of the Committee to date stamp correspondence when received. An affidavit of the former Compliance Fund Director explains that contributions were not transferred from the joint escrow account until a contributor form redesignating the contributions was received. It should be noted that in a few instances, the Audit staff identified contributions transferred from the joint escrow account to the Compliance Fund without a letter authorizing the redesignation.

It is the opinion of the Audit Staff that the Committee's response does not contain sufficient competent evidentiary material to establish the date of receipt of the contributor's redesignation. The Audit Staff cannot accept, as evidence of the date of receipt of a redesignation letter, the statement of one individual that transfers were not made until a redesignation letter was received.

The Committee also argues that the time period in which action must be taken on the contributions is more appropriately 80 days rather than the 60 days allowed in the interim report. The Committee cites 11 C.F.R. §§102.8(a) and 103.3(a), which provide 10 days for persons receiving contributions to forward them to the treasurer and a second 10 day period from the date of the treasurer's receipt to deposit of contribution. The Committee proposes to add this 20 day period onto the 60 day period provided in the interim audit report. The Committee also continues to argue that the contributions were properly reattributed, however, if the Commission accepts the 80 day time period, the Committee will accept the Commission's determination in this matter. It is the opinion of the Audit Staff that since the Committee has not provided sufficient competent evidentiary material to establish the date of receipt of the contributors' redesignation letters, the Committee has not provided evidence that the redesignation letters were received within 60 or even 80 days from the date of the check.

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The Committee did provide evidence that two contributions from two contributors totalling \$2,000 were documented as Compliance Fund contributions and should not be included in cash on hand at July 20, 1988. The Audit staff has adjusted the NOCO statement accordingly. The Committee's NOCO statement, as amended by the Audit staff, appears below.

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FEDERAL ELECTION COMMISSION  
999 E Street, N.W.  
Washington, D.C. 20463

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FIRST GENERAL COUNSEL'S REPORT

**SENSITIVE**

MUR #3449

STAFF MEMBER: Dawn Odrowski

SOURCE: Internally Generated

RESPONDENTS: Dukakis/Bentsen Committee, Inc., and  
Dukakis/Bentsen General Election Legal and  
Accounting Compliance Fund and  
Edward Pliner, as treasurer of both;<sup>1</sup>  
Fried, Frank, Harris, Shriver and Jacobson

RELEVANT STATUTES: 2 U.S.C. § 434(b)(4)  
2 U.S.C. § 434(b)(5)(A)  
2 U.S.C. § 441a(a)(1)(A)  
2 U.S.C. § 441a(f)  
2 U.S.C. § 441b(a)  
2 U.S.C. § 431(8)(A)(i) and(ii)  
2 U.S.C. § 431(8)(B)(i) and (ix)  
2 U.S.C. § 441f  
26 U.S.C. § 9003(b)  
11 C.F.R. § 100.2(a) and (b)  
11 C.F.R. § 100.7(b)(3) and (14)  
11 C.F.R. § 9003.3(a)(1)(i)  
11 C.F.R. § 9003.3(a)(2)

INTERNAL REPORTS CHECKED: Audit documents

FEDERAL AGENCIES CHECKED: None

I. GENERATION OF MATTER

This matter was generated by an audit of the Dukakis/Bentsen Committee, Inc. ("the Committee") and the Dukakis/Bentsen General Election Legal and Accounting Compliance Fund ("GELAC") pursuant to 26 U.S.C. § 9007(a). See also 26 U.S.C. § 9009(b). The Commission voted to refer certain issues arising from the Final Audit to the Office of the General Counsel for enforcement.

1. Robert A. Farmer was the treasurer at the time the events at issue occurred.

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Attachment 1.<sup>2</sup>

II. FACTUAL AND LEGAL ANALYSIS<sup>3</sup>

A. Unreported Draft Account Activity

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The Federal Election Campaign Act of 1971, as amended ("the Act") requires each report filed by a political committee to disclose for the reporting period and the calendar year, the total amount of all disbursements and all disbursements made for specific categories, including operating expenditures. 2 U.S.C. § 434(b)(4). Moreover, each report must disclose the name and address of each person to whom a committee makes an expenditure in an aggregate amount or value in excess of \$200 within the calendar year to meet a candidate or committee operating expense, together with the date, amount, and purpose of such expenditure. 2 U.S.C. § 434(b)(5)(A). During the 1988 election cycle, the Committee maintained a draft account used primarily by state campaign offices to pay expenses. The Audit staff's review of this account disclosed that drafts totaling \$3,153,346.34, which cleared the account during November and December, 1988, were not included in the Committee's disclosure reports for the relevant period. The Committee filed amended reports disclosing the draft activity on April 5, 1989.

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2. The referral originally included an Exhibit C which concluded that the Committee had exceeded the expenditure limitation applicable to candidates receiving public financing. The Commission determined in the Final Audit Report that the Committee did not exceed the expenditure limitation so that issue is not addressed here.

3. All citations are to statutes and regulations which were in effect in 1988.

The Committee's response to the Interim Audit Report stated that the November and December reports contained incomplete information because it had insufficient staff to timely process documentation relevant to the large volume of drafts, particularly given the reporting detail required and the difficulty it encountered contacting former campaign staffers for necessary information. The Committee also pointed out it had "attempted" to report the activity on its January and February 1989 reports.<sup>4</sup> Committee's January 4, 1991 Response to the Interim Audit ("Interim Audit Response") at 11.

Although the Committee remedied this reporting violation, its correction was untimely and the violation involved a significant amount of draft activity. Only 42% of the Committee's operating expenditure disbursements for the relevant period were timely reported. Therefore, this Office recommends that the Commission find reason to believe that the Dukakis/Bentsen Committee, Inc., and Edward Pliner, as treasurer, violated 2 U.S.C. § 434(b)(4).

B. Electoral College Memo -- Legal Services and Related Expenses

1. Excessive In-Kind Contribution/Violation of Public Funding Agreement -- Legal Services

a. Law

Under the Act, no person shall make contributions to any candidate and his or her authorized committees with respect to any election for Federal office which exceed \$1,000 in the aggregate.

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4. By this, the Committee apparently means it disclosed some, but not all, of the unreported draft activity in these 1989 reports before disclosing all the unreported activity in the April, 1989, amendments to its 1988 reports.

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2 U.S.C. § 441a(a)(1)(A). The term "person" includes a partnership. 2 U.S.C. § 431(11). Similarly, no candidate or political committee shall knowingly accept any contribution in violation of the provisions of Section 441a. 2 U.S.C. § 441a(f). The Act also prohibits the making and receipt of corporate contributions in connection with Federal elections. 2 U.S.C. § 441b(a).

A contribution by a partnership shall be attributed to the partnership and to each partner either in direct proportion to his or her share of the partnership or by agreement of the partners under certain conditions. 11 C.F.R. § 110.1(e). A contribution by a partnership shall not exceed the contribution limitations of the Act and accompanying regulations. Id. No portion of such contribution may be made from the profits of a corporation that is a partner. Id.

Under the statutes, the term "contribution" is broadly defined to include any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office. 2 U.S.C. § 431(8)(A)(i). A contribution also includes the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose. 2 U.S.C. § 431(8)(A)(ii). However, legal or accounting services rendered to or on behalf of an authorized committee or a candidate are specifically excluded from the definition of contribution if the person paying for such services is the regular employer of the individual rendering such services

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and if such services are solely for the purpose of ensuring compliance with the Act or with the public financing provisions (chapter 95 or 96 of Title 26). See 2 U.S.C. § 431(8)(B)(ix). The value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee is also excluded from the definition of contribution under 2 U.S.C. § 431(8)(B)(i) and 11 C.F.R. § 100.7(b)(3).

Under the Presidential Election Campaign Fund Act (the "Fund Act"), candidates for President and Vice President must agree as part of their eligibility requirements for public financing, that neither they nor their authorized committees will accept contributions to defray qualified campaign expenditures. 26 U.S.C. § 9003(b)(2).

b. Facts

In September 1988, the New York law firm of Fried, Frank, Harris, Shriver & Jacobson, a partnership including professional corporations ("the firm"), agreed to update a 1980 memorandum it had written concerning the electoral college and to provide it to the Committee without charge. In a September 14, 1988, letter notifying the Committee that the firm would do the work, a firm partner ("the partner") expressed his opinion that the legal services would not constitute contributions because they did not relate to a general election "as defined." Attachment 2 at 2. The partner also explained the firm's pro bono policy required that it bill and collect monthly out-of-pocket expenses made in connection with the free legal services the firm provided, including disbursements made for duplicating, phone calls,

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computer time, and messenger and data research services. Id.

The firm sent the Committee an updated electoral college memorandum ("the memo") on or about October 27, 1988.

Attachment 3. Subsequently, in an April 25, 1989 response to a Committee inquiry about invoices it had received, the firm noted it had incurred \$76,905.50 in professional service fees preparing the memo for which it had not billed the Committee. Attachment 2 at 5. These charges consisted of time spent preparing the memo by the partner, associates, paralegals and summer associates, apparently billed at varying hourly rates. Id. at 8-9. In addition, the firm noted the Committee owed \$17,942.41 in actual expenses incurred in connection with the memo. Id. at 7.

The Committee reimbursed the firm \$17,942.41 for the memo expenses on June 9, 1989, and reported this disbursement in its 1989 July Monthly report as a compliance expense.<sup>5</sup> Attachment 2 at 11-13. No payments were made for the \$76,905.50 in legal services provided.

c. Audit Determination and Committee's Response

Audit determined that the legal services the firm provided to the Committee without charge constituted an excessive in-kind contribution totaling at least \$65,888 and included this amount in its calculation of the Committee's operating expenditures subject

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5. In response to the Interim Audit, the Committee contended it had erroneously paid the memo expenses and on January 15, 1991, GELAC reimbursed the Committee for the expenses. This "reimbursement" is discussed further at Section II.B.2.b.

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to the expenditure limitation of 2 U.S.C. § 441a(b).<sup>6</sup> See Final Audit Report on Dukakis/Bentsen Committee, Inc., and the Dukakis/Bentsen GELAC ("Final Audit Report") at 10. Audit also determined that the \$17,942.41 in memo-related expenses were qualified campaign expenses also subject to the Committee's expenditure limitation. Id.

The Committee presented essentially two arguments supporting their contention that the value of legal services provided in connection with the memo update was not an in-kind contribution. First, during the audit, the Committee orally argued that the firm's work was exempt volunteer activity pursuant to 11 C.F.R. § 100.7(b)(3). Attachment 1 at 3; see also Attachment 2 at 14. To support this position, the Committee referenced a November 1, 1989 letter it sought from the firm stating that lawyers who work on the firm's pro bono matters do so voluntarily, but receive their ordinary compensation while doing so.<sup>7</sup> Attachment 2 at 14-15; see also Interim Audit Response at 9. Second, in its written response to the Interim Audit Report, the Committee contended that the legal services were not contributions because the memo dealt solely with issues relating to the electoral

6. In-kind contributions are reported as both contributions and expenditures. See 11 C.F.R. § 104.13.

7. The firm also stated in this letter that it relied upon 11 C.F.R. § 100.7(b)(13) when it agreed to update the memo. That regulation exempts from the definition of contribution certain legal services provided to any political committee of a political party which are not attributable to activities that directly further the election of a candidate for federal office. Since the Committee is an authorized committee of a candidate and not a political party committee, that regulation is inapplicable here.

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college election. According to the Committee, an electoral college election is not an "election" as defined at 11 C.F.R. § 100.2. As part of this argument, the Committee also seems to maintain that legal work related to the 1988 electoral college election did not influence the 1988 general election since that election was not "a matter for the Electoral College to decide." See Interim Audit Response at 9.

d. Legal Analysis

The legal services provided to update the electoral college memo appear to constitute an excessive in-kind contribution to the Committee because they were made for the purpose of influencing a federal election and do not fall within any relevant statutory exemptions. Additionally, because the firm is a partnership that includes professional corporations, a portion of the in-kind contribution may constitute a prohibited contribution.

The correspondence and memo provided in response to the Interim Audit Report show that the firm's legal work indeed concerned the Electoral College. Attachment 3. The memo outlined the general requirements and procedures by which electors are appointed and discharge their duties. It also pointed out possible irregularities with a view toward preventing any "mishaps" in the electoral college process which might have defeated the Dukakis/Bentsen ticket. The cover letter enclosing the memo described the work as "a summary of actions to be taken in preparation for the selection and voting of the Electoral College." Attachment 3 at 1. A comprehensive summary of state laws relating to selection of electors and procedures governing

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each state's electoral college election was included with the memo. See sample summary contained in Attachment 3 at 12-13.

Contrary to the Committee's contention, the firm's electoral college research was undertaken for the purpose of influencing an election to federal office since the Electoral College is an essential part of any general presidential election. Electoral College votes are acquired by a candidate based upon the general election results and a candidate must prevail in Electoral College votes to become President regardless of the popular vote. See U.S. Const. art. II, §1 and amend. XII. Indeed, the Presidential Campaign Fund Act defines "presidential election" as "the election of presidential and vice-presidential electors." The Committee acknowledged the integral nature and importance of the electoral college process to the popular election when it requested the firm to update the memo to use "as our primary resource when the campaign develops our strategy to deal with the possibility of a 'faithless elector' situation." Attachment 2 at 1.

The Committee's reliance on 11 C.F.R. § 100.2 generally, and Section 100.2(b), specifically, to assert that no contribution resulted because the electoral college is not an election is misplaced. The definition of "election" as used in the Act and regulations is broadly defined at 11 C.F.R. § 100.2(a) as the "process by which individuals . . . seek nomination for election or election to Federal office (emphasis added)." As noted earlier, the electoral college is part of the process by which an individual seeks election to the Office of President.

Since the firm's memo-related legal services were provided to

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influence a federal election, one of the statutory exemptions would have to apply to prevent a contribution from resulting. None of the exemptions appears to apply here. The legal services provided were not exempt under 2 U.S.C. § 431(8)(B)(ix) (or 11 C.F.R. § 100.7(b)(14)) since the nature of the legal work performed was unrelated to ensuring compliance with the Act or public financing provisions. Rather, the memo served a strategic purpose -- to point out possible problems in the electoral college process so the Committee could prevent or correct them to ensure the ticket's victory. Additionally, the comprehensive state law summary provided the Committee with a ready legal reference tool in case such problems arose.

Similarly, the legal services cannot be considered exempt volunteer activity pursuant to 2 U.S.C. § 431(8)(B)(i) (or 11 C.F.R. § 100.7(b)(3)). Although the firm stated in a letter to the Committee that its lawyers work on pro bono matters voluntarily, it also admitted that they are paid their ordinary compensation while doing so.<sup>8</sup> Attachment 2 at 15. Since lawyers and other salaried staff who worked on the memo apparently received their regular compensation while doing the work, their services fall outside the volunteer activity exemption which only excludes from the "contribution" definition, "the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee. . . ." 2 U.S.C. § 431(8)(B)(i); see also AO 1982-4. By contrast, the

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8. The firm's response regarding its pro bono policy addressed only lawyers.

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services attributable to the firm partner may have been permissible if his compensation was tied to his proprietary interest in the firm. See AOs 1979-58 and 1980-107 (concluding that compensation paid by a law firm to a partner volunteering services to a political committee was not a contribution where the compensation was tied to partner's proprietary interest in the firm and not to the number of hours worked) and cf. AO 1980-115 (concluding firm contribution may result if compensation paid to candidate-partner is not reduced to reflect lower number of hours worked since compensation is partially based on client billable hours). Audit valued the firm's in-kind contribution at \$65,888 -- the total cost for each hour firm employees worked on the memo as reflected in the firm's billing statement. Attachment 2 at 8-9. The cost of the partner's time, \$11,017.50, was excluded (\$76,905.50 - \$11,017.50 = \$65,888).

Because the law firm is a partnership that includes professional corporations, a portion of the firm's in-kind contribution may be attributable to a corporate partner resulting in a prohibited contribution. Additionally, the in-kind contribution was accepted by the Committee to defray qualified campaign expenses for the general election in violation of 26 U.S.C. § 9003(b).

Therefore, this Office recommends that the Commission find reason to believe that (1) the Dukakis/Bentsen Committee, Inc., and Edward Pliner, as treasurer, violated 2 U.S.C. §§ 441a(f) and 441b(a) for accepting an excessive in-kind contribution from the firm, a partnership including professional

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corporations, and (2) Fried, Frank, Harris, Shriver and Jacobson violated 2 U.S.C. §§ 441a(a)(1)(A) and 441b(a) for making such contribution.<sup>9</sup> Moreover, this Office recommends that the Commission find reason to believe that the Dukakis/Bentsen Committee, Inc., and Edward Pliner, as treasurer, violated 26 U.S.C. § 9003(b).

2. Improper Use of Compliance Funds -- Memo Expenses

a. Law

Commission regulations permit a major party candidate for president to accept private contributions to a legal and accounting compliance fund in addition to any public financing received. 11 C.F.R. § 9003.3(a)(1)(i).

Compliance fund contributions shall be used only: (1) to defray legal and accounting costs provided solely to ensure compliance with the Act and Title 26; to defray overhead costs related to ensuring compliance; to defray any civil and criminal penalties imposed under the Act; to make repayments to the Presidential Election Campaign Fund; to defray the cost of soliciting contributions to the compliance fund; and to make a loan to an account established pursuant to 11 C.F.R. § 9003.4 to defray qualified campaign expenses incurred prior to the expenditure report period or prior to receipt of federal funds provided loans are restored to the compliance funds. 11 C.F.R. § 9003.3(a)(2)(i).

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9. This Office makes no recommendation at this time with regard to possible excessive contributions by individual partners pending responses to discovery requests.

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b. Analysis

As noted earlier, Audit determined that the \$17,942.41 in memo-related expenses were qualified campaign expenses subject to the Committee's expenditure limitations and were not related to compliance with the Act. Final Audit Report at 10 and Attachment 1 at 5. The Committee paid the firm for these expenses on June 9, 1989 and reported the \$17,942.41 disbursement in its 1989 July Monthly report as a compliance expense. Later, in response to the Interim Audit, the Committee contended that it had erroneously paid the expenses since the legal work associated with the memo "did not influence the general election." Interim Audit Response at 14. The Committee further stated that in May 1989 its legal counsel had instructed GELAC to pay the memo expenses. Id. and Attachment 2 at 5.<sup>10</sup> Consequently, on January 15, 1991, GELAC reimbursed the Committee for the full amount of the memo expenses.

The Committee's position lacks clarity. By saying that GELAC originally should have paid for the expenses, the Committee is treating the expenses as having been compliance-related. The Committee also states, however, that the memo was "unrelated to the general election." If this were so, the memo expenses could not be considered compliance-related. The Committee also cites to 11 C.F.R. § 9003.3(a)(2)(iv) in support of GELAC's payment of the expenses. That regulation permits any excess campaign funds remaining after payment of all general election expenses to be

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10. Committee counsel's instructions on the first invoice for a portion of the memo expenses, however, directed Committee staff on October 28, 1988, to "pay and charge general election." See Attachment 2 at 11.

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used to retire primary debts or for "any purpose permitted under 2 U.S.C. § 439a and 11 C.F.R. Part 113."<sup>11</sup>

Whatever the Committee's position, the use of GELAC funds to pay for the memo expenses was improper. As previously discussed, the memo was not related to the Committee's compliance with the Act; rather it discussed strategy and outlined procedures for the electoral college. Moreover, the use of GELAC funds to reimburse the Committee for the memo expenses does not appear to fall within any of the permissible uses enumerated at 11 C.F.R.

§ 9003.3(a)(2). Since the memo expenses at issue here are general election-related expenses, 11 C.F.R. § 9003.3(a)(2)(iv) is simply inapplicable. Therefore, this Office recommends that the Commission find reason to believe that Dukakis/Bentsen Committee, Inc. (Dukakis/Bentsen General Election Legal and Accounting Compliance Fund), and Edward Pliner, as treasurer, violated 11 C.F.R. § 9003.3(a)(2) by using compliance funds to defray non-compliance related general election expenses.

C. Sequentially-Numbered Money Orders

Under the Act, it is unlawful for a person to make a contribution in the name of another person or to knowingly permit his or her name to be used to effect such a contribution.

2 U.S.C. § 441f. Similarly, it is unlawful for a person to

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11. Those provisions prohibit excess campaign funds to be converted to personal use, but permit such funds to be used to defray expenses incurred in connection with an individual's duties as a federal officeholder, to be donated to charity or to be "used for any other lawful purpose." The Committee apparently relies on the "lawful purpose" language here. See Interim Audit Response at 14, footnote 3.

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knowingly accept a contribution made by one person in the name of another person. Id.

Upon examining documents made available by GELAC only after completion of audit fieldwork, the Audit staff found that GELAC received a total of \$15,360 in contributions in the form of three sets of sequentially numbered money orders. Attachment 1 at 6 and 10. The majority of the money orders, 114 totaling \$14,600, were drawn on an account at Marine Midland Payment Services, Inc., ("Marine Midland") and are dated between May 31, 1988, to June 15, 1988. Attachment 1 at 6, 16-52. Seven \$100 money orders were drawn from the Bank of Smithtown, ("Smithtown") all dated June 1, 1988. Attachment 1 at 7, 13-15. The five remaining money orders, totaling \$60, were drawn from the North Community Bank of Chicago, Illinois ("NCB"). Attachment 1 at 7, 11-12.

The Audit staff points out that in addition to the sequential ordering and dating patterns, each of the three groups of money orders evidence similarities which suggest that an individual other than the purchasers filled them out. The Smithtown money orders are each made payable to "Dukakis for President Compliance Fund" in handwriting that appears to be the same for each order. Similarly, the NCB money orders are all undated, payable to "Dukakis Compliance Fund" and the payable line and purchaser's name and address also appear to be written in the same upper and lower case printing. Such similarities also exist for the 114 Marine Midland money orders. Each of these money orders bears the name of individuals residing in the New York area and all but 15 are in amounts of \$100 or less. The Audit staff states that the

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Marine Midland money orders fall into five distinct subgroups of sequentially numbered money orders. Within these subgroups, each money order is sequentially-numbered, bears the same date or group of dates, and appears to have been filled out by the same person. Audit also notes that 49 money orders appear to have had the words "compliance fund" added. See Attachment 4 (chart describing the particular patterns noted in each of the subgroups).

The sequential numbering, uniform handwriting and typing and consistent dates within each set of money orders raise a question as to the actual source of the funds used to purchase these money orders. See MUR 3089 (Commission found reason to believe that a violation of 2 U.S.C. § 441f occurred with regard to sequential money orders from Banco de Santander, P.R. and Marine Midland Bank payable to "Dukakis for President" either uniformly typed in the same type-face or evidencing handwriting similarities) and MUR 2717 (Commission found reason to believe that a violation of 2 U.S.C. § 441f occurred with regard to sequential money orders from Bay Ridge Federal Savings payable to "Haig for President" written for the same amount, dated the same day, and evidencing handwriting similarities on the payee and signature of drawer lines).<sup>12</sup> Based on the foregoing, therefore, this Office recommends that the Commission find reason to believe that the Dukakis/Bentsen Committee, Inc. (Dukakis/Bentsen General Election

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12. See also MUR 1353 (Commission found reason to believe that the Carter/Mondale Presidential Committee violated 2 U.S.C. § 441f by using cash contributions to purchase money orders under the contributor names of employees of a restaurant where a fundraiser was held).

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Legal and Accounting Compliance Fund), and Edward Pliner, as treasurer, violated 2 U.S.C. § 441f.<sup>13</sup>

**III. RECOMMENDATIONS**

1. Find reason to believe that the Dukakis/Bentsen Committee, Inc., and Edward Pliner, as treasurer, violated 2 U.S.C. §§ 434(b)(4), 441a(f) and 441b(a) and 26 U.S.C. § 9003(b).

2. Find reason to believe that Dukakis/Bentsen Committee, Inc. (Dukakis/Bentsen General Election Legal and Accounting Compliance Fund), and Edward Pliner, as treasurer, violated 2 U.S.C. § 441f and 11 C.F.R. § 9003.3(a)(2).

3. Find reason to believe that Fried, Frank, Harris, Shriver and Jacobson, a partnership including professional corporations, violated 2 U.S.C. §§ 441a(a)(1)(A) and 441b(a).

4. Approve the attached Factual and Legal Analyses.

5. Approve the appropriate letters.

Date

4/23/93

Lawrence M. Noble  
General Counsel

**Attachments**

1. Audit referral including sequential money orders
2. Correspondence relating to electoral college memo
3. Electoral college memo and cover letter
4. Description of Midland Marine sequentially-numbered money orders
5. Factual and Legal Analyses

<sup>13</sup>. Given the large number of money orders and their respective amounts, this Office makes no recommendation at this time regarding the individual contributors pending discovery responses from the Committee.

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FEDERAL ELECTION COMMISSION

WASHINGTON DC 20463

MEMORANDUM

TO: LAWRENCE M. NOBLE  
GENERAL COUNSEL

FROM: MARJORIE W. EMMONS/BONNIE J. ROSS  
COMMISSION SECRETARY

DATE: APRIL 29, 1993

SUBJECT: MUR 3449 - FIRST GENERAL COUNSEL'S REPORT  
DATED APRIL 23, 1993.

The above-captioned document was circulated to the Commission on Monday, April 26, 1993 at 11:00 a.m.

Objection(s) have been received from the Commissioner(s) as indicated by the name(s) checked below:

Commissioner Aikens	_____
Commissioner Elliott	XXX _____
Commissioner McDonald	_____
Commissioner McGarry	_____
Commissioner Potter	XXX _____
Commissioner Thomas	_____

This matter will be placed on the meeting agenda for Tuesday, May 4, 1993.

Please notify us who will represent your Division before the Commission on this matter.

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of )  
 ) MUR 3449  
Dukakis/Bentsen Committee, Inc., and )  
Dukakis/Bentsen General Election Legal )  
and Accounting Compliance Fund and )  
Edward Pliner, as treasurer of both; )  
Fried, Frank, Harris, Shriver and )  
Jacobson )

CERTIFICATION

I, Marjorie W. Emmons, recording secretary for the Federal Election Commission executive session on May 4, 1993, do hereby certify that the Commission decided by a vote of 4-2 to take the following actions in MUR 3449:

1. Find reason to believe that the Dukakis/Bentsen Committee, Inc. and Edward Pliner, as treasurer, violated 2 U.S.C. §§ 434(b)(4), 441a(f) and 441b(a) and 26 U.S.C. § 9003(b).
2. Find reason to believe that Dukakis/Bentsen Committee, Inc. (Dukakis/Bentsen General Election Legal and Accounting Compliance Fund), and Edward Pliner, as treasurer, violated 2 U.S.C. § 441f and 11 C.F.R. § 9003.3(a)(2).

(continued)

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3. Find reason to believe that Fried, Frank, Harris, Shriver and Jacobson, a partnership including professional corporations, violated 2 U.S.C. §§ 441a(a)(1)(A) and 441b(a).
4. Approve the Factual and Legal Analyses recommended in the General Counsel's report dated April 23, 1993.
5. Approve the appropriate letters as recommended in the General Counsel's report dated April 23, 1993.

Commissioners Aikens, McDonald, McGarry, and Thomas voted affirmatively for the decision; Commissioners Elliott and Potter dissented.

Attest:

5-4-93  
Date

Marjorie W. Emmons  
Marjorie W. Emmons  
Secretary of the Commission

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*File*



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

May 7, 1993

Mr. Edward Pliner, Treasurer  
Dukakis/Bentsen Committee, Inc.  
483 Washington St.  
Brookline, MA 02146

RE: MUR 3449  
Dukakis/Bentsen Committee, Inc.  
(Dukakis/Bentsen General  
Election Legal and Accounting  
Compliance Fund) and Edward  
Pliner, as treasurer

Dear Mr. Pliner:

On May 4, 1993, the Federal Election Commission found that there is reason to believe Dukakis/Bentsen Committee, Inc. and you, as treasurer, violated 2 U.S.C. §§ 2 U.S.C. § 434(b)(4), 441a(f) and 441b(a) and 26 U.S.C. § 9003(b), provisions of the Federal Election Campaign Act of 1971, as amended ("the Act"). The Commission also found reason to believe Dukakis/Bentsen Committee, Inc. (Dukakis/Bentsen General Election Legal and Accounting Compliance Fund) and you, as treasurer, violated 2 U.S.C. § 441f and 11 C.F.R. § 9003.3(a)(2). The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

Under the Act, you have an opportunity to demonstrate that no action should be taken against Dukakis/Bentsen Committee, Inc. (Dukakis/Bentsen General Election Legal and Accounting Compliance Fund) and you, as treasurer. You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of your receipt of this letter. Where appropriate, statements should be submitted under oath.

In the absence of any additional information demonstrating that no further action should be taken against Dukakis/Bentsen Committee, Inc. (Dukakis/Bentsen General Election Legal and Accounting Compliance Fund) and you, as treasurer, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the

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Mr. Edward R. Pliner, Treasurer  
Page 2

General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter. Further, the Commission will not entertain requests for pre-probable cause conciliation after briefs on probable cause have been mailed to the respondent.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

If you intend to be represented by counsel in this matter, please advise the Commission by completing the enclosed form stating the name, address, and telephone number of such counsel, and authorizing such counsel to receive any notifications and other communications from the Commission.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

For your information, we have enclosed a brief description of the Commission's procedures for handling possible violations of the Act. If you have any questions, please contact Dawn M. Odrowski, the attorney assigned to this matter, at (202) 219-3400.

Sincerely,



Scott E. Thomas  
Chairman

Enclosures  
Factual and Legal Analysis  
Procedures  
Designation of Counsel Form

cc: Michael Dukakis  
Lloyd Bentsen

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Dukakis/Bentsen Committee, Inc. MUR: 3449  
and Dukakis/Bentsen General  
Election Legal and Accounting  
Compliance Fund and Edward Pliner,  
as treasurer of both<sup>1</sup>

I. GENERATION OF MATTER

This matter was generated based on an audit of the Dukakis/Bentsen Committee, Inc. ("the Committee") and the Dukakis/Bentsen General Election Legal and Accounting Compliance Fund ("GELAC") pursuant to 26 U.S.C. § 9007(a). See also 26 U.S.C. § 9009(b).

II. FACTUAL AND LEGAL ANALYSIS<sup>2</sup>

A. Unreported Draft Account Activity

The Federal Election Campaign Act of 1971, as amended ("the Act") requires each report filed by a political committee to disclose for the reporting period and the calendar year, the total amount of all disbursements and all disbursements made for specific categories, including operating expenditures.

2 U.S.C. § 434(b)(4). Moreover, each report must disclose the name and address of each person to whom a committee makes an expenditure in an aggregate amount or value in excess of \$200 within the calendar year to meet a candidate or committee

1. Robert A. Farmer was the treasurer at the time the events at issue occurred.

2. All citations are to statutes and regulations which were in effect in 1988.

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operating expense, together with the date, amount, and purpose of such expenditure. 2 U.S.C. § 434(b)(5)(A).

During the 1988 election cycle, the Committee maintained a draft account used primarily by state campaign offices to pay expenses. The audit determined that drafts totaling \$3,153,346.34, which cleared the account during November and December, 1988, were not included in the Committee's disclosure reports for the relevant period. The Committee filed amended reports disclosing the draft activity on April 5, 1989.

The Committee's response to the Interim Audit Report stated that the November and December reports contained incomplete information because it had insufficient staff to timely process documentation relevant to the large volume of drafts, particularly given the reporting detail required and the difficulty it encountered contacting former campaign staffers for necessary information. The Committee also pointed out that it had "attempted" to report the activity on its January and February 1989 reports.<sup>3</sup>

Although the Committee remedied this reporting violation, its correction was untimely and the violation involved a significant amount of draft activity. Only 42% of the Committee's operating expenditure disbursements for the relevant period were timely reported. Therefore, there is reason to

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3. By this, the Committee apparently means it disclosed some, but not all, of the unreported draft activity in these 1989 reports before disclosing all the unreported activity in the April, 1989, amendments to its 1988 reports.

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believe the Dukakis/Bentsen Committee, Inc., and Edward Pliner, as treasurer, violated 2 U.S.C. § 434(b)(4).

**B. Electoral College Memo -- Legal Services and Related Expenses**

**1. Excessive In-Kind Contribution/Violation of Public Funding Agreement -- Legal Services**

**a. Law**

Under the Act, no person shall make contributions to any candidate and his or her authorized committees with respect to any election for Federal office which exceed \$1,000 in the aggregate. 2 U.S.C. § 441a(a)(1)(A). The term "person" includes a partnership. 2 U.S.C. § 431(11). Similarly, no candidate or political committee shall knowingly accept any contribution in violation of the provisions of Section 441a. 2 U.S.C. § 441a(f). The Act also prohibits the making and receipt of corporate contributions in connection with Federal elections. 2 U.S.C. § 441b(a).

A contribution by a partnership shall be attributed to the partnership and to each partner either in direct proportion to his or her share of the partnership or by agreement of the partners under certain conditions. 11 C.F.R.

§ 110.1(e). A contribution by a partnership shall not exceed the contribution limitations of the Act and accompanying regulations. Id. No portion of such contribution may be made from the profits of a corporation that is a partner. Id.

Under the statutes, the term "contribution" is broadly defined to include any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the

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purpose of influencing any election for Federal office. 2 U.S.C. § 431(8)(A)(i). A contribution also includes the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose. 2 U.S.C. § 431(8)(A)(ii). However, legal or accounting services rendered to or on behalf of an authorized committee or a candidate are specifically excluded from the definition of contribution if the person paying for such services is the regular employer of the individual rendering such services and if such services are solely for the purpose of ensuring compliance with the Act or with the public financing provisions (chapter 95 or 96 of Title 26). See 2 U.S.C. § 431(8)(B)(ix). The value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee is also excluded from the definition of contribution under 2 U.S.C. § 431(8)(B)(i) and 11 C.F.R. § 100.7(b)(3).

Under the Presidential Election Campaign Fund Act (the "Fund Act"), candidates for President and Vice President must agree as part of their eligibility requirements for public financing, that neither they nor their authorized committees will accept contributions to defray qualified campaign expenditures. 26 U.S.C. § 9003(b)(2).

**b. Facts**

In September 1988, the New York law firm of Fried, Frank, Harris, Shriver & Jacobson, a partnership including professional corporations ("the firm"), agreed to update a 1980 memorandum it

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had written concerning the electoral college and to provide it to the Committee without charge. In a September 14, 1988, letter notifying the Committee that the firm would do the work, a firm partner ("the partner") expressed his opinion that the legal services would not constitute contributions because they did not relate to a general election "as defined." The partner also explained the firm's pro bono policy required that it bill and collect monthly out-of-pocket expenses made in connection with the free legal services the firm provided, including disbursements made for duplicating, phone calls, computer time, and messenger and data research services.

The firm sent the Committee an updated electoral college memorandum ("the memo") on or about October 27, 1988. Subsequently, in an April 25, 1989 response to a Committee inquiry about invoices it had received, the firm noted it had incurred \$76,905.50 in professional service fees preparing the memo for which it had not billed the Committee. These charges consisted of time spent preparing the memo by a partner, associates, paralegals and summer associates, apparently billed at varying hourly rates. In addition, the firm noted the Committee owed \$17,942.41 in actual expenses incurred in connection with the memo.

The Committee reimbursed the firm \$17,942.41 for the memo expenses on June 9, 1989, and reported this disbursement in its

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1989 July Monthly report as a compliance expense.<sup>4</sup> No payments were made for the \$76,905.50 in legal services provided.

c. Audit Determination and Committee's Response

The Final Audit Report included \$65,888 of the value of the firm's legal services in its calculation of the Committee's operating expenditures subject to the expenditure limitation of 2 U.S.C. § 441a(b).<sup>5</sup> See Final Audit Report on Dukakis/Bentsen Committee, Inc. and the Dukakis/Bentsen GELAC at 10. The Final Audit Report also included the \$17,942.41 in memo-related expenses in that calculation. Id.

The Committee presented essentially two arguments supporting their contention that the value of legal services provided in connection with the memo update was not an in-kind contribution. First, during the audit, the Committee orally argued that the firm's work was exempt volunteer activity pursuant to 11 C.F.R. § 100.7(b)(3). To support this position, the Committee referenced a November 1, 1989 letter it sought from the firm stating that lawyers who work on the firm's pro bono matters do so voluntarily, but receive their ordinary

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4. In response to the Interim Audit, the Committee contended it had erroneously paid the memo expenses and on January 15, 1991, GELAC reimbursed the Committee for the expenses. This "reimbursement" is discussed further at Section II.B.2.b.

5. In-kind contributions are reported as both contributions and expenditures. See 11 C.F.R. § 104.13. See the Legal Analysis below in Section II.B.1.d. for discussion of the value of the firm's contribution.

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compensation while doing so.<sup>6</sup> Second, in its written response to the Interim Audit Report, the Committee contended that the legal services were not contributions because the memo dealt solely with issues relating to the electoral college election. According to the Committee, an electoral college election is not an "election" as defined at 11 C.F.R. § 100.2. As part of this argument, the Committee also seems to maintain that legal work related to the 1988 electoral college election did not in fact "influence" the 1988 general election since that election was not "a matter for the Electoral College to decide."

d. Legal Analysis

The legal services provided to update the electoral college memo appear to constitute an excessive in-kind contribution to the Committee because they were made for the purpose of influencing a federal election and do not fall within any relevant statutory exemptions. Additionally, because the firm is a partnership that includes professional corporations, a portion of the in-kind contribution may constitute a prohibited contribution.

The correspondence and memo provided in response to the Interim Audit Report show that the firm's legal work indeed

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6. The firm also stated in this letter that it relied upon 11 C.F.R. § 100.7(b)(13) when it agreed to update the memo. That regulation exempts from the definition of contribution certain legal services provided to any political committee of a political party which are not attributable to activities that directly further the election of a candidate for federal office. Since the Committee is an authorized committee of a candidate and not a political party committee, that regulation is inapplicable here.

concerned the Electoral College. The memo outlined the general requirements and procedures by which electors are appointed and discharge their duties. It also pointed out possible irregularities with a view toward preventing any "mishaps" in the electoral college process which might have defeated the Dukakis/Bentsen ticket. The cover letter enclosing the memo described the work as "a summary of actions to be taken in preparation for the selection and voting of the Electoral College." A comprehensive summary of state laws relating to selection of electors and procedures governing each state's electoral college election was included with the memo.

Contrary to the Committee's contention, the firm's electoral college research was undertaken for the purpose of influencing an election to federal office since the Electoral College is an essential part of any general presidential election. Electoral College votes are acquired by a candidate based upon the general election results and a candidate must prevail in Electoral College votes to become President regardless of the popular vote. See U.S. Const. art. II, §1 and amend. XII. Indeed, the Presidential Campaign Fund Act defines "presidential election" as "the election of presidential and vice-presidential electors." The Committee acknowledged the integral nature and importance of the electoral college process to the popular election when it requested the firm to update the memo to use "as our primary resource when the campaign develops our strategy to deal with the possibility of a 'faithless elector' situation."

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The Committee's reliance on 11 C.F.R. § 100.2 generally, and Section 100.2(b), specifically, to assert that no contribution resulted because the electoral college is not an election is misplaced. The definition of "election" as used in the Act and regulations is broadly defined at 11 C.F.R. § 100.2(a) as the "process by which individuals ... seek nomination for election or election to Federal office (emphasis added)." As noted earlier, the electoral college is part of the process by which an individual seeks election to the Office of President.

Since the firm's memo-related legal services were provided to influence a federal election, one of the statutory exemptions would have to apply to prevent a contribution from resulting. None of the exemptions appears to apply here. The legal services provided were not exempt under 2 U.S.C. § 431(8)(B)(ix) (or 11 C.F.R. § 100.7(b)(14)) since the nature of the legal work performed was unrelated to ensuring compliance with the Act or public financing provisions. Rather, the memo served a strategic purpose -- to point out possible problems in the electoral college process so the Committee could prevent or correct them to ensure the ticket's victory. Additionally, the comprehensive state law summary provided the Committee with a ready legal reference tool in case such problems arose.

Similarly, the legal services cannot be considered exempt volunteer activity pursuant to 2 U.S.C. § 431(8)(B)(i) (or 11 C.F.R. § 100.7(b)(3)). Although the firm stated in a letter to the Committee that its lawyers work on pro bono matters

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voluntarily, it also admitted that they are paid their ordinary compensation while doing so.<sup>7</sup> Since lawyers and other salaried staff who worked on the memo apparently received their regular compensation while doing the work, their services fall outside the volunteer activity exemption which only excludes from the "contribution" definition, "the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee...." 2 U.S.C. § 431(8)(B)(i); see also AO 1982-4. By contrast, the services attributable to the firm partner, may have been permissible if his compensation was tied to his proprietary interest in the firm. See AOs 1979-58 and 1980-107 (concluding that compensation paid by a law firm to a partner volunteering services to a political committee was not a contribution where the compensation was tied to partner's proprietary interest in the firm and not to the number of hours worked) and cf. AO 1980-115 (concluding firm contribution may result if compensation paid to candidate-partner is not reduced to reflect lower number of hours worked since compensation is partially based on client billable hours). Audit valued the firm's in-kind contribution at \$65,888 -- the total cost for each hour firm employees worked on the memo as reflected in the firm's billing statement. Attachment 2 at 8-9. The cost of the partner's time, \$11,017.50, was excluded (\$76,905.50 - \$11,017.50 = \$65,888).

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7. The firm's response regarding its pro bono policy addressed only lawyers.

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Because the law firm is a partnership that includes professional corporations, a portion of the firm's in-kind contribution may be attributable to a corporate partner resulting in a prohibited contribution. Additionally, the in-kind contribution was accepted by the Committee to defray qualified campaign expenses for the general election in violation of 26 U.S.C. § 9003(b).

Therefore, there is reason to believe that the Dukakis/Bentsen Committee, Inc. and Edward Pliner, as treasurer, violated 2 U.S.C. §§ 441a(f) and 441b(a) and 26 U.S.C. § 9003(b) for accepting an excessive in-kind contribution from the firm, a partnership including professional corporations.

2. Improper Use of Compliance Funds -- Memo Expenses

a. Law

Commission regulations permit a major party candidate for president to accept private contributions to a legal and accounting compliance fund in addition to any public financing received. 11 C.F.R. § 9003.3(a)(1)(i).

Compliance fund contributions shall be used only: (1) to defray legal and accounting costs provided solely to ensure compliance with the Act and Title 26; to defray overhead costs related to ensuring compliance; to defray any civil and criminal penalties imposed under the Act; to make repayments to the Presidential Election Campaign Fund; to defray the cost of soliciting contributions to the compliance fund; and to make a loan to an account established pursuant to 11 C.F.R. § 9003.4 to defray qualified campaign expenses incurred prior to the

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expenditure report period or prior to receipt of federal funds provided loans are restored to the compliance funds. 11 C.F.R. § 9003.3(a)(2)(i).

b. Analysis

The Committee paid the firm for the actual expenses incurred by the firm in connection with the memo on June 19, 1989 and reported the \$17,942.41 disbursement in its 1989 July Monthly report as a compliance expense. Later, in response to the Interim Audit, the Committee contended that it had erroneously paid the expenses since the legal work associated with the memo "did not influence the general election." The Committee further stated that in May 1989 its legal counsel had instructed GELAC to pay the memo expenses.<sup>8</sup> Consequently, on January 15, 1991, GELAC reimbursed the Committee for the full amount of the memo expenses.

The Committee's position lacks clarity. By saying that GELAC originally should have paid for the expenses, the Committee is treating the expenses as having been compliance-related. The Committee also states, however, that the memo was "unrelated to the general election." If this were so, the memo expenses could not be considered compliance-related. The Committee also cites to 11 C.F.R. § 9003.3(a)(2)(iv) in support of GELAC's payment of the expenses. That regulation permits any excess campaign funds

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8. Committee counsel's instructions on the first invoice for a portion of the memo expenses, however, directed Committee staff on October 28, 1988, to "pay and charge general election."

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remaining after payment of all general election expenses to be used to retire primary debts or for "any purpose permitted under 2 U.S.C. § 439a and 11 C.F.R. Part 113."<sup>9</sup>

Whatever the Committee's position, the use of GELAC funds to pay for the memo expenses was improper. As previously discussed, the memo was not related to the Committee's compliance with the Act; rather it discussed strategy and outlined procedures for the electoral college. Moreover, the use of GELAC funds to reimburse the Committee for the memo expenses does not appear to fall within any of the permissible uses enumerated at 11 C.F.R. § 9003.3(a)(2). Since the memo expenses at issue here are general election-related expenses, 11 C.F.R. § 9003.3(a)(2)(iv) is simply inapplicable. Therefore, there is reason to believe that Dukakis/Bentsen Committee, Inc. (Dukakis/Bentsen General Election Legal and Accounting Compliance Fund), and Edward Pliner, as treasurer, violated 11 C.F.R. § 9003.3(a)(2) by using compliance funds to defray non-compliance related general election expenses.

C. Sequentially-Numbered Money Orders

Under the Act, it is unlawful for a person to make a contribution in the name of another person or to knowingly permit his or her name to be used to effect such a contribution. 2 U.S.C. § 441f. Similarly, it is unlawful for a person to

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9. Those provisions prohibit excess campaign funds to be converted to personal use, but permit such funds to be used to defray expenses incurred in connection with an individual's duties as a federal officeholder, to be donated to charity or to be "used for any other lawful purpose." The Committee apparently relies on the "lawful purpose" language here.

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knowingly accept a contribution made by one person in the name of another person. Id.

Based on documents made available by GELAC only after completion of audit fieldwork, the audit identified \$15,360 in contributions received by GELAC in the form of three sets of sequentially numbered money orders. Attachment 1 at 1. The majority of the money orders, 114 totaling \$14,600, were drawn on an account at Marine Midland Payment Services, Inc. ("Marine Midland") and are dated between May 31, 1988, to June 15, 1988. Seven \$100 money orders were drawn from the Bank of Smithtown, ("Smithtown") all dated June 1, 1988. The five remaining money orders, totaling \$60, were drawn from the North Community Bank of Chicago, Illinois ("NCB").

In addition to the sequential ordering and dating patterns, each of the three groups of money orders evidence similarities which suggest that an individual other than the purchasers filled them out. The Smithtown money orders are each made payable to "Dukakis for President Compliance Fund" in handwriting that appears to be the same for each order. Similarly, the NCB money orders are all undated, payable to "Dukakis Compliance Fund" and the payable line and purchaser's name and address also appear to be written in the same upper and lower case printing. Such similarities also exist for the 114 Marine Midland money orders. Each of these money orders bears the name of individuals residing in the New York area and all but 15 are in amounts of \$100 or less. The Marine Midland money orders appear to fall into five distinct subgroups of

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sequentially numbered money orders. Within these subgroups, each money order is sequentially-numbered, bears the same date or group of dates, and appears to have been filled out by the same person. Forty-nine of these money orders appear to have had the words "compliance fund" added. See Attachment 1 at 2-3 for a chart describing the particular patterns noted in each of the subgroups.

The sequential numbering, uniform handwriting and typing and consistent dates within each set of money orders raise a question as to the actual source of the funds used to purchase these money orders. See MUR 1353 (Commission found reason to believe that the Carter/Mondale Presidential Committee violated 2 U.S.C. § 441f by using cash contributions to purchase money orders under the contributor names of employees of a restaurant where a fundraiser was held). Based on the foregoing, therefore, there is reason to believe that the Dukakis/Bentsen Committee, Inc. (Dukakis/Bentsen General Election Legal and Accounting Compliance Fund), and Edward Pliner, as treasurer, violated 2 U.S.C. § 441f.

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FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

May 7, 1993

Fried, Frank, Harris, Shriver & Jacobson  
Attn: Arthur Fleischer, Managing Partner  
One New York Plaza  
New York, N.Y. 10004

RE: MUR 3449  
Fried, Frank, Harris,  
Shriver & Jacobson

Dear Mr. Fleischer:

On May 4, 1993, the Federal Election Commission found that there is reason to believe Fried, Frank, Harris, Shriver & Jacobson, a partnership including professional corporations ("Fried, Frank"), violated 2 U.S.C. §§ 441a(a)(1)(A) and 441b(a), provisions of the Federal Election Campaign Act of 1971, as amended ("the Act"). The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

Under the Act, you have an opportunity to demonstrate that no action should be taken against Fried, Frank. You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of your receipt of this letter. Where appropriate, statements should be submitted under oath.

In the absence of any additional information demonstrating that no further action should be taken against Fried, Frank, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter. Further, the Commission will not entertain requests for pre-probable cause conciliation after briefs on probable cause have been mailed to the respondent.

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Fried, Frank, Harris, Shriver & Jacobson  
Attn: Arthur Fleischer, Managing Partner  
Page 2

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

If you intend to be represented by counsel in this matter, please advise the Commission by completing the enclosed form stating the name, address, and telephone number of such counsel, and authorizing such counsel to receive any notifications and other communications from the Commission.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

For your information, we have enclosed a brief description of the Commission's procedures for handling possible violations of the Act. If you have any questions, please contact Dawn M. Odrowski, the attorney assigned to this matter, at (202) 219-3400.

Sincerely,



Scott E. Thomas  
Chairman

Enclosures  
Factual and Legal Analysis  
Procedures  
Designation of Counsel Form

cc: William Josephson

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Fried, Frank, Harris, Shriver  
and Jacobson

MUR: 3449

I. GENERATION OF MATTER

This matter was generated based on information ascertained by the Federal Election Commission ("the Commission") in the normal course of carrying out its responsibilities. 2 U.S.C. § 437g(a)(2). The information is based on a memo provided to the Dukakis/Bentsen Committee, Inc. ("the Committee") in October, 1988, regarding the electoral college.

II. FACTUAL AND LEGAL ANALYSIS<sup>1</sup>

A. Law

Under the Act, no person shall make contributions to any candidate and his or her authorized committees with respect to any election for Federal office which exceed \$1,000 in the aggregate. 2 U.S.C. § 441a(a)(1)(A). The term "person" includes a partnership. 2 U.S.C. § 431(11). The Act also prohibits the making and receipt of corporate contributions in connection with Federal elections. 2 U.S.C. § 441b(a).

A contribution by a partnership shall be attributed to the partnership and to each partner either in direct proportion to his or her share of the partnership or by agreement of the partners under certain conditions. 11 C.F.R.

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1. All citations are to statutes and regulations which were in effect in 1988.

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§ 110.1(e). A contribution by a partnership shall not exceed the contribution limitations of the Act and accompanying regulations. Id. No portion of such contribution may be made from the profits of a corporation that is a partner. Id.

Under the statutes, the term "contribution" is broadly defined to include any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.

2 U.S.C. § 431(8)(A)(i). A contribution also includes the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose. 2 U.S.C. § 431(8)(A)(ii).

However, legal or accounting services rendered to or on behalf of an authorized committee or a candidate are specifically excluded from the definition of contribution if the person paying for such services is the regular employer of the individual rendering such services and if such services are solely for the purpose of ensuring compliance with the Act or with the public financing provisions (chapter 95 or 96 of Title 26). See 2 U.S.C. § 431(8)(B)(ix). The value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee is also excluded from the definition of contribution under 2 U.S.C.

§ 431(8)(B)(i) and 11 C.F.R. § 100.7(b)(3).

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**B. Facts**

In September 1988, the New York law firm of Fried, Frank, Harris, Shriver & Jacobson, a partnership including professional corporations ("the firm"), agreed to update a 1980 memorandum it had written concerning the electoral college and to provide it to the Committee without charge. In a September 14, 1988, letter notifying the Committee that the firm would do the work, a firm partner ("the partner") expressed his opinion that the legal services would not constitute contributions because they did not relate to a general election "as defined." The partner also explained the firm's pro bono policy required that it bill and collect monthly out-of-pocket expenses made in connection with the free legal services the firm provided, including disbursements made for duplicating, phone calls, computer time, and messenger and data research services.

The firm sent the Committee an updated electoral college memorandum ("the memo") on or about October 27, 1988. Subsequently, in an April 25, 1989 response to a Committee inquiry about invoices it had received, the firm noted it had incurred \$76,905.50 in professional service fees preparing the memo for which it had not billed the Committee. These charges consisted of time spent preparing the memo by the partner, associates, paralegals and summer associates, apparently billed at varying hourly rates. In addition, the firm noted the Committee owed \$17,942.41 in actual expenses incurred in connection with the memo.

The Committee reimbursed the firm \$17,942.41 for the memo

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expenses on June 9, 1989, and reported this disbursement in its 1989 July Monthly report as a compliance expense. No payments were made for the \$76,905.50 in legal services provided.

C. Legal Analysis

The legal services provided to update the electoral college memo appear to constitute an excessive in-kind contribution to the Committee because they were made for the purpose of influencing a federal election and do not fall within any relevant statutory exemptions. Additionally, because the firm is a partnership that includes professional corporations, a portion of the in-kind contribution may constitute a prohibited contribution.

The firm's legal work indeed concerned the Electoral College. The memo outlined the general requirements and procedures by which electors are appointed and discharge their duties. It also pointed out possible irregularities with a view toward preventing any "mishaps" in the electoral college process which might have defeated the Dukakis/Bentsen ticket. The cover letter enclosing the memo described the work as "a summary of actions to be taken in preparation for the selection and voting of the Electoral College." A comprehensive summary of state laws relating to selection of electors and procedures governing each state's electoral college election was included with the memo.

In two letters to the Committee dated September 14, 1988 and November 1, 1989, the firm partner opined that legal services rendered in connection with the electoral college

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memo would not constitute a contribution since the electoral college was not an election within the meaning of 11 C.F.R. § 100.2.<sup>2</sup> Contrary to this assertion, however, the definition of "election" as used in the Act and regulations is broadly defined at 11 C.F.R. § 100.2(a) as the "process by which individuals ... seek nomination for election or election to Federal office (emphasis added)." The Electoral College is an essential part of any general presidential election. Electoral college votes are acquired by a candidate based upon the general election results and a candidate must prevail in Electoral College votes to become President regardless of the popular vote. See U.S. Const. art. II, §1 and amend. XII. Indeed, the Presidential Campaign Fund Act defines "presidential election" as "the election of presidential and vice-presidential electors." Furthermore, the Committee acknowledged the integral nature and importance of the electoral college process to the popular election when it requested the firm to update the memo to use "as our primary resource when the campaign develops our strategy to deal with the possibility of a 'faithless elector' situation." See August 28, 1988 letter from Daniel A. Taylor of the Committee to the firm. Accordingly, the firm's electoral

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2. The partner also stated in this letter that the firm relied upon 11 C.F.R. § 100.7(b)(13) when it agreed to update the memo. That regulation exempts from the definition of contribution certain legal services provided to any political committee of a political party which are not attributable to activities that directly further the election of a candidate for federal office. Since the Committee is an authorized committee of a candidate and not a political party committee, that regulation is inapplicable here.

college research was undertaken for the purpose of influencing an election to federal office since the Electoral College is an essential part of any general presidential election.

Since the firm's memo-related legal services were provided to influence a federal election, one of the statutory exemptions would have to apply to prevent a contribution from resulting. None of the exemptions appears to apply here. The legal services provided were not exempt under 2 U.S.C. § 431(8)(B)(ix) (or 11 C.F.R. § 100.7(b)(14)) since the nature of the legal work performed was unrelated to ensuring compliance with the Act or public financing provisions. Rather, the memo served a strategic purpose -- to point out possible problems in the electoral college process so the Committee could prevent or correct them to ensure the ticket's victory. Additionally, the comprehensive state law summary provided the Committee with a ready legal reference tool in case such problems arose.

Similarly, the legal services cannot be considered exempt volunteer activity pursuant to 2 U.S.C. § 431(8)(B)(i) (or 11 C.F.R. § 100.7(b)(3)). Although the firm stated in its November 1, 1989 letter to the Committee that its lawyers work on pro bono matters voluntarily, it also admitted that they are paid their ordinary compensation while doing so.<sup>3</sup> Since lawyers and other salaried staff who worked on the memo apparently received their regular compensation while doing the work, their services fall outside the volunteer activity exemption which

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3. The firm's response regarding its pro bono policy addressed only lawyers.

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only excludes from the "contribution" definition, "the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee. . ."

2 U.S.C. § 431(8)(B)(i); see also AO 1982-4. By contrast, the services attributable to the firm partner may have been permissible if his compensation was tied to his proprietary interest in the firm. See AOs 1979-58 and 1980-107 (concluding that compensation paid by a law firm to a partner volunteering services to a political committee was not a contribution where the compensation was tied to partner's proprietary interest in the firm and not to the number of hours worked) and cf. AO 1980-115 (concluding firm contribution may result if compensation paid to candidate-partner is not reduced to reflect lower number of hours worked since compensation is partially based on client billable hours). Audit valued the firm's in-kind contribution at \$65,888 -- the total cost for each hour firm employees worked on the memo as reflected in the firm's billing statement. See Final Audit Report at page 10. The cost of the partner's time, \$11,017.50, was excluded (\$76,905.50 - \$11,017.50 = \$65,888).

Because the law firm is a partnership that includes professional corporations, a portion of the firm's in-kind contribution may be attributable to a corporate partner resulting in a prohibited contribution. Therefore, there is reason to believe that Fried, Frank, Harris, Shriver and

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Jacobson violated 2 U.S.C. §§ 441a(a)(1)(A) and 441b(a) for making an excessive in-kind contribution to the Committee.

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ONE INTERNATIONAL PLACE  
BOSTON • MASSACHUSETTS 02110-2607  
TELEPHONE (617) 489-2303 FACSIMILE (617) 489-2380

VIA FAX  
(202-219-3880)

May 17, 1993

Dawn M. Odrowski, Esq.  
Federal Election Commission  
999 E Street, N.W.  
Washington, D.C. 20463

Dear Dawn:

I received just this morning a copy of the cover letter to Mr. Ed Pliner dated May 7, 1993 and accompanying MUR 3449. I request an extension of time to respond until Friday, June 4, 1993. I have previously filed with the FEC a blanket designation for all matters relating to Dukakis' election, but for some reason I was not send a copy of this until Mr. Pliner forwarded it. I would be grateful if you could include me as a copy on all future communication concerning this MUR or any others.

Sincerely,

*Daniel A. Taylor*  
Daniel A. Taylor

cc: Mr. Edward Pliner

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**STATEMENT OF DESIGNATION OF COUNSEL**

MUR 3449 & all general election in

NAME OF COUNSEL: Daniel Taylor

ADDRESS: Hill and Barlow  
One International Place  
Boston, MA

TELEPHONE: 617 439 3555

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93 MAY 21 PM 3:31

The above-named individual is hereby designated as my  
counsel and is authorized to receive any notifications and other  
communications from the Commission and to act on my behalf before  
the Commission.

5/18/93  
Date

  
Signature

RESPONDENT'S NAME: Edward Pliner

ADDRESS: 12 River St  
Salem MA 01970

HOME PHONE: 508 741 4445

BUSINESS PHONE: 617 552 9478

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FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

MAY 21, 1993

Daniel A. Taylor, Esq.  
Hill & Barlow  
One International Place  
Boston, Massachusetts 02110-2607

RE: MUR 3449  
Dukakis/Bentsen Committee, Inc.  
(Dukakis/Bentsen General  
Election Legal and Accounting  
Compliance Fund) and  
Edward Pliner, as treasurer

Dear Mr. Taylor:

This is in response to your letter dated May 17, 1993, which we received on May 17, 1993, requesting an extension until June 4, 1993, to respond to the factual and legal analysis in MUR 3449. Having received a designation of counsel from the Dukakis/Bentsen Committee, Inc. and Edward Pliner, as treasurer, on May 19, and after considering the circumstances presented in your letter, the Office of the General Counsel has granted the requested extension. Accordingly, your response is due by the close of business on June 4, 1993.

If you have any questions, please contact me at  
(202) 219-3400.

Sincerely,

*[Handwritten signature]*  
Dawn M. Odrowski  
Attorney

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FEDERAL ELECTION COMMISSION  
WASHINGTON D.C. 20463

MAY 24, 1993

Daniel A. Taylor, Esq.  
Hill & Barlow  
One International Place  
Boston, Massachusetts 02110-2607

RE: MUR 3449  
Dukakis/Bentsen Committee, Inc.  
(Dukakis/Bentsen General  
Election Legal and Accounting  
Compliance Fund) and  
Edward Pliner, as treasurer

Dear Mr. Taylor:

As a follow-up to our May 19, 1993 phone conversation, I am enclosing copies of the consecutively-numbered money orders discussed in the Factual and Legal Analysis sent to the Committee on May 7, 1993, and listed in an attachment thereto. A few copies may be difficult to read. If you have questions about individual documents, I may be able to help you decipher a name or address from the microfiche copy, although portions of it are also of poor quality.

I trust that these documents will help you respond to the Factual and Legal Analysis. Again, do not hesitate to call me at (202) 219-3400 if you have additional questions.

Sincerely,

Dawn M. Odrowski  
Attorney

Attachment  
Sequential Money Orders

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FRIED, FRANK, HARRIS, SHRIVER & JACOBSON  
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS  
ONE NEW YORK PLAZA  
NEW YORK, N.Y. 10004-1980  
(212) 820-8000

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FACSIMILE NUMBERS

(212) 747-1526

(212) 820-8445

(212) 820-8466

If you have problems receiving this transmission, please contact us at  
(212) 820-8362.

Confidentiality Note:

The information contained in this facsimile message is legally privileged and confidential information intended only for the use of the addressee named below. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this telecopy is strictly prohibited. If you have received this telecopy in error, please immediately notify us by telephone and return the original message to us at the address above via the United States Postal Service. We will reimburse any costs you incur in notifying us and returning the message to us. Thank you.

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FACSIMILE COVER LETTER  
(for Single Recipient)

Date: May 26, 1993 Number of Pages (including cover sheet) 1

To: Dawn M. Odrowski, Esq. Fax No.: (202) 219-3923

Firm Name: Federal Election Commission  
Washington, D.C. Office No.: (202) 219-3400

From: William Jacobson Ext. 8220 Fl. 26

Comments: Re: Matter Under Review 3449.

Confirming your telephone conversation this morning with David Whitescarver, Esq. of Rogers & Wells, this is to request an extension of time until June 15, 1993 of the foregoing MUR which was initiated by a letter dated May 7, 1993 to Fried, Frank, Harris, Shriver & Jacobson from the SEC Chair. Your letter was received by us on May 12, 1993. We have requested Anthony F. Essaye, Esq. of Rogers & Wells, who originally involved us in the work which is the subject of MUR 3449, to advise us in this matter or to obtain for us counsel expert in FEC procedures and applicable law. Mr. Essaye received the documents on May 17, 1993, (has since become a grandfather for the first time) and requires more time to study the matter. Since our 15 days to submit a response to the FEC's letter dated May 7, 1993 expires on May 27, 1993, Mr. Essaye and we would appreciate your prompt confirmation of the June 15 extension which we understand from your conversations with Mr. Essaye's colleague, David Whitescarver, Esq., you are inclined to grant.

cc: David Whitescarver, Esq., Rogers & Wells (by fax and regular mail)

Please Check Appropriate Selection(s)

Original will not follow

Original will follow via:

- Regular Mail
- Overnight Delivery
- Hand Delivery
- Other

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FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

MAY 28, 1993

William Josephson, Esq.  
Fried, Frank, Harris, Shriver & Jacobson  
One New York Plaza  
New York, New York 10004-1980

RE: MUR 3449  
Fried, Frank, Harris, Shriver &  
Jacobson

Dear Mr. Josephson:

This is in response to your letter by facsimile dated May 26, 1993, which we received on May 26, 1993, requesting an extension until June 15, 1993 to respond to MUR 3449. After considering the circumstances presented in your letter, the Office of the General Counsel has granted the requested extension. Accordingly, your response is due by the close of business on June 15, 1993.

If you have any questions, please contact me at (202) 219-3400.

Sincerely,

Dawn M. Odrowski  
Attorney

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RECEIVED  
FEDERAL ELECTION COMMISSION  
93 JUN -4 AM 10:33

June 3, 1993

VIA FEDERAL EXPRESS

Mr. Scott E. Thomas  
Chairman  
Federal Election Commission  
Washington, D.C. 20463

Re: MUR 3449

Dear Chairman Thomas:

This constitutes the response of the Dukakis/Bentsen Committee, Inc. and of Edward Pliner, Treasurer,<sup>1</sup> to your letter of May 7, 1993 and the accompanying Factual and Legal Analysis. By letter dated May 21, 1993 from Dawn M. Odrowski, the time for response was extended until the close of business on June 4, 1993. Three issues are raised, which are addressed under lettered headings below that correspond to the same letter headings.

1/ As Footnote 1 to the Analysis states, Mr. Pliner was not the Treasurer at the time of the events at issue. To the extent the Commission is asserting any jurisdiction over Mr. Pliner for purposes of any alleged individual liability whatsoever (as opposed to liability in a representative capacity to the extent of Committee assets he controls as current Treasurer), he objects to being named and moves to be dismissed.

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Mr. Scott E. Thomas  
June 3, 1993  
Page 2

A. Unreported Draft Account Activity. The essence of this allegation is that the Committee was late in filing information with respect to \$3.1 million in drafts which cleared the account during November and December, 1988, immediately after the general election which Governor Dukakis and Secretary Bentsen lost. The fact that they lost is of obvious importance. Virtually all hands ran for the lifeboats and started rowing rapidly away from the sunken ship.

There is no allegation whatsoever that the Committee's reports were inaccurate or even that any mistakes were made. The only charge is that the reports filed after the election were late, though accurate. With the few hands remaining, the Committee could have chosen to cobble together a timely filing, leaving the correction of errors to the FEC auditors and the audit process. But consistent with the way all of its other reporting was handled, it did not do this but waited until the records could be filed correctly.

I believe this charge, raised in an MUR, borders on overzealousness, and I cite two examples to demonstrate my point. The Analysis states on page 2: "The Committee also pointed out that it had 'attempted' to report the activity on its January and February 1989 reports." And then in a footnote to that sentence it explains "By this, the Committee apparently means it disclosed some, but not all, of the unreported draft activity in these 1989 reports before disclosing all the unreported activity in the April, 1989 amendments to its 1988 reports." In point of fact what is dismissed as a disclosure of "some, but not all" draft activity was the reporting of \$639,261.94 of the \$3.1 million draft activity in the January 1989 report. The Analysis glosses this fact over, and to the casual reader -- hopefully not the Commission -- it would appear that the Committee reported nothing at all of the \$3.1 million from November, 1988 until April, 1989.

Second, the Analysis states on page 2:

"Only 42% of the Committee's operating expenditure disbursements for the relevant period were timely reported." From the Final Audit (p. 10), the Commission has determined that through June 30, 1991, \$53,155,440.13 of expenditures were subject to limitation. In a proceeding such as a MUR, it should be more relevant that nearly 95% of all the Committee's expenditures were

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Mr. Scott E. Thomas  
June 3, 1993  
Page 3

reported timely, and 100% were reported timely before the losing election. Even more relevant is that 100% of all reporting was accurate. This "violation" is incidental to the election probity policies which the Commission is charged with upholding.

B. Electoral College Volunteer Legal Work

1. Background

In 1980, as a pro bono matter, lawyers at Fried, Frank, Harris, Shriver & Jacobsen advised the Carter/Mondale election effort as to the laws governing the meetings of Electors for President and Vice President of the United States, their balloting, the certification and transmittal and counting of their ballots, the choosing of a President by the House of Representatives and the choosing of a Vice President by the Senate under the United States Constitution. At that time Fried, Frank reviewed the applicable law and determined that the actions of the Electors, the House and the Senate were not "elections" within the meaning of any of the applicable federal laws regulating federal office campaign contributions or expenditures.

2. Explanation of Work Performed

In August, 1988, Fried, Frank was asked to update, on a pro bono basis, the memorandum prepared by the firm in 1980. Fried, Frank accepted the matter after, I am informed, review by the firm's Pro Bono Committee. At that time I understand that the firm, and the Committee, reviewed the 1980 determination that the actions of the Electors, the House or the Senate were not "elections" within the meaning of any of the applicable federal campaign financing laws, reaching the same conclusion the firm had reached in 1980. And, as Mr. Josephson stated in a letter to counsel to the Committee dated November 1, 1989, "[a]ll lawyers who work on a pro bono matter accepted by this firm do so on a voluntary basis...."

The electoral college memorandum which was updated in 1988 describes the sequence of steps concerning Electors, from their meeting, balloting, and transmitting of their ballots, to the determination of the Electors' credentials and counting of their votes by the House and Senate. The memorandum addressed the duties and responsibilities of the Electors, and of the house and

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Mr. Scott E. Thomas  
June 3, 1993  
Page 4

Senate, after the November general election not anything relating to the general election itself. Because the substance of the memorandum is dispositive of this issue, a copy (including its state by state analysis) is attached in full to this submission.

3. Reason for Billing of Expenses

As a general policy, I have been informed that the firm requires all non-indigent pro bono clients to reimburse the firm for its disbursements. This policy is predicated on, among other things, Disciplinary Rule 5-103(B) of the American Bar Association Model Code of Professional Responsibility, which provides in pertinent part that:

[w]hile representing a client . . . a lawyer shall not advance or guarantee financial assistance to his client...

This policy is applied to all pro bono matters as indicated by the following quotations from the firm's Handbook for Lawyers and Legal Assistants as in effect in 1988 at 43-48 and 123:

In general, pro bono clients should reimburse the Firm for disbursements. This policy is based on many considerations, including Disciplinary Rule 5-103(B). In accordance with the well-established exception to the rules against maintenance, pro bono matters for indigent clients may be accepted by the Firm without regard to reimbursement of disbursements with the approval of the Pro Bono Committee and the relevant department head.

If a proposed pro bono client is capable of paying disbursements, but is reluctant to do so, substantial ethical issues may be raised. They and the reasons for non-payment, together with the amount of projected disbursements, are factors which the Pro Bono Committee and the relevant department head should take into consideration in deciding whether or not to accept the matter.

To avoid misunderstandings, the agreement between the pro bono client and the Firm with respect to payment

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Mr. Scott E. Thomas  
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Page 5

of disbursements should be set forth in writing at the time a matter is undertaken.

All pro bono matters shall be placed on at least a quarterly billing cycle, and the partner in charge shall monitor, bill and collect disbursements in the same way for any billable client on a billing cycle.

\* \* \* \*

When the Firm serves as counsel on a pro bono basis, disbursements incurred by lawyers involved in such work will be reimbursed by the Firm. Such matters include court appointed representation and work for organizations accepted as pro bono clients will generally be expected to agree -- indeed the Code of Professional Responsibility may require the Firm to obtain their agreement -- to reimburse the Firm for disbursements, whether or not any fee for professional services is charged.

4. Actions of Electors, House and Senate Are Not Elections for Purposes of the Presidential Election Campaign Fund or Federal Election Campaign Acts

2 U.S.C. § 431(8)(A)(i) of the Federal Election Campaign Act of 1971, as amended (the "Act"), defines a "contribution" to include:

any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office....

Thus, to constitute a contribution, the services must influence an "election."

All the relevant federal statutory definitions of elections make clear that actions of the Electors, and of the House and Senate under the Constitution, are not "elections" for purposes of such statutes.

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Mr. Scott E. Thomas  
June 3, 1993  
Page 6

The term "election" is expressly defined by 2 U.S.C. § 431(1) as follows:

- (1) The term "election" means --
- (A) a general, special, primary or runoff election;
  - (B) a convention or caucus of a political party which has authority to nominate a candidate;
  - (C) a primary election held for the selection of delegates to a national nominating convention of a political party; and
  - (D) a primary election held for the expression of a preference for the nomination of individuals for election to the office of President.  
[emphasis added]

The actions of the Electors or of the House and Senate in choosing the President and Vice President are not included in any of the above-detailed descriptions.

Similarly, Section 9002 of the Presidential Elections Campaign Fund Act, chapter 95 of the Internal Revenue Code, 26 U.S.C. § 9002, defines the term "presidential election" to mean "the election of presidential and vice-presidential electors." [emphasis added] Thus, the actions of the Electors themselves, let alone those of the House and Senate, are not covered.<sup>2</sup> Section 591(a) of 18 U.S.C., related to Elections and Political Activities, was amended with the Federal Election Campaign and Presidential Campaign Fund Acts. It was, prior to 1972 and until its repeal in 1980, to almost identical effect.

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<sup>2/</sup> The Analysis (at p. 8) either misunderstands the Fried, Frank memorandum or §9002. The memorandum did not address general election issues at which Electors are elected, which is the meaning of §9002. Rather the memorandum addressed the actions to be taken by Electors, the House and Senate after the Electors are chosen in the general election.

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Mr. Scott E. Thomas  
June 3, 1993  
Page 7

Thus, the balloting of the Electors and the actions of the House and Senate in evaluating the credentials of the electors and counting their ballots, are neither expressly, nor by implication, included within the statutory definition of "general election." Therefore, any legal services pertaining thereto do not fall within the definition of a "contribution."

This conclusion is confirmed by the Acts' legislative history. References to "voters" too numerous to cite make it clear that the Congress was concerned with voting by citizens, not the constitutional balloting by Electors which is never mentioned in any of the legislative history.

This conclusion is also confirmed by the relevant regulations of the Federal Elections Commission. Obviously, the constitutional balloting of the Electors, the determination of their credentials or the counting of their votes by Congress are not a primary or run-off election, caucus or convention. They could only be general or special elections. However, "general election" is specifically defined by the FEC in 11 C.F.R. 100.2(B) as only either:

- (1) An election held in even numbered years on the Tuesday following the first Monday in November...
- (2) An election which is held to fill a vacancy in a Federal office (i.e., a special election).... [emphasis added]

By law the Electors ". . . shall meet and give their votes on the first Monday after the second Wednesday in December . . . ." 62 Stat. 673 (1948), 3 U.S.C. § 7. By law the electoral votes are counted on the next January 6. 62 Stat. 675 (1948), 3 U.S.C. § 15. Thus, 11 C.F.R. 100.2(b)(1) is inapplicable. Section 100.2(b)(2) is inapplicable on its face.

That post-general election actions are not to be related back generally and become a part of the "elections" is confirmed by 11 C.F.R. 100.7(b)(20) and 100.8(b)(20) which provide that contributions or expenditures, respectively, with respect to a recount or election contest are not contributions or expenditures for purposes of the regulations. Finally, the FEC's regulations

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Mr. Scott E. Thomas  
June 3, 1993  
Page 8

make no effort to regulate the expenditures of Electors, unlike those of convention delegates. 11 C.F.R. 110.14.

C. The Payment of Fried, Frank's Disbursements from the GELAC Account Was Proper under 11 C.F.R. § 9003.3(a)(2). The Committee's position is clear and straight forward. While the Committee was somewhat surprised at the size of the disbursement invoice from Fried, Frank, after inquiry of the firm and a review of the invoices, the campaign paid the invoice and charged its GELAC account.<sup>3</sup>

The reason that such a charge was proper was that the Committee's GELAC account did then, and does now, have surplus funds. 11 C.F.R. § 9003.3(a)(2) regulating the payment of surplus GELAC funds, which the Analysis dismisses out of hand, provides that

"if after payment of all expenses relating to the general election, there are excess campaign funds, such funds may be used for any purpose permitted under 2 U.S.C. § 439a and 11 C.F.F. Part 113 . . ."

Both §439a and §113.2(d) provide in identical language that except for conversion to personal use, such funds "may be used for any lawful purpose." Certainly paying Fried, Frank's disbursements were a "lawful purpose" for which to use the GELAC surplus, and this was done.

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<sup>3/</sup> I apparently inadvertently wrote on an early invoice that "general election" should be charged; the error was caught and this 10/26/88 invoice was never paid. Subsequently when I did authorize payment of the large disbursement invoice I wrote "Please pay \$17,942.41 per compiled invoice sum - GELAC." (See Fried Frank 4/25/89 letter and invoice attached.) It has always been clear to me that the legal research relating to the electoral college was not a proper general election expenditure. The \$17,942.41 paid to Fried, Frank was insured from the General Election funds but was charged to GELAC costs as ported in the June, 1989 FEC reports. This was the manner in which all GELAC and wind-down costs were processed and reported.

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Mr. Scott E. Thomas  
June 3, 1993  
Page 9

D. Sequentially-Numbered Money Orders. This issue, was not raised during the audit process when it could have been answered; nor was it mentioned by the Commission in the Final Audit. As a result, answering the suggestion of impropriety, and it is no more than a suggestion,<sup>4</sup> is extremely difficult for the Committee some five years after the fact. The Committee's records either no longer exist or are in storage.<sup>5</sup>

All money orders have all required information as to the name and addresses of the contributors, and there is no suggestion that any names are fictitious. Nor does it appear that the Commission staff has sought to contact any of the named contributors to ascertain whether or not they made the contribution reported in their name.

Nevertheless, I will attempt to respond as best I can. I have been informed that a fundraiser was held in the Astoria section of Queens to raise funds for GELAC around the middle of June, 1988. I believe that the primary amounts at issue were associated with this fundraising activity (the Marine Midland money orders). I have been informed that within the Greek community, which generally was very supportive of Governor Dukakis' electoral efforts, there is a pre-disposition to make cash contributions that is much greater than the pre-disposition generally found in the electorate at large. I am also informed that campaign fundraisers sought to discourage any and all cash donations, including those otherwise lawful. The reason for this was that fundraisers did not like to carry the responsibility of managing substantial amounts of cash; the Campaign, in turn, preferred the controls afforded by dealing in checks, and if necessary money orders. I believe what happened in these cases is that the named individual did, indeed, make the contributions at issue, but that initially they proposed making cash contributions.

4/ On page 15 the Analysis states: "The sequential numbering, uniform handwriting and typing in consistent dates within each set of money orders raise a question as to the actual source of the funds used to purchase these money orders." [emphasis added]

5/ Counsel to the Commission has provided copies of the money orders in issue.

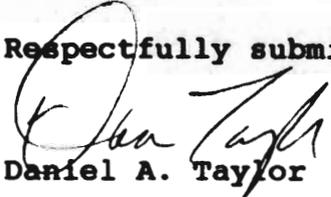
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&  
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Mr. Scott E. Thomas  
June 3, 1993  
Page 10

When this was pointed out to be either impermissible under the law or undesirable from the Campaign's point of view, one or more individuals took the records and cash to Marine Midland and had money orders drawn. It is possible that the individuals in question then asked assistance of the fundraising staff in correctly filling out the payee. This explanation is far more consistent with what likely happened five years ago than is speculation that one or more individuals went to extraordinary lengths in order to disguise contributions, most of which were in the range of \$10 to \$100. There is nothing approximating evidence that the Committee knowingly accepted a contribution made by one person in the name of another person. So many years after the fact, the Committee finds it virtually impossible to produce evidence to rebut speculation.

Respectfully submitted,

  
Daniel A. Taylor

cc: Dawn Odrowski, Esq.  
Mr. Edward Pliner  
Ms. Mary Wong

TAYD/VL1

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OGC 9013

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON  
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(for Single Recipient)

Date: June 8, 1993 Number of Pages (including cover sheet) 1

To: Dawn M. Odrowski, Esq. Fax No.: (202) 219-3923

Firm Name: Federal Election Commission Office No.: (202) 219-3400  
Washington, D.C.

From: William Jacobson Ext. 8220 Fl. 26

Comments: As requested, this is to confirm that, on behalf of Fried, Frank, Harris, Shriver & Jacobson, that confidential matters regarding MUR 3449 may be discussed in the presence, at our prospective meeting, of Fried, Frank's advisers, Anthony F. Essaye, Esq. and David Whitescarver, Esq., of the law firm of Rogers & Nells, who are attending at our request. Thank you for arranging the meeting.

Please Check Appropriate Selection(s)

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FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

JUNE 11, 1993

William Josephson, Esq.  
Fried, Frank, Harris, Shriver & Jacobson  
One New York Plaza  
New York, New York 10004-1980

RE: MUR 3449  
Fried, Frank, Harris, Shriver &  
Jacobson

Dear Mr. Josephson:

As agreed at our meeting yesterday, this confirms that the Office of the General Counsel will grant you a second extension of time in which to file a response in this matter. It is our understanding that this additional time will permit you to determine whether certain documents still exist which may be useful in preparing your response. Accordingly, your response is due by the close of business on June 25, 1993.

If you have any additional questions, please contact me at (202) 219-3400. I will be back in the office on June 23. If you have any questions before then, please contact Lisa Klein, the Assistant General Counsel supervising this matter, at the same number.

Sincerely,

*Dawn M. Odrowski*

Dawn M. Odrowski  
Attorney

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**FRIED, FRANK, HARRIS, SHRIVER & JACOBSON**

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WRITER'S DIRECT LINE

820-8586  
(FAX: 820-8586)

June 24, 1993

The Honorable Scott E. Thomas  
Chair  
Federal Election Commission  
Washington, D.C. 20463

Dear Chairman Thomas:

Enclosed is my affidavit in response to your letter dated May 7, 1993 to Arthur Fleischer, Jr., Esq., of Fried, Frank, Harris, Shriver & Jacobson, regarding Matter Under Review 3449. We are grateful for the courtesy that Lawrence M. Noble, Esq., General Counsel, Lisa E. Klein, Esq., Assistant General Counsel and Dawn M. Odrowski, Esq., attorney of the Commission staff showed in meeting with us and discussing these matters preparatory to our submission of this response.

Please permit me, in particular, to call to your attention the arguments set forth in paragraphs 11 through 19 of the enclosed affidavit. In brief, we believe that there is no basis in statute or legislative history for the position taken in the Factual and Legal Analysis which accompanied your letter, that the FEC has authority to regulate post-presidential general election events involving the electors of the several states, the counting of their ballots and the consequences thereof. We also believe that if the FEC should start toward regulating those events, there would be no point at which it could rationally stop. Ultimately, it would embroil itself in disputes and controversies which have nothing to do with its authority to regulate the popular presidential election process.

Finally, we believe that if the FEC should, nevertheless, wish to regulate those events, to do so by a

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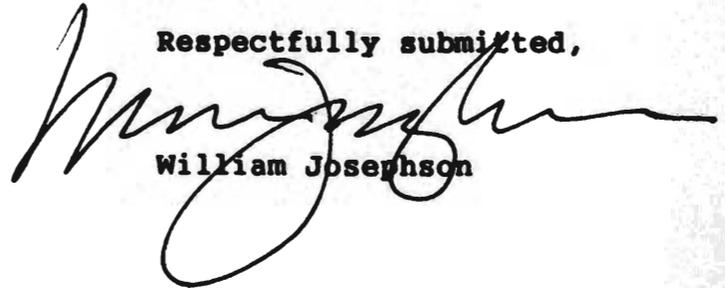
The Honorable Scott E. Thomas

-2-

June 24, 1993

Matter Under Review, as opposed to a rule-making, is completely inappropriate. The FEC has hitherto provided no guidance to candidates, candidate committees, political committees or their lawyers that it has any interest in regulating these events. Should it wish to do so, the only appropriate way is to give them and the general public notice and an opportunity to be heard.

Respectfully submitted,



William Josephson

WJ:rg  
Enclosure

cc: Lawrence M. Noble, Esq. (w/enc.)  
Lisa E. Klein, Esq. (w/enc.)  
Dawn M. Odrowski, Esq. (w/enc.)

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## AFFIDAVIT

WILLIAM JOSEPHSON, being duly sworn, deposes and says:

1. I am a member of the Bars of the State of New York and of the District of Columbia, and a partner in Fried, Frank, Harris, Shriver & Jacobson, a law firm that includes professional corporations. I am also co-chair of the Pro Bono Committee in the New York office of that firm.

2. The Pro Bono Committee is responsible for approving pro bono publico projects for lawyers in the firm. All lawyers' participation in approved pro bono projects is entirely on a volunteer basis. The firm recently chose not to accept the American Bar Association's so-called pro bono challenge. If the firm had accepted that challenge, it almost certainly would have had to impose mandatory pro bono requirements on lawyers in the firm.

3. I make this affidavit in connection with the Federal Election Commission's Matter Under Review 3449. In that connection, I am aware of a letter dated June 3, 1993 from Daniel A. Taylor, Esq., of Hill & Barlow, counsel to the Dukakis/Bentsen Committee, Inc. to The Honorable Scott E. Thomas, Chair, Federal Election Commission, and in particular Section B thereof which deals with the issues raised by the letter dated May 7, 1993 from The Honorable Scott E. Thomas, Chair of the Federal Election Commission to Fried Frank, and the Federal Election Commission's Factual and Legal Analysis

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with respect to MUR 3449. In fact, Section B of Mr. Taylor's letter is drawn largely from a September 24, 1990 draft that I had prepared and sent to Mr. Taylor, although I did not receive a response to that draft from him, and I was unaware of his June 3, 1993 letter to Chair Thomas, until a copy of it was made available to me on or about June 10, 1993. Rather than repeat the arguments set forth in Section B of Mr. Taylor's letter, they are adopted for purposes of this affidavit and incorporated by reference herein as Exhibit A.

4. Fried Frank first developed experience with respect to possible presidential general election issues in 1980. At that time we were requested by Anthony F. Essaye, Esq., of Rogers & Wells to advise on the issues that might arise if no 1980 general election presidential candidate obtained a majority in the so-called electoral college. In the 1980 presidential general election a third candidate, former United States Representative from Illinois John B. Anderson, was running. This seemed an excellent summer project for the summer associates. It was approved by the Pro Bono Committee. A number of summer associates volunteered to work on it. A number of regular associates volunteered to supervise it. By the time the general election took place, a substantial memorandum had been prepared with respect to issues that might arise concerning the convening of the electors, casting of ballots, transmission of ballots, counting of ballots and

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challenges of the votes of the electors for President and Vice President of the United States. A good start had also been made about issues that might arise if the House of Representatives should be required to elect a President, or the Senate should be required to elect a Vice President. President Reagan obtained a majority of the electors, and all those issues were moot.

5. It is a policy of the firm that the firm's disbursements and other charges be paid in pro bono projects, unless clients are indigent. That policy was followed in 1980.

6. In 1988, Mr. Essaye, who was then a member of the Executive Committee (and is now the Chair) of the National Lawyers Council of the Democratic National Committee, approached us to update our material in connection with the 1988 presidential election. Although there was no significant third party presidential candidate in that year, he expressed a concern that in any close election the issues raised by the so-called "faithless elector" might be determinative. There have been seven such electors in this century, and, in fact, there was one in the 1988 election, when a Democratic elector in the State of West Virginia cast his votes for Lloyd Bentsen for President and Michael Dukakis for Vice President. We followed the same procedures for approving and implementing this pro bono project as we did in 1980.

7. Footnote 2 of the Federal Election Commission's Factual and Legal Analysis in this MUR raises a question as to

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why we relied upon 11 C.F.R. § 100.7(b)(13) when we agreed to do the pro bono work. The answer is simple. We had been requested to do so by a representative of the Democratic National Committee. Both in 1980 and 1988, we virtually only had contact with the Democratic National Committee and with the Democratic state parties to obtain up-to-date state laws and party rules, for example. In fact, we virtually had no contact with the Dukakis/Bentsen Committee, Inc. in regard to the legal work we were doing until on or about October 27, 1988, a few days before the 1988 presidential general election.

8. On or about October 27, 1988, I received a telephone call from Mr. Taylor or one of his colleagues, asking about the progress of our work. I told him that our work was essentially complete. I was told by whomever that called that the election was expected to be close, and I was asked to provide a memorandum outlining post-general election issues. On or about October 27, 1988, I did so. As the Federal Election Commission's Factual and Legal Analysis indicates on page 4, the firm's legal work, as reflected in the memorandum, had nothing to do with the 1988 presidential general election and had only to do with the second Wednesday in December, 1988, and thereafter post-1988 presidential general election activities.

9. In fact, those activities are extremely complex. The process is outlined and discussed in the May 1992 Federal

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Election Commission's National Clearinghouse on Election Administration Essays in Elections 1 The Electoral College, by Mr. William C. Kimberling, which is adopted and incorporated by reference herein as Exhibit B. For example, the one United States Supreme Court decision dealing with whether or not electors are or can be bound is extremely unsatisfactory. Half of the states or state parties purport to bind electors one way or another. The other half do not. The federal and state court cases on the resulting issues are not consistent. The United States Senate and House precedents for counting or not counting the votes of faithless electors are not well established. Just the effort to bring state laws and state party rules up to date from 1980 to 1988 was enormous.

10. To my knowledge, Exhibit B is the only FEC issuance regarding the so-called electoral college, and there is not a word in it which suggests that the FEC has any regulatory role whatsoever with respect to the electoral college. Surely, if the FEC was convinced of its authority to regulate the electoral college process, it would have used this publication to provide guidance to the public, candidates, candidates' committees and party committees.

11. The central legal position taken on page 5 of the Federal Election Commission's Factual and Legal Analysis, "The Electoral College is an essential part of any general presidential election," is unprecedented and not "substantially

justified." Federal Election Comm'n v. Political Contributions Data, Inc., Nos. 1369 & 92-6240 (2d Cir. June 18, 1993) (passim). No authority is cited for this proposition. Nor do I believe any could be. The Factual and Legal Analysis states on page 5 that the definition of election as used in the Act and regulations "is broadly defined as the 'process by which individuals seek nomination for election or election to Federal office'." This is not so as to the Act. "Election" is defined in 2 U.S.C. § 431(1) as meaning in relevant part: "(A) a general, special, primary, or runoff election;". Paragraphs (B), (C) and (D) are irrelevant. The word "process" never appears.

12. The word "process" does appear in the FEC's Regulations, § 100.2(a). This raises a question as to whether or not its use is beyond the authorization in the statute. Even so, the Regulations define "Election" as "the process by which individuals ... seek ... election ... to Federal Office." (emphasis added). The statutory definition of election is still directly pertinent. Moreover, § 100.2(a) goes on to state in the very next sentence, not quoted in the Factual and Legal Analysis:

The specific types of elections, as set forth at 11 CFR, 100.2(b), (c), (d), (e) and (f) are included in this definition.

Subsections (c), (d), (e) and (f) are irrelevant to this issue. As with the statute, the only conceivable relevant

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section is (b), "General election." The only relevant general election is:

- (1) An election held in even numbered years on the Tuesday following the first Monday in November....

None of the legal services provided by Fried Frank related to the 1988 general election.

13. Fried Frank conscientiously looked at the question of whether or not the legal services provided in 1980 or 1988 could have been considered campaign contributions for purposes of the federal election campaign laws. As the FEC's Factual and Legal Analysis indicates, in each case it concluded, after going through the discipline of a written opinion, that those legal services could not be so considered based upon the guidance provided by the statutes and the regulations and published opinions of the FEC.

14. Since the position set forth in the FEC's factual and legal analysis is not consistent with the applicable Act, is a dubious construction of the applicable regulations, is unprecedented and is not "substantially justified," it is inappropriate for the Federal Election Commission to launch a post-general election regulatory effort. If this is in fact a case of first impression, as we believe it to be, it is particularly inappropriate for the FEC to launch this regulatory effort by means of a Matter Under Review. If the FEC wishes to begin regulation of this area, it should be by means of a notice of a proposed rule-making of prospective

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application, with an opportunity for all interested parties to comment, as, for example, it recently did when it considered changing the rules on foreign contributions.

15. This is not to suggest that we advocate such a rule-making. We believe that nothing in the applicable statutes or their legislative history authorizes the FEC to engage in a post-general election regulatory effort.

16. Moreover, we believe that if the FEC were to do so in the context of post-general election, presidential and vice presidential elections, it would not only be unauthorized by the statute, but contrary to the public interest. Essays in Elections 1 The Electoral College describes at pages 7 and 8 the current working of the so-called electoral college. If the FEC were to regulate the electoral college events, there would be no clear place to draw the line until a President of the United States was actually duly sworn. State laws and party rules with respect to the election of the electors, their convening, filing of vacancies, and casting of the ballots vary enormously. They present major opportunities for disputes and litigation nationwide. The procedures by which the so-called electoral college's votes are sealed and transmitted is actually more complicated than described in Essays in Elections 1 The Electoral College. They also afford major opportunities for disputes and litigation. The counting of the electoral college ballots in joint session of the United States Senate

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and House is another major opportunity for disputes and litigation. The separate votes of the Senate and House on disputed electoral ballots is yet another. The possibility of election of the President by the House of Representatives and the Vice President by the Senate raises hosts of unanswered questions. The House, for example, has never adopted standing rules establishing its procedures for such a situation. If the House cannot elect a President, the Constitution provides no clear answer to the question of when an Acting President might become President or cease to act.

17. If the Federal Election Commission decides to proceed down this road, what are candidates for President and Vice President and their political committees who accept public funding supposed to do, reserve completely unascertainable amounts for efforts and litigation in the 50 states and with respect to sessions of the United States Senate and House? The applicable federal laws and regulations did not contemplate such use of public funds. The definition of Presidential election in the Presidential Campaign Fund Act is "the election of Presidential and Vice Presidential electors". 26 U.S.C. § 9002(10) (emphasis added). The Act does not define presidential elections as elections by or of and by the presidential and vice presidential electors, let alone by joint session of the Senate or the House or by the House or Senate. The FEC's Legal and Factual Analysis' Citation of this statute on page 5 is completely unfair and misleading.

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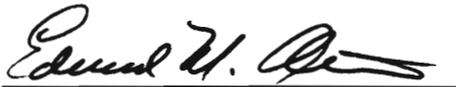
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18. The FEC's Presidential Campaign Fund General Election Finance Regulations define presidential election in 11 C.F.R. § 9002.10 substantially the same as the statute does. Those regulations and this apparent proposed post-general presidential election regulatory effort by the FEC raises a significant anomaly. Section 9002.11 defines "qualified campaign expense," among other things, as "any expenditure ... Incurred within the expenditure report period, as defined under 11 CRF 9002.12...." Section 9002.12 defines this period of time in the case of a major party as ending "thirty days after the Presidential Election." Thus, if public funding were elected, public funds could not be used with respect to the electoral college process, which by federal law does not begin until the second Wednesday in December. 3 U.S. C. § 7. Yet, if public funding had been elected, could private funds be used for this purpose?

19. This is but one further reason why the Federal Election Commission should not venture into this thicket, let alone by means of a Matter Under Review.

  
 William Josephson

Sworn to before me this  
 29<sup>th</sup> day of June, 1993.

  
 Notary Public

1368I

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EXHIBIT A

R21267

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FEDERAL REPUBLIC OF GERMANY  
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FACSIMILE 49-69-67-67-11-33

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WRITER'S DIRECT DIAL NUMBER

<b>DATE:</b>	June 10, 1993
<b>TO:</b>	William Josephson
<b>COMPANY:</b>	Fried, Frank
<b>FAX NUMBER:</b>	212-820-8445
<b>FROM:</b>	David S. Whitescarver
<b>NUMBER OF PAGES (Including Cover):</b>	11
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**MESSAGE:**

Bill,

As discussed, attached please find a copy of Dan Taylor's submission to the FEC dated June 3, 1993.

With best regards.

David

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A PROFESSIONAL CORPORATION

ONE INTERNATIONAL PLACE  
BOSTON • MASSACHUSETTS 02110-2607  
TELEPHONE (617) 451-2100 FACSIMILE (617) 451-2100

June 3, 1993

VIA FEDERAL EXPRESS

Mr. Scott E. Thomas  
Chairman  
Federal Election Commission  
Washington, D.C. 20463

Re: MUR 3449

Dear Chairman Thomas:

This constitutes the response of the Dukakis/Bentsen Committee, Inc. and of Edward Pliner, Treasurer,<sup>1</sup> to your letter of May 7, 1993 and the accompanying Factual and Legal Analysis. By letter dated May 21, 1993 from Dawn M. Odrowski, the time for response was extended until the close of business on June 4, 1993. Three issues are raised, which are addressed under lettered headings below that correspond to the same letter headings.

1/ As Footnote 1 to the Analysis states, Mr. Pliner was not the Treasurer at the time of the events at issue. To the extent the Commission is asserting any jurisdiction over Mr. Pliner for purposes of any alleged individual liability whatsoever (as opposed to liability in a representative capacity to the extent of Committee assets he controls as current Treasurer), he objects to being named and moves to be dismissed.

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Mr. Scott E. Thomas  
June 3, 1993  
Page 2

A. Unreported Draft Account Activity. The essence of this allegation is that the Committee was late in filing information with respect to \$3.1 million in drafts which cleared the account during November and December, 1988, immediately after the general election which Governor Dukakis and Secretary Bentsen lost. The fact that they lost is of obvious importance. Virtually all hands ran for the lifeboats and started rowing rapidly away from the sunken ship.

There is no allegation whatsoever that the Committee's reports were inaccurate or even that any mistakes were made. The only charge is that the reports filed after the election were late, though accurate. With the few hands remaining, the Committee could have chosen to cobble together a timely filing, leaving the correction of errors to the FEC auditors and the audit process. But consistent with the way all of its other reporting was handled, it did not do this but waited until the records could be filed correctly.

I believe this charge, raised in an MUR, borders on overzealousness, and I cite two examples to demonstrate my point. The Analysis states on page 2: "The Committee also pointed out that it had 'attempted' to report the activity on its January and February 1989 reports." And then in a footnote to that sentence it explains "By this, the Committee apparently means it disclosed some, but not all, of the unreported draft activity in these 1989 reports before disclosing all the unreported activity in the April, 1989 amendments to its 1988 reports." In point of fact what is dismissed as a disclosure of "some, but not all" draft activity was the reporting of \$639,261.94 of the \$3.1 million draft activity in the January 1989 report. The Analysis glosses this fact over, and to the casual reader -- hopefully not the Commission -- it would appear that the Committee reported nothing at all of the \$3.1 million from November, 1988 until April, 1989.

Second, the Analysis states on page 2:

"Only 42% of the Committee's operating expenditure disbursements for the relevant period were timely reported." From the Final Audit (p. 10), the Commission has determined that through June 30, 1991, \$53,155,440.13 of expenditures were subject to limitation. In a proceeding such as a MUR, it should be more relevant that nearly 95% of all the Committee's expenditures were

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Mr. Scott E. Thomas  
 June 3, 1993  
 Page 3

reported timely, and 100% were reported timely before the losing election. Even more relevant is that 100% of all reporting was accurate. This "violation" is incidental to the election probity policies which the Commission is charged with upholding.

B. Electoral College Volunteer Legal Work

1. Background

In 1980, as a pro bono matter, lawyers at Fried, Frank, Harris, Shriver & Jacobsen advised the Carter/Mondale election effort as to the laws governing the meetings of Electors for President and Vice President of the United States, their balloting, the certification and transmittal and counting of their ballots, the choosing of a President by the House of Representatives and the choosing of a Vice President by the Senate under the United States Constitution. At that time Fried, Frank reviewed the applicable law and determined that the actions of the Electors, the House and the Senate were not "elections" within the meaning of any of the applicable federal laws regulating federal office campaign contributions or expenditures.

2. Explanation of Work Performed

In August, 1988, Fried, Frank was asked to update, on a pro bono basis, the memorandum prepared by the firm in 1980. Fried, Frank accepted the matter after, I am informed, review by the firm's Pro Bono Committee. At that time I understand that the firm, and the Committee, reviewed the 1980 determination that the actions of the Electors, the House or the Senate were not "elections" within the meaning of any of the applicable federal campaign financing laws, reaching the same conclusion the firm had reached in 1980. And, as Mr. Josephson stated in a letter to counsel to the Committee dated November 1, 1989, "[a]ll lawyers who work on a pro bono matter accepted by this firm do so on a voluntary basis...."

The electoral college memorandum which was updated in 1988 describes the sequence of steps concerning Electors, from their meeting, balloting, and transmitting of their ballots, to the determination of the Electors' credentials and counting of their votes by the House and Senate. The memorandum addressed the duties and responsibilities of the Electors, and of the house and

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Mr. Scott E. Thomas  
 June 3, 1993  
 Page 4

Senate, after the November general election not anything relating to the general election itself. Because the substance of the memorandum is dispositive of this issue, a copy (including its state by state analysis) is attached in full to this submission.

3. Reason for Billing of Expenses

As a general policy, I have been informed that the firm requires all non-indigent pro bono clients to reimburse the firm for its disbursements. This policy is predicated on, among other things, Disciplinary Rule 5-103(B) of the American Bar Association Model Code of Professional Responsibility, which provides in pertinent part that:

[w]hile representing a client . . . a lawyer shall not advance or guarantee financial assistance to his client...

This policy is applied to all pro bono matters as indicated by the following quotations from the firm's Handbook for Lawyers and Legal Assistants as in effect in 1988 at 43-48 and 123:

In general, pro bono clients should reimburse the Firm for disbursements. This policy is based on many considerations, including Disciplinary Rule 5-103(B). In accordance with the well-established exception to the rules against maintenance, pro bono matters for indigent clients may be accepted by the Firm without regard to reimbursement of disbursements with the approval of the Pro Bono Committee and the relevant department head.

If a proposed pro bono client is capable of paying disbursements, but is reluctant to do so, substantial ethical issues may be raised. They and the reasons for non-payment, together with the amount of projected disbursements, are factors which the Pro Bono Committee and the relevant department head should take into consideration in deciding whether or not to accept the matter.

To avoid misunderstandings, the agreement between the pro bono client and the Firm with respect to payment

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&  
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**Mr. Scott E. Thomas  
June 3, 1993  
Page 5**

of disbursements should be set forth in writing at the time a matter is undertaken.

All pro bono matters shall be placed on at least a quarterly billing cycle, and the partner in charge shall monitor, bill and collect disbursements in the same way for any billable client on a billing cycle.

\* \* \* \*

When the Firm serves as counsel on a pro bono basis, disbursements incurred by lawyers involved in such work will be reimbursed by the Firm. Such matters include court appointed representation and work for organizations accepted as pro bono clients will generally be expected to agree -- indeed the Code of Professional Responsibility may require the Firm to obtain their agreement -- to reimburse the Firm for disbursements, whether or not any fee for professional services is charged.

4. Actions of Electors, House and Senate Are Not Elections for Purposes of the Presidential Election Campaign Fund or Federal Election Campaign Acts

2 U.S.C. § 431(8)(A)(i) of the Federal Election Campaign Act of 1971, as amended (the "Act"), defines a "contribution" to include:

any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office....

Thus, to constitute a contribution, the services must influence an "election."

All the relevant federal statutory definitions of elections make clear that actions of the Electors, and of the House and Senate under the Constitution, are not "elections" for purposes of such statutes.

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The term "election" is expressly defined by 2 U.S.C. § 431(1) as follows:

- (1) The term "election" means --
  - (A) a general, special, primary or runoff election;
  - (B) a convention or caucus of a political party which has authority to nominate a candidate;
  - (C) a primary election held for the selection of delegates to a national nominating convention of a political party; and
  - (D) a primary election held for the expression of a preference for the nomination of individuals for election to the office of President.  
[emphasis added]

The actions of the Electors or of the House and Senate in choosing the President and Vice President are not included in any of the above-detailed descriptions.

Similarly, Section 9002 of the Presidential Elections Campaign Fund Act, chapter 95 of the Internal Revenue Code, 26 U.S.C. § 9002, defines the term "presidential election" to mean "the election of presidential and vice-presidential electors." [emphasis added] Thus, the actions of the Electors themselves, let alone those of the House and Senate, are not covered.<sup>2</sup> Section 591(a) of 18 U.S.C., related to Elections and Political Activities, was amended with the Federal Election Campaign and Presidential Campaign Fund Acts. It was, prior to 1972 and until its repeal in 1980, to almost identical effect.

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2/ The Analysis (at p. 8) either misunderstands the Fried, Frank memorandum or §9002. The memorandum did not address general election issues at which Electors are elected, which is the meaning of §9002. Rather the memorandum addressed the actions to be taken by Electors, the House and Senate after the Electors are chosen in the general election.

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Thus, the balloting of the Electors and the actions of the House and Senate in evaluating the credentials of the electors and counting their ballots, are neither expressly, nor by implication, included within the statutory definition of "general election." Therefore, any legal services pertaining thereto do not fall within the definition of a "contribution."

This conclusion is confirmed by the Acts' legislative history. References to "voters" too numerous to cite make it clear that the Congress was concerned with voting by citizens, not the constitutional balloting by Electors which is never mentioned in any of the legislative history.

This conclusion is also confirmed by the relevant regulations of the Federal Elections Commission. Obviously, the constitutional balloting of the Electors, the determination of their credentials or the counting of their votes by Congress are not a primary or run-off election, caucus or convention. They could only be general or special elections. However, "general election" is specifically defined by the FEC in 11 C.F.R. 100.2(B) as only either:

- (1) An election held in even numbered years on the Tuesday following the first Monday in November...
- (2) An election which is held to fill a vacancy in a Federal office (i.e., a special election).... [emphasis added]

By law the Electors ". . . shall meet and give their votes on the first Monday after the second Wednesday in December . . . ." 62 Stat. 673 (1948), 3 U.S.C. § 7. By law the electoral votes are counted on the next January 6. 62 Stat. 675 (1948), 3 U.S.C. § 15. Thus, 11 C.F.R. 100.2(b)(1) is inapplicable. Section 100.2(b)(2) is inapplicable on its face.

That post-general election actions are not to be related back generally and become a part of the "elections" is confirmed by 11 C.F.R. 100.7(b)(20) and 100.8(b)(20) which provide that contributions or expenditures, respectively, with respect to a recount or election contest are not contributions or expenditures for purposes of the regulations. Finally, the FEC's regulations..

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make no effort to regulate the expenditures of Electors, unlike those of convention delegates. 11 C.F.R. 110.14.

C. The Payment of Fried, Frank's Disbursements from the GELAC Account Was Proper under 11 C.F.R. § 9003.3(a)(2). The Committee's position is clear and straight forward. While the Committee was somewhat surprised at the size of the disbursement invoice from Fried, Frank, after inquiry of the firm and a review of the invoices, the campaign paid the invoice and charged its GELAC account.<sup>3</sup>

The reason that such a charge was proper was that the Committee's GELAC account did then, and does now, have surplus funds. 11 C.F.R. § 9003.3(a)(2) regulating the payment of surplus GELAC funds, which the Analysis dismisses out of hand, provides that

"if after payment of all expenses relating to the general election, there are excess campaign funds, such funds may be used for any purpose permitted under 2 U.S.C. § 439a and 11 C.F.F. Part 113 . . ."

Both §439a and §113.2(d) provide in identical language that except for conversion to personal use, such funds "may be used for any lawful purpose." Certainly paying Fried, Frank's disbursements were a "lawful purpose" for which to use the GELAC surplus, and this was done.

3/ I apparently inadvertently wrote on an early invoice that "general election" should be charged; the error was caught on this 10/26/88 invoice was never paid. Subsequently when I did authorize payment of the large disbursement invoice I wrote "Please pay \$17,942.41 per compiled invoice sum - GELAC." (See Fried Frank 4/25/89 letter and invoice attached.) It has always been clear to me that the legal research relating to the electoral college was not a proper general election expenditure. The \$17,942.41 paid to Fried, Frank was insured from the General Election funds but was charged to GELAC costs as ported in the June, 1989 FEC reports. This was the manner in which all GELAC and wind-down costs were processed and reported.

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D. Sequentially-Numbered Money Orders. This issue, was not raised during the audit process when it could have been answered; nor was it mentioned by the Commission in the Final Audit. As a result, answering the suggestion of impropriety, and it is no more than a suggestion,<sup>4</sup> is extremely difficult for the Committee some five years after the fact. The Committee's records either no longer exist or are in storage.<sup>5</sup>

All money orders have all required information as to the name and addresses of the contributors, and there is no suggestion that any names are fictitious. Nor does it appear that the Commission staff has sought to contact any of the named contributors to ascertain whether or not they made the contribution reported in their name.

Nevertheless, I will attempt to respond as best I can. I have been informed that a fundraiser was held in the Astoria section of Queens to raise funds for GELAC around the middle of June, 1988. I believe that the primary amounts at issue were associated with this fundraising activity (the Marine Midland money orders). I have been informed that within the Greek community, which generally was very supportive of Governor Dukakis' electoral efforts, there is a pre-disposition to make cash contributions that is much greater than the pre-disposition generally found in the electorate at large. I am also informed that campaign fundraisers sought to discourage any and all cash donations, including those otherwise lawful. The reason for this was that fundraisers did not like to carry the responsibility of managing substantial amounts of cash; the Campaign, in turn, preferred the controls afforded by dealing in checks, and if necessary money orders. I believe what happened in these cases is that the named individual did, indeed, make the contributions at issue, but that initially they proposed making cash contributions.

4/ On page 15 the Analysis states: "The sequential numbering, uniform handwriting and typing in consistent dates within each set of money orders raise a question as to the actual source of the funds used to purchase these money orders." [emphasis added]

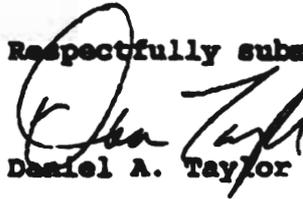
5/ Counsel to the Commission has provided copies of the money orders in issue.

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When this was pointed out to be either impermissible under the law or undesirable from the Campaign's point of view, one or more individuals took the records and cash to Marine Midland and had money orders drawn. It is possible that the individuals in question then asked assistance of the fundraising staff in correctly filling out the payee. This explanation is far more consistent with what likely happened five years ago than is speculation that one or more individuals went to extraordinary lengths in order to disguise contributions, most of which were in the range of \$10 to \$100. There is nothing approximating evidence that the Committee knowingly accepted a contribution made by one person in the name of another person. So many years after the fact, the Committee finds it virtually impossible to produce evidence to rebut speculation.

Respectfully submitted,



Daniel A. Taylor

cc: Dawn Odrowski, Esq.  
Mr. Edward Pliner  
Ms. Mary Wong

TAYD/VL1

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# Essays in Elections 1



**The  
Electoral  
College**

EXHIBIT B

# The Electoral College

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**Published by:**

National Clearinghouse on Election Administration

Federal Election Commission

Washington, D.C. 20463

May 1992

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# Introduction by the Clearinghouse

This report is the first of a new series of *Essays in Elections* being published by the FEC's National Clearinghouse on Election Administration.

The purpose of this series is to provide a forum for interested persons to address topics of general concern to the election community. It is important to note, however, that **the views and opinions expressed in these essays are those of the authors and are not necessarily shared by the Federal Election Commission or any division thereof.**

We welcome your comments on these essays as well as any suggestions you may have for future topics. We also welcome any essays you may want to submit for consideration. You may mail these to us at:

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# The Electoral College

In order to appreciate the reasons for the Electoral College, it is essential to understand its historical context and the problem that the Founding Fathers were trying to solve. They faced the difficult question of how to elect a president in a nation that:

- was composed of thirteen large and small States jealous of their own rights and powers and suspicious of any central national government
- contained only 4,000,000 people spread up and down a thousand miles of Atlantic seaboard barely connected by transportation or communication (so that national campaigns were impractical even if they had been thought desirable)
- believed, under the influence of such British political thinkers as Henry St John Bolingbroke, that political parties were mischievous if not downright evil, and
- felt that gentlemen should not campaign for public office (The saying was "The office should seek the man, the man should not seek the office.").

How, then, to choose a president without political parties, without national campaigns, and without upsetting the carefully designed balance between the presidency and the Congress on one hand and between the States and the federal government on the other?

## Origins of the Electoral College

The Constitutional Convention considered several possible methods of selecting a president.

One idea was to have the Congress choose the president. This idea was rejected, however, because some felt that making such a choice would be too divisive an issue and leave too many hard feelings in the Congress. Others felt that such a procedure would invite unseemly political bargaining, corruption, and perhaps even interference from foreign powers. Still others felt that such an arrangement would upset the balance of power between the legislative and executive branches of the federal government.

A second idea was to have the State legislatures select the president. This idea, too, was rejected out of fears that a president beholden to the State legislatures might permit them to erode federal authority and thus undermine the whole idea of a federation.

A third idea was to have the president elected by a direct popular vote. Direct election was rejected not because the Framers of the Constitution doubted public intelligence but rather because they feared that without sufficient information about candidates from outside their State, people would naturally vote for a "favorite son" from their own State or region. At worst, no president would emerge with a popular majority sufficient to govern the whole country. At best, the choice of president would always be decided by the largest, most populous States with little regard for the smaller ones.

Finally, a so-called "Committee of Eleven" in the Constitutional Convention proposed an indirect election of the president through a College of Electors.

The function of the College of Electors in choosing the president can be likened to that in the Roman Catholic Church of the College of Cardinals selecting the Pope. The original idea was for the most knowledgeable and informed individuals from each State to select the president based solely on merit and without regard to State of origin or political party.

The structure of the Electoral College can be traced to the Centurial Assembly system of the Roman Republic. Under that system, the adult male citizens of Rome were divided, according to their wealth, into groups of 100 (called Centuries). Each group of 100 was entitled to cast only one vote either in favor or against proposals submitted to them by the Roman Senate. In the Electoral College system, the States serve as the Centurial groups (though they are not, of course, based on wealth), and the number of votes per State is determined by the size of each State's Congressional delegation. Still, the two systems are similar in design and share many of the same advantages and disadvantages.

The similarities between the Electoral College and classical institutions are not accidental. Many of the Founding Fathers were well schooled in ancient history and its lessons.

### The First Design

In the first design of the Electoral College (described in Article II, Section 1 of the Constitution):

- Each State was allocated a number of Electors equal to the number of its U.S. Senators (always 2) plus the number of its U.S. Representatives (which may change each decade according to the size of each State's population as determined in the decennial census). This arrangement built upon an earlier com-

promise in the design of the Congress itself and thus satisfied both large and small States.

- The manner of choosing the Electors was left to the individual State legislatures, thereby pacifying States suspicious of a central national government.
- Members of Congress and employees of the federal government were specifically prohibited from serving as an Elector in order to maintain the balance between the legislative and executive branches of the federal government.
- Each State's Electors were required to meet in their respective States rather than all together in one great meeting. This arrangement, it was thought, would prevent bribery, corruption, secret dealing, and foreign influence.
- In order to prevent Electors from voting only for a "favorite son" of their own State, each Elector was required to cast *two* votes for president, at least one of which had to be for someone outside their home State. The idea, presumably, was that the winner would likely be everyone's second favorite choice.
- The electoral votes were to be sealed and transmitted from each of the States to the President of the Senate who would then open them before both houses of the Congress and read the results.
- The person with the most electoral votes, provided that it was an absolute majority (at least one over half of the total), became president. Whoever obtained the next greatest number of electoral votes became vice president — an office which they seem to have invented for the occasion since it had not been mentioned previously in the Constitutional Convention.
- In the event that no one obtained an absolute majority in the Electoral College or in the event of a tie vote, the U.S. House of Representatives, as the chamber closest to the

people, would choose the president from among the top five contenders. They would do this (as a further concession to the small States) by allowing each State to cast only one vote with an absolute majority of the States being required to elect a president. The vice presidency would go to whatever remaining contender had the greatest number of electoral votes. If that, too, was tied, the U.S. Senate would break the tie by deciding between the two.

In all, this was quite an elaborate design. But it was also a very clever one when you consider that the whole operation was supposed to work *without political parties* and *without national campaigns* while maintaining the balances and satisfying the fears in play at the time. Indeed, it is probably because the Electoral College was originally designed to operate in an environment so totally different from our own that many people think it is anachronistic and fail to appreciate the new purposes it now serves. But of that, more later.

### The Second Design

The first design of the Electoral College lasted through only four presidential elections. For in the meantime, political parties had emerged in the United States. The very people who had been condemning parties publicly had nevertheless been building them privately. And too, the idea of political parties had gained respectability through the persuasive writings of such political philosophers as Edmund Burke and James Madison.

One of the accidental results of the development of political parties was that in the presidential election of 1800, the Electors of the Democratic-Republican Party gave Thomas Jefferson and Aaron Burr (both of that party) an equal number of electoral votes. The tie was resolved by the House of Representatives in Jefferson's favor — but only after 36 tries and some serious political dealings which were considered unseemly at the time. Since this sort of bargaining over the presidency was the very thing the Electoral Col-

lege was supposed to prevent, the Congress and the States hastily adopted the Twelfth Amendment to the Constitution by September of 1804.

To prevent tie votes in the Electoral College which were made probable, if not inevitable, by the rise of political parties (and no doubt to facilitate the election of a president and vice president of the same party), the 12th Amendment requires that each Elector cast *one* vote for president and a *separate* vote for vice president rather than casting two votes for president with the runner-up being made vice president. The Amendment also stipulates that if no one receives an absolute majority of electoral votes for president, then the U.S. House of Representatives will select the president from among the top three contenders with each State casting only one vote and an absolute majority being required to elect. By the same token, if no one receives an absolute majority for vice president, then the U.S. Senate will select the vice president from among the top two contenders for that office. All other features of the Electoral College remained the same including the requirement that, in order to prevent Electors from voting only for "favorite sons", either the presidential or vice presidential candidate has to be from a State other than that of the Electors.

In short, political party loyalties had, by 1800, begun to cut across State loyalties thereby creating new and different problems in the selection of a president. By making seemingly slight changes, the 12th Amendment fundamentally altered the design of the Electoral College and, in one stroke, accommodated political parties as a fact of life in American presidential elections.

It is noteworthy in passing that the idea of electing the president by direct popular vote was not widely promoted as an alternative to redesigning the Electoral College. This may be because the physical and demographic circumstances of the country had not changed that much in a dozen or so years. Or it may be because the excesses of the recent French revolution (and its fairly rapid degeneration into dictatorship) had

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given the populists some pause to reflect on the wisdom of too direct a democracy.

## **The Evolution of the Electoral College**

Since the 12th Amendment, there have been several federal and State statutory changes which have affected both the time and manner of choosing Presidential Electors but which have not further altered the fundamental workings of the Electoral College. There have also been a few curious incidents which its critics cite as problems but which proponents of the Electoral College view as merely its natural and intended operation.

### **The Manner of Choosing Electors**

From the outset, and to this day, the manner of choosing its State's Electors was left to each State legislature. And initially, as one might expect, different States adopted different methods.

Some State legislatures decided to choose the Electors themselves. Others decided on a direct popular vote for Electors either by Congressional district or at large throughout the whole State. Still others devised some combination of these methods. But in all cases, Electors were chosen individually from a single list of all candidates for the position.

During the 1800's, two trends in the States altered and more or less standardized the manner of choosing Electors. The first trend was toward choosing Electors by the direct popular vote of the whole State (rather than by the State legislature or by the popular vote of each Congressional district). Indeed, by 1836, all States had moved to choosing their Electors by a direct statewide popular vote except South Carolina which persisted in choosing them by the State legislature until 1860. Today, all States choose their Electors by direct statewide election except Maine (which in 1969) and Nebraska (which in 1991) changed to selecting two of its Electors by

a statewide popular vote and the remainder by the popular vote in each Congressional district.

Along with the trend toward their direct statewide election came the trend toward what is called the "winner-take-all" system of choosing Electors. Under the winner-take-all system, the presidential candidate who wins the most popular votes within a State wins all of that State's Electors. This winner-take-all system was really the logical consequence of the direct statewide vote for Electors owing to the influence of political parties. For in a direct popular election, voters loyal to one political party's candidate for president would naturally vote for that party's list of proposed Electors. By the same token, political parties would propose only as many Electors as there were electoral votes in the State so as not to fragment their support and thus permit the victory of another party's Elector.

There arose, then, the custom that each political party would, in each State, offer a "slate of Electors" — a list of individuals loyal to their candidate for president and equal in number to that State's electoral vote. The voters of each State would then vote for each individual listed in the slate of whichever party's candidate they preferred. Yet the business of presenting separate party slates of individuals occasionally led to confusion. Some voters divided their votes between party lists because of personal loyalties to the individuals involved rather than according to their choice for president. Other voters, either out of fatigue or confusion, voted for fewer than the entire party list. The result, especially in close elections, was the occasional splitting of a State's electoral vote. This happened as late as 1916 in West Virginia when seven Republican Electors and one Democrat Elector won.

Today, the individual party candidates for Elector are seldom listed on the ballot. Instead, the expression "Electors for" usually appears in fine print on the ballot in front of each set of candidates for president and vice president (or else the State law specifies that votes cast for the candidates are to be counted as being for the slate

of delegates pledged to those candidates). It is still true, however, that voters are actually casting their votes for the Electors for the presidential and vice presidential candidates of their choice rather than for the candidates themselves.

### The Time of Choosing Electors

The time for choosing Electors has undergone a similar evolution. For while the Constitution specifically gives to the Congress the power to "determine the Time of chusing the Electors", the Congress at first gave some latitude to the States.

For the first fifty years of the Federation, Congress permitted the States to conduct their presidential elections (or otherwise to choose their Electors) anytime in a 34 day period before the first Wednesday of December which was the day set for the meeting of the Electors in their respective States. The problems born of such an arrangement are obvious and were intensified by improved communications. For the States which voted later could swell, diminish, or be influenced by a candidate's victories in the States which voted earlier. In close elections, the States which voted last might well determine the outcome. (And it is perhaps for this reason that South Carolina, always among the last States to choose its Electors, maintained for so long its tradition of choosing them by the State legislature. In close elections, the South Carolina State legislature might well decide the presidency!).

The Congress, in 1845, therefore adopted a uniform day on which the States were to choose their Electors. That day — the Tuesday following the first Monday in November in years divisible by four — continues to be the day on which all the States now conduct their presidential elections.

### Historical Curiosities

In the evolution of the Electoral College, there have been some interesting developments and remarkable outcomes. Critics often try to use these as examples of what can go wrong. Yet most

of these historical curiosities were the result of profound political divisions within the country which the designers of the Electoral College system seem to have anticipated as needing resolution at a higher level.

■ In 1800, as previously noted, the Democratic-Republican Electors gave both Thomas Jefferson and Aaron Burr an equal number of electoral votes. The tie, settled in Jefferson's favor by the House of Representatives in accordance with the original design of the Electoral College system, prompted the 12th Amendment which effectively prevented this sort of thing from ever happening again.

■ In 1824, there were four fairly strong contenders in the presidential contest (Andrew Jackson, John Quincy Adams, William Crawford, and Henry Clay) each of whom represented an important faction within the now vastly dominant Democratic-Republican Party. The electoral votes were so divided amongst them that no one received the necessary majority to become president (although the popular John C. Calhoun did receive enough electoral votes to become vice president). In accordance with the provisions of the 12th Amendment, the choice of president devolved upon the House of Representatives who narrowly selected John Quincy Adams despite the fact that Andrew Jackson had obtained the greater number of electoral votes. This election is often cited as the first one in which the candidate who obtained the greatest popular vote (Jackson) failed to be elected president. The claim is a weak one, though, since six of the twenty four States at the time still chose their Electors in the State legislature. Some of these (such as sizable New York) would likely have returned large majorities for Adams had they conducted a popular election.

■ The 1836 presidential election was a truly strange event. The developing Whig Party, for example, decided to run three different presidential candidates (William Henry Harrison, Daniel Webster, and Hugh White) in separate parts of the country. The idea was that their respective regional popularities would ensure a Whig major-

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ity in the Electoral College which would then decide on a single Whig presidential ticket. This fairly inspired scheme failed, though, when Democratic-Republican candidate Martin Van Buren won an absolute majority of Electors. Nor has such a strategy ever again been seriously attempted. Yet Van Buren himself did not escape the event entirely unscathed. For while he obtained an electoral majority, his vice presidential running mate (one Richard Johnson) was considered so objectionable by some of the Democratic-Republican Electors that he failed to obtain the necessary majority of electoral votes to become vice president. In accordance with the 12th Amendment, the decision devolved upon the Senate which chose Johnson as vice president anyway. A really bizarre election, that one.

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■ In the 1872 election, Democratic candidate Horace Greeley (he of earlier "Go West, young man, go West" journalistic fame whose nomination makes a good story in itself) thoughtlessly died during that period between the popular vote for Electors and the meeting of the Electoral College. The Electors who were pledged to him, clearly unprepared for such an eventuality, split their electoral votes amongst several other Democratic candidates (including three votes for Greeley himself as a possible comment on the incumbent Ulysses S. Grant). That hardly mattered, though, since the Republican Grant had readily won an absolute majority of Electors. Still, it was an interesting event for which the political parties are now prepared.

■ In 1876, the country once again found itself in serious political turmoil echoing, in some respects, both the economic divisions of 1824 and the impending political party realignments of 1836, but with the added bitterness of Reconstruction. A number of deep cross currents were in play. After a vast economic expansion, the country had fallen into a deep depression. Monetary and tariff issues were eroding the Union Republican coalition of East and West while a solid Republican black vote eroded the traditional Democratic hold on the South. The incumbent Republican administration of Grant had

suffered a seemingly endless series of scandals involving graft and corruption on a scale hitherto unknown. And the South was eager to put an end to Radical Reconstruction which was, after all, a kind of vast political mugging. Against this backdrop, the resurging Democratic Party easily nominated Samuel J. Tilden, the popular Governor of New York, and Thomas A. Hendricks of Indiana (shrewd geographic choices under the circumstances). The Republicans, in a more turbulent convention, selected Ohio Governor Rutherford B. Hayes and William A. Wheeler of New York. A variety of fairly significant third parties also cropped up, further shattering the country's political cohesion.

This is about as good a prescription for electoral chaos as anyone might hope for. Indeed, it is almost surprising that things did not turn out worse than they did. For on election night, it looked as though Tilden had pulled off the first Democratic presidential victory since the Civil War — although the decisive electoral votes of South Carolina, Florida, and Louisiana remained in balance. Yet these States were as divided internally as was the nation at large. Without detailing the machinations of the vote count, suffice it to say that each State finally delivered to the Congress two sets of electoral votes — one set for Tilden and one set for Hayes. Because the Congressional procedures for resolving disputed sets of Electors had expired, the Congress established a special 15-member commission to decide the issue in each of the three States. After much partisan intrigue, the special commission decided (by one vote in each case) on Hayes' Electors from all three States. Thus, Hayes was elected president despite the fact that Tilden, by everyone's count, had obtained a slight majority of popular votes (although the difference was a mere 3% of the total vote cast). As a final note, the Congress enacted in 1887 legislation that delegated to each State the final authority to determine the legality of its choice of Electors and required a concurrent majority of both houses of Congress to reject any electoral vote. That legislation remains in effect to this day so that the events of 1876 will not repeat themselves.

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■ Benjamin Harrison's election in 1888 is really the only clearcut instance in which the Electoral College vote went contrary to the popular vote. This happened because the incumbent, Democrat Grover Cleveland, ran up huge popular majorities in several of the 18 States which supported him while the Republican challenger, Benjamin Harrison, won only slender majorities in some of the larger of the 20 States which supported him (most notably in Cleveland's home State of New York). Even so, the difference between them was only 110,476 votes out of 11,381,032 cast — less than 1% of the total. Interestingly, in this case, there were few critical issues (other than tariffs) separating the candidates so that the election seems to have been fought — and won — more on the basis of superior party organization in getting out the vote than on the issues of the day.

These, then, are the major historical curiosities of the Electoral College system. And because they are so frequently cited as flaws in the system, a few observations on them seem in order.

First, all of these events occurred over a century ago. For the past hundred years, the Electoral College has functioned without incident in every presidential election through two world wars, a major economic depression, and several periods of acute civil unrest. Only twice in this century (the States' Rights Democrats in 1948 and George Wallace's American Independents in 1968) have there been attempts to block an Electoral College victory and thus either force a negotiation for the presidency or else force the decision into the Congress. Neither attempt came close to succeeding. Such stability, rare in human history, should not be lightly dismissed.

Second, each of these events (except 1888) resulted either from political inexperience (as in 1800, 1836, and 1872) or from profound political divisions within the country (as in 1824, 1876, and even 1948 and 1968) which required some sort of higher order political resolution. And all of them were resolved in a peaceable and orderly fashion without any public uprising and without

endangering the legitimacy of the sitting president. Indeed, it is hard to imagine how a direct election of the president could have resolved events as agreeably.

Finally, as the election of 1888 demonstrates, the Electoral College system imposes two requirements on candidates for the presidency:

- that the victor obtain a *sufficient* popular vote to enable him to govern (although this may not be the absolute majority), and
- that such a popular vote be sufficiently *distributed* across the country to enable him to govern.

Such an arrangement ensures a regional balance of support which is a vital consideration in governing a large and diverse nation (even though in close elections, as in 1888, distribution of support may take precedence over majority of support).

Far from being flaws, then, the historical oddities described above demonstrate the strength and resilience of the Electoral College system in being able to select a president in even the most troubled of times.

## Current Workings of the Electoral College

The current workings of the Electoral College are the result of both design and experience. As it now operates:

- Each State is allocated a number of Electors equal to the number of its U.S. Senators (always 2) plus the number of its U.S. Representatives (which may change each decade according to the size of each State's population as determined in the Census).
- The political parties (or independent candidates) in each State submit to the State's chief election official a list of individuals pledged to their candidate for president and equal in number to the State's electoral vote. Usually, the major political parties select these indi-

viduals in their State party conventions while third parties and independent candidates merely designate theirs.

- Members of Congress and employees of the federal government are prohibited from serving as an Elector in order to maintain the balance between the legislative and executive branches of the federal government.
- After their caucuses and primaries, the major parties nominate their candidates for president and vice president in their national conventions — traditionally held in the summer preceding the election. (Third parties and independent candidates follow different procedures according to the individual State laws). The names of the duly nominated candidates are then officially submitted to each State's chief election official so that they might appear on the general election ballot.
- On the Tuesday following the first Monday of November in years divisible by four, the people in each State cast their ballots for the party slate of Electors representing their choice for president and vice president (although as a matter of practice, general election ballots normally say "Electors for" each set of candidates rather than list the individual Electors on each slate).
- Whichever party slate wins the most popular votes in the State becomes that State's Electors — so that, in effect, whichever presidential ticket gets the most popular votes in a State wins all the Electors of that State. [The two exceptions to this are Maine and Nebraska where two Electors are chosen by a statewide popular vote and the remainder by the popular vote within each Congressional district].
- On the Monday following the second Wednesday of December (as established in federal law) each State's Electors meet in their respective State capitals and cast their electoral votes — one for president and one for vice president.

- In order to prevent Electors from voting only for "favorite sons" of their home State, at least one of their votes must be for a person from outside their State (though this is seldom a problem since the parties have consistently nominated presidential and vice presidential candidates from different States).
- The electoral votes are then sealed and transmitted from each State to the President of the Senate who, on the following January 6, opens and reads them before both houses of the Congress.
- The candidate for president with the most electoral votes, provided that it is an absolute majority (one over half of the total), is declared president. Similarly, the vice presidential candidate with the absolute majority of electoral votes is declared vice president.
- In the event no one obtains an absolute majority of electoral votes for president, the U.S. House of Representatives (as the chamber closest to the people) selects the president from among the top three contenders with each State casting only one vote and an absolute majority of the States being required to elect. Similarly, if no one obtains an absolute majority for vice president, then the U.S. Senate makes the selection from among the top two contenders for that office.
- At noon on January 20, the duly elected president and vice president are sworn into office.

Occasionally questions arise about what would happen if the presidential or vice presidential candidate died at some point in this process. For answers to these, as well as to a number of other "what if" questions, readers are advised to consult a small volume entitled *After the People Vote: Steps in Choosing the President* edited by Walter Berns and published in 1983 by the American Enterprise Institute. Similarly, further details on the history and current functioning of the Electoral College are available in the second edition of *Congressional Quarterly's Guide to U.S.*

### Distribution of Electoral Votes

State	1981-1990	1991-2000
Alabama	9	9
Alaska	3	3
Arizona	7	8
Arkansas	6	6
California	47	54
Colorado	8	8
Connecticut	8	8
Delaware	3	3
District of Columbia	3	3
Florida	21	25
Georgia	12	13
Hawaii	4	4
Idaho	4	4
Illinois	24	22
Indiana	12	12
Iowa	8	7
Kansas	7	6
Kentucky	9	8
Louisiana	10	9
Maine	4	4
Maryland	10	10
Massachusetts	13	12
Michigan	20	18
Minnesota	10	10
Mississippi	7	7
Missouri	11	11
Montana	4	3
Nebraska	5	5
Nevada	4	4
New Hampshire	4	4
New Jersey	16	15
New Mexico	5	5
New York	36	33
North Carolina	13	14
North Dakota	3	3
Ohio	23	21
Oklahoma	8	8
Oregon	7	7
Pennsylvania	25	23
Rhode Island	4	4
South Carolina	8	8
South Dakota	3	3
Tennessee	11	11
Texas	29	32
Utah	5	5
Vermont	3	3
Virginia	12	13
Washington	10	11
West Virginia	6	5
Wisconsin	11	11
Wyoming	3	3

**TOTAL ELECTORAL VOTE: 538**

**NEEDED TO ELECT: 270**

*Elections*, a real goldmine of information, maps, and statistics.

## The Pro's and Con's of the Electoral College System

There have, in its 200-year history, been a number of critics and proposed reforms to the Electoral College system — most of them trying to eliminate it. But there are also staunch defenders of the Electoral College who, though perhaps less vocal than its critics, offer very powerful arguments in its favor.

### Arguments Against the Electoral College

Those who object to the Electoral College system and favor a direct popular election of the president generally do so on four grounds:

- the possibility of electing a minority president
- the risk of so-called "faithless" Electors,
- the possible role of the Electoral College in depressing voter turnout, and
- its failure to accurately reflect the national popular will.

Opponents of the Electoral College are disturbed by *the possibility of electing a minority president* (one without the absolute majority of popular votes). Nor is this concern entirely unfounded since there are three ways in which that could happen.

One way in which a minority president could be elected is if the country were so deeply divided politically that three or more presidential candidates split the electoral votes among them such that no one obtained the necessary majority. This occurred, as noted above, in 1824 and was unsuccessfully attempted in 1948 and again in 1968. Should that happen today, there are two possible resolutions: either one candidate could throw his electoral votes to the support of another (before the meeting of the Electors) or else, absent an absolute majority in the Electoral College, the

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U.S. House of Representatives would select the president in accordance with the 12th Amendment. Either way, though, the person taking office would not have obtained the absolute majority of the popular vote. Yet it is unclear how a direct election of the president could resolve such a deep national conflict without introducing a presidential run-off election — a procedure which would add substantially to the time, cost, and effort already devoted to selecting a president and which might well deepen the political divisions while trying to resolve them.

A second way in which a minority president could take office is if, as in 1888, one candidate's popular support were heavily concentrated in a few States while the other candidate maintained a slim popular lead in enough States to win the needed majority of the Electoral College. While the country has occasionally come close to this sort of outcome, the question here is whether the distribution of a candidate's popular support should be taken into account alongside the relative size of it. This issue was mentioned above and is discussed at greater length below.

A third way of electing a minority president is if a third party or candidate, however small, drew enough votes from the top two that no one received over 50% of the national popular total. Far from being unusual, this sort of thing has, in fact, happened 15 times including (in this century) Wilson in both 1912 and 1916, Truman in 1948, Kennedy in 1960, and Nixon in 1968. The only remarkable thing about those outcomes is that few people noticed and even fewer cared. Nor would a direct election have changed those outcomes without a run-off requiring over 50% of the popular vote (an idea which not even proponents of a direct election seem to advocate).

Opponents of the Electoral College system also point to *the risk of so-called "faithless" Electors*. A "faithless Elector" is one who is pledged to vote for his party's candidate for president but nevertheless votes for another candidate. There have been 7 such Electors in this century and as recently as 1988 when a Democrat Elector in the

State of West Virginia cast his votes for Lloyd Bensen for president and Michael Dukakis for vice president instead of the other way around. Faithless Electors have never changed the outcome of an election, though, simply because most often their purpose is to make a statement rather than make a difference. That is to say, when the electoral vote outcome is so obviously going to be for one candidate or the other, an occasional Elector casts a vote for some personal favorite knowing full well that it will not make a difference in the result. Still, if the prospect of a faithless Elector is so fearsome as to warrant a Constitutional amendment, then it is possible to solve the problem without abolishing the Electoral College merely by eliminating the individual Electors in favor of a purely mathematical process (since the individual Electors are no longer essential to its operation).

Opponents of the Electoral College are further concerned about *its possible role in depressing voter turnout*. Their argument is that, since each State is entitled to the same number of electoral votes regardless of its voter turnout, there is no incentive in the States to encourage voter participation. Indeed, there may even be an incentive to discourage participation (and they often cite the South here) so as to enable a minority of citizens to decide the electoral vote for the whole State. While this argument has a certain surface plausibility, it fails to account for the fact that presidential elections do not occur in a vacuum. States also conduct other elections (for U.S. Senators, U.S. Representatives, State Governors, State legislators, and a host of local officials) in which these same incentives and disincentives are likely to operate, if at all, with an even greater force. It is hard to imagine what counter-incentive would be created by eliminating the Electoral College.

Finally, some opponents of the Electoral College point out, quite correctly, *its failure to accurately reflect the national popular will* in at least two respects.

First, the distribution of Electoral votes in the College tends to over-represent people in rural

States. This is because the number of Electors for each State is determined by the number of members it has in the House (which more or less reflects the State's population size) plus the number of members it has in the Senate (which is always two regardless of the State's population). The result is that in 1988, for example, the combined voting age population (3,119,000) of the seven least populous jurisdictions of Alaska, Delaware, the District of Columbia, North Dakota, South Dakota, Vermont, and Wyoming carried the same voting strength in the Electoral College (21 Electoral votes) as the 9,614,000 persons of voting age in the State of Florida. Each Floridian's potential vote, then, carried about one third the weight of a potential vote in the other States listed.

A second way in which the Electoral College fails to accurately reflect the national popular will stems primarily from the winner-take-all mechanism whereby the presidential candidate who wins the most popular votes in the State wins all the Electoral votes of that State. One effect of this mechanism is to make it extremely difficult for third-party or independent candidates ever to make much of a showing in the Electoral College. If, for example, a third-party or independent candidate were to win the support of even as many as 25% of the voters nationwide, he might still end up with no Electoral College votes at all unless he won a plurality of votes in at least one State. And even if he managed to win a few States, his support elsewhere would not be reflected. By thus failing to accurately reflect the national popular will, the argument goes, the Electoral College reinforces a two-party system, discourages third-party or independent candidates, and thereby tends to restrict choices available to the electorate.

In response to these arguments, proponents of the Electoral College point out that it was never intended to reflect the national popular will. As for the first issue, that the Electoral College over-represents rural populations, proponents respond that the United States Senate — with two seats per State regardless of its population — over-

represents rural populations far more dramatically. But since there have been no serious proposals to abolish the United States Senate on these grounds, why should such an argument be used to abolish the lesser case of the Electoral College? Because the presidency represents the whole country? But so, as an institution, does the United States Senate.

As for the second issue of the Electoral College's role in reinforcing a two-party system, proponents, as we shall see, find this to be a positive virtue.

### Arguments for the Electoral College

Proponents of the Electoral College system normally defend it on the philosophical grounds that it:

- contributes to the cohesiveness of the country by requiring a distribution of popular support to be elected president
- enhances the status of minority interests,
- contributes to the political stability of the nation by encouraging a two-party system, and
- maintains a federal system of government and representation.

Recognizing the strong regional interests and loyalties which have played so great a role in American history, proponents argue that the Electoral College system *contributes to the cohesiveness of the country by requiring a distribution of popular support to be elected president*. Without such a mechanism, they point out, presidents would be selected either through the domination of one populous region over the others or through the domination of large metropolitan areas over the rural ones. Indeed, it is principally because of the Electoral College that presidential nominees are inclined to select vice presidential running mates from a region other than their own. For as things stand now, no one region contains the absolute majority (270) of electoral votes required to elect a president. Thus, there is an incentive for presidential candidates

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to pull together coalitions of States and regions rather than to exacerbate regional differences. Such a unifying mechanism seems especially prudent in view of the severe regional problems that have typically plagued geographically large nations such as China, India, the Soviet Union, and even, in its time, the Roman Empire.

This unifying mechanism does not, however, come without a small price. And the price is that in very close popular elections, it is possible that the candidate who wins a slight majority of popular votes may not be the one elected president — depending (as in 1888) on whether his popularity is concentrated in a few States or whether it is more evenly distributed across the States. Yet this is less of a problem than it seems since, as a practical matter, the popular difference between the two candidates would likely be so small that either candidate could govern effectively.

Proponents thus believe that the practical value of requiring a distribution of popular support outweighs whatever sentimental value may attach to obtaining a bare majority of popular support. Indeed, they point out that the Electoral College system is designed to work in a rational series of defaults: if, in the first instance, a candidate receives a substantial majority of the popular vote, then that candidate is virtually certain to win enough electoral votes to be elected president; in the event that the popular vote is extremely close, then the election defaults to that candidate with the best distribution of popular votes (as evidenced by obtaining the absolute majority of electoral votes); in the event the country is so divided that no one obtains an absolute majority of electoral votes, then the choice of president defaults to the States in the U.S. House of Representatives. One way or another, then, the winning candidate must demonstrate both a **sufficient** popular support to govern as well as a **sufficient distribution** of that support to govern.

Proponents also point out that, far from diminishing minority interests by depressing voter

participation, the Electoral College actually *enhances the status of minority groups*. This is so because the votes of even small minorities in a State may make the difference between winning all of that State's electoral votes or none of that State's electoral votes. And since ethnic minority groups in the United States happen to concentrate in those States with the most electoral votes, they assume an importance to presidential candidates well out of proportion to their number. The same principle applies to other special interest groups such as labor unions, farmers, environmentalists, and so forth.

It is because of this "leverage effect" that the presidency, as an institution, tends to be more sensitive to ethnic minority and other special interest groups than does the Congress as an institution. Changing to a direct election of the president would therefore actually damage minority interests since their votes would be overwhelmed by a national popular majority.

Proponents further argue that the Electoral College *contributes to the political stability of the nation by encouraging a two-party system*. There can be no doubt that the Electoral College has encouraged and helps to maintain a two-party system in the United States. This is true simply because it is extremely difficult for a new or minor party to win enough popular votes in enough States to have a chance of winning the presidency. Even if they won enough electoral votes to force the decision into the U.S. House of Representatives, they would still have to have a majority of over half the State delegations in order to elect their candidate — and in that case, they would hardly be considered a minor party.

In addition to protecting the presidency from impassioned but transitory third party movements, the practical effect of the Electoral College (along with the single-member district system of representation in the Congress) is to virtually force third party movements into one of the two major political parties. Conversely, the major parties have every incentive to absorb minor

party movements in their continual attempt to win popular majorities in the States. In this process of assimilation, third party movements are obliged to compromise their more radical views if they hope to attain any of their more generally acceptable objectives. Thus we end up with two large, pragmatic political parties which tend to the center of public opinion rather than dozens of smaller political parties catering to divergent and sometimes extremist views. In other words, such a system forces political coalitions to occur within the political parties rather than within the government.

A direct popular election of the president would likely have the opposite effect. For in a direct popular election, there would be every incentive for a multitude of minor parties to form in an attempt to prevent whatever popular majority might be necessary to elect a president. The surviving candidates would thus be drawn to the regionalist or extremist views represented by these parties in hopes of winning the run-off election.

The result of a direct popular election for president, then, would likely be a frayed and unstable political system characterized by a multitude of political parties and by more radical changes in policies from one administration to the next. The Electoral College system, in contrast, encourages political parties to coalesce divergent interests into two sets of coherent alternatives. Such an organization of social conflict and political debate contributes to the political stability of the nation.

Finally, its proponents argue quite correctly that the Electoral College *maintains a federal system of government and representation*. Their reasoning is that in a formal federal structure, important political powers are reserved to the component States. In the United States, for example, the House of Representatives was designed to represent the States according to the size of their population. The States are even responsible for drawing the district lines for their House seats. The Senate was designed to repre-

sent each State equally regardless of its population. And the Electoral College was designed to represent each State's choice for the presidency (with the number of each State's electoral votes being the number of its Senators plus the number of its Representatives). To abolish the Electoral College in favor of a nationwide popular election for president would strike at the very heart of the federal structure laid out in our Constitution and would lead to the nationalization of our central government — to the detriment of the States.

Indeed, if we become obsessed with government by popular majority as the only consideration, should we not then abolish the Senate which represents States regardless of population? Should we not correct the minor distortions in the House (caused by districting and by guaranteeing each State at least one Representative) by changing it to a system of proportional representation? This would accomplish "government by popular majority" and guarantee the representation of minority parties, but it would also demolish our federal system of government. If there are reasons to maintain State representation in the Senate and House as they exist today, then surely these same reasons apply to the choice of president. Why, then, apply a sentimental attachment to popular majorities only to the Electoral College?

The fact is, they argue, that the original design of our federal system of government was thoroughly and wisely debated by the Founding Fathers. State viewpoints, they decided, are more important than political minority viewpoints. And the collective opinion of the individual State populations is more important than the opinion of the national population taken as a whole. Nor should we tamper with the careful balance of power between the national and State governments which the Founding Fathers intended and which is reflected in the Electoral College. To do so would fundamentally alter the nature of our government and might well bring about consequences that even the reformers would come to regret.

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## Conclusion

The Electoral College has performed its function for over 200 years (and in over 50 presidential elections) by ensuring that the President of the United States has both sufficient popular support to govern and that his popular support is sufficiently distributed throughout the country to enable him to govern effectively.

Although there were a few anomalies in its early history, none have occurred in the past century. Proposals to abolish the Electoral Col-

lege, though frequently put forward, have failed largely because the alternatives to it appear more problematic than is the College itself.

The fact that the Electoral College was originally designed to solve one set of problems but today serves to solve an entirely different set of problems is a tribute to the genius of the Founding Fathers.

### A Selected Bibliography On the Electoral College

#### Highly Recommended

Berns, Walter (ed.). *After the People Vote: Steps in Choosing the President*. Washington: American Enterprise Institute for Public Policy Research, 1983.

Bickel, Alexander M. *Reform and Continuity*. New York: Harper & Row, 1971.

*Congressional Quarterly's Guide to U.S. Elections* (2nd ed.). Washington, D.C.: Congressional Quarterly, 1985.

Schlesinger, Arthur M. Jr. (ed.). *History of Presidential Elections 1789-1968*. New York: Chelsea House Publishers, 1971.

#### Other Sources

American Enterprise Institute for Public Policy Research. *Proposals for Revision of the Electoral College System*. Washington: 1969.

Best, Judith. *The Case Against the Direct Election of the President*. Ithica: Cornell University Press, 1975.

Longley, Lawrence D. *The Politics of Electoral College Reform*. New Haven: Yale University Press, 1972.

Pierce, Neal R. and Longley, Lawrence D. *The People's President: The Electoral College in American History and the Direct-Vote Alternative*. New Haven: Yale University Press, 1981.

Sayre, Wallace Stanley. *Voting for President*. Washington: Brookings Institution, c1970.

Zeidenstein, Harvey G. *Direct Election of the President*. Lexington, Mass: Lexington Books, 1973.

For information about other

## Essays in Elections

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WASHINGTON, D.C. 20463

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**SENSITIVE**

January 13, 1994

**MEMORANDUM**

To: The Commission  
From: Lois G. Lerner *LL*  
Associate General Counsel  
Subject: MUR

3449

Recommended Actions in Light of FEC v. NRA  
Political Victory Fund, No. 91-5360, (D.C. Cir.  
Oct. 22, 1993)

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**I. BACKGROUND**

On November 5, 1993, the Office of the General Counsel forwarded to the Commission a memorandum regarding the recent appellate decision in FEC v. NRA Political Victory Fund, et al. No. 91-5360 (D.C. Cir. Oct. 22, 1993) and advised the Commission on the effects and implications of that decision on the pending enforcement caseload. This Office has reviewed the Commission's pending enforcement docket and in this memorandum makes recommendations with respect to MURs in which the Commission found reason to believe prior to the court's decision in NRA. The recommendations put forth as to each of the matters are consistent with the Commission's November 9, 1993, decisions concerning compliance with the NRA opinion.

**II. RECOMMENDED ACTIONS IN LIGHT OF FEC v. NRA**

g. MUR 3449

This Office recommends that the Commission, consistent with its November 9, 1993, decisions concerning compliance with the NRA opinion, and based on the original referral from the Audit Division, revote to: find reason to believe that the Dukakis/Bentsen Committee, Inc. and Edward Pliner, as treasurer, violated 2 U.S.C. §§ 434(b)(4), 441a(f), 441b(a), and 26 U.S.C. § 9003(b); find reason to believe Dukakis/Bentsen Committee Inc. (Dukakis/Bentsen General Election Legal and Accounting Compliance Fund) and Edward Pliner, as treasurer, violated 2 U.S.C. § 441f and 11 C.F.R. § 9003.3(a)(2); and, find reason to believe that Fried, Frank, Harris, Shriver and Jacobson, a partnership including professional corporations, violated 2 U.S.C. §§ 441a(a)(1)(A) and 441b(a). It is also recommended that the Commission approve the Factual and Legal Analyses for these respondents that were attached to the General Counsel's Report dated April 23, 1993. A copy of the certification reflecting the Commission's previous vote is attached. (Attachment 11.)

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**III. RECOMMENDATIONS**

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MUR 3449

- a. Find reason to believe that the Dukakis/Bentsen Committee, Inc. and Edward Pliner, as treasurer, violated 2 U.S.C. §§ 434(b)(4), 441a(f), 441b(a), and 26 U.S.C. § 9003(b).
- b. Find reason to believe that Dukakis/Bentsen Committee Inc. (Dukakis/Bentsen General Election Legal and Accounting Compliance Fund) and Edward Pliner, as treasurer, violated 2 U.S.C. § 441f and 11 C.F.R. § 9003.3(a)(2).
- c. Find reason to believe that Fried, Frank, Harris, Shriver and Jacobson, a partnership including professional corporations, violated 2 U.S.C. §§ 441a(a)(1)(A) and 441b(a).

- d. Approve the Factual and Legal Analyses that were attached to the General Counsel's Report dated April 23, 1993.
- e. Approve the appropriate letters.

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of )  
 )  
Dukakis/Bentsen Committee, Inc. and ) MUR 3449  
Edward Pliner, as treasurer; )  
Fried, Frank, Harris, Shriver, and )  
Jacobson. )

CERTIFICATION

I, Marjorie W. Emmons, Secretary of the Federal Election Commission, do hereby certify that on January 25, 1994, the Commission decided by a vote of 4-2 to take the following actions in MUR 3449:

1. Find reason to believe that the Dukakis/Bentsen Committee, Inc. and Edward Pliner, as treasurer, violated 2 U.S.C. §§ 434(b)(4), 441a(f), 441b(a), and 26 U.S.C. § 9003(b).
2. Find reason to believe that Dukakis/Bentsen Committee Inc. (Dukakis/Bentsen General Election Legal and Accounting Compliance Fund) and Edward Pliner, as treasurer, violated 2 U.S.C. § 441f and 11 C.F.R. § 9003.3(a)(2).
3. Find reason to believe that Fried, Frank, Harris, Shriver and Jacobson, a partnership including professional corporations, violated 2 U.S.C. §§ 441a(a)(1)(A) and 441b(a).

(continued)

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4. Approve the Factual and Legal Analyses that were attached to the General Counsel's Report dated April 23, 1993.
5. Approve the appropriate letters, as recommended in General Counsel's Memorandum dated January 13, 1994.

Commissioners Aikens, McDonald, McGarry, and Thomas voted affirmatively for the decision; Commissioners Elliott and Potter dissented.

Attest:

1-26-94  
Date

  
Marjorie W. Emmons  
Secretary of the Commission

Received in the Secretariat: Thurs., Jan. 13, 1994 11:29 a.m.  
Circulated to the Commission: Thurs., Jan. 13, 1994 4:00 p.m.  
Deadline for vote: Wed., Jan. 19, 1994 4:00 p.m.  
Insufficient Votes at deadline.

bjr

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FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

FEBRUARY 1, 1994

William Josephson, Esq.  
Fried, Frank, Harris, Shriver & Jacobson  
One New York Plaza  
New York, New York 10004-1980

RE: MUR 3449  
Fried, Frank, Harris, Shriver &  
Jacobson

Dear Mr. Josephson:

On May 4, 1993, the Federal Election Commission found that there is reason to believe that Fried, Frank, Harris, Shriver and Jacobson violated 2 U.S.C. §§ 441a(a)(1)(A) and 441b(a).

As you may be aware, on October 22, 1993, the D.C. Circuit declared the Commission unconstitutional on separation of powers grounds due to the presence of the Clerk of the House of Representatives and the Secretary of the Senate or their designees as members of the Commission. FEC v. NRA Political Victory Fund, 6 F.3d 821 (D.C. Cir. 1993). Since the decision was handed down, the Commission has taken several actions to comply with the court's decision. While the Commission petitions the Supreme Court for a writ of certiorari, the Commission, consistent with that opinion, has remedied any possible constitutional defect identified by the Court of Appeals by reconstituting itself as a six member body without the Clerk of the House and the Secretary of the Senate or their designees. In addition, the Commission has adopted specific procedures for revoting or ratifying decisions pertaining to open enforcement matters.

In this matter, on January 26, 1994, the Commission revoted to find reason to believe that Fried, Frank, Harris, Shriver and Jacobson violated 2 U.S.C. §§ 441a(a)(1)(A) and 441b(a), and to approve the Factual and Legal Analysis previously mailed to you. Please refer to that document for the basis of the Commission's decision. If you need an additional copy, one will be provided upon request.

You may rely on your prior submissions, or you may submit any additional factual and legal materials that you believe are relevant to the Commission's consideration of this matter.

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William Josephson, Esq.  
Page 2

Please submit such materials to the General Counsel's Office within 15 days of your receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

If you have any questions, please contact Dawn M. Odrowski, the attorney assigned to this matter, at (202) 219-3400.

For the Commission,

  
Trevor Potter  
Chairman

95043680517



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

FEBRUARY 1, 1994

Daniel A. Taylor, Esq.  
Hill & Barlow  
One International Place  
Boston, Massachusetts 02110-2607

RE: MUR 3449  
Dukakis/Bentsen Committee, Inc.  
(Dukakis/Bentsen General  
Election Legal and Accounting  
Compliance Fund) and  
Edward Pliner, as treasurer

Dear Mr. Taylor:

On May 4, 1993, the Federal Election Commission found that there is reason to believe that the Dukakis/Bentsen Committee, Inc. and Edward Pliner, as treasurer, violated 2 U.S.C. §§ 434(b)(4), 441a(f), 441b(a), and 26 U.S.C. § 9003(b). Additionally, on May 4, 1993, the Commission found that there was reason to believe that Dukakis/Bentsen Committee Inc. (Dukakis/Bentsen General Election Legal and Accounting Compliance Fund) and Edward Pliner, as treasurer, violated 2 U.S.C. § 441f and 11 C.F.R. § 9003.3(a)(2).

As you may be aware, on October 22, 1993, the D.C. Circuit declared the Commission unconstitutional on separation of powers grounds due to the presence of the Clerk of the House of Representatives and the Secretary of the Senate or their designees as members of the Commission. FEC v. NRA Political Victory Fund, 6 F.3d 821 (D.C. Cir. 1993). Since the decision was handed down, the Commission has taken several actions to comply with the court's decision. While the Commission petitions the Supreme Court for a writ of certiorari, the Commission, consistent with that opinion, has remedied any possible constitutional defect identified by the Court of Appeals by reconstituting itself as a six member body without the Clerk of the House and the Secretary of the Senate or their designees. In addition, the Commission has adopted specific procedures for revoting or ratifying decisions pertaining to open enforcement matters.

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Daniel A. Taylor, Esq.  
Page 2

In this matter, on January 24, 1994, the Commission revoted to find reason to believe that the Dukakis/Bentsen Committee, Inc. and Edward Pliner, as treasurer, violated 2 U.S.C. §§ 434(b)(4), 441a(f), 441b(a), and 26 U.S.C. § 9003(b) and that the Dukakis/Bentsen Committee Inc. (Dukakis/Bentsen General Election Legal and Accounting Compliance Fund) and Edward Pliner, as treasurer, violated 2 U.S.C. § 441f and 11 C.F.R. § 9003.3(a)(2), and to approve the Factual and Legal Analysis previously mailed to you. Please refer to that document for the basis of the Commission's decision. If you need an additional copy, one will be provided upon request.

You may rely on your prior submissions, or you may submit any additional factual and legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of your receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

With regard to your recent correspondence concerning an anticipated change in treasurers for the various Dukakis committees, staff has reviewed the draft statement of organization you provided and it appears sufficient to effect a treasurer change. However, given that three separate committees presumably will be affected, Dukakis for President, Inc., Dukakis/Bentsen Committee, Inc., and Dukakis/Bentsen General Election Legal and Accounting Compliance Fund, a separate statement of organization should be filed for each, signed by the new treasurer.

If you have any questions, please contact Dawn M. Odrowski, the attorney assigned to this matter, at (202) 219-3400.

For the Commission,

  
Trevor Potter  
Chairman

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matters of )  
)  
Dukakis for President Committee, Inc. )  
and Leonard Aronson, as treasurer; )  
Dukakis/Bentsen General Election )  
Legal and Accounting Compliance Fund )  
and Leonard Aronson, as treasurer; )  
Dukakis/Bentsen Committee, Inc.; )  
The Senator Lloyd Bentsen Election )  
Committee and Marc L. Irvin, as )  
treasurer; and )  
Fried, Frank, Harris, Shriver and )  
Jacobson )

Aug 30 4 37 PM '94  
MURs 3562, 3449,  
3089 and 2715

**SENSITIVE**

GENERAL COUNSEL'S REPORT

I. BACKGROUND

During conciliation agreement negotiations in MUR 3562, an enforcement matter arising out of the audit of the Dukakis for President Committee ("Committee"), counsel proposed resolving all open Matters Under Review ("MURS") involving the various Dukakis committees in a single conciliation agreement. Counsel submitted a counter-proposal to that effect together with a Motion to Dismiss on the grounds that these matters are time-barred by the statute of limitations set forth at 28 U.S.C. § 2462. Attachments 1, 2, and 3. Counsel has asked that the Committee's counter-proposal be considered in the event the Commission denies the Motion to Dismiss.

We recommend that the Commission deny the Committee's

1. Edward Pliner resigned as treasurer of all three Dukakis committees in January 1994. Leonard Aronson has succeeded him as treasurer to the Dukakis for President Committee and the Dukakis/Bentsen General Election Legal and Accounting Compliance Fund. The Dukakis/Bentsen Committee currently has no treasurer and has had no cash on hand since June 1992.

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Motion to Dismiss for the reasons set forth in Section II. The Committee's substantive responses to the reason to believe findings in MUR 3562 are also discussed in that Section. Although we also recommend rejecting the Committee's most recent counter-proposal, we find merit in counsel's proposal to attempt settlement of all the open Dukakis MURs in a single conciliation agreement. Thus, Section III discusses the open Dukakis MURs individually. The necessary recommendations in light of the FEC v. NRA decision are set forth in Section IV. Finally, our recommendations for a combined conciliation agreement with the Dukakis committees and a proposed conciliation agreement with Fried, Frank, the remaining respondent in MUR 3449, are discussed in Section V.

II. DISCUSSION OF MOTION TO DISMISS AND RESPONSES IN MUR 3562

A. Motion to Dismiss

Like the respondents in MUR 3360 (Jack Kemp for President), the Committee vigorously argues that the Commission should dismiss MUR 3562 because it is time-barred by the general federal statute of limitations found at 28 U.S.C. § 2462.<sup>2</sup> See Attachments 1 and 2. Moreover, as the Committee's most recent submissions make clear, the Committee believes that Section 2462 requires the Commission to not only initiate MUR proceedings,

2. 28 U.S.C. § 2462 provides:

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued. . .

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but to initiate judicial enforcement within five years of the date a violation occurs. Attachments 1 at 4 and 2 at 4. Thus, the Committee requests that all of the open Dukakis MURs be dismissed. Attachments 2 at 1 and 3 at 2.<sup>3</sup>

The Committee contends that Section 2462 applies since the Act has no statute of limitations relating to the initiation of a MUR proceeding. Attachment 2 at 3. It further argues that, in cases where an administrative proceeding is required prior to commencing an enforcement suit, courts apply Section 2462 differently depending on whether the required administrative proceeding is adjudicative or prosecutorial in nature. See Attachment 2 at 4-9. According to the Committee, where adjudicative proceedings are required, courts have held that an agency's cause of action under Section 2462 does not accrue until the conclusion of the agency adjudication. In contrast, where the required proceeding is essentially a decision to prosecute, the Committee says courts have held that the cause of action accrues from the date of an alleged violation. Accordingly, the Committee contends that because a MUR proceeding "leads only to an agency decision to prosecute" and is not an administrative adjudication of a violation, the FEC

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3. Counsel for the Committee submitted a motion to dismiss on March 31, 1994 (Attachment 1) at a meeting with members of this Office after having submitted an initial counterproposal. On April 11, counsel submitted what appears to be a revised motion to dismiss together with a second counterproposal (Attachment 2). Counsel renewed the motion via a letter on May 4, 1994 in which counsel cites "additional authority" that 28 U.S.C. § 2462 bars these matters (Attachment 3). The Committee has not withdrawn its April 11 counterproposal, although it asks that the Commission first consider the motion to dismiss.

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must initiate judicial enforcement within five years from the date of the alleged violations. Attachment 2 at 4.

The Committee relies chiefly upon U.S. v. Meyer, 808 F.2d. 912 (1st Cir. 1987), to support its position. Meyer involved a civil penalty enforcement suit brought more than five years from the date an individual allegedly violated provisions of the Export Administration Act. The First Circuit held that when a statutory prerequisite to the bringing of a civil penalty enforcement action exists, Section 2462 "does not begin to run, so long as administrative proceedings have been seasonably initiated, until the same have been concluded and a final (administrative) decision has resulted." Meyer at 922. In distinguishing cases relied upon by the Fifth Circuit to reach the opposite conclusion, the Meyer court opined that where prosecutorial decisions rather than adjudicatory proceedings constitute the statutory precondition to suit, Section 2462 runs from the date a violation occurred. Meyer at 920.

To a lesser degree, the Committee also relies on 3M v. Browner, 17 F.3d 1453 (D.C. Cir. 1994); rehearing denied on May 9, 1994. See Attachment 2 at 5 and 9. There, the D.C. Circuit held that Section 2462 barred assessment of civil penalties for any violations committed by 3M more than five years before the EPA commenced its proceedings under the Toxic Substances Control Act. The 3M court held that Section 2462 begins to run when the underlying violations occurred. The Committee cites to the policy considerations discussed by the 3M court in favor of a general five year statute of limitations for

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government penalty actions, in arguing that its ability to effectively defend itself has been hampered by the passage of time. Attachment 2 at 9-13.

The Commission has previously considered the applicability of 28 U.S.C. § 2462 to its proceedings in MURs 3360, 2619 (Antonovich for Senate), and 3492 (Jesse Jackson for President '88) and the case analyses discussed in those matters is incorporated herein. See First General's Report in MUR 3360, dated April 12, 1994 at 3-11, General Counsel's Report in MUR 2619 dated June 22, 1994 at 3-6, and General Counsel's Report in MUR 3492 dated July 8, 1994 at 10-11. Additionally, this Office has specifically addressed the applicability of Section 2462 to civil actions brought by the Commission in district court. See e.g., FEC's Memorandum in Opposition to Defendant's Motion for Summary Judgment in FEC v. National Right to Work, Civil Action No. 90-0571 (D.D.C. filed March 1, 1991) at 31-42 and FEC's Opposition to the Defendant's Motion to Dismiss in FEC v. Larry R. Williams, No. CV-93-6321-ER(BX) (C.D.Cal. filed May 3, 1994). As we concluded in each of those matters, Section 2462 does not apply to Commission investigations and conciliation proceedings. These matters are not adjudicatory and the Commission neither assesses nor imposes civil penalties. Section 2462 is also inapplicable to civil enforcement actions because Congress provided a special statutory scheme in FECA favoring resolution of FECA violations through "informal methods of conciliation, conference and persuasion" before a civil action can be filed. 2 U.S.C. § 437g(a)(4). See also, Occidental Life Ins. v. Equal

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Employment Opportunity Commission, 432 U.S. 355 (1977) (outside statute of limitations held inapplicable where conciliation is mandated by statute, and Congress intended that informal resolution through conciliation be attempted before resort to federal courts). Even assuming that Section 2462 applies to the Commission's filing of civil actions, no claim has yet accrued in these matters since under the Act the Commission cannot file a civil action until after a probable cause finding and completion of the mandatory conciliation period.<sup>4</sup>

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The Committee's reliance on distinctions drawn by the Meyer court between mandated administrative proceedings which are prosecutorial or adjudicative is misplaced. First, none of the cases cited by the Committee, except for Meyer, explicitly discusses such a distinction. See Attachment 2 at 4-6. Moreover, the critical distinction in Meyer was not whether an antecedent proceeding was adjudicatory or prosecutorial, but whether mandatory administrative proceedings are a prerequisite to a judicial action for enforcement of a civil penalty. Meyer at 922. Finally, assuming arguendo, that the nature of mandatory antecedent proceedings is critical to Meyer's holding, the FECA enforcement process cannot be equated with the type of wholly prosecutorial decision-making contemplated in Meyer. FECA enforcement proceedings consist of a multi-step process

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4. Moreover, even if Section 2462 applied to the Commission's proceedings and begins to run from the date of the underlying violation, the Commission would only be precluded from seeking a civil penalty. It could still request a court to grant injunctive or declaratory relief.

that includes investigation, a briefing stage, a Commission determination that there is probable cause to believe a violation occurred and a conciliation period. The Act requires that such steps be taken before a civil suit can be filed. In addition, the investigation may include the use of discovery devices such as interrogatories and subpoenas for documents and depositions which often lengthen enforcement proceedings. See 2 U.S.C. §§ 437g(a)(2), 437d(a)(1) and 437d(a)(4). The Meyer court considered the scope of mandated antecedent proceedings in its holding, opining that lengthy administrative proceedings could impair an agency's ability to bring an enforcement action within the time prescribed by Section 2462. See Meyer at 919.<sup>5</sup>

Finally, the Committee's contention that it is unable to mount an effective defense is less than compelling. The various Dukakis committees have long been notified of the Commission's reason to believe findings in MURs 2715, 3089 and 3449. In the case of MUR 3562, the Committee was notified throughout the audit process of various staff recommendations concerning the

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5. Moreover, the Act provides certain procedural protections for alleged FECA violators which are apparently absent from the type of prosecutorial proceedings discussed in Meyer. The Act requires the Commission to notify respondents of the factual and legal basis of the Commission's reason to believe finding and later, requires the general counsel to notify respondents of any recommendations made to the Commission to find probable cause to believe a violation has occurred. 2 U.S.C. §§ 437g(a)(2) and (3). In the latter case, a brief must be sent to respondents stating the general counsel's position on the factual and legal issues of a case. Respondents are afforded opportunities to respond at both stages.

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potential violations which gave rise to that MUR.<sup>6</sup> Thus, the Committee has had ample opportunity to gather and preserve evidence and cannot now claim surprise.

Based on the foregoing, this Office recommends that the Commission deny the Committee's motion to dismiss.<sup>7</sup>

**B. Committee's Response to Reason to Believe Findings in MUR 3562**

The Commission found reason to believe that the Committee violated various provisions of the Federal Election Campaign Act of 1971, as amended (the "Act"), and the Presidential Primary Matching Payment Account Act ("Matching Payment Act") by making excessive state expenditures; accepting a prohibited in-kind contribution; failing to report contributions upon receipt; and accepting excessive contributions which were not timely refunded, reattributed, or redesignated to a legal and accounting compliance fund. In an attempt to resolve this matter expeditiously, the Commission simultaneously approved a

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6. The Committee was informed during the May 1989 audit exit conference of adjustments made to the Iowa and New Hampshire expenditure allocations. Additionally, the February 1990 Interim Audit Report detailed the potential violations involving the Iowa and New Hampshire spending limits and the joint escrow account (including both the reporting and excessive contributions violations). Finally, the Committee was notified through the Final Audit Report in December 1991 that the value of the additional Iowa and New Hampshire phone bank allocations was viewed as an in-kind contribution and that certain matters had been referred to the General Counsel.

7. In the event the Commission denies its motion to dismiss, the Committee also asks that this Office share "its brief" explaining why Section 2462 doesn't apply in this matter. This Office will not share this report with the Committee but will explain its view on the issue in a letter should the Commission deny the Motion to Dismiss.

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pre-probable cause conciliation

As noted, the Committee has moved to dismiss MUR 3562 and the other open Dukakis MURs on the grounds that Section 2462 bars further enforcement proceedings. The Committee also submitted two substantive responses to the Commission's findings in MUR 3562 together with a counter-proposal in the event the Commission denied its motion. Attachments 4 and 5.<sup>8</sup> These responses are discussed below.

1. Excessive State Expenditures

The Committee makes two arguments in response to the Commission's reason to believe findings that it exceeded the state-by-state expenditure limits in Iowa and New Hampshire by \$279,013.84 and \$57,848.92, respectively.<sup>9</sup> First, the Committee repeats its Interim Audit arguments, justifying its own allocations to these states. Second, the Committee argues that no facts have been asserted to show that it "knowingly" exceeded the state spending limits. Rather, the Committee asserts throughout its responses that even if it improperly allocated

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8. The Committee filed its initial response to the Commission's reason to believe findings on January 19, 1994 (Attachment 4) and supplemented it on March 14 when it also submitted its first counter-proposal (Attachment 5). As noted earlier, a second counter-proposal was submitted on April 11 (Attachment 2 at 14-21).

9. Based on the Final Audit determination of the expenditures properly allocable to Iowa and New Hampshire, the Commission determined that the Committee should repay the U.S. Treasury a total of \$491,282, including \$98,607.83 for exceeding the Iowa and New Hampshire spending limits. The Committee has filed a lawsuit challenging the Commission's repayment determination. See footnote 22, infra.

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certain expenses, it did so based on differing interpretations of the relevant statutory and regulatory provisions which do not constitute a knowing violation. See e.g., Attachment 4 at 10 and 11.

The Committee's arguments in support of its allocations were previously considered and rejected by the Commission during the audit process. The Commission-approved Statement of Reasons in Support of Final Repayment Determination thoroughly discusses the reasons for rejecting the Committee's position on these allocations. See Statement of Reasons, approved February 25, 1993, at 14-39.

As for the Committee's argument that it did not "knowingly" exceed the limits, we note first that the Commission made reason to believe findings based on two statutory provisions -- 441a(b)(1)(A) and 26 U.S.C. § 9035(a), and only Section 9035(a) requires that a committee "knowingly" act.<sup>10</sup> Even so, however, a "knowing" violation requires only that the committee or candidate know the facts which render its conduct unlawful. See Federal Election Commission v. California Medical Association, 502 F. Supp. 196, 203-204 (N.D.Cal.1980), aff'd on other grounds, 641 F.2d 619 (1980), aff'd. 453 U.S. 182 (1981)(holding that "knowledge of the facts. . . which rendered its conduct unlawful" was sufficient to create civil liability under Section

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10. 26 U.S.C. § 9035(a) provides that "no candidate may knowingly incur qualified campaign expenses in excess of the expenditure limitation applicable under section 441a(b)(1)(A) of title 2..." Section 441a(b)(1)(A), on the other hand, provides only that "No candidate . . . may make expenditures in excess of [the state spending limits]."

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441a(f)). It does not require proving that respondents intentionally violated the Act. The Committee appears to confuse a "knowing" standard with a "knowing and willful" standard which would require "knowledge that one is violating a law . . ." Federal Election Commission v. Dranesi, 640 F. Supp. 985, 987 (D.N.J. 1986). Here, the Committee knew that it made and/or incurred the expenditures at issue in Iowa and New Hampshire which is all that is required to establish the violation of the state-by-state expenditure limit.<sup>11</sup>

2. Prohibited In-Kind Contribution: Phone Bank Services (Iowa and New Hampshire)

The Commission found reason to believe that the Committee violated 2 U.S.C. § 441b by accepting a prohibited in-kind contribution from the American Federation of State, County and Municipal Employees (AFSCME), a labor organization, in the form of phone bank services and related rented office space. This finding was based on an audit review of Iowa and New Hampshire phone bank-related records at AFSCME headquarters and phone bills subpoenaed from phone companies which revealed that the costs incurred for these operations exceeded the amounts billed for these services by about \$33,000.

The Committee contends that it did not "knowingly" accept a prohibited in-kind contribution from AFSCME because it

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11. In fact, all of the expenditure allocations at issue involve reductions from the allocations originally made and reported by the Committee. Moreover, even the Committee's reports reflect a final allocation to Iowa that exceeds the limit by \$60,455. See Form 3P of Committee's 1992 October Quarterly Report.

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justifiably relied upon AFSCME's invoices, "which on their face were reasonable and appropriate." See Attachments 5 at 2 and 4 at 13. In contrast, the Committee points out, the audit computations are based on internal AFSCME records and subpoenaed phone company bills, documents that "no responsible official of the Committee has ever seen." Attachment 4 at 13.<sup>12</sup> The Committee also challenges the audit figures for not taking into account that, "in some cases", the Committee had limited access to the phone banks because AFSCME and other campaigns, including Jesse Jackson's, used the same phones. The Committee notes that its leases with AFSCME provided that AFSCME would invoice it for the "actual use of the facilities and equipment . . . in an amount based on the normal and usual rental charge . . . and including any actual telephone charges incurred by the lessee" and believes the invoices reflect such usage. Attachment 5 at 3. Accordingly, the Committee concludes that if AFSCME misbilled it, the Commission should pursue AFSCME.

Although the Committee's argument appears to have some appeal on its face, a review of AFSCME's bills and the lease agreements suggest that the Committee may have had reason to question the accuracy and completeness of the Iowa and New

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12. Pursuant to counsel's request, this Office produced the following additional phone bank documentation to the Committee: copies of audit's workpapers detailing the basis for its computations together with a written explanation explaining the workpapers; copies of the subleases between AFSCME and the committee (which AFSCME apparently mailed the committee with its invoices); and copies of the underlying leases (AFSCME's leases with the property owners). Although counsel was contacted to determine whether additional explanation or information was needed, no further requests were received.

Hampshire bills. A cover letter accompanying the first invoice that included most of the New Hampshire and Iowa phone bank operations states that a final bill would be sent for each location once all the actual bills were received from the phone companies involved. Attachment 6. None of AFSCME's subsequent bills, however, included additional charges for Iowa and New Hampshire. The only amounts billed for locations in those states were a rental charge for the office space and a flat \$50 deposit per phone. No "actual telephone charges" appear to have been included in AFSCME's bills for Iowa and New Hampshire contrary to the Committee's lease agreements.

Moreover, AFSCME's bills show that the Committee leased phone banks from AFSCME in more than 80 cities in eighteen states. Although the Committee and AFSCME have stated that "some" unidentified phone banks were leased to both the Dukakis and Jackson campaigns and both maintain that "in many cases" AFSCME used the phones for its own purposes precluding the Committee's use, neither the Committee nor AFSCME has ever demonstrated that the Committee actually shared the Iowa and New Hampshire phone bank facilities with anyone.

Finally, correspondence between AFSCME and the Committee undermines the Committee's present assertion that the invoices "on their face were reasonable and appropriate." In fact, the Committee questioned AFSCME's final phone bill and apparently met with AFSCME officials to discuss it in April 1989. See Attachment 7.

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3. Joint Escrow Account

The Commission found reason to believe that the Committee violated 2 U.S.C. §§ 434(b)(2) and 434(b)(3)(A) for failing to report when received about \$1.4 million in contributions deposited into its joint escrow account in 1988 and to identify contributors making such contributions.<sup>13</sup> The Commission also found reason to believe that the Committee violated 2 U.S.C. § 441a(f) by accepting excessive contributions totaling \$111,924.53, which were not refunded, reattributed or redesignated to GELAC in a timely manner. These excessive contributions consisted of contributions deposited into the joint escrow account which exceeded the Act's contribution limits when aggregated with other primary contributions from the same individuals.

The Committee regards the reporting violations as "solely an issue of timeliness" since GELAC or the Committee eventually reported these contributions. Attachments 5 at 3 and 4 at 14. It also protests the inclusion in the reporting violations of the entire \$1.4 million in 1988 joint escrow deposits. The

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13. The joint escrow account was a checking account opened by the Committee after Mr. Dukakis won the June 1988 California primary. The Committee has said it opened the account because it was apparent then that it would raise more funds than it could legally spend. Contributions received thereafter, which were not payable to the Committee's GELAC account, were deposited in the joint escrow account. The Committee then requested that contributors redesignate their contributions to GELAC or request a refund. Contributions for which the Committee received redesignations were subsequently transferred to the GELAC and only then reported as receipts on GELAC's disclosure reports. The Committee did not initially report the receipt or refund of joint escrow contributions ultimately refunded.

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Committee apparently believes contributions received after July 20, 1988 and the pre-July 20 contributions which the Commission viewed as having been timely redesignated to GELAC when determining the Committee's cash on hand for NOCO purposes, should be excluded from the violation. Attachment 4 at 14.

The Committee attempts to trivialize the reporting violations by framing them as mere timeliness issues. However, timely reporting of contributions is critical to the effectiveness of public disclosure. Moreover, in this particular case, the failure to timely report was the result of an apparent attempt by the Committee to prevent a surplus and consequent repayment to the U.S. treasury by transferring primary contributions to the GELAC. The Committee's characterization also masks the fact that many of the joint escrow contributions went unreported until long after their receipt. For example, more than \$230,000 of joint escrow contributions received and ultimately refunded in 1988 and 1989 were not reported until September 1990 and approximately \$244,000 in contributions which had not been refunded or transferred to GELAC as of May 1989 were first reported in April 1990. Finally, the Committee's attempt to chip away at the \$1.4 million figure by arguing that some of the contributions were not included in the calculation of the Committee's cash on hand for NOCO purposes is immaterial to these reporting violations. The fact is, all of the contributions deposited into the joint escrow account should have been reported when received and they were not.

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As for the Committee's acceptance of excessive primary contributions, the Committee essentially argues that no excessives existed since the contributions deposited into the joint escrow account were not primary contributions. In its view, the whole purpose of the joint escrow account was to hold contributions while the Committee ascertained the contributors' intent which it has asserted was to benefit the general election through the GELAC. Id at 15. See also Committee's June 12, 1989 letter to the Commission included as part of Attachment 3 to the First General Counsel's Report dated November 5, 1993. In any case, the Committee contends that any "inadvertent" violation has been vitiated since it refunded or otherwise resolved the excessive contributions for which it had taken no action at the time of the Interim Audit Report. Id. at 16.

All of the contributions at issue were dated prior to July 20, 1988, the date of Governor Dukakis' nomination, and all were payable to "Dukakis for President" or a similar entity (i.e., none were payable to GELAC). Thus, they are properly considered primary contributions. See 11 C.F.R. § 110.1(b). Although the Committee mitigated its violation to the extent that it untimely refunded contributions for which it had not received written redesignations or reattributions, such mitigation does not nullify the violation.

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**III. SUMMARY OF OTHER DUKAKIS MATTERS: NURS 3449, 3089 and 2715**

**A. NUR 3449: Dukakis/Bentsen Committee, Inc.,  
Dukakis/Bentsen General Election Legal and Accounting  
Compliance Fund, and Fried, Frank, Harris, Shriver  
& Jacobson**

This matter was generated from an audit of the Dukakis/Bentsen Committee, Inc. ("GEC"), and the Dukakis/Bentsen General Election Legal and Accounting Compliance Fund ("GELAC"), a separate account of the GEC. The Commission found reason to believe that the GEC violated 2 U.S.C. § 434(b)(4) by failing to timely report approximately \$3.1 million in draft account activity which cleared the account in November and December 1988. It also found reason to believe that the GEC violated 2 U.S.C. §§ 441a(f) and 441b(a)<sup>14</sup> and 26 U.S.C. § 9003(b) by accepting an in-kind contribution from a law firm in the form of legal services provided to prepare a memo about the electoral college, and that the law firm, Fried, Frank, Harris, Shriver & Jacobson, violated 2 U.S.C. § 441a(a)(1)(A) and 441b(a) for providing such a contribution. Additionally, the Commission found reason to believe that the GEC(GELAC) violated 11 C.F.R. § 9003.3(a)(2) by improperly using private compliance fund contributions to pay for \$17,942 in expenses incurred by the law firm in preparing the electoral college memo, and 2 U.S.C. § 441f for accepting contributions in the form of sequential money orders which appeared to have been completed by someone other than the named contributor.

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<sup>14</sup>. The law firm, Fried, Frank is a partnership which includes professional corporations.

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In response, the GEC asserts that its actions were either unintentional and have been corrected or do not constitute violations of the Act. Attachment 8. The law firm also asserts that its preparation and provision of the memo did not violate the Act. Attachment 9.

1. Untimely Reporting

The GEC argues that its failure to timely report all of its operating expenditure disbursements was inadvertent and resulted only because it was inadequately staffed after the election. Attachment 8 at 2. Since the GEC does not dispute that it untimely reported approximately \$3.1 million of these disbursements, but merely attempts to explain the untimeliness, this Office recommends that this issue be included in the consolidated conciliation agreement.

2. Electoral College Memorandum

Both the GEC and Fried, Frank ("the firm") vigorously argue that no violation occurred in connection with the electoral college memo. In their view, actions of electors and post-general election electoral college matters are outside the Commission's jurisdiction. The GEC elaborates on its audit arguments that work related to "actions of electors" is not a contribution because the electoral college is not an election as defined by the Act, the Presidential Election Campaign Fund Act ("Fund Act") or Commission regulations. Attachment 8 at 5-7. It also contends that the definition of presidential election at 26 U.S.C. § 9002(10), the legislative history of the Act, and the statutory and regulatory framework all confirm that the Act

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does not cover the actions of electors. Attachment 8 at 6-8. In particular, the GEC cites to regulations exempting from the definitions of expenditure and contribution monies spent on recounts or election contests, and regulations governing expenditures by convention delegates, but not electors, as evidence that "post-general election actions" are not intended to be regulated. Attachment 8 at 7-8. The GEC also continues to argue that it properly paid for the memo expenses with GELAC funds, arguing that Commission regulations permit use of surplus GELAC funds for any legal purpose.

The firm's response, in the form of an affidavit by William Josephson, the firm partner who coordinated the memo work, incorporates the GEC's arguments. Attachment 9 at 3-4. The firm also contends that the FEC's position is not "substantially justified" because neither the Act nor Commission regulations define general election to include electoral college activity. See Attachment 9 at 7-9. It also argues that if this issue is one of first impression, it should be addressed through rule-making and then articulates reasons why the Commission should not regulate electoral college matters even if it can, including the difficulty in determining what activities should be regulated. Attachment 9 at 9-12. The firm also reveals that it was asked to prepare the memo by a member of the National Lawyers' Council of the Democratic National Committee and that it had virtually no contact with the GEC until shortly before

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forwarding the memo to it. Attachment 9 at 5-6.<sup>15</sup>

Respondents raise thoughtful arguments about the Commission's ability to regulate activities relating to the electoral college. However, the unique nature of the Presidential general election must be considered in interpreting the relevant statutory and regulatory provisions. The general presidential election consists of two separate but integral steps -- the selection of electors in each state which is accomplished through a November popular election and the electoral college election. Electoral college votes are acquired by a candidate based upon the November election results and the Constitution mandates that a candidate prevail in the electoral college to become President. See U.S. Const., art. II §1 and amend XII. Commission regulations at 11 C.F.R. § 100.2(a) acknowledge the unique nature of the Presidential general election in defining election as "the process by which individuals . . . seek nomination for election, to Federal office."

Moreover, leaving activities relating to the electoral college unregulated would permit unlimited private funds to be spent on activities clearly meant to further the election of candidates to the Office of President and Vice President. Such a result would undermine the purposes of the Act and the Fund Act which are intended to limit the potentially corrupting

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15. Since the memo was given to the GEC for the purpose of furthering Dukakis' election, however, it would not qualify for an exemption under 11 C.F.R. § 100.7(b)(13) as once suggested by the firm.

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effect of private contributions and influences in federal elections by ensuring disclosure of contributions and expenditures and, in the case of presidential elections, limiting spending.

Even if the Act, the Fund Act and Commission regulations were deemed not to encompass post-general election electoral college matters, the memo itself deals in part with "selection of electors" which clearly falls within the definition of "presidential election" found at 26 U.S.C. § 9002(10). As pointed out in the memo's nine-page narrative, the comprehensive summary of state laws (which comprises the remainder of and the bulk of the memo) addresses state requirements relating to the November "election of electors" including requirements for elector nomination, the form of the ballot for the November election and how the popular vote determines who is appointed electors. Attachment 8 at 14-15 and 23-122. Indeed, as the narrative further states, the purpose of the memo is to aid in preventing "mishaps in the electoral college process" from defeating the Dukakis/Bentsen ticket, whenever they occurred. Attachment 8 at 14.

Finally, since the memo was provided to influence and to further the election of the Dukakis/Bentsen ticket, the associated memo expenses were qualified campaign expenses which could be paid for only with federal funds since the memo was unrelated to compliance with the Act.

Based on the foregoing, this Office recommends that the violations relating to the electoral college memo and the

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payment of related expenses be included in the combined conciliation agreement. This Office also recommends that the Commission approve a conciliation agreement with the firm on this issue. A proposed agreement is attached and described in Section V.B.

3. Sequential Money Orders

The GEC(GELAC) denies that it knowingly accepted contributions made by persons in the name of another. Instead, the GEC(GELAC) explains the handwriting similarities on the sequential money orders at issue by positing that members of the Greek community made cash contributions which were then converted into money orders by an unnamed person or persons before being forwarded to campaign headquarters. Attachment 8 at 9-10. The facts asserted by the GEC(GELAC) in support of this explanation are minimal. It states that most of the money orders, which bear the name of individuals with Greek surnames, were associated with a mid-June 1988 GELAC fundraiser in Queens; that Mr. Dukakis' supporters in the Greek community tended to make cash contributions; and that campaign fundraisers discouraged cash contributions because they didn't like the responsibility of handling large amounts of cash and the campaign preferred the controls afforded by written instruments.

Information provided to the Audit division by a committee official concerning the code "FRONN" that appears on many of the Marine Midland money orders is consistent with the Committee's assertion that those money orders were associated with a June 1988 GELAC fundraiser. No other information is currently known

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about this fundraiser or the persons involved in soliciting or collecting the contributions. However, the GEC(GELAC)'s explanation for the money orders at issue -- that they are the result of cash contributions converted into money orders -- parallels the results of the investigation in MUR 3089.

MUR 3089 arose from another audit referral of one of the Dukakis committees (in this case, the Dukakis for President Committee) and also involved sequential money orders apparently purchased by one or two individuals rather than the named contributors. Discovery in MUR 3089, discussed more extensively below, revealed that the majority of the individuals whose names appeared on the money orders actually made cash contributions which were then converted into money orders in the amount of cash given, probably to facilitate transmittal of the funds to campaign headquarters.

Assuming the GEC(GELAC)'s explanation is accurate, however, the GEC(GELAC) instead violated 11 C.F.R. § 110.4(c) by accepting cash contributions in excess of \$100 and failing to promptly return the amounts over \$100 to the respective contributors. Fifteen of the money orders at issue, totaling \$4,900, were for amounts over \$100. The receipt of sequentially-numbered money orders drawn on the same institution, bearing similar dates and handwriting/typing patterns, should have alerted the Committee to inquire further

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into the circumstances surrounding the contributions as part of its duty to determine the legality of contributions. See 11 C.F.R. § 103.3(b). This is especially true since eight of the fifteen money orders at issue consisted of apparent "duplicate" contributions from four individuals.<sup>16</sup> Moreover, the GEC(GELAC) was evidently aware cash contributions had been made at other fundraising events since it says that fundraisers discouraged cash contributions. Attachment 8 at 9. Thus, this Office recommends that the Commission find reason to believe that the GEC(GELAC) and Leonard Aronson, as treasurer, violated 11 C.F.R. § 110.4(c).

B. MUR 3089: Dukakis for President Committee, Inc.<sup>17</sup>

This matter involves the Committee's acceptance of contributions in the form of sequential money orders drawn on banks in Puerto Rico and New York. The Commission found reason to believe that the Committee and approximately 40 individuals violated 2 U.S.C. § 441f for making and accepting contributions made in the name of another.

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16. These eight money orders, numbered sequentially from 0155634-0155641, consist of: two \$250 contributions from George Kafantaris dated 6/2/88; two \$250 contributions from Athena Marangoudakis dated 6/2/88; two \$250 contributions from Vasilios Marangoudakis dated 6/2/88; and two \$250 contributions from Anastasio Lekkas dated 5/31/88. Each pair of contributions is reported together on the Committee's disclosure reports.

17. The requisite NRA recommendations for this matter are included in Section IV.

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The investigation revealed that a majority of the individuals indeed made the contributions at issue at two separate fundraisers in New York and Puerto Rico. See General Counsel's Report in MUR 3089, dated January 14, 1992. However, nine contributions were made in cash.<sup>18</sup> Since it appeared that all of these cash contributions were accepted by the Committee's fundraising agent, the Commission found reason to believe that the Committee violated 11 C.F.R. § 110.4(c) for failing to return the amounts in excess of \$100 to each contributor.

The Committee acknowledges that one \$150 cash contribution apparently slipped through its review process in connection with the New York fundraiser but denies that it accepted cash in connection with the eight other contributions -- all associated with the Puerto Rico fundraiser. Attachment 10 at 2. The Committee contends that the Puerto Rico contributions arrived at Committee headquarters in the form of money orders and were accompanied by completed contributor cards. It denies Committee staff knew the contributions were made in cash or participated in the conversion of cash into money orders. Attachment 10 at 1-2. The Committee acknowledges that a staff member was involved in the fundraiser but contends his involvement was limited to setting a date for the event, coordinating the scheduling details with an individual who organized the event, and ensuring the funds raised were promptly transmitted to

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18. Eight of these contributions were for \$1,000 and one was for \$300.

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headquarters. Id.

Since the Committee acknowledges it accepted an excess cash contribution in one instance, this violation will be included in the combined conciliation agreement. Moreover, we believe the Committee should also be held accountable for having accepted excessive cash contributions in connection with the other eight Puerto Rico contributions. Although the Committee generally denies it accepted cash contributions, it acknowledges a cash contribution slipped through its review process on at least one occasion. Moreover, previously-submitted affidavits of Committee staff and the interrogatory responses of Hector Martinez, Jr., the person who solicited these contributions, leave open the possibility that the Committee knew or should have known the money orders resulted from excess cash contributions. Gary Barron, the Committee staffer charged with responsibility for organizing and overseeing fundraising for a region that included Puerto Rico, has stated this his involvement in this fundraiser included "ensuring that the funds raised were promptly transmitted to Boston." Attachment 10 at 3. However, Mr. Barron has not elaborated on his contacts with the fundraiser organizers regarding the transmittal of funds raised. Similarly, Hector Martinez, Jr.'s response is vague regarding the circumstances surrounding the subsequent money order conversion, stating only that he was "generally aware that cash contributions are illegal under federal law and should be made through a written instrument. . ." Attachment 11 at 15. He has not elaborated on the facts surrounding the transmittal

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of the contributions either, stating only that the money orders "were forwarded" to the Committee. Attachment 11 at 3 and 16. Finally, Charlotte McCormick, the Committee's Director of Administration for the Finance Department, has stated that she returned some Puerto Rico contributions to Barron or his assistant to gather additional information, although she does not specifically recall if it was in connection with this fundraiser. Attachment 10 at 4-5.

Even if the Committee was not made aware through its contact with local organizers that cash contributions were made, the arrival of the eleven Puerto Rico contributions at Committee headquarters in the form of sequential money orders drawn on the same institution on the same date, prepared in an identical manner, and all in amounts of \$1,000, should have alerted the Committee to inquire further into the circumstances surrounding these contributions as part of its duty to determine the legality of contributions. See 11 C.F.R. § 103.3(b).

We also recommend at this time that the Commission take no further action against the Committee and Leonard Aronson, as treasurer, with respect to the initial 441f finding.

With regard to the individual contributors, as noted, the Commission initially found reason to believe that each violated Section 441f. After responses were received, the Commission subsequently found reason to believe that seven individuals violated 2 U.S.C. § 441g by making excessive cash contributions.

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No further action was taken against one of these respondents, Mr. Jim Hetelekides, based on the small amount involved. The other six respondents, who all made cash contributions in connection with the Puerto Rico fundraiser, deny they violated Section 441g because no cash was actually tendered to the Committee. Rather, each of these respondents say they gave cash to Mr. Martinez, Jr., who was a friend of the individual at whose home the fundraiser was held. Attachment 11 at 2-3 and 6-7. Five of the respondents point out that cash contributions are lawful and commonly made in Puerto Rico and say they relied on Martinez to transmit them to the Committee "in any lawful manner." Attachment 11 at 2-3. The sixth respondent, Mr. Luis Sierra, asserts that Mr. Martinez specifically requested cash, and he too relied on Martinez to transmit the contribution to the Committee. Attachment 11 at 6-9.

We reject the argument that a Section 441g violation can be avoided by giving cash to an intermediary rather than directly to a political committee. However, in light of the fact that the Committee will be pursued for accepting these contributions and the relatively minimal amounts involved for each individual respondent, we recommend that the Commission take no further action with respect to the outstanding 441f and 441g findings against these individuals -- Hector Martinez Franco, Sol R. Martinez, Esteban Fuertes, Celeste Fuertes, Milton Mendez Orsini and Luis Sierra -- include an admonishment in each respondent's notification letter, and close the file with respect to them.

Questions remain regarding two individuals who deny making

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contributions to the Committee -- Mrs. Milton Mendes (Myrta Falcon de Mendes) and Mrs. Luis Sierra (Silmarie Montilla Sierra). As noted in the January 14, 1992 General Counsel's Report, Mrs. Mendes denies making any contribution although her husband, Mr. Milton Mendes Orsini stated that he made a \$1,000 contribution on her behalf. Both Mrs. Sierra and her husband deny that Mrs. Sierra made a \$1,000 contribution. However, Hector Martinez, Jr., states that he purchased money orders with the cash provided to him "in the name of the individual who actually provided me with the funds used to purchase that money order" and in some cases, he states that husbands provided funds for themselves and their wives. Attachment 11 at 16 and 19. Given the additional resources necessary to resolve these remaining discrepancies involving 1988 election activity and the minimal amounts involved, this Office recommends that the Commission exercise its prosecutorial discretion and take no further action with respect to the outstanding 441f findings against these -- Silmarie Montilla Sierra, Myrta Falcon de Mendes and Mr. Hector Martinez, Jr. -- and close the file with respect to them. See Heckler v. Chaney. 470 U.S. 821 (1985).

Given Mr. Sierra's sworn statement that Hector Martinez, Jr. specifically requested a cash contribution at issue, we also recommend that the Commission include an admonishment in his notification letter.

Finally, two of the remaining individual respondents -- Benjamin Torres Vazquez and Julieta Torres -- could not be located and have not been notified of the initial Section 441f

findings against them. Thus, this Office also recommends that the Commission take no further action and close the file as to them.

C. MUR 2715: Dukakis/Bentsen Committee, Inc. and The Senator Lloyd Bentsen Committee<sup>19</sup>

This matter concerns issues arising from Lloyd Bentsen's dual candidacies for U.S. Senate and the Vice Presidency in 1988. The Commission found reason to believe that the GEC violated 2 U.S.C. §§ 441a(f) and 26 U.S.C. § 9003(b)(2) for accepting an in-kind contributions from the Senator Lloyd Bentsen Election Committee ("Senate Committee") in connection with a Senate-financed phone bank and newsletter and that the Senate Committee violated 2 U.S.C. § 441a(a)(1)(A) for making them. The Commission also approved discovery requests to both committees in connection with a Senate-financed mailgram referencing both candidacies. Additionally, the Commission found reason to believe that both the GEC and the Senate Committee violated 11 C.F.R. §§ 106.1(a), 110.8(d)(2) and 110.8(d)(3) by sharing facilities and personnel, and by failing to allocate air travel, food and lodging expenditures during campaign tours that benefited both the Senate Committee and the GEC. Finally, the Commission found reason to believe that the GEC violated 2 U.S.C. §§ 441a(a)(1)(A) by making an excessive in-kind contribution to the Senate Committee as a result of its failure to allocate the aforementioned expenditures and that the

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19. The requisite NRA recommendations for this matter are included in Section IV.

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Senate Committee violated 2 U.S.C. §§ 441a(f) by accepting such a contribution.

Following the investigation in this matter, this Office prepared and sent both committees a General Counsel's Brief and a revised General Counsel's Brief indicating that we were prepared to make recommendations to the Commission. The briefs recommended that the Commission: (1) find probable cause to believe that the GEC and the Senate Committee violated certain provisions of the Act and Fund Act in connection with the Senate mailgram; (2) find probable cause to believe but take no further action that the GEC and Senate Committee violated the Act and Fund Act in connection with the phone bank activity; and (3) find no probable cause to believe that the GEC and Senate Committee violated the Act and Commission regulations in connection with the newsletter, by sharing facilities and personnel or by failing to allocate air travel, food and lodging expenditures during dual campaign tours. Responses to the original briefs were received from both respondents in May and June 1992. Group Attachments 12 at 1-23 (GEC) and 13 at 7-9 (Senate Committee).<sup>20</sup> Only the Senate Committee responded to the

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20. Included with the attached responses to the briefs are each committee's responses to interrogatories and reason to believe findings in both MURs 2715 and 2652 which were eventually merged. Attachments 12 at 28-63 (GEC) and 13 at 10-79 (Senate Committee). Given the already voluminous attachments to this report, most of the discovery documents produced by the GEC and the Senate Committee are not attached here but are available for review in the Docket division. Documents produced by the Senate Committee in regard to the mailgram and phone banks are attached, however, since probable cause findings are recommended as to those issues.

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revised brief. Attachment 13 at 1-6.

With two exceptions, this Office now makes the same recommendations as made in the revised General Counsel Briefs, incorporated herein by reference. First, the Briefs recommend pursuing both the GEC and the Senate Committee in connection with the mailgram. However, should the Commission concur with our recommendations, the mailgram issue would be the only probable cause finding outstanding against the Senate Committee. Although the GEC's liability on this issue is easily incorporated into a combined conciliation agreement with the GEC, pursuing this matter with the Senate Committee will require additional use of resources. Thus, we recommend that the Commission exercise its prosecutorial discretion and find probable cause but take no further action against the Senate Committee on this issue which involves less than \$5,000. Second, the Briefs recommend that the Commission find probable cause to believe that violations occurred with respect to the GEC's apparent payment for two plane trips that benefited the Senate campaign. In response, the GEC submitted documentation showing the DNC paid for these trips. Consequently, we recommend that the Commission find no probable cause to believe with respect to both committees on this issue. These and the other issues in MUR 2715 are summarily discussed below.

Phone Banks

As detailed in the General Counsel's Briefs, the Senate Committee contracted with a commercial vendor, '88 Texas, to conduct the phone bank and other campaign activity. Telephone

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scripts produced revealed only one reference to Bentsen's Vice-Presidential race in the form of a question about whether the call recipient would vote for the Dukakis/Bentsen or Bush/Quayle ticket. In its most recent response on this issue, the Senate Committee reiterates that the phone bank focused on voter identification and that voter identification surveys, like the one in question, frequently use questions regarding presidential contest preference given the high-profile nature of that election. Attachment 13 at 7-8. The Senate Committee also continues to argue that since none of the information from the phone bank operation was transferred or provided to the GEC, no benefit was received. It thus urges the Commission to make a no probable cause finding on this issue. Attachment 13 at 8. The Senate Committee's position has been echoed by the GEC in earlier responses. The GEC also adds that it did not enter into any agreement with any other candidate or political party or political committee for services rendered by the vendor for the general election. See Attachment 12 at 53-54 and 57-58.

As pointed out in the Briefs, Senator Bentsen's name is used often in the phone bank scripts. Moreover, persons called were encouraged to support the entire Democratic ticket. Thus, Senator Bentsen arguably could have benefited from the phone bank efforts as a Vice-Presidential candidate. However, given that only one in a series of questions conducted in the phone bank surveys actually referenced the Vice Presidential contest, this Office recommends that the Commission find probable cause to believe that the GEC violated 2 U.S.C § 441a(f) or 26 U.S.C.

§ 9003(b)(2) and that the Senate Committee violated 2 U.S.C. § 441a(a)(1)(A) but take no further action with respect to both.

Mailgram

Discovery revealed that the Senate mailgram, described in detail in the revised GC Brief, was sent to 2,076 individuals including Senate Committee county coordinators, selected contributors who had given the Senate campaign more than \$1,000 and members of two Republican and Independent committees who had endorsed Bentsen's Senate re-election bid. The Senate Committee developed the mailgram mailing list from in-house lists and paid a commercial vendor \$9,964 to produce and distribute it.

In response to the revised GC Brief, the Senate Committee requests the Commission find no probable cause to believe a violation occurred on this issue and essentially repeats its earlier argument that the mailgram's focus was on the Senate race and its purpose was to promote Secretary Bentsen's Senate candidacy whether or not the mailgram recipients supported his Vice-Presidency bid. Thus, the Senate Committee contends it should be viewed as solely a Senate campaign expenditure. Attachment 13 at 3-6. The GEC has not responded to the General Counsel's recommendation to find probable cause on this issue. However, in its earlier responses, the GEC made the same argument as the Senate Committee and concluded the mailgram was not a presidential campaign expense. See GEC's August 28, 1988 response to complaint and Attachment 12 at 54-55 and 59-60. The GEC has also stated that it did not participate in the mailgram's preparation or distribution. Id.

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As discussed in the revised GC Brief, the mailgram, dated the day Governor Dukakis announced that Secretary Bentsen would be his running-mate, referenced the Vice Presidential nomination, and stated Secretary Bentsen's belief that "the Democratic ticket will prevail in November and that my nomination is of great importance to Texas and its future." Although the mailgram includes no request for contributions, it was sent to contributors who had given "more than" \$1,000 to the Senate Committee and seeks their continued support. Moreover, the use of a commercial vendor to produce and distribute the mailgram precludes it from qualifying for the coattails exception. Accordingly, this Office recommends that the Commission find probable cause to believe that the GEC violated 2 U.S.C. § 441a(f) and 26 U.S.C. § 9003(b)(2) by accepting an excessive in-kind contribution as a result of the production and distribution of the mailgram. We also recommend that the Commission find probable cause to believe that the Senate Committee violated 2 U.S.C. § 441a(a)(1)(A) by making an excessive in-kind to the GEC in connection with the mailgram, but take no further action for the reasons discussed on page 32.

Allocation of Food, Lodging and Travel Expenses/  
Sharing of Personnel and Facilities

As detailed in the GC Brief, Lloyd Bentsen held approximately ten meetings/fundraisers with Senate campaign supporters while on Vice-Presidential campaign trips. It appeared from the investigation that the two campaigns did not share personnel or facilities and that each campaign paid for

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its own expenses for dual-purpose trips. Moreover, it initially appeared that GEC paid the airfare for two of the ten trips in question rather than the Democratic National Committee ("DNC"), as contended by the GEC. In response to the GC Brief, however, the GEC provided documentation that the DNC paid for these trips as well. Attachment 12 at 1-22. Thus, the GEC made no in-kind contribution to the Senate Committee in connection with the airfare for trips benefiting the Senate campaign. Accordingly, this Office recommends that the Commission find no probable cause to believe that the Senate Committee violated 2 U.S.C. § 441a(f) by accepting excessive in-kind contributions in the form of GEC-paid airfare. Similarly, this Office recommends that the Commission find no probable cause to believe that the GEC violated 2 U.S.C. §§ 441a(a)(1)(A) or 26 U.S.C. § 9004(c) for making such contributions. Additionally, this Office recommends that the Commission find no reason to believe that either the GEC or the Senate Committee violated 11 C.F.R. §§ 106.1, 110.8(d)(2) and 110.8(d)(3) by failing to allocate air travel, food and lodging expenses or by sharing personnel and facilities.

Senate Newsletter

The Senate Committee paid for the production and distribution costs of the newsletter, described in more detail in the GC Briefs, which volunteers labeled and mailed. Although a commercial vendor was paid to duplicate, stitch and hand fold the newsletter, it appears that sufficient volunteer activity was involved to qualify as exempt activity. See e.g., MUR 2270.

Because the revised GC Brief indicated that the General Counsel would make a no probable cause to believe recommendation in connection with this issue, neither committee addresses it in their responses to the Briefs. Accordingly, the Office of General Counsel recommends that the Commission find no probable cause to believe that the Senate Committee violated 2 U.S.C. § 441a(a)(1)(A) or that the GEC violated 2 U.S.C. § 441a(f) and 26 U.S.C. § 9003(b)(2) in connection with the newsletter.

**IV. RECOMMENDATIONS IN LIGHT OF FEC v. NRA**

Consistent with the Commission's November 9, 1993 decisions concerning compliance with the court's decision in FEC v. NRA Political Victory Fund, 6 F.3d 821 (D.C. Cir. 1993), cert. granted, 62 U.S.L.W. 3842 (U.S. June 20, 1994), this Office recommends that the Commission take the following action in connection with MUR 2715: (1) ratify its November 13, 1989 determination to merge MUR 2652 into MUR 2715; (2) ratify its reason to believe findings that the Dukakis/Bentsen Committee, Inc., and its treasurer, violated 26 U.S.C. § 9003(b)(2), 2 U.S.C. §§ 441a(a)(1)(A) and 441a(f), and 11 C.F.R. §§ 106.1(a), 110.8(d)(2) and 110.8(d)(3); and (3) ratify its reason to believe findings that the Senator Lloyd Bentsen Election Committee, and its treasurer, violated 2 U.S.C. §§ 441a(a)(1)(A) and 441a(f) and 11 C.F.R. §§ 106.1(a), 110.8(d)(2) and 110.8(d)(3).

Additionally, based on the original audit referrals in MUR 3089, this Office recommends that the Commission: (1) revoke reason to believe that the Dukakis for President Committee and

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its treasurer, Hector Martinez Franco, R. Martinez (Mrs. Sol R. Martinez), Hector Martinez, Jr., Esteban L. Fuertes, Mrs. Esteban L. Fuertes (Celeste S. Fuertes), Milton Mendez Orsini, Mrs. Milton Mendez (Myrta Falcon de Mendez), Luis S. Sierra, Mrs. Luis Sierra (Silmarie Montilla Sierra), Benjamin Torres Vazquez and Julieta Torres violated 2 U.S.C. § 441f; and (2) approve the factual and legal analyses, samples of which were attached to the First General Counsel's Report dated January 25, 1991. Based on the subsequent responses received from respondents in MUR 3089, this Office further recommends that the Commission: (1) revoke reason to believe that the Dukakis for President Committee and its treasurer violated 11 C.F.R. § 110.4(c); (2) revoke reason to believe that Hector Martinez Franco, Mrs. Sol R. Martinez, Esteban L. Fuertes; Mrs. Celeste S. Fuertes, Milton Mendez Orsini and Luis S. Sierra each violated 2 U.S.C. § 441g; and (3) approve the factual and legal analyses attached to the General Counsel's Report dated January 14, 1992.

Attached are the relevant certifications in MURs 2715 and 3089 for the Commission's information. Attachment 14. NRA findings have already been made in MUR 3449 and none were necessary in MUR 3562 since the reconstituted Commission made those findings.

V. CONCILIATION

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**VI. RECOMMENDATIONS**

1. Deny the motion to dismiss MURs 3562, 3449, 3089 and 2715 put forward by counsel for the Dukakis for President Committee, the Dukakis/Bentsen Committee, and the Dukakis/Bentsen General Election Legal and Accounting Compliance Fund.
2. Reject the Dukakis for President Committee's counter-proposal dated April 11, 1994.
3. Find reason to believe that the Dukakis/Bentsen Committee, Inc. (Dukakis Bentsen General Election Legal and Accounting Compliance Fund) and Leonard Aronson, as treasurer, violated 11 C.F.R. § 110.4(c) in MUR 3449 and approve the attached factual and legal analysis (Attachment 17).
4. Ratify the Commission's November 13, 1989 determination to merge MUR 2652 into MUR 2715.
5. Ratify reason to believe that the Dukakis/Bentsen Committee, Inc., and its treasurer violated 26 U.S.C. § 9003(b)(2); 2 U.S.C. §§ 441a(a)(1)(A) and 441a(f); and 11 C.F.R §§ 106.1(a), 110.8(d)(2) and 110.8(d)(3) in MUR 2715.
6. Find probable cause to believe that the Dukakis/Bentsen Committee, Inc., violated 2 U.S.C. § 441a(f) and 26 U.S.C. § 9003(b)(2) in connection with the mailgram in MUR 2715.
7. Find probable cause to believe that the Dukakis/Bentsen Committee, Inc., violated 26 U.S.C. § 9003(b)(2) in connection with the Senate Committee phone banks, but take no further action in MUR 2715.
8. Find no probable cause to believe that the Dukakis/Bentsen Committee, Inc., violated 2 U.S.C. § 441a(f) or 26 U.S.C. § 9003(b)(2) in connection with the Senate Committee newsletter publication; 2 U.S.C. § 441a(a)(1)(A), 26 U.S.C. § 9004(c), and 11 C.F.R.

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§§ 106.1(a) and 110.8(d)(2) in connection with the airfare, food and lodging shared with the Senate Committee; and 11 C.F.R. § 110.8(d)(3) in connection with sharing of personnel or facilities in MUR 2715.

9. Ratify reason to believe that the Senator Lloyd Bentsen Election Committee and its treasurer violated 2 U.S.C. §§ 441a(a)(1)(A) and 441a(f); and 11 C.F.R. §§ 106.1(a), 110.8(d)(2) and 110.8(d)(3) in MUR 2715.
10. Find probable cause to believe that the Senator Lloyd Bentsen Committee and Marc L. Irvin, as treasurer, violated 2 U.S.C. § 441a(a)(1)(A) in connection with the mailgram and phone banks in MUR 2715, but take no further action with respect to these issues.
11. Find no probable cause to believe that the Senator Lloyd Bentsen Committee and Marc L. Irvin, as treasurer, violated 2 U.S.C. § 441a(a)(1)(A) in connection with the Senate Committee newsletter publication; 2 U.S.C. § 441a(f) and 11 C.F.R. §§ 106.1(a) and 110.8(d)(2) in connection with sharing airfare, food and lodging with the GEC; and 11 C.F.R. § 110.8(d)(3) in connection with sharing of personnel or facilities in MUR 2715 and close the file with respect to the Senate Committee.
12. Revote reason to believe that the Dukakis for President Committee and its treasurer violated 2 U.S.C. § 441f and 11 C.F.R. § 110.4(c) in MUR 3089.
13. Revote reason to believe that Hector Martinez Franco, R. Martinez (Mrs. Sol R. Martinez), Hector Martinez, Jr., Esteban L. Fuertes, Mrs. Esteban Fuertes (Celeste S. Fuertes), Milton Mendez Orsini, Mrs. Milton Mendez (Myrta Falcon de Mendez), Luis S. Sierra, Mrs. Luis Sierra (Silmarie Montilla Sierra), Benjamin Torres Vasquez and Julieta Torres each violated 2 U.S.C. § 441f in MUR 3089.
14. Revote reason to believe that Hector Martinez Franco, R. Martinez (Mrs. Sol R. Martinez), Esteban L. Fuertes, Mrs. Esteban Fuertes (Celeste S. Fuertes), Milton Mendez Orsini and Luis S. Sierra each violated 2 U.S.C. § 441g in MUR 3089.
15. Approve the factual and legal analyses which were attached to the General Counsel's Report dated January 14, 1992 and samples of which were attached to the First General Counsel's Report dated January 25, 1991 in MUR 3089.
16. Take no further action against the Dukakis for President Committee, Inc., and Leonard Aronson, as

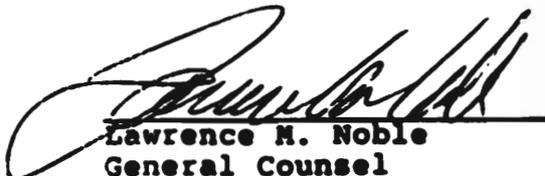
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treasurer, in connection with the 2 U.S.C. § 441f violation in MUR 3089.

17. Take no further action against Hector Martinez Franco, R. Martinez (Mrs. Sol R. Martinez), Esteban L. Fuertes, Mrs. Esteban Fuertes (Celeste S. Fuertes), Milton Mendez Orsini, Luis S. Sierra, Hector Martinez, Jr., Mrs. Milton Mendez (Myrta Falcon de Mendez), Mrs. Luis Sierra (Silmarie Montilla Sierra), Benjamin Torres Vazquez and Julieta Torres and close the file with respect to each of them in MUR 3089.
18. Enter into pre-probable cause conciliation with the Dukakis for President Committee, Inc., and Leonard Aronson, as treasurer, in MUR 3089 and the Dukakis/Bentsen Committee, Inc. and the Dukakis/Bentsen Committee, Inc. (Dukakis/Bentsen General Election Legal and Accounting Compliance Fund), and Leonard Aronson, as treasurer, in MUR 3449, and approve the attached proposed combined conciliation agreement for MURs 3562, 3449, 3089 and 2715.
19. Enter into pre-probable cause conciliation with Fried, Frank, Harris, Shriver and Jacobson and approve the attached proposed conciliation agreement in MUR 3449.
20. Approve the appropriate letters.

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8/30/94  
Date

  
Lawrence M. Noble  
General Counsel

**Attachments**

1. Committee's 3/31/94 motion to dismiss (MUR 3562)
2. Committee's 4/11/94 letter and second counterproposal (MUR 3562)
3. Committee's 5/5/94 letter renewing its motion to dismiss and enclosing "supplemental authority" (MUR 3562)
4. Committee's 1/19/94 RTB response (MUR 3562)
5. Committee's 3/14/94 supplemental RTB response and first counterproposal (MUR 3562)
6. 3/15/88 letter from AFSCME to Committee enclosing phone bank invoice
7. 4/25/89 letter from Committee to AFSCME re: payment of final bill for phone banks
8. GEC's RTB response in MUR 3449
9. Law Firm's RTB response in MUR 3449 (electoral college memo)
10. Committee's 2/18/92 Response to cash contribution issue in MUR 3089
11. (Group) Responses of individuals who made cash contributions in MUR 3089



FEDERAL ELECTION COMMISSION  
WASHINGTON DC 20463

MEMORANDUM

TO: LAWRENCE M. NOBLE  
GENERAL COUNSEL

FROM: MARJORIE W. EMMONS / BONNIE J. ROSS   
COMMISSION SECRETARY

DATE: SEPTEMBER 2, 1994

SUBJECT: MURS 3562, 3449, 3089, and 2715 - GENERAL COUNSEL'S  
REPORT DATED  
AUGUST 30, 1994.

The above-captioned document was circulated to the Commission on Wednesday, August 31, 1994 at 4:00.

Objection(s) have been received from the Commissioner(s) as indicated by the name(s) checked below:

Commissioner Aikens	_____
Commissioner Elliott	<u>XXX</u>
Commissioner McDonald	_____
Commissioner McGarry	_____
Commissioner Potter	<u>XXX</u>
Commissioner Thomas	<u>XXX</u>

This matter will be placed on the meeting agenda for Tuesday, September 13, 1994.

Please notify us who will represent your Division before the Commission on this matter.

95043680561

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
Dukakis for President Committee, Inc.	)	MURS 3562,
and Leonard Aronson, as treasurer;	)	3449, 3089,
Dukakis/Bentsen General Election	)	and 2715
Legal and Accounting Compliance Fund	)	
and Leonard Aronson, as treasurer;	)	
Dukakis/Bentsen Committee, Inc.;	)	
The Senator Lloyd Bentsen Election	)	
Committee and Marc L. Irvin, as	)	
treasurer; and	)	
Fried, Frank, Harris, Shriver and	)	
Jacobson	)	

CERTIFICATION

I, Marjorie W. Emmons, recording secretary for the Federal Election Commission executive session on September 20, 1994, do hereby certify that the Commission decided by a vote of 4-0 to take the following actions with respect to MURS 3562, 3449, 3089, and 2715:

1. Deny the motion to dismiss MURS 3562, 3449, 3089, and 2715 put forward by counsel for the Dukakis for President Committee, the Dukakis/Bentsen Committee, and the Dukakis/Bentsen General Election Legal and Accounting Compliance Fund.

(continued)

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2. Reject the Dukakis for President Committee's counterproposal dated April 11, 1994.
3. Find reason to believe that the Dukakis/Bentsen Committee, Inc. (Dukakis Bentsen General Election Legal and Accounting Compliance Fund) and Leonard Aronson, as treasurer, violated 11 C.F.R. § 110.4(c) in MUR 3449 and approve the factual and legal analysis designated Attachment 17 to the FEC General Counsel's report dated August 30, 1994.
4. Ratify the Commission's November 13, 1989 determination to merge MUR 2652 into MUR 2715.
5. Ratify reason to believe that the Dukakis/Bentsen Committee, Inc., and its treasurer, violated 26 U.S.C. § 9003(b)(2); 2 U.S.C. §§ 441a(a)(1)(A) and 441a(f); and 11 C.F.R. §§ 106.1(a), 110.8(d)(2) and 110.8(d)(3) in MUR 2715.
6. Find probable cause to believe that the Dukakis/Bentsen Committee, Inc. violated 2 U.S.C. § 441a(f) and 26 U.S.C. § 9003 (b)(2) in connection with the mailgram in MUR 2715.

(continued)

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7. Find probable cause to believe that the Dukakis/Bentsen Committee, Inc., violated 26 U.S.C. 9003(b)(2) in connection with the Senate Committee phone banks, but take no further action in MUR 2715.
  8. Find no probable cause to believe that the Dukakis/Bentsen Committee, Inc. violated 2 U.S.C. § 441a(f) or 26 U.S.C. § 9003(b)(2) in connection with the Senate Committee newsletter publication; 2 U.S.C. § 441a(a)(1)(A), 26 U.S.C. § 9004(c), and 11 C.F.R. §§ 106.1(a) and 110.8(d)(2) in connection with the airfare, food and lodging shared with the Senate Committee; and 11 C.F.R. § 110.8(d)(3) in connection with sharing of personnel or facilities in MUR 2715.
  9. Ratify reason to believe that the Senator Lloyd Bentsen Election Committee and its treasurer, violated 2 U.S.C. §§ 441a(a)(1)(A) and 441a(f); and 11 C.F.R. §§ 106.1(a), 110.8(d)(2) and 110.8(d)(3) in MUR 2715.
  10. Find probable cause to believe that the Senator Lloyd Bentsen Committee and Marc L. Irvin, as treasurer, violated 2 U.S.C. § 441a(a)(1)(A) in connection with the mailgram and phone banks in MUR 2715, but take no further action with respect to these issues.

(continued)

11. Find no probable cause to believe that the Senator Lloyd Bentsen Committee and Marc L. Irvin, as treasurer, violated 2 U.S.C. § 441a(a)(1)(A) in connection with the Senate Committee newsletter publication; 2 U.S.C. § 441a(f) and 11 C.F.R. §§ 106.1(a) and 110.8(d)(2) in connection with sharing airfare, food and lodging with the GEC; and 11 C.F.R. § 110.8(d)(3) in connection with sharing of personnel or facilities in MUR 2715 and close the file with respect to the Senate Committee.
12. Revote reason to believe that the Dukakis for President Committee and its treasurer violated 2 U.S.C. § 441f and 11 C.F.R. § 110.4(c) in MUR 3089.
13. Revote reason to believe that Hector Martinez Franco, R. Martinez (Mrs. Sol R. Martinez), Hector Martinez, Jr., Esteban L. Fuertes, Mrs. Esteban Fuertes (Celeste S. Fuertes), Milton Mendez Orsini, Mrs. Milton Mendez (Myrta Falcon de Mendez), Luis S. Sierra, Mrs. Luis Sierra (Silmarie Montilla Sierra), Benjamin Torres Vasquez and Julieta Torres each violated 2 U.S.C. § 441f in MUR 3089.
14. Revote reason to believe that Hector Martinez Franco, R. Martinez (Mrs. Sol R. Martinez) Esteban L. Fuertes, Mrs. Esteban Fuertes (Celeste S. Fuertes), Milton Mendez Orsini and Luis S. Sierra each violated 2 U.S.C. § 441g in MUR 3089.

(continued)

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15. Approve the factual and legal analyses which were attached to the General Counsel's Report dated January 14, 1992 and samples of which were attached to the First General Counsel's Report dated January 25, 1991 in MUR 3089.
16. Take no further action against the Dukakis for President Committee, Inc., and Leonard Aronson, as treasurer, in connection with the 2 U.S.C. § 441f violation in MUR 3089.
17. Take no further action against Hector Martinez Franco, R. Martinez (Mrs. Sol R. Martinez), Esteban L. Fuertes, Mrs. Esteban Fuertes (Celeste S. Fuertes), Milton Mendez Orsini, Luis S. Sierra, Hector Martinez, Jr., Mrs. Milton Mendez (Myrta Falcon de Mendez), Mrs. Luis Sierra (Silmarie Montilla Sierra), Benjamin Torres Vazquez and Julieta Torres and close the file with respect to each of them in MUR 3089.
18. Enter into pre-probable cause conciliation with the Dukakis for President Committee, Inc., and Leonard Aronson, as treasurer, in MUR 3089 and the Dukakis/Bentsen Committee, Inc. and the Dukakis/Bentsen Committee, Inc. (Dukakis/Bentsen General Election Legal and Accounting Compliance Fund), and Leonard Aronson, as treasurer, in MUR 3449, and approve the proposed combined conciliation agreement for MURS 3562, 3449, 3089 and 2715 as recommended in the General Counsel's report dated August 30, 1994.

(continued)

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19. Enter into pre-probable cause conciliation with Fried, Frank, Harris, Shriver and Jacobson and approve the proposed conciliation agreement in MUR 3449 as recommended in the General Counsel's August 30, 1994 report.
  
20. Approve the appropriate letters as recommended in the General Counsel's August 30, 1994 report.

Commissioners Aikens, McDonald, McGarry, and Thomas voted affirmatively for the decision. Commissioner Elliott was not present. Commissioner Potter noted that he was not participating with regard to these matters and he was not present.

Attest:

9-21-94  
Date

Marjorie W. Emmons  
Marjorie W. Emmons  
Secretary of the Commission

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FEDERAL ELECTION COMMISSION

WASHINGTON DC 20541

OCTOBER 3, 1994

VIA EXPRESS MAIL

Daniel A. Taylor, Esq.  
Hill & Barlow  
One International Place  
Boston, MA 02110-2607

HAND DELIVERED

Kenneth A. Gross, Esq.  
Skadden, Arps, Slate, Meagher & Flom  
1440 New York Avenue  
Washington, D.C. 20005

RE: MURs 3562, 3449, 3089 and 2715  
Dukakis for President Committee,  
and Leonard Aronson, as  
treasurer  
Dukakis/Bentsen Committee, Inc.  
(Dukakis/Bentsen General  
Election Legal and Accounting  
Compliance Fund) and Leonard  
Aronson, as treasurer, and  
Dukakis/Bentsen Committee, Inc.

Dear Messrs. Taylor and Gross:

This letter is to advise you of the various actions taken by the Federal Election Commission (the "Commission") on September 20, 1994, in the above-referenced matters.

The Commission considered and denied your clients' Motion to Dismiss these matters. It also reviewed and rejected your clients' April 11th counter-conciliation agreement proposing to settle all of the above-referenced MURs. Although the Commission denied your counter-offer, it is amenable to your proposal that we attempt to settle all of these matters in a single conciliation agreement. Accordingly, the Commission took the actions described below with respect to MURs 3449, 3089 and 2715 and approved the enclosed combined conciliation agreement in an effort to expeditiously settle all of these matters. The combined conciliation agreement contains the factual bases for, and admissions of, violations at issue in all of the above-referenced MURs.

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With respect to MUR 2715 (for which Mr. Gross is designated counsel), the Commission ratified its prior determination to merge MUR 2562 into MUR 2715 and its findings of reason to believe that the Dukakis/Bentsen Committee, Inc., and its treasurer ("GEC") violated 26 U.S.C. § 9003(b)(2); 2 U.S.C. §§ 441a(a)(1)(A) and 441a(f); and 11 C.F.R. §§ 106.1(a), 110.8(d)(2) and 110.8(d)(3).<sup>1</sup> It also found probable cause to believe that the GEC violated 2 U.S.C. § 441a(f) and 26 U.S.C. § 9003(b)(2) in connection with the Senate Committee mailgram; found probable cause to believe that the GEC violated 26 U.S.C. § 9003(b)(2) in connection with the Senate Committee phone banks, but determined to take no further action; and found no probable cause to believe that the GEC violated 2 U.S.C. § 441a(f) and 26 U.S.C. § 9003(b)(2) in connection with the Senate Committee newsletter publication, and 2 U.S.C. § 441a(a)(1)(A), 26 U.S.C. § 9004(c), and 11 C.F.R. §§ 106.1(a), 110.8(d)(2), and 110.8(d)(3) in connection with the sharing of airfare, food, lodging, personnel and facilities with the Senate Committee.

With respect to MUR 3089, the Commission revoked its prior findings of reason to believe that the Dukakis for President Committee, Inc. and its treasurer ("the Committee") violated 2 U.S.C. § 441f and 11 C.F.R. § 110.4(c) and to approve the factual and legal analyses which were previously mailed to them.<sup>2</sup> After considering the circumstances of this matter, the Commission also determined to take no further action against the Committee, and Leonard Aronson as treasurer, in connection with the Section 441f finding. It also determined to enter into pre-probable cause conciliation with the Committee and Leonard Aronson, as treasurer, in settlement of the violation of 11 C.F.R. § 110.4(c).

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1. This action was taken in accordance with specific procedures adopted by the Commission as a result of the D.C. Circuit decision in FEC v. NRA Political Victory Fund, 6 F.3d 821 (D.C. Cir. 1993), cert. granted, 114 S.Ct. 2703 (1994). As you are aware, the D.C. Circuit declared the Commission unconstitutional on separation of powers grounds due to the presence of the Clerk of the House of Representatives and the Secretary of the Senate or their designees as members of the Commission. While awaiting the Supreme Court's consideration of the Commission's appeal, the Commission, consistent with that opinion, has remedied any possible constitutional defect identified by the Court of Appeals by reconstituting itself as a six member body without the Clerk of the House and the Secretary of the Senate or their designees, and has adopted specific procedures for revoting or ratifying decisions pertaining to open enforcement matters.

2. See Footnote 1.

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With respect to MUR 3449, the Commission considered your clients' June 6, 1993 response to its reason to believe findings and determined to enter into negotiations directed toward reaching a conciliation agreement in settlement of this matter prior to a finding of probable cause to believe. It also found reason to believe that the Dukakis Bentsen Committee, Inc. (Dukakis Bentsen General Election Legal and Accounting Compliance Fund) and Leonard Aronson, as treasurer, violated 11 C.F.R. § 110.4(c) in connection with the sequential money order issue. The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

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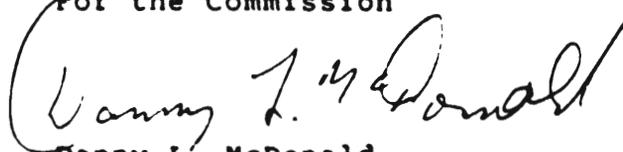
Finally, the Commission notes that Mr. Taylor requested that the General Counsel's Office share its reasoning as to why it believes 28 U.S.C. § 2462 does not preclude the Commission from proceeding in these matters. The General Counsel's Office ordinarily does not provide a written statement of its reasons for recommending motions to dismiss. However, the Commission's position on this particular issue has been set forth in several civil actions pending before various courts. Enclosed for your

information is a copy of a recently-filed brief addressing this issue in FEC v. National Republican Senatorial Committee, Civil Action No. 93-1612 (D.D.C. filed September 1, 1994).

The Commission is hopeful that these matters can be settled through conciliation negotiations. In light of the fact that pre-probable cause conciliation negotiations are limited to 30 days, you should respond to this agreement no later than 30 days of your receipt of this notification. If agreement is not reached within this period, MURs 3562, 3449 and 3089 will proceed to the next stage of the enforcement process. Similarly, since MUR 2715 is already in the probable cause stage, if we are unable to reach agreement on this matter within this time, the Commission may institute a civil suit in the United States District Court with respect to this matter and seek payment of a civil penalty. See 2 U.S.C. §§ 437g(a)(4) and (6).

If you have questions or suggestions for changes in the enclosed conciliation agreement, please contact Dawn M. Odrowski, the staff attorney assigned to these matters, at (202) 219-3400.

For the Commission



Danny L. McDonald  
Vice Chairman

Enclosures

Conciliation Agreement  
Factual and Legal Analysis in MUR 3449  
Copy of brief in FEC v. NRSC

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Dukakis/Bentsen Committee, Inc.  
(Dukakis/Bentsen General Election  
Legal and Accounting Compliance  
Fund) and Leonard Aronson, as  
treasurer

MUR: 3449

I. BACKGROUND

This matter was generated based on information ascertained by the Federal Election Commission ("the Commission") in the normal course of carrying out its supervisory responsibilities. See 2 U.S.C. § 437g(a)(2).

II. FACTUAL AND LEGAL ANALYSIS

A. The Law

Under the Federal Election Campaign Act of 1971, as amended (the "Act"), it is unlawful for any person to make contributions of currency which, in the aggregate, exceed \$100, with respect to any campaign for Federal office. See 2 U.S.C. § 441g. In addition, under Commission regulations a candidate or committee receiving cash contributions in excess of \$100 shall promptly return the amount over \$100 to the contributor. 11 C.F.R. § 110.4(c)(2).

B. Analysis

The Commission originally found reason to believe that the Dukakis/Bentsen Committee, Inc. (Dukakis/Bentsen General Election Committee Legal and Accounting Compliance Fund) and its treasurer ("the GEC/GELAC"), violated 2 U.S.C. § 441f based on GEC/GELAC's acceptance of contributions in the form of

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sequential money orders which appeared to have been prepared by persons other than the named contributor. The GEC(GELAC) denies that it knowingly accepted contributions made by persons in the name of another. Instead, the GEC(GELAC) explains the handwriting similarities on the sequential money orders at issue by positing that members of the Greek community made cash contributions which were then converted into money orders by an unnamed person or persons before being forwarded to campaign headquarters.

The facts asserted by the GEC(GELAC) in support of its explanation are minimal. It states that most of the money orders, which bear the name of individuals with Greek surnames, were associated with a mid-June 1988 GELAC fundraiser in Queens; that Mr. Dukakis' supporters in the Greek community tended to make cash contributions; and that campaign fundraisers discouraged cash contributions because they didn't like the responsibility of handling large amounts of cash and the campaign preferred the controls afforded by written instruments.

Information provided to the Audit division by a committee official concerning the code "FRONN" that appears on many of the Marine Midland money orders is consistent with the Committee's assertion those money orders were associated with a June 1988 GELAC fundraiser. Moreover, the GEC(GELAC)'s explanation for the money orders at issue -- that they are the result of cash contributions converted into money orders -- is supported by circumstances which occurred in connection with two other fundraisers for Mr. Dukakis held in January and April 1988.

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At both of these events, contributors made cash contributions which were later converted into money orders.

In light of the above, and assuming the GEC(GELAC)'s explanation is accurate, the GEC(GELAC) appears to have instead violated 11 C.F.R. § 110.4(c) by accepting cash contributions in excess of \$100 and failing to promptly return the amounts over \$100 to the respective contributors. Fifteen of the money orders at issue, totaling \$4,900, were for amounts over \$100.<sup>1</sup> The receipt of sequentially-numbered money orders drawn on the same institution, bearing similar dates and handwriting/typing patterns, should have alerted the Committee to inquire further into the circumstances surrounding the contributions as part of its duty to determine the legality of contributions. See 11 C.F.R. § 103.3(b). This is especially true since eight of the fifteen money orders at issue consisted of apparent "duplicate" contributions from four individuals.<sup>2</sup> Moreover, the GEC(GELAC) was evidently aware cash contributions had been made at other fundraising events since it says that fundraisers

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1. These fifteen contributions were made by the following contributors in the amounts and on the dates indicated: Anastasios Lekkas, two \$250 contributions dated 5/31/88; George Kanfantaris, two \$250 contributions dated 6/2/88; Athena Marangoudakis, two \$250 contributions dated 6/2/88; Vasilios Marangoudakis, two \$250 contributions dated 6/2/88; Aspasia Marangoudakis, \$500 on 6/2/88; Charlie Marangoudakis, \$500 on 6/2/88; Konstantinos Marangoudakis, \$500 on 6/2/88; Stephanie Marangoudakis, \$500 on 6/2/88; Konstantinos Metropoulos, \$500 on 6/9/88; Menelos Pappas, \$200 on 6/15/88; Alex Vasilou, \$200 on 6/15/88.

2. See the first eight contributions listed in footnote 1, above. Each pair of contributions is reported together on the Committee's disclosure reports.

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discouraged cash contributions. Accordingly, there is reason to believe that the Dukakis/Bentsen General Election Committee, Inc., and Leonard Aronson, as treasurer, violated 11 C.F.R. § 110.4(c).

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FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

OCTOBER 3, 1994

William Josephson, Esq.  
Fried, Frank, Harris,  
Shriver & Jacobson  
One New York Plaza  
New York, NY 10004-1980

RE: MUR 3449  
Fried, Frank, Harris,  
Shriver & Jacobson

Dear Mr. Josephson:

On May 4, 1993, the Federal Election Commission found reason to believe that Fried, Frank, Harris, Shriver & Jacobson violated 2 U.S.C. §§ 441a(a)(1)(A) and 441b(a). As you may recall, the Commission notified you on February 1, 1994, that it had revoked these reason to believe findings as a result of the D.C. Circuit's decision in FEC v. NRA Political Victory Fund, 6 F.3d. 821 (D.C. Cir. 1993), cert. granted, 114 S.Ct. 2703 (1994). Most recently, after considering your June 24, 1993 response to its findings, on September 20, 1994, the Commission decided to offer to enter into negotiations directed toward reaching a conciliation agreement in settlement of this matter prior to a finding of probable cause to believe.

Enclosed is a conciliation agreement that the Commission has approved in settlement of this matter. If you agree with the provisions of the enclosed agreement, please sign and return it, along with the civil penalty, to the Commission. In light of the fact that conciliation negotiations, prior to a finding of probable cause to believe, are limited to a maximum of 30 days, you should respond to this notification as soon as possible.

If you have any questions or suggestions for changes in the agreement, or if you wish to arrange a meeting in connection with a mutually satisfactory conciliation agreement, please contact me at (202) 219-3400.

Sincerely,

Dawn M. Odrowski  
Attorney

Enclosure  
Conciliation Agreement

95043680576

**Anthony F. Essaye**  
607 Fourteenth Street, N.W., 9th Floor  
Washington, D.C. 20005

**William Josephson**  
1 New York Plaza, 25th Floor  
New York, New York 10004

November 17, 1994

Federal Election Commission  
Office of General Counsel  
999 E Street, N.W.  
Washington, D.C. 20463

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RECEIVED  
FEDERAL ELECTION  
COMMISSION  
OFFICE OF GENERAL COUNSEL  
NOV 18 12 53 PM '94

Ladies and Gentlemen:

In accordance with 11 C.F.R. Part 200 of Subchapter B of the Administrative Regulations of the Federal Election Commission (the "Commission"), Anthony F. Essaye and William Josephson hereby petition for the issuance of a ruling implementing the Federal Election Campaign Act of 1971 and the Presidential Election Campaign Fund Act, both as amended.

1. The name and address of the Petitioners are:

(a) Anthony F. Essaye, Esq.  
607 Fourteenth Street, N.W., 9th floor  
Washington, D.C. 20005-2011

(b) William Josephson, Esq.  
1 New York Plaza, 25th Floor  
New York, New York 10004-1980

2. This is a Petition for the issuance of a rule.

3. The specific sections of the Commission's regulations to be affected are 11 C.F.R. Sections 100.2(b) and 9002.12(a).

4. Legal and Factual Background. Section 100.2(b) of the Commission's regulations defines "General Election" as an election which is either held in even numbered years on the Tuesday following the first Monday in November or an election which is held to fill a vacancy in federal office.

Section 9002.11(a) defines qualified campaign expenses to mean any expenditures incurred to further a candidate's campaign for election to the office of President or Vice President of the United States which are incurred within the expenditure period as defined in 11 C.F.R. Section 9002.12.

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Section 9002.12(a) provides that the reporting period ends 30-days after the presidential election.

The Presidential Election Campaign Fund Act in Section 9002.10 defines the terms "Presidential Election" to mean "the election of Presidential and Vice Presidential electors." (emphasis added)

Presidential and Vice Presidential electors are appointed, i.e. elected, in accordance with 3 U.S.C. Section 1 by, and in, each of the several States and the District of Columbia on the Tuesday next after the first Monday in November in every fourth year succeeding every election of a President and Vice President except in those cases to which 3 U.S.C. Section 4 applies.

Under 3 U.S.C. Section 7, the electors of President and Vice President of each State shall meet and give their votes on the first Monday after the second Wednesday in December next following their appointment.

Under Section 3 U.S.C. Section 15, The Congress shall be in session on the sixth day of January succeeding that meeting of the electors, and the votes of the electors shall be ascertained and counted, and the results shall be delivered to the President of the Senate who shall immediately announce the state of the vote.

Under the Twelfth Amendment to the Constitution of the United States, if no person shall have a majority of the whole number of electors for President, the House of Representatives shall choose immediately by ballot the President, and if no person shall have a majority for Vice President, the Senate shall choose the Vice President.

The latest date on which the second Tuesday in November can fall is the eighth of November. Thirty days from the eighth of November is the eighth of December.

The casting of the ballots of the electors and the counting of the ballots and the election of a President by the House of Representatives, if any, and the election of a Vice President by the Senate, if any, will all take place more than 30 days after the second Tuesday after the first Monday in November.

Three times in the history of the United States, in 1800, 1824 and 1876, the votes of the majority of the entire number of electors did not elect a President of the United States, and once in the history of the United States the Senate had to elect a Vice President. If either should appear possible of happening again, the casting of ballots by the electors and the counting of ballots and any election of a President by the House of Representatives and a Vice President by the Senate or both will become contested parts of "the process by which individuals seek nomination for election, or election, to federal office" of President and/or Vice President of the United States. 11 C.F.R. § 110.2(a).

However, nothing in the Commission's regulations under either the Federal Election Campaign Act of 1971, as amended, or the Presidential Election Campaign Fund Act, as

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amended, regulates receipts or disbursements with respect to the casting of ballots by the electors, the counting of those ballots, or the election of a President by the House of Representatives or a Vice President by the Senate, or any of the actions incident thereto to such as the filling of vacancies among the electors, see, e.g., 3 U.S.C. Section 4, or the determination of controversies as to appointment of electors, 3 U.S.C. Section 5.

This absence of regulation is inferentially confirmed by the Commission's own regulations. They eliminate from the definitions of contribution and expenditure anything of value made with respect to recount of the results of a federal election or an election contest concerning a federal election (other than the prohibitions in 11 C.F.R. §100.4(a) and Part 114). See 11 C.F.R. §§ 100.7(b)(20) & 100.8(b)(20). If the electoral college process should ever again be contested or the President or Vice President should ever again have to be elected by the House or Senate, respectively, the analogy to a recount or election contest is plain.

Since the passage of the Federal Election Campaign Act of 1971, as amended, Presidential Election Fund Act, as amended, to our knowledge no candidate for President or Vice President, or their supporters, who has accepted public funding, has budgeted with respect to post-December 8 parts of the process of electing a President or Vice President.

Third party candidates waged serious national campaigns for President and Vice President in 1980 to 1992 and may do so again in the future. This increases the likelihood that the electors may not elect a President and/or Vice President.

This possibility also exists in two-major-candidate presidential campaigns. Approximately half the States do not bind their electors to ballot in accordance with the State's popular vote, and the legal effect of the approximately half of the States that do purport to bind their electors, one way or another, is not entirely clear. The closer the popular vote, the more likely it is that electors may become subject to campaigns to vote in or not vote in accordance with the popular vote and that Senators and Representatives will be lobbied to count or not to count electoral votes or to vote for this or that candidate for President or Vice President.

The absence of statutory or administrative regulation of this area raises important and substantial policy and legal issues which should be addressed and resolved before the next presidential election and can only be addressed and resolved by the Commission or, failing that, by The Congress.

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Wherefore Petitioners respectfully request the Commission, in accordance with 11 C.F.R. Section 200.3, to comply with subsections (a)(1), (a)(2) and (a)(3) and (c) thereof by deciding that a public hearing on this Petition would contribute to the Commission's determination whether to commence a rulemaking proceeding, and by publishing an appropriate notice in the Federal Register to advise interested persons and to invite their participation.

Respectfully submitted,



Anthony F. Essaye, Petitioner



William Josephson, Petitioner

cc: Dawn Odrowski, Esq.  
Lisa Klein, Esq.

95043680580

bcc: Kenneth A. Gross, Esq.  
David Whitescarver, Esq.  
Sheldon L. Raab, P.C.

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BEFORE THE FEDERAL ELECTION COMMISSION

RECEIVED  
FEDERAL ELECTION  
COMMISSION  
SECRETARIAT

Apr 28 4 02 PM '95

In the Matter of

)  
) 28 U.S.C. § 2462  
) Statute of Limitations  
)

GENERAL COUNSEL'S REPORT

**SENSITIVE**  
MAY 16 1995

EXECUTIVE SESSION

I. INTRODUCTION<sup>1</sup>

As the Commission is aware, on February 24, 1995, the U.S. District Court for the District of Columbia decided in Federal Election Commission v. National Republican Senatorial Committee, 1995 WL 83006 (D.D.C. 1995) ("NRSC"), that the statute of limitations set forth at 28 U.S.C. § 2462 ("Section 2462") applied to Commission enforcement suits seeking civil penalties, relying upon the D.C. Circuit's opinion in 3M Co. v. Browner, 17 F.3d 1453 (D.C. Cir. 1994). This Report discusses the statute of limitations generally, describes

enforcement matters potentially affected by the NRSC court's conclusion and makes recommendations for each of the potentially affected matters.<sup>2</sup>

1. This is a combined General Counsel's Report from the Enforcement and Public Financing, Ethics and Special Projects ("PFESP") areas of the Office of the General Counsel.

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In NRSC, Judge Pratt held that the Commission could not seek a civil penalty in conjunction with its civil enforcement action against the defendant for violations of 2 U.S.C. §§ 441a(h) and 434(b) because the 5-year federal catch-all statute of limitations found at 28 U.S.C. § 2462 applied to Commission-initiated enforcement suits seeking civil penalties. The court, however, allowed the Commission's suit to go forward notwithstanding this conclusion, ruling that Section 2462 did not apply to the declaratory and equitable relief also sought by the Commission. Therefore, the court so far has issued no final appealable decision.

On May 17, 1994, in FEC v. Williams, the U.S. District Court for the Central District of California reached the opposite conclusion about the applicability of 28 U.S.C. § 2462 to the Commission's enforcement actions. Mr. Williams' contributions in the name of another took place more than 5 years before the Commission filed its complaint and counsel raised 28 U.S.C. § 2462 as an affirmative defense. However, the court ruled at an oral hearing that the statute of limitations did not apply. Instead, the court awarded the Commission a \$10,000 civil penalty against Mr. Williams for violations of 2 U.S.C. § 441f. FEC v. Williams, No. 93-6321 (C.D. Cal. Jan. 31, 1995), appeal docketed, No. 95-55320 (9th Cir. 1995) ("Williams"). - Mr. Williams has filed a notice of appeal regarding, inter alia, the district court's

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statute of limitations decision. Thus, whether and to what extent the statute of limitations at 28 U.S.C. § 2462 will apply to Commission enforcement cases will be before the 9th Circuit shortly, and could also be the subject of a later appeal before the D.C. Circuit in NRSC.<sup>3</sup>

In light of this conflict between the courts and the pendency of the appeal, this Office believes a decision to close enforcement cases based solely on a conclusion that the 5 year statute of limitations would apply to any potential enforcement suits would be unwarranted. This is especially true since neither 28 U.S.C. § 2462 nor the NRSC decision limits the Commission's authority to complete administrative investigations or seek civil penalties in voluntary conciliation prior to filing suit. Nonetheless, the Office of the General Counsel recognizes that until the statute of limitations is finally resolved by the courts, respondents are likely to raise it as a defense, making settlement more complicated. Thus, even though the Commission is not bound by the NRSC decision in other cases, the Office of the General Counsel believes the Commission should take this issue into consideration on a case-by-case basis when looking at its active and inactive enforcement cases -- particularly those with older activity -- and, in an exercise of its prosecutorial discretion, attempt to bring the matters most vulnerable to

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statute of limitations difficulties to an early administrative disposition.<sup>4</sup>

In order to give the Commission the broadest picture of the possible effect of a statute of limitations on its caseload, this Office has analyzed all enforcement cases where there is FECA-violative activity that will be 5 years old at some point during this year. Section II of this Report gives an overview of principles involved in analyzing the statute of limitations issue, with particular attention to determining when a Commission cause of action might accrue, and when the running of the statute may be tolled by equitable principles. Section III describes how this Office applied these principles to its active and inactive enforcement caseload and the approach used in making its recommendations for Commission action. Section IV includes descriptions of each of the potentially affected enforcement matters, outlines the statute of limitations difficulties this Office foresees for each, and recommends specific Commission action for each potentially affected matter.

II. THE LAW

This section discusses 28 U.S.C. § 2462, the federal catch-all statute of limitations, and issues relating to when the statute begins to run, under what circumstances it may be tolled

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and declaratory and equitable relief available to the Commission even if the statute of limitations has run completely.

**A. Accrual**

Section 2462 requires commencement of a suit for civil penalties within five years from the date when the claim first accrued.<sup>5</sup> Thus, as a threshold matter, in considering the potential effect of the limitations period on a particular case, one must determine the complex issue of when the claim first accrued.

**1. General Principles**

A cause of action normally accrues when the factual and legal prerequisites for filing suit are in place, i.e., at the precise moment when the violation occurred.<sup>6</sup> However, federal courts have generally applied the discovery rule of accrual, an equitable doctrine under which a claim is considered to have accrued at the time that a potential claimant knew, or through the exercise of reasonable diligence should have known, of the facts underlying the cause of action.<sup>7</sup>

5. 28 U.S.C. § 2462 provides:

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued . . . .

6, United States v. Lindsay, 346 U.S. 568, 569 (1954).

7. See, e.g., Delaware State College v. Ricks, 449 U.S. 250, 259 (1980) (Court implicitly applied discovery rule to Title VII discrimination suit); United States v. Rubrick, 444 U.S. 111, 122-25 (1979) (court implicitly endorsed discovery rule of accrual, but limited it to discovery of facts underlying a claim,

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The substantial harm theory of accrual can be considered analytically as a particular application of the discovery rule. It is usually advanced in personal injury actions involving latent injuries or injuries difficult to detect, especially in cases of "creeping disease" such as asbestosis. The rule rests on the idea that plaintiffs cannot have a tenable claim for the recovery of damages unless and until they have been harmed. Under the substantial harm theory, therefore, damage claims in cases involving latent injuries or illnesses do not accrue until substantial harm matures or, in other words, until the harm becomes apparent.

The Supreme Court has cautioned against "attempting to define for all purposes when a cause of action first accrues. Such words are to be interpreted in light of the general purposes of the statute and of its other provisions, and with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought."<sup>8</sup> Thus, in determining the time of accrual in cases arising under the FECA,

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(Footnote 7 continued from previous page)  
 rather than extending the rule to discovery of legal cause of action); see also Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1386 (3d Cir. 1994); Dixon v. Anderson, 928 F.2d 212, 215 (6th Cir. 1991); Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450 (7th Cir. 1990); Corn v. City of Lauderdale Lakes, 904 F.2d 585, 588 (11th Cir. 1990); Alcorn v. Burlington Northern Railroad Co., 878 F.2d 1105, 1108 (8th Cir. 1989); Lavellee v. Listi, 611 F.2d 1129, 1131 (5th Cir. 1980); Cullen v. Margiotta, 811 F.2d 698, 725 (2d Cir. 1987); Cline v. Brusett, 661 F.2d 108, 110 (9th Cir. 1981); Bireline v. Seagondollar, 567 F.2d 260, 263 (4th Cir. 1977).

8. Crown Coat Front Co., Inc. v. United States, 386 U.S. 503, 517 (1967) (quoting Reading Co. v. Roons, 271 U.S. 58, 62 (1926)).

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courts will look to the nature and goals of the FECA versus the interests underlying the five-year limitations period.

2. Accrual in the Context of the FECA

While the discovery rule has been applied in a wide range of cases, originating in the tort context and extending to, inter alia, contract, Title VII, and RICO actions, to date, it appears that only the United States District Court for the District of Columbia has held that the Section 2462 statute of limitations is applicable to the FECA. The court also addressed the precise question of when a cause of action accrues under the FECA. Inasmuch as the district court in NRSC relied on the decision of the Court of Appeals for the District of Columbia in 3M Co. v. Browner, 17 F.3d 1453 (D.C. Cir. 1994) ("3M"), the latter case will be summarized first.

3M was an action brought by the Environmental Protection Agency ("EPA") to impose civil penalties against a company for violations of the Toxic Substances Control Act, wherein the EPA argued that in the exercise of due diligence it could not have discovered the violations earlier. In 3M, the defendant misstated and failed to include information on notices required by the EPA. The court acknowledged that the District of Columbia Circuit has adopted the discovery rule, under which, as discussed above, a claim is considered to have accrued at the time that a claimant knew or should have known of the facts underlying the cause of action. However, the 3M court found that the discovery rule had only been applied in limited circumstances -- those involving remedial, civil claims -- and specifically rejected the discovery

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rule under the circumstances presented, stating that the rule proposed by the EPA in that case was a "discovery of violation" rule. The court concluded that in civil penalty actions the running of the limitations period of Section 2462 is measured from the date of the violation.<sup>9</sup>

In NRSC, a suit arising from violations of the FECA involving excessive contributions and failure to report such contributions to the FEC, the court repeated the options for defining the time of accrual set forth in 3M, stating that a claim accrues "when the defendant commits his wrong or when substantial harm matures." Then, without pinpointing the exact time of accrual, and without specifically attempting to define accrual in the FECA context, the court held that the FECA claim accrued "considerably before the end of the [FEC's] administrative process." While the district court's accrual finding was imprecise, Judge Pratt's construction of 3M suggests that the discovery rule of accrual may be rejected in FECA claims brought in that Circuit.

On the other hand, the Court of Appeals for the Third Circuit, in considering a citizens' suit brought under the Clean

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9. In 3M, the court cited the Supreme Court's decision in Unexcelled Chemical Corp. v. United States, 345 U.S. 59 (1953), which was a suit for liquidated damages against a government contractor for unlawfully employing child labor. As the 3M decision noted, in that case, the Supreme Court held that "a cause of action is created when there is a breach of duty owed the plaintiff. It is that breach of duty, not its discovery, that normally is controlling." However, the Supreme Court's focus was the question of whether the claim accrued at the time of the violation versus after it had been administratively determined that the contractor was liable. The Court was not concerned specifically with the question of whether the claim accrued at the time of the violation versus when the plaintiff knew or should have known of the facts underlying the claim.

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Water Act, which has statutory self-reporting requirements comparable to the FECA, held the Section 2462 statute of limitations applicable and embraced the discovery rule. There, the Third Circuit held that since the defendant was responsible for filing reports under the Act and the public could not reasonably be deemed to have known about any violation until the defendant filed the report, the cause of action did not accrue until the reports listing the violations were filed.<sup>10</sup> A district court in Virginia<sup>11</sup> has also embraced this discovery rule for determining accrual under the Clean Water Act.<sup>12</sup>

**B. EQUITABLE TOLLING**

There are instances in which a court may determine that equitable considerations require the statute of limitations to be tolled. Such a determination is made on a case-by-case basis and

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10. Public Interest Research Group v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 75 (3d Cir. 1990), cert. denied, 498 U.S. 1109 (1991).

11. United States v. Hobbs, 736 F. Supp. 1406 (E.D. Va. 1990).

12. Various other circuit courts have grappled with the question of when the federal five-year statute of limitations of Section 2462 begins to run, but these cases, which have produced conflicting rulings, have all involved actions to recover civil penalties rather than actions to impose them. Compare United States Dept. of Labor v. Old Ben Coal Co., 676 F.2d 259 (7th Cir. 1982) (in action to recover civil penalty, claim accrues only after administrative proceeding has ended, penalty has been assessed, and violator failed to pay) and United States v. Meyer, 808 F.2d 912 (1st Cir. 1987) (in civil penalty enforcement action limitations period is triggered on date civil penalty is administratively imposed) with United States v. Core Laboratories Inc., 759 F.2d 480 (5th Cir. 1985) (in suit to recover civil penalty limitations period begins to run on date of underlying violation).

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is referred to as equitable tolling.<sup>13</sup> Equitable tolling presumes claim accrual and steps in to toll, or stop, the running of the statute of limitations in light of established equitable considerations.<sup>14</sup> The most fundamental rule of equity is that a party should not be permitted to profit from its own wrongdoing.

There are three principal situations in which equitable tolling may be appropriate: (1) where the defendant has actively misled the plaintiff regarding the plaintiff's cause of action; (2) where the plaintiff in some extraordinary way has been prevented from asserting his or her rights; and (3) where the

13. Some courts have pointed out that, in instances where the defendant has taken active steps to prevent the plaintiff from suing, e.g., in cases involving fraudulent concealment, the tolling of the statute of limitations is more appropriately referred to as equitable estoppel. See Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450-51 (7th Cir. 1990).

14. Courts have held that statutes of repose cannot be extended by federal tolling principles, see Baxter Healthcare, 920 F.2d at 451; First United Methodist Church of Hyattsville v. United States Gypsum Company, 882 F.2d 862 (4th Cir. 1989). While statutes of repose and statutes of limitations have sometimes been referred to interchangeably, a statute of repose is legally distinguishable from a statute of limitations. Whereas a statute of limitations is a procedural device motivated by considerations of fairness to the defendant, a statute of repose is a substantive grant of immunity after a legislatively determined period of time and is based on the economic interest of the public as a whole and a legislative balance of the respective rights of potential plaintiffs and defendants. See First United Methodist Church, *supra*. To date, this Office's research has revealed no instances in which a court has held that Section 2462 is a statute of repose in the legal sense and, therefore, held tolling principles to be inapplicable. Indeed, in 3M, the court noted the potential applicability of the doctrine of fraudulent concealment to Section 2462. See 3M, 17 F.3d at 1461, n.15.

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plaintiff has timely asserted his or her rights mistakenly in the wrong forum.<sup>15</sup>

1. Doctrine of Fraudulent Concealment

The Supreme Court has defined the doctrine of fraudulent concealment as the rule that "where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party." Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946). The Court went on to state that this equitable doctrine is read into every federal statute of limitation. Id.

The doctrine, as applied by the circuit courts of appeal, requires the plaintiff to plead<sup>16</sup> and prove three elements:

15. School District of City of Allentown v. Marshall, 657 F.2d 16, 19-20 (3d Cir. 1981) (quoting Smith v. American President Lines, Ltd., 571 F.2d 102, 109 (2d Cir. 1978)). It should also be noted that statutes of limitations are subject to waiver and may be tolled by agreement of the parties. See Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982).

16. Pleading requirements for fraudulent concealment are very strict. Some courts invoke Fed. R. Civ. P. 9(b) and require a plaintiff to meet the pleading requirements for fraud. See Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389, 394 (6th Cir. 1975). Other courts, while not specifically invoking Rule 9, still require specificity and particularity in pleading. See Rutledge v. Boston Woven Hose & Rubber Co., 576 F.2d 248, 250 (9th Cir. 1978); Weinberger v. Retail Credit Co., 498 F.2d 552, 555 (4th Cir. 1974).

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- (1) use of fraudulent means by the defendant;
- (2) plaintiff's failure to discover the operative facts that are the basis of his cause of action within the limitations period; and
- (3) plaintiff's due diligence until discovery of the facts.

State of Colorado v. Western Paving Construction, 833 F.2d 867, 874 (10th Cir. 1987).

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The first prong of the plaintiff's burden under the doctrine - the use of fraudulent means by the defendant - warrants some elaboration. The courts have generally held that to establish this element of the doctrine one of two facts must be shown: 1) that fraud is an inherent part of the violation so that the violation conceals itself; or 2) that the defendant committed an affirmative act of concealment - a trick or contrivance intended to exclude suspicion or prevent inquiry.<sup>17</sup> These approaches to establishing the first element of the doctrine of fraudulent concealment have been referred to, respectively, as the self-concealing theory and the subsequently concealed theory. By contrast, the courts have pointed out that silence, without some fiduciary duty, never satisfies this element.<sup>18</sup>

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17. See Riddell v. Riddell Washington Corp., 866 F.2d 1480, 1491 (D.C. Cir. 1989); State of Colorado v. Western Paving Construction, 833 F.2d at 876-78.

18. See Rutledge v. Boston Woven Hose & Rubber Co., 576 F.2d 248, 250 (9th Cir. 1978); Dayco Corp. v. Firestone Tire & Rubber Co., 386 F. Supp. 546, 549 (N.D. Ohio 1974), aff'd sub. nom., Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389 (6th Cir. 1975). Some courts have also held that a denial of an accusation of wrongdoing does not constitute fraudulent concealment. See King & King Enters. v. Champlin Petroleum Co., 657 F.2d 1147, 1155 (10th Cir. 1981), cert. denied, 454 U.S. 1164 (1982); but see Rutledge, supra ("denying wrongdoing may constitute fraudulent concealment where the circumstances make the plaintiff's reliance upon the denial reasonable").

Where the plaintiff establishes all three of the required elements, the doctrine provides the plaintiff with the full statutory limitations period, starting from the date the plaintiff discovers, or with due diligence could have discovered, the facts supporting the plaintiff's cause of action.

2. Inducement Due to Intentional or Unintentional Misrepresentation

In cases where the plaintiff has refrained from commencing suit during the period of limitation because of inducement by the defendant, the Supreme Court has found the statutory period tolled because of the conduct of the defendant. See Glus v. Brooklyn Eastern Terminal, 359 U.S. 231 (1973). Under the facts of Glus, supra, the plaintiff averred that the defendant had fraudulently or unintentionally misstated information upon which the plaintiff relied in withholding suit.

3. Subpoena Enforcement

Several district courts have tolled other statutes of limitations in circumstances where the plaintiff was forced to initiate subpoena enforcement proceedings to uncover facts underlying the cause of action.<sup>19</sup> While research to date has not revealed specific instances in which a court has tolled the Section 2462 statute of limitations because the plaintiff was

19. EEOC v. Gladioux Refinery, Inc., 631 F. Supp. 927, 935-36 (N.D. Ind. 1986) (Court held that the statute of limitations was tolled during the time between issuance of subpoena and enforcement because defendant did not have valid basis for not complying with subpoena); EEOC v. City of Memphis, 581 F. Supp. 179, 182 (W.D. Tenn. 1983) (Court held that the statute of limitations was tolled until documents sought in subpoena were made available to EEOC).

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forced to initiate subpoena enforcement proceedings, Section 2462 is sufficiently similar to those statutes which courts have tolled to suggest that the same result would be appropriate. Further, a good argument could be made for equitably tolling Section 2462 in such circumstances because defendants' refusal to comply with the Commission's subpoenas, whether that refusal is reasonable or otherwise, frustrates the Commission's ability to bring the action within the limitations period. Not tolling the statute of limitations in such circumstances while allowing defendants to plead the statute of limitations as an affirmative defense to actions brought by the Commission would allow defendants to profit from refusing to comply with subpoenas, and thus "offer a tempting method of defeating the basic purpose of [the Act]."<sup>20</sup>

4. Continuous Violation Theory

The continuous violation theory is another theory that operates to toll statutes of limitations. In the case of a continuing violation, the violation is not complete for purposes of the statute of limitations as long as the proscribed course of conduct continues, and the statute of limitations does not begin to run until the last day of the continuing offense.<sup>21</sup>

The Supreme Court has cautioned that continuing offenses are not to be too readily found, explaining in the criminal context that "such a result should not be reached unless the

20. See Hodgson v. International Printing Press, 440 F.2d 1113, 1119 (6th Cir. 1973).

21. See Fiswick v. United States, 329 U.S. 211, 216 (1946); United States v. Butler, 792 F.2d 1528, 1532-33 (11th Cir. 1986).

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explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." Toussie v. United States, 397 U.S. 112, 115 (1970). Thus, the question of whether a violation is a continuing one is largely a matter of statutory interpretation involving the precise statutory definition of the violation.

Courts will generally not find that a violation is continuous absent clear language in the statute.<sup>22</sup>

C. Declaratory Relief and Equitable Remedies

The limitations period set forth in 28 U.S.C. § 2462 applies only to suits for civil penalties. Section 2462, by its own terms, has no bearing on suits in equity.<sup>23</sup> The following is a purely exemplary, non-exhaustive list of various forms of equitable relief that may be available. It should be noted that it is within the discretion of the courts to grant or withhold

22. Compare Toussie, 397 U.S. 112 (1970) (Court held that failure register for draft was not continuing violation where draft statute contained no language that clearly contemplated continuing offense, and regulation under Act referring to continuing duty to register was insufficient, of itself, to establish continuing offense) with United States v. Cores, 356 U.S. 405 (1958) (statute prohibiting alien crewmen from remaining in United States after permits expired contemplated continuing offense where conduct proscribed is the affirmative act of willfully remaining, and crucial word "remains" permits no connotation other than continuing presence). See also Keystone Insurance Company v. Houghton, 863 F.2d 1125 (3d Cir. 1988) (In RICO action, court held that language of the Act, which makes a pattern of conduct the essence of the crime, "clearly contemplates a prolonged course of conduct."); West v. Philadelphia Electric Co., 45 F.3d 744 (3d Cir. 1995) (Court applied continuing violation theory where cause of action required showing of intentional, pervasive, and regular racial discrimination).

23. See Hobbs, 736 F. Supp. at 1410; NRSC, 1995 WL 83006, at \*4.

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equitable remedies and courts will exercise that discretion on a case-by-case basis in light of the particular circumstances of each case.

o **Declaratory Judgment** - A declaratory judgment is a court judgment which establishes the rights of parties or expresses the opinion of the court on a question of law without the court necessarily ordering anything to be done. While a declaratory judgment is similar in some respects to an advisory opinion, unlike the latter, a declaratory judgment is rendered in an adversarial proceeding and is legally binding on all the parties involved.

o **Disgorgement** - Disgorgement is aimed at preventing the unjust enrichment of a wrongdoer. The disgorgement remedy takes away "ill-gotten gains," thereby depriving a respondent of wrongfully obtained proceeds and returning the wrongdoer to the position the wrongdoer was in before the proceeds were wrongfully obtained.

o **Injunction** - A prohibitory injunction is a court order that requires a party to refrain from doing or continuing a particular act or activity. Prohibitory injunctions are generally considered preventative measures which guard against future acts rather than affording remedies for past wrongs.

By contrast, a mandatory injunction is a type of injunction that requires some positive action. A mandatory injunction (1) commands the respondent to do a particular thing; (2) prohibits the respondent from refusing (or persisting in refusing) to do or permit some act to which the plaintiff has a legal right; or (3) restrains the respondent from permitting his previous wrongful act to continue to take effect, thus virtually compelling him or her to undo it. A conciliation agreement provision that requires a committee to amend its reports in conformance with the Act is similar in effect to a mandatory injunction, albeit one entered into voluntarily and without court order. In addition, the creative forms of equitable relief listed below are examples of possible mandatory injunctions that the Commission might seek in court.

o **Creative Forms of Equitable Relief**

- require defendant(s) to notify the public that the defendant(s) violated the FECA, e.g., bulletin board posting.
- require additional reporting relevant to preventing future violations of the type committed.
- require defendant(s) to put different procedures in place to prevent future violations of the type committed.
- require defendant(s) to take courses to become familiar with the requirements of the FECA.

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**III. ANALYSIS**

This section outlines the underlying legal assumptions and other factors considered by this Office in evaluating and making recommendations for each of the potentially affected cases discussed in Section IV, infra. As a preliminary matter, this Office notes that it has reviewed all of the active and inactive enforcement matters where there appears to have been FECA-violative activity prior to January 1, 1991 that will thus be at least 5 years old by the end of this year. By selecting the cases in this manner, this Office has attempted to bring to the Commission's attention all of the matters where, were the NRSC decision applied, the statute of limitations might run this year.<sup>24</sup>

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This Office has assumed for purposes of these recommendations the possibility of a uniform application of the Section 2462 statute of limitations to the FECA in all circuits

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This Office has further assumed that it is possible courts will deem claims arising under the FECA to have accrued at the precise moment that the violation occurred.

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In setting forth the case summaries, this Office has divided its discussion into three sections.

The third

section analyzes matters which this Office  
recommends that the Commission not pursue.

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IV. CASE DISCUSSIONS

This section provides brief descriptions of enforcement matters assigned to the Public Financing, Ethics and Special Projects and Enforcement areas, including the Central Enforcement Docket.

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**3. Cases this Office Recommends the Commission Close**

**NUR 2984 (Robert Johnson et al.)**

This matter involves 1988 corporate fundraising mailings for the 1988 Bush/Quayle campaign and a pattern of contributions made in the name of another, resulting in knowing and willful probable cause findings for violations of 2 U.S.C. §§ 441f, 441b(a), and 441d(a) against the individual and corporate actors.

Of the respondents still open in the matter, Robert G. Johnson and E. Kenneth Twichell were formally referred to the Department of Justice for criminal prosecution; Mr. Johnson pled guilty to felony perjury for lying under oath in a Commission deposition and Mr. Twichell pled guilty to obstructing the Commission's investigation. The corporate respondents, all closely tied to Mr. Johnson, were neither pursued nor prosecuted during the criminal proceeding. As this Office has reported, Mr. Johnson's remaining sentence was stayed based on NRA arguments

No action has taken place since the Supreme Court dismissed the Commission's appeal in NRA, and whether Mr. Johnson will have to serve the balance of his sentence is still unclear.

All of the transactions underlying FECA liability date from 1988, thus posing an obstacle under 28 U.S.C. § 2462 in the event the Commission chose to litigate this matter to obtain civil penalties. The Commission found probable cause in January of 1992, but then referred the matter to the Department of Justice, and resumed proceedings in late 1993 after resolution of the criminal proceedings. Prosecutorial discretion strongly counsels against further pursuing the remaining respondents in this matter. The

age of the activity as compared to other pending matters, and the desirability of making public the Commission's initiating role in the prosecution of Mr. Johnson argue in favor of closing this matter.

For the reasons outlined above, this Office recommends the Commission take no further action with respect to the remaining respondents in this matter and close the file.

**Staff Assigned: Jonathan Bernstein and Colleen Sealander**

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**MUR 3182 (Kentucky Democratic Party, et al.)**

This matter, a merger of MURs 3145 and 3182, involves television ads broadcast by the Kentucky Democratic Party during the 1990 general election campaign on behalf of the Democratic Party's Senatorial candidate, Dr. Harvey Sloane. The complaints allege that the ads were prepared by the Sloane campaign's media consultant, paid for by the Kentucky Democratic party's nonfederal account, and financed in part by contributions from the ATLA PAC and from Mary C. Bingham. Mrs. Bingham recently passed away.

Most of the outstanding issues in this matter occurred in the Fall of 1990, slightly less than five years ago. Thus, it does not appear that the Commission would presently be barred from seeking a civil penalty even under the strictest reading of Section 2462. In order for the Commission to obtain a judicially imposed civil penalty in this matter, civil suit must be filed by November of 1995. Yet, even if the Commission were to devote substantial resources to this matter, it is virtually inconceivable that the deadline would be met.

First, in order to proceed, the Commission must review and revoke its earlier determinations in this matter to comply with the NRA opinion. Second, this matter is still in the investigatory stage and further investigation appears necessary. Third, the issues are complex and the two staff attorneys previously assigned to this matter have been transferred to other areas of this agency. Moreover, the allocation regulations at issue in this matter are no longer in effect, having been revised in 1991

Finally, it does not appear that equitable relief would be appropriate here as the only feasible remedy we may obtain is injunctive relief on the misallocation issue: The Sloan Committee has virtually no money for disgorgement and Sloan has never been a candidate in any other federal election. In view of all the foregoing, this Office recommends the Commission take no further action and close this file.

Staff Assigned: Lisa Klein (pending reassignment)

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**NUR 3228 (Dahlson for Congress, et al.)**

This matter was generated by a referral from the Commission's Reports Analysis Division, and involves the subsidization of the campaign by a corporation associated with the candidate (§ 441b(a)) and the misreporting of one of the corporate loans (§ 434(b)). Specifically, the candidate funneled approximately \$47,000 in corporate funds to the campaign through his personal checking account, thus concealing the true source of the funds. The candidate/corporate loans took place from May to October 1990. Further, the committee misreported the source of a May 2, 1990 direct contribution from the corporation (\$10,000) in its 12-Day Pre-Primary report filed May 21, 1990. Consequently, assuming 28 U.S.C. § 2462 applies, the Commission might be unable to obtain a judicially imposed civil penalty for most of the violations as early as May of this year.

This matter is presently in the investigative stage after an unsuccessful attempt at pre-probable cause conciliation. Most recently, on March 2, 1995, this Office interviewed the campaign's treasurer. The interview established that the treasurer was not involved in the committee's receipt of the funneled corporate contributions and that the misreporting may have resulted from innocent error. Consequently, the available evidence suggests that the candidate Roy Dahlson was the individual chiefly responsible for the violations in this matter.

Additional investigation would be necessary -- including the taking of depositions -- to prove that the § 441b(a) violations by Mr. Dahlson are knowing and willful. This investigation and the subsequent procedural stages leading to litigation would have to be completed in the most expeditious fashion. This Office recommends that the Commission forgo this course. Mr. Dahlson was a one-time candidate who won the primary election but lost the general election with 35% of the vote. Mr. Dahlson is now retired. Accordingly, this matter does not warrant the expenditure of resources necessary for its most expeditious completion and resolution. Therefore, this Office recommends that the Commission take no further action in this matter and close the file.

**Staff Assigned: Jonathan Bernstein and Jose Rodriguez**

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**NUR 3787 (Georgia Republican Party)  
Public Financing, Ethics and Special Projects**

This case involves violations committed during the 1988 election cycle. In particular, an audit of the Georgia Republican Party ("the Party") revealed that the Party accepted \$20,350 in excessive contributions from five individuals that were not resolved in a timely manner. Similarly, the Party accepted \$13,403 in prohibited contributions that were not resolved in a timely manner. The Party also did not properly document approximately \$333,270 in individual contributions. In addition, the Commission found reason to believe that the respondent violated 2 U.S.C. § 441a(f) by paying phone bank employees to conduct get-out-the-vote activities and voter identification on behalf of the Bush-Quayle campaign.

The Party admits that it erred in accepting the prohibited and excessive contributions, but urged the Commission to accept as a mitigating factor the fact that it rid its accounts of the impermissible amounts upon discovery. Similarly, the Party concedes that it failed to keep adequate records for certain contributions, but asserts that a large portion of those receipts were \$35 contributions which it did not believe it was required to document. Finally, this Office has concluded that documentation and affidavits furnished by the Party demonstrate that only \$26,700 of the more than \$300,000 in Party expenditures made for get-out-the-vote and voter identification activities amounted to impermissible contributions by the Party.

Although it may be possible to enjoin similar conduct in future elections, the Party has acknowledged that it violated the Act. Accordingly, assuming that the NRSC decision is followed and judicially-imposed civil penalties are time-barred then in light of the age of this case and the ordering of the Commission's priorities, we recommend that the Commission take no further action in this matter and close the file. If the Commission adopts this recommendation, the notification letter to the Party will contain appropriate admonishment language.

Staff Assigned: Kenneth E. Kellner and Jane Whang

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**MUR 3973 (Bob Davis)**

This matter stems from a House Bank Task Force referral indicating that former Representative Bob Davis used his committee's petty cash to make disbursements in excess of \$100. Between 1988 and 1992, the committee reported disbursing \$22,708 in petty cash disbursements, \$16,567 of which was reported as having been disbursed by Mr. Davis. In May of last year the Commission found reason to believe that Mr. Davis, his committee and its treasurer violated 2 U.S.C. § 432(h)(1), and that his committee and its treasurer additionally violated 2 U.S.C. § 432(h)(2) for failing to maintain a petty cash journal as required. However, because RAD had allowed the committee to terminate some months before, the Commission took no further action with respect to the committee's violations. Thus, only Mr. Davis remains a respondent in the case.

Of the \$22,708 in petty cash, all but approximately \$9,400 was disbursed prior to 1991. Thus, if 28 U.S.C. § 2462 applies, the Commission might be time-barred from obtaining a judicially imposed civil penalty for a substantial portion of the petty cash.

While our inquiries have confirmed that the committee kept no petty cash journal, that it possesses receipts for only a portion of its cash transactions, and that a small number of the disbursements exceeded \$100, it now appears that Mr. Davis' role in the committee's petty cash was de minimus. Affidavits from two members of Mr. Davis' congressional staff and one from his former campaign treasurer state that while Mr. Davis was the payee of many of the checks, and was reported as same, this was to enable the staff to easily cash the checks at the Wright-Patman Federal Credit Union. In fact, the affiants maintain, the majority of the petty cash was disbursed by the campaign and congressional staff and not Mr. Davis.

Given the age of these violations, the fact that Mr. Davis is no longer a candidate for federal office and his apparently limited personal involvement in his committee's petty cash violations, this Office recommends the Commission take no further action in MUR 3973 and close the file.

**Staff Assigned: Jonathan Bernstein and Colleen Sealander**

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**MUR 4013 (National Freedom PAC)  
Public Financing, Ethics and Special Projects**

This matter involves chronic reporting violations and the apparent commingling of Committee funds with the personal funds of the Committee's treasurer, Rick Woodrow. The respondents are the Committee and Mr. Woodrow. The material events occurred in 1990.<sup>31</sup>

This is an inactive, internally generated matter. Assuming that the NRSC decision is followed and judicially-imposed civil penalties are time-barred then in light of the age of the violations at issue.

this Office recommends that the Commission take no further action with respect to this matter and close the file.

Staff Assigned: Kenneth E. Kellner and Delanie Dewitt Painter

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31. On July 20, 1994, MUR 3516 was merged with MUR 4013. In MUR 3516, which arose out of a RAD referral, the Commission found reason to believe that National Freedom PAC committed reporting violations.

MURs 3562, 3449, 3089 and 2715 (Dukakis for President, et al.)

MURs 3562, 3449 and 3089 were generated from Title 26 audits of the Dukakis 1988 presidential campaign; MUR 2715 is a complaint-generated matter arising out of Lloyd Bentsen's 1988 dual candidacy for the Vice-Presidency and the U.S. Senate. The Commission has found reason to believe that the Dukakis for President Committee, the Dukakis/Bentsen Committee, Inc. ("GEC") and the Dukakis/Bentsen General Election Legal and Accounting Compliance Fund (collectively "the Committees") violated various provisions of the FECA, the Presidential Primary Matching Payment Account Act and the Presidential Election Campaign Fund Act.<sup>29</sup> The Commission has also found probable cause to believe that the GEC violated 2 U.S.C. § 441a(f) and 26 U.S.C. § 9003(b)(2) by accepting a \$4,980 in-kind contribution in the form of a mailgram concerning Bentsen's dual candidacy. Finally, the Commission found reason to believe that the law firm of Fried, Frank, Harris, Shriver & Jacobson ("the firm"), a partnership including corporations, violated 2 U.S.C. §§ 441a(a)(1)(A) and 441b in connection with an electoral college memo provided to the GEC.

Last September, the Commission, inter alia, rejected the Committees' motion to dismiss these matters based on 28 U.S.C. § 2462 and approved a consolidated conciliation agreement with the Committees. Commission also approved a conciliation agreement with the law firm

Upon learning of the NRSC decision, counsel renewed his request for dismissal of these matters. Attachment 7.

In addition, the firm partner who oversaw preparation of the memo has filed a Petition for Rulemaking concerning the Commission's jurisdiction over disbursements relating to the electoral college.

<sup>29</sup> The violations include making \$336,000 in excessive state expenditures, failing to report upon receipt \$1.4 million in contributions deposited into a joint escrow account and to timely report \$3.1 million in draft account activity, and accepting a \$65,000 excessive in-kind contribution from a law firm in the form of legal services provided to prepare an electoral college memo.

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It appears that virtually all of the violations at issue in this matter occurred over five years ago. Thus, assuming 28 U.S.C. § 2462 applies, the Commission would probably not be able to obtain a civil penalty if it litigated the matter. With respect to the Committees, this was a publicly funded campaign and the reporting violations alone involve large amounts. In addition, other remaining 1988 presidential audit respondents have been willing to continue negotiations and pay civil penalties despite the recent court cases interpreting Section 2462. Given the foregoing, we recommend that the Commission deny the Committees' latest request for dismissal and approve the attached counterproposal in an attempt to obtain a conciliation agreement with a civil penalty. Attachment 9.<sup>30</sup> With respect to the law firm, this Office recommends that the Commission take no further action and close the file as to it.

Staff Assigned: Lisa Klein and Dawn Odrowski

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**V. RECOMMENDATIONS**

Take no further action, close the file and approve the appropriate letters in the following matters:

- 1) MUR 2984
- 2) MUR 3182
- 3) MUR 3228
- 4) MUR 3787
- 5) MUR 3973
- 6) MUR 4013

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(J)

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With regard to MUR 3492:

- 1) Accept the attached conciliation counteroffer.
- 2) Close the file.
- 3) Approve the appropriate letter.

(K)

G. With regard to MURs 3562, 3449, 3089 and 2715:

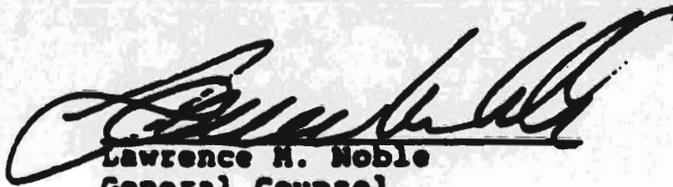
- 1) Take no further action and close the file as to Fried, Frank, Harris, Shriver & Jacobson.
- 2) Deny the Respondents' request for dismissal.
- 3) Approve the attached conciliation agreement for the remaining Respondents

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(L)

4) Approve the appropriate letters.

4/29/75  
Date

  
Lawrence M. Noble  
General Counsel

Staff Assigned

Staff members assigned to each of the potentially affected matters prepared their respective case discussions; the PRESF cases were coordinated by Jim Portnoy; Tracey Ligon drafted the legal section; and Colleen Sealander combined the parts into one document.

95043680615

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of )  
 )  
Dukakis for President Committee, ) MURs 3562, 3449,  
Inc., and Leonard Aronson, ) 3089, and 2715  
as treasurer; )  
Dukakis/Bentsen Committee, Inc., )  
and, )  
Dukakis/Bentsen Committee, Inc. )  
(Dukakis/Bentsen Committee )  
General Election Legal and )  
Accounting Compliance Fund), )  
and Leonard Aronson, as treasurer)

CERTIFICATION

I, Marjorie W. Emmons, recording secretary for the Federal Election Commission executive session on May 16, 1995, do hereby certify that the Commission decided by a vote of 5-0 to take the following actions with respect to the above-captioned matters:

1. Take no further action and close the file as to Fried, Frank, Harris, Shriver & Jacobson.
2. Deny the Respondents' request for dismissal.

(continued)

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Federal Election Commission  
Certification: MURS 3562, 3449,  
3089 AND 2715  
May 16, 1995

Page 2

3. Approve the conciliation agreement for the remaining Respondents

Commissioners Aikens, Elliott, McDonald, McGarry, and Thomas voted affirmatively for the decision. Commissioner Potter recused himself from these matters and was not present during their consideration.

Attest:

5-19-95  
Date

Marjorie W. Emmons  
Marjorie W. Emmons  
Secretary of the Commission

95043680617



FEDERAL ELECTION COMMISSION

WASHINGTON, DC 20463

May 23, 1995

Daniel A. Taylor, Esq.  
Hill & Barlow  
One International Place  
Boston, MA 02110-2607

Kenneth A. Gross, Esq.  
Skadden, Arps, Slate, Meagher & Flom  
1440 New York Avenue  
Washington, D.C. 20005

RE: MURs 3562, 3449, 3089 and 2715  
Dukakis for President Committee,  
and Leonard Aronson, as  
treasurer  
Dukakis/Bentsen Committee, Inc.  
(Dukakis/Bentsen General  
Election Legal and Accounting  
Compliance Fund) and Leonard  
Aronson, as treasurer, and  
Dukakis/Bentsen Committee, Inc.

Dear Messrs. Taylor and Gross:

On May 16,  
1995, the Commission considered and rejected your request to  
dismiss these matters. In a final effort to resolve these  
matters at this stage of the proceedings, however, the  
Commission approved the enclosed proposed agreement.

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Daniel A. Taylor .sq.  
Kenneth A. Gross Esq.  
MURs 3562, 3449, 3089 and 2715  
Page 2

The Commission remains hopeful that this matter can be settled through a conciliation agreement. So that we may all soon put these matters behind us, we ask that you respond to this proposal within five days of your receipt of this letter.

If you have any further questions, please contact me at (202) 219-3400.

Sincerely,



Dawn M. Odrowski  
Attorney

Enclosure  
Conciliation Agreement

95043680619



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

May 23, 1995

William Josephson, Esq.  
Fried, Frank, Harris,  
Shriver & Jacobson  
One New York Plaza  
New York, NY 10004-1980

RE: MUR 3449  
Fried, Frank, Harris,  
Shriver & Jacobson

Dear Mr. Josephson:

On May 4, 1993, you were notified that the Federal Election Commission found reason to believe that Fried, Frank, Harris, Shriver & Jacobson ("Fried, Frank") violated 2 U.S.C. §§ 441a(a)(1)(A) and 441b(a). The Commission notified you that it revoked these reason to believe findings on January 25, 1994, as a result of the D.C. Circuit's decision in FEC v. NRA Political Victory Fund, 6 F.3d. 821 (D.C Cir. 1993), cert. dismissed for want of jurisdiction, 115 S.Ct. 537 (1994). On September 20, 1994 the Commission decided to offer to enter into pre-probable cause negotiations with Fried, Frank.

After considering the circumstances of the matter, the Commission determined on May 16, 1995, to take no further action against Fried, Frank, Harris & Jacobson and closed the file as it pertains to it. The file will be made public within 30 days after this matter has been closed with respect to all other respondents involved.

You are advised that the confidentiality provisions of 2 U.S.C. § 437g(a)(12)(A) still apply with respect to all respondents still involved in this matter. The Commission will notify you when the entire file has been closed.

If you have any questions, please contact me at (202) 219-3400.

Sincerely,

Dawn M. Odrowski  
Attorney

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matters of )  
)  
Dukakis for President Committee, Inc. ) MURs 3562, 3449,  
and Leonard Aronson, as treasurer; ) 3089 and 2715  
Dukakis/Bentsen Committee, Inc.; )  
Dukakis/Bentsen Committee, Inc. )  
(Dukakis/Bentsen General Election )  
Legal and Accounting Compliance )  
Fund) and Leonard Aronson, )  
as treasurer; )

GENERAL COUNSEL'S REPORT

I. BACKGROUND

On May 16, 1995, the Commission considered recommendations for forty-five enforcement matters potentially affected by a D.C. District Court decision applying 28 U.S.C. § 2462, the general federal five year statute of limitations, to Commission enforcement actions. See FEC v. NRSC, 877 F. Supp 15 (D.D.C. 1995). Among the cases the Commission considered were the four above-referenced MURs, involving the presidential campaign committees of Michael Dukakis for the 1988 primary and general elections ("Respondents").

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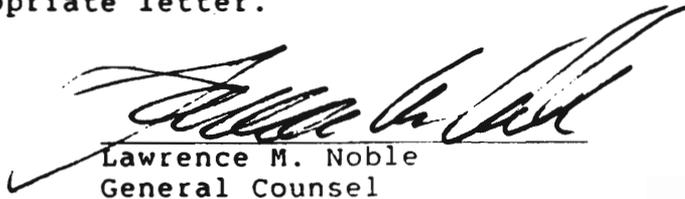
Before closing MUR 3449, we also recommend that the Commission take no further action as to the outstanding 2 U.S.C. § 441f reason to believe finding against the Dukakis Bentsen Committee, Inc. (Dukakis/Bentsen General Election Legal and Accounting Compliance Fund) ("GELAC"). The Section 441f finding was based on similarities in handwriting and dates on a series of sequential money order contributions drawn on the same

banking institutions. Based on GELAC's response that the money orders represented "converted" cash contributions made by the individuals whose names appear on them, the Commission subsequently found reason to believe that the GELAC violated 11 C.F.R. § 110.4(c) for accepting excessive cash contributions. The Section 441f finding was left open pending investigation in the event pre-probable cause conciliation failed. Since the conciliation agreement includes admissions of violations of 11 C.F.R. § 110.4(c), it is appropriate to now take no further action as 2 U.S.C. § 441f.

**III. RECOMMENDATIONS**

1. Accept the combined conciliation agreement with the Dukakis for President Committee, Inc. and Leonard Aronson, as treasurer, Dukakis/Bentsen Committee, Inc., and Dukakis/Bentsen Committee, Inc. (Dukakis/Bentsen General Election Legal and Accounting Compliance Fund) and Leonard Aronson, as treasurer, in MURs 3562, 3449, 3089 and 2715.
2. Take no further action against the Dukakis/Bentsen Committee, Inc. (Dukakis/Bentsen General Election Legal and Accounting Compliance Fund) and its treasurer in connection with the 2 U.S.C. § 441f reason to believe finding in MUR 3449.
2. Close the files in MURs 3562, 3449, 3089 and 2715.
3. Approve the appropriate letter.

Date 6/22/95

  
 Lawrence M. Noble  
 General Counsel

**Attachments**

1. Conciliation Agreement
2. Respondents' 6/7/95 letter
3. Respondents' 6/14/95 letter

Staff assigned: Dawn M. Odrowski

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matters of )  
 )  
Dukakis for President Committee, ) MURS 3562, 3449,  
Inc. and Leonard Aronson, as ) 3089 and 2715  
treasurer; )  
Dukakis/Bentsen Committee, Inc.; )  
Dukakis/Bentsen Committee, Inc. )  
(Dukakis/Bentsen General )  
Election Legal and Accounting )  
Compliance Fund) and Leonard )  
Aronson, as treasurer )

CERTIFICATION

I, Marjorie W. Emmons, recording secretary for the Federal Election Commission executive session on June 27, 1995, do hereby certify that the Commission decided by a vote of 6-0 to take the following actions with respect to MURs 3562, 3449, 3089 and 2715:

1. Accept the combined conciliation agreement with the Dukakis for President Committee, Inc. and Leonard Aronson, as treasurer, Dukakis/Bentsen Committee, Inc., and Dukakis/Bentsen Committee, Inc. (Dukakis/Bentsen General Election Legal and Accounting Compliance Fund) and Leonard Aronson, as treasurer, in MURs 3562, 3449, 3089 and 2715.

(continued)

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2. Take no further action against the Dukakis/Bentsen Committee, Inc. (Dukakis/Bentsen General Election Legal and Accounting Compliance Fund) and its treasurer in connection with the 2 U.S.C. § 441f reason to believe finding in MUR 3449.
3. Close the files in MURs 3562, 3449, 3089 and 2715.
4. Approve the appropriate letter as recommended in the General Counsel's report dated June 22, 1995.

Commissioners Aikens, Elliott, McDonald, McGarry, Potter, and Thomas voted affirmatively for the decision.

Attest:

6-28-95  
Date

Marjorie W. Emmons  
Marjorie W. Emmons  
Secretary of the Commission

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FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

July 10, 1995

William Josephson, Esq.  
Fried, Frank, Harris,  
Shriver & Jacobson  
One New York Plaza  
New York, NY 10004-1980

RE: MUR 3449  
Fried, Frank, Harris,  
Shriver & Jacobson

Dear Mr. Josephson:

This is to advise you that this matter is now closed. The confidentiality provisions at 2 U.S.C. § 437g(a)(12) no longer apply and this matter is now public. In addition, although the complete file must be placed on the public record within 30 days, this could occur at any time following certification of the Commission's vote. If you wish to submit any factual or legal materials to appear on the public record, please do so as soon as possible. While the file may be placed on the public record before receiving your additional materials, any permissible submissions will be added to the public record upon receipt.

If you have any questions, please contact me at  
(202) 219-3400.

Sincerely,

Eric Brown  
Paralegal Specialist

95043680627



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

July 10, 1995

Daniel A. Taylor, Esq.  
Hill & Barlow  
One International Place  
Boston, MA 02110-2607

Kenneth A. Gross, Esq.  
Skadden, Arps, Slate, Meagher & Flom  
1440 New York Avenue  
Washington, D.C. 20005

RE: MURs 3562, 3449, 3089 and 2715  
Dukakis for President Committee,  
and Leonard Aronson, as  
treasurer  
Dukakis/Bentsen Committee, Inc.  
(Dukakis/Bentsen General  
Election Legal and Accounting  
Compliance Fund) and Leonard  
Aronson, as treasurer, and  
Dukakis/Bentsen Committee, Inc.

Dear Messrs. Taylor and Gross:

On June 27, 1995, the Federal Election Commission accepted the signed conciliation agreement submitted on your clients' behalf in settlement of violations of 2 U.S.C. §§ 441a(b)(1)(A), 441b(a), 434(b)(2), 434(b)(3)(A), 434(b)(4), 441a(f), provisions of the Federal Election Campaign Act of 1971, as amended ("the Act"); 11 C.F.R. §§ 110.4(c) and 9003.3(a)(2), provisions of the Code of Federal Regulations implementing the Act; and 26 U.S.C. §§ 9003(b) and 9035(a), provisions of Chapters 95 and 96 of Title 26, U.S. Code. Accordingly, the files have been closed in these matters. Please be advised that the civil penalty in this agreement reflects the particular circumstances of these cases which relate to the 1988 presidential election cycle.

The confidentiality provisions at 2 U.S.C. § 437g(a)(12) no longer apply and these matters are now public. In addition, although the complete files must be placed on the public record within 30 days, this could occur at any time following certification of the Commission's vote. If you wish to submit any factual or legal materials to appear on the public record, please do so as soon as possible. While the files may be placed on the public record before receiving your additional materials,

*Celebrating the Commission's 20th Anniversary*

YESTERDAY, TODAY AND TOMORROW  
DEDICATED TO KEEPING THE PUBLIC INFORMED

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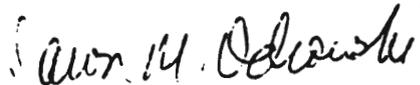
Daniel A. Taylor, Esq.  
Kenneth A. Gross  
NURS 3562, 3449, 3039 and 2715  
Page 2

any permissible submissions will be added to the public record upon receipt.

Information derived in connection with any conciliation attempt will not become public without the written consent of the respondents and the Commission. See 2 U.S.C. § 437g(a)(4)(B). The enclosed conciliation agreement, however, will become a part of the public record.

Enclosed you will find a copy of the fully executed conciliation agreement for your files. Please note that the civil penalty is due within 30 days of the conciliation agreement's effective date or within 5 days of your receipt of the repayment refund owed as a result of Dukakis v. FEC, No. 93-1219 (D.C. Cir. 1995), whichever occurs later. If you have any questions, please contact me at (202) 219-3400.

Sincerely,



Dawn M. Odrowski  
Attorney

Enclosure  
Conciliation Agreement

95043680629

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matters of )  
 )  
Dukakis for President Committee, ) MURs 3562, 3449,  
Inc., and Leonard Aronson, ) 3089 and 2715  
as treasurer, )  
Dukakis/Bentsen Committee, Inc., )  
and, )  
Dukakis/Bentsen Committee, Inc., )  
(Dukakis/Bentsen Committee )  
General Election Legal and )  
Accounting Compliance Fund), )  
and Leonard Aronson, as )  
treasurer )

CONCILIATION AGREEMENT

Matters Under Review ("MURs") 3089, 3449, and 3562 were initiated by the Federal Election Commission ("Commission"), pursuant to information ascertained in the normal course of carrying out its supervisory responsibilities. MUR 2715 was initiated from complaints filed by Beau Boulter and Jann L. Olsten, on behalf of the National Republican Senatorial Committee.

In MUR 3562, the Commission found reason to believe that the Dukakis for President Committee, Inc., and its treasurer ("Primary Committee") violated 2 U.S.C. §§ 441a(b)(1)(A), 441b(a), 434(b)(2), 434(b)(3)(A), 441a(f), and 26 U.S.C. § 9035(a).

In MUR 3449, the Commission found reason to believe that the Dukakis/Bentsen Committee, Inc., and its treasurer ("GEC"), violated 2 U.S.C. §§ 434(b)(4), 441a(f), 441b(a) and 26 U.S.C. § 9003(b). The Commission also found reason to believe the Dukakis/Bentsen General Election Legal and Accounting Compliance Fund and its treasurer ("GEC/GELAC"), a

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separate account of the GEC, violated 11 C.F.R. §§ 110.4(c) and 9003.3(a)(2).

In MUR 3089, the Commission found reason to believe that the Primary Committee and its treasurer violated 11 C.F.R. § 110.4(c).

Finally, in MUR 2715, the Commission found probable cause to believe that the GEC violated 26 U.S.C. § 9003(b)(2).

NOW, THEREFORE, the Commission and the Primary Committee, the GEC, the GEC/GELAC and their treasurer (solely in his capacity as treasurer) (collectively, "Respondents") having participated in informal methods of conciliation prior to a finding of probable cause to believe with respect to MURs 3089, 3449 and 3562, and the Commission and the GEC, having duly entered into conciliation pursuant to 2 U.S.C. § 437g(a)(4)(A)(i) with respect to MUR 2715, do hereby agree as follows:

I. The Commission has jurisdiction over the Respondents and the subject matter of this proceeding, and with respect to MURs 3089, 3449 and 3562, this agreement has the effect of an agreement entered pursuant to 2 U.S.C. § 437g(a)(4)(A)(i). No other MURs involving Respondents are currently pending or being processed.

II. Respondents have had a reasonable opportunity to demonstrate that no action should be taken in this matter.

III. Respondents enter voluntarily into this agreement with the Commission.

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IV. The pertinent facts in this matter are as follows:

1. The Dukakis for President Committee, Inc., is a political committee within the meaning of 2 U.S.C. § 431(4) and was the principal campaign committee of Michael Dukakis for the 1988 presidential primary elections.

2. The Dukakis/Bentsen Committee, Inc., was an authorized campaign committee of Michael Dukakis and Lloyd Bentsen, the Democratic Party nominees for President and Vice President in the 1988 general election, within the meaning of 26 U.S.C. § 9002.

3. The Dukakis/Bentsen Committee, Inc. (Dukakis/Bentsen Committee General Election Committee Legal and Accounting Compliance Fund) is a separate account of the GEC, established pursuant to 11 C.F.R. § 9003.3.

4. Robert Farmer was the treasurer of the Primary Committee, the GEC and GEC(GELAC) at the time the events herein occurred. Edward Pliner, succeeded Mr. Farmer as treasurer of each committee but resigned this position on January 14, 1994. Leonard Aronson is the current treasurer of the Primary Committee and (GEC)GELAC.

A. MUR 3562

5. Pursuant to 2 U.S.C. §§ 441a(b)(1)(A) and 441a(c) of the Federal Election Campaign Act of 1971, as amended (the "Act") and 26 U.S.C. § 9035(a) of the Presidential Primary Matching Payment Account Act ("Matching Payment Act"), no candidate for the office of President of the United States, who is eligible under 26 U.S.C. § 9033 to receive payments from the Secretary of the Treasury, may make expenditures in any one state aggregating in excess of the greater of 16 cents multiplied by the voting age

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population of the state, or \$200,000, as adjusted by changes in the Consumer Price Index. Except for expenditures exempted under 11 C.F.R. § 106.2, expenditures incurred by a candidate's authorized committee or committees for the purpose of influencing the nomination of that candidate for the office of President with respect to a particular state shall be allocated to that state.

11 C.F.R. § 106.2(a)(1).

6. For the 1988 presidential primary elections, the expenditure limitation for the State of Iowa was \$775,217.60. The Commission has determined that the Primary Committee exceeded this limitation by \$279,013.84.

7. For the 1988 presidential primary elections, the expenditure limitation for the State of New Hampshire was \$461,000. The Commission has determined that the Primary Committee exceeded this limitation by \$57,848.92.

8. Under the Act, the terms "contribution" and "expenditure" are broadly defined to include any gift, subscription, purchase, payment, distribution, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office. 2 U.S.C.

§§ 431(8)(A)(i) and 431(9)(A). "Anything of value" includes in-kind contributions. 11 C.F.R. §§ 100.7(a)(1)(iii)(A) and 100.8(a)(1)(iv)(A). A contribution also includes the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose. 2 U.S.C. § 431(8)(A)(ii). However, legal and accounting services rendered to or on behalf of an authorized

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committee or a candidate are specifically excluded from the definition of contribution if the person paying for such services is the regular employer of the individual rendering such services and if such services are solely for the purpose of ensuring compliance with the Act or with the public financing provisions (chapter 95 or 96 of Title 26). 2 U.S.C. § 431(8)(B)(ix). The value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee is also excluded from the definition of contribution under 2 U.S.C. § 431(8)(B)(i) and 11 C.F.R. § 100.7(b)(3).

9. Pursuant to 2 U.S.C. § 441b(a), it is prohibited for any candidate or political committee to knowingly accept or receive a contribution from any corporation or labor organization in connection with a federal election.

10. The American Federation of State, County and Municipal Employees ("AFSCME") is a labor organization within the meaning of 2 U.S.C. § 441b.

11. During the 1988 presidential campaign, the Primary Committee entered into an agreement with AFSCME for phone bank services and related space in various states. The Commission audit of the Primary Committee identified \$24,806.43 in phone bank and related space costs allocable to Iowa and \$25,004.84 in such costs allocable to New Hampshire.

12. The Primary Committee paid AFSCME \$9,244.55 for phone bank services and related space allocable to Iowa and \$7,152.50 for phone bank services and related space allocable to New Hampshire.

13. The Primary Committee accepted prohibited in-kind

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contributions from AFSCME for phone bank services and related space in Iowa and New Hampshire in the amounts of \$15,561.88 and \$17,852.34, respectively. The Primary Committee contends it justifiably relied upon AFSCME's billings statements in paying the phone bank-related expenses and in allocating them to the respective states in which they were conducted.

14. Pursuant to 2 U.S.C. § 434(b)(2), each report filed by a political committee must disclose the amount of cash on hand at the beginning of the reporting period, and for the reporting period and the calendar year, the total amount of all receipts and the total amount of contributions received from persons other than political committees. Pursuant to 2 U.S.C. § 434(b)(3)(A), each report must also disclose the identification of each person who makes a contribution to the committee during the reporting period whose contributions have an aggregate amount or value in excess of \$200 within the calendar year, together with the date and amount of any such contribution.

15. No person shall make contributions to any candidate and his or her authorized committees with respect to any election for Federal office which exceed \$1,000 in the aggregate. 2 U.S.C. § 441a(a)(1)(A). Similarly, no candidate or political committee shall knowingly accept any contribution in violation of the provisions of Section 441a. 2 U.S.C. § 441a(f). The term "person" includes a partnership. 2 U.S.C. § 431(11).

16. Pursuant to 11 C.F.R. § 103.3(b), the treasurer of a political committee shall ascertain whether a contribution, when aggregated with other contributions from the same contributor,

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exceeds the contribution limits of 2 U.S.C. § 441a(a). Contributions which on their face and contributions which, when aggregated with other contributions from the same contributor, exceed the contribution limits, may either be deposited into a campaign depository or returned to the contributor. If an excessive contribution is deposited, the treasurer may request that the contribution be redesignated or reattributed by the contributor in accordance with 11 C.F.R. §§ 110.1(b) or 110.1(k), as appropriate.

17. Pursuant to 11 C.F.R. § 9003.3, in the case of presidential elections, a major party candidate for president may accept contributions to a legal and accounting compliance fund if such contributions are received and disbursed in accordance with 11 C.F.R. § 9003.3. Contributions made after the beginning of the expenditure report period which are designated for the primary election, and contributions that exceed a contributor's limit for the primary election, may be deposited into the compliance fund if a candidate receives a contributor's redesignation or a reattribution in accordance with 11 C.F.R. § 110.1.

18. A contribution shall be considered redesignated to another election if: (1) the treasurer requests that the contributor provide a written redesignation of the contribution and informs the contributor that the contributor may request a refund as an alternative to providing a written redesignation, and (2) the contributor provides a signed, written redesignation to the treasurer within sixty days from the date of the treasurer's receipt of the contribution. 11 C.F.R. § 110.1(b)(5)(ii).

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19. A contribution shall be considered reattributed to another contributor if: (1) the treasurer asks the contributor whether the contribution is intended to be a joint contribution by more than one person, and informs the contributor that he or she may request a refund of the excessive portion of the contribution if it is not intended to be a joint contribution, and (2) within sixty days of the treasurer's receipt of the contribution, the contributor provides the treasurer with a signed, written reattribution indicating the amount to be attributed to each if other than equal attribution is intended. 11 C.F.R. § 110.1(k)(3)(ii).

20. The Primary Committee opened a checking account, known as the "Joint Escrow Account," on June 10, 1988. The Primary Committee deposited contributions received thereafter, payable to Dukakis for President and payees other than the General Election Legal and Accounting Compliance Fund ("GELAC"), into the joint escrow account. A total of \$1,447,570.42 was deposited into that account between June 10 and December 30, 1988. Once contributions were so deposited, the Primary Committee sent a form to contributors requesting them to redesignate their contributions to the GELAC or request a refund.

21. None of the contributions deposited into the joint escrow account was reported by the Primary Committee when received. Contributions subsequently transferred to the GELAC were reported in GELAC's disclosure reports only after the transfer. Contributions refunded, and contributions which had not been refunded or transferred to GELAC as of May 1989, were not reported until 1990. Additionally, certain contributions initially

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deposited into the joint escrow account were never reported in the Primary Committee's disclosure reports.

22. Additionally, the audit review of joint escrow account contributions attributable to the primary election revealed that the Primary Committee accepted a total of 259 excessive contributions, or portions thereof, totaling \$111,924. Of these, 143 contributions or portions thereof, totaling \$56,129.53, were reattributed or redesignated to GELAC in an untimely manner, and 116 contributions or portions thereof, totaling \$55,795, were refunded in an untimely manner.

B. MUR 3449

23-25. Paragraphs 8, 9 and 15 are repeated as Paragraphs 23, 24 and 25, respectively, as though fully set forth herein.

26. Under the Presidential Election Campaign Fund Act ("Fund Act"), to be eligible to receive public funding, candidates for President and Vice President must certify that neither they nor their authorized committees will accept contributions to defray qualified campaign expenditures. 26 U.S.C. § 9003(b)(2).

27. A contribution by a partnership shall be attributed to the partnership and to each partner either in direct proportion to his or her share of the partnership or by agreement of the partners under certain conditions. 11 C.F.R. § 110.1(e). A contribution by a partnership shall not exceed the contribution limitations of the Act and accompanying regulations. Id. No portion of such contribution may be made from the profits of a corporation that is a partner. Id.

28. The Act provides, in pertinent part, that an "election"

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means a general, special, primary or run-off election. 2 U.S.C. § 431(1)(A). Commission regulations further provide, in pertinent part, that "election" means "the process by which individuals, whether opposed or unopposed, seek nomination for election, or election, to Federal Office." 11 C.F.R. § 100.2(a).

29. The electoral college is an integral part of the general presidential election. Electoral college votes are acquired based on the results of the popular vote and candidates must prevail in the electoral college to become President and Vice President. See U.S. Const. art. II, §1 and amend. XII. Respondents contend that the procedures relating to the electoral college are not governed by the Act.

30. Commission regulations permit a major party candidate for president to accept private contributions to a legal and accounting compliance fund in addition to any public financing received. 11 C.F.R. § 9003.3(a)(1)(i). The use of compliance funds, however, is strictly regulated. Pursuant to 11 C.F.R. § 9003.3(a)(2)(i), compliance fund contributions shall be used only: to defray legal and accounting costs provided solely to ensure compliance with the Act and Title 26; to defray overhead costs related to ensuring compliance; to defray any civil and criminal penalties imposed under the Act; to make repayments to the Presidential Election Campaign Fund; to defray the cost of soliciting contributions to the compliance fund; and to make a loan to an account established pursuant to 11 C.F.R. § 9003.4 to defray qualified campaign expenses incurred prior to the expenditure report period or prior to receipt of federal funds

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provided loans are restored to the compliance funds. Compliance funds can also be used to reimburse a federal fund account in an amount equal to 10% of the payroll and overhead expenditures of a candidate's national campaign headquarters and state offices, and in an amount equal to 70% of the costs associated with computer services. 11 C.F.R. § 9003.3(a)(ii). Any excess compliance funds may be used for any purpose permitted under 2 U.S.C. § 439a and 11 C.F.R. § 113, et seq., only after payment of all general election-related expenses. See 11 C.F.R. § 9003.3(a)(iv).

31. Fried, Frank, Harris, Shriver & Jacobson, a New York law firm, is a partnership that includes professional corporations ("the firm").

32. In September 1988, the firm and the GEC formally agreed that the firm would update a 1980 legal memorandum ("memo") it had written concerning the electoral college. The firm billed the GEC \$17,942.41 for out-of-pocket disbursements it made in connection with its preparation of the memo ("memo expenses"). The firm also incurred \$76,905.50 in professional service fees preparing the memo for which it did not bill the GEC. Firm employees who worked on the memo received their ordinary compensation while doing so.

33. The GEC paid for the memo expenses in June 1989. It made no payments for the legal services. In January 1991, the GELAC "reimbursed" the GEC for the memo expenses.

34. The memo included comprehensive summaries of state laws that addressed procedures governing the selection of electors and procedures governing their post-selection electoral college duties. The purpose of the memo and the legal services rendered

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to prepare it, was to provide guidance to the GEC to ensure that "mishaps in the electoral college process" would not defeat the Dukakis/Bentsen ticket. The memo did not address compliance with the Act, Fund Act, or Matching Payment Act.

35. The GEC accepted excessive and prohibited in-kind contributions in the form of legal services rendered without charge to prepare the memo. Respondents contend that the legal services rendered do not constitute a contribution under the Act or Commission regulations.

36. GELAC funds were improperly used to pay for the memo expenses since they were unrelated to compliance with the Act, Fund Act, or Matching Payment Act. Respondents contend GELAC funds were properly used.

37. The Act requires each report filed by a political committee to disclose for the reporting period and the calendar year, the total amount of all disbursements and all disbursements made for specific categories, including operating expenditures. 2 U.S.C. § 434(b)(4). Moreover, each report must disclose the name and address of each person to whom a committee makes an expenditure in an aggregate amount or value in excess of \$200 within the calendar year to meet an operating expense, together with the date, amount, and purpose of such expenditure. 2 U.S.C. § 434(b)(5)(A). The principal campaign committee of a Presidential candidate shall file a post-general election report no later than the 30th day after a general election which shall be complete as of the 20th day after such election. 2 U.S.C. §§ 434(a)(3)(A)(i) and 434(a)(2)(A)(ii). A year-end report shall

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be filed no later than January 31 of the following calendar year.  
2 U.S.C. §§ 434(a)(3)(A)(i).

38. During the 1988 election cycle, the GEC maintained a draft account used primarily by state campaign offices to pay office expenses. An audit review of this account revealed that drafts totaling \$3,153,346.34 which cleared the account during November and December, 1988, were not included in the Committee's disclosure reports for the relevant period. The Committee filed an amended report disclosing all of the previously unreported draft activity as operating expenditures on April 5, 1989.

C. MURs 3449 and 3089

39. Pursuant to 2 U.S.C. § 441g, it is unlawful for any person to make contributions of currency which exceed \$100 in the aggregate, with respect to any campaign for Federal office. Commission regulations require a candidate or committee receiving cash contributions in excess of \$100 to promptly return the amount over \$100 to the contributor. 11 C.F.R. § 110.4(c).

40. In connection with a June, 1988, GELAC fundraiser in Queens, New York, the GEC(GELAC) received approximately 15 cash contributions in sums between \$200 and \$500 which had been converted into sequentially-numbered money orders. The GEC(GELAC) failed to return the amounts in excess of \$100 to each contributor.

41. In connection with a January 9, 1988 fundraiser in San Juan Puerto Rico and an April, 1988, fundraiser in Rochester, New York, the Primary Committee received eight cash contributions of \$1,000 each which had been converted into sequentially-numbered

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money orders, and a \$300 cash contribution, half of which had been converted into money order form. The Primary Committee failed to return the amounts exceeding \$100 to each contributor.

D. MUR 2715

42. The Senator Lloyd Bentsen Election Committee (the "Senate Committee") is a political committee within the meaning of 2 U.S.C. § 431(4) and was the principal campaign committee of Senator Lloyd Bentsen for his 1988 election campaign for the United States Senate.

43-44. Paragraphs 8 and 26 are repeated as Paragraphs 43 and 44 as though fully set forth herein.

45. Expenditures by publicly financed Presidential candidates which further the election of other candidates for any public office shall be allocated in accordance with 11 C.F.R. § 106.1(a), and such expenditures will be considered qualified campaign expenses only to the extent that they specifically further the election of the Presidential/Vice Presidential candidates. See 11 C.F.R. § 9002.11(b)(3); 26 U.S.C. § 9002(11).

46. Pursuant to 11 C.F.R. § 106.1(a), expenditures made on behalf of two or more Federal candidates, shall be attributed to each candidate in proportion to, and shall be reported to reflect, the benefit reasonably expected to be derived.

47. Payments by a candidate (or by the candidate's authorized committee) for campaign materials that include information on or reference to any other candidate for Federal office, and which are used in connection with volunteer activities (including handbills and brochures), are not a contribution to the candidate so

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referred to, so long as the communication is not disseminated by direct mail or similar types of general public communication or political advertising. 2 U.S.C. § 431(8)(B)(XI). See 11 C.F.R. §§ 100.7(b)(16) and 100.8(b)(17).

48. During the 1988 election, the Senate Committee produced and distributed a July 12, 1988, mailgram which, inter alia, advised recipients that Senator Bentsen had accepted Governor Dukakis' request to run as the Democratic vice-presidential nominee and that he would also continue to run for re-election to the U.S. Senate. The mailgram expressed Senator Bentsen's belief that the Democratic ticket would prevail in November and that his nomination was of great importance to Texas and its future. It also sought the recipients' continued advice and support.

49. The mailgram was dated the day of Governor Dukakis' announcement that Senator Bentsen would be his running mate. It was sent to 2,076 individuals, including all 254 of the Senate Committee county coordinators, members of two Republican and Independent committees who had endorsed Bentsen's Senate re-election bid, and selected contributors who had given more than \$1,000 to the Senate Committee.

50. The Senate Committee paid Western Union Electronic Mail, Inc., \$9,964.80 to produce and distribute the mailgram. Given the use of a commercial vendor to produce and disseminate the mailgram, it does not qualify for the "coattail exception" of 2 U.S.C. § 431(8)(B)(xi). Accordingly, the GEC accepted an in-kind contribution in the form of the mailgram. The GEC contends that the mailgram did not constitute an in-kind

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contribution to it.

V. 1. For the sole purpose of settling MUR 3562, the Primary Committee concedes that:

a. the Primary Committee exceeded the primary campaign expenditure limitations for the states of Iowa and New Hampshire by a total of \$279,013.84 and \$57,848.92, respectively, in violation of 2 U.S.C. § 441a(b)(1)(A) and 26 U.S.C. § 9035(a).

b. the Primary Committee accepted a prohibited in-kind contribution, totaling \$33,414, from AFSCME in the form of phone bank services and related office space in Iowa and New Hampshire, in violation of 2 U.S.C. § 441b(a).

c. the Primary Committee failed to report contributions deposited into the joint escrow account, and to identify contributors making such contributions, when those contributions were received, in violation of 2 U.S.C. §§ 434(b)(2) and 434(b)(3)(A).

d. the Primary Committee accepted excessive contributions totaling \$111,924, in violation of 2 U.S.C. § 441a(f).

2. The GEC(GELAC) and the Primary Committee received 24 cash contributions in excess of \$100 and failed to return the amounts over \$100 to the contributors in violation of 11 C.F.R. § 110.4(c).

3. The GEC(GELAC) improperly used compliance funds to pay for expenses related to the electoral college memo, in violation of 11 C.F.R. § 9003.3(a)(2).

4. The GEC accepted an excessive in-kind contribution from

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a law firm in the form of legal services provided to prepare a memo regarding the electoral college, in violation of 2 U.S.C. § 441a(f) and 26 U.S.C. 9003(b). Additionally, because the law firm is a partnership which includes professional corporations, the GEC accepted prohibited contributions from that portion of the services attributable to the firm's corporate partners, in violation of 2 U.S.C. § 441b.

5. The GEC failed to timely disclose approximately \$3.1 million in operating expenditures in violation of 2 U.S.C. § 434(b)(4).

6. The GEC accepted an in-kind contribution in the form of a mailgram from the Senator Lloyd Bentsen Election Committee in violation of 2 U.S.C. § 441a(f) and 26 U.S.C. § 9003(b)(2).

VI. 1. Respondents will pay a civil penalty to the Federal Election Commission in the amount of fifteen thousand dollars (\$15,000), pursuant to 2 U.S.C. § 437g(a)(5)(A).

2. Respondent Dukakis for President Committee, Inc. and Michael S. Dukakis hereby waive any and all claims they might have for attorney's fees in Dukakis v. FEC, No. 93-1219 (D.C. Cir. 1995).

VII. The Commission, on request of anyone filing a complaint under 2 U.S.C. § 437g(a)(1) concerning the matters at issue herein or on its own motion, may review compliance with this agreement. If the Commission believes that this agreement or any requirement thereof has been violated, it may institute a civil action for relief in the United States District Court for the District of Columbia.

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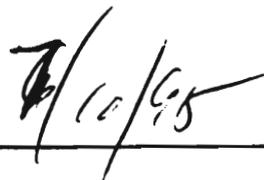
VIII. This agreement shall become effective as of the date that all parties hereto have executed same and the Commission has approved the entire agreement.

IX. Respondents shall have no more than 30 days from the date this agreement becomes effective or five days from receipt of the the repayment refund due the Primary Committee and Michael Dukakis as a result of Dukakis v. FEC, supra, whichever last occurs, to comply with and implement the requirements contained in this agreement and to so notify the Commission.

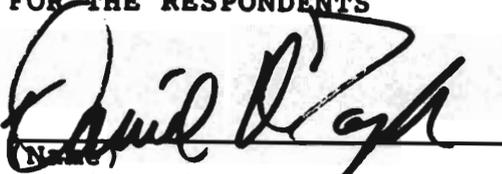
X. This Conciliation Agreement constitutes the entire agreement between the parties on the matters raised herein, and no other statement, promise, or agreement, either written or oral, made by either party or by agents of either party, that is not contained in this written agreement shall be enforceable. The parties also agree that this Agreement concludes and settles these matters as to Respondents, all former treasurers and other officers, directors, employees and agents of the Committees and Michael S. Dukakis.

FOR THE COMMISSION:

  
\_\_\_\_\_  
Lawrence M. Noble  
General Counsel

  
\_\_\_\_\_  
Date

FOR THE RESPONDENTS

  
\_\_\_\_\_  
(Name)  
(Position)  
Attorney

  
\_\_\_\_\_  
Date

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FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

THIS IS THE END OF MUR # 3449

DATE FILMED 8-7-95 CAMERA NO. 4

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