



FEDERAL ELECTION COMMISSION

WASHINGTON DC 20461

THIS IS THE BEGINNING OF MUR # 3484

DATE FILMED 10/28/93 CAMERA NO. 2

CAMERAMAN MC

93040983152

MILT ERHART

FOR U.S. SENATE

P.O. Box 7371 • Boise, Idaho 83707
(208) 336-MILT • (208) 336-6458

RECEIVED
FEDERAL ELECTION COMMISSION
MAIL ROOM

92 MAR -4 AM 11:21

February 28, 1992

Federal Election Commission
999 E. St. N.W.
Washington, DC 20463

This is a formal request to investigate what I feel are violations of campaign reporting law by the Dirk Kempthorne Senate '92 Committee, FEC ID #C00254771.

In December of 1991, the Committee received results from a poll conducted by The Tarrance Group of Alexandria, Virginia.

A portion of the results of the poll were released on December 18, 1991.

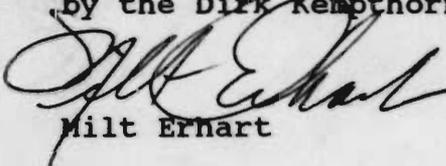
The poll was conducted for the benefit of the National Republican Senatorial Committee (N.R.S.C.).

The N.R.S.C. made the poll available to the Dirk Kempthorne Senate '92 Committee under what I understand is described as an "in kind" contribution.

When I received the poll results in February of 1992 the N.R.S.C. included therein were specific instructions as to how to report the contributions as an "in kind" contribution.

In the Campaign reports filed by the Dirk Kempthorne Senate '92 for the period of 7-1-91 through 12-31-91, no mention of this contribution was listed in the report.

I request the FEC look into the possible violation of the appropriate FEC regulations of failure to report the contribution by the Dirk Kempthorne Senate '92 Committee.


Milt Erhart

Feb 28, 1992

Coelene Martin
Notary Public
Expires 7-22-94

93040983153



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

March 5, 1992

Milt Erhart
P.O. Box 7371
Boise, ID 83707

Dear Mr. Erhart:

This is to acknowledge receipt on March 4, 1992, of your letter dated February 28, 1992. The Federal Election Campaign Act of 1971, as amended ("the Act") and Commission Regulations require that the contents of a complaint meet certain specific requirements. One of these requirements is that a complaint be sworn to and signed in the presence of a notary public and notarized. Your letter was not properly sworn to.

In order to file a legally sufficient complaint, you must swear before a notary that the contents of your complaint are true to the best of your knowledge and the notary must represent as part of the jurat that such swearing occurred. The preferred form is "Subscribed and sworn to before me on this ____ day of ____, 19__." A statement by the notary that the complaint was sworn to and subscribed before him/her also will be sufficient. We are sorry for the inconvenience that these requirements may cause you, but we are not statutorily empowered to proceed with the handling of a compliance action unless all the statutory requirements are fulfilled. See 2 U.S.C. § 437g.

Enclosed is a Commission brochure entitled "Filing a Complaint." I hope this material will be helpful to you should you wish to file a legally sufficient complaint with the Commission. The file regarding this correspondence will remain confidential for a 15 day time period during which you may file an amended complaint as specified above. If the defects are not cured and the allegations are not refiled, no additional notification will be provided and the file will be closed.

If you have any questions concerning this matter, please contact me at (202) 219-3410.

Sincerely,

Retha Dixon
Docket Chief

Enclosure

cc: Dirk Kempthorne Senate '92 Committee

93040983154

MILT ERHART

FOR U.S. SENATE

RECEIVED
FEDERAL ELECTION
COMMISSION
MAIL ROOM

MAR 16 12 48 PM '92

P.O. Box 7371 • Boise, Idaho 83707
(208) 336-MILT • (208) 336-6458

AMENDED

February 28, 1992

MUR 3484

Federal Election Commission
999 E. St. N.W.
Washington, DC 20463

RECEIVED
FEDERAL ELECTION COMMISSION
OFFICE OF GENERAL COUNSEL
92 MAR 16 PM 3:38

This is a formal request to investigate what I feel are violations of campaign reporting law by the Dirk Kempthorne Senate '92 Committee, FEC ID #C00254771.

In December of 1991, the Committee received results from a poll conducted by The Tarrance Group of Alexandria, Virginia.

A portion of the results of the poll were released on December 18, 1991.

The poll was conducted for the benefit of the National Republican Senatorial Committee (N.R.S.C.).

The N.R.S.C. made the poll available to the Dirk Kempthorne Senate '92 Committee under what I understand is described as an "in kind" contribution.

When I received the poll results in February of 1992 the N.R.S.C. included therein were specific instructions as to how to report the contributions as an "in kind" contribution.

In the Campaign reports filed by the Dirk Kempthorne Senate '92 for the period of 7-1-91 through 12-31-91, no mention of this contribution was listed in the report.

I request the FEC look into the possible violation of the appropriate FEC regulations of failure to report the contribution by the Dirk Kempthorne Senate '92 Committee.



Milt Erhart

"Subscribed and sworn to before me on this 10th day of March, 19 92."

Feb 28, 1992

3-10-92
Coelene Martin
Notary Public

Coelene Martin
Notary Public
Expires 7-22-94

93040983155



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

March 20, 1992

Milt Erhart
P.O. Box 7371
Boise, Idaho 83707

RE: MUR 3484

Dear Mr. Erhart:

This letter acknowledges receipt on March 16, 1992, of your complaint alleging possible violations of the Federal Election Campaign Act of 1971, as amended ("the Act"), by Dirk Kempthorne Senate '92 and Sharon L. Allen, as treasurer. The respondents will be notified of this complaint within five days.

You will be notified as soon as the Federal Election Commission takes final action on your complaint. Should you receive any additional information in this matter, please forward it to the Office of the General Counsel. Such information must be sworn to in the same manner as the original complaint. We have numbered this matter MUR 3484. Please refer to this number in all future correspondence. For your information, we have attached a brief description of the Commission's procedures for handling complaints.

Sincerely,

George F. Rishel
Assistant General Counsel

Enclosure
Procedures

93040983156



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

March 20, 1992

Sharon L. Allen, Treasurer
Dirk Kempthorne Senate '92
Box 1866
Boise, Idaho 83701

RE: MUR 3484

Dear Ms. Allen:

The Federal Election Commission received a complaint which alleges that Dirk Kempthorne Senate '92 ("Committee") and you, as treasurer, may have violated the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint is enclosed. We have numbered this matter MUR 3484. Please refer to this number in all future correspondence.

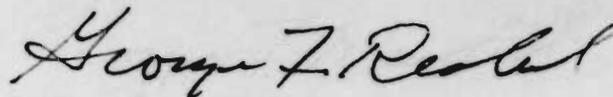
Under the Act, you have the opportunity to demonstrate in writing that no action should be taken against the Committee and you, as treasurer, in this matter. Please submit any factual or legal materials which you believe are relevant to the Commission's analysis of this matter. Where appropriate, statements should be submitted under oath. Your response, which should be addressed to the General Counsel's Office, must be submitted within 15 days of receipt of this letter. If no response is received within 15 days, the Commission may take further action based on the available information.

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 matter to be made public. 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.

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If you have any questions, please contact Jeffrey Long, the staff member assigned to this matter, at (202) 219-3690. For your information, we have enclosed a brief description of the Commission's procedures for handling complaints.

Sincerely,



George F. Rishel
Assistant General Counsel

Enclosures

1. Complaint
2. Procedures
3. Designation of Counsel Statement

93040983158



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

March 20, 1992

James L. Hagen, Treasurer
National Republican Senatorial Committee
425 Second Street, NE
Washington, DC 20002

RE: MUR 3484

Dear Mr. Hagen:

The Federal Election Commission received a complaint which alleges that the National Republican Senatorial Committee ("Committee") and you, as treasurer, may have violated the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint is enclosed. We have numbered this matter MUR 3484. Please refer to this number in all future correspondence.

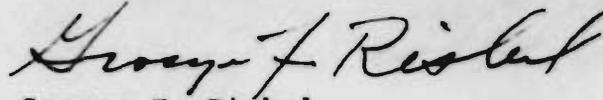
Under the Act, you have the opportunity to demonstrate in writing that no action should be taken against the Committee and you, as treasurer, in this matter. Please submit any factual or legal materials which you believe are relevant to the Commission's analysis of this matter. Where appropriate, statements should be submitted under oath. Your response, which should be addressed to the General Counsel's Office, must be submitted within 15 days of receipt of this letter. If no response is received within 15 days, the Commission may take further action based on the available information.

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If you have any questions, please contact Jeffrey Long, the staff member assigned to this matter, at (202) 219-3690. For your information, we have enclosed a brief description of the Commission's procedures for handling complaints.

Sincerely,



George F. Rishel
Assistant General Counsel

Enclosures

1. Complaint
2. Procedures
3. Designation of Counsel Statement

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March 30, 1992

RECEIVED
FEDERAL ELECTION
COMMISSION
MAIL ROOM

Apr 6 9 44 AM '92

RECEIVED
FEDERAL ELECTION COMMISSION
OFFICE OF GENERAL COUNSEL
92 APR -6 AM 3:40

Mr. George F. Rishel
Assistant General Counsel
Federal Election Commission
Washington, D.C. 20463

Dear Mr. Rishel:

This will acknowledge receipt of your March 20, letter on March 24, regarding MUR 3484.

This committee received polling results from the National Republican Senatorial Committee in late December.

Documentation indicating an "in-kind" contribution and the amount was received from the National Republican Senatorial Committee on March 9, and will be reported on this committee's first quarter report to the Commission. A copy of the National Republican Senatorial Committee's correspondence notifying this committee of the "in-kind" contribution is enclosed for your examination.

Please advise this committee if you have any questions and if any additional information is required.

Sincerely,

DIRK KEMPTHORNE Senate '92

Sharon L. Allen

Sharon L. Allen
Treasurer

encl.

9 3 0 4 0 9 8 3 1 6 1

National Republican Senatorial Committee

MAR 09 1992

3/9/92

SENATOR PHIL GRAMM
CHAIRMAN

JEB HENSARLING
EXECUTIVE DIRECTOR

February 28, 1992

Sharon L. Allen, Treasurer
Dirk Kempthorne Senate '92
Post Office Box 1866
Boise, ID 83701

Dear Ms. Allen:

The National Republican Senatorial Committee has made an expenditure on behalf of your campaign committee. This expenditure is being treated as an "In-Kind" contribution to your campaign and applies against the \$17,500 cash contribution which the NRSC can provide your campaign.

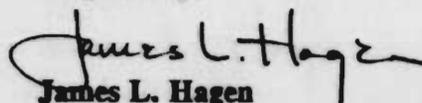
AMOUNT: \$765.00
PURPOSE: Polling
VENDOR: Tarrance & Associates

You must report this amount as a contribution and expense on your next FEC report. The contribution should be recorded on Line 11(b) and the expense on Line 17. Both entries should reflect a date of 2/28/92 and disclose the following name and address:

National Republican Senatorial Committee
425 Second Street NE
Washington, DC 20002

If you have any questions, please call me at 800/877-6775.

Respectfully,


James L. Hagen
Treasurer

RONALD REAGAN REPUBLICAN CENTER
425 SECOND STREET, N.E. • WASHINGTON, D.C. 20002 • (202) 675-6000

PAID FOR AND AUTHORIZED BY THE NATIONAL REPUBLICAN SENATORIAL COMMITTEE

93040983162

OGC 4657

WILEY, REIN & FIELDING

1776 K STREET, N. W.
WASHINGTON, D. C. 20006
(202) 429-7000

JAN WITOLD BARAN
(202) 429-7330

April 9, 1992

FACSIMILE
(202) 429-7049
TELEX 248349 WYRN UR

Lawrence M. Noble, Esq.
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Attn: Jeffrey Long

Re: MUR 3484

Dear Mr. Noble:

This office represents the National Republican Senatorial Committee ("NRSC") and James L. Hagen, as Treasurer, ("Respondents"). An executed Statement of Designation of Counsel Form is attached. This Response, including the attached affidavit, is submitted in reply to a complaint filed by Milt Erhart and designated Matter Under Review ("MUR") 3484.

For the reasons set forth herein, the Federal Election Commission ("FEC" or "Commission") should take no further action against Respondents and close the file.

THE COMPLAINT

The Complaint in this Matter was filed against the Dirk Kempthorne Senate '92 Committee regarding its reporting of the receipt of poll results from the NRSC. The Complaint states that the NRSC conducted a poll, the results of which it made available

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FEDERAL ELECTION COMMISSION
GENERAL COUNSEL

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Lawrence M. Noble, Esq.
April 9, 1992
Page 2

to the Dirk Kempthorne Senate '92 Committee in December, 1991. The Complaint alleges that the Kempthorne Committee did not report its receipt of the poll in its 1991 Year-End Report.

RESPONSE

The Complaint in this matter accurately states that the NRSC conducted a poll in the State of Idaho. Affidavit of Jeff Willis Before the Federal Election Commission in MUR 3484 (hereinafter "Willis Aff.") at ¶3. Further, the NRSC made the results of this poll available to the Kempthorne Campaign in December, 1991. Id. The poll results were released after 60 days, and thus the NRSC allocated 5% of the cost of the poll to the Kempthorne Campaign as an in-kind contribution to that campaign. Id.

The amount of this contribution was \$765. Id. The NRSC reported this in-kind contribution in its February monthly report on Schedule B, line 23, p.4. Counsel has been advised that the internal NRSC processing documentation of this transaction (which occurred close to the December holiday period when the NRSC was closed) was misplaced and not discovered until February, 1992. For this reason, the transaction was disclosed after the filing of the year-end report.

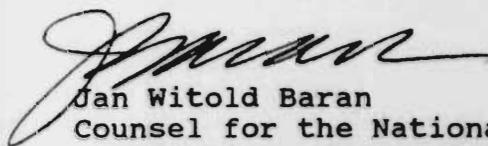
In light of the clearly minor delay in reporting a relatively small donation which has now been reported, the Commission should

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Lawrence M. Noble, Esq.
April 9, 1992
Page 3

take no further action against the National Republican Senatorial
Committee and James L. Hagen, as Treasurer.

Sincerely,



Jan Witold Baran
Counsel for the National
Republican Senatorial Committee
and James L. Hagen, as Treasurer

cc: James L. Hagen

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BEFORE THE FEDERAL ELECTION COMMISSION

City of Washington)
District of Columbia) MUR 3484

RECEIVED
FEDERAL ELECTION COMMISSION
OFFICE OF GENERAL COUNSEL
92 APR -9 PM 3:35

AFFIDAVIT OF JEFF WILLIS

Jeff Willis, first being duly sworn, deposes and says:

1. I am Jeff Willis. Since August 1988, I have served as the Director of Polling Services for the National Republican Senatorial Committee (NRSC).

2. I am familiar with the Complaint filed with the Federal Election Commission styled Matter Under Review ("MUR") 3484 which alleges that the Dirk Kempthorne Senate '92 Committee did not report the receipt of polling results from the NRSC.

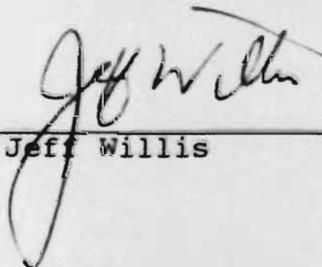
3. The NRSC did conduct a poll in Idaho in October, 1991. After sixty days, in December, 1991, the NRSC made the results of this poll available to the Kempthorne campaign. In accordance with the Federal Election Commission regulations, the NRSC allocated 5% of the total cost of this poll to the Kempthorne campaign as an in-kind contribution to that campaign committee. The amount of this contribution was \$765.

4. The NRSC also made a portion of the poll results available to the Erhart campaign in February, 1992. The NRSC allocated 5% of the percentage of the poll results

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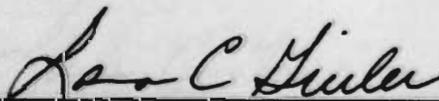
made available to the Erhart campaign as a contribution to that campaign committee. The amount of this contribution was \$557.

The above is true and correct to the best of my knowledge.



Jeff Willis

Signed and sworn to before me
this 8th day of April, 1992.



Notary Public

My Commission Expires: July 14, 1992



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RECEIVED
FEDERAL ELECTION COMMISSION
OFFICE OF GENERAL COUNSEL

82 APR 10 PM 5:15

STATEMENT OF DESIGNATION OF COUNSEL

MUR 3484

NAME OF COUNSEL: Jan Witold Baran

ADDRESS: Wiley, Rein & Fielding

1776 K Street, N.W.

Washington, D.C. 20006

TELEPHONE: (202) 429-7330

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.

4/9/92
Date

James L. Hagen
Signature

RESPONDENT'S NAME: National Republican Senatorial Committee
and James L. Hagen as Treasurer

ADDRESS: 425 Second St., N.E.

Washington, D.C. 20002

HOME PHONE: _____

BUSINESS PHONE: _____

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RECEIVED
F.E.C.
SECRETARIAT

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

92 JUL 27 PM 1:41

FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR 3484
DATE COMPLAINT RECEIVED
BY OGC March 16, 1992
DATE OF NOTIFICATION TO
RESPONDENTS March 20, 1992
STAFF MEMBER Jeffrey D. Long

COMPLAINANT:

Milt Erhart

RESPONDENTS:

Dirk Kempthorne Senate '92 and
Sharon L. Allen, as treasurer

National Republican Senatorial
Committee and James L. Hagen, as
treasurer

RELEVANT STATUTES:

2 U.S.C. § 431(8)(A)
2 U.S.C. § 434(b)
2 U.S.C. § 441a(h)
11 C.F.R. § 100.7(a)(1)(iii)
11 C.F.R. § 104.13(a)
11 C.F.R. § 106.4

FEC v. AFSCME, No. 88-3208 (D.D.C.
July 10, 1990)

United States v. Hopkins,
916 F.2d 207 (5th Cir. 1990)

INTERNAL REPORTS CHECKED:

Dirk Kempthorne Senate '92 and
National Republican Senatorial
Committee disclosure reports

FEDERAL AGENCIES CHECKED:

None

I. GENERATION OF MATTER

This matter was generated by a complaint filed by Milt
Erhart, a candidate for the Republican Senate nomination in

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Idaho,¹ against Dirk Kempthorne Senate '92 and Sharon L. Allen, as treasurer ("Kempthorne Committee") regarding the alleged receipt of a poll from the National Republican Senatorial Committee ("NRSC") in December 1991, which was not reported in the 1991 Year End Report. A copy of the complaint was also sent to the NRSC because the allegations also related to its activities.² Dirk Kempthorne is also a candidate for the Republican Senate nomination in Idaho in 1992. He filed his Statement of Candidacy on September 23, 1991, and designated Dirk Kempthorne Senate '92 as his principal campaign committee. Its first report was the 1991 Year End Report. On April 6, 1992, the Kempthorne Committee filed its response to the complaint. Dirk Kempthorne was nominated as the Republican Senate nominee in the Idaho primary on May 26, 1992.

II. FACTUAL AND LEGAL ANALYSIS

A. Complaint and Response

The complainant alleges that in December 1991 the Kempthorne Committee received the results of a poll conducted by The Tarrance Group of Alexandria, Virginia, for the benefit of the NRSC, which made it available to the Kempthorne Committee as an

1. Milt Erhart filed his Statement of Candidacy on January 24, 1992, designated Milt Erhart for Senate as his principal campaign committee.

2. The complainant had filed the complaint on March 3, 1992, in a letter dated February 28, 1992, which was deemed improper because it had not been subscribed and sworn to. Complainant was informed of this deficiency in a letter dated March 5, 1992, which was also sent to the Kempthorne Committee. We cannot ascertain, at this time, if the complainant had contacted the NRSC or the Kempthorne Committee about the substance of his complaint before it was originally filed.

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"in-kind" contribution. He alleges that a portion of the results were released on December 18, 1991. The complainant adds that when he received the poll results in February 1992, the NRSC included specific instructions on how to report it as an in-kind contribution. The complainant alleges that the 1991 Year End Report by the Kempthorne Committee does not disclose its receipt of these poll results. Attachment 1.

The 1991 Year End Report filed by the Kempthorne Committee discloses receipts of \$121,766.75 and disbursements of \$68,815.48 with ending cash on hand of \$52,947.27. It does not disclose the receipt of any contributions from political party committees. See Attachment 4. No reported disclosure of the making of an in-kind contribution by the NRSC to the Kempthorne Committee is made in the NRSC's report for the month of December 1991. The NRSC's report for the month of February 1992, however, does disclose the making of the in-kind contribution to the Kempthorne Committee and the Milt Erhart for Senate Committee on February 28, 1992. This report discloses a payment of \$765 to Tarrance & Associates as an in-kind to the Kempthorne Committee and a \$557 payment to Tarrance & Associates as an in-kind to Erhart. See Attachment 5.

In its response, the Kempthorne Committee acknowledges that it "received polling results from the National Republican Senatorial Committee in late December." It adds that documentation indicating an "in-kind" contributions and the amount was received from the NRSC on March 9, 1992, and will be reported on the committee's first quarter report. Attachment 2.

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The Kempthorne Committee enclosed a copy of the notice from the NRSC. This notice is a letter dated February 28, 1992, from the treasurer of the NRSC to the treasurer of the Kempthorne Committee. It notifies the treasurer that the NRSC has made an expenditure on behalf of the committee which is being treated as an "in-kind" contribution and applied against the \$17,500 cash contribution available to the NRSC. It identifies the amount of the contribution as \$765, the purpose as polling, and the vendor as Tarrance & Associates. The letter then instructs the treasurer to report this contribution on both line 11(b) and line 17 with a date of February 28, 1992, with the name and address of the NRSC.

In its response the NRSC states that the complaint is accurate that the NRSC conducted a poll in the state of Idaho and acknowledges that it made the results of that poll available to the Kempthorne campaign in December, 1991.³ The NRSC valued the

3. In MUR 2212, the NRSC admitted to violations of 2 U.S.C. §§ 434(b) and 441a(h) and 441a(f) and paid a \$5,000 civil penalty relating to the undervaluation of poll results provided to the Snelling '86 Committee in three instances. In the first instance, the NRSC made no allocation to the Snelling '86 Committee at the time the poll results were provided to the eventual candidate who was then testing the waters (or, as the NRSC contended, was being recruited to become a candidate) or when that person became a candidate. In the other two instances, the Snelling '86 Committee only paid the NRSC approximately 2.5 percent of the total cost of the polls or approximately 5 percent of the portion allocable to the Snelling '86 Committee. The NRSC contended that numerical data was not provided to the Snelling '86 Committee until more than 60 days after the NRSC had received the results of the polls, although the facts demonstrated that the NRSC had briefed the candidate on the results of the polls including providing him with percentages that often matched or closely matched the numerical data. In two instances these briefings occurred within 15 days of the NRSC's receipt of the poll results and in one instance the briefing occurred within 30 days.

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in-kind contribution at \$765 and reported it in its 1992 February monthly report.⁴ The NRSC states that the delay in reporting the in-kind contribution was due to their misplacing of the internal NRSC processing documentation. An affidavit of the NRSC Director of Polling Services attached to the response states that the polling results were also made available to the Erhart campaign in February of 1992, and states that the NRSC placed a 5% valuation on the poll as an in-kind contribution to Kempthorne and Erhart.

B. The Act, Regulations, and Judicial Opinions

The Act defines "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." 2 U.S.C. § 431(8)(A)(1). Person is defined to include a political committee. 2 U.S.C. § 431(11). Commission regulations provide that "anything of value" includes "all in-kind contributions." 11 C.F.R. § 100.7(a)(1)(iii)(A). The Act permits the Republican or Democratic Senatorial Campaign Committee or the national party committee or any combination of such committees to make contributions up to \$17,500 to a candidate for nomination or election to the United States Senate. 2 U.S.C. § 441a(h); see also, 11 C.F.R. § 110.2(e).

4. The NRSC explains that the poll results were released after 60 days, and thus 5% of the cost of the poll was allocated to the Kempthorne campaign as an in-kind contribution.

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The Act further provides that each political committee, including a principal campaign committee, shall file periodic reports that shall disclose "for the reporting period" the total of all contributions from political party committees as well as the identification of each "political committee which makes a contribution to the reporting committee during the reporting period, together with the date and amount of any such contribution." 2 U.S.C. §§ 434(b)(2)(C) and 434(b)(3)(B).

Similarly, a political committee that makes contributions shall disclose "for the reporting period" all "contributions made to other political committees" as well as the name and address of the political committee which has received a contribution from the reporting committee "during the reporting period" together with the date and amount of any such contribution. 2 U.S.C. §§ 434(b)(4)(H)(i) and 434(b)(6)(B)(i). Commission regulations provide that in-kind contributions shall be reported in an amount equal to the usual and normal value "on the date received" and reported as a contribution and as an expenditure. 11 C.F.R. § 104.13(a).

These reporting requirements were judicially construed in FEC v. American Federation of State, County and Municipal Employees - P.E.O.P.L.E. Qualified, No. 88-3208 (D.D.C. July 10, 1990) (hereinafter "AFSCME"). In that situation AFSCME had operated phone banks prior to the 1982 and 1984 general elections on behalf of Frank McCloskey, a Democratic Party candidate for the House of Representatives. AFSCME paid for the phone banks when the bills were received (after the election) and reported the

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payments as disbursements for that period (the period when they were paid). The court concluded that the phone banks constituted an in-kind contribution from AFSCME to McCloskey. The court further stated that the plain language of the Act in its entirety "requires reporting of contributions in the period in which they were made." AFSCME, slip op. at 5. Thus, in-kind contributions should be reported during the reporting period in which they are made and received, regardless of when the bills relating to the in-kind contributions are paid.

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Commission regulations also make it clear that the purchase of poll results by a political committee not authorized by a candidate to make expenditures and the subsequent acceptance of such results by a candidate is an in-kind contribution by the purchaser to the candidate and an expenditure by the candidate. 11 C.F.R. § 106.4(b). The regulation provides that polling results are accepted by the candidate if the candidate or the candidate's agent or authorized political committee (1) requests the poll results before their receipt; (2) uses the poll results; or (3) does not notify the contributor that the results are refused. Id.; see also, Advisory Opinion 1987-22. The acceptance of any part of poll results, which part, prior to receipt, has been made public without any request, authorization, prearrangement, or coordination by the candidate or political committee that accepted the results is not an in-kind contribution and expenditure. 11 C.F.R. § 106.4(c).

Commission regulations also provide for the valuation of the poll results accepted as an in-kind contribution. The amount

attributable to each candidate is that share of the overall cost of the poll allocable to each candidate based upon the cost allocation formula of the polling firm from which the results are purchased, or that amount computed by dividing the overall costs equally among candidates receiving results, or that amount which represents the proportion of the overall costs equal to the proportion of the number of question results received by the candidate compared to the total number of questions results received by all candidates, or that amount computed by any other method which reasonably reflects the benefit derived. 11 C.F.R. § 106.4(e). The candidate(s) receiving poll results purchased by another political committee within 15 days after the initial receipt by the initial recipients shall compute the amount of the contribution and expenditure in accordance with these formula. 11 C.F.R. § 106.4(f).

The amount of the contribution and expenditure by a candidate receiving poll results purchased by another political committee more than 15 days after the receipt of such poll results by the initial recipient shall be (1) 50 percent of the amount allocated to the initial recipient of the same results if the results are received during the period 16 to 60 days following receipt by the initial recipient; or (2) 5 percent of the allocable amount if the results are received during the period 61 to 180 days after the receipt by the initial recipient; or (3) no amount if the results are received more than 180 days after receipt by the initial recipient. 11 C.F.R. § 106.4(g). The contributor of poll results must maintain records sufficient to support the

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valuation of the contributions and shall inform the candidate receiving the results of the value of the contributions.

11 C.F.R. § 106.4(h).

C. Analysis

In 1991, the NRSC, using the services of Tarrance & Associates, conducted a poll in the state of Idaho. In December of 1991, the NRSC made the results of that poll available to Dirk Kempthorne for Senate '92, which was assertedly more than 60 days after the poll was conducted. In February of 1992, the NRSC made the poll results available to Milt Erhart for U.S. Senate. Included with those results were instructions from the NRSC for the Erhart campaign to report the receipt of the results as an in-kind contribution. The NRSC also notified the Kempthorne campaign, on February 28, 1992, and instructed them to report the receipt of the poll as an in-kind contribution and as having been received on February 28, 1992, even though the results had been given to Kempthorne at least as early as December. The Erhart Committee reported the in-kind contribution on its 1992 April Quarterly disclosing the \$557 contribution from the NRSC for polling on February 28, 1992. The Kempthorne Committee reported the in-kind contribution on its 1992 April Quarterly disclosing the \$765 contribution from the NRSC on March 3, 1992. The NRSC 1992 February Monthly discloses a payment of \$557 to Tarrance & Associates as an in-kind to the Erhart Committee on February 28, 1992 and a \$765 payment to Tarrance & Associates as an in-kind to the Kempthorne Committee also on February 28, 1992.

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The reporting requirements clearly hold that in-kind contributions are to be reported in the period in which they are made. The Kempthorne Committee has acknowledged that they received the results of the NRSC poll in late December of 1991, however, the Committee did not appropriately report the receipt of that in-kind contribution on its 1991 Year-End Report. Although the Kempthorne Committee may not have received notifying correspondence from the NRSC until March 1992, the Kempthorne Committee did knowingly accept the poll from the NRSC prior to the end of the 1991 Year-End reporting period. Therefore, the Office of General Counsel recommends that the Commission find reason to believe that Dirk Kempthorne for Senate '92 and Sharon L. Allen, as treasurer, violated 2 U.S.C. § 434(b) for failing to report an in-kind contribution.

Similarly, the NRSC acknowledges that it provided the results of the poll to the Kempthorne Committee in December of 1991, but did not disclose making that in-kind contribution until reporting it on the February monthly report. Again, the reporting requirements are clear that in-kind contributions shall be disclosed in the period in which they are made. Furthermore, attached to the Kempthorne Committee response is a copy of a notice signed by the treasurer of the NRSC instructing the Committee to disclose the \$765 in-kind contribution for polling results by the NRSC and report the date as February 28, 1992.

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As stated earlier, both Respondents acknowledge that the poll was provided to Kempthorne in December of 1991.⁵

The Act provides for violations of the law that are knowing and willful. See 2 U.S.C. §§ 437g(a)(5)(C) and 437g(d).

"Knowing and willful" has been defined by Congressman Hays as "actions taken with full knowledge of all of the facts and a recognition that the action is prohibited by law." See House debates on the Conference Report for the 1976 Amendments. The knowing and willful standard has also been addressed by the courts. The Court of Appeals for the District of Columbia Circuit has held on two occasions that proof of a "knowing and willful" violation of the FECA requires a finding of "defiance," or "knowing, conscious, and deliberate flaunting of the Act." National Right to Work Committee v. Federal Election Commission, 716 F.2d 1401, 1403 (1983) (NRWC v. FEC), on remand from the United States Supreme Court, 459 U.S. 197 (1982), quoting American Federation of Labor v. Federal Election Commission, 628 F.2d 98 (1980) (AFL v. FEC). The Court of Appeals for the Fifth Circuit found that a knowing and willful violation may be established "by proof that the defendant acted deliberately and with knowledge that the representation was false." United States v. Hopkins, 916 F.2d 207, 214 (5th Cir.

5. The NRSC has not stated or provided documents regarding when the poll was taken, when the NRSC first received the poll results, whether they orally briefed Kempthorne on the poll prior to providing him with the results in December, how much of the poll they provided him, what portion of the poll was allocable to Kempthorne and how that was determined, and when and how much Tarrance & Associates were paid for conducting the poll.

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1990). Furthermore, the court said that an inference of a knowing and willful violation may be drawn "from the defendants' elaborate scheme for disguising" their actions and that "they deliberately conveyed information they knew to be false to the Federal Election Commission." Id. at 214-215. In Federal Election Commission v. John A. Dramesi for Congress Committee, 640 F. Supp. 985 (D. N.J. 1986), the court noted that the knowing and willful standard requires knowledge that one is violating the law.

These court decisions show that efforts to disguise one's actions, deliberately conveying false information to the Commission, and consciously not timely and publicly reporting information that should be timely reported may be evidence that the respondent knew it was violating the law.

As stated in its response, the NRSC had full knowledge that the poll results were provided to the Kempthorne Committee at least two months prior to the date it reported making the contribution and two months prior to the date it instructed the Kempthorne Committee to disclose the contribution. Given the familiarity of the NRSC with the reporting provisions of the Act and its expertise in conducting polls on behalf of campaigns as well as the history of MUR 2212, its delay in reporting is seen as a deliberate misrepresentation of information to the Federal Election Commission and its improper instruction to the Kempthorne Committee is seen as an attempt to disguise when the poll results were given to Kempthorne so that the reported date would coincide with the date the results were given to Erhart.

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Therefore, this Office recommends that the Commission find reason to believe that the National Republican Senatorial Committee and James L. Hagen, as treasurer, knowingly and willfully violated 2 U.S.C. § 434(b).

This Office will prepare and send questions and a request for documents to the NRSC, the Kempthorne Committee and to Tarrance & Associates to determine the dates of the poll, how and how much of the poll results were provided to Kempthorne, how the poll was allocated to Kempthorne and when and how much Tarrance & Associates were paid by the NRSC for conducting the poll.

III. RECOMMENDATIONS

1. Find reason to believe that Dirk Kempthorne Senate '92 and Sharon L. Allen, as treasurer, violated 2 U.S.C. § 434(b).
2. Find reason to believe that the National Republican Senatorial Committee and James L. Hagen, as treasurer, knowingly and willfully violated 2 U.S.C. § 434(b).
3. Approve the appropriate letters and attached Factual and Legal Analyses.

Lawrence M. Noble
General Counsel

Date 7/24/92

BY: 
Lois G. Lerner
Associate General Counsel

Attachments

1. Complaint
2. Kempthorne Response
3. NRSC Response
4. Kempthorne report excerpts
5. NRSC report excerpts
6. Proposed Factual and Legal Analyses (2)

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FEDERAL ELECTION COMMISSION
WASHINGTON D.C. 20463

MEMORANDUM

TO: LAWRENCE M. NOBLE
GENERAL COUNSEL

FROM: MARJORIE W. EMMONS /DONNA ROACH *DR*
COMMISSION SECRETARY

DATE: JULY 30, 1992

SUBJECT: MUR 3484 - FIRST GENERAL COUNSEL'S REPORT
DATED JULY 24, 1992.

The above-captioned document was circulated to the
Commission on MONDAY, JULY 27, 1992 at 4:00 P.M.

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

Commissioner Aikens	<u>XXX</u>
Commissioner Elliott	<u>XXX</u>
Commissioner McDonald	<u> </u>
Commissioner McGarry	<u> </u>
Commissioner Potter	<u> </u>
Commissioner Thomas	<u>XXX</u>

This matter will be placed on the meeting agenda
for TUESDAY, AUGUST 4, 1992

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 3484
Dirk Kempthorne Senate '92 and)
Sharon L. Allen, as treasurer;)
National Republican Senatorial)
Committee and James L. Hagen, as)
treasurer.)

AMENDED CERTIFICATION

I, Marjorie W. Emmons, recording secretary for the Federal Election Commission executive session on August 4, 1992, do hereby certify that the Commission decided by a vote of 5-0 to take the following actions in MUR 3484:

1. Find reason to believe that Dirk Kempthorne Senate '92 and Sharon L. Allen, as treasurer, violated 2 U.S.C. § 434(b).

2. Find reason to believe that the National Republican Senatorial Committee and James L. Hagen, as treasurer, violated 2 U.S.C. § 434(b).

(continued)

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3. Approve the appropriate letters and Factual and Legal Analyses as recommended in the General Counsel's report dated July 24, 1992, subject to amendment to conform with the actions noted above.

Commissioners Aikens, Elliott, McDonald, McGarry, and Thomas voted affirmatively for the decision. Commissioner Potter was not present during its consideration.

Attest:

9-9-92
Date

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

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FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

August 13, 1992

Sharon L. Allen, Treasurer
Dirk Kempthorne Senate '92
P.O. Box 1866
Boise, Idaho 83701

RE: MUR 3484
Dirk Kempthorne Senate '92 and
Sharon L. Allen, as treasurer

Dear Ms. Allen:

On March 20, 1992, the Federal Election Commission notified Dirk Kempthorne Senate '92 ("Committee") and you, as treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to you at that time.

Upon further review of the allegations contained in the complaint, and information supplied by you, the Commission, on August 4, 1992, found that there is reason to believe the Committee and you, as treasurer, violated 2 U.S.C. § 434(b), a provision of 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 the Committee 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 along with answers to the enclosed questions within 30 days of 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 the Committee 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 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

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Sharon L. Allen, Treasurer
Page 2

Office of the General Counsel may recommend that pre-probable 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 matter to be made public.

If you have any questions, please contact Jeffrey Long, the staff member assigned to this matter, at (202) 219-3690.

Sincerely,

Joan D. Aikens

Joan D. Aikens
Chairman

Enclosures
Questions
Designation of Counsel Form
Factual & Legal Analysis

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

)
) MUR 3484
)
)

**INTERROGATORIES AND REQUEST
FOR PRODUCTION OF DOCUMENTS**

TO: Dirk Kempthorne Senate '92
and Sharon L. Allen, as treasurer

In furtherance of its investigation in the above-captioned matter, the Federal Election Commission hereby requests that you submit answers in writing and under oath to the questions set forth below within 30 days of your receipt of this request. In addition, the Commission hereby requests that you produce the documents specified below, in their entirety, for inspection and copying at the Office of the General Counsel, Federal Election Commission, Room 659, 999 E Street, N.W., Washington, D.C. 20463, on or before the same deadline, and continue to produce those documents each day thereafter as may be necessary for counsel for the Commission to complete their examination and reproduction of those documents. Clear and legible copies or duplicates of the documents which, where applicable, show both sides of the documents may be submitted in lieu of the production of the originals.

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INSTRUCTIONS

In answering these interrogatories and request for production of documents, furnish all documents and other information, however obtained, including hearsay, that is in possession of, known by or otherwise available to you, including documents and information appearing in your records.

Each answer is to be given separately and independently, and unless specifically stated in the particular discovery request, no answer shall be given solely by reference either to another answer or to an exhibit attached to your response.

The response to each interrogatory propounded herein shall set forth separately the identification of each person capable of furnishing testimony concerning the response given, denoting separately those individuals who provided informational, documentary or other input, and those who assisted in drafting the interrogatory response.

If you cannot answer the following interrogatories in full after exercising due diligence to secure the full information to do so, answer to the extent possible and indicate your inability to answer the remainder, stating whatever information or knowledge you have concerning the unanswered portion and detailing what you did in attempting to secure the unknown information.

Should you claim a privilege with respect to any documents, communications, or other items about which information is requested by any of the following interrogatories and requests for production of documents, describe such items in sufficient detail to provide justification for the claim. Each claim of privilege must specify in detail all the grounds on which it rests.

The following interrogatories and requests for production of documents are continuing in nature so as to require you to file supplementary responses or amendments during the course of this investigation if you obtain further or different information prior to or during the pendency of this matter. Include in any supplemental answers the date upon which and the manner in which such further or different information came to your attention.

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DEFINITIONS

For the purpose of these discovery requests, including the instructions thereto, the terms listed below are defined as follows:

"You" shall mean the named respondent in this action to whom these discovery requests are addressed, including all officers, employees, agents or attorneys thereof.

"Persons" shall be deemed to include both singular and plural, and shall mean any natural person, partnership, committee, association, corporation, or any other type of organization or entity.

"Document" shall mean the original and all non-identical copies, including drafts, of all papers and records of every type in your possession, custody, or control, or known by you to exist. The term document includes, but is not limited to books, letters, contracts, notes, diaries, log sheets, records of telephone communications, transcripts, vouchers, accounting statements, ledgers, checks, money orders or other commercial paper, telegrams, telexes, pamphlets, circulars, leaflets, reports, memoranda, correspondence, surveys, tabulations, audio and video recordings, drawings, photographs, graphs, charts, diagrams, lists, computer print-outs, and all other writings and other data compilations from which information can be obtained.

"Identify" with respect to a person shall mean state the full name, the most recent business and residence addresses and the telephone numbers, the present occupation or position of such person, the nature of the connection or association that person has to any party in this proceeding. If the person to be identified is not a natural person, provide the legal and trade names, the address and telephone number, and the full names of both the chief executive officer and the agent designated to receive service of process for such person.

"And" as well as "or" shall be construed disjunctively or conjunctively as necessary to bring within the scope of these interrogatories and requests for the production of documents any documents and materials which may otherwise be construed to be out of their scope.

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**INTERROGATORIES AND REQUEST
FOR PRODUCTION OF DOCUMENTS**

1. With regard to the poll conducted in Idaho in 1991 and provided to the Dirk Kempthorne Senate '92 committee, state when any portion of the results were made known, orally or in written form, or provided to the Kempthorne campaign. State who provided the polling results.
2. State whether the poll results were provided to the campaign on different dates or in portions, and if so, state how much of the poll was provided and when.
3. State the manner in which any and all portions of the poll results were provided to the Kempthorne campaign.
4. State whether Dirk Kempthorne was briefed on the general results or trends of the poll. If so, state by whom and when.
5. State why Dirk Kempthorne Senate '92 reported the receipt of the poll results as occurring on February 28, 1992, rather than in December of 1991, when they had been received, and why the campaign has not filed an amendment.
6. Provide a copy of the poll results provided to the campaign and copies of all documents that support your answers to these interrogatories.

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Dirk Kempthorne Senate '92
and Sharon L. Allen, as treasurer

MUR 3484

This matter was generated by a complaint filed by Milt Erhart against Dirk Kempthorne Senate '92 and Sharon L. Allen, as treasurer ("Kempthorne Committee"), regarding the alleged receipt of a poll from the National Republican Senatorial Committee ("NRSC") in December 1991, which was not reported in the 1991 Year End Report. Dirk Kempthorne is a candidate for the Republican Senate nomination in Idaho in 1992. He filed his Statement of Candidacy on September 23, 1991, and designated Dirk Kempthorne Senate '92 as his principal campaign committee. Its first report was the 1991 Year End Report. On April 6, 1992, the Kempthorne Committee filed its response to the complaint. Dirk Kempthorne was nominated as the Republican Senate nominee in the Idaho primary on May 26, 1992.

A. Complaint and Response

The complainant alleges that in December 1991 the Kempthorne Committee received the results of a poll conducted by The Tarrance Group of Alexandria, Virginia, for the benefit of the NRSC, which made it available to the Kempthorne Committee as an "in-kind" contribution. He alleges that a portion of the results were released on December 18, 1991. The complainant adds that when he received the poll results in February 1992, the NRSC included specific instructions on how to report it as an in-kind contribution. The complainant alleges that the 1991 Year End

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Report by the Kempthorne Committee does not disclose its receipt of these poll results.

The 1991 Year End Report filed by the Kempthorne Committee discloses receipts of \$121,766.75 and disbursements of \$68,815.48 with ending cash on hand of \$52,947.27. It does not disclose the receipt of any contributions from political party committees. No reported disclosure of the making of an in-kind contribution by the NRSC to the Kempthorne Committee is made in the NRSC's report for the month of December 1991. The NRSC's report for the month of February 1992, however, does disclose the making of the in-kind contribution to the Kempthorne Committee and the Milt Erhart for Senate Committee on February 28, 1992. This report discloses a payment of \$765 to Tarrance & Associates as an in-kind to the Kempthorne Committee and a \$557 payment to Tarrance & Associates as an in-kind to Erhart.

In its response, the Kempthorne Committee acknowledges that it "received polling results from the National Republican Senatorial Committee in late December." It adds that documentation indicating an "in-kind" contributions and the amount was received from the NRSC on March 9, 1992, and will be reported on the committee's first quarter report. The Kempthorne Committee enclosed a copy of the notice from the NRSC. This notice is a letter dated February 28, 1992, from the treasurer of the NRSC to the treasurer of the Kempthorne Committee. It notifies the treasurer that the NRSC has made an expenditure on behalf of the committee which is being treated as an "in-kind" contribution and applied against the \$17,500 cash contribution available to the

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NRSC. It identifies the amount of the contribution as \$765, the purpose as polling, and the vendor as Tarrance & Associates. The letter then instructs the treasurer to report this contribution on both line 11(b) and line 17 with a date of February 28, 1992, with the name and address of the NRSC.

The NRSC has stated that it conducted a poll in the state of Idaho and acknowledges that it made the results of that poll available to the Kempthorne campaign in December, 1991. The NRSC valued the in-kind contribution at \$765 and reported it in its 1992 February monthly report.¹ The NRSC states that the delay in reporting the in-kind contribution was due to their misplacing of the internal NRSC processing documentation. An affidavit of the NRSC Director of Polling Services attached to the response states that the polling results were also made available to the Erhart campaign in February of 1992, and states that the NRSC placed a 5% valuation on the poll as an in-kind contribution to Kempthorne and Erhart.

B. The Act, Regulations, and Judicial Opinions

The Act defines "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." 2 U.S.C. § 431(8)(A)(1). Person is defined to include a political committee. 2 U.S.C. § 431(11). Commission regulations provide that "anything of value" includes

1. The NRSC explains that the poll results were released after 60 days, and thus 5% of the cost of the poll was allocated to the Kempthorne campaign as an in-kind contribution.

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"all in-kind contributions." 11 C.F.R. § 100.7(a)(1)(iii)(A). The Act permits the Republican or Democratic Senatorial Campaign Committee or the national party committee or any combination of such committees to make contributions up to \$17,500 to a candidate for nomination or election to the United States Senate. 2 U.S.C. § 441a(h); see also, 11 C.F.R. § 110.2(e).

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The Act further provides that each political committee, including a principal campaign committee, shall file periodic reports that shall disclose "for the reporting period" the total of all contributions from political party committees as well as the identification of each "political committee which makes a contribution to the reporting committee during the reporting period, together with the date and amount of any such contribution." 2 U.S.C. §§ 434(b)(2)(C) and 434(b)(3)(B). Similarly, a political committee that makes contributions shall disclose "for the reporting period" all "contributions made to other political committees" as well as the name and address of the political committee which has received a contribution from the reporting committee "during the reporting period" together with the date and amount of any such contribution. 2 U.S.C. §§ 434(b)(4)(H)(i) and 434(b)(6)(B)(i). Commission regulations provide that in-kind contributions shall be reported in an amount equal to the usual and normal value "on the date received" and reported as a contribution and as an expenditure. 11 C.F.R. § 104.13(a).

These reporting requirements were judicially construed in FEC v. American Federation of State, County and Municipal Employees -

P.E.O.P.L.E. Qualified, No. 88-3208 (D.D.C. July 10, 1990) (hereinafter "AFSCME"). In that situation AFSCME had operated phone banks prior to the 1982 and 1984 general elections on behalf of Frank McCloskey, a Democratic Party candidate for the House of Representatives. AFSCME paid for the phone banks when the bills were received (after the election) and reported the payments as disbursements for that period (the period when they were paid). The court concluded that the phone banks constituted an in-kind contribution from AFSCME to McCloskey. The court further stated that the plain language of the Act in its entirety "requires reporting of contributions in the period in which they were made." AFSCME, slip op. at 5. Thus, in-kind contributions should be reported during the reporting period in which they are made and received, regardless of when the bills relating to the in-kind contributions are paid.

Commission regulations also make it clear that the purchase of poll results by a political committee not authorized by a candidate to make expenditures and the subsequent acceptance of such results by a candidate is an in-kind contribution by the purchaser to the candidate and an expenditure by the candidate. 11 C.F.R. § 106.4(b). The regulation provides that polling results are accepted by the candidate if the candidate or the candidate's agent or authorized political committee (1) requests the poll results before their receipt; (2) uses the poll results; or (3) does not notify the contributor that the results are refused. Id.; see also, Advisory Opinion 1987-22. The acceptance of any part of poll results, which part, prior to receipt, has

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been made public without any request, authorization, prearrangement, or coordination by the candidate or political committee that accepted the results is not an in-kind contribution and expenditure. 11 C.F.R. § 106.4(c).

Commission regulations also provide for the valuation of the poll results accepted as an in-kind contribution. The amount attributable to each candidate is that share of the overall cost of the poll allocable to each candidate based upon the cost allocation formula of the polling firm from which the results are purchased, or that amount computed by dividing the overall costs equally among candidates receiving results, or that amount which represents the proportion of the overall costs equal to the proportion of the number of question results received by the candidate compared to the total number of questions results received by all candidates, or that amount computed by any other method which reasonably reflects the benefit derived. 11 C.F.R. § 106.4(e). The candidate(s) receiving poll results purchased by another political committee within 15 days after the initial receipt by the initial recipients shall compute the amount of the contribution and expenditure in accordance with these formula. 11 C.F.R. § 106.4(f).

The amount of the contribution and expenditure by a candidate receiving poll results purchased by another political committee more than 15 days after the receipt of such poll results by the initial recipient shall be (1) 50 percent of the amount allocated to the initial recipient of the same results if the results are received during the period 16 to 60 days following receipt by the

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initial recipient; or (2) 5 percent of the allocable amount if the results are received during the period 61 to 180 days after the receipt by the initial recipient; or (3) no amount if the results are received more than 180 days after receipt by the initial recipient. 11 C.F.R. § 106.4(g). The contributor of poll results must maintain records sufficient to support the valuation of the contributions and shall inform the candidate receiving the results of the value of the contributions. 11 C.F.R. § 106.4(h).

C. Analysis

In 1991, the NRSC, using the services of Tarrance & Associates, conducted a poll in the state of Idaho. In December of 1991, the NRSC made the results of that poll available to Dirk Kempthorne for Senate '92, which was assertedly more than 60 days after the poll was conducted. In February of 1992, the NRSC made the poll results available to Milt Erhart for U.S. Senate. Included with those results were instructions from the NRSC for the Erhart campaign to report the receipt of the results as an in-kind contribution. The NRSC also notified the Kempthorne campaign, on February 28, 1992, and instructed them to report the the receipt of the poll as an in-kind contribution and as having been received on February 28, 1992, even though the results had been given to Kempthorne at least as early as December. The Erhart Committee reported the in-kind contribution on its 1992 April Quarterly disclosing the \$557 contribution from the NRSC for polling on February 28, 1992. The Kempthorne Committee reported the in-kind contribution on its 1992 April Quarterly disclosing the \$765 contribution from the NRSC on March 3, 1992. The NRSC

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1992 February Monthly discloses a payment of \$557 to Tarrance & Associates as an in-kind to the Erhart Committee on February 28, 1992 and a \$765 payment to Tarrance & Associates as an in-kind to the Kempthorne Committee also on February 28, 1992.

The reporting requirements clearly hold that in-kind contributions are to be reported in the period in which they are made. The Kempthorne Committee has acknowledged that they received the results of the NRSC poll in late December of 1991, however, the Committee did not appropriately report the receipt of that in-kind contribution on its 1991 Year-End Report. Although the Kempthorne Committee may not have received notifying correspondence from the NRSC until March 1992, the Kempthorne Committee did knowingly accept the poll from the NRSC prior to the end of the 1991 Year-End reporting period. Therefore, there is reason to believe Dirk Kempthorne Senate '92 and Sharon L. Allen, as treasurer, violated 2 U.S.C. § 434(b).

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

August 13, 1992

Jan Witold Baran, Esquire
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

RE: MUR 3484
National Republican Senatorial
Committee and James L. Hagen, as
treasurer

Dear Mr. Baran:

On March 20, 1992, the Federal Election Commission notified your clients, the National Republican Senatorial Committee and James L. Hagen, as treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your clients at that time.

Upon further review of the allegations contained in the complaint, and information supplied by you, the Commission, on August 4, 1992, found that there is reason to believe your clients violated 2 U.S.C. § 434(b), a provision of 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 your clients. 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 along with answers to the enclosed questions within 30 days of 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 the Committee 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 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

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Jan Witold Baran, Esquire
Page 2

Office of the General Counsel may recommend that pre-probable 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.

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 matter to be made public.

If you have any questions, please contact Jeffrey Long, the staff member assigned to this matter, at (202) 219-3690.

Sincerely,

Joan D. Aikens

Joan D. Aikens
Chairman

Enclosures
Questions
Factual & Legal Analysis

93040983200

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

)
) MUR 3484
)
)

INTERROGATORIES AND REQUEST
FOR PRODUCTION OF DOCUMENTS

TO: National Republican Senatorial Committee
and James L. Hagen, as treasurer

c/o Jan Witold Baran, Esquire
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

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In furtherance of its investigation in the above-captioned matter, the Federal Election Commission hereby requests that you submit answers in writing and under oath to the questions set forth below within 30 days of your receipt of this request. In addition, the Commission hereby requests that you produce the documents specified below, in their entirety, for inspection and copying at the Office of the General Counsel, Federal Election Commission, Room 659, 999 E Street, N.W., Washington, D.C. 20463, on or before the same deadline, and continue to produce those documents each day thereafter as may be necessary for counsel for the Commission to complete their examination and reproduction of those documents. Clear and legible copies or duplicates of the documents which, where applicable, show both sides of the documents may be submitted in lieu of the production of the originals.

INSTRUCTIONS

In answering these interrogatories and request for production of documents, furnish all documents and other information, however obtained, including hearsay, that is in possession of, known by or otherwise available to you, including documents and information appearing in your records.

Each answer is to be given separately and independently, and unless specifically stated in the particular discovery request, no answer shall be given solely by reference either to another answer or to an exhibit attached to your response.

The response to each interrogatory propounded herein shall set forth separately the identification of each person capable of furnishing testimony concerning the response given, denoting separately those individuals who provided informational, documentary or other input, and those who assisted in drafting the interrogatory response.

If you cannot answer the following interrogatories in full after exercising due diligence to secure the full information to do so, answer to the extent possible and indicate your inability to answer the remainder, stating whatever information or knowledge you have concerning the unanswered portion and detailing what you did in attempting to secure the unknown information.

Should you claim a privilege with respect to any documents, communications, or other items about which information is requested by any of the following interrogatories and requests for production of documents, describe such items in sufficient detail to provide justification for the claim. Each claim of privilege must specify in detail all the grounds on which it rests.

The following interrogatories and requests for production of documents are continuing in nature so as to require you to file supplementary responses or amendments during the course of this investigation if you obtain further or different information prior to or during the pendency of this matter. Include in any supplemental answers the date upon which and the manner in which such further or different information came to your attention.

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DEFINITIONS

For the purpose of these discovery requests, including the instructions thereto, the terms listed below are defined as follows:

"You" shall mean the named respondent in this action to whom these discovery requests are addressed, including all officers, employees, agents or attorneys thereof.

"Persons" shall be deemed to include both singular and plural, and shall mean any natural person, partnership, committee, association, corporation, or any other type of organization or entity.

"Document" shall mean the original and all non-identical copies, including drafts, of all papers and records of every type in your possession, custody, or control, or known by you to exist. The term document includes, but is not limited to books, letters, contracts, notes, diaries, log sheets, records of telephone communications, transcripts, vouchers, accounting statements, ledgers, checks, money orders or other commercial paper, telegrams, telexes, pamphlets, circulars, leaflets, reports, memoranda, correspondence, surveys, tabulations, audio and video recordings, drawings, photographs, graphs, charts, diagrams, lists, computer print-outs, and all other writings and other data compilations from which information can be obtained.

"Identify" with respect to a person shall mean state the full name, the most recent business and residence addresses and the telephone numbers, the present occupation or position of such person, the nature of the connection or association that person has to any party in this proceeding. If the person to be identified is not a natural person, provide the legal and trade names, the address and telephone number, and the full names of both the chief executive officer and the agent designated to receive service of process for such person.

"And" as well as "or" shall be construed disjunctively or conjunctively as necessary to bring within the scope of these interrogatories and requests for the production of documents any documents and materials which may otherwise be construed to be out of their scope.

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**INTERROGATORIES AND REQUEST
FOR PRODUCTION OF DOCUMENTS**

1. With regard to the poll conducted in Idaho in 1991 and provided to the Dirk Kempthorne Senate '92 committee, state when the poll was taken and when the NRSC first received the poll results.
2. State when any portion of the results were made known, orally or written form, or provided to the Kempthorne campaign and to the Erhart campaign. If the poll results were provided to either campaign on different dates or in portions, state how much of the poll was provided and when.
3. State the manner in which any and all portions of the poll results were provided to the Kempthorne campaign and to the Erhart campaign.
4. State whether Dirk Kempthorne was briefed on the general results or trends of the poll. If so, state by whom and when.
5. State what portion of the poll was allocable to Kempthorne and how that amount was determined. State how much of the poll was allocable to the Erhart campaign and how that amount was determined.
6. State how much Tarrance & Associates was paid for conducting the poll. Provide copies of invoices, payment checks and reports.
7. State why the NRSC instructed Dirk Kempthorne Senate '92 to report February 28, 1992, as the date of receipt of the poll results from the NRSC.
8. State why the NRSC, when the internal NRSC processing

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documentation of the in-kind contribution was discovered, did not file an amended 1991 Year End Report to show the making of the in-kind contribution in December, but instead reported it as February.

9. Provide a copy of the poll and copies of all documents that support your answers to these interrogatories.

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: National Republican Senatorial
Committee and James L. Hagen,
as treasurer

MUR 3484

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This matter was generated by a complaint filed by Milt Erhart against Dirk Kempthorne Senate '92 and Sharon L. Allen, as treasurer ("Kempthorne Committee"), regarding the alleged receipt of a poll from the National Republican Senatorial Committee ("NRSC") in December 1991, which was not reported in the 1991 Year End Report. A copy of the complaint was also sent to the NRSC because the allegations also related to its activities. Dirk Kempthorne is a candidate for the Republican Senate nomination in Idaho in 1992. He filed his Statement of Candidacy on September 23, 1991, and designated Dirk Kempthorne Senate '92 as his principal campaign committee. Its first report was the 1991 Year End Report. Dirk Kempthorne was nominated as the Republican Senate nominee in the Idaho primary on May 26, 1992. The NRSC filed its response on April 9, 1992.

A. Complaint and Response

The complainant alleges that in December 1991, the Kempthorne Committee received the results of a poll conducted by The Tarrance Group of Alexandria, Virginia, for the benefit of the NRSC, which made it available to the Kempthorne Committee as an "in-kind" contribution. He alleges that a portion of the results were released on December 18, 1991. The complainant adds that when he received the poll results in February 1992, the NRSC included

specific instructions on how to report it as an in-kind contribution. The complainant alleges that the 1991 Year End Report by the Kempthorne Committee does not disclose its receipt of these poll results.

The 1991 Year End Report filed by the Kempthorne Committee discloses receipts of \$121,766.75 and disbursements of \$68,815.48 with ending cash on hand of \$52,947.27. It does not disclose the receipt of any contributions from political party committees. No reported disclosure of the making of an in-kind contribution by the NRSC to the Kempthorne Committee is made in the NRSC's report for the month of December 1991. The NRSC's report for the month of February 1992, however, does disclose the making of the in-kind contribution to the Kempthorne Committee and the Milt Erhart for Senate Committee on February 28, 1992. This report discloses a payment of \$765 to Tarrance & Associates as an in-kind to the Kempthorne Committee and a \$557 payment to Tarrance & Associates as an in-kind to Erhart.

In its response, the Kempthorne Committee acknowledges that it "received polling results from the National Republican Senatorial Committee in late December." It adds that documentation indicating an "in-kind" contributions and the amount was received from the NRSC on March 9, 1992, and will be reported on the committee's first quarter report. The Kempthorne Committee enclosed a copy of the notice from the NRSC. This notice is a letter dated February 28, 1992, from the treasurer of the NRSC to the treasurer of the Kempthorne Committee. It notifies the treasurer that the NRSC has made an expenditure on behalf of the

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committee which is being treated as an "in-kind" contribution and applied against the \$17,500 cash contribution available to the NRSC. It identifies the amount of the contribution as \$765, the purpose as polling, and the vendor as Tarrance & Associates. The letter then instructs the treasurer to report this contribution on both line 11(b) and line 17 with a date of February 28, 1992, with the name and address of the NRSC.

In its response the NRSC states that the complaint is accurate that the NRSC conducted a poll in the state of Idaho and acknowledges that it made the results of that poll available to the Kempthorne campaign in December, 1991.¹ The NRSC valued the in-kind contribution at \$765 and reported it in its 1992 February monthly report.² The NRSC states that the delay in reporting the

1. In MUR 2212, the NRSC admitted to violations of 2 U.S.C. §§ 434(b) and 441a(h) and 441a(f) and paid a \$5,000 civil penalty relating to the undervaluation of poll results provided to the Snelling '86 Committee in three instances. In the first instance, the NRSC made no allocation to the Snelling '86 Committee at the time the poll results were provided to the eventual candidate who was then testing the waters (or, as the NRSC contended, was being recruited to become a candidate) or when that person became a candidate. In the other two instances, the Snelling '86 Committee only paid the NRSC approximately 2.5 percent of the total cost of the polls or approximately 5 percent of the portion allocable to the Snelling '86 Committee. The NRSC contended that numerical data was not provided to the Snelling '86 Committee until more than 60 days after the NRSC had received the results of the polls, although the facts demonstrated that the NRSC had briefed the candidate on the results of the polls including providing him with percentages that often matched or closely matched the numerical data. In two instances these briefings occurred within 15 days of the NRSC's receipt of the poll results and in one instance the briefing occurred within 30 days.

2. The NRSC explains that the poll results were released after 60 days, and thus 5% of the cost of the poll was allocated to the Kempthorne campaign as an in-kind contribution.

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in-kind contribution was due to their misplacing of the internal NRSC processing documentation. An affidavit of the NRSC Director of Polling Services attached to the response states that the polling results were also made available to the Erhart campaign in February of 1992, and states that the NRSC placed a 5% valuation on the poll as an in-kind contribution to Kempthorne and Erhart.

B. The Act, Regulations, and Judicial Opinions

The Act defines "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." 2 U.S.C. § 431(8)(A)(1). Person is defined to include a political committee. 2 U.S.C. § 431(11). Commission regulations provide that "anything of value" includes "all in-kind contributions." 11 C.F.R. § 100.7(a)(1)(iii)(A). The Act permits the Republican or Democratic Senatorial Campaign Committee or the national party committee or any combination of such committees to make contributions up to \$17,500 to a candidate for nomination or election to the United States Senate. 2 U.S.C. § 441a(h); see also, 11 C.F.R. § 110.2(e).

The Act further provides that each political committee, including a principal campaign committee, shall file periodic reports that shall disclose "for the reporting period" the total of all contributions from political party committees as well as the identification of each "political committee which makes a contribution to the reporting committee during the reporting period, together with the date and amount of any such contribution." 2 U.S.C. §§ 434(b)(2)(C) and 434(b)(3)(B).

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Similarly, a political committee that makes contributions shall disclose "for the reporting period" all "contributions made to other political committees" as well as the name and address of the political committee which has received a contribution from the reporting committee "during the reporting period" together with the date and amount of any such contribution. 2 U.S.C.

§§ 434(b)(4)(H)(i) and 434(b)(6)(B)(i). Commission regulations provide that in-kind contributions shall be reported in an amount equal to the usual and normal value "on the date received" and reported as a contribution and as an expenditure. 11 C.F.R. § 104.13(a).

These reporting requirements were judicially construed in FEC v. American Federation of State, County and Municipal Employees - P.E.O.P.L.E. Qualified, No. 88-3208 (D.D.C. July 10, 1990) (hereinafter "AFSCME"). In that situation AFSCME had operated phone banks prior to the 1982 and 1984 general elections on behalf of Frank McCloskey, a Democratic Party candidate for the House of Representatives. AFSCME paid for the phone banks when the bills were received (after the election) and reported the payments as disbursements for that period (the period when they were paid). The court concluded that the phone banks constituted an in-kind contribution from AFSCME to McCloskey. The court further stated that the plain language of the Act in its entirety "requires reporting of contributions in the period in which they were made." AFSCME, slip op. at 5. Thus, in-kind contributions should be reported during the reporting period in which they are made and received, regardless of when the bills relating to the in-kind

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contributions are paid.

Commission regulations also make it clear that the purchase of poll results by a political committee not authorized by a candidate to make expenditures and the subsequent acceptance of such results by a candidate is an in-kind contribution by the purchaser to the candidate and an expenditure by the candidate. 11 C.F.R. § 106.4(b). The regulation provides that polling results are accepted by the candidate if the candidate or the candidate's agent or authorized political committee (1) requests the poll results before their receipt; (2) uses the poll results; or (3) does not notify the contributor that the results are refused. Id.; see also, Advisory Opinion 1987-22. The acceptance of any part of poll results, which part, prior to receipt, has been made public without any request, authorization, prearrangement, or coordination by the candidate or political committee that accepted the results is not an in-kind contribution and expenditure. 11 C.F.R. § 106.4(c).

Commission regulations also provide for the valuation of the poll results accepted as an in-kind contribution. The amount attributable to each candidate is that share of the overall cost of the poll allocable to each candidate based upon the cost allocation formula of the polling firm from which the results are purchased, or that amount computed by dividing the overall costs equally among candidates receiving results, or that amount which represents the proportion of the overall costs equal to the proportion of the number of question results received by the candidate compared to the total number of questions results

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received by all candidates, or that amount computed by any other method which reasonably reflects the benefit derived. 11 C.F.R. § 106.4(e). The candidate(s) receiving poll results purchased by another political committee within 15 days after the initial receipt by the initial recipients shall compute the amount of the contribution and expenditure in accordance with these formula. 11 C.F.R. § 106.4(f).

The amount of the contribution and expenditure by a candidate receiving poll results purchased by another political committee more than 15 days after the receipt of such poll results by the initial recipient shall be (1) 50 percent of the amount allocated to the initial recipient of the same results if the results are received during the period 16 to 60 days following receipt by the initial recipient; or (2) 5 percent of the allocable amount if the results are received during the period 61 to 180 days after the receipt by the initial recipient; or (3) no amount if the results are received more than 180 days after receipt by the initial recipient. 11 C.F.R. § 106.4(g). The contributor of poll results must maintain records sufficient to support the valuation of the contributions and shall inform the candidate receiving the results of the value of the contributions. 11 C.F.R. § 106.4(h).

C. Analysis

In 1991, the NRSC, using the services of Tarrance & Associates, conducted a poll in the state of Idaho. In December of 1991, the NRSC made the results of that poll available to Dirk Kempthorne for Senate '92, which was assertedly more than 60 days after the poll was conducted. In February of 1992, the NRSC made

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the poll results available to Milt Erhart for U.S. Senate. Included with those results were instructions from the NRSC for the Erhart campaign to report the receipt of the results as an in-kind contribution. The NRSC also notified the Kempthorne campaign, on February 28, 1992, and instructed them to report the receipt of the poll as an in-kind contribution and as having been received on February 28, 1992, even though the results had been given to Kempthorne at least as early as December. The Erhart Committee reported the in-kind contribution on its 1992 April Quarterly disclosing the \$557 contribution from the NRSC for polling on February 28, 1992. The Kempthorne Committee reported the in-kind contribution on its 1992 April Quarterly disclosing the \$765 contribution from the NRSC on March 3, 1992. The NRSC 1992 February Monthly discloses a payment of \$557 to Tarrance & Associates as an in-kind to the Erhart Committee on February 28, 1992 and a \$765 payment to Tarrance & Associates as an in-kind to the Kempthorne Committee also on February 28, 1992.

The NRSC acknowledges that it provided the results of the poll to the Kempthorne Committee in December of 1991, but did not disclose making that in-kind contribution until reporting it on the February monthly report. Again, the reporting requirements are clear that in-kind contributions shall be disclosed in the period in which they are made. Furthermore, attached to the Kempthorne Committee response is a copy of a notice signed by the treasurer of the NRSC instructing the Committee to disclose the \$765 in-kind contribution for polling results by the NRSC and report the date as February 28, 1992. As stated earlier, both

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Respondents acknowledge that the poll was provided to Kempthorne in December of 1991.

The Act provides for violations of the law that are knowing and willful. See 2 U.S.C. §§ 437g(a)(5)(C) and 437g(d). "Knowing and willful" has been defined by Congressman Hays as "actions taken with full knowledge of all of the facts and a recognition that the action is prohibited by law." See House debates on the Conference Report for the 1976 Amendments. The knowing and willful standard has also been addressed by the courts. The Court of Appeals for the District of Columbia Circuit has held on two occasions that proof of a "knowing and willful" violation of the FECA requires a finding of "defiance," or "knowing, conscious, and deliberate flaunting of the Act." National Right to Work Committee v. Federal Election Commission, 716 F.2d 1401, 1403 (1983) (NRWC v. FEC), on remand from the United States Supreme Court, 459 U.S. 197 (1982), quoting American Federation of Labor v. Federal Election Commission, 628 F.2d 98 (1980) (AFL v. FEC). The Court of Appeals for the Fifth Circuit found that a knowing and willful violation may be established "by proof that the defendant acted deliberately and with knowledge that the representation was false." United States v. Hopkins, 916 F.2d 207, 214 (5th Cir. 1990). Furthermore, the court said that an inference of a knowing and willful violation may be drawn "from the defendants' elaborate scheme for disguising" their actions and that they deliberately conveyed information they knew to be false to the Federal Election Commission." Id. at 214-215. In Federal Election Commission v. John A. Dramesi for Congress Committee, 640

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F. Supp. 985 (D. N.J. 1986), the court noted that the knowing and willful standard requires knowledge that one is violating the law.

These court decisions show that efforts to disguise one's actions, deliberately conveying false information to the Commission, and consciously not timely publicly reporting information that should be timely reported may be evidence that the respondent knew it was violating the law.

As stated in its response, the NRSC had full knowledge that the poll results were provided to the Kempthorne Committee at least two months prior to the date it reported making the contribution and two months prior to the date it instructed the Kempthorne Committee to disclose the contribution. Given the familiarity of the NRSC with the reporting provisions of the Act and its expertise in conducting polls on behalf of campaigns as well as the history of MUR 2212, its delay in reporting is seen as a deliberate misrepresentation of information to the Federal Election Commission and its improper instruction to the Kempthorne Committee is seen as an attempt to disguise when the poll results were given to Kempthorne so that the reported date would coincide with the date the results were given to Erhart. Therefore, there is reason to believe that the National Republican Senatorial Committee and James L. Hagen, as treasurer, knowingly and willfully violated 2 U.S.C. § 434(b).

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WILEY, REIN & FIELDING

1776 K STREET, N. W.
WASHINGTON, D. C. 20006
(202) 429-7000

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COMMISSION
MAIL ROOM

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WRITER'S DIRECT DIAL NUMBER

August 14, 1992

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TELEX 248349 WYRN UR

(202) 429-7301

Lawrence M. Noble, Esq.
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Attn: Jeffrey Long

Re: MUR 3484 (National Republican Senatorial
Committee and James L. Hagen, as Treasurer)

Dear Mr. Noble:

This letter will confirm my conversation with Jeffrey Long of your office regarding Matter Under Review 3484. Upon inquiry, Mr. Long confirmed that despite the General Counsel's Factual and Legal Analysis, the Commission did not find reason to believe that the National Republican Senatorial Committee and James L. Hagen, as Treasurer, knowingly and willfully violated 2 U.S.C. § 434(b).

Sincerely,

Carol A. Laham
Carol A. Laham

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OFFICE OF GENERAL COUNSEL
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1776 K STREET, N. W.
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JAN WITOLD BARAN
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September 14, 1992

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(202) 429-7049
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Lawrence M. Noble, Esq.
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Attn: Jeffrey Long

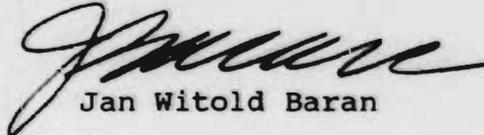
Re: MUR 3484 (National Republican Senatorial
Committee and James L. Hagen, as Treasurer)

Dear Mr. Noble:

Enclosed please find the Response of the National Republican Senatorial Committee and James L. Hagen, as Treasurer ("Respondents") to the Interrogatories propounded by the Federal Election Commission in Matter Under Review 3484.

This Response includes a copy of the poll at issue in this matter as requested in the Commission's interrogatories. However, the NRSC views its polls as proprietary information, and does not release such information to the public. Thus, we request that this information be treated confidentially and excerpted from the public file, including from any reports, when the matter is closed.

Sincerely,


Jan Witold Baran

cc: James L. Hagen

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RESPONSE OF THE NATIONAL REPUBLICAN SENATORIAL
COMMITTEE TO THE INTERROGATORIES OF
THE FEDERAL ELECTION COMMISSION IN MUR 3484

Question 1

With regard to the poll conducted in Idaho in 1991 and provided to the Dirk Kempthorne Senate '92 committee, state when the poll was taken and when the NRSC first received the poll results.

Response

As stated by Jeff Willis, Director of Polling Services for the NRSC, "the poll was conducted on October 16 and 17, 1992. It is standard for the NRSC to obtain the poll results one day after the poll is completed. In accordance with this practice, the NRSC would have received the poll results on October 18, 1992." Affidavit of Jeff Willis dated September 14, 1992 in MUR 3484 Before the Federal Election Commission (hereinafter "Willis Aff.") at ¶ 2.

Question 2

State when any portion of the results were made known, orally or written form, or provided to the Kempthorne campaign and to the Erhart campaign. If the poll results were provided to either campaign on different dates or in portions, state how much of the poll was provided and when.

Response

Mr. Willis states that "[a]fter sixty days, in the period between December 18 and 23, 1991, the NRSC made the results of the entire poll, which consisted of fifty-five (55) questions, available to the Kempthorne campaign. The

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results of forty-one (41) questions were made available to the Erhart campaign on February 14, 1992." Id. at ¶ 3.

Question 3

State the manner in which any and all portions of the poll results were provided to the Kempthorne campaign and to the Erhart campaign.

Response

"In both cases, the results were made available in written form." Id.

Question 4

State whether Dirk Kempthorne was briefed on the general results or trends of the poll. If so, state by whom and when.

Response

Mr. Willis states that, to his knowledge, "Dirk Kempthorne was not briefed on the general results or trends of the poll before sixty-one (61) days." Id. at ¶ 4. It is his understanding, however, that after that time "the pollster met with Mr. Kempthorne and briefed him on the results of the poll, in addition to providing copies of the written results." Id.

Question 5

State what portion of the poll was allocable to Kempthorne and how that amount was determined. State how much of the poll was allocable to the Erhart campaign and how that amount was determined.

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Response

[T]he results of the poll were allocated in accordance with the Federal Election Commission's regulations. The regulations state that "[t]he amount of the contribution and expenditure reported by a candidate or a political committee receiving poll results under paragraph (b) of this section more than 15 days after receipt of such poll results by the initial recipient(s) shall be-- . . . (2) If the results are received during the period 61 to 180 days after receipt by the initial recipient(s), 5 percent of the amount allocated to an initial recipient of the same results." 11 C.F.R. § 106.4(g)(2). The NRSC therefore allocated 5% of the total cost of this poll to the Kempthorne campaign as an in-kind contribution to that campaign committee. The poll itself cost \$15,300. Thus, the amount of the contribution to the Kempthorne Committee was \$765.

In the case of the Erhart campaign, because it received only 41 questions, the NRSC allocated 5% of the costs of those poll results as a contribution to the Erhart Committee. The amount of this contribution was \$557.

Id. at ¶ 5.

Question 6

State how much Tarrance & Associates was paid for conducting the poll. Provide copies of invoices, payment checks and reports.

Response

Tarrance & Associates was paid \$15,300. Copies of the invoice and NRSC payment are attached.

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Question 7

State why the NRSC instructed Dirk Kempthorne Senate '92 to report February 28, 1992, as the date of receipt of the poll results from the NRSC.

Response

As the Commission was previously informed, the processing documentation, which was initially written the day before the NRSC closed for the Christmas and New Year Holidays, was misplaced until late February. In this unique circumstance, because the item reported was the sharing of a poll, and because the Commission regulation requires the same allocation of polling results whether they are shared on the 61st day or the 180th day, and because the poll was shared in this time period, the expenditure was allocated on the date upon which the accounting department received the processing information. For this reason, we instructed the Kempthorne campaign to use the same date.

Question 8

State why the NRSC, when the internal NRSC processing documentation of the in-kind contribution was discovered, did not file an amended 1991 Year End Report to show the making of the in-kind contribution in December, but instead reported it as February.

Response

See response to question 7 above.

Question 9

Provide a copy of the poll and copies of all documents that support your answers to these interrogatories.

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Response

The NRSC has provided a copy of the polling questions as requested. All other supporting documentation is attached.

The above statements are true and correct to the best of my knowledge and belief.

James L. Hagen
James L. Hagen

Washington, D.C.

Subscribed to and sworn before me this 14th day of September 1992.

Roberta P. Barber
Notary Public

My Commission Expires: 1-31-93

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BEFORE THE FEDERAL ELECTION COMMISSION

City of Washington)
District of Columbia) MUR 3484

AFFIDAVIT OF JEFF WILLIS

Jeff Willis, first being duly sworn, deposes and says:

1. I am Jeff Willis. Since August 1988, I have served as the Director of Polling Services for the National Republican Senatorial Committee (NRSC). This Affidavit will serve as a supplement to my affidavit dated April 8, 1992 in this Matter.

2. As I previously stated, the NRSC did conduct a poll in Idaho in October, 1991. Specifically, the poll was conducted on October 16 and 17, 1992. It is standard for the NRSC to obtain the poll results one day after the poll is completed. In accordance with this practice, the NRSC would have received the poll results on October 18, 1992.

3. After sixty days, in the period between December 18 and 23, 1991, the NRSC made the results of the entire poll, which consisted of fifty-five (55) questions, available to the Kempthorne campaign. The results of forty-one (41) questions were made available to the Erhart campaign on February 14, 1992. In both cases, the results were made available in written form.

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4. To my knowledge, Dirk Kempthorne was not briefed on the general results or trends of the poll before sixty-one (61) days. After that time, it is my understanding that the pollster met with Mr. Kempthorne and briefed him on the results of the poll, in addition to providing copies of the written results.

5. As previously stated, the results of the poll were allocated in accordance with the Federal Election Commission's regulations. The regulations state that "[t]he amount of the contribution and expenditure reported by a candidate or a political committee receiving poll results under paragraph (b) of this section more than 15 days after receipt of such poll results by the initial recipient(s) shall be-- . . . (2) If the results are received during the period 61 to 180 days after receipt by the initial recipient(s), 5 percent of the amount allocated to an initial recipient of the same results." 11 C.F.R. § 106.4(g)(2). The NRSC therefore allocated 5% of the total cost of this poll to the Kempthorne campaign as an in-kind contribution to that campaign committee. The poll itself cost \$15,300. Thus, the amount of the contribution to the Kempthorne Committee was \$765.

In the case of the Erhart campaign, because it received only 41 questions, the NRSC allocated 5% of the costs of those poll results as a contribution to the Erhart Committee. The amount of this contribution was \$557.

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The above is true and correct to the best of my knowledge.

Jeff Willis
Jeff Willis

Signed and sworn to before me
this 14th day of September, 1992.

Loa C. Seider
Notary Public

My Commission Expires: July 14, 1997

93040983225



TARRANCE & ASSOCIATES

Research for Decisions in Politics and Public Affairs

V. Lance Tarrance, Jr.
Chairman of the Board, CEO

Ed Goss
President

Richard E. Ryan, Ph.D.
Senior Vice-President
Corporate Public Affairs

Phyllis Meier
Executive Vice-President

Larry J. Frushmont, Ph.D.
Senior Vice-President

Beverly Chaffin
Treasurer/Controller

Brian C. Tringali
Vice-President
Washington, D.C. Office

David J. Seibell
Vice-President
Washington, D.C. Office

Richard S. Bird
Director of Operations

Michael B. Swales
Senior Research Associate
Washington, D.C. Office

Patricia Myers
Senior Research Associate

October 17, 1991

Jeff Willis
National Republican Senatorial Committee
425 Second St., N.E.
Washington, D.C. 20002

INVOICE # 14140
STUDY # 5684

Tarrance & Associates is pleased to conduct research for the National Republican Senatorial Committee.

Payment is now due for the Idaho Statewide survey and should be remitted to us by Friday, November 1, 1991. Wiring instructions are shown below as you may use our Federal Express number.

\$15,300.00

THANK YOU.

Please remit to Tarrance & Associates, Inc.
14530 Tarry Chase Blvd., Suite 600
Houston, Texas 77014
Phone No. 713-444-9840
Telex No. 9776-7761-8

Wiring Instructions
Wester Colonial Bank-Houston, TX
ABA No. 113061268
Tarrance & Associates, Inc.
Account No. 045-578

vgz 10/2

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SENATORIAL COMMITTEE

53110

IR REF. NO.	YOUR INVOICE NO.	INVOICE DATE	INVOICE AMOUNT	AMOUNT PAID	DISCOUNT TAKEN	NET CHECK AMOUNT
00005	14140	10/17/91	15,300.00	15,300.00	.00	
CONSULTING SERVICE						
01-TARRANCE	1E-053110	11/07/91				15,300.00

NATIONAL REPUBLICAN
 SENATORIAL COMMITTEE
 420 CONCORD STREET, N.E.
 WASHINGTON, DC 20002

01-TARRANCE

CITIZEN BANK
 VIENNA, VA
 FD-109/500

53110

11/07/91 053110 ****\$15,300.00

*****15,300 DOLLARS AND 00 CENTS

TARRANCE & ASSOCIATES
 ATTENTION: D. STOVALL
 POST OFFICE BOX 73209
 HOUSTON TX 77273

NOT NEGOTIABLE

53110 60560040390 651-71729270

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Memo: **KEMPTHORNE SURVEY ALLOCATION**
To: Enoh
CC: Jim Hagen
From: Jeff
Date: 23 December 1991

Results of our October 1991 survey have been shared with the Kempthorne campaign, following a 61 day delay, thereby rendering the allocable cost to be 5% of original value.

The allocable amount, based on ~~25~~ questions shared, is \$348. Please record this as an in-kind expenditure against the NRSC's \$17,500 Kempthorne campaign account.

93040983228



RECEIVED
FEDERAL ELECTION
COMMISSION
MAIL ROOM

SEP 22 10 09 AM '92

September 18, 1992

RECEIVED
FEDERAL ELECTION COMMISSION
OFFICE OF GENERAL COUNSEL
92 SEP 22 PM 12: 03

General Counsel
Federal Election Commission
Washington, D.C. 20463

ATTN: Mr. Jeffrey Long
RE: MUR 3484

Dear Mr. Long:

This responds to Chairman Aiken's August 13, 1992 letter.

To demonstrate that no action should be taken against this committee, the following answers are submitted in the same order of your interrogatories:

1. The results of the subject poll were provided to this committee orally and in writing on December 18, 1992, by Lance Tarrance and Ed Goetas of The Tarrance Group, Alexandria, Virginia, at the request of the National Republican Senatorial Committee (NRSC).
2. The results of the entire poll were provided to this committee on December 18, 1992.
3. An oral briefing and written presentation of the poll results were provided.
4. Dirk Kempthorne was briefed on the results by Lance Tarrance and Ed Goetas on December 18, 1992.
5. The committee had no knowledge of the value of the poll results until approximately February 28, 1992, when informed and instructed to report by the NRSC. Your citation of 11 C.F.R. | 106.4(h) indicates "The contributor of poll results...shall inform the candidate receiving the results of the value of the contributions." The committee has reported the value of the poll results as informed by the provider, the NRSC.
6. A copy of the poll is enclosed as instructed.

Please advise of any additional questions and how this matter can be settled.

Sincerely,

Sharon L. Allen
Treasurer

93040983230

MUR # 3484

ADDITIONAL DOCUMENTS WILL BE ADDED TO THIS FILE AS THEY BECOME AVAILABLE. PLEASE CHECK FOR ADDITIONAL MICROFILM LOCATIONS.

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

THIS IS THE END OF MUR # 3484
DATE FILMED 10/28/93 CAMERA NO. 2
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FEDERAL ELECTION COMMISSION
WASHINGTON DC 20463

Microfilm
 Public Records
 Press

THE FOLLOWING DOCUMENTATION IS ADDED TO

THE PUBLIC RECORD IN CLOSED MUR 3484.

12/10/93

93043542688

**THE READER IS REFERRED TO ADDITIONAL MICROFILM LOCATIONS
FOR THE FOLLOWING DOCUMENTS PERTINENT TO THIS CASE**

1. Memo, General Counsel to the Commission, dated September 22, 1992, Subject: Priority System Report. See Reel 354, pages 1590-94.
2. Memo, General Counsel to the Commission, dated April 14, 1993, Subject: Enforcement Priority System. See Reel 354, pages 1595-1620.
3. Certification of Commission vote, dated April 28, 1993. See Reel 354, pages 1621-22.
4. General Counsel's Report, In the Matter of Enforcement Priority, dated December 3, 1993. See Reel 354, pages 1623-1740.
5. Certification of Commission vote, dated December 9, 1993. See Reel 354, pages 1741-1746.

93043542689



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

DEC 10 1993

Jan W. Baran, Esquire
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

RE: MUR 3484

Dear Mr. Baran:

On August 13, 1992, you were notified that the Federal Election Commission had found reason to believe the National Republican Senatorial Committee and its treasurer, violated 2 U.S.C. § 434(b). On September 14, 1992, you submitted a response to the Commission's reason to believe findings.

After considering the circumstances of this matter, the Commission has determined to exercise its prosecutorial discretion and to take no further action against the National Republican Senatorial Committee and Sonja M. Vazquez, as treasurer. See attached narrative. Accordingly, the Commission closed its file in this matter.

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 receipt of your additional materials, any permissible submissions will be added to the public record when they are received.

If you have any questions, please contact me at (202) 219-3690.

Sincerely,

Jeffrey D. Long

Attachment
Narrative

DEC 09 1993

Date the Commission voted to close the file: _____

93043542690

MUR 3484
DIRK KEMPTHORNE SENATE '92
AND NATIONAL REPUBLICAN SENATORIAL
COMMITTEE

In this case the Commission found reason to believe that Dirk Kempthorne Senate '92 failed to report an in-kind contribution from the National Republican Senatorial Committee in the form of a poll, and that the NRSC violated Section 434(b) by failing to appropriately report the expenditure for the poll. The NRSC values the poll at approximately \$1,000.

There is no significant issue relative to the other issues pending before the Commission and there was a limited amount of money involved.

93043542691



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

DEC 10 1993

Sharon L. Allen, Treasurer
Dirk Kempthorne '92
P.O. Box 1866
Boise, Idaho 83701

RE: MUR 3484

Dear Ms. Allen:

On August 13, 1992, Dirk Kempthorne '92 ("Committee") and you, as treasurer, were notified that the Federal Election Commission had found reason to believe the Committee and you, as treasurer, violated 2 U.S.C. § 434. On September 18, 1992, you submitted a response to the Commission's reason to believe finding.

After considering the circumstances of this matter, the Commission has determined to exercise its prosecutorial discretion and to take no further action against the Committee and you, as treasurer. See attached narrative. Accordingly, the Commission closed its file in this matter.

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 receipt of your additional materials, any permissible submissions will be added to the public record when they are received.

If you have any questions, please contact me at (202) 219-3690.

Sincerely,

Jeffrey D. Long

Attachment
Narrative

DEC 09 1993

Date the Commission voted to close the file: _____

93043542692

MUR 3484
DIRK KEMPTHORNE SENATE '92
AND NATIONAL REPUBLICAN SENATORIAL
COMMITTEE

In this case the Commission found reason to believe that Dirk Kempthorne Senate '92 failed to report an in-kind contribution from the National Republican Senatorial Committee in the form of a poll, and that the NRSC violated Section 434(b) by failing to appropriately report the expenditure for the poll. The NRSC values the poll at approximately \$1,000.

There is no significant issue relative to the other issues pending before the Commission and there was a limited amount of money involved.

93043542693



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

DEC 10 1993

**CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

Milt Erhart
P.O. Box 7371
Boise, Idaho 83707

RE: MUR 3484

Dear Mr. Erhart:

On March 16, 1992, the Federal Election Commission received your complaint alleging certain violations of the Federal Election Campaign Act, as amended. On August 4, 1992, the Commission found reason to believe that Dirk Kempthorne Senate '92 and Sharon L. Allen, as treasurer, and that the National Republican Senatorial Committee and its treasurer, violated 2 U.S.C. § 434(b). After considering the circumstances of this matter, the Commission has determined to exercise its prosecutorial discretion and to take no further action against Dirk Kempthorne Senate '92 and Sharon L. Allen, as treasurer, and against the National Republican Senatorial Committee and Sonja M. Vasquez, as treasurer. See attached narrative. Accordingly, the Commission closed its file in this matter. This matter will become part of the public record within 30 days.

The Act allows a complainant to seek judicial review of the Commission's dismissal of this action. See 2 U.S.C. § 437g(a)(8).

Sincerely,

Jeffrey D. Long

Attachment
Narrative

Date the Commission voted to close the file:

DEC 09 1993

93043542694

**MUR 3484
DIRK KEMPTHORNE SENATE '92
AND NATIONAL REPUBLICAN SENATORIAL
COMMITTEE**

In this case the Commission found reason to believe that Dirk Kempthorne Senate '92 failed to report an in-kind contribution from the National Republican Senatorial Committee in the form of a poll, and that the NRSC violated Section 434(b) by failing to appropriately report the expenditure for the poll. The NRSC values the poll at approximately \$1,000.

There is no significant issue relative to the other issues pending before the Commission and there was a limited amount of money involved.

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